

## **Opportunity to provide comment: Application under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 in relation to Dunmore Lakes Sand & Soil, Dunmore, New South Wales**

We refer to the application made under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) by Mr Gary Caines, a Wodi Wodi man of the Dharawal people (**applicant**) on 7 September 2021 (**application**). The application seeks protection of a specified area known as Stage 5A and Stage 5B of Dunmore Lakes Sand & Soil Project, Dunmore, New South Wales (NSW) (**specified area**, as identified by shading in Figure 1, below). We note that a second application was made under section 10 of the ATSIHP Act by Ms Sharralyn Robinson (Aunty Shas), a Yuin Elder and member of the Aboriginal Cultural Company, also seeking protection of the specified area on 10 September 2021 (**Robinson application**).

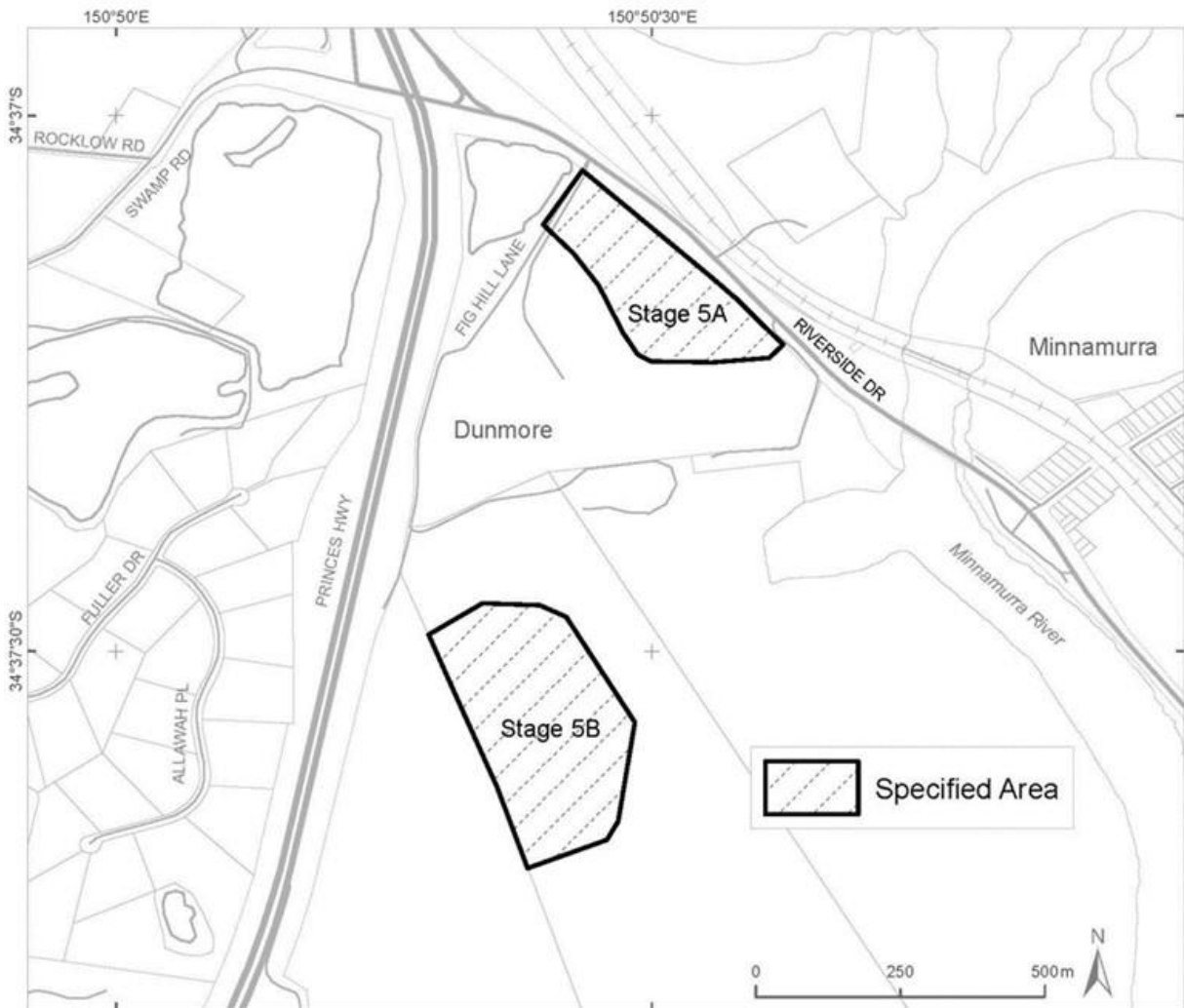
The department, on behalf of the Minister for the Environment (**Minister**), now seeks further comments and submissions from interested parties only in relation to:

- the Minister considering not making a declaration under section 10 of the ATSIHP Act due to an absence of evidence to support the claim that the specified area is a significant Aboriginal area specifically in relation to:
  - how historical traditional use of the area, including the specified area means it is of particular significance in accordance with *Aboriginal tradition*,
  - the presence of burials in the specified area (rather than the possibility of burials being present),
  - the specified area being within the site of the 1818 Minnamurra Massacre.
- the Minister considering not making a declaration under section 10 of the ATSIHP Act on the basis that because the specified area is not a significant Aboriginal area, it is not an area that is under threat of injury or desecration for the purposes of s 10(1)(b)(ii) of the ATSIHP Act,
- the Minister proposing to consider, for the purposes of this application, information, representations, and material provided, and the section 10 report prepared, in relation to the Robinson application, including material provided for the purposes of the section 10 report for the Robinson application,
- other considerations for the Minister in deciding whether to exercise her discretion to make a declaration under s 10 of the ATSIHP Act.

To aid in providing the requested comments and submissions, the background to the application is outlined below.

### **The application**

1. On 7 September 2021, the applicant submitted the application, seeking a declaration in relation to the specified area identified at Figure 1 below.



**Figure 1 - Map showing the specified area being Stage 5A and Stage 5B of the Dunmore Lakes Sand & Soil Project, Dunmore, NSW.**

2. The applicant claims that the specified area is a significant Aboriginal area for the Dharawal people because it is a known area where Dharawal people lived and buried their dead. Mr Caines states that the site holds evidence of tens of thousands of years of occupation and traditional use.
3. The application is seeking protection of the specified area because the above features are claimed to be under the threat of injury or desecration by the creation of Stage 5 (Stage 5A and Stage 5B) of Dunmore Sand & Soil sand quarry operated by Dunmore Sand & Soil Pty Ltd, a wholly owned subsidiary of Boral Resources (NSW) Pty Ltd (Boral) (**the proponent**).

**Claims in relation to ‘significant Aboriginal area’**

4. In considering an application for a declaration made under section 10 of the ATSIHP Act, the Minister must consider whether the specified area described in the application is a significant Aboriginal area for the purposes of section 10(1)(b)(i) of the ATSIHP Act.
5. A “significant Aboriginal area” is relevantly defined in section 3 of the ATSIHP Act as meaning “*an area of land in Australia... being an area of particular significance to Aboriginals in accordance with Aboriginal tradition*”. “Aboriginal tradition” is relevantly defined in section 3 of the ATSIHP Act as meaning “*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”.*

6. The applicant claims they have knowledge that the specified area is a significant Aboriginal area for the Dharawal people because it is a known area where Dharawal people lived and buried their dead. Mr Caines states that the site holds evidence of tens of thousands of years of occupation and traditional use.
7. Specifically, the applicant has claimed:
  - a. The specified area was valued residential and economic resource area for local Aboriginal people, including the softer sand and soils which allowed for the relative ease of setting up comfortable living areas in a resource rich environment – the specified area is a site of tens of thousands of years of occupation and traditional use;
  - b. The 1818 Minnamurra Massacre occurred in the immediate area of the Minnamurra River, with it being more than possible that it occurred in the Stage 5A and Stage 5B expansion areas, and it also being likely that the persons massacred are buried in the same area due to the sandy soils in which generations of local Aboriginal people would bury their dead;
  - c. The applicant’s great grandfather William Walker, being said to have escaped the 1818 Minnamurra Massacre and who lived long term at Bass Point, was buried in soft sandy soil at saltwater creek (Rocklow Creek) which runs into the Minnamurra River just near the Dunmore Stage 5 expansion area;
  - d. The soft sandy soils are a certain sign of the likelihood of burials; and
  - e. The cultural importance of not disturbing ancestral remains.

**Claimed threat of injury or desecration**

8. In considering an application for a declaration made under section 10 of the ATSIHP Act, the Minister must consider whether an area identified as a significant Aboriginal area is under threat of injury or desecration for the purposes of section 10(1)(b)(ii) of the ATSIHP Act.
9. For the purposes of the ATSIHP Act, an area will 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.
10. An area is taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.
11. The applicant claims that the significant features of the specified area are under threat of injury or desecration through:
  - a. Poor archaeological excavation and salvage practices leading to objects being disturbed or removed without due care;

- b. Archaeological works being undertaken without transparency or clear authorisation e.g., by use of ground penetrating radar and under cover of darkness;
- c. Excavation and salvage not being undertaken in a culturally sensitive way, resulting in the loss/destruction of a cultural record and offence to traditional owners; and
- d. Damage to the country causing sickness amongst Aboriginal people and possibly others.

#### **Other considerations**

12. After considering the matters in subsections 10(1)(b)(i) and (ii) of the ATSIHP Act, the Minister has a residual discretion in deciding whether to make a declaration in relation to a specified area. The Minister can accordingly consider other relevant factors that may weigh in favour of or against the making of a declaration. These can include, for example, community benefits, economic benefits, and the pecuniary impacts of interested parties (including proponents) that would flow from making a declaration.
13. Following its review of the current evidence in relation to the application, the department invites further comments from the parties in relation to the following issues relevant to the Minister's residual discretion in relation to the application:
  - a. The status of the development application and associated applications, if any, seeking the relevant New South Wales State approvals for the Developments;
  - b. The pecuniary impact of a declaration;
  - c. The proprietary impact of a declaration;
  - d. The community benefits associated with the Developments;
  - e. The economic benefits associated with the Developments; and
  - f. Any other considerations.