

---

---

## Dandy Premix Quarries Pty Ltd; re Grantville Quarry and Aboriginal heritage issues

### Memorandum of Advice

- 1 Dandy Premix Quarries Pty Ltd (**Dandy Premix**) is the owner and operator of the Grantville Quarry (**the Quarry**), situated at 1381–1395 Bass Highway, Grantville (**the Subject Land**), which currently operates under Work Authority No 1488 (**WA1488**) and Planning Permit 120388 (**the Permit**).
- 2 Dandy Premix has applied for an amendment to the Permit (**the Amendment Application**).
- 3 The Minister for Planning (**the Minister**) called in the Amendment Application and referred all submissions to an independent panel, which heard submissions between 22 to 25 March 2021 (inclusive), 30 and 31 March 2021, 1 April 2021, 6 to 8 April 2021 (inclusive).
- 4 On 1 July 2021, following completion of the hearing, the Bunurong Land Council Aboriginal Corporation (**the BLC**) wrote to the Minister alleging that the Amendment Application and the Quarry expansion require a mandatory cultural heritage management plan (**CHMP**) under Aboriginal heritage legislation.
- 5 The CHMP issue has arisen because of a contention that part of the activity area for the Amendment Application is within 200 metres of the Western Port Ramsar Wetland Site and, thus, within an area of cultural heritage sensitivity under Regulation 29(1) of the Aboriginal Heritage Regulations 2018 (**the AH Regulations**). The AH Regulations operate under the *Aboriginal Heritage Act 2006* (**the AH Act**).
- 6 I am asked to advise in relation to the matters raised in the BLC submission.

### Background

- 7 The Subject Land is located on the eastern side of the Bass Highway, approximately 1 km to the north of the Grantville township, as shown in the figure below.



- 8 The Subject Land has a frontage to Bass Highway of approximately 285 metres. It runs eastward from the Bass Highway for some 2177 metres. Its north-south depth generally varies between 490 metres and 1137 metres. The Subject Land is 156 hectares in size.
- 9 The western part of the Subject Land sits within the coastal plain between Western Port Bay and the Strzelecki Ranges to the east. It is gently undulating with an ephemeral tributary, MW3840, to Deep Creek, located within part of it. The eastern part of the land is more undulating and forms part of the foothills to the Strzelecki Ranges. The site's elevation ranges from approximately 120 m AHD on the ridge in the east of the site, down to less than 10 m AHD at the western end of the Deep Creek tributary.
- 10 The Subject Land includes three small lots fronting the Bass Highway. Each of these have a dwelling and associated shedding located on them.
- 11 Prior to sand extraction commencing, the land was historically used for grazing activities. Pasture grasses were the predominant vegetation, with native vegetation located in areas of the eastern part of the land.

## **The Amendment Application**

### The Endorsed Work Plan

- 12 On 29 May 2020, the Department of Jobs, Precincts and the Regions (Earth Resources Regulation) (**DJPR**) statutorily endorsed a Work Plan Variation for the proposed further development of the land (**the Endorsed Work Plan**). This was done pursuant to section 77TD of the *Mineral Resources (Sustainable Development) Act 1990* (**the MRSD Act**).

### The Amendment Application

- 13 On 7 July 2020, Dandy Premix lodged the Amendment Application, seeking approval for the proposed further development, as set out in the

Endorsed Work Plan, with Bass Coast Shire Council (**Council**) as the responsible authority.

- 14 An Amended Permit to approve the works described in the Endorsed Work Plan.
- 15 In particular, the Amendment Application seeks to amend the Permit to allow the following:
  - The further deepening and expansion of the existing fine–medium sand extraction area;
  - The implementation of a cutter suction dredging extraction method to win material from below the groundwater level;
  - The development of a new extraction area in the upper eastern part of the site for the extraction of coarse sand;
  - The introduction of sand washing and slimes dewatering processes; and
  - An extension of operating hours, to enable the required ‘run-on’ use of the filter belt press dewatering process plant and for a wider sales loading and dispatch window of operations.

#### **Dandy Premix response in relation to aboriginal heritage issues**

- 16 On 4 August 2021, Dandy Premix provided a written submission to DELWP in relation to aboriginal heritage issues.
- 17 The submission included a letter prepared by Mr Eriks Birzulis, a registered land surveyor, that confirmed the precise location of the Western Port Ramsar Wetland Site boundary in the area near the Grantville Quarry.
- 18 Based on the information provide to him, Mr Birzulis concluded that the Western Port Ramsar Site boundary:
  - aligns with the approximated high tide mark in the area closest to the Grantville Quarry; and
  - at its closest point is a minimum of 291.5 metres from the title boundary of the Grantville Quarry.

Mr Birzulis concluded that no part of the Grantville Quarry is within 200m of the Western Port Ramsar Wetland Site.

- 19 The Dandy Premix submission contended, as an alternative, that permit conditions could address the BLC Submission. The proposed conditions would require (inter alia) that the westernmost sections of the existing Work Authority and extraction boundaries be amended so that they are setback to exclude any undisturbed areas from the area identified as sensitive on the State government mapping.

## Advice

- 20 Whether any part of the activity area for the Amendment Application is within 200 metres of the Western Port Ramsar Wetland Site and is thus within an area of cultural heritage sensitivity under the Regulation 29(1) of the AH Regulations depends on an interpretation of relevant statutory documents.
- 21 So, too, does the question as to whether a mandatory CHMP is triggered by the Amendment Application.
- 22 Thus, is it desirable to first set out relevant extracts from these statutory documents.

## Aboriginal Heritage Act

- 23 Section 42 of the AH Act defines a cultural heritage management plan (CHMP). This involves a plan for an area that consists of:
- a an assessment of the area to determine the nature of any Aboriginal cultural heritage present in the area; and
  - b a written report setting out—
    - i the results of the assessment; and
    - ii conditions to be complied with before, during and after an activity to manage and protect the Aboriginal cultural heritage identified in the assessment.
- 24 Section 45 of the AH Act provides that a person may prepare a cultural heritage management plan even if the plan is not required under this Act.
- 25 Section 46(1) of the AH Act provides that a cultural heritage management plan is required if:
- (a) the regulations require the preparation of the plan for the activity; or
  - (b) the Minister directs the preparation of a plan for the activity under section 48; or
  - (c) a plan is required for the activity under section 49; or
  - (d) a plan is required for the activity under section 49A; or
  - (e) the Secretary receives an application for the certification of a preliminary Aboriginal heritage test determining that a proposed activity requires the preparation of a cultural heritage management plan, and the Secretary certifies that the test is correct.
- 26 Section 47 of the AH Act provides that the regulations may specify the circumstances in which a cultural heritage management plan is required for an activity or class of activity.
- 27 Section 4 of the AH Act contains definitions. This relevantly provides:

**activity** means the development or use of land;

**coastal waters of Victoria** has the same meaning as the expression "coastal waters of the State" has in relation to Victoria under the Coastal Waters (State Powers) Act 1980 of the Commonwealth;

**development**, in relation to land, includes the following kinds of development—

(c) the construction or carrying out of works;

28 The *Coastal Waters (State Powers) Act* 1980 of the Commonwealth defines the expression "coastal waters of the State" to mean:

in relation to each State:

(a) the part or parts of the territorial sea of Australia that is or are within the adjacent area in respect of the State, other than any part referred to in subsection 4(2); and

(b) any sea that is on the landward side of any part of the territorial sea of Australia and is within the adjacent area in respect of the State but is not within the limits of the State or of a Territory.

29 Subsection 4(2) of the *Coastal Waters (State Powers) Act* 1980 deals with the sea greater than 3 nautical miles; and is not presently relevant.

#### Aboriginal Heritage Regulations

30 Clause 7 of the AH Regulations defines a cultural heritage management plan (CHMP). This provides:

A cultural heritage management plan is required for an activity if—

(a) all or part of the activity area for the activity is an area of cultural heritage sensitivity; and

(b) all or part of the activity is a high impact activity.

31 Clause 5 of the AH Regulations contains definitions. This relevantly provides:

**area of cultural heritage sensitivity** means—

(a) an area specified as an area of cultural heritage sensitivity in Division 3 of Part 2; or

(b) if Division 4 of Part 2 applies, an area specified as an area of cultural heritage sensitivity in that Division;

**coastal Crown land** has the same meaning as in the Coastal Management Act 1995;

**high impact activity** means an activity specified as a high impact activity in Division 5 of Part 2;

32 The *Coastal Management Act* 1995 defines the expression "coastal Crown land" to mean:

**coastal Crown land** means—

- (a) any land reserved under the *Crown Land (Reserves) Act 1978* for the protection of the coastline; and
- (b) any Crown land within 200 metres of high water mark of—
  - (i) the coastal waters of Victoria; or
  - (ii) any sea within the limits of Victoria; and
- (c) the sea-bed of the coastal waters of Victoria; and
- (d) the sea-bed of any sea within the limits of Victoria; and
- (e) any Crown land which is declared by the Governor in Council under subsection (2) to be coastal Crown land—

but does not include any land which the Governor in Council declares under subsection (2) not to be coastal Crown land for the purposes of this Act;

- 33 Division 3 of Part 2 of the AH Regulations specifies the following types of area as potentially being areas of cultural heritage sensitivity in Victoria:
- a A registered cultural heritage place and land within 50 metres of a registered cultural heritage place.
  - b A waterway or land within 200 metres of a waterway.
  - c A prior waterway or land within 200 metres of a prior waterway.
  - d An ancient lake or land within 200 metres of an ancient lake.
  - e A declared Ramsar wetland or land within 200 metres of a declared Ramsar wetland.
  - f Coastal Crown land and land within 200 metres of the high water mark of the coastal waters of Victoria or any sea within the limits of Victoria.
  - g A park.
  - h The high plains.
  - i The Koo Wee Rup Plain.
  - j A greenstone outcrop.
  - k The stony rises associated with the Mt Eccles, Mt Napier and Mt Rouse lava flows.
  - l The volcanic cones of western Victoria.
  - m A cave, a rock shelter or a cave entrance.
  - n A lunette.
  - o A dune or a source bordering dune.
  - p A sand sheet, including the Cranbourne sand.
- 34 Division 4 of Part 2 of the AH Regulations specifies the following area as potentially being areas of cultural heritage sensitivity in Victoria:

- a Bucks Sandhill
- 35 I am instructed that the only areas identified as potential areas of cultural heritage sensitivity *that are relevant in this case* are:
- a A registered cultural heritage place and land within 50 metres of a registered cultural heritage place.
  - b A declared Ramsar wetland or land within 200 metres of a declared Ramsar wetland.
  - c Coastal Crown land and land within 200 metres of the high water mark of the coastal waters of Victoria or any sea within the limits of Victoria.
- 36 In relation to a declared Ramsar wetland, regulation 29(c) of the AH Regulations provides:
- In this regulation, **declared Ramsar wetland** has the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth.

Environment Protection and Biodiversity Conservation Act

- 37 Section 17 of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) of the Commonwealth provides:

**17 What is a declared Ramsar wetland?**

*Areas designated for listing*

(1) A wetland, or part of a wetland, designated by the Commonwealth under Article 2 of the Ramsar Convention for inclusion in the List of Wetlands of International Importance kept under that Article is a **declared Ramsar wetland** as long as the wetland or part is not:

- (a) excluded by the Commonwealth from the boundaries of a wetland in the List under that Article; or
- (b) deleted by the Commonwealth from the List under that Article.

*Areas declared by the Minister*

(2) A wetland, or part of a wetland, is also a **declared Ramsar wetland** for the period for which a declaration of the wetland as a declared Ramsar wetland is in force.

- 38 Section 528 of the EPBC Act defines a “wetland” as having the same meaning as in the Ramsar Convention (**the Ramsar Convention**).
- 39 Article 1 of the Ramsar Convention defines a ‘wetland’ in the following terms:

1. For the purpose of this Convention wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt,

including areas of marine water the depth of which at low tide does not exceed six metres.

- 40 Division 2 of Part 15 of the EPBC Act deals with managing wetlands of international importance. Section 325 contains a simplified outline of this Division:

The Commonwealth may designate a wetland for inclusion in the List of Wetlands of International Importance kept under the Ramsar Convention only after seeking the agreement of relevant States, self-governing Territories and land-holders.

The Minister must make plans for managing wetlands listed under the Ramsar Convention that are entirely in Commonwealth areas. The Commonwealth and Commonwealth agencies must not contravene such plans.

The Commonwealth must try to prepare and implement management plans for other wetlands listed under the Ramsar Convention, in co-operation with the relevant States and self-governing Territories.

The Commonwealth and Commonwealth agencies have duties relating to declared Ramsar wetlands in States and Territories.

The Commonwealth can provide assistance for the protection or conservation of declared Ramsar wetlands.

- 41 Section 326 of the EPBC Act provides that the Commonwealth may designate a wetland for inclusion in the List of Wetlands of International Importance kept under the Ramsar Convention only if the Minister is satisfied that the Commonwealth has used its best endeavours to reach agreement with the owner or occupier, and the State or Territory concerned, about the matter.

- 42 Section 327 of the EPBC Act then provides:

**327 Minister must give notice of designation of wetland etc.**

(1) The Minister must give notice in the Gazette and in the way (if any) prescribed by the regulations of any of the following events as soon as practicable after the event occurs:

- (a) the Commonwealth designates a wetland for inclusion in the List of Wetlands of International Importance kept under the Ramsar Convention;
- (b) the Commonwealth extends the boundaries of a wetland it has included in the List;
- (c) the Commonwealth restricts the boundaries of a wetland it has included in the List;
- (d) the Commonwealth deletes from the List a wetland it previously included in the List.

(2) The notice must specify the area included in, or excluded or deleted from, the List as a result of the event.



(3) A failure to comply with this section does not affect the status of an area as a declared Ramsar wetland.

[Emphasis added.]

### Western Port Ramsar wetland

43 The Western Port Ramsar wetland was designated on 15 December 1982 (**the Original Ramsar Designation**). This records the following:

#### WESTERN PORT

Western Port Bay. 15/12/82; Victoria; 59,297 ha; 38°22'S 145°17'E. A coastal embayment incorporating vast mudflats, two sites of international, geological and geomorphological significance, and nationally important expanses of relatively undisturbed, species-rich, saltmarsh vegetation. An internationally important feeding and roosting area for numerous species of summering waders, many of which are listed under the bilateral Migratory Birds Agreements Australia has with Japan and China. The site periodically supports over 10,000 waders and 10,000 ducks and swans, and a rich invertebrate fauna of 1,381 species. There is intensive use by commercial shipping. Human activities include recreation, commercial fishing, water extraction, and livestock grazing. Ramsar site no. 267. Most recent RIS information: 1998.

44 The Boundary Map for the Western Port Ramsar wetland that is published on the Commonwealth Department of Agriculture Water and Environment website is set out below.



- 45 It is apparent that the Original Ramsar Designation had effect under s 17(1) of the EPBC Act. Moreover, the Original Ramsar Designation has not been deleted nor part of it excluded from the designation.
- 46 My instructing solicitor's searches of the Commonwealth Government Gazettes have identified that no notice has been published in the gazette of an extension to, or variation of, the Ramsar boundary for Western Port.
- 47 On 6 July 2021, following requests for copies of the Original Ramsar Designation, Ms Kimmings, acting Assistant Director (Victoria and Tasmania Assessments) of Commonwealth Department of Agriculture, Water and the Environment confirmed that no changes to the Ramsar Site boundary for Western Port have been gazetted under s 327 of the EPBC Act.
- 48 I have also done my own searches. These also confirm that no changes to the Ramsar Site boundary for Western Port have been gazetted under s 327 of the EPBC Act.
- 49 Accordingly, the current boundary of the Western Port Ramsar wetland for the purposes of the EPBC Act and the Regulations – and the Aboriginal Heritage Regulations - remains as shown in the Original Ramsar Designation.

#### State government cultural heritage sensitivity mapping

- 50 The State Government maintains a map to provide guidance as to areas of Aboriginal cultural heritage sensitivity.
- 51 The State Government map has no legal operation, but it intended to provide guidance.
- 52 That the State Government map has no legal operation has been confirmed by the Victorian Civil and Administrative Tribunal on at least two occasions: see *Morgan v Mildura Rural CC* [2014] VCAT 1503 and *Rafeek v Knox CC* [2015] VCAT 1136.
- 53 In *Rafeek v Knox CC* [2015] VCAT 1136 at [5], the Tribunal said

This proceeding is a timely reminder that the mapping of culturally sensitive areas should not be relied upon. Regulation 23 of the AH Regulations sets out that a waterway or land within 200m of a waterway is an area of cultural heritage sensitivity. The AAV1 map of cultural sensitivity indicates that the area around the three lakes in this housing estate falls within such an area. However, the written information on the side of the map includes the following statement:

Any critical decision about the likely cultural heritage sensitivity of an area should not rely solely on the mapped information, but should be made following reference to the Aboriginal Heritage Regulations 2007.

- 54 The following extract show the relevant portions of the State Government map.



- 55 The dark green circles on the map represent registered cultural heritage places and land within 50 metres of these places. According to Nicholas Clark, an archaeologist who gave evidence at the panel hearing, these registered cultural heritage places were likely to have been destroyed (in accordance with relevant permits) during widening of Bass Highway, sometime after their original registration in 1997. In any event, I am instructed that none of these areas affect the Subject Land.
- 56 The “bulge” shown on this map in lighter green reflects a 200-metre radius from a *proposed* extension of the Ramsar wetland into the Deep Creek inlet. This bulge *does* affect the Subject Land.

#### Proposed extension of the Ramsar wetland

- 57 According to Nicholas Clark, the basis of this “bulge” in the sensitivity map is that in late 2013 the boundary of the Western Port Ramsar wetland, and the dataset for mapping that boundary, were amended to become the RAMSAR25 spatial dataset (citing “Western Port Ramsar Site Boundary Description Technical Report”, Victorian Department of Environment and Primary Industries, 2013). According to Clark, this *added* an additional section of Crown Allotment 96B to the dataset. This parcel straddles Deep Creek on the southern side of Deep Creek Street and extends to the western edge of Bass Highway.

- 58 I have accessed the Western Port Ramsar Site Boundary Description Technical Report, published by the Victorian Department of Environment and Primary Industries in 2013. The Introduction to the report relevantly states:

It is a requirement of the Convention on Wetlands that a suitable map or maps are provided for each Ramsar wetland. The Department of Sustainability, Environment, Water, Population and Communities (SEWPAC), requires that both the written description and the spatial data of the Ramsar site boundaries are accurate. This information is used to gazette the boundary of the declared Ramsar wetland in accordance with Section 327 of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). Under the EPBC Act there are requirements for approval of activities which have, or are likely to have a significant impact on the ecological character of a declared Ramsar wetland. Precise identification of site boundaries helps to ensure that the exact boundaries of the Ramsar site can be easily identified, which can facilitate compliance with the EPBC Act as well as its effective enforcement.

The RAMSAR100 spatial dataset is a polygon layer that identifies each Victorian Ramsar area individually. RAMSAR100 was produced in conjunction with a report describing each Ramsar site (DCNR 1995). The Department of Environment and Primary Industries (DEPI) is the custodian of RAMSAR100. Most of the line work in RAMSAR100 was initially derived from 1:100,000 reference data. Because of its broader scale, this data was not always consistent with the cadastre and other more accurate features that have now been used to better define the majority of the Western Port Ramsar Site. The updated spatial definition of Western Port Ramsar Site is identified in a new RAMSAR25 spatial dataset.

This report details the written description of the Western Port Ramsar Site to explicitly define the Ramsar boundaries, along with a accompanying maps. [Emphasis added]

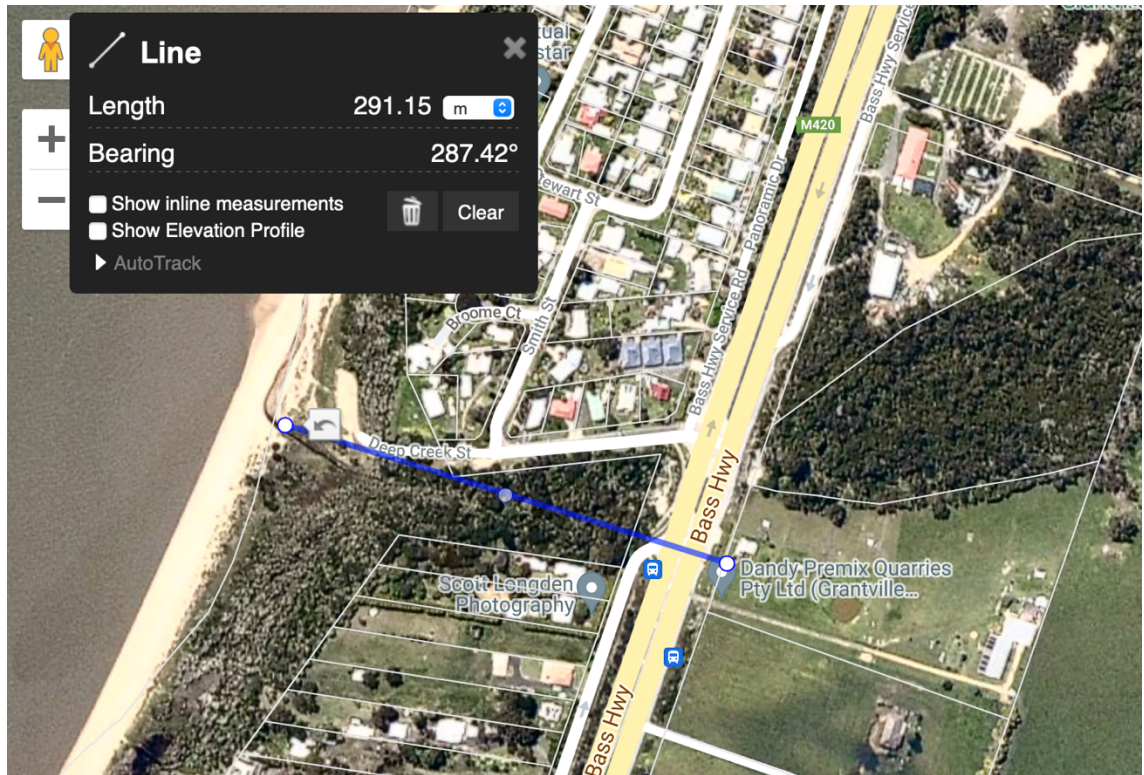
#### Australian Government response

- 59 I am instructed that the Australian Government submitted a Ramsar Information Sheet update to the Ramsar Convention Secretariat in July 2020. This update included a change to the Western Port boundary to reflect that the boundary “has been delineated more accurately” than in the original map supplied. However, in my opinion, having regard to Division 2 of Part 15 of the EPBC Act, the mere submission of such an update has no legal effect. Rather the method envisaged in the EPBC Act is a formal designation by the Commonwealth, followed by the giving of notice in the Government Gazette of such designation. (I note this is required to be done as soon as practicable after the designation.)
- 60 However, the information in the Technical Report has never been used to designate a new boundary of the Western Port Ramsar wetland, or to gazette such a new boundary in accordance with s 327 of EPBC Act.

- 61 Section 327 of the EPBC Act has been used on a number of occasions - see:
- 6 February 2013 - Piccaninnie Ponds Karst Wetlands
  - 4 December 2014 - Becher Point Wetlands
  - 3 November 2015 - Narran Lake Nature Reserve
  - 29 March 2018 - Glenelg Estuary and Discovery Bay Wetlands.
- 62 It is true that a failure to give the required notice in the Government gazette does not affect the status of an area as a declared Ramsar wetland. But this provision only operates if there has been a lawful designation, by the Commonwealth, of a declared Ramsar wetland or of a new area for a declared Ramsar wetland. And, based on the information set out herein, that has not happened.
- 63 Thus, in my opinion, the defined Ramsar wetland for Western Port is the original defined area.

#### Land Survey

- 64 Dandy Premix engaged Mr Eriks Birzulis, a registered land surveyor, to identify the precise location of the original Western Port Ramsar wetlands boundary in the area near the Grantville Quarry, as shown in the Original Ramsar Designation.
- 65 Mr Birzulis examined the Original Ramsar Designation, carried out a survey of the area near the Grantville Quarry, and prepared a report setting out his opinions and conclusions.
- 66 Mr Birzulis concludes that the Western Port Ramsar wetland boundary, as detailed in the Original Ramsar Designation, and in the plans referred to above:
- a aligns with the approximated high tide mark in the area closest to the Grantville Quarry; and
  - b at its closest point is a minimum of 291.5 metres from the title boundary of the Grantville Quarry.
- 67 This means that the Subject Land is not within, or within 200 metres of, a declared Ramsar wetland.
- 68 This also means that the Subject Land is not within 200 metres of the high-water mark of the coastal waters of Victoria or any sea within the limits of Victoria. (This being another trigger of cultural sensitivity.)
- 69 And, on my instructions, the Subject Land is not within 50 metres of a registered cultural heritage place.
- 70 Mr Birzulis' conclusion can be understood by reference to the following annotated NearMap image.



### The wise approach

71 Notwithstanding that the Subject Land is not within an area of cultural heritage sensitivity under the AH Act and AH Regulations, such that a CHMP is *not* required, in my opinion, it is open to the Minister to consider Aboriginal heritage issues in relation to the amendment application and to impose a condition on an amended permit to address such issues. Such a condition needs to relate to the amendment sought by the permit.

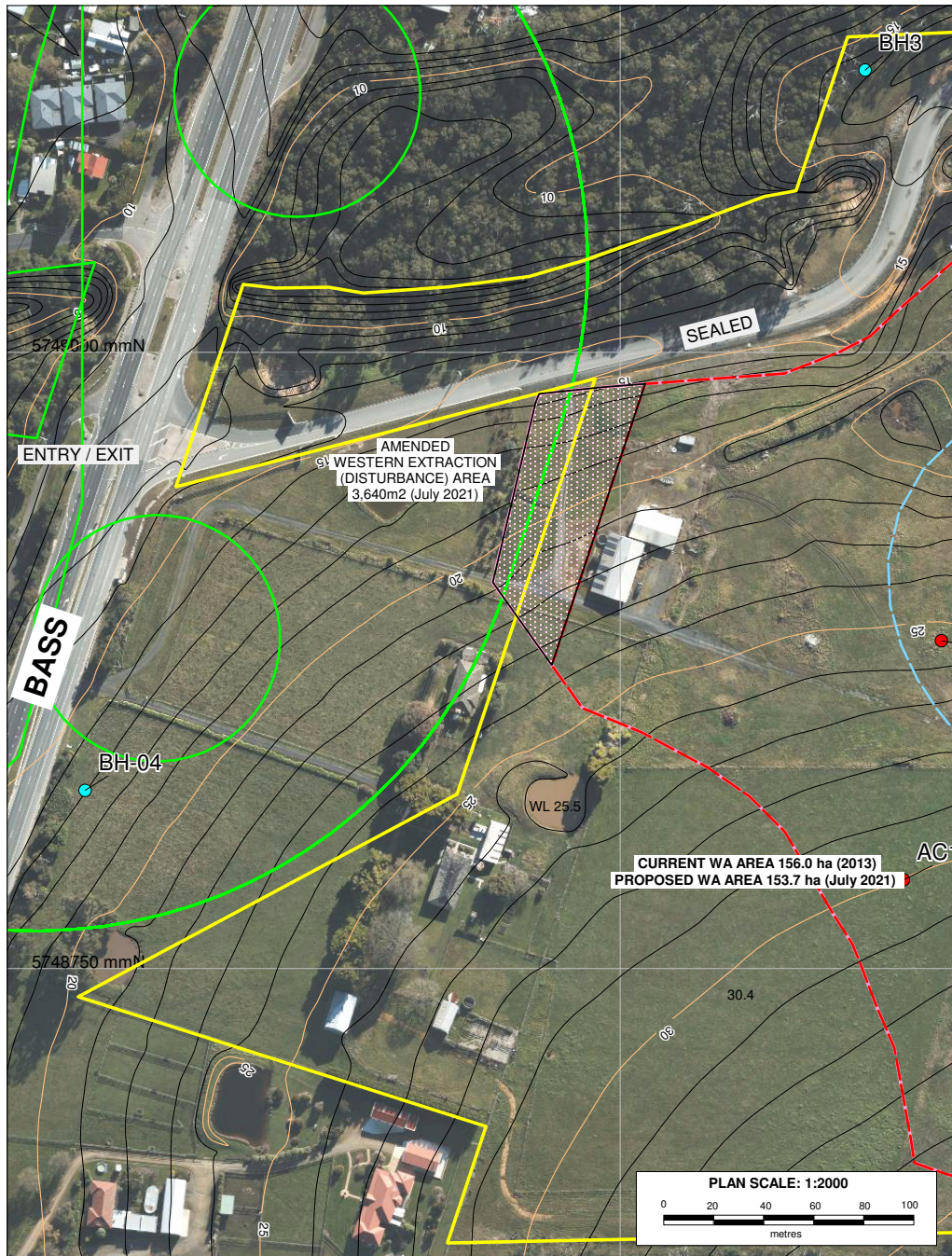
72 I am instructed that Dandy Premix would be prepared to accept a permit condition requiring the layout of the Grantville Quarry to be amended so that:

The existing approved Work Authority boundary is setback eastwards so that any undisturbed areas are excluded from the area identified as sensitive on the State government mapping.

The existing approved extraction boundary and any other works associated with the Amendment Application are also setback behind the amended Work Authority boundary.

73 The attached revised layout plan illustrates how these changes could be implemented. This plan could be referenced in a condition requiring amended plans. (I am instructed that this proposal is consistent with the submissions made to the Panel.)





- 74 The effect of the proposed permit condition would be to ensure that the extraction area for the quarry was *beyond* 200 metres from the *proposed* extension to the Western Port Ramsar wetland, thus avoiding significant ground disturbance in this area.
- 75 In my opinion, this would be a wise response to the circumstances; as well it would be a practical response, as it avoids the need to form a concluded view as to the legal status of the proposed extension to the Western Port Ramsar wetland.

76 It is important that Aboriginal heritage be respected, but, equally, burdens ought not be placed on development unless required by law. In this instance, although no CHMP is, or ought to be, required, there ought be a response, by way of permit condition, to avoid any *actual* impact on land that might, in time, be regarded as an area of cultural heritage sensitivity.

A handwritten signature in black ink, appearing to read 'Stuart Morris', written in a cursive style.

Stuart Morris

12 October 2021