

Opportunity to provide comment and further submissions:

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**). 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**).

At this time, we refer only to the Caines application.

We also note the correspondence from the department on behalf of the Minister for the Environment sent 6 May 2022 which:

- provided background information to the application, and
- sought comments and submissions from the interested parties regarding specific matters in relation to the application (**6 May 2022 correspondence**).

Please find the 6 May 2022 correspondence attached in the email.

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

1. the Minister considering making a partial declaration over the south-eastern portion of Stage 5B of the specified area under section 10 of the ATSIHP Act because:
 - a. there is evidence to support the claim that this part of the specified area is a significant Aboriginal area for the purposes of s 10(1)(b)(i) due to:
 - i. evidence indicating the potential presence of burials
 - ii. this evidence indicating the potential presence of burials being corroborated by the representations provided by Paul Knight, Kayla Williamson, the Gerroa Environmental Protection Society, and Friends of Minnamurra River Inc. which support the burials as potentially being Aboriginal burials,
 - iii. the area in which there is evidence indicating potential burials being in close proximity to, or overlapping part of, the approximate location of the 1818 Minnamurra Massacre site as set out in a map prepared by Professor Lyndall Ryan, University of Newcastle historian, as part of the University of Newcastle's Frontier Massacre Mapping Project.
 - b. the specified area is under threat of injury or desecration for the purposes of s 10(1)(b)(ii) of the ATSIHP Act because:
 - i. the NSW IPC has approved the Dunmore Lakes Sand Project Modification 2 (**Project**) for sandmining in the specified area, which will involve the disturbance of the ground within the specified area to create extraction pits from which sand will be mined as part of the Project,
 - ii. Dunmore Sand & Soil Pty Ltd has begun mining sand from Stage 5A of the specified area, and
 - iii. the Heritage Management Plan prepared for Dunmore Sand & Soil Pty Ltd is not considered to provide sufficient protection for the potential burials from injury or desecration.

2. A summary of the key points of the report prepared by Dr Brendan Corrigan for the purposes of section 10 of the ATSIHP Act (see Annexure A).

The department requests that you provide any further comments or submissions on the points above by **COB Friday 3 August 2022**.

ANNEXURE A - key points of the report prepared by Dr Brendan Corrigan for the purposes of section 10 of the ATSIHP Act

On 12 October 2021, the former Minister for the Environment, the Hon Sussan Ley MP, nominated Dr Brendan Corrigan to complete a report pursuant to s10(4) of the ATSIHP Act. In preparing his report, Dr Corrigan had regard to the application and the submissions and evidence provided to him by each of the interested parties.

On 3 May 2022, Dr Corrigan furnished his report to the Minister. In his report, Dr Corrigan considered each of the matters listed in s 10(4) of the ATSIHP Act:

- a. In relation to the particular significance of the specified area to Aboriginals (s 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 significance is founded on three principles in accordance with local Aboriginal laws and customs, first, the high value economic resource elements (marine and terrestrial foods and water supply, supporting large residential gatherings in historic and prehistoric times). Second, the knowledge of these special resource dimensions of this area including that it is a known country type for burials and is in association with a local massacre of Aboriginal people who may potentially be buried in this burial target type of country. Thirdly the known “moderate to high value” archaeological materials which, amongst relevant Aboriginal people (traditional owners and custodians), are argued to be most properly protected by being kept in the ground;
 - iii. 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
 - iv. 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 (s 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. He accepts the Aboriginal parties' argument that the proposed wholesale removal of the sand and soils is entirely inconsistent with their Laws and Customs; and
 - iii. 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; and
 - ii. Any such protection should extend to any similar large scale earth moving activities.
- d. In relation to the prohibitions and restrictions to be made with respect to the area (s 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.
- g. 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 concludes:

- 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.