

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)
Declaration 2021*

Legislative Authority

Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Act) provides that the Minister may, by legislative instrument, make a declaration preserving and protecting a specified area from injury or desecration if, among other things, he or she is satisfied that the area is a significant Aboriginal area and that it is under threat of injury or desecration.

Purpose

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Declaration 2021* (the Declaration) is to preserve and protect the significant Aboriginal area at the Wahluu Mount Panorama site (the declared area) from injury or desecration.

Background

The Act preserves and protects from injury or desecration significant Aboriginal areas and objects that are of particular significance to Aboriginal and Torres Strait Islander people in accordance with Aboriginal or Torres Strait Islander traditions. This includes an area of land in Australia or beneath Australian waters, an area of water in Australia or an area of Australian waters. Part II of the Act provides for the protection of significant Aboriginal areas and objects.

The Act recognises the body of traditions, observances, customs and beliefs of Aboriginal and Torres Strait Islanders generally or of a particular community or group thereof, including any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

Section 10 of Part II of the Act provides that where the Minister:

- Receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration
- Is satisfied:
 - That the area is a significant Aboriginal area; and
 - That it is under threat of injury or desecration;
- Has received a report under subsection 10(4) of the Act in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and
- Has considered such other matters as he or she thinks relevant;

He or she may, by legislative instrument, make a declaration in relation to the area.

On 8 February 2019 (executed 18 February 2019), the then Minister for the Environment, received an oral application from the Wiradyuri Traditional Owners Central West Aboriginal Corporation seeking the preservation or protection of a specified area from injury or desecration.

The Minister received a report under subsection 10(4) of the Act in relation to the specified area that is the subject of the application and considered the report and the representations attached to the report.

Before the report was submitted to the Minister, a notice was published in the *Gazette* and in the *Western Advocate* – a local newspaper circulating in the area of Bathurst:

- Stating the purpose of the application made under subsection 10(1) of the Act and the matters required to be dealt with in the report
- Inviting interested persons to furnish representations in connection with the report by 1 November 2019 (subsequently extended to 7 February 2020) that date being not less than 14 days after the date of publication of the notice in the *Gazette*; and
- Specifying the address to which such representations may be furnished.

The report gave due consideration to those representations and those representations were attached to the report when it was submitted to the Minister.

The report in relation to the area dealt with the matters in subsection 10(4) of the Act, including:

- The particular significance of the area to Aboriginals
- The nature and extent of the threat of or injury to, or desecration of the area
- The prohibitions and restrictions to be made with respect to the area
- The effect making the declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginals to whom the area is significant.

On 8 October 2020, the Minister consulted the New South Wales Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, the Hon Don Harwin MLC, as to whether there is, under a law of NSW, effective protection of the declared area from the threat of injury or desecration, in accordance with subsection 13(2) of the Act. Minister Harwin's response stated that Aboriginal objects within the specified area are protected under NSW law but that there was at the time no legislative framework in place to protect the intangible Aboriginal cultural heritage values of the specified area.

The Minister considered the application and the report and was satisfied that the declared area is a significant Aboriginal area and that it was under threat of injury or desecration from a proposed go-kart track development by Bathurst Regional Council. Accordingly, the Minister decided to make a declaration under section 10 of the Act to preserve or protect the declared area from injury or desecration.

Impact and Effect

The Declaration preserves and protects the area of significance to Aboriginals at the Wahluu Mount Panorama site from injury or desecration for a period of 10 years commencing on 5 May 2021.

Consultation

Targeted consultation with 8 parties identified as having proprietary and pecuniary interest in a declaration being made was undertaken between 30 March and 15 April 2021. Responses to that consultation have been taken into account by the Minister in making this declaration. Broad consultation was also undertaken in the preparation of the section 10 report, which 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 declaration under section 10 of the Act in relation to the site.

On 8 October 2020, the Minister consulted the New South Wales Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, the Hon Don Harwin MLC, on making a declaration under the Act, in fulfilment of the requirements of subsection 13(2) of the Act. The outcome of that consultation is noted above.

Details/ Operation

Details of the Declaration are set out in Attachment A.

Other

The Declaration 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 B.

The Declaration is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Declaration 2021*

Section 1 – Name

This section provides that the name of the declaration is the *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Declaration 2021*.

Section 2 – Commencement

This section provides for the declaration to commence on 5 May 2021.

Section 3 – Authority

This section provides that the declaration is made under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

Section 4 – Definitions

This section sets out the definitions used in the instrument, including the definition of *declared area* (which is relevant to section 5, inserted by item 1 below) and definitions of *bulk earthworks* and *clearing of vegetation* (which are relevant to subsection 6(2), inserted by item 2 below).

Part 2 – Declaration of an area as a significant Aboriginal area to be preserved and protected from injury or desecration

Item 1 – Section 5

This item declares the specified area of Wahluu/Mout Panorama in Bathurst in New South Wales, identified by the map in this provision as the *declared area* for the purposes of subsection 10(1) of the Act. The map is an accurate topographic map that is to scale.

Item 2 – Section 6

Subsection 6(1) provides that the declared area (identified by the map inserted by item 1 above) is a significant Aboriginal area that is to be preserved and protected from injury and desecration.

Subsection 6(2) provides for the ways in which the declared area is to be protected from injury or desecration. Specifically, a person must not, within the declared area:

- Undertake any clearing of vegetation; or
- Undertake any bulk earthworks.

Subsection 6(2) further provides that a person must also not:

- Construct any buildings on the declared area; or
- Seal any part of the declared area (including with bitumen or concrete); or

- Undertake any action that will, or is likely to, directly alter the topography or landform of the declared area.

The note to subsection 6(2) refers the reader to subsection 22(1) of the Act, which provides that a person commits an offence if the person engages in conduct that contravenes a provision of a declaration made under Part II of the Act in relation to a significant Aboriginal area and sets out the penalty for such contravention.

New subsection 6(3) sets out exceptions to subsection 6(2) by clarifying the activities that are permitted in the declared area. These are:

- The enjoyment of a lawful right of access to or use of land within the declared area
- The use of the declared area as a campsite
- The use of the declared area otherwise as a public open space; and
- Any activities necessary to maintain the public safety of the declared area, consistent with its use as a public open space,

provided the use, access or activities do not involve any of the activities in subsection 6(2). The intention of this subsection is to clarify that ongoing usage of the area as public open space is still permitted.

Item 3 – Section 7

This section specifies the period for which the instrument will remain in effect, in accordance with subsection 12(2) of the Act. The instrument will remain in effect for 10 years from the date it commences. The instrument will commence on 5 May 2021 (see section 2 above).

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) Declaration 2021

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

Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Act) allows the Australian Government Minister for the Environment to make declarations in relation to areas where the Minister receives a valid application by or on behalf of an Aboriginal or a group of Aboriginals and is satisfied that the area is a significant Aboriginal area and that it is under threat of injury or desecration.

Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Declaration 2021 (the Declaration) is a declaration made by the Minister under section 10 of the Act. The purpose of the Declaration is to preserve and protect the significant Aboriginal area at the Wahluu Mount Panorama Site from the threat of injury or desecration attributed to a proposed go-kart development by the Bathurst Regional Council.

The Declaration contains a list of prohibited conduct, including any action that will or is likely to threaten the topography of the declared area.

Human rights implications

This Declaration engages the following rights:

- The right to self-determination
- The right to enjoy and benefit from culture
- The right to equality and non-discrimination; and
- The right to freedom of thought, conscience and religion or belief.

The right to self-determination

The rights of peoples to freely determine their political status and freely pursue their economic, social and cultural development are 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 Declaration 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 the social and cultural development of the Wiradyuri people and enables them to continue to observe and take part in their cultural practices on their own terms.

The declared area is of particular significance to the Wiradyuri people as Wahluu, Mount Panorama, and in particular its topography, is representative of the fallen warrior Wahluu, a figure that is of significance to the cultural narratives of the Wiradyuri people. The proposed development of a go-kart track 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. This would interfere with the right of the Wiradyuri people to freely pursue their social and cultural development.

Relevantly, the Wiradyuri people have been involved in the process which has led to the Declaration. 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, Mount Panorama.

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’.

The Declaration ensures that the area containing part of the summit of Wahluu, Mount Panorama, being the shoulder of the fallen warrior Wahluu, that is of significance to the Wiradyuri tradition is not destroyed or damaged. This promotes the right to enjoy culture as it ensures the protection of the land and natural attributes within the declared area and preserves it for the Wiradyuri people to use and enjoy in accordance with Wiradyuri tradition.

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.

The Declaration 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 Declaration 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 the declared area.

While this Declaration constitutes differential treatment on the basis of race, it can be characterised as a ‘special measure’ within the meaning of Article 1(4) of the ICERD. Article 1(4) provides that special measures shall not be deemed as racial discrimination, provided that the measure:

- is taken for the sole purpose of securing adequate advancement of a certain racial or ethnic group or individual;
- is necessary to ensure the equal enjoyment or exercise of human rights and fundamental freedoms for the group or individual;
- does not, as a consequence, lead to the maintenance of separate rights for different racial groups; and
- is not continued after the objectives for which it was taken have been achieved.

This instrument meets the requirements of Article 1(4) 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;
- is necessary, as otherwise the rights of the Wiradyuri people in relation to the declared area will not be preserved; and
- continues for a period of 10 years from the day Declaration commences, which is intended to ensure the preservation and protection of the declared area from threats of injury or desecration arising specifically from the proposed go-kart track.

The right to freedom of thought, conscience and religion or belief

Article 18 of the ICCPR protects the right of individuals to think freely, and to entertain ideas and hold positions based on conscientious or religious or other beliefs. Subject to certain limitations, persons also have the right to demonstrate or manifest religious or other beliefs, by way of worship, observance, practice, and teaching.

The Declaration promotes this right as it preserves and protects the declared area that is considered to be a spiritually significant area by the Wiradyuri people. The instrument allows

the local indigenous community to express their spiritual and cultural connection to the area and practice their beliefs.

Conclusion

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

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