

Friends of Minnamurra River Incorporated¹

9 Samuels Lane
KIAMA DOWNS
NSW 2533

Email: FOMR2533@gmail.com



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Ms Tanya Plibersek MHR
Minister for Environment
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

tanya.plibersek.mp@aph.gov.au

cc. Dr Georgia McWhinney, Senior Policy Officer, DCCEW
(georgia.mcwhinney@dcceew.gov.au; ATSIHPA@awe.gov.au); Mr Dan Doran,
Chief of Staff, Environment Minister's Office, PO Box 6022, House of
Representatives, Parliament House, Canberra 2600.

Dear Minister Plibersek

RE: SIXTH INVITED SUBMISSION – FOMR INC. COMMENTS ON CONSULTANT'S RECOMMENDATION FOR DECLARATION OF DUNMORE LAKES' STAGE 5B AS AN ATSIHP ACT SIGNIFICANT ABORIGINAL AREA

We refer to your Department's email to FOMR Inc. on 8 February 2023 re: *Opportunity to provide comment: Applications under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 in relation to Dunmore Lakes Sand & Soil, Dunmore, just north of Kiama, NSW*

The Department refers to the application made under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) by Ms Sharralyn Robinson (Aunty Shas), a Yuin Elder and member of the Aboriginal Cultural Company (applicant) on 10 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). The Department notes that a second application was made under section 10 of the ATSIHP Act by Mr Gary Caines, a Wodi Wodi man of the Dharawal people, also seeking protection of the specified area, on 7 September 2021 (Caines application).

¹Friends of Minnamurra River (FOMR) is an active incorporated community-based association formed five years ago to conserve, protect and enhance the estuarine and catchment ecosystems of the Minnamurra River. It has qualified expertise available to it and within its membership in plant and animal ecology, archaeology, hydrology and environmental science.

This is the sixth submission made at your invitation about various aspects of the Applications and your Consultant's recommendation that you declare Stages 5A and 5B of the Specified Area a Significant Aboriginal Area.

However, you should note that FOMR Inc's submissions have been concerned with only Stage 5B of the Specified Area because the sand mining company, Boral Limited, moved into the Stage 5A area early in 2022 and is continuing to completely destroy it with a deepening dredge pit.

In this sixth submission, FOMR Inc. will comment on the findings, on 3 May 2022, of the Australian Government's Consultant, Dr Brendan Corrigan, to help focus the many comments that your Department is seeking.

1. From Dr Corrigan's report:

In relation to the particular significance of the specified area to Aboriginal people (section 10(4)(a)), Dr Corrigan concluded that: i. the Specified Area is of particular significance to Aboriginal People in accordance with their Laws and Customs; ii. the laws and customs (Aboriginal Tradition) which the Aboriginal parties have pointed to are those learnt by ancestors and relevant senior Aboriginal people, which have a normative effect on their obligation to 'care for Country' particularly country which has been identified to them as being 'highly culturally significant', containing a record of countless generations of residential, economic and social practices, and relied upon to teach upcoming generations of traditional owners and custodians; and iii. archaeologists have identified some archaeological materials as low significance (to archaeological science) and some of those materials as moderate to high significance (to archaeological science) but the Aboriginal people who have made representations to this enquiry have identified those materials as highly significant (to them). Regardless of the value archaeologists may validly place on archaeological materials, it is only Aboriginal people who can advise their views on the significance Archaeological materials have to themselves. b. In relation to the nature and the extent of the injury to or desecration of the specified area (section 10(4)(b)), Dr Corrigan concluded that: i. the nature and extent of the threat of injury to, or desecration of, the specified area is the wholesale removal of all related soils to an industrial depth. According to the Aboriginal parties, this would have the effect of removing the 'Country' from existence along with its associated cultural heritage values. It would also have the effect of removing any archaeological materials from their in situ contextual locations, possibly never to be recovered, depending on the removal techniques. In any case, any and all archaeological materials still in the ground at the specified area would be removed from their pre-historic context unless a salvage archaeology program was performed for the entirety of the sand and soil to be mined; ii. The consultant accepts the Aboriginal parties' argument that the proposed wholesale removal of the sand and soils is entirely inconsistent with their laws and customs.

1. FOMR comment:

Dr Corrigan's findings above are simply incontrovertible in every respect and are fully supported by previous FOMR submissions to you and to your Department, submissions which in themselves have contained substantiating information and observations from the considerable archaeological and other expertise available to FOMR.

The findings are also very strongly supported by the Aboriginal stakeholders themselves, many of whom were visibly reduced to tears and states of collapse when at the Specified Area's Site 5A in 2021. Most of them Custodians of the land in question or with family relations to those Custodians, they were employed by Boral Limited's archaeological consultant in undertaking its less than scientifically rigorous 'salvage' archaeology at the site.

The absolute 'richness' or wealth – and previously unrealized diversity - of prehistoric artefacts unearthed and being taken out of archaeological or scientific context at Site 5A surprised even Boral's consultants.

Worse, the local Aboriginal stakeholders, become distraught at the realisation that they were not only destroying their own cultural heritage but were unscientifically unearthing artefacts and implements used by their ancestors which their current generations had never seen.

Experienced archaeological excavators, these Aboriginal stakeholders immediately realised that, if properly excavated and analysed, this material would further enrich their cultural heritage and their knowledge of it. As they said at the time, it was too important to them to have it destroyed for any reason, let alone by a sand mine of only three or four years' duration.

The stakeholders, realising the importance of the area as an intensively utilised Aboriginal occupation site over very many millennia, also became overwhelmed by the possibility, even probability, of exhuming their ancestors' burials, a matter which made newspaper and ABC headlines when the stakeholders stopped work at Stage 5A excavations in 2021.

Overwhelmed by their situation, the Aboriginal stakeholders went on strike, withdrawing their labour until Boral and its archaeological consultant reconsidered all alternative options, including rigorous and scientific archaeological excavation of significant areas of the entire Stage 5A area.

Boral shut down the site and Covid lockdowns kept it shut down and neither the inadequate 'salvage' archaeology or proper scientifically based investigation was ever resumed.

Many of the local Aboriginal stakeholders and custodians stayed on strike and still deeply upset, have never returned to the site on the lands of which they are Custodians.

Their land and undoubted wealth of undiscovered cultural material at specified site Stage 5A has now completely gone, destroyed by Boral's sand dredge digging an ever deepening pit.

Given the geomorphology (surface shape) of the specified area's Stage 5B, its location closer to the Minnamurra River, its far greater biodiversity and its relative proximity to the now destroyed Stage 5A, it is axiomatic that site 5B is of equal if not more of a Significant Aboriginal Area and, as Dr Corrigan recommends, must be saved by Ministerial declaration as such. However, dredging of Site 5B will start as soon as site 5A is exhausted of its sand.

The archaeological, cultural heritage and Aboriginal significance of the site, even more than that of the now destroyed Site 5A, has been evidenced by the indication of a wealth of Aboriginal cultural materials found in only a relatively small number of archaeological test

pits sunk by Boral's consultant within the past two years in the sand deposits and terraces of Stage 5B.

This is confirmed, if any confirmation were necessary, by Boral Limited's report to you in August last year that it had unearthed more evidence of Aboriginal significance at its Stage 5B site in the form of buried Aboriginal hearths or campsite fireplaces, their number disproportionately large to the relatively small area of Stage 5B in which they were located. The hearths confirm intense Aboriginal prehistoric occupation of the area over millennia.

Stage 5B almost certainly will also contain ancient burials both as a result of the many millennia of Aboriginal occupation and as the near certain burial site of the victims of the 1818 massacre by European settlers of Aboriginal people camped at or very near the site.

Local living relatives of the massacre survivors say they know where the burials of their ancestors are but, of course, are prevented for various cultural reasons from revealing such information.

However, we in FOMR and other observers who have spoken with these First Nations descendants, have noticed their extreme sensitivity to and reaction against any suggestion of any disturbance to the Stage 5B area now proposed for destruction by Boral's sand mine.

The Kiama Municipal Council has, with signage, acknowledged the area as the 1818 massacre site and a NSW Government sign beside the Princes Motorway, only 250 metres away, notes that the area was intensively occupied over millennia by Aboriginal people who also buried their dead in the sandy terraces and embankments along the Minnamurra River. The proposed Stage 5B mine site is only 160 metres from the Minnamurra River.

There are relatively few sites on the NSW South Coast – and certainly none close to the Stage 5B site - which have been scientifically excavated and of these, most of them are located on the sea shore or immediately adjoining the shore. The Stage 5B proposed sand mining site is different. It is a riverine environment very close to the Minnamurra River and about 750 metres from the sea shore at the mouth of the river. As an Aboriginal Custodian of the area told FOMR in 2021: "The place was so important for us because in the old times it was the meeting of the saltwater and the freshwater and it was a meeting place for saltwater people and freshwater people." The terraces or old beaches which are present at the north end of Site 5B are also evidence of where the saltwater once met the freshwater, as is the presence and depth of sand that Boral now wants to mine. Given the dearth of such archaeological sites along the South Coast, the resulting large gaps in the cultural knowledge about the First Nations people of this particular area and the site's undoubted immense archaeological and cultural heritage value, FOMR believes it must be declared under Section 10 of the ATSIHP Act, as Dr Corrigan recommends.

2. From Dr Corrigan's report:

While Boral made strong efforts to reconcile their sand mining proposal with the protection of Aboriginal heritage, their best efforts have failed to arrive at a position that is satisfactory to the Aboriginal Parties relevantly making and supporting the application addressed in this report. c. In relation to the extent of the area that should be protected (section 10(4)(c)), Dr Corrigan concluded that: i. to avoid the wholesale destruction of the Aboriginal heritage values in and at the specified area the entire specified area should be protected from the

proposed sand mining; ii. any such protection should extend to any similar large scale earth moving activities; and iii. prohibitions and restrictions to be made with respect to the specified area are those which prohibit sand mining and similar industrial earth disturbing activities. d. In relation to the prohibitions and restrictions to be made with respect to the area (section 10(4)(d)), Dr Corrigan concluded that: i. he recommends prohibitions and restrictions on sand mining and similar industrial earth disturbing activities. e. In relation to the effects the making of a declaration may have on the proprietary or pecuniary interests of persons (section 10(4)(e)), Dr Corrigan concluded that: i. any proprietary or pecuniary interests which may affect Boral appear to be routine tax-deductible risks that are entirely inherent to proving up large scale extractive industry projects and in the case of the landowners there would be no wind-fall income from the project without the project going ahead; ii. it is beyond his scope of expertise to accurately predict the effect on the value of their land but offers the opinion that while their land may experience a decrease in value if encumbered by a declaration, but it may experience an increase; and iii. it is possible Boral may obtain access to commercial volumes of sand from other sources which would off-set any losses experienced as a lack of access to the specified area. f. In relation to the duration of any declaration (section 10(4)(f)), Dr Corrigan concluded: i. to avoid the wholesale destruction of Aboriginal heritage values in and at the specified area, the entire specified area should be protected from the proposed sand mining on an ongoing basis.

2. FOMR comment:

The only way to prevent the complete destruction of the Stage 5B specified area to ensure the protection of the area which the Applicants in this case are seeking under the Commonwealth's ATSIHP Act, is to adopt Dr Corrigan's recommendations in full.

Without Ministerial declaration and consequently allowing Boral's Stage 5B sand mine to proceed, will mean the unique and rare biodiversity and cultural heritage of this site will be irretrievably lost to all Australians.

And yet the very disturbing fact is that such destruction and loss does not have to occur at all:

- (a) The proposed Stage 5B mine is very temporary. Boral informed the NSW Independent Planning Commission in 2021 that the two new sand mines proposed for the Specified Area would have a combined life of up to only three to four years (leaving any mine at Stage 5B with a duration of only about two years).*
- (b) The land of the specified area, Stage 5B, is being leased from a local landholder by Boral Limited specifically for the purposes of mining and in the event of Stage 5B not proceeding, the land would revert to the landholder.*
- (c) The land has never been and is not an economic generator (except its mining lease now has economic value to the landholder). It has not been utilized for any sort of agricultural for 50 years or more and before that nothing but incipient agriculture such as small scale livestock grazing by early European settlers. This was because the nature of the loam and sand substrate makes it unsuitable for cropping and intensive farming. Additionally, nearly about half of the proposed mining area is subject to periodic flooding from the nearby Minnamurra River.*

- (d) *In Boral's overall scale of sand mining activities in NSW, the proposed Stage 5B mine (and, indeed, the year-old Stage 5A mine) are very small operations and have no long term value at all to Boral because, as Boral has told both the Independent Planning Commission and FOMR, the sand resources in Stages 5A and 5B are very limited, which is why both Stages 5A and Stage 5b (if it is permitted to proceed), will be commercial for up to only three or four years.*
- (e) *Further, Boral informed FOMR at a meeting in 2021 that the company had already developed, at a plant on the Southern Highlands of NSW, an artificial substitute for natural sand or silica. Even at that time, Boral said it was working very actively to expand its production of artificial sand to reduce its use of natural sand such as that which would come from its sites at Dunmore, NSW.*
- (f) *At the same time, Boral also informed FOMR that it had discovered large-scale sand resources near Nowra, NSW, and it was undertaking drilling operations to determine the full scale of that resource. It indicated its existing main sand mining operation at Dunmore, NSW, of which the specified area is an extension, would be moved to Nowra when the resource at Dunmore was depleted, which, FOMR understands, it largely is now.*
- (g) *Finally, Boral informed the NSW Government in 2018 in its application for the two new sand mines, that there would be no new jobs created, either in construction or operation of the new mines if approval were granted.*

3. Dr Corrigan's report:

In relation to the extent to which the area is or may be protected by or under a law of a state or territory, and effectiveness of any remedies available under any such law (section 10(4)(g)), Dr Corrigan concluded: i. Boral has claimed that the applicant (and by extension, other Aboriginal Parties) has not sought alternate remedies to this situation by making separate applications under the NSW National Parks and Wildlife Act, or through a challenge to the NSW Independent Planning Commission; and ii. the Federal Minister is still entitled to make a declaration in this matter, regardless of other avenues which may potentially be available to the applicant, if the Commonwealth considers this an 'appropriate case' and further that if the Federal Minister does make a declaration it does not prohibit the Aboriginal parties from subsequently seeking other state based supports, such as those suggested by Boral.

3. FOMR comment:

As FOMR has informed you in previous submissions, Boral Limited has been far from a model corporate citizen in the entire process of applying for and receiving approval of the mine.

FOMR has legal advice, confirming what the local MP, Gareth Ward, subsequently a minister in the current NSW government, told the NSW Parliament in 2021, that there were anomalies and irregularities, quite possibly unlawful, in Boral's application to the NSW Department of Planning for approval of the sand mines in the specified area.

The evidence of a defective sand mining application process by Boral and the NSW Department of Planning was so strong that FOMR had planned to mount a judicial review but was prevented from doing so by the potential cost of such an action, possibly exposing FOMR to costs in six figures, beyond FOMR's means.

This situation is analogous to that of the Aboriginal stakeholders and First Nations' land and landscape custodians connected to the Applicants in this matter under the ATSIHP Act.

It is derisory, indeed cynical, of Boral to suggest to Dr Corrigan that the Aboriginal custodian/stakeholders/peoples involved could or can appeal Boral's approval to mine and destroy the Stage 5B site which has been recommended for declaration as a Significant Aboriginal Area. Some of these people are only semi-literate and can communicate with or make submissions to your Department only by dictating what they want to say to people who are literate and can translate the spoken word into written communication.

And no individual or organization in the Illawarra First Nations' community has the financial resources to mount appeals or actions against Boral Limited, one of Australia's largest corporate entities.

Besides that, the relevant laws of NSW, particularly those under the National Parks and Wildlife Act relevant to this case, clearly militate against any Aboriginal individual or group opposing or trying to prevent a potentially destructive mining project or industrial development.

Additionally, FOMR re-emphasises the wealth of strong evidence put to you in our fifth submission on this matter of 30 January 2023.

Part of this evidence was that the laws of NSW, clearly and demonstrably biased as they are in favour of mining and other industrial development, over and above major detriment to the natural environment and the destruction of Aboriginal cultural and other heritage, led to a defective process, culminating in the NSW Independent Planning Commission being misled and under-informed in reaching its approval decision in 2021 on the new sand mining sites in the specified area.

The evidence is that these shortcomings included, but were not confined to:

- (a) There has not so far been any scientifically-based environment assessment, detailed or accurate, of the impacts of the proposed Boral Australia new sand mining pits in the Minnamurra River catchment, approved in November 2020 by the NSW government-appointed Independent Planning Commission (IPC);*
- (b) The Assessment report on the proposed new sand mining pits prepared for the IPC by the NSW Department of Planning, Industry and Environment (DPIE) – and on which the IPC said it relied almost entirely as the basis for its approval of the new mines - was a theoretical exercise conducted from the department's head office without the benefit of much needed peer reviewed fieldwork or scientific studies;*
- (c) The DPIE's 'Assessment' on which the IPC relied, was not formulated from original research, studies or fieldwork by the department but in large part comprised only*

selected summaries of a 25 April 2019 document entitled Environmental Assessment of the Dunmore Lakes Sand Extraction Project Modification 2, produced by consultants to Boral Australia to support the company's application for new sand mining pits in the Minnamurra River catchment and also relying extensively in key assessments only on broad 'guidelines' provided by NSW government agencies, and

(d) As a consequence, the two IPC commissioners did not have complete, balanced or scientifically rigorous information available to them on which to base their decision to approve Boral's two new mine pits and it is reasonable to propose that their decision would have been different if they had been fully, properly and scientifically informed by DPIE or an independent environmental assessor.

To reiterate, the only strength that the Section 10 and Section 12 (of the ATSIHP Act) Applicants have in this case against a corporate entity such as Boral Limited, is the power vested in you through that Act to have their cultural landscapes and cultural heritage protected in perpetuity. And in this case, such protection is possible at virtually no economic cost or loss to any individual or entity.

4. From the Department's invitation

Your Department has invited "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.

4. FOMR's comment

FOMR has dealt with (a), (b) and (c) immediately above in this and previous submissions to you but completes this submission below with a comment on (d), above, the community benefits which would arise from a declaration of the Stage 5B specified area as a Significant Aboriginal Area.

Such a declaration would rejuvenate a local Aboriginal community divided and embittered by the NSW Government and Boral process which threatens to completely destroy the few remaining landscapes and heritage the community has left.

The community has been badly affected by threats and intimidation arising from the importation from areas well outside the Illawarra region of Aboriginal people who have then been used to misrepresent the local community and mislead you, in submissions to you and the Department in 2022, about certain heritage values and aspects of the specified area's Aboriginal landscapes and cultural heritage proposed for destruction.

A Section 10 declaration would also restore the faith of both the Aboriginal and non-Aboriginal communities here and elsewhere in the cultural heritage and environmental protection laws embodied in such Commonwealth laws as the ATSIHP Act and the EPBC Act. The public faith in the effectiveness of these laws has been shattered during the past

decade in particular and the election of your government has brought renewed hope that things will change, that these laws will once again be applied and enforced.

The protection in perpetuity of Stage 5B of the specified area at Dunmore would also bring the very real but less visible feeling of 'wellbeing' to both the Aboriginal and non-Aboriginal community Australia-wide. It is recognized here and overseas that human communities derive a feeling of 'wellbeing' simply by knowing that there are natural places remaining, such as national parks or nature reserves, set aside and protected to conserve their naturalness of flora and fauna.

Many urban dwellers may never visit such reserved natural areas far away but they are happier and have a resulting feeling of wellbeing simply knowing that such areas exist. Similarly, the protection in perpetuity of the biodiversity and cultural landscape of the Stage 5B area would give rise to community wellbeing in Australia.

Finally, it seems incomprehensible to the members of FOMR that a Commonwealth Government committed to much needed Aboriginal reconciliation could or would disregard or ignore both a government expert consultant's recommendations and the heritage protection powers available to it in Australian law and allow the threatened destruction by a temporary sand mine of not only Commonwealth-listed biodiversity but cultural heritage and Aboriginal landscapes of proven inestimable value to Australia and Australians.

Yours sincerely,

Will Chyra
Chair, FOMR Inc.

0419 633 191