

EXPLANATORY STATEMENT

Issued by authority of the Minister for the Environment

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

*Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site)
Emergency Declaration 2021 - Extension*

Legislative Authority

Part 2 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Act)* provides for the protection of significant Aboriginal areas and objects. Under subsection 9(1) of the Act, the Australian Government Minister for the Environment may, by legislative instrument, make an emergency declaration to preserve and protect a significant Aboriginal area that is under serious and immediate threat of injury or desecration.

Under subsection 9(3) of the Act, the Minister may, by legislative instrument, also extend the effect of an emergency declaration for a further period of 30 days after the day on which a declaration under subsection 9(1) would otherwise cease to have effect.

Purpose

The purpose of this declaration is to extend the effect of the emergency declaration, *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 (Declaration)* made under subsection 9(1) of the Act, to preserve or protect an area of Wahluu Mount Panorama (**specified area**) for a further period of 30 days after the day on which the Declaration would otherwise cease to have effect.

Background

On 20 December 2018, the former Minister for the Environment, the Hon Melissa Price MP, received an oral application from the Wiradyuri Traditional Owners Central West Aboriginal Corporation seeking the preservation or protection of the specified area from injury or desecration.

On 5 March 2021, the Minister for the Environment, the Hon Sussan Ley MP, made the Declaration to preserve and protect the specified area from the serious and immediate threat of injury or desecration attributed to a proposed go-kart track development by Bathurst Regional Council.

In making the Declaration, the Minister considered the application and a related section 10 report prepared in accordance with the Act, and was satisfied, that the specified area is a significant Aboriginal area that was under serious and immediate threat of injury or desecration from the proposed go-kart track development by Bathurst Regional Council.

The Declaration was intended to be an interim measure and is in place for 30 days while further assessment is undertaken. This instrument, the *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 –*

Extension (Extension Declaration), is intended to extend the Declaration to allow further consultation needed to process the related section 10 application for the specified area.

Impact and Effect

This instrument extends the effect of the Declaration for a further 30 days, which prevents works that would be carried out in a way that will or is likely to cause injury or desecration to the specified area.

Consultation

Given the urgency, consultation was not specifically undertaken in relation to the Declaration and the Extension Declaration, however broad consultation had already been undertaken in preparation of the section 10 report. The broader consultations involved the applicants, being the Wiradyuri Traditional Owners Central West Aboriginal Corporation, the Bathurst Regional Council, and other parties with interests that may be affected by the decision of the Minister whether to make a section 10 declaration.

The New South Wales Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs and the Arts, the Hon Don Harwin MLC was consulted on making a declaration under the Act, in fulfilment of the requirements of subsection 13(2) of the Act.

Details

Part 1 – Preliminary matters

Part 1 sets out the preliminary matters of this instrument.

Section 1 provides the name of this instrument.

Section 2 provides the commencement information for this instrument.

Section 3 provides the day on which this instrument is repealed.

Section 4 provides the authority under which this instrument is made.

Section 5 provides the definitions used in this instrument.

Part 2 – Extension of emergency declaration to preserve and protect a significant Aboriginal area

Part 2 of this instrument provides for the extension of the effect of the initial emergency declaration to preserve and protect a significant Aboriginal area.

Subsection 6(a) declares that the Declaration shall remain in effect for a period of 30 days beyond the day on which it would otherwise cease to have effect. As a result, the Declaration will remain in force until the expiration of 60 days after the day on which it came into effect, which is the maximum period allowed by subsection 9(3) of the Act.

Subsection 6(b) provides for the repeal of the Declaration to be extended until the day after the end of the 60 day period for which it will remain in force under subsection 6(a). Subsection 6(c) provides that the Extension Declaration will have effect despite Part 2, section 4 of the Declaration.

Other

The *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 – Extension* is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment A.

The *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 - Extension* is a legislative instrument for the purposes of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 - Extension

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of this legislative instrument is to extend the effect of the *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 (Declaration)* for a further period of 30 days beyond the day on which it would otherwise cease to have effect.

Subsection 9(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the **Act**) allows the Australian Government Minister for the Environment to make, by legislative instrument, emergency declarations in relation to areas where the Minister is satisfied that the area is a significant Aboriginal area, and that it is under serious and immediate threat of injury or desecration. Subsection 9(3) of the Act allows the Minister to extend the effect of an emergency declaration, by legislative instrument, for a period of 60 days after the day the emergency declaration made under subsection 9(1) came into effect.

The Declaration is intended to be an interim measure and is only in place for 30 days while further assessment is undertaken. This instrument, the *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Emergency Declaration 2021 – Extension (Extension Declaration)*, is intended to extend the protection of the Declaration to allow further consultation needed to process the related section 10 application for the specified area.

Human rights implications

This legislative instrument engages the following rights:

- the right to self-determination;
- the right to enjoy and benefit from culture; and
- the right to equality and non-discrimination.

The right to self-determination

The rights of peoples to freely determine their political status and freely pursue their economic, social and cultural development is contained in article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right is a collective right applying to groups of peoples, in contrast to rights to culture which protect the rights of individuals within a group.

This legislative instrument promotes the right to self-determination for people of Aboriginal and Torres Strait Islander descent, and in particular for the Wiradyuri people, as it preserves and protects the specified area from injury or desecration until the Minister is in a position to decide on whether to make a longer-term declaration to protect the area, which could enable the Wiradyuri to observe and take part in cultural practices on their own terms.

Protection of the specified area against immediate unauthorised action, development or other threats could preserve any social and cultural development of the Wiradyuri people without outside interference until a decision is made as to the long-term protection of the specified area. This is particularly important as the specified area is currently under threat by the proposed development of a go-kart track that would result in the permanent alteration of the topography at part of the summit of Wahluu, Mount Panorama and will remove or constrain access to part of the summit of Wahluu, Mount Panorama. Relevantly, the Wiradyuri people have been involved in the process which has led to the Declaration and the subsequent making of this instrument. The application for the Declaration was made by the Wiradyuri Traditional Owners Central West Aboriginal Corporation, a group of Aboriginal Elders and traditional owners of Wahluu.

The right to enjoy and benefit from culture

The right to enjoy and benefit from culture is contained in Article 27 of the ICCPR and Article 15 of the ICESCR. Article 27 of the ICCPR protects the rights of individuals belonging to ethnic, religious and linguistic minorities within a country to enjoy their own culture, practise their own religion and use their own language. Article 15 of the ICESCR protects the right of all persons to take part in cultural life.

In General Comment No. 23 (CCPR/C/21/Rev.1/Add.5 (1994)), the Human Rights Committee stated that Article 27 is directed towards ‘ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole’. The Committee also observed that ‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples... The enjoyment of those rights may require positive legal measures of protection’.

In General Comment No. 21 (E/C.12/GC/21 (2009)) the United Nations Committee on Economic, Social and Cultural Rights stated that the ‘strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity’.

This instrument promotes the right to enjoy culture as it ensures the protection of the land and natural resources within the specified area and preserves it for the Wiradyuri people to use and enjoy in accordance with information about Wiradyuri tradition known at the time.

This instrument ensures that the area containing part of the summit, being the shoulder of the fallen warrior Wahluu (Mt Panorama) that may be of particular significance is not destroyed

or damaged before the Minister has adequate time to consider and decide on whether to make a declaration to protect the declared area for a longer term.

The right to equality and non-discrimination

Articles 2, 16 and 26 of the ICCPR affirm the rights of all people to be treated equally. Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further prohibits discrimination on the basis of race.

This instrument extends the effect of the Declaration, which specifies the declared area as a significant Aboriginal area and prohibits any action that will or is likely to adversely affect the use or significance of the declared area in accordance with Aboriginal tradition. In doing so, the instrument favours the interests of the Wiradyuri people over those of other persons on the basis of race, with the result that other persons do not benefit from being able to take particular actions in or near the declared area.

While this instrument constitutes differential treatment on the basis of race, it can be characterised as a ‘special measure’ with the meaning of Article 1(4) of the ICERD. Article 1(4) provides that ‘special measures’ are deemed not to be discrimination. Special measures are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms.’ For a measure to be characterised as a ‘special measure’ it must:

- be for a particular group or individuals;
- be taken for the sole purpose of securing the adequate advancement of those groups or individuals;
- be necessary; and
- not continue after its objectives have been achieved.

This instrument meets these criteria because it:

- preserves and protects the declared area for the benefit of the Wiradyuri people;
- has the sole purpose of protecting the rights of the Wiradyuri people to continue to enjoy their own culture and undertake traditional activities in the declared area until further information is obtained;
- is necessary, otherwise any rights of the Wiradyuri people may have in relation to the declared area will not be preserved; and
- continues for a period of a further 30 days from the day the Declaration took effect, which is intended to preserve and protect the declared area from the serious and immediate threats of injury or desecration until it is decided whether the circumstances warrant further action.

Conclusion

The Legislative Instrument is compatible with human rights because it promotes the protection of human rights and to the extent that it may limit certain human rights, those limitations are reasonable, necessary and proportionate.

**The Hon. Sussan Ley MP
Minister for the Environment**