



Australian Government

Department of the Environment and Energy

STATEMENT OF REASONS FOR A DECISION UNDER SECTION 10 OF THE *ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984*

I, Sussan Ley, Minister for the Environment, provide the following statement of reasons for my decision under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the **ATSIHP Act**), to decline to make a declaration in relation to the protection of certain areas from the development of the Shenhua Watermark Coal Mine by Shenhua Watermark Coal Pty Limited (**Shenhua**), near Breeza, New South Wales in relation to an application received under the ATSIHP Act dated 28 April 2015.

Legislation

1. Legislative provisions relevant to my decision are extracted for convenience at **Annexure A** to this statement of reasons.

Background

The Application

2. On 28 April 2015, the then Minister for the Environment, the Hon Greg Hunt MP (the **previous Minister**), received an application from Beatty Legal on behalf of the Gomeroi Traditional Custodians (the **Applicants**) seeking that he make declarations under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the **ATSIHP Act**) in relation to certain sites (the **Specified Areas**) near Breeza in New South Wales (the **Application**).
3. The Application sought protection of the Specified Areas from injury or desecration. Applicants asserted that the Specified Areas would be irreversibly injured or desecrated by the development of the Shenhua Watermark Coal Mine by Shenhua Watermark Coal Pty Ltd (**Shenhua**). The site for the Shenhua Watermark Coal Mine encompasses each of the Specified Areas.
4. On 7 May 2015, the then Minister replied to the Applicants, stating that he had not received all of the material identified in the email application of 28 April 2015.
5. On 13 May 2015, the then Minister received two additional emails from Beatty Legal on behalf of the Applicants. The emails had four additional attachments: a letter dated 6 May 2015 from Toni Comber, Chief Executive Officer of the Red Chief Local Aboriginal Land Council, a set of statutory declarations, a restricted appendix to the application document, and a map.
6. On 4 May 2016, the then Minister declined to make an emergency declaration protecting the Specified Areas under section 9 of the ATSIHP Act. While the then Minister was satisfied that the Specified Areas were significant Aboriginal areas, and that there was sufficient information available to determine that the Specified Areas were under serious

threat of injury or desecration, he was not satisfied that the Specified Areas were under immediate threat of injury or desecration.

Shenhua Watermark Coal Mine – Commonwealth and NSW approvals

7. On 28 January 2015, the Shenhua Watermark Coal Mine was approved, subject to conditions, through a Development Consent provided by the NSW Planning Assessment Commission (**NSW PAC**) under the *Environmental Planning and Assessment Act 1979* (NSW) (**NSW EPA Act**). The Shenhua Watermark Coal Mine is considered a State Significant Development under the NSW EPA Act.
8. On 4 July 2015, the then Minister approved, subject to conditions, the Shenhua Watermark Coal Mine, under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) (EPBC 2011/6201). The conditions attached to the approval of the mine require Shenhua to provide a Water Management Plan, Biodiversity Management Plan, Rehabilitation Management Plan and Water Impact Verification Report to me for approval before mining can commence.
9. The Department received drafts of the Biodiversity Management Plan and the Rehabilitation Management Plan in April 2019. The Groundwater Management and Monitoring Plan and Water Impact Verification Report are yet to be provided to myself or the Department of Environment and Energy (the **Department**).

Appointment of a section 10 reporter

10. On 17 August 2016, the then Minister for the Environment and Energy, the Hon Josh Frydenberg MP (Minister Frydenberg), appointed Ms Susan Phillips, Barrister, as the reporter (the **Reporter**) for the purposes of the application under section 10 of the Act.
11. On 8 September 2016, in accordance with section 10(3)(ii) of the ATSIHP Act, the Reporter sought representations from interested parties by publishing a notice in the *Commonwealth Government Notices Gazette* and in the *Gunnedah Namoi Valley Independent* (a local newspaper).
12. The closing date for representations was originally set as 11 October 2016, but was extended to 11 November 2016 to allow the Reporter to hold a public meeting in Gunnedah to enable representations to be made in person on 2 and 3 November 2016. This meeting was provided at the request of the Applicants.
13. On 14 March 2017, the Reporter submitted her report (the **Section 10 Report**).

Request to amend the section 10 application

14. During the Reporter's visit to the sites that make up the Specified Areas on 2 and 3 November 2016, the archaeologist providing certain submissions for the Applicants, Dr Owen, identified that the Application incorrectly specified the location of one of the sites: the culturally modified Kurrajong tree (identified as WM-ST5-11 on the Applicants' map at **Annexure C**). The Applicants advised the Reporter that there was a culturally

modified scar tree of a different species located at that site, and claimed that the scar tree was culturally significant.

15. On 16 November 2016, the Applicants wrote to Minister Frydenberg seeking to amend the Application:
 - a. so that it applied for protection of the Kurrajong tree in its correct location; and
 - b. to correct a typographic error relating to one of the grinding grooves. This grinding groove was identified both as WM-GG23-12 on the Applicants' map as well as WM-GG3-12.
16. In separate correspondence, also dated 16 November 2016, the Applicants' representative provided a notification under section 20 of the ATSIHP Act to advise of possible Aboriginal remains. This correspondence also requested protection of additional sites.
17. On 8 March 2017, the Department advised the Applicants that the Application could not be amended.
18. Consequently, the Reporter considered the scar tree located at WM-ST5-11 (named in the Application as the site of the Kurrajong tree) for the purposes of the Section 10 Report. The Reporter did not consider the Kurrajong tree in the Section 10 Report.
19. On 21 December 2017, the Department wrote to the representatives for the Applicants and Shenhua. This correspondence was to afford them the opportunity to comment upon material relevant to the Minister's consideration of whether to make a declaration. Subsequently:
 - a. on 17 January 2018, Shenhua provided submissions to the Department via their legal representatives Minter Ellison; and
 - b. on 7 March 2018, the Applicants provided submissions to the Department via their legal representatives Beatty Legal.I considered these submissions in making my decision.
20. Also on 21 December 2017, a separate application was received from the Applicants under section 10 of the ATSIHP Act relating to a number of specified areas. This further application is the subject of separate consideration.

Site visit – 24 June 2019

21. On 24 June 2019, to gain a comprehensive understanding of the context of the Application, I visited the Watermark Mountain area where I met and spoke with the Applicants' representatives and representatives from Shenhua.
22. I spoke with Shenhua, with whom I travelled with onto the site of the proposed coal mine. I was able to get an idea of the size and scope of the works. I visited the eastern grinding grooves (WM-GG3-12), within Specified Area 3, and Shenhua explained mitigation measures. I note that these mitigation measures are requirements that must be undertaken in accordance with NSW approvals.
23. I then met with the Applicants and we travelled to Specified Area 1a where we visited the grinding groove site (WM-GG1-11) and the stone features identified as possible burial cairns. During the visit, the Applicants explained the importance of the sites,

Watermark Mountain and the interconnectedness of the physical landscape with cultural practices, spirituality and well-being.

24. I also met with the Gunnedah Shire Council, who were generally supportive of the Shenhua Watermark Coal Mine.

Evidence or other material on which my findings were based

25. A list of material I considered in making my decision is available at **Annexure B**.

Findings on material questions of fact

26. Section 10(1) of the ATSIHP Act provides that where I:
- a. receive an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;
 - b. am satisfied:
 - i. that the specified area is a significant Aboriginal area; and
 - ii. that the specified area is under threat of injury or desecration;
 - c. have received a report in relation to the specified area from a person I nominated, and have considered the report and any representations attached to the report; and
 - d. have considered such other matters I think are relevant;

then I may make a declaration under section 10 of the ATSIHP Act in relation to the specified area.

Application under section 10(1)(a) of the ATSIHP Act

27. The Application was made in writing and consisted of the letter from Beatty Legal on behalf of the Applicants of 28 April 2015 and attachments sent by email by Beatty Legal on behalf of the Applicants on 13 May 2015, as well as additional information sent by email by Beatty Legal on behalf of the Applicants on 7 March 2018. Details in relation to the Application and the Specified Areas have been provided at paragraphs 2 to 5 above.
28. Each of the Specified Areas are located in country that is claimed to be the traditional homelands of the Gomeroi People, also known as Gamilaraay and Kamilaroi. The Application identifies the Applicants, the Gomeroi Traditional Custodians, as an Aboriginal group whose 'senior elders' comprise 'the heads of families from Gomeroi people throughout the Breeza, Curlewis and Gunnedah region' and who 'represent 191 people and our families'. I accepted that the Applicants are Aboriginal for the purposes of the ATSIHP Act.
29. The Application sought protection of five different areas from injury or desecration resulting from the development of the Shenhua Watermark Coal Mine. However, the map of the Specified Areas attached to the Application showed that the Applicants sought the protection of six, not five, areas, defined by the six circles shown in the map (see **Annexure C** of this statement). Each circle was centred on a point, which had a

descriptive label corresponding to the descriptions of the five areas in the Applicants' letter. The six areas specified for protection, the Specified Areas, were as follows:

- a. **Specified Area 1a** was the circular area in the map whose centre was labelled '1. Grinding groove complex (including WM-GG1-11)' situated in the Western Mining Area.
 - b. **Specified Area 1b** was the circular area in the map whose centre was labelled '1. Grinding groove complex (including WM-GG2-11)' located on the north-western slope of Mount Watermark.
 - c. **Specified Area 2** was the circular area in the map whose centre was labelled '2. Watermark Mountain' including an important creek as part of the cultural landscape.
 - d. **Specified Area 3** was the circular area in the map whose centre was labelled '3. Grinding groove site WM-GG3-12'.
 - e. **Specified Area 4** was the circular area in the map whose centre was labelled '4. Kurrajong Tree WM-ST5-11'.
 - f. **Specified Area 5** was the circular area in the map whose centre was labelled '5. Culturally modified Possum tree-WM-ST2-11'.
30. The Applicants also requested that landscape viewing corridors, from the summit of Mount Watermark looking towards the culturally significant areas identified above, not be impacted by overburden from the mine works or other significant landscape changes.
31. On the basis of the information in paragraphs 2 to 6 and the details about the Applicants and Specified Areas from paragraphs 27 to 30 above, I was satisfied that I had received an application made in writing by or on behalf a group of Aboriginal people seeking the preservation or protection of specified areas from injury or desecration in accordance with section 10(1)(a) of the ATSIHP Act.

Whether the Specified Areas are significant Aboriginal areas under section 10(1)(b)(i) of the ATSIHP Act

32. Section 3 of the ATSIHP Act defines the term '*significant Aboriginal area*' as, relevantly, an area of land in Australia, '*... being an area of particular significance to Aboriginals in accordance with Aboriginal tradition*'.
33. '*Aboriginal tradition*' is defined by section 3 as '*... the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships*'.
34. Therefore, in order to be satisfied that the Specified Areas are significant Aboriginal areas, I was required to be satisfied that the Specified Areas are of particular significance to Aboriginals in accordance with the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals.
35. In the Application, the Applicants asserted that the Specified Areas consist of sacred sites and highly important sites, and that the sites are particularly significant because:

- a. The area is part of some of the Applicants' traditional homelands (Country) and as such retains immeasurable cultural values;
- b. Senior Elders and traditional owners strongly identify connection to Country, cultural practices, including hunting, handing down of information and memories relating to the area from generation to generation, and as such identify that the area retains immeasurable cultural values;
- c. There is continuing cultural use of the area—including the pastoral lands within the surrounding area—for continued hunting and gathering of medicinal plants and vegetation for bush tucker purposes and gathering of materials for cultural arts;
- d. The connection to the banks of the Mooki River and Watermark Gully and Goran Lake as a traditional camping area. These areas are not included as part of the Specified Area but are considered to be connected and to retain immeasurable cultural values to the Applicants;
- e. The general region has a history of organised resistance and frontier warfare by the Kamilaroi and as such holds cultural significance and shared Aboriginal and non-Aboriginal cultural and historic significance;

s45, s47F



- g. The three grinding groove sites identified in the Application are important and interrelated without being a duplication of each other. I noted that submissions provided in the Section 10 Report detail the differences between the grinding groove sites and identify their cultural significance. The importance of keeping these grinding groove stones in place is connected to the ability to pass on knowledge and to relate the landscape's connection to each grinding groove.
 - h. The culturally modified possum tree demonstrates cultural wisdom and practices and provides meaning to the broader cultural landscape.
36. The Applicants also provided information concerning their cultural connection to Country in 'Restricted Appendix B' of the Application.
37. I noted archaeologist Dr Owen's representations, attached to the Application, which stated that the Gomeroi people hold a demonstrated connection to land within the Shenhua Watermark Coal Mine boundary, a connection that forms part of their culture, within a landscape (the broader regional landscape that includes the Specified Areas) that has been demonstrated to be a living component.
38. I also noted Dr Owen's identification of the Specified Areas 1a, 1b, 3 and 5 as sites with both tangible and intangible significance, and Dr Owen's conclusion that the sites that make up the Specified Areas are connected to each other and to sites outside of the Specified Areas.
39. I noted that the Application also included a letter of support from the Red Chief Local Aboriginal Land Council dated 21 May 2015. This letter detailed the Applicants' connection to, and responsibility for Country.

40. Most of the public representations made to the Reporter in connection with the Section 10 Report supported the Applicants' assertions that the Specified Areas are significant Aboriginal areas, with some focussing on the significance of the grinding groove complexes and the Min Min lights.
41. In their representations to the Reporter, Shenhua disputed the significance of some of the Specified Areas, arguing that with the exception of Mount Watermark, which is Crown land, the Specified Areas did not demonstrate evidence of continued cultural use and significance because the land has been in private ownership since 1929. Shenhua also suggested some of the Specified Areas could not be significant for the purposes of the ATSIHP Act because they were unknown to the Applicants prior to onsite investigations. Further, Shenhua asserted that Specified Area 5 contains two cut marks on the trunk that appear to have been made by a chainsaw, and on this basis, challenged the significance of this site.
42. These arguments were considered in the Section 10 Report. The Reporter disagreed with Shenhua's statements, concluding the above factors did not affect whether or not the sites were significant for the purposes of the ATSIHP Act.
43. The Reporter considered that each of the sites constituting the Specified Areas is of particular significance in accordance with the definition of 'Aboriginal tradition' outlined in the ATSIHP Act. I agreed with the Reporter's conclusion.
44. As a result, I was satisfied that the Specified Areas are '*significant Aboriginal areas*' for the purposes of section 10(1)(b)(i) of the ATSIHP Act.

Whether the Specified Areas are under threat of injury or desecration under section 10(1)(b)(ii) of the ATSIHP Act

45. Section 3(2) of the ATSIHP Act relevantly provides that an area shall be taken to be injured or desecrated if:
 - a. it is used or treated in a manner inconsistent with Aboriginal tradition;
 - b. by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
 - c. passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition.
46. The Applicants stated in the Application and in representations to the Reporter that the Specified Areas would be threatened or desecrated by the Shenhua Watermark Coal Mine in several ways. I considered this information, which is culturally sensitive and which I therefore have not included in this statement of reasons, in making my decision whether to make a declaration under section 10 of the ATSIHP Act.
47. In representations provided in connection with the Section 10 Report, Shenhua argued that none of the sites are under threat of injury or desecration as the two grinding groove complexes located within mining areas will be moved from the excavation area as part of mitigation measures agreed to in the NSW Development Consent, and the other sites are outside the excavation area.
48. Representations from persons other than the Applicants and Shenhua identified similar concerns to those raised by the Applicants. Particular concerns were raised in respect of

the threat of injury or desecration to grinding grooves (WM-GG1-11 and WM-GG3-12 – Specified Areas 1a and 3) that need to be moved as part of the construction of the eastern and western mining areas.

49. I noted that the Section 10 Report found that removing the grinding groove complexes (WM-GG1-11 and WM-GG3-12 – Specified Areas 1a and 3) will harm those complexes by disconnecting the sites from Mount Watermark and the broader cultural landscape. In the Reporter's view, even if the grinding grooves are returned to the rehabilitated mine site in the future, their cultural values and association with the surrounding cultural landscape will be lost.
50. I also noted the conclusion in the Section 10 Report that Mount Watermark and the two scar trees (WM-ST2-11 and WM-ST5-11) (Specified Areas 2, 5 and 4 respectively), and the grinding groove near the summit of Mount Watermark (WM-GG2-11) (Specified Area 1b) will not be directly damaged by the proposed mine. However, I agreed with the Reporter's conclusion that there would be inferential harm from vibration, dust and the alteration to the cultural landscape that includes the relocation of the two grinding groove complexes.
51. Furthermore, the Section 10 Report found that, as a result of the mine, there will be harm to the Specified Areas and consequential harm to their cultural custodians from their inability to protect the sites and maintain a tangible link to their culture.
52. I noted the Section 10 Report's conclusion that as a result, the Specified Areas were under threat of injury or desecration as defined under section 3(2) of the ATSIHP Act.
53. I agreed with the Reporter that there will be a physical change to the landscape from the mine works and that cultural damage will occur due to the two grinding groove complexes (WM-GG1-11 and WM-GG3-12) (Specified Areas 1a and 3) needing to be moved to allow the mine to proceed. I found that there was likely no need to physically dissect or reduce the size of the grinding groove rocks to move them. However, as a result of the removal of Specified Areas 1a and 3 from their current location and the potential for physical damage as a consequence of that removal, I found that the context of these Specified Areas within the broader landscape would be altered. I therefore considered that Specified Areas 1a and 3 were under the threat of injury or desecration by reason of their proposed removal, which would have an adverse effect on the use or significance of the Specified Areas in accordance with Aboriginal tradition.
54. I also found that the overburden from the mine would create a visual impact and potentially impact the landscape context of the Specified Areas.
55. I agreed with the Reporter that there will be no direct physical harm to the grinding groove complex WM-GG2-11, the Kurrajong Tree WM-ST5-11 and the culturally modified Possum tree–WM-ST2-11 should the mine proceed (Specified Areas 1b, 4 and 5). The NSW Development Consent requires that these sites are protected from harm. However, I found that these sites, as well as Watermark Mountain (Specified Area 2), may be indirectly harmed by changes to the physical landscape and the loss of connection to other sites inside and outside of the project boundary. On this basis, I considered that Specified Areas 1b, 2, 4 and 5 were under the threat of injury or desecration by reason of changes to the landscape as a result of the mine, which would have an adverse effect on the use or significance of the Specified Areas in accordance with Aboriginal tradition.

56. On this basis, I concluded that Specified Areas 1a, 1b, 2, 3, 4 and 5 were under the threat of injury or desecration by reason of the proposed mining activities in and near the area, and, in respect of Specified Areas 1a and 3, the removal of the grinding grooves, having an adverse effect on the use or significance of the Specified Areas in accordance with Aboriginal tradition.
57. Therefore, based on information provided in the Application, the Section 10 Report and representations from the Applicants, Shenhua, and members of the public attached to the Section 10 Report, I was satisfied that the Specified Areas are under threat of injury or desecration for the purposes of section 10(1)(b)(ii) of the ATSIHP Act.

The Report and any representations attached to the Report under section 10(1)(c) of the ATSIHP Act

Extent to which the Specified Areas are protected by NSW legislation

58. I noted that the Section 10 Report determined that there are no further avenues under NSW state law that would assist the Applicants to protect the Specified Areas. However, the Section 10 Report does not discuss protection and mitigation measures in any detail.
59. I noted that the NSW Development Consent of the Shenhua Watermark Coal Mine includes the following protections and mitigation measures:
- a. Shenhua must ensure that the development does not cause any direct or indirect impact on any identified Aboriginal heritage items located outside the project disturbance area of the mine.
 - b. Shenhua must establish two Aboriginal heritage conservation areas and make arrangements (including a detailed management plan) to protect them in perpetuity.
 - c. Shenhua must implement a heritage management plan, which must be prepared by suitably qualified and experienced persons whose appointment is endorsed by the Secretary of the NSW Department of Planning and Environment. The plan must be to the satisfaction of the Secretary. The plan must contain measures to deal issues including minimising impacts on the grinding grooves and other heritage items, protecting and monitoring known heritage items, maintaining access for Aboriginal stakeholders, ongoing research and consultation with Aboriginal stakeholders.
 - d. Grinding grooves WM-GG1-11 and WM-GG3-12 (Specified Areas 1a and 3) must be moved to a preservation area to be agreed with traditional owners. These two grinding groove complexes must be moved intact, maintained in the preservation area, and restored to an agreed area(s) as part of the mine rehabilitation process. The NSW PAC acknowledged that moving the grinding grooves, although not ideal, is the best balance between development and maintaining heritage. Consultation was undertaken with senior elders and whilst they would prefer the grinding grooves remain in situ, they have agreed to their careful management, including their movement, should the mine be approved.
 - e. All other Specified Areas, as well as other sites outside the mine disturbance area, along with any undiscovered heritage must not be damaged.
60. I noted that the NSW PAC for the Shenhua Watermark Coal Mine considered impacts to Aboriginal heritage, and determined that, once mitigated, the residual impacts are

acceptable. The NSW Development Consent sets out the conditions by which the mine can proceed under NSW law, which includes measures to mitigate and manage impacts on Indigenous heritage. I noted that the NSW Government has set out heritage management processes for the Specified Areas, which will minimise the impact to the Specified Areas.

61. I noted the claims of the Applicants and their archaeologist, Dr Owen, that the physical extent of the sites below the soil surface has not been fully determined and the impact of removing the sites from water sources has not been considered. The rock formations are sandstone and draw moisture from the surrounding water sources. A changed regimen of wetting and drying cycles may impact the sandstone material, which over time could result in their disintegration and loss.
62. I therefore found that the protections offered by NSW state law (particularly the terms of the Development Consent) described above are not sufficient to protect the Specified Areas so that the areas are not under threat of injury or desecration within the meaning of section 3 of the ATSIHP Act. Nevertheless, I concluded that those measures do go some way to protecting the Indigenous heritage in the Specified Areas, and provide mitigation and protection to some extent in an environment where the mine is allowed to proceed.

The effects of a declaration on the proprietary and pecuniary interests of third parties

63. In representations made in connection with the Section 10 Report, Shenhua stated that a declaration made in respect of the Specified Areas would prevent development of at least two of the three open cut pits that comprise the Shenhua Watermark Coal Mine. This is because the Specified Areas are centred within those two mining areas. Shenhua argued as those two mining areas constitute 82% (219.5 tonnes) of the Run of Mine reserves for the Shenhua Watermark Coal Mine, the loss of production from those areas would make the Shenhua Watermark Coal Mine commercially unviable.
64. Further, Shenhua asserted that it cannot redesign the mine to avoid the Specified Areas and remain commercially viable noting the current design is the optimal design to avoid unacceptable environmental impacts and minimises those impacts that are unavoidable, while maximising social and economic returns.
65. Given the above, I accepted that the Shenhua Watermark Coal Mine would not be commercially viable if I made a declaration to protect the Specified Areas.
66. I found that the estimated economic benefits of the Shenhua Watermark Coal Mine were reasonable, noting that Shenhua's economic estimates were accepted in the NSW PAC process.
67. Taking into consideration the recent purchase of land by the NSW Government from Shenhua resuming 51.4% of the Shenhua Watermark Coal Mine site, I also found that it was reasonable to consider that this purchase has significantly limited options for Shenhua to relocate its open cut pits.
68. The Department advised that after reviewing the Watermark Coal Project Mine Plan Justification Report and supplementary information, including the NSW Planning and Assessment Commission's review and submissions provided as part of the

Environmental Impact Statement, the Department accepted the best mine plan in terms of maximising benefits and minimising social, economic and environmental impacts is the current approved mine plan.

69. I agreed and found that it would not be commercially feasible for Shenhua to redesign the mine plan. Even if a redesign could be made to be commercially feasible, any redesign would still be unlikely to address the Applicants' overall concerns about the impact of the mine on Aboriginal heritage, and could potentially impact other Aboriginal heritage sites within the Shenhua Watermark Coal Mine project boundary, or increase impacts on the broader environment.
70. Given paragraph 60, I therefore concluded that a declaration under section 10 of the ATSIHP Act that would provide effective protection for the Specified Area would also likely result in the Shenhua Watermark Coal Mine not proceeding.
71. I acknowledged that this would result in financial impacts on Shenhua and broader social impacts on the community. My findings on broader social and economic considerations are outlined in the next section.

Other relevant matters under section 10(1)(d) of the ATSIHP Act

72. In making a decision on whether to make a declaration under section 10 of the ATSIHP Act, I was required to consider such other matters as I thought relevant. I considered that it was open to me to take into account a wide range of policy and public interest considerations, including social and economic considerations.

Economic impacts

73. Shenhua and the Applicants provided economic analyses of the viability and profitability of the project, which reached divergent conclusions.
74. The economic impact assessment of the project prepared by Gillespie Economics (the **Gillespie Report**), and commissioned by Hansen Bailey Environmental Consultants on behalf of Shenhua, found that the Shenhua Watermark Coal Mine is desirable and justified from an economic efficiency perspective, on the basis that it is expected to have net production benefits to Australia of at least \$1.3 billion.
75. In contrast, the Gillespie Report estimated the cost of residual environmental, cultural and social impacts at \$6 million in total. The analysis included the cost of mitigating impacts to greenhouse gas emissions, noise, air quality, ecology, groundwater, surface water, blasting, road transport, Aboriginal and non-Aboriginal heritage and visual impacts. I noted that the costing of impacts in this report did not include intangible values, such as those claimed by the Applicants.
76. The Gillespie Report also noted that the net production benefits would likely be distributed among a number of different stakeholder groups at the local, state, national and global level, including:
 - a. the Commonwealth Government, in the form of company tax payable (estimated at \$745 million present value);
 - b. the NSW Government, in the form of royalties (estimated at \$565 million present value) payable by Shenhua;

- c. The local and regional community in the form of voluntary contributions to community infrastructure and services by Shenhua (estimated \$11 million present value).
77. Based on an input-output economic impact analysis using 2006 census data, the Gillespie Report also found that the operation of the mine is estimated to make up to the following contributions to the local, regional and NSW economies:
- a. **Local economy:** \$902 million in annual direct and indirect regional output or business turnover, \$493 million in annual direct and indirect regional value added, \$80 million in annual direct and indirect household income, and 908 direct and indirect jobs;
 - b. **Regional economy:** \$913 million in annual direct and indirect regional output or business turnover, \$507 million in annual direct and indirect regional value added, \$91 million in annual direct and indirect household income, and 1015 direct and indirect jobs;
 - c. **NSW economy:** \$1554 million in annual direct and indirect regional output or business turnover, \$802 million in annual direct and indirect regional value added, \$276 million in annual direct and indirect household income, and 3260 direct and indirect jobs.
78. Subsequently, as part of the NSW PAC assessment process, in the response to the submissions received in response the Watermark Coal Project Environmental Impact Statement, Hansen Bailey, on behalf of Shenhua, conducted an economic impact assessment (the **Hansen Bailey Report**) based on 2011 census data, which resulted in the following updated figures of contributions to the local, regional and NSW economies:
- a. **Local economy** (Gunnedah, Tamworth and Liverpool Plains local government areas): \$939 million in annual direct and indirect output or business turnover, \$434 million in annual direct and indirect value added, \$77 million in annual direct and indirect household income, and 1143 direct and indirect jobs;
 - b. **Regional economy** (Gunnedah, Tamworth, Liverpool Plains, Narrabri and Upper Hunter local government areas): \$960 million in annual direct and indirect output or business turnover, \$442 million in annual direct and indirect value added, \$88 million in annual direct and indirect household income, and 1208 direct and indirect jobs; and
 - c. **NSW economy:** \$1752 million in annual direct and indirect output or business turnover, \$826 million in annual direct and indirect value added, \$306 million in annual direct and indirect household income, and 3728 direct and indirect jobs.
79. The Hansen Bailey Report also noted that the introduction of the construction workforce will generate significant indirect economic benefits to the regional area over the 18 month construction period. These indirect benefits will largely accrue through flow-on spending by project construction employees in the local area, particularly on accommodation, food, leisure and recreation, and personal services.

80. The Environmental Assessment Report prepared by the NSW Government (the **NSW EA Report**) acknowledged that while cost benefit analyses are most likely overstated, based on the cost benefit analysis undertaken for the project, and similar cost benefit analyses undertaken for other coal mines in the region and elsewhere in NSW, NSW was satisfied that the project's economic benefits to society (especially to the particular region and to NSW more generally) would significantly outweigh its costs, including externalities.
81. The NSW EA Report also considered that there was a considerable need for the project in terms of meeting society's basic energy needs.
82. In contrast, the Applicants submitted that the economic benefits described in Shenhua's submissions were overstated, on the basis of flaws in the calculations of coal prices, operating costs and capital expenditure. In making these claims, the Applicants relied on submissions to the NSW PAC by Marsden Jacobs and The Australia Institute.
83. In respect of projected coal prices, the Applicants noted that the Gillespie Report based its economic assessment of the mine on 2011 prices for coking coal (A\$142 per ton) and thermal coal (A\$99 per ton). However, the Applicants argued that, given that coal prices have decreased since 2011, the analysis in the Gillespie Report was unrealistic and significantly overstated the potential revenue of the project.
84. The Applicant provided two alternatives of projected coal prices that it considered to be 'more realistically valued':
- thermal coal at A\$80 per ton and coking coal at A\$102 per ton (Marsden Jacobs, referring to Whitehaven Coal – 2014)
 - thermal coal at A\$80 per ton for the next three years, increasing to A\$115 per ton and coking coal at A\$100 per ton for the next three years, increasing to A\$135 per ton (NSW Department of Resources and Energy (**NSW DRE**) – 2014)
85. I noted the Applicants' argument that, even using the higher of these two alternatives (the NSW DRE figures), redoing the calculations would produce a net present value of coal from the mine of \$5.9 billion, rather than \$8.1 billion, as claimed by Shenhua.
86. I also noted the Applicants' submission that the analysis of economic benefit in the Gillespie Report relied on operating costs that were significantly below the industry average as calculated by the Reserve Bank of Australia, and that those operating costs were not calculated based on actual project parameters.
87. I noted the Applicants' submission that given the claimed overestimation of coal prices and the underestimation of operating costs, the Applicants argued that once the additional costs of impacts to adjacent agricultural land are incorporated, the net present value of the mine would be significantly lower than that forecast by Shenhua, and could instead result in a loss of \$974 million, compared to Shenhua's forecast profit of over \$3 billion.
88. The Applicants submitted that this adjustment would mean that State mine royalty payments were more realistically estimated to be \$250 million, compared to the

estimate of \$565 million in the Gillespie Report. This would result in NSW Government royalties of around \$18-20 million per year. In addition, based on these figures, Shenhua would not pay any federal taxes.

89. I noted the Applicant's argument that, on the basis that the net present value of the mine was likely to be much lower than Shenhua has estimated and that the mine will be unable to pay required royalties, the Applicants submit that it is unclear that the project is viable.
90. More generally, the Applicants argued that Shenhua overstated the contribution of the coal industry to the NSW economy, and that, in fact, agriculture produces a greater proportion of employment opportunities in the Liverpool Plains region. Moreover, as Shenhua is 100 per cent foreign owned, benefits from the mine other than jobs and royalties will accrue overseas, rather than within Australia.

Critique of economic modelling and methodology

91. The Applicants also criticised the methodology and modelling used in the Gillespie Report. In particular, the Applicants considered that the input-output analysis produced an inaccurate picture of the economic impacts of the mine as it relied on assumptions of fixed prices, and of unlimited water, labour and land, and gave no consideration of agricultural impacts, thereby overstating the positive economic impacts of the project.
92. The Applicants further argued that the economic analysis in the Gillespie Report did not adequately assess, give sufficient weight to or place any economic value on 'soft' values, such as impacts from greenhouse gases, noise, and air quality, and impacts on agriculture, air quality, surface and ground water, ecology, and Aboriginal and non-Aboriginal heritage. The Applicants considered that to the extent that the Gillespie Report sought to place a monetary value on impacts on Aboriginal heritage and culture, this was not based on any recognised methodology and was therefore unsound.

Impacts on agriculture

93. I noted that concerns were raised during the public submission phase of the EPBC Act and NSW approval processes in respect of the potential impact of the mine on agricultural lands within the Namoi Catchment, in particular:
 - a. Land within the Shenhua Watermark Coal Mine project boundary and its immediate vicinity have historically been used for a variety of agricultural enterprises, including cattle grazing and cropping. While the mine is in operation, some land would be unavailable for agricultural production. Some land will be permanently removed from production; and
 - b. The mine will require sufficient water resources for all stages of the development, which could result in less water available for other uses, including agriculture.
94. I also noted that the Applicants, relying primarily on a report by the Australia Institute (the **Australia Institute Report**), submitted that the proposed mine would have significant adverse impacts on agriculture in the local region, including increased water costs, a reduction in agricultural land, loss of land value and the creation of significant

disincentives to invest. The Applicants noted that the cost benefit analysis in the Gillespie Report focussed entirely on the land directly impacted by the project and its offset sites, and makes no consideration of wider impacts to agriculture, thereby understating the impacts of the project.

95. I noted the Applicants' claim that Shenhua inadequately assessed the impacts of the mine on agricultural production and understated the value of regional agricultural production by using outdated data from 2006, that is, prior to the implementation of water reforms and the capital investment by local farmers of approximately \$1 billion in water efficiency infrastructure. The Applicants also claimed that Shenhua failed to take into account the particularly fertile environment of the Liverpool Plains region (particularly the black soils), which make it uniquely suited for agriculture, as well as the impact of the mine on the value of water infrastructure assets, and the likelihood that water will be less available and accessible for agricultural use as a result of the mine. The Applicants submitted that these factors will significantly reduce land values in the region.
96. The Applicants also submitted that the mine would force local farmers to shift from irrigated cropping to dryland cropping (a less profitable and less reliable form of farming), with the result that tens of millions of annual cropping income is at risk if the mine proceeds. The Applicants noted that it was unclear that the land will be able to be returned to agricultural use after the closure of the mine.
97. I noted that the Australia Institute Report cited case studies concerning local farmers who have invested significant amounts of funds into businesses that revolve around long-term sustainable access to water of a high quality. The Report claims that any threats to their water resources, such as that posed by the proposed mine, threatens the ability of local farmers to pay investors and creditors and affect the long-term viability of their business and those of everyone on the Liverpool Plains. The Report also claims that local farmers considered that the proposal for the mine has already reduced the number of potential buyers and investors who are interested in their business, largely due to the perceived and actual impacts on groundwater resources.
98. I noted that NSW also recognised the importance of the agricultural industry and prime agricultural land to society, and considered that any impacts should be avoided where possible and otherwise minimised to the greatest extent possible.
99. However, I noted that the NSW EA Report, citing the Gillespie Report, concluded that the gross economic benefits of the project far outweighed the economic benefits associated with the continued use of the project land for agriculture (which could be quantified as 41 jobs, \$5 million in annual business turnover, \$3 million in annual value added to the gross regional product and \$1 million in annual household income).
100. I noted that the NSW EA Report concluded that the project had been designed in a manner that achieved a reasonable balance between maximising the recovery of a recognised coal resource of state significance, and minimising the potential impacts on surrounding land users (including agricultural users) and the environment as far as practicable. Additionally, with the land buyback of exploration licence 7223, the NSW Government has ensured there is minimal black soil farming land remaining within the

project boundary. The conditions of the Development Consent also create a buffer zone of 150 metres between the black soils and the mining footprint, thereby protecting the farming future of the Liverpool Plains.

101. I noted that while some groups raised concerns about the effects of the mine on agriculture, the NSW PAC found that the mine would not preclude the continuation of significant agricultural production occurring on the black soil plains as the Shenhua Watermark mine is on the hills and slopes adjacent to the black soils. In addition, the NSW Planning Assessment Commission Determination Report (**NSW PAC Report**) assessed:
 - a. the likely impacts of the Shenhua Watermark Coal Mine on water resources; and
 - b. Shenhua's proposed avoidance, mitigation and management of these impacts.
102. I noted the conclusion of the NSW PAC Report that, taking the proposed mitigation measures into account and noting the existing protection of the water systems of the region, the Shenhua Watermark Coal Mine is unlikely to have any significant impacts on water resources or agricultural productivity of the Liverpool Plains.
103. I noted that the protection of water resources is also a consideration under the EPBC Act approval and the project cannot commence without my approval of a Water Impact Verification Report, which is yet to be provided to me.

Employment and training

104. Shenhua provided analysis by Hansen Bailey of the likely impacts of the mine on employment. I noted the conclusions of the Hansen Bailey Report, which found that:
 - a. The construction workforce is estimated to be approximately 600 fulltime equivalent employees;
 - b. The operational work force is estimated to be approximately 600 fulltime equivalent employees at full production (year 21), with an average workforce of 425 over the life of the mine. The initial operational workforce is estimated to be approximately 200, with a similar number estimated for the final year of the project (year 30);
 - c. For the construction phase of the project, an additional 956 jobs are estimated to be generated within NSW as 'flow-on employment' as a result of production and consumption induced effects of the project – 398 of these jobs are estimated to be generated in the regional area, while 382 of these regional jobs are estimated to be generated in the local area;
 - d. For the operational phase of the project, an additional 2826 jobs are estimated to be generated within NSW as 'flow-on employment' as a result of production and consumption effects of the project – 585 of these jobs are estimated to be generated in the regional area, while 539 of these regional jobs are estimated to be generated in the local area.

105. I also noted that Shenhua has committed to sourcing as much of its operational workforce as possible from the region and will encourage non-local hires to settle locally.
106. I noted that the Hansen Bailey Report found that high youth and Indigenous unemployment levels (often above 20% in the region) are expected to improve as a consequence of the cumulative mining and resources development in the region. While the extent to which this may improve is difficult to determine, I agreed with the Report's conclusion that Shenhua's focus on providing jobs and training to local young people and local Indigenous people is expected to help alleviate the currently high rates of unemployment in these demographics.
107. I also noted that Shenhua has committed to developing training and employment strategies that will target all levels of education and various community groups, including the Indigenous community. These include:
- a. Providing apprenticeships, traineeships and graduate placement programs, including dedicated positions for Indigenous and youth candidates, for Gunnedah, Liverpool Plains and Tamworth local government area residents;
 - b. Shenhua's School-based Trainee Program will support 10 students (Indigenous and non-Indigenous) each year over the life of the Shenhua Watermark Coal Mine, to pursue a career in mechanical, electrical or metal fabrication;
 - c. Funds and assistance to the value of \$1 million (\$5,000 per year for 20 years) to school programs throughout the region e.g. the Mooki Murris Program at Quirindi High School;
 - d. A scholarship fund of \$200,000 (\$10,000 for 20 years) for locally based students to study a mining related course at university;
 - e. Seed funding of \$250,000 towards the construction of a proposed Mining Skills Centre in Gunnedah in collaboration with other mining and resource companies in the region; and
 - f. Annual scholarship fund of \$50,000 (\$5,000 for 10 years) for locally based students to study a child care related course, and sponsoring a traineeship program for child care workers.
108. I noted that, based on the NSW Environmental Assessment Report, the NSW Government was satisfied that these measures are appropriate and adequate to encourage relocation to the local area.
109. I also noted the following conclusions in the Hansen Bailey Report in relation to the employment opportunities created by the project:
- a. The project related effects would be incremental, given the incremental employment growth;
 - b. The subregion would likely be able to absorb a substantial portion of the jobs created by the project, given the relatively high unemployment (especially in

youth and Indigenous employment) and low participation rates (including low women's labour workforce participation rates); and

- c. Skilled labour is an issue for the region, which will result in an expected demand for non-local hires, particularly in the construction phase.
110. The Applicants submitted that Shenhua failed to assess the impacts of fly-in fly-out (FIFO) and drive-in, drive-out (DIDO) workforces on the relevant communities. The Applicants also submitted that employment opportunities generated by mining operations are largely taken by people from other metropolitan and rural areas rather than from the local community. In addition, the Applicants argued that, during the life of its operation, the mine would likely switch to automated technology, further reducing employment opportunities for the local community. Accordingly, the Applicants considered the Mine would only result in the limited generation of local employment, and would also lead to reduced affordability of local housing markets, negative social impacts from large temporary resident populations, and increased pressure on physical and social infrastructure and demand for services (addressed in further detail below). The Applicants noted that the reduced ability of existing sectors (such as the trades, transport, retail and hospitality industries) to compete with the high wages offered by the mining industry, may lead to skills shortages.
 111. I noted that a number of local businesses and the Councils generally supported the mine, suggesting that it would bring more employment and population growth opportunities to the region.
 112. I am satisfied that the Shenhua Watermark Coal Mine would bring significant employment and training opportunities to the region.

Housing affordability and pressure on services

113. I noted the following findings of the Hansen Bailey Report in relation to the potential impacts of the project on housing affordability and services in the region:
 - a. Residential housing availability and affordability is a current issue, however there is ample land supply available in the Gunnedah, Liverpool Plains and Tamworth local government areas, and the predicted housing growth rates are consistent with historical growth rates in the area;
 - b. Health services would be strained with the cumulative development of mines in the region, with one of the most prominent impacts being the impacts of the construction workforce, especially families near the proposed MAC Werris Creek workers accommodation facility;
 - c. Education facilities (including pre-school, primary, secondary and tertiary schools) are likely to have sufficient capacity to accommodate the project, but would be strained with the cumulative development of mines in the region;
 - d. Emergency services (including Police, Fire and Rescue, Rural Fire Service, State Emergency Service, NSW Ambulance) are likely to have sufficient capacity to accommodate the project, but would be strained by cumulative development

of mines in the region, and services around the MAC Werris Creek facility may also be strained;

- e. Community recreation, sports and cultural facilities will face increased but not unreasonable demand;
 - f. Public transport facilities (including air, rail and bus services) would face some additional, but not unreasonable, demand; and
 - g. The project would inevitably have some impact on the community identity, values, cohesion and lifestyle, given the large size of the project.
114. On these issues, the Applicants submitted that the mine will result in a two-tiered economic system and increased poverty and strain on families who are not directly employed in mining activity. In particular, the Applicants were concerned that the likely increase in the cost of rental properties once the mine is active will make housing unaffordable for long term residents and low income families. The Applicants also submitted that local businesses will suffer, and some may have to close down, as a result of young employees leaving their existing jobs to earn higher wages working in mining activities.
115. The NSW EA Report noted that, with regard to socio-economic impacts, NSW considered that the project is unlikely to have any significant adverse impacts on community infrastructure and services in the wider area.
116. I noted that, in order to mitigate any adverse social impacts as far as practicable, Shenhua has developed a wide range of mitigation measures, which will be managed via a Social Impact Management Plan. The list of proposed mitigation measures includes those commitments relating to education and training set out above, as well as the following commitments by Shenhua:
- a. An investment of up to \$400,000 (\$20,000 per year for 20 years) to encourage retainment of medical staff at the Gunnedah Rural Health Centre.
 - b. Investment of approximately \$1 million (\$50,000 per year for 20 years) into capital equipment for services such as the bushfire brigade, ambulance and other community services in the Gunnedah and Liverpool Plains Local Government Areas.
117. I also noted that Shenhua has committed to continue working with the Gunnedah, Liverpool Plains and Tamworth regional councils, and community groups to provide information and advice to assist the region to prepare for the commencement of the Shenhua Watermark Coal Mine. In particular, Shenhua has committed to working with the regional councils and community groups to identify and address gaps in areas such as mental health, family support, domestic violence and community safety.
118. The NSW EA Report noted that the proposed social mitigation measures described above and in the Hansen Bailey Report are outside and on top of the direct contributions to local councils that Shenhua has committed to as part of the NSW Development Consent. The NSW Development Consent for the proposed Shenhua Watermark Coal Mine requires Shenhua to enter into voluntary planning agreements

with Gunnedah Shire Council and Liverpool Plains Council, pursuant to section 93F of the NSW EPA Act, to provide the following financial contributions:

- i. \$6 million towards a community facility for Gunnedah,
- ii. \$1.2 million towards the Quirindi Sports Centre, and
- iii. \$350,000 towards an outdoor play/multi-purpose centre and stage 2 of Tamworth Marsupial Park.

These financial contributions are payable by Shenhua within 30 days from the NSW Development Consent being physically commenced.

119. I noted that the Watermark Community Consultative Committee has been established under the auspice of NSW Department of Planning and Environment to provide a forum for open discussion between Shenhua, community representatives, other interested stakeholders and relevant government agencies. It provides an avenue to identify and address potential concerns and to assist Shenhua to improve communication with the general community.
120. I noted during my trip on 24 June 2019, the Gunnedah Shire Council were generally supportive of the Shenhua Watermark Coal Mine.
121. After considering the proposed social impact mitigation measures as part of its approval process, NSW was satisfied that they were appropriate and adequate. I agreed with NSW's analysis and conclusion.

Impacts on regional heritage

122. I noted that the Applicants submitted that the mine will have adverse impacts on the historical significance of the region in the form of irreversible changes to the landscape and disruption to the region's historical pattern of agricultural and pastoral development. The Applicants suggested that the land within the project application area and the Liverpool Plains more generally may satisfy NSW criteria for the assessment of heritage significance, and that the area constitutes a continuing historic cultural landscape that is significant as it demonstrates an historic settlement pattern and evolution of land uses associated with agricultural development and technical innovation, thereby holding special value for the community.
123. The Applicants argued that the historical and heritage significance of the Liverpool Plains region was not adequately assessed in the evidence provided by Shenhua, and therefore that appropriate mitigation measures have not been identified to manage the impacts of the action on the historic and social values of the region.
124. While I note the Applicants' concerns, I am satisfied that historical heritage was considered as part of the NSW PAC process.

Impacts on Indigenous communities and heritage

125. The Applicants submitted that Shenhua's analysis trivialised the loss of culture to the Applicants that would result from the destruction of the Specified Areas, and failed to give sufficient weight to the resulting social impacts of the destruction of their culture on Aboriginal peoples. In particular, the Applicants submitted that the development of

the mine and the resulting destruction of cultural traditions, burial sites, and places and objects of significance would have significant adverse impacts on the Applicants' mental health and wellbeing, in the form of emotional damage, a sense of displacement, and mental health issues – for current, past and future generations. The Applicants asserted that the Hansen Bailey Report, in particular, did not consider the relevance of dislocation and dispossession on Aboriginal people. Moreover, the Applicants considered that Shenhua's submissions failed to consider the link between the destruction of Aboriginal culture and heritage and substance abuse, violence, poor educational outcomes, and poverty amongst Aboriginal communities.

126. Having regard to traditional cultural connections, the Applicants also noted that the mining operations would affect the Gomeroi nation group of over 15,000 persons, rather than being limited to the local residential community.
127. Along with mental health impacts, the Applicants noted that mining operations had particularly harmful consequences for Aboriginal peoples, including preventing Aboriginal people from accessing sacred places and objects of importance, changing the social dynamics of communities, and causing division in communities based on groups that support and do not support the mining operation.
128. The Applicants also submitted that the Gillespie and Hansen Bailey Reports failed to consider the social impact on Gomeroi people of the loss of access to the view of the night sky from the Specified Areas, which has significant cultural importance.
129. The Applicants also stated that Shenhua has failed to address matters such as light pollution, climate change, land management and erosion caused by the development and operation of the mine, and the contribution of these matters to the loss of their Indigenous cultural heritage.
130. I considered that, for the purposes of weighing the impacts of the project on Indigenous heritage against the social and economic benefits of the mine, the following information was also relevant:
 - a. NSW was satisfied that Shenhua has explored and identified reasonable and feasible measures to minimise the project's impacts on Aboriginal heritage values as far as practicable, and concluded that the project's residual impacts are unlikely to have a significant impact on the Aboriginal heritage values of the area;
 - b. Condition 42 of the NSW Development Consent requires Shenhua to prepare and implement a comprehensive Heritage Management Plan which must be approved by NSW. In respect of Indigenous heritage, this plan will require (among other things):
 - i. ongoing consultation with the local Aboriginal community and NSW;
 - ii. a detailed plan for the implementation and long term protection of the Aboriginal cultural heritage conservation areas, and the Aboriginal values of the biodiversity offsets area;

- iii. a detailed geotechnical assessment of the two grinding groove sites that includes recommendations for minimising the impacts on these sites during the proposed relocation process;
 - iv. a description of the measures that would be implemented for relocating and minimising the two grinding groove sites in accordance with such recommendations; and
 - v. a description of the measures that would be implemented for protecting all the grinding groove sites, including the site outside the project disturbance area.
- c. the NSW PAC Report considered the significance of the Indigenous heritage values that are likely to be impacted and strengthened the conditions to require that the Heritage Conservation Areas are protected in perpetuity and that the grinding groove formations are relocated intact to the chosen site. On this basis, the NSW PAC Report considered that it would not be in the broader public interest to prohibit the mining.
 - d. Shenhua's mitigation measures outlined above were the subject of consultation with the Senior Elders and Elders group.
 - e. On the basis of the section 10 Reporter's investigation and subsequent report, I noted that other Aboriginal people, claiming to be from the area, have contrasting views to those held by the Applicants concerning how the impacts to Aboriginal heritage can be mitigated and the balancing of the significance of the area with the economic opportunities and benefits that will flow from the mine. The Applicants were not satisfied that the impacts to Aboriginal heritage can be mitigated, particularly the intangible values of the Specified Areas, and the Applicants believe that the significance of the area is more important than the economic opportunities and benefits that will flow from the mine.

Pollution and health impacts

131. The Applicants considered that Shenhua's economic analysis failed to appropriately assess the impacts of greenhouse gas emissions from the mine on the community.
132. I also noted the Applicants' argument that the mine will produce noise and air pollution, including through the increase of dust levels in the air. While Shenhua's analysis concluded that all noise, air and blasting impacts of the mine are fully mitigated by the acquisition of land or the installation of mitigation measures at residences where this is mandated by NSW, the Applicants argued that the analysis fails to consider the health impacts of the mine on the regional community and the financial effect on land values of proximity to a mine.
133. I note that health impacts were considered as a part of the NSW PAC process.

Impacts on other regional industry

134. The Applicants submitted that light pollution from night lights at the mine will affect astronomy operations at Siding Springs Observatory, which could affect the ability of researchers to carry out their work and reduce the marketability of the benefits of the

Observatory to international research partners, with flow-on impacts for the local community.

135. While I note the Applicants' concerns, I am satisfied that lighting impacts were considered as part of the NSW PAC process.

Conclusion on social and economic considerations

136. Overall, I considered that the expected social and economic benefits of the Shenhua Watermark Coal Mine to the local community outweighed the impacts of the mine on the Applicants as a result of the likely destruction of parts of their Indigenous cultural heritage.
137. In coming to this conclusion, I took into consideration the Section 10 Report, the Gillespie Report, the Hansen Bailey Report, the Response to Submissions (prepared by Hansen Bailey), the NSW EA Report, the NSW PAC Report, and all submissions received, including from Shenhua and the Applicants.
138. I acknowledged that the Specified Areas for which protection is sought retain immeasurable cultural values and connection to Country for the Applicants and Gomeroi people as a whole. Having regard to the Section 10 Report, I agreed that the Specified Areas are of particular significance to Aboriginal people. I also accepted the analysis in the Section 10 Report that even though the measures required under the NSW Development Consent will mitigate the mine's impact on the Aboriginal heritage to some extent, there will be some loss of heritage values. Moreover, I acknowledged that there were difficulties in measuring or otherwise quantifying the value of Indigenous cultural heritage and in comparing the value of such to potential economic or social benefits of the mine.
139. That said, the difficulty of the task did not remove the need to weigh up the competing views expressed and evidence provided by Shenhua and the Applicants on the likely impacts of the mine on both the local and broader communities. The need for this balancing exercise was inherent in the fact that section 10 of the ATSIHP Act did not compel me to make a declaration in circumstances where the Section 10 Report has found that the Specified Area is a significant Aboriginal area and is under threat of desecration or injury, and instead allowed me to consider 'other relevant matters' before deciding whether to make a declaration.
140. In deciding how much weight to give the evidence provided by Shenhua, particularly the social and economic information in the Gillespie and Hansen Bailey Reports, I noted that this information was largely accepted by NSW during the mine approval process. In particular, the NSW PAC concluded that the predicted public benefits of the mine are most likely overestimates. After careful consideration, NSW PAC was satisfied the mine would still generate significant economic benefits to the community. While acknowledging that the Applicants disagree with both the content and methodology of the Gillespie and Hansen Bailey Reports, I accepted NSW's analysis and conclusion on this matter.
141. In relation to the economic benefits of the mine specifically, I carefully considered the information submitted by the Applicants and agreed that there was some doubt

regarding the potential benefits to the state and national economies that could flow from the mine and that are described in the Gillespie Report. This doubt is caused by the uncertainty in both the accuracy of the coal prices that have been used in the analysis (which the Applicants contended are overstated) and the operating costs of the mine (which the Applicants contended are understated). For this reason, and also noting NSW's conclusion that the predicted economic benefits of the mine are likely to be overstated in Shenhua's submissions, I was of the view that these uncertainties meant the evidence available is unlikely, of its own accord, to support a conclusion that the economic benefits to the broader regional, state and national economies from the mine are to be preferred over the impacts to the Indigenous community from the loss of their cultural heritage.

142. However, I viewed the likely social and economic benefits of the mine to the local community differently. These benefits were more direct and certain, and less likely to be overstated on the basis of (potentially) inflated coal prices. Rather, the available evidence indicated that the benefits to the local community were likely to flow directly from the construction and operation of the mine, particularly as a result of the increase in employment opportunities (both direct and indirect), increase in investment in the local economy and the increase in wages associated with employment in mining and mining-related activities. In this sense, I noted particularly the findings of the Response to Submissions by Hansen Bailey that the mine will (as an estimate) result in \$939 million in annual local business turnover, \$434 million in value added to the local economy, an increase of \$77 million in annual household income in the local area and the creation of 1143 jobs. I further noted that the Hansen Bailey Report found that the introduction of the construction workforce in particular will generate significant indirect economic benefits to the local area and that NSW was satisfied that the mine's economic benefits to the region would significantly outweigh its costs. For these reasons, I concluded that the expected economic benefits to the local community from the mine are likely to be significant and, as such, that I could give these benefits considerable weight as part of the balancing exercise.
143. In light of this, I also carefully considered the information presented by the Applicants concerning the economic impacts of the mine on the local agricultural community. I noted the concerns expressed by the local farmers regarding the ongoing viability of their businesses and the potential negative impact on land values caused by proximity to the mine, and acknowledged that there were still some uncertainties in how agribusinesses will be impacted by the mine in an economic sense.
144. However, I also noted that these concerns and uncertainties arose primarily from the perceived impacts of the mine on groundwater resources, with the local farmers worried that the mine will threaten their long-term sustainable access to water of a high quality resulting in flow-on negative economic effects. On this point, I noted that likely impacts of the mine on water resources, particularly groundwater, were assessed in detail by both NSW and the Commonwealth during the environmental approval process. In particular, the Department noted that the controlling provisions for water resources had been engaged for the purposes of the EPBC Act approval, which meant that likely impacts on water resources was the subject of a thorough environmental assessment that included advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. Both the NSW and

Commonwealth assessments found that the impacts of the mine on water resources, including groundwater used by the local farmers, would not be significant taking into account the proposed mitigation measures and the conditions attached to the approval.

145. I also acknowledged the concerns raised by the Applicants in relation to potential adverse social impacts of the mine on the local community, particularly the Indigenous community. I carefully considered the Applicants' submissions that the mine may result in decreased housing affordability, increased pressure on infrastructure and services, and limited generation of local employment opportunities (largely as a result of the FIFO and DIDO workforce that the Applicants contend would be created as a result of the development of the Mine). Moreover, I also acknowledged the Applicants' submissions that the destruction of culturally significant heritage would result in significant social damage to the Applicants, particularly in the form of negative impacts on the health and wellbeing of the applicants and the broader Gomeroi nation group of over 15,000 persons (while noting that the Applicants do not speak for the entire Gomeroi nation), including mental health impacts and a sense of displacement, dislocation and dispossession.
146. However, I considered that the social mitigation measures that Shenhua has committed to undertaking are likely to some extent mitigate these adverse impacts. The social mitigation measures are expressly directed at the local community and many can be tailored to directly address the concerns raised by the Applicants – particularly those measures aimed at expanding (and decreasing pressure on) services, those measures involving financial contributions and the commitment by Shenhua to working with local councils and community groups to assist the region to prepare for the commencement of the mine and to identify gaps in areas such as mental health, family support, domestic violence and community safety.
147. I further noted that Shenhua has committed to sourcing as much of its operational workforce as possible from the region and will encourage non-local hires to settle locally. I considered that this will ameliorate the concerns raised by the Applicants regarding the impacts of a FIFO/DIDO workforce and a temporary resident population and will also help to ensure that the employment-related benefits arising from the mine substantially flow to the local community, including the Indigenous community. I further noted the information in the Hansen Bailey Report that high youth and Indigenous unemployment in the local area is expected to improve as a result of the mine and that Shenhua has committed to focussing on providing jobs and training to local young people and local Indigenous people.
148. For these reasons, I found that there were significant social and economic benefits that would flow to the local area in particular as both a direct and indirect result of the mine. These benefits carried considerable weight as part of the balancing exercise I undertook in making my decision.
149. Furthermore, I noted that under the NSW Development Consent, Shenhua is required to mitigate the impact to Aboriginal heritage sites (as set out above in paragraphs 59 and 60). This includes Shenhua establishing the Watermark Gully Aboriginal Cultural Heritage Conservation Area and the Mooki River Aboriginal Cultural Heritage Conservation Area and ensuring that the grinding grooves are relocated intact and

protected in perpetuity. Other mitigation strategies will be developed as part of the broader Aboriginal Cultural Heritage Management Plan in consultation with local Aboriginal stakeholders. The costs of these offset areas and mitigation strategies have been included in the development costs of the mine. I agreed with the conclusions of the NSW EA Report that Shenhua has explored and identified reasonable and feasible measures to as far as practicable minimise the mine's impact on the Specified Areas, and Aboriginal heritage within the broader project area, and as well as the broader environment.

150. Accordingly, while I accepted that not making a declaration will cause some harm, both tangible and intangible to the Applicants and potentially to the Gomeroi people as a whole, I considered that:
- a. This harm will be mitigated to some extent while still allowing the mine to proceed;
 - b. The local social and economic benefits arising from the mine are significant and if they were to be foregone it would result in a substantial detriment to the local area, including the local economy; and
 - c. Any adverse social impacts to the local community, particularly the Indigenous community, that are likely to flow from the mine will be able to be mitigated to an acceptable level by the social mitigation measures which Shenhua has committed to undertaking.
151. For these reasons, I came to the view that there was sufficient evidence to allow me to reasonably form the view that the significant nature of the economic and social benefits of the mine, particularly to the local community, outweighed the loss of heritage value in the Specified Areas, as well as the potential adverse social impacts on the community, including on Indigenous people (noting that the impacts of the mine will be mitigated to some extent so as to reduce the loss of Indigenous heritage and adverse social impacts on both Indigenous and non-Indigenous communities).
152. For the reasons described above and on the basis of the socio-economic benefits of the mine, I therefore declined to make a declaration under section 10 of the ATSIHP Act to protect the Specified Areas.

Conclusion

153. In summary, based on the material summarised above, and in light of my findings in paragraphs 26 to 152, I was satisfied that:
- a. I received an application for the purposes of section 10(1)(a); and
 - b. the Specified Areas are significant Aboriginal Areas for the purposes of section 10(b)(i) of the ATSIHP Act; and
 - c. there is a threat of injury or desecration to the Specified Areas due to the proposed Shenhua Watermark Coal Mine, as defined under section 10(b)(ii) of the ATSIHP Act; and

- d. as required under section 10(1)(c) of the Act, a report and representations received in relation to that report were provided to me on this matter by the nominated reporter, Ms Susan Phillips; and
- e. I gave consideration to other matters as I thought relevant as required under section 10(1)(d).

154. For the reasons set out above, and particularly on the basis of the social and economic benefits of the mine, I decided to decline to make a declaration under section 10 of the ATSIHP Act to protect the Specified Areas.

Signed



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The Hon Sussan Ley MP
Minister for the Environment

26 June 2019

Enclosed:

Annexure A – A copy of the ATSIHP Act

Annexure B – Evidence or material on which my decision was based

Annexure C – Map of the Specified Areas

Annexure A – Legislation

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

3 Interpretation

- (1) In this Act, unless the contrary intention appears:

Aboriginal means a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.

...

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

area includes a site.

...

significant Aboriginal area means:

- (a) an area of land in Australia or in or beneath Australian waters;
- (b) an area of water in Australia; or
- (c) an area of Australian waters;

being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

...

- (2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

- (a) in the case of an area:

- (i) it is used or treated in a manner inconsistent with Aboriginal tradition;
- (ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
- (iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

- (b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.

- (3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

4 Purpose of Act

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.”

10 Other declarations in relation to areas

- (1) Where the Minister:
 - (a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aborigines seeking the preservation or protection of a specified area from injury or desecration;
 - (b) is satisfied:
 - (i) that the area is a significant Aboriginal area; and
 - (ii) that it is under threat of injury or desecration;
 - (c) has received a report under subsection (4) in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and
 - (d) has considered such other matters as he or she thinks relevant;

he or she may, by legislative instrument, make a declaration in relation to the area.
- (2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.
- (3) Before a person submits a report to the Minister for the purposes of paragraph (1)(c), he or she shall:
 - (a) publish, in the Gazette, and in a local newspaper, if any, circulating in any region concerned, a notice:
 - (i) stating the purpose of the application made under subsection (1) and the matters required to be dealt with in the report;
 - (ii) inviting interested persons to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the Gazette; and
 - (iii) specifying an address to which such representations may be furnished; and
 - (b) give due consideration to any representations so furnished and, when submitting the report, attach them to the report.
- (4) For the purposes of paragraph (1)(c), a report in relation to an area shall deal with the following matters:
 - (a) the particular significance of the area to Aborigines;
 - (b) the nature and extent of the threat of injury to, or desecration of, the area;
 - (c) the extent of the area that should be protected;
 - (d) the prohibitions and restrictions to be made with respect to the area;
 - (e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aborigines referred to in paragraph (1)(a);
 - (f) the duration of any declaration;

- (g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;
- (h) such other matters (if any) as are prescribed

...

11 Contents of declarations under section 9 or 10

A declaration under subsection 9(1) or 10(1) in relation to an area shall:

- (a) describe the area with sufficient particulars to enable the area to be identified; and
- (b) contain provisions for and in relation to the protection and preservation of the area from injury or desecration.

...

13 Making of declarations

- (1) In this section:

declaration means a declaration under this Division.

- (2) The Minister shall not make a declaration in relation to an area, object or objects located in a State, the Northern Territory or Norfolk Island unless he or she has consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration.
- (3) The Minister may, at any time after receiving an application for a declaration, whether or not he or she has made a declaration pursuant to the application, request such persons as he or she considers appropriate to consult with him or her, or with a person nominated by him or her, with a view to resolving, to the satisfaction of the applicant or applicants and the Minister, any matter to which the application relates.
- (4) Any failure to comply with subsection (2) does not invalidate the making of a declaration.
- (5) Where the Minister is satisfied that the law of a State or of any Territory makes effective provision for the protection of an area, object or objects to which a declaration applies, he or she shall revoke the declaration to the extent that it relates to the area, object or objects.
- (6) Nothing in this section limits the power of the Minister to revoke or vary a declaration at any time.

...

16 Refusal to make declaration

Where the Minister refuses to make a declaration under this Division in pursuance of an application, he or she shall take reasonable steps to notify the applicant or applicants of his or her decision.

Annexure B – Evidence or other material on which my findings were based

My decision to decline to make a declaration under section 10 of the ATSIHP Act was made after considering the following attachments:

- A. GTC Section 10 application - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (including original section 9 application) provided 28 April 2015.
 - A1 – Part 1 Application Cover Letter.
 - A2 – Appendix A – Map with 5 identified areas.
 - A3 – s45, s47F
 - A4 – Appendix C – Application Non-restricted Information.
 - A5 – Statutory Declarations (submissions from GTC applicants).
 - A6 – Letter of support from the Red Chief Local Aboriginal Land Council.
 - A7 – GML Letter.
- B. Enlarged map showing area specified for protection under the ATSIHP Act section 10 application
- C. Statement of Reasons for the Watermark Section 9 Decision under the ATSIHP Act
- D. Provisions of the ATSIHP Act relevant to the Minister’s decision under section 10 of the Act
- E. A copy of the Commonwealth Gazette notice published on behalf of the reporter Ms Phillips on 8 September 2016
- F. A report dated 14 March 2017 under section 10 of the ATSIHP Act by Ms Phillips (the section 10 report)
- G. Media release on NSW buyback as provided for the procedural fairness Annexure 4 correspondence
- H. Watermark Coal Project Economic Impact Assessment (2012), prepared by Gillespie Economics on behalf of Shenhua
- I. Watermark Coal Project Social Impact Assessment (2013), prepared by Hansen Bailey on behalf of Shenhua
- J. Watermark Coal Project Mine Plan Justification Report (2013), prepared by GHD on behalf of Shenhua
- K. Watermark Coal Project Background Document (2011), prepared by Hansen Bailey

- L. Watermark Coal Project Response to Submissions [to the Environmental Impact Statement], prepared by Hansen Bailey
- M. Charter of the Watermark Coal Project Consultative Committee
- N. John D Pettigrew (2003) The Min Min light and the Fata Morgana: An optical account of a mysterious Australian phenomenon, *Clinical and Experimental Optometry*, 86.2: 109-120
- O. EIS document Q Geotechnical and Geomorphology Investigation of Grinding Groove Sites prepared by SCT Operations Pty Ltd dated February 2013
- P. Department analysis and summary – Section 10 application – Watermark (NSW)
- Q. Key correspondence providing notification under section 20 of the ATSIHP Act and requesting additional protection of areas under section 10

Q1 – Letter from the applicant's solicitor, Beatty Legal, to Minister Frydenberg, providing notification under section 20 of the ATSIHP Act and requesting additional protection of areas under section 10 – dated 1 November 2016.

Q2 – Letter from Minter Ellison, legal representatives to Shenhua Watermark Pty Ltd to Minister Frydenberg, responding to Q1 – dated 7 November 2016.

Q3 – Letter from the applicants' solicitor, Beatty Legal, to nominated reporter, Ms Phillips, identifying errors in reports provided by Shenhua regarding the location of Specified Areas as well as identifying shortcomings in the reporting process – dated 8 November 2016.

Q4 – Letter from the applicants' solicitor, Beatty Legal, to Minister Frydenberg, identifying location errors of objects in specified areas under section 10 of the ATSIHP Act – dated 16 November 2016. This letter mirrors the letter at Q3.

Q5 – Letter from the applicants' solicitor, Beatty Legal, to Minister Frydenberg, requesting an amendment to the application under section 10 of the ATSIHP Act – dated 1 December 2016.

Q6 – Letter from Minister Frydenberg to the applicants (MS16-001542), the Gomeri Traditional Custodians, providing a copy of the statement of reasons, explaining why former Minister Hunt declined to make a declaration under section 9 of the ATSIHP Act and updating them on the status of the reporting process under section 10 of the ATSIHP Act – dated 15 December 2016.

Q7 – Emails dated 22 December 2016 from the applicants' solicitor, Beatty Legal, clarifying their understanding of the current ATSIHP Act.

Q8 – Email dated 21 December 2016 responding to the applicants' solicitor, Beatty Legal, concerning their previous correspondence of November 2016. This response provided an update on the report under section 10 of the ATSIHP Act

and indicated that new material provided by the applicant would need to be treated as a new section 10 application.

Q9 – Departmental letter dated 8 March 2017 responding to incoming letter at Q5 from the applicants' solicitor, Beatty Legal, requesting an amendment to the section 10 application under the ATSIHP Act clarifying their understanding of the current ATSIHP Act process.

Q10 – Email dated 31 March 2017 from the applicants' solicitor, Beatty Legal, indicating that their clients will be submitting a new application under section 10 of the ATSIHP Act.

Q11 – Email dated 10 April 2017 from the applicants' solicitor, Beatty Legal, seeking clarification on the ATSIHP Act application under section 10.

Q12 – Letter from Beatty Legal requesting a copy of the section 10 report as well as advice on when the reports are due under EPBC 2011/6201 would be provided (MC17-014419) – dated 27 June 2017.

Q13 – Department file note 170629 dated 29 June 2017 from Minter Ellison, Shenhua legal representatives seeking clarification on the current ATSIHP Act process and providing an update from their clients.

Q14 – Letter from Minter Ellison, Shenhua legal representatives to Beatty Legal, the applicants' solicitor advising that additional access to the site will not be granted to facilitate a new application under section 10 of the ATSIHP Act – dated 6 July 2017.

Q15 – Departmental reply (MC17-014419) updating the applicants' legal representatives on the status of a new section 10 report as well as responding to the request for a copy of the current section 10 report – dated 6 July 2017.

Q16 – Department file note 170707 dated 7 July 2017. Incoming phone call from Beatty Legal requesting the Department intervene to gain site access for their clients to the Shenhua Watermark Coal Mine project site.

Q17 – Incoming email and departmental reply requesting a copy of the section 10 report by Minter Ellison, Shenhua's legal representative, dated 19 and 20 July 2017.

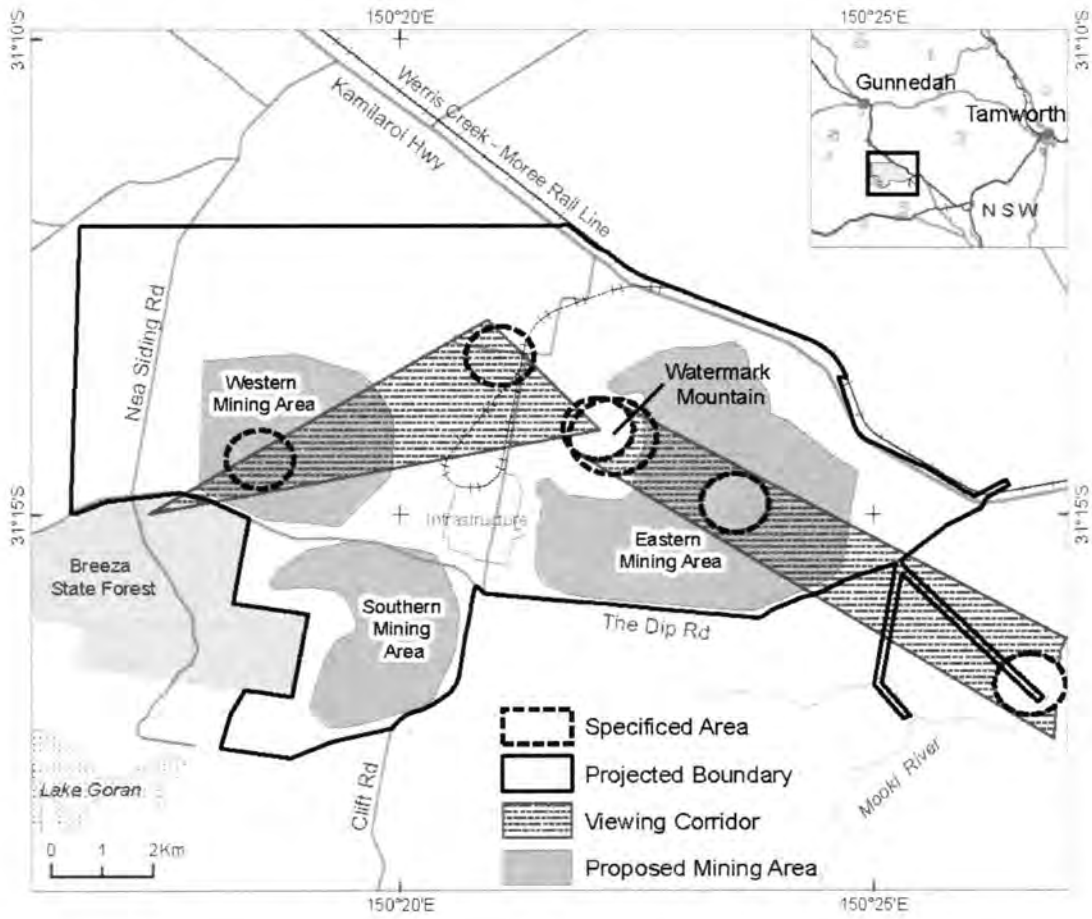
Q18 – Letter from the Department to Beatty Legal acknowledging their clients' intent to submit a new consolidated application under section 10 of the ATSIHP Act by mid-September 2017 – dated 28 August 2017.

Q19 – Letter from the Department to Beatty Legal advising that the Kurrajong tree will not be considered under this report – dated 8 March 2017.

Q20 – Letter from the Department to Beatty Legal dated 21 December 2017.

- Q21 – Letter from the Department to Minter Ellison dated 21 December 2017.
- Q22 – Letter from Beatty Legal to the Department dated 31 December 2017.
- Q23 – Letter from the Department to Beatty Legal dated 4 January 2018.
- Q24 – Letter from Minter Ellison to the Department dated 17 January 2018.
- Q25 – Letter from Beatty Legal to the Department dated 19 January 2018.
- Q26 – Letter from the Department to Beatty Legal dated 23 January 2018.
- Q27 – Letter from Beatty Legal to the Department dated 23 February 2018.
- Q28 – Letter from Beatty Legal to the Department dated 7 March 2018.
- R.** Legal Advice [***This legal advice is subject to legal professional privilege it should not be disclosed to or discussed with third parties.***]
- S.** EPBC approval and approval conditions EPBC 2011/6201 for the Shenhua Watermark Coal Mine
- T.** Package of procedural fairness notification and documents provided to interested parties on 21 December 2017
- U.** Shenhua Watermark Pty Ltd response to procedural fairness documents
- V.** GTC response to procedural fairness documents

Annexure C – Map of the Specified Areas





Australian Government

Department of the Environment and Energy

STATEMENT OF REASONS FOR A DECISION UNDER SECTION 10 OF THE *ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984*

I, Sussan Ley, Minister for the Environment and Energy, provide the following statement of reasons for my decision under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the **ATSIHP Act**), to decline to make a declaration in relation to the protection of certain areas from the development of the Shenhua Watermark Coal Mine by Shenhua Watermark Coal Pty Limited (**Shenhua**), near Breeza, New South Wales in relation to an application received on 21 December 2017.

Legislation

1. Legislative provisions relevant to my decision are extracted for convenience at **Annexure A** to this statement of reasons.

Background

The Application

2. On 28 April 2015, the then Minister for the Environment, the Hon Greg Hunt MP, received an application from Beatty Legal Pty Ltd on behalf of the Gomeroi Traditional Custodians (**GTC**) seeking a declaration under sections 9 and 10 of the ATSIHP Act in relation to five areas close to Breeza in New South Wales near Tamworth (the **Previous Application**). The sites for which protection was sought under the Previous Application lie within or immediately adjacent to the proposed footprint of the Shenhua Watermark Coal Mine.
3. On 1 November 2016, the Applicants, through their legal representatives Beatty Legal, submitted correspondence that attempted to alter the Previous Application. This correspondence sought protection under section 10 of the ATSHIP Act for a further three areas adjacent to the areas identified in the Previous Application and three culturally modified trees.
4. Following exchange of correspondence between the Applicant and the Department of Environment and Energy (the **Department**), on 21 December 2017, the then Minister for the Environment and Energy, the Hon Josh Frydenberg MP, received correspondence from Ms Veronica "Dolly" Talbott on behalf of GTC (the **Applicants**) seeking a declaration under section 10 of the ATSIHP Act in relation to three culturally modified trees and eight areas (the **Specified Areas**), close to Breeza in New South Wales, near Tamworth (the **Application**).
5. This statement relates to my decision in relation to the Application received on 21 December 2017.

6. I note the Applicants have largely relied on material they provided in relation to their Previous Application in support of the Application of 21 December 2017.

Shenhua Watermark Coal Mine – Commonwealth and NSW approvals

7. On 28 January 2015, the Shenhua Watermark Coal Mine was approved, subject to conditions, through a Development Consent provided by the NSW Planning Assessment Commission (**NSW PAC**) under the *Environmental Planning and Assessment Act 1979* (NSW) (**NSW EPA Act**). The Shenhua Watermark Coal Mine is considered a State Significant Development under the NSW EPA Act.
8. On 4 July 2015, the then Minister approved, subject to conditions, the Shenhua Watermark Coal Mine, under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) (EPBC 2011/6201). The conditions attached to the approval of the mine require Shenhua to provide a Water Management Plan, Biodiversity Management Plan, Rehabilitation Management Plan and Water Impact Verification Report to me for approval before mining can commence.
9. The Department received drafts of the Biodiversity Management Plan and the Rehabilitation Management Plan in April 2019. The Groundwater Management and Monitoring Plan and Water Impact Verification Report are yet to be provided to myself or the Department of Environment and Energy (the **Department**).

Appointment of a section 10 reporter

10. On 12 February 2018, the then Minister, the Hon Josh Frydenberg MP appointed Ms Susan Phillips, Barrister, as the reporter (the Reporter) for the purposes of the Application under section 10 of the Act.
11. On 8 March 2018, in accordance with section 10(3)(a) of the ATSIHP Act, the Reporter sought representations from interested parties by publishing a notice in the *Commonwealth Government Notices Gazette* and in the *Gunnedah Namoí Valley Independent* (a local newspaper). A correction to the notice was submitted on 15 March 2018.
12. On 7 October 2018, the Reporter submitted her report (the **Section 10 Report**).

Site visit – 24 June 2019

13. On 24 June 2019, to gain a comprehensive understanding of the context of the Application, I visited the Watermark Mountain area where I met and spoke with the Applicants' representatives and representatives from Shenhua.
14. I spoke with Shenhua, with whom I travelled with onto the site of the proposed coal mine. I was able to get an idea of the size and scope of the works. I visited the eastern grinding grooves (WM-GG3-12), within **Specified Area 4**, and Shenhua explained mitigation measures. I note that these mitigation measures are requirements that must be undertaken in accordance with NSW approvals.

15. I then met with the Applicants and we travelled to **Specified Area 1** where we visited the grinding groove site (WM-GG1-11) and the stone features identified as possible burial cairns. During the visit, the Applicants explained the importance of the sites, Watermark Mountain and the interconnectedness of the physical landscape with cultural practices, spirituality and well-being.
16. I also met with the Gunnedah Shire Council, who were generally supportive of the Shenhua Watermark Coal Mine.

Evidence or other material on which my findings were based

17. A list of material I considered in making my decision is available at **Annexure B**.

Findings on material questions of fact

18. Section 10(1) of the ATSIHP Act provides that where I:
 - a. receive an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;
 - b. am satisfied:
 - i. that the specified area is a significant Aboriginal area; and
 - ii. that the specified area is under threat of injury or desecration;
 - c. have received a report in relation to the specified area from a person I nominated, and have considered the report and any representations attached to the report; and
 - d. have considered such other matters I think are relevant;

then I may make a declaration under section 10 of the ATSIHP Act in relation to the specified area.

Application under section 10(1)(a) of the ATSIHP Act

15. The Application was made in writing and consisted of an email from Dolly Talbott, through Beatty Legal, on behalf of the Applicants dated 21 December 2017
16. Each of the Specified Areas is located in country that is claimed to be the traditional homelands of the Gomeroi People, also known as Gamilaraay and Kamilaroi. The Application identifies the Applicants, the GTC, as an Aboriginal group whose 'senior elders' comprise 'the heads of families from Gomeroi people throughout the Breeza, Curlewis and Gunnedah region' and who 'represent 191 people and our families'. I accepted that the Applicants are Aboriginal for the purposes of the ATSIHP Act.
17. The Application sought protection of eight areas and three culturally modified trees from injury or desecration resulting from the development of the Shenhua Watermark

Coal Mine. The areas for which protection is sought, as marked on the map at Annexure C with an overlay of the Project, are as follows:

Areas:

- a. **Specified Area 1** is the circular area in the map whose centre is labelled **1. Grinding Groove Complex and Burial Complex (West)**, situated in the Western Mining Area, including:
 - (A) a grinding groove site (identified as WM-GG1-11); and
 - (B) two stone features identified as possible burial cairns.
- b. **Specified Area 2** is the circular area in the map whose centre is labelled **2. Watermark Gully**, situated in the Western Mining Area including a camping ground and massacre site.
- c. **Specified Area 3** is the circular area in the map whose centre is labelled **3. Watermark Mountain**, situated in the middle of the map, this overlaps with both the Western Mining Area and the Eastern Mining Area comprising the entirety of Mount Watermark, including a grinding groove site (identified as WM-GG2-11).
- d. **Specified Area 4** is the circular area in the map whose centre is labelled **4. Grinding Groove Complex and Burial Complex (East)**, situated in the Eastern Mining Area, including:
 - (A) a grinding groove site (identified as WM-GG3-12);
 - (B) five culturally modified burial trees, including red ochre; and
 - (C) a stone feature identified as a possible burial cairn.
- e. **Specified Area 5** is the snake shaped area in the map whose centre is labelled **5. Mooki River Traditional Area**, situated in the Eastern Mining Area including:
 - (A) a camping ground;
 - (B) potential burials; and
 - (C) a culturally modified tree referred to as the Possum Tree (identified as WM-ST2-11).
- f. **Specified Area 6** is the circular area in the map whose centre is labelled **6. Old Swamp**, situated in the Eastern Mining Area.
- g. **Specified Area 7** is the area in the map whose centre is labelled **7. Defence, Protective and Hunting Area (travelling and viewing corridor)**, situated near the Western Mining Area comprising broad area including:
 - (A) part of Mount Watermark;
 - (B) Specified Areas 1 and 2; and
 - (C) The White Box Tree (identified as ST5-11).

h. **Specified Area 8** is the small circular area in the map whose centre is labelled **8. Ceremonial Travelling and Viewing Corridor**, situated nearby the Eastern Mining Area comprising a broad area including:

(A) Part of Mount Watermark; and

(B) Specified Areas 4 and 5.

Culturally modified trees:

i. **Tree A** is the small circle that is labelled **A. White Box Tree**, situated near the Western Mining Area and within **Specified Area 7**;

j. **Tree B** is the small circle that is labelled **B. Kurrajong Tree**, situated in the Eastern Mining Area; and

k. **Tree C** is the small circle that is labelled **C. Possum Tree**, situated within **Specified Area 5**.

18. I note that the map provided by the Applicant in their Application included an out of date Shenhua Watermark Coal Mine footprint. The map at Annexure C sets out the Specified Areas with an overlay of the amended Shenhua Watermark Coal Mine footprint which is based on advice from Shenhua in its submission to the Reporter of 4 May 2018, which the Applicant was made aware of.

19. I note that Tree A and Tree C are fully within Specified Area 7 and Specified Area 5 respectively, I have therefore considered the Applicant as seeking protection for these trees independently of the larger specified areas in which they are situated. In this Statement a reference to 'Specified Areas' is a reference collectively to the eight specified areas and three culturally modified trees described above.

20. On the basis of the information in paragraphs 2 to 17, I was satisfied that I received an application made in writing by or on behalf a group of Aboriginal people seeking the preservation or protection of specified areas from injury or desecration in accordance with section 10(1)(a) of the ATSIHP Act.

Whether the Specified Areas are significant Aboriginal areas under section 10(1)(b)(i) of the ATSIHP Act

21. Section 3 of the ATSIHP Act defines the term '*significant Aboriginal area*' as, relevantly, an area of land in Australia, '*... being an area of particular significance to Aboriginals in accordance with Aboriginal tradition*'.

22. '*Aboriginal tradition*' is defined by section 3 as '*... the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships*'.

23. Therefore, in order to be satisfied that the Specified Areas are significant Aboriginal areas, I was required to be satisfied that the Specified Areas are of particular significance to Aboriginals in accordance with the body of traditions, observances,

customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals.

24. In the Application, the Applicants asserted that the Specified Areas are of particular significance in accordance with Aboriginal tradition because the Specified Areas retain immeasurable historic, social and cultural value arising from:
- a. The area is a multi-nation 'superhighway' songline for trade, cultural exchange and the lore of Baiame including burial and ceremonial practices. This superhighway is a critical pathway to the Gomeroi people's songlines and interconnected creation story by Baiame.
 - b. Baiame is their great ancestral being of the Creation period. The creator's presence is felt throughout many South-Eastern Indigenous Australian communities and this includes the Gomeroi (Gamilaraay) people. The Gomeroi believe that during the creation period Baiame moved across the land, shaping the landscape giving life to the environment and the human race, initiating lore of country. When his journey was complete Baiame's returned to the sky appearing in different seasons to remind his peoples of the lore. Baiame's journeys are recorded through their song, dance, art, oral histories and through their Dreaming sites.
 - c. The Shenhua Watermark Coal Mine area holds significant Dreaming sites and forms the network of places and objects of importance gifted to the people by Baiame. Baiame comes in a variety of names depending on the nation.
 - d. The Shenhua Watermark Coal Mine area is considered to also be an important 'cultural junction area', a place for gathering, ceremony, trade and defence of country.
 - e. The places and culturally sensitive and significant objects within the cultural landscape are particularly important to the Gomeroi and this is even more accentuated in relation to values for Aboriginal Gomeroi men.
 - f. The Shenhua Watermark Coal Mine area houses numerous important multi-complex burial places.
 - g. Despite the agriculture in the area there are rare, intact grinding groove sites and burial cairns, and burial trees, markers and pathway indicators and ceremonial places which have survived and remain important resting places of our ancestral family members our warriors and Elders.
 - h. Because of the intensity and diversity of the burials within the Shenhua Watermark Coal Mine area it is a rare example of the differing practices and traditions used under their law and remain part of their traditional teachings today.
 - i. The production of ceremonial or place markers are still intact within the Project area and there are also elaborate markings known as dendroglyphs, and can be found in two forms within the Shenhua Watermark Coal Mine area. The first form denotes a ceremonial usage, where certain aspects of culture are taught

(teletglyphs). They may also indicate a place, and are primarily an indication of a burial site (taphoglyphs).

- j. There remains a deep cultural, social, environmental, spiritual and economic connection of the Gomerōi Traditional Owners and their Nations to the lands and waters within and beyond the Project area.
25. The Applicants also provided information concerning their cultural connection to Country in 'Restricted Appendix B' of the Application.
26. I noted archaeologist Dr Owen's report of 21 December 2017, attached to the Application, which stated that 'within the context of the GTC's Aboriginal tradition, the significance of heritage items cannot be assessed in isolation from one another, but should be regarded as an interrelated Aboriginal cultural landscape'.
27. I also considered the detailed overview of the cultural landscape and tables summarising the elements, sites, places, traditions and connections relevant to each of the Specified Areas in Dr Owen's report.
28. In their representations to the Reporter, Shenhua disputed the significance of some of the Specified Areas. Shenhua's heritage expert stated that the Applicant's claims were not supported by 'any actual documented evidence'.
29. Most of the public representations made to the Reporter in connection with the Section 10 Report supported the Applicants' assertions that the Specified Areas are significant Aboriginal areas.
30. The Reporter considered that the sites, the trees and the linking corridors, are situated in a landscape vested with traditional significance to Gomerōi people. The Reporter considered that the Specified Areas contain places and object of significance to Aboriginal people in accordance with their traditions, observances and beliefs. I agreed with the Reporter's conclusion.
31. As a result, I was satisfied that the Specified Areas are significant Aboriginal areas for the purposes of section 10(1)(b)(i) of the ATSIHP Act.

Whether the Specified Areas are under threat of injury or desecration under section 10(1)(b)(ii) of the ATSIHP Act

32. Section 3(2) of the ATSIHP Act relevantly provides that an area shall be taken to be injured or desecrated if:
 - a. it is used or treated in a manner inconsistent with Aboriginal tradition;
 - b. by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
 - c. passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition.

33. The Applicants stated in the Application and in representations to the Reporter that the Specified Areas would be threatened or desecrated by the Shenhua Watermark Coal Mine in several ways. I noted in particular the Applicants' view that *'the proposed mining activity proposed by Shenhua Watermark is completely incompatible with the cultural and traditional values of the Gomerioi people and would result in irreparable destruction and desecration of places and objects of great importance to our people'*
34. I note most of the areas and objects for which protection is sought are located within the Shenhua Watermark Coal Mine's disturbance footprint. The sites that are not located directly within the areas to be excavated or to be used as infrastructure areas [i.e. Specified Areas, 2 and 5] will, in the view of GTC, nevertheless be irreversibly injured or desecrated as they will lose their connection with the traditions and landscape that inform their significance.
35. I have considered the report of Dr Owen dated 8 November 2016 in support of the Application. In that report Dr Owen provided a table setting out the type of harm, degree of harm and consequences of harm that would occur as a result of the Project to the Specified Areas. I note in particular the comments on the proposal in the Development Consent requiring the relocation of the grinding groove slabs for both the east and west complexes, is untested and presents a high degree of risk that the slabs would break.
36. I also noted the conclusion in the Section 10 Report that there will be physical injury to the grinding groove sites, destruction of the Kurrajong Tree and consequential injury to the other sites from close proximity to an open cut mine and the impact of relocation of the grinding grooves on the mythological and spiritual significance they hold for the Gomerioi People.
37. I noted the Section 10 Report's conclusion that as a result, the Specified Areas were under threat of injury or desecration as defined under section 3(2) of the ATSIHP Act. I agreed with the Reporter that there will be a physical change to the landscape from the mining works and that cultural damage will occur due to the two grinding groove complexes needing to be moved to allow the mine to proceed.
38. I also found that the overburden from the mine would create a visual impact and potentially impact the landscape context of the Specified Areas.
39. In respect of those Specified Areas that will not be physically changed, I find that the significance of these specified areas in terms of their broader cultural context, particularly the unique interconnectedness and inter related cultural places and objects of the Specified Areas, will be adversely affected by the close proximity of the mining operations.
40. On this basis, I am satisfied all the Specified Areas subject to the Application are under threat of injury or discretion for the purposes of section 10(1)(b)(ii) of the ATSHIP Act.

The Report and any representations attached to the Report under section 10(1)(c) of the ATSIHP Act

Extent to which the Specified Areas are protected by NSW legislation

41. I noted that the Section 10 Report determined that there are no further avenues under NSW state law that would assist the Applicants to protect the Specified Areas. However, the Section 10 Report does not discuss protection and mitigation measures in any detail.
42. I noted that the NSW Development Consent of the Shenhua Watermark Coal Mine includes the following protections and mitigation measures:
 - a. Shenhua must ensure that the development does not cause any direct or indirect impact on any identified Aboriginal heritage items located outside the project disturbance area of the mine.
 - b. Shenhua must establish two Aboriginal heritage conservation areas and make arrangements (including a detailed management plan) to protect them in perpetuity.
 - c. Shenhua must implement a heritage management plan, which must be prepared by suitably qualified and experienced persons whose appointment is endorsed by the Secretary of the NSW Department of Planning and Environment. The plan must be to the satisfaction of the Secretary. The plan must contain measures to deal issues including minimising impacts on the grinding grooves and other heritage items, protecting and monitoring known heritage items, maintaining access for Aboriginal stakeholders, ongoing research and consultation with Aboriginal stakeholders.
 - d. Grinding grooves WM-GG1-11 and WM-GG3-12 (within Specified Areas 1 and 4) must be moved to a preservation area to be agreed with traditional owners. These two grinding groove complexes must be moved intact, maintained in the preservation area, and restored to an agreed area(s) as part of the mine rehabilitation process. The NSW PAC acknowledged that moving the grinding grooves, although not ideal, is the best balance between development and maintaining heritage. Consultation was undertaken with senior elders and whilst they would prefer the grinding grooves remain in situ, they have agreed to their careful management, including their movement, should the mine be approved.
 - e. All other Specified Areas, as well as other sites outside the mine disturbance area, along with any undiscovered heritage must not be damaged.
43. I noted that the NSW PAC for the Shenhua Watermark Coal Mine considered impacts to Aboriginal heritage, and determined that, once mitigated, the residual impacts are acceptable. The NSW Development Consent sets out the conditions by which the mine can proceed under NSW law, which includes measures to mitigate and manage Indigenous heritage. I noted that the NSW Government has set out heritage management processes for the Specified Areas, which will minimise the impact to the Specified Areas.

44. I noted the claims of the Applicants and their archaeologist, Dr Owen, that the physical extent of the sites below the soil surface has not been fully determined and the impact of removing the sites from water sources has not been considered. The rock formations are sandstone and draw moisture from the surrounding water sources. A changed regimen of wetting and drying cycles may impact the sandstone material, which over time could result in their disintegration and loss.
45. I therefore found that the protections offered by NSW state law (particularly the terms of the Development Consent) described above are not sufficient to protect the Specified Areas so that the areas are not under threat of injury or desecration within the meaning of section 3 of the ATSIHP Act. Nevertheless, I concluded that those measures do go some way to protecting the Indigenous heritage in the Specified Areas, and provide mitigation and protection to some extent in an environment where the mine is allowed to proceed.

The effects of a declaration on the proprietary and pecuniary interests of third parties

46. In representations made in connection with the Section 10 Report, Shenhua stated that a declaration made in respect of the Specified Areas would prevent development of at least two of the three open cut pits that comprise the Shenhua Watermark Coal Mine. This is because the Specified Areas are centred within those two mining areas. Shenhua argued as those two mining areas constitute 82% (219.5 million tonnes) of the Run of Mine reserves for the Shenhua Watermark Coal Mine, the loss of production from those areas would make the Shenhua Watermark Coal Mine commercially unviable.
47. Further, Shenhua asserted that it cannot redesign the mine to avoid the Specified Areas (noting not all Specified Areas are within the mine disturbance footprint) and remain commercially viable, noting the current design is the optimal design to avoid unacceptable environmental impacts and minimises those impacts that are unavoidable, while maximising social and economic returns.
48. Given the above, I accepted that the Shenhua Watermark Coal Mine would not be commercially viable if I made a declaration to protect the all the Specified Areas.
49. I found the estimated economic benefits of the Shenhua Watermark Coal Mine were reasonable, noting that Shenhua's economic estimates were accepted in the NSW PAC process;
50. Taking into consideration the recent purchase of land by the NSW Government from Shenhua resuming 51.4% of the Shenhua Watermark Coal Mine site, I also found that it was reasonable to consider that this purchase has significantly limited options for Shenhua to relocate its open cut pits.
51. The Department advised that after reviewing the Watermark Coal Project Mine Plan Justification Report and supplementary information, including the NSW Planning and Assessment Commission's review and submissions provided as part of the Environmental Impact Statement, the Department accepted the best mine plan in

terms of maximising benefits and minimising social, economic and environmental impacts is the current approved mine plan.

52. I agreed and found that it would not be commercially feasible for Shenhua to redesign the mine plan. Even if a redesign could be made to be commercially feasible, any redesign would still be unlikely to address the Applicants' overall concerns about the impact of the mine on Aboriginal heritage, and could potentially impact other Aboriginal heritage sites within the Shenhua Watermark Coal Mine project boundary, or increase impacts on the broader environment.
53. Given paragraph 47, I therefore concluded that a declaration under section 10 of the ATSIHP Act that would provide effective protection for the Specified Area would also likely result in the Shenhua Watermark Coal Mine not proceeding.
54. I acknowledged that this would result in financial and social impacts on Shenhua. My findings on broader social and economic considerations are outlined in the next section.

Other relevant matters under section 10(1)(d) of the ATSIHP Act

55. In making a decision on whether to make a declaration under section 10 of the ATSIHP Act, I was required to consider such other matters as I thought relevant. I considered that it was open to me to take into account a wide range of policy and public interest considerations, including social and economic considerations.

Economic impacts

56. Shenhua and the Applicants provided economic analyses of the viability and profitability of the project, which reached divergent conclusions.
57. The economic impact assessment of the project prepared by Gillespie Economics (the **Gillespie Report**), and commissioned by Hansen Bailey Environmental Consultants on behalf of Shenhua, found that the Shenhua Watermark Coal Mine is desirable and justified from an economic efficiency perspective, on the basis that it is expected to have net production benefits to Australia of at least \$1.3 billion.
58. In contrast, the Gillespie Report estimated the cost of residual environmental, cultural and social impacts at \$6 million in total. The analysis included the cost of mitigating impacts to greenhouse gas emissions, noise, air quality, ecology, groundwater, surface water, blasting, road transport, Aboriginal and non-Aboriginal heritage and visual impacts. I noted that the costing of impacts in this report did not include intangible values, such as those claimed by the Applicants.
59. In its submission, Shenhua asserts that the proposed mine would bring significant estimated benefits to the State, local and regional economies. Shenhua predicts, as set out in the Hansen Bailey Report, the Watermark Mine will make up to the following total annual contribution to the **NSW economy** over a 30 year period:
 - a. \$1,752 million in annual direct and indirect regional output and business turnover;
 - b. \$826 million in annual direct and indirect regional value added;

- c. \$306 million in annual direct and indirect household income; and
 - d. 3,728 direct and indirect jobs
60. Shenhua estimates the mine will provide the following total annual contribution to the **local economy** over 30 years:
- a. \$939 million in annual direct and indirect regional output or business turnover;
 - b. \$434 million in annual direct and indirect regional value added;
 - c. \$77 million in annual direct and indirect household income; and
 - d. 1,143 direct and indirect jobs.
61. Shenhua estimates the mine will make the following total annual contribution to the **regional economy** over 30 years:
- a. \$960 million in annual direct and indirect regional output and business turnover;
 - b. \$442 million in annual direct and indirect regional value added;
 - c. \$88 million in annual direct and indirect household income; and
 - d. 1,208 direct and indirect jobs.
62. The Hansen Bailey Report also noted that the introduction of the construction workforce will generate significant indirect economic benefits to the regional area over the 18 month construction period. These indirect benefits will largely accrue through flow-on spending by project construction employees in the local area, particularly on accommodation, food, leisure and recreation, and personal services.
63. The Environmental Assessment Report prepared by the NSW Government (the **NSW EA Report**) acknowledged that while cost benefit analyses may have flaws, based on the cost benefit analysis undertaken for the project, and similar cost benefit analyses undertaken for other coal mines in the region and elsewhere in NSW, NSW was satisfied that the project's economic benefits to society (especially to the particular region and to NSW more generally) would significantly outweigh its costs, including externalities.
64. In contrast, the Applicants submitted that the economic benefits described in Shenhua's submissions were overstated, on the basis of flaws in the calculations of coal prices, operating costs and capital expenditure. In making these claims, the Applicants relied on submissions to the NSW PAC by Marsden Jacobs and The Australia Institute.
65. In respect of projected coal prices, the Applicants noted that the Gillespie Report based its economic assessment of the mine on 2011 prices for coking coal (A\$142 per ton) and thermal coal (A\$99 per ton). However, the Applicants argued that, given that coal prices have decreased since 2011, the analysis in the Gillespie Report was unrealistic and significantly overstated the potential revenue of the project.

66. The Applicant provided two alternatives of projected coal prices that it considered to be 'more realistically valued':
 - a. thermal coal at A\$80 per ton and coking coal at A\$102 per ton (Marsden Jacobs, referring to Whitehaven Coal – 2014); and
 - b. thermal coal at A\$80 per ton for the next three years, increasing to A\$115 per ton and coking coal at A\$100 per ton for the next three years, increasing to A\$135 per ton (NSW Department of Resources and Energy (**NSW DRE**) – 2014)
67. I noted the Applicants' argument that, even using the higher of these two alternatives (the NSW DRE figures), redoing the calculations would produce a net present value of coal from the mine of \$5.9 billion, rather than \$8.1 billion, as claimed by Shenhua.

Critique of economic modelling and methodology

68. The Applicants also criticised the methodology and modelling used in the Gillespie Report. In particular, the Applicants considered that the input-output analysis produced an inaccurate picture of the economic impacts of the mine as it relied on assumptions of fixed prices, and of unlimited water, labour and land, and gave no consideration of agricultural impacts, thereby overstating the positive economic impacts of the project.
69. The Applicants further argued that the economic analysis in the Gillespie Report did not adequately assess, give sufficient weight to or place any economic value on 'soft' values, such as impacts from greenhouse gases, noise, and air quality, and impacts on agriculture, air quality, surface and ground water, ecology, and Aboriginal and non-Aboriginal heritage. For instance, the Applicants consider that Shenhua has not sufficiently quantified the impacts of the mine on property prices in the area, including from the 24-hour operation of the mine and night lighting.
70. The Applicants considered that to the extent that the Gillespie Report sought to place a monetary value on impacts on Aboriginal heritage and culture, this was not based on any recognised methodology and was therefore unsound.
71. I note the Applicants concerns as set out in paragraph 68 above, however, I am of the view that the majority of the impacts were considered as part of the NSW and EPBC processes.

Impacts on agriculture

72. I noted that concerns were raised during the public submission phase of the EPBC Act and NSW approval processes in respect of the potential impact of the mine on agricultural lands within the Namoi Catchment, in particular:
 - a. Land within the Shenhua Watermark Coal Mine project boundary and its immediate vicinity have historically been used for a variety of agricultural enterprises, including cattle grazing and cropping. While the mine is in operation, some land would be unavailable for agricultural production. Some land will be permanently removed from production; and
 - b. The mine will require sufficient water resources for all stages of the development, which could result in less water available for other uses, including agriculture.

73. I also noted that the Applicants, relying primarily on a report by the Australia Institute (the **Australia Institute Report**), submitted that the proposed mine would have significant adverse impacts on agriculture in the local region, including increased water costs, a reduction in agricultural land, loss of land value and the creation of significant disincentives to invest. The Applicants noted that the cost benefit analysis in the Gillespie Report focussed entirely on the land directly impacted by the project and its offset sites, and makes no consideration of wider impacts to agriculture, thereby understating the impacts of the project.
74. I noted the Applicants' claim that Shenhua inadequately assessed the impacts of the mine on agricultural production and understated the value of regional agricultural production by using outdated data from 2006, that is, prior to the implementation of water reforms and the capital investment by local farmers of approximately \$1 billion in water efficiency infrastructure. The Applicants also claimed that Shenhua failed to take into account the particularly fertile environment of the Liverpool Plains region (particularly the black soils), which make it uniquely suited for agriculture, as well as the impact of the mine on the value of water infrastructure assets, and the likelihood that water will be less available and accessible for agricultural use as a result of the mine. The Applicants submitted that these factors will significantly reduce land values in the region.
75. The Applicants also submitted that the mine would force local farmers to shift from irrigated cropping to dryland cropping (a less profitable and less reliable form of farming), with the result that tens of millions of annual cropping income is at risk if the mine proceeds. The Applicants noted that it was unclear that the land will be able to be returned to agricultural use after the closure of the mine.
76. I noted that the Australia Institute Report cited case studies concerning local farmers who have invested significant amounts of funds into businesses that revolve around long-term sustainable access to water of a high quality. The Report considered that any threats to their water resources, such as that posed by the proposed mine, threatens the ability of local farmers to pay investors and creditors and affect the long-term viability of their business and those of everyone on the Liverpool Plains. The Report also noted that local farmers considered that the proposal for the mine has already reduced the number of potential buyers and investors who are interested in their business, largely due to the perceived and actual impacts on groundwater resources.
77. I noted that NSW also recognised the importance of the agricultural industry and prime agricultural land to society, and considered that any impacts should be avoided where possible and otherwise minimised to the greatest extent possible.
78. However, I noted that the NSW EA Report, citing the Gillespie Report, concluded that the gross economic benefits of the project far outweighed the economic benefits associated with the continued use of the project land for agriculture (which could be quantified as 41 jobs, \$5 million in annual business turnover, \$3 million in annual value added to the gross regional product and \$1 million in annual household income).

79. I noted that the NSW EA Report concluded that the project had been designed in a manner that achieved a reasonable balance between maximising the recovery of a recognised coal resource of state significance and minimising the potential impacts on surrounding land users (including agricultural users) and the environment as far as possible. Additionally, with the land buyback of exploration licence 7223, the NSW Government has ensured there is minimal black soil farming land remaining within the project boundary. The conditions of the Development Consent also create a buffer zone of 150 metres between the black soils and the mining footprint, thereby protecting the farming future of the Liverpool Plains.
- a. I noted that while some groups raised concerns about the effects of the mine on agriculture, the NSW PAC found that the mine would not preclude the continuation of significant agricultural production occurring on the black soil plains as the Shenhua Watermark mine is on the hills and slopes adjacent to the black soils. In addition, the NSW Planning Assessment Commission Determination Report (**NSW PAC Report**) assessed:
 - b. the likely impacts of the Shenhua Watermark Coal Mine on water resources; and
 - c. Shenhua's proposed avoidance, mitigation and management of these impacts.
80. I noted the conclusion of the NSW PAC Report that, taking the proposed mitigation measures into account and noting the existing protection of the water systems of the region, the Shenhua Watermark Coal Mine is unlikely to have any significant impacts on water resources or agricultural productivity of the Liverpool Plains.
81. I noted that the protection of water resources is also a consideration under the EPBC Act approval and the project cannot commence without my approval of a Water Impact Verification Report, which is yet to be provided to me.

Employment and training

82. Shenhua provided analysis by Hansen Bailey of the likely impacts of the mine on employment. I noted the conclusions of the Hansen Bailey Report, which found that:
- a. The construction workforce is estimated to be approximately 600 fulltime equivalent employees;
 - b. The operational work force is estimated to be approximately 600 fulltime equivalent employees at full production (year 21), with an average workforce of 425 over the life of the mine. The initial operational workforce is estimated to be approximately 200, with a similar number estimated for the final year of the project (year 30);
 - c. For the construction phase of the project, an additional 956 jobs are estimated to be generated within NSW as 'flow-on employment' as a result of production and consumption induced effects of the project – 398 of these jobs are estimated to be generated in the regional area, while 382 of these regional jobs are estimated to be generated in the local area;

- d. For the operational phase of the project, an additional 2826 jobs are estimated to be generated within NSW as 'flow-on employment' as a result of production and consumption effects of the project – 585 of these jobs are estimated to be generated in the regional area, while 539 of these regional jobs are estimated to be generated in the local area.
83. I also noted that Shenhua has committed to sourcing as much of its operational workforce as possible from the region and will encourage non-local hires to settle locally.
84. I noted that the Hansen Bailey Report found that high youth and Indigenous unemployment levels (often above 20% in the region) are expected to improve as a consequence of the cumulative mining and resources development in the region. While the extent to which this may improve is difficult to determine, I agreed with the Report's conclusion that Shenhua's focus on providing jobs and training to local young people and local Indigenous people is expected to help alleviate the currently high rates of unemployment in these demographics.
85. I also noted that Shenhua has committed to developing training and employment strategies that will target all levels of education and various community groups, including the Indigenous community. These include:
- a. Providing apprenticeships, traineeships and graduate placement programs, including dedicated positions for Indigenous and youth candidates, for Gunnedah, Liverpool Plains and Tamworth local government area residents;
 - b. Shenhua's School-based Trainee Program will support 10 students (Indigenous and non-Indigenous) each year over the life of the Shenhua Watermark Coal Mine, to pursue a career in mechanical, electrical or metal fabrication;
 - c. Funds and assistance to the value of \$1 million (\$5,000 per year for 20 years) to school programs throughout the region e.g. the Mooki Murris Program at Quirindi High School;
 - d. A scholarship fund of \$200,000 (\$10,000 for 20 years) for locally based students to study a mining related course at university;
 - e. Seed funding of \$250,000 towards the construction of a proposed Mining Skills Centre in Gunnedah in collaboration with other mining and resource companies in the region; and
 - f. Annual scholarship fund of \$50,000 (\$5,000 for 10 years) for locally based students to study a child care related course, and sponsoring a traineeship program for child care workers.
86. I also noted the following conclusions in the Hansen Bailey Report in relation to the employment opportunities created by the project:
- a. The project related effects would be incremental, given the incremental employment growth;

- b. The subregion would likely be able to absorb a substantial portion of the jobs created by the project, given the relatively high unemployment (especially in youth and Indigenous employment) and low participation rates (including low women's labour workforce participation rates); and
 - c. Skilled labour is an issue for the region, which will result in an expected demand for non-local hires, particularly in the construction phase.
87. The Applicants submitted that Shenhua failed to assess the impacts of fly-in fly-out (FIFO) and drive-in, drive-out (DIDO) workforces on the relevant communities. The Applicants also submitted that employment opportunities generated by mining operations are largely taken by people from other metropolitan and rural areas rather than from the local community. In addition, the Applicants argued that, during the life of its operation, the mine would likely switch to automated technology, further reducing employment opportunities for the local community. Accordingly, the Applicants considered the Mine would only result in the limited generation of local employment, and would also lead to reduced affordability of local housing markets, negative social impacts from large temporary resident populations, and increased pressure on physical and social infrastructure and demand for services (addressed in further detail below). The Applicants noted that the reduced ability of existing sectors (such as the trades, transport, retail and hospitality industries) to compete with the high wages offered by the mining industry, may lead to skills shortages.
88. I noted during my trip on 24 June 2019, the Gunnedah Shire Council were generally supportive of the Shenhua Watermark Coal Mine.
89. I noted that a number of local businesses and the Councils generally supported the mine, suggesting that it would bring more employment and population growth opportunities to the region.

Housing affordability and pressure on services

90. I noted the following findings of the Hansen Bailey Report in relation to the potential impacts of the project on housing affordability and services in the region:
- a. Residential housing availability and affordability is a current issue, however there is ample land supply available in the Gunnedah, Liverpool Plains and Tamworth local government areas, and the predicted housing growth rates are consistent with historical growth rates in the area;
 - b. Health services would be strained with the cumulative development of mines in the region, with one of the most prominent impacts being the impacts of the construction workforce, especially families near the proposed MAC Werris Creek workers accommodation facility;
 - c. Education facilities (including pre-school, primary, secondary and tertiary schools) are likely to have sufficient capacity to accommodate the project, but would be strained with the cumulative development of mines in the region;
 - d. Emergency services (including Police, Fire and Rescue, Rural Fire Service, State Emergency Service, NSW Ambulance) are likely to have sufficient capacity

to accommodate the project, but would be strained by cumulative development of mines in the region, and services around the MAC Werris Creek facility may also be strained;

- e. Community recreation, sports and cultural facilities will face increased but not unreasonable demand;
 - f. Public transport facilities (including air, rail and bus services) would face some additional, but not unreasonable, demand; and
 - g. The project would inevitably have some impact on the community identity, values, cohesion and lifestyle, given the large size of the project.
91. On these issues, the Applicants submitted that the mine will result in a two-tiered economic system and increased poverty and strain on families who are not directly employed in mining activity. In particular, the Applicants were concerned that the likely increase in the cost of rental properties once the mine is active will make housing unaffordable for long term residents and low income families. The Applicants also submitted that local businesses will suffer, and some may have to close down, as a result of young employees leaving their existing jobs to earn higher wages working in mining activities.
92. The NSW EA Report noted that, with regard to socio-economic impacts, NSW considered that the project is unlikely to have any significant adverse impacts on community infrastructure and services in the wider area.
93. I noted that, in order to mitigate any adverse social impacts as far as possible, Shenhua has developed a wide range of mitigation measures, which will be managed via a Social Impact Management Plan. The list of proposed mitigation measures includes those commitments relating to education and training set out above, as well as the following commitments by Shenhua:
- a. An investment of up to \$400,000 (\$20,000 per year for 20 years) to encourage retainment of medical staff at the Gunnedah Rural Health Centre.
 - b. Investment of approximately \$1 million (\$50,000 per year for 20 years) into capital equipment for services such as the bushfire brigade, ambulance and other community services in the Gunnedah and Liverpool Plains Local Government Areas.
94. I also noted that Shenhua has committed to continue working with the Gunnedah, Liverpool Plains and Tamworth regional councils, and community groups to provide information and advice to assist the region to prepare for the commencement of the Shenhua Watermark Coal Mine. In particular, Shenhua has committed to working with the regional councils and community groups to identify and address gaps in areas such as mental health, family support, domestic violence and community safety.
95. The NSW EA Report noted that the proposed social mitigation measures described above and in the Hansen Bailey Report are outside and on top of the direct contributions to local councils that Shenhua has committed to as part of the NSW Development Consent. The NSW Development Consent for the proposed Shenhua

Watermark Coal Mine requires Shenhua to enter into voluntary planning agreements with Gunnedah Shire Council and Liverpool Plains Council, pursuant to section 93F of the NSW EPA Act, to provide the following financial contributions:

- a. \$6 million towards a community facility for Gunnedah,
- b. \$1.2 million towards the Quirindi Sports Centre, and
- c. \$350,000 towards an outdoor play/multi-purpose centre and stage 2 of Tamworth Marsupial Park.

These financial contributions are payable by Shenhua within 30 days from the NSW Development Consent being physically commenced.

96. I noted that the Watermark Community Consultative Committee has been established under the auspice of NSW Department of Planning and Environment to provide a forum for open discussion between Shenhua, community representatives, other interested stakeholders and relevant government agencies. It provides an avenue to identify and address potential concerns and to assist Shenhua to improve communication with the general community.
97. After considering the proposed social impact mitigation measures as part of its approval process, NSW was satisfied that they were appropriate and adequate. I agreed with NSW's analysis and conclusion.

Conclusion on social and economic considerations

98. Overall, I considered that the expected social and economic benefits of the Shenhua Watermark Coal Mine to the local community outweighed the impacts of the mine on the Applicants as a result of the likely destruction of parts of their Indigenous cultural heritage.
99. In coming to this conclusion, I took into consideration the Section 10 Report, the Gillespie Report, the Hansen Bailey Report, the Response to Submissions (prepared by Hansen Bailey), the NSW EA Report, the NSW PAC Report, and all submissions received, including from Shenhua and the Applicants.
100. I acknowledged that the Specified Areas for which protection is sought retain immeasurable cultural values and connection to Country for the Applicants and Gomeroi people as a whole. Having regard to the Section 10 Report, I agreed that the Specified Areas are of particular significance to Aboriginal people. I also accepted the analysis in the Section 10 Report that even though the measures required under the NSW Development Consent will mitigate the mine's impact on the Aboriginal heritage to some extent, there will be some loss of heritage values. Moreover, I acknowledged that there were difficulties in measuring or otherwise quantifying the value of Indigenous cultural heritage and in comparing the value of such to potential economic or social benefits of the mine.
101. That said, the difficulty of the task did not remove the need to weigh up the competing views expressed and evidence provided by Shenhua and the Applicants on the likely impacts of the mine on both the local and broader communities. The need for this balancing exercise was inherent in the fact that section 10 of the ATSIHP Act does not compel me to make a declaration in circumstances where the Section 10 Report has found that the Specified Area is a significant Aboriginal area and is under threat of desecration or injury, and instead allowed me to consider 'other relevant matters' before deciding whether to make a declaration.
102. In deciding how much weight to give the evidence provided by Shenhua, particularly the social and economic information in the Gillespie and Hansen Bailey Reports, I noted that this information was largely accepted by NSW during the mine approval process. In particular, while the NSW PAC concluded that the predicted public benefits of the mine are most likely overestimates, after careful consideration it was satisfied that the mine would still generate significant economic benefits to the community. While acknowledging that the Applicants disagree with both the content and methodology of the Gillespie and Hansen Bailey Reports, I accepted NSW's analysis and conclusion on this matter.
103. In relation to the economic benefits of the mine specifically, I carefully considered the information submitted by the Applicants and agreed that there was some doubt regarding the potential benefits to the state and national economies that could flow from the mine and that are described in the Gillespie Report. This doubt is caused by the uncertainty in both the accuracy of the coal prices that have been used in the analysis (which the Applicants contended are overstated) and the operating costs of the mine (which the Applicants contended are understated). For this reason, and also noting NSW's conclusion that the predicted economic benefits of the mine are likely to

be overstated in Shenhua's submissions, I was of the view that these uncertainties meant the evidence available is unlikely, of its own accord, to support a conclusion that the economic benefits to the broader regional, state and national economies from the mine are to be preferred over the impacts to the Indigenous community from the loss of their cultural heritage.

104. However, I viewed the likely social and economic benefits of the mine to the local community differently. These benefits were more direct and certain, and less likely to be overstated on the basis of (potentially) inflated coal prices. Rather, the available evidence indicated that the benefits to the local community were likely to flow directly from the construction and operation of the mine, particularly as a result of the increase in employment opportunities (both direct and indirect), increase in investment in the local economy and the increase in wages associated with employment in mining and mining-related activities. In this sense, I noted particularly the findings of the Response to Submissions by Hansen Bailey that the mine will (as an estimate) result in \$939 million in annual local business turnover, \$434 million in value added to the local economy, an increase of \$77 million in annual household income in the local area and the creation of 1143 jobs. I further noted that the Hansen Bailey Report found that the introduction of the construction workforce in particular will generate significant indirect economic benefits to the local area and that NSW was satisfied that the mine's economic benefits to the region would significantly outweigh its costs. For these reasons, I concluded that the expected economic benefits to the local community from the mine are likely to be significant and, as such, that I could give these benefits considerable weight as part of the balancing exercise.
105. In light of this, I also carefully considered the information presented by the Applicants concerning the economic impacts of the mine on the local agricultural community. I noted the concerns expressed by the local farmers regarding the ongoing viability of their businesses and the potential negative impact on land values caused by proximity to the mine, and acknowledged that there were still some uncertainties in how agribusinesses will be impacted by the mine in an economic sense.
106. However, I also noted that these concerns and uncertainties arose primarily from the perceived impacts of the mine on groundwater resources, with the local farmers worried that the mine will threaten their long-term sustainable access to water of a high quality resulting in flow-on negative economic effects. On this point, I noted that likely impacts of the mine on water resources, particularly groundwater, were assessed in detail by both NSW and the Commonwealth during the environmental approval process. In particular, the Department noted that the controlling provisions for water resources had been engaged for the purposes of the EPBC Act approval, which meant that likely impacts on water resources was the subject of a thorough environmental assessment that included advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development. Both the NSW and Commonwealth assessments found that the impacts of the mine on water resources, including groundwater used by the local farmers, would not be significant taking into account the proposed mitigation measures and the conditions attached to the approval.
107. I also acknowledged the concerns raised by the Applicants in relation to potential adverse social impacts of the mine on the local community, particularly the Indigenous

community. I carefully considered the Applicants' submissions that the mine may result in decreased housing affordability, increased pressure on infrastructure and services, and limited generation of local employment opportunities (largely as a result of the FIFO and DIDO workforce that the Applicants contend would be created as a result of the development of the Mine). Moreover, I also acknowledged the Applicants' submissions that the destruction of culturally significant heritage would result in significant social damage to the Applicants, particularly in the form of negative impacts on the health and wellbeing of the applicants and the broader Gomeroi nation group of over 15,000 persons (while noting that the Applicants do not speak for the entire Gomeroi nation), including mental health impacts and a sense of displacement, dislocation and dispossession.

108. However, I considered that the social mitigation measures that Shenhua has committed to undertaking are likely to some extent mitigate these adverse impacts. The social mitigation measures are expressly directed at the local community and many can be tailored to directly address the concerns raised by the Applicants – particularly those measures aimed at expanding (and decreasing pressure on) services, those measures involving financial contributions and the commitment by Shenhua to working with local councils and community groups to assist the region to prepare for the commencement of the mine and to identify gaps in areas such as mental health, family support, domestic violence and community safety.
109. I further noted that Shenhua has committed to sourcing as much of its operational workforce as possible from the region and will encourage non-local hires to settle locally. I considered that this will ameliorate the concerns raised by the Applicants regarding the impacts of a FIFO/DIDO workforce and a temporary resident population and will also help to ensure that the employment-related benefits arising from the mine substantially flow to the local community, including the Indigenous community. I further noted the information in the Hansen Bailey Report that high youth and Indigenous unemployment in the local area is expected to improve as a result of the mine and that Shenhua has committed to focussing on providing jobs and training to local young people and local Indigenous people.
110. For these reasons, I found that there were significant social and economic benefits that would flow to the local area in particular as both a direct and indirect result of the mine, and that these benefits carried considerable weight as part of the balancing exercise I undertook in making my decision.
111. Furthermore, I noted that under the NSW Development Consent, Shenhua is required to mitigate the impact to Aboriginal heritage sites (as set out above in paragraphs 42 and 43). This includes Shenhua establishing the Watermark Gully Aboriginal Cultural Heritage Conservation Area and the Mooki River Aboriginal Cultural Heritage Conservation Area and ensuring that the grinding grooves are relocated intact and protected in perpetuity. Other mitigation strategies will be developed as part of the broader Aboriginal Cultural Heritage Management Plan in consultation with local Aboriginal stakeholders. The costs of these offset areas and mitigation strategies have been included in the development costs of the mine. I agreed with the conclusions of the NSW EA Report that Shenhua has explored and identified reasonable and feasible measures to as far as practicable minimise the mine's impact on the Specified Areas,

and Aboriginal heritage within the broader project area, and as well as the broader environment.

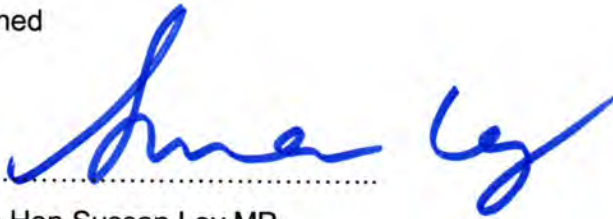
112. Accordingly, while I accepted that not making a declaration will cause some harm, both tangible and intangible to the Applicants and to the Gomeroi people as a whole, I considered that:
- a. This harm will be mitigated to some extent while still allowing the mine to proceed;
 - b. The localised social and economic benefits arising from the mine are significant and if they were to be foregone it would result in a substantial detriment to the local area, including the local economy; and
 - c. Any adverse social impacts to the local community, particularly the Indigenous community, that are likely to flow from the mine will be able to be mitigated to an acceptable level by the social mitigation measures which Shenhua has committed to undertaking.
113. For these reasons, I came to the view that there was sufficient evidence to allow me to reasonably form the view that the significant nature of the economic and social benefits of the mine, particularly to the local community, outweighed the loss of heritage value in the Specified Areas, as well as the potential adverse social impacts on the community, including on Indigenous people (noting that the impacts of the mine will be mitigated to some extent so as to minimise the loss of Indigenous heritage and adverse social impacts on both Indigenous and non-Indigenous communities).
114. For the reasons described above and on the basis of the socio-economic benefits of the mine, I therefore declined to make a declaration under section 10 of the ATSIHP Act to protect the Specified Areas. I encourage all parties to work together to seek a suitable outcome.

Conclusion

115. In summary, based on the material summarised above, and in light of my findings in paragraphs 18 to 114, I was satisfied that:
- a. I received an application for the purposes of section 10(1)(a); and
 - b. the Specified Areas are significant Aboriginal areas for the purposes of section 10(b)(i) of the ATSIHP Act; and
 - c. there is a threat of injury or desecration to the Specified Areas due to the proposed Shenhua Watermark Coal Mine, as defined under section 10(b)(ii) of the ATSIHP Act; and
 - d. as required under section 10(1)(c) of the Act, a report and representations received in relation to that report were provided to me on this matter by the nominated reporter, Ms Susan Phillips; and
 - e. I gave consideration to other matters as I thought relevant as required under section 10(1)(d).

116. For the reasons set out above, and particularly on the basis of the social and economic benefits of the mine, I decided to decline to make a declaration under section 10 of the ATSIHP Act to protect the Specified Areas.

Signed



.....
The Hon Sussan Ley MP

Minister for the Environment and Energy

1 July 2019

Enclosed:

Annexure A – Relevant legislation

Annexure B – Evidence or material on which my decision was based

Annexure C – Map of Specified Areas

Annexure A – Legislation

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

3 Interpretation

- (1) In this Act, unless the contrary intention appears:

Aboriginal means a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.

...

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

area includes a site.

...

significant Aboriginal area means:

- (a) an area of land in Australia or in or beneath Australian waters;
- (b) an area of water in Australia; or
- (c) an area of Australian waters;

being an area of particular significance to Aboriginals in accordance with Aboriginal tradition.

...

- (2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

- (a) in the case of an area:

- (i) it is used or treated in a manner inconsistent with Aboriginal tradition;
- (ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
- (iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

- (b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.

- (3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

4 Purpose of Act

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

10 Other declarations in relation to areas

- (1) Where the Minister:
 - (a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aborigines seeking the preservation or protection of a specified area from injury or desecration;
 - (b) is satisfied:
 - (i) that the area is a significant Aboriginal area; and
 - (ii) that it is under threat of injury or desecration;
 - (c) has received a report under subsection (4) in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and
 - (d) has considered such other matters as he or she thinks relevant;

he or she may, by legislative instrument, make a declaration in relation to the area.
- (2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.
- (3) Before a person submits a report to the Minister for the purposes of paragraph (1)(c), he or she shall:
 - (a) publish, in the Gazette, and in a local newspaper, if any, circulating in any region concerned, a notice:
 - (i) stating the purpose of the application made under subsection (1) and the matters required to be dealt with in the report;
 - (ii) inviting interested persons to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the Gazette; and
 - (iii) specifying an address to which such representations may be furnished; and
 - (b) give due consideration to any representations so furnished and, when submitting the report, attach them to the report.
- (4) For the purposes of paragraph (1)(c), a report in relation to an area shall deal with the following matters:
 - (a) the particular significance of the area to Aborigines;
 - (b) the nature and extent of the threat of injury to, or desecration of, the area;
 - (c) the extent of the area that should be protected;
 - (d) the prohibitions and restrictions to be made with respect to the area;
 - (e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aborigines referred to in paragraph (1)(a);
 - (f) the duration of any declaration;

- (g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;
- (h) such other matters (if any) as are prescribed

...

11 Contents of declarations under section 9 or 10

A declaration under subsection 9(1) or 10(1) in relation to an area shall:

- (a) describe the area with sufficient particulars to enable the area to be identified; and
- (b) contain provisions for and in relation to the protection and preservation of the area from injury or desecration.

...

13 Making of declarations

- (1) In this section:

declaration means a declaration under this Division.

- (2) The Minister shall not make a declaration in relation to an area, object or objects located in a State, the Northern Territory or Norfolk Island unless he or she has consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration.
- (3) The Minister may, at any time after receiving an application for a declaration, whether or not he or she has made a declaration pursuant to the application, request such persons as he or she considers appropriate to consult with him or her, or with a person nominated by him or her, with a view to resolving, to the satisfaction of the applicant or applicants and the Minister, any matter to which the application relates.
- (4) Any failure to comply with subsection (2) does not invalidate the making of a declaration.
- (5) Where the Minister is satisfied that the law of a State or of any Territory makes effective provision for the protection of an area, object or objects to which a declaration applies, he or she shall revoke the declaration to the extent that it relates to the area, object or objects.
- (6) Nothing in this section limits the power of the Minister to revoke or vary a declaration at any time.

...

16 Refusal to make declaration

Where the Minister refuses to make a declaration under this Division in pursuance of an application, he or she shall take reasonable steps to notify the applicant or applicants of his or her decision.

Annexure B – Evidence or other material on which my findings were based

My decision to decline to make a declaration under section 10 of the ATSIHP Act was made after considering the following:

- A.** GTC Section 10 application - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (provided on 21 December 2017)
- B.** Enlarged map showing area specified for protection under the ATSIHP Act section 10 application.
- C.** The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
- D.** A copy of the Commonwealth Gazette notice published on behalf of the reporter Ms Phillips on 8 March 2018 and the correction notice published on 15 March 2018.
- E.** A report dated 7 October 2018 under section 10 of the ATSIHP Act by Ms Phillips (the section 10 report) with representations made to the Reporter, including by:
 - GTC dated 4 May 2018; and
 - Shenhua dated 4 M 2018.
- F.** Representations by GTC in relation to the Previous Application, as attached to the s 10 report dated 14 March 2017 for the Previous Application.
- G.** Representations by Shenhua in relation to the Previous Application, as attached to the s 10 report dated 14 March 2017 for the Previous Application
- H.** Watermark Coal Project Economic Impact Assessment (2012), prepared by Gillespie Economics on behalf of Shenhua
- I.** Watermark Coal Project Social Impact Assessment (2013), prepared by Hansen Bailey on behalf of Shenhua
- J.** Watermark Coal Project Mine Plan Justification Report (2013), prepared by GHD on behalf of Shenhua
- K.** Watermark Coal Project Background Document (2011), prepared by Hansen Bailey
- L.** Watermark Coal Project Response to Submissions [to the Environmental Impact Statement], prepared by Hansen Bailey
- M.** Charter of the Watermark Coal Project Consultative Committee
- N.** John D Pettigrew (2003) The Min Min light and the Fata Morgana: An optical account of a mysterious Australian phenomenon, *Clinical and Experimental Optometry*, 86.2: 109-120
- O.** EIS document Q Geotechnical and Geomorphology Investigation of Grinding Grooves Sites prepared by SCT Operations Pty Ltd dated February 2013
- P.** Department analysis and summary – Section 10 Application – Watermark 2 (NSW)

- Q.** Key correspondence providing notification under section 20 and requesting additional protection of areas under section 10
- R.** Legal Advice (These advices are subject to legal professional privilege)
- S.** EPBC approval and approval conditions EPBC 2011/6201 for the Shenhua Watermark Coal Mine
- T.** Letters to Beatty Legal and Minter Ellison notifying of procedural fairness process dated 21 Dec 2017 in relation to the Previous Application.
- U.** Shenhua Watermark response to procedural fairness documents
- V.** GTC response to procedural fairness documents

Annexure C – Map of Specified Areas

