

EXPLANATORY STATEMENT

Issued by authority of the Minister for the Environment and Water

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Aboriginal and Torres Strait Islander Heritage Protection (Kings Plains) Declaration 2024

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 (Kings Plains) Declaration 2024* (the Declaration) is to preserve and protect the area made up of part of the Belubula River, its headwaters and its springs at Kings Plains, near Blayney, New South Wales (NSW) (the declared area) from injury or desecration.

The Declaration is made for the purposes of section 10 of the Act.

Relevant legislative provisions

The Act recognises the body of traditions, observances, customs and beliefs of Aboriginal and Torres Strait Islander people 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.

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.

Section 10 of the Act provides that the Minister may, by legislative instrument, make a declaration in relation to an area if 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 (paragraph 10(1)(a) of the Act); and
- is satisfied that:
 - the area is a significant Aboriginal area (subparagraph 10(1)(b)(i) of the Act); and

- the area is under threat of injury or desecration (subparagraph 10(1)(b)(ii) of the Act);
- has received a report under subsection 10(4) of the Act in relation to the area from a person (the Reporter) nominated by him or her and has considered the report and any representations attached to the report (paragraph 10(1)(c) of the Act); and
- has considered such other matters as he or she thinks relevant (paragraph 10(1)(d) of the Act).

Section 3 of the Act defines *significant Aboriginal area* to mean an area of land in Australia or in or beneath Australian waters, an area of water in Australia, or an area of Australian waters, being an area of particular significance to Aboriginals in accordance with Aboriginal tradition. *Aboriginal tradition* is defined in section 3 as meaning the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

Subsection 3(2) of the Act has the effect that, for the purposes of this Act, an area shall be taken to be injured or desecrated if:

- it is used or treated in a manner inconsistent with Aboriginal tradition;
- by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
- passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition.

Subsection 3(3) of the Act has the effect that an area shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

A declaration made under subsection 10(1) in relation to an area is required under section 11 to describe the area with sufficient particulars to enable the area to be identified, and to contain provisions for and in relation to the protection and preservation of the area from injury or desecration.

Subsection 13(2) of the Act requires the Minister, before making a declaration under subsection 10(1), to consult with the appropriate Minister of the relevant State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration.

Section 22 of the Act has the effect that failure to comply with a declaration made under subsection 10(1) is an offence.

Background

On 24 October 2020, the then Minister for the Environment, the Hon Sussan Ley MP (the former Minister) received a written application by Ms Nyree Reynolds (the applicant) under paragraph 10(1)(a) of the Act seeking the protection of an area known as Kings Plains, near

Blayney, NSW (the specified area). The application sought the preservation and protection of the specified area from injury or desecration by requesting that the Minister make a declaration under section 10 of the Act.

The specified area is part of a site proposed for the development of the McPhillamys Gold Mine, by Regis Resources Pty Ltd (the proponent).

The applicant and supporting parties claim that the specified area is a significant Aboriginal area because it is of particular significance in accordance with Aboriginal tradition. This claim is on the basis that the Wiradjuri people have a significant spiritual connection to the Belubula River, its headwaters and springs through the overall intangible cultural heritage it embodies, including the Blue Banded Bee Dreaming. They also claim that:

- a. the specified area sits within an important cultural landscape of the Three Brothers Dreaming, containing sacred Songlines, ancestral/culturally modified trees, connections to Aboriginal people past and traditional pre-initiation ceremonies;
- b. the specified area contains Aboriginal sites (including burial sites, an ochre site, artefacts, culturally modified trees and Aboriginal Heritage Information Management System (AHIMS) recorded sites); and
- c. the specified area has national significance due to its history in the Frontier Wars.

The applicant sought protection of the entire specified area because the above features are claimed to be under threat of injury or desecration by the development of the proposed gold mine by the proponent.

On 7 September 2021, the former Minister appointed, under subsection 10(4) of the Act, a reporter to provide a report in relation to Kings Plains.

A notice was published in the *Commonwealth Government Notices Gazette* on 20 October 2021. A notice was also published in the *Central Western Daily* on 28 October 2021. The published notices:

- stated the purpose of the application made under section 10 of the Act and the matters required to be dealt with in the report;
- invited interested persons to furnish representations in connection with the report by 5pm, Saturday 20 November 2021; and
- specified the address to which such representations may be furnished.

The reporter provided their report to the former Minister on 4 May 2022. The report dealt with the matters set out in subsection 10(4) of the Act in relation to the specified area. The report also gave due consideration to the representations provided in response to the notices mentioned above and those representations were attached to the report when it was submitted to the former Minister and, following the change of government, to the Minister.

Impact and effect

The Declaration would preserve and protect the part of the specified area that comprises part of the Belubula River, its headwaters and springs (the declared area) from conduct that will, or is likely to, injure or desecrate the declared area.

Legislative pre-conditions

The application was made by Ms Nyree Reynolds, a Wiradjuri Elder, and sought preservation and protection from injury or desecration of an area known as Kings Plains, near Blayney, NSW.

On this basis, the Minister is satisfied that the application meets the criteria in paragraph 10(1)(a) of the Act.

Significant Aboriginal area

The Minister is satisfied that part of the specified area that comprises the Belubula River, its headwaters and springs (the declared area) is of particular significance to Aboriginal people in accordance with Aboriginal traditions on the basis of the sacred connection the area holds for Wiradjuri people through Dreaming, Storylines and Lore, one of which is the Blue Banded Bee Dreaming.

The Minister accepts that water and water sites are inherently sacred to Wiradjuri people for their centrality to social, ceremonial, and spiritual practices. Specifically, the springs of the Belubula River hold particular significance due to their life-giving nature and their traditional use during times of drought. The intrinsic link between the springs and the Belubula River itself is embodied in the Belubula River's name meaning River Pair which references the river on the surface and the continued groundwater supply provided by the springs.

The Minister is satisfied that the source and validity of the Blue Banded Bee Dreaming as a tradition or belief of particular significance to the Wiradjuri people, and its connection to the declared area has been sufficiently evidenced by the applicant and the Wiradjuri Traditional Owners Central West Aboriginal Corporation (the WTOCWAC). In particular, the Minister accepts that the Blue Banded Bee Dreaming describes the creation of geographic features consistent with the Belubula Headwaters and its springs.

The Minister is also satisfied that the declared area is of particular significance to Aboriginal people in accordance with Aboriginal traditions on the basis that it sits within a broader cultural landscape in which that part of the specified area was used for pre-initiation ceremonies.

For these reasons, the Minister finds that the part of the specified area that comprises the Belubula River, its headwaters and springs is of particular significance to Aboriginal people in accordance with Aboriginal traditions. The Minister is therefore satisfied that the declared area is a significant Aboriginal area (within the meaning of the Act) and meets the criteria at subparagraph 10(1)(b)(i) of the Act.

The applicant also submits that the specified area holds particular significance due to the presence of the Dungeon Burial site, registered on the NSW AHIMS. The applicant's claim is on the basis of evidence documenting the discovery of skeletal human remains at the Dungeon Property which were identified at the time to be those of an Aboriginal person.

Owing to their state, the applicant claims that the burial predates contact, and in light of its proximity to a nearby ochre site, the burial is likely to have been conducted in accordance with Aboriginal tradition.

The Minister accepts the applicant's claim that the specified area includes the Dungeon Burial site and considers there is sufficient evidence to conclude that the Dungeon Burial site is of particular significance to Aboriginal people in accordance with Aboriginal traditions.

For this reason, the Minister is satisfied that the part of the specified area that comprises the Dungeon Burial site is a significant Aboriginal area (within the meaning of the Act) and meets the criteria at subparagraph 10(1)(b)(i) of the Act.

In contrast, the Minister is not satisfied that the remaining part of the specified area is a significant Aboriginal area for the purposes of subparagraph 10(1)(b)(i) of the Act, as there is insufficient evidence of the Aboriginal traditions that make the area of particular significance to Aboriginal people.

Specifically, while the Minister accepts there is archaeological evidence (including the identified artefact scatters, isolated finds, camp ovens and stone tools) of occupation of the specified area by Aboriginal people, there is no information to suggest that these artefacts and finds are otherwise tied to Aboriginal tradition.

In addition, the Minister considers there is insufficient evidence that:

- a. the Pounds Lane Ochre site falls within the specified area; or
- b. specific Frontier War incidents or events occurred within the specified area, or that Frontier War events are otherwise tied to Aboriginal traditions.

For these reasons, the Minister is not satisfied that the parts of the specified area other than the Belubula River, its headwaters and springs, and the Dungeon Burial site meets the criteria at subparagraph 10(1)(b)(i) of the Act.

Threat of injury or desecration

As the Minister was only satisfied that part of the specified area (being the declared area and the Dungeon burial site) was a significant Aboriginal area, the Minister only considered whether that part of the specified area was under threat of injury and desecration for the purposes of subparagraph 10(b)(ii) of the Act.

The applicant claims the declared area is under threat of injury or desecration because of the activities associated with the proposed McPhillamys Gold Mine. In particular:

- a. the development of the mine is claimed to be inconsistent with Aboriginal tradition because it will adversely affect the traditional use of the area by impacting access by the Aboriginal community to the area and increase the risk of vandalism, loss of seclusion and privacy of the area; and
- b. the development of a mine, and in particular, a tailings storage facility, will cause physical damage to the specified area and restoration of the site will result in an altered watercourse of the Belubula River. These actions would be inconsistent with Aboriginal tradition as it would physically damage the watercourse. It would also

disrupt the intangible values and connection between the watercourse and the Blue Banded Bee Dreaming and traditional ceremonies that were historically conducted in the declared area.

The applicant also claims there is a threat of injury or desecration to the Dungeon Burial site from heavy machinery and project extension plans.

In relation to the declared area, the Minister accepts that the tailings storage facility required for the development of the mine will impact the Belubula River, its headwaters and springs in a manner inconsistent with Aboriginal tradition as it will cause physical and intangible damage to the Belubula River, its headwaters and springs through the construction and use of the tailings storage facility.

The Minister also accepts that the proponent's planned rehabilitation of the mine site does not adequately address the restoration of damage or injury to the Belubula River, its headwaters or springs, as it would still result in permanent realignment of the river headwaters and damage to the springs. The Minister considers that the permanent realignment of the Belubula River would effectively destroy the area that is considered to be the headwaters, and that this would damage the sacredness of the watercourse as well as disrupt the connection between the watercourse and the Blue Banded Bee Dreaming and traditional ceremonies that were historically conducted in the area.

For these reasons, the Minister considers that there is sufficient evidence to conclude that declared area is under threat of injury or desecration from the activities associated with the McPhillamys Gold Mine.

The Minister is therefore satisfied that the declared area meets the criteria at subparagraph 10(1)(b)(ii) of the Act.

In contrast, the Minister considers that there is insufficient evidence to be satisfied that Dungeon burial site is under threat of injury or desecration. This is because the Minister accepts that:

- a. the Dungeon Burial site is outside of the direct disturbance footprint by approximately 600 metres; and
- b. there is no evidence that supports the claim that the project impact site will be extended or that heavy machinery will be used outside of the project site in a manner that would injure or desecrate the Dungeon Burial site; and
- c. insufficient evidence has been provided to establish how the loss of access or risk of vandalism, loss of seclusion and privacy of the area will result in a threat of injury or desecration to the Dungeon Burial site. In particular, loss of access to the Dungeon Burial site will not occur as a result of the project, as access does not currently exist.

For these reasons the Minister is not satisfied that the Dungeon Burial site meets the criteria at subparagraph 10(1)(b)(ii) of the Act.

Consideration of report

In deciding whether to make a declaration, the Minister considered, for the purposes of paragraph 10(1)(c) of the Act, the report provided by the reporter and the representations attached to the report. This included consideration of the matters listed at subsection 10(4) of the Act.

Effective state protection

Following consultation with the relevant NSW Ministers, the Minister is satisfied that there is nothing in NSW law that would prevent the likely injury or desecration to the part of the Belubula River, its headwaters and springs that make up the declared area. On this basis, the Minister is satisfied there is, not, under a law of that State, effective protection of the declared area from the threat of injury or desecration.

Decision to make a declaration

As the Minister was satisfied that the declared area was a significant Aboriginal area and under threat of injury or desecration, the Minister decided to make a declaration under section 10 of the Act to preserve or protect the declared area from injury or desecration.

Consultation

Required statutory consultation

In accordance with subsection 13(2) of the Act, the Minister consulted with:

- a. the NSW Minister for Climate Change, Energy, the Environment and Heritage, the Hon Penny Sharpe MLC;
- b. the NSW Minister for Aboriginal Affairs and Treaty, the Hon David Harris MP; and
- c. the NSW Minister for Natural Resources, the Hon Courtney Houssos MLC,

in relation to whether NSW law provides effective protection of the declared area from the threat of injury or desecration.

In addition, the former Minister consulted with the former NSW Minister for State Growth, Minister for Public Services and Employee Relations, Aboriginal Affairs and the Arts, the Hon Don Harwin MLC.

From the outcomes of the consultation the Minister is satisfied that NSW law does not provide effective protection of the declared area from threat of injury or desecration.

Other consultation conducted

Consultation was undertaken by the reporter as part of the preparation of the report. This consultation involved the applicant, the WTOCWAC, the proponent, the Orange Local Aboriginal Land Council (OLALC), and other parties with interests that may be affected.

On 10 June 2022 and 17 June 2022 (Round 1), 17 August 2022 (Round 2), 7 September 2022 (Round 3), 19 April 2023 and 9 May 2023 (Round 4) in the interest of procedural fairness, the Department of Climate Change, Energy, the Environment and Water (the Department) provided the applicant, the proponent, the WTOCWAC, the Belubula Headwaters Protection Group (BHPG) and other interested individuals an opportunity to comment and provide

submissions. Responses were received from the applicant, the proponent, the WTOCWAC, the BHPG and one other interested individual. The Minister had regard to this information when deciding to make the Declaration, and in relation to the scope of the Declaration.

Between 8 January 2024 and 19 January 2024 (round 5), the Department provided the above parties and the OLALC with a further opportunity to comment and provide submissions. Responses were received from the proponent, the WTOCWAC and the OLALC. The Minister had regard to this information when deciding to make the Declaration, and in relation to the scope of the Declaration.

A final opportunity to comment and provide submissions (Round 6) was offered to the applicant, WTOCWAC, OLALC and the proponent between 27 February 2024 and 7 March 2024. A response was received from the WTOCWAC and the proponent. The applicant provided a response as part of the WTOCWAC response. A submission was also received from the Wellington Valley Wiradjuri Aboriginal Corporation. The Minister had regard to this information when deciding to make the Declaration, and in relation to the scope of the Declaration.

As a result of the consultation outlined above, it was considered unnecessary to undertake additional consultation in relation to the specific instrument.

Details and Operation

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

The Declaration commences on the day after registration on the Federal Register of Legislation.

Details of the Declaration are set out in [Attachment A](#).

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](#).

Details of the *Aboriginal and Torres Strait Islander Heritage Protection (Kings Plains) Declaration 2024*

Part 1 – Preliminary

Section 1 – Name

1. This section provides that the name of the legislative instrument is the *Aboriginal and Torres Strait Islander Heritage Protection (Kings Plains) Declaration 2024* (the Declaration).

Section 2 – Commencement

2. This section provides for the Declaration to commence on the day after registration on the Federal Register of Legislation.
3. The commencement day for the Declaration is in accordance with paragraph 14(1)(b) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Act), which provides that a declaration made under Part II of the Act comes into operation on the day after the day of its registration under the *Legislation Act 2003* or such a later date as is specified. Section 10 is located in Part II of the Act.

Section 3 – Authority

4. This section provides that the Declaration is made under section 10 of the Act.

Section 4 – Definitions

5. This section sets out the definitions used in the Declaration. The note provides that a number of expressions used in the Declaration are defined in section 3 of the Act. These include key definitions such as *area* and *significant Aboriginal area*.
6. A key definition in the Declaration is *declared area*. The definition in section 4 is a ‘signpost’ definition and refers readers to section 5 where that term is substantively defined.

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

Section 5 – Declared area

7. Subsection 10(1) of the Act provides that the Minister may, by legislative instrument, make a declaration to preserve or protect a specified significant Aboriginal area that is under threat of injury or desecration.
8. In making the declaration, the Minister must be satisfied that the area is a significant Aboriginal area (within the definition in subsection 3(1) of the Act); and that it is under threat of injury or desecration (within the meaning in subsection 3(2) of the

Act). An assessment of these matters against the legislative criteria is set out at pages 4 to 6 of this explanatory statement.

9. Paragraph 11(a) of the Act provides that such a declaration must describe the area that the declaration relates to with sufficient particulars to enable the area to be identified.
10. This section is made for the purposes of subsection 10(1) and paragraph 11(a) of the Act, and provides that the area specified in subsection 5(2) of the Declaration, that is a significant Aboriginal area, is declared for protection and preservation (subsection 5(1) of the Declaration).
11. Subsection 5(2) of the Declaration provides that the declared area is the area that which comprises part of the Belubula River, its headwaters and its springs, at Kings Plains, near Blayney in New South Wales.
12. The declared area reflects the part of the area specified in the section 10 application for which the Minister was satisfied is both a significant Aboriginal area (within the meaning of subsection 3(1) of the Act) and under threat of injury or desecration (within the meaning in subsections 3(2) and 3(3) of the Act).
13. Subsection 5(3) provides that Schedule 1 to the Declaration sets out a map that indicates the declared area.
14. A decision under subsection 10(1) of the Act to make a declaration is not merits reviewable, as such a decision is of a legislative character. The decision involves the making of a legislative instrument that is not directed towards the circumstances of a particular person but applies to the public generally. The Administrative Review Council has recognised these reasons as justification to exclude merits review in relation to decisions of this name (see paragraphs 3.1 to 3.7 of *What decisions should be subject to merit review?*).
15. However, because the Declaration is a legislative instrument under the *Legislation Act 2003*, the usual Parliamentary scrutiny processes (including disallowance) apply.

Section 6 – Protection and preservation of declared area

16. Paragraph 11(b) of the Act provides that a declaration made under subsection 10(1) of the Act must contain provisions for, and in relation to, the protection and preservation of the area from injury or desecration.
17. This section is made for the purposes of subsection 10(1) and paragraph 11(b) of the Act, and provides for and in relation to the protection and preservation of the declared area from injury and desecration (subsection 6(1) of the Declaration).
18. Subsection 6(2) of the Declaration provides that to protect and preserve the declared area, a person must not engage in any conduct that will, or is likely to, injure or desecrate the declared area.

19. The first note under subsection 6(2) of the Declaration refers readers to subsection 3(2) of the Act, which provides for when an area is taken to be injured or desecrated.
20. The second note under subsection 6(2) of the Declaration refers readers to subsection 22(1) of the Act, which provides that a person commits an offence if the person engages in conduct that contravenes this provision.
21. Subsection 6(3) of the Declaration provides that without limiting subsection 6(2), a person must not:
 - a. undertake any mining activities within the declared area;
 - b. construct any bulk earthworks on the declared area;
 - c. seal any part of the declared area, including with concrete;
 - d. undertake any activity that will, or is likely to, significantly alter the landform or course of water flowing within the declared area;
 - e. conduct any drilling activities or preliminary activities associated with drilling; or
 - f. conduct any clearing activities or preliminary activities associated with clearing;
 - g. disturb native vegetation or soil, in a way that will, or is likely to, damage the declared area.
22. The term ‘mining activities’ is defined in section 4 of the Declaration as meaning activities that include, or are related to, the extraction of materials and minerals from the ground. The term ‘bulk earthworks’ is defined in section 4 of the Declaration as meaning the excavation or other movement of large quantities of soil or rock with the intent or effect of changing the level or elevation of an area of land.
23. The references to preliminary activities associated with clearing and drilling are intended to cover the physical activities that are necessary pre-cursors to drilling or clearing. This may include, for example, activities such as building any roads needed to get to the site, erecting buildings or other structures, using heavy vehicles in the relevant area, and moving items in the relevant area.
24. These activities are intended to provide examples of the prohibited conduct outlined in subsection 6(2). They do not limit any conduct that will, or is likely to, injure or desecrate the declared area.

Schedule 1 – Map of declared area – Kings Plains, New South Wales

25. Schedule 1 to the Declaration provides for a map of the declared area, as described in subsection 5(2). This area comprises part of the Belubula River, its headwaters and its springs, at Kings Plains, near Blayney in NSW.

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 (Kings Plains) Declaration
2024**

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 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Act) provides for the preservation and protection of areas, objects and remains that are of particular significance to Aboriginal and Torres Strait Islander persons from injury or desecration. This includes areas, or objects and remains, that are in Australia or in Australian waters.

Part II of the Act provides for the protection of significant Aboriginal areas and objects. Section 10 of the Act allows the Minister 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, is satisfied that the area is a significant Aboriginal area and that it is under serious and immediate threat of injury or desecration, has received a report in relation to the area that includes certain matters, and has considered other matter he or she thinks relevant.

The *Aboriginal and Torres Strait Islander Heritage Protection (Kings Plains) Declaration 2024* (the Declaration) is made by the Minister under section 10 of the Act. The purpose of the Declaration is to preserve and protect the declared area from the threat of injury or desecration. The declared area is the area made up of part of the Belubula River, its headwaters and its springs, Kings Plains, near Blayney, New South Wales (NSW).

Consistent with section 10 of the Act, the Minister was satisfied that the declared area is a significant Aboriginal area and that it is under threat of injury or desecration from development through gold mining.

Human rights implications

The Declaration engages the following rights:

- right to self-determination in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- right to enjoy and benefit from culture in Article 27 of the ICCPR and Article 15 of the ICESCR;

- right to equality and prohibition on discrimination in Articles 2, 16 and 26 of the ICCPR and Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- right to freedom of thought, conscience and religion or belief in Article 18 of the ICCPR.

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 ICCPR and the 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.

The Declaration promotes the right to self-determination for people of Aboriginal and Torres Strait Islander descent, and in particular for the Wiradjuri Traditional Custodians, as it preserves and protects the declared area from injury or desecration.

The declared area is of particular significance to Aboriginal people as it contains sacred watercourses that are tied to Dreaming stories and ceremonies of Wiradjuri people. The significance of the declared area has been attested to in detailed information provided by the applicant and supporting parties, which has been accepted by the Minister.

The Declaration will prohibit any person from conducting an activity that will, or is likely to, injure or desecrate the declared area for the period of the declaration. This includes mining activities, bulk earthworks, clearing activities, disturbing native vegetation or soil in a way that will, or is likely to, damage the declared area, or any activity that will, or is likely to, significantly alter the landform or course of water flowing within the declared area.

Therefore, the Declaration promotes the right to self-determination under Article 1 of the ICCPR and Article 1 of the ICESCR. It positively engages this right by ensuring that the specified area is preserved and protected for Aboriginal people to enjoy in accordance with their customs and traditions, and to freely pursue their social and cultural development.

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 a portion of the Belubula River, its headwaters and its springs, are not damaged or disturbed. This promotes the right to enjoy and benefit from culture under Article 27 of the ICCPR and Article 15 of the ICESCR as it ensures the protection of the declared area and preserves it for Aboriginal people to enjoy in accordance with culture and 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 ICERD further prohibits discrimination on the basis of race.

The Declaration specifies that the declared area is 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 Aboriginal 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’ with 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 Aboriginal people;

- has the sole purpose of protecting the rights of Aboriginal people to continue to enjoy their own culture and undertake traditional activities in the declared area; and
- is necessary, as otherwise the rights of the Aboriginal people in relation to the declared area will not be preserved.

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 Aboriginal area. The instrument allows the Traditional Custodians to continue to express their spiritual and cultural connection to the area and practice their beliefs.

Therefore, the Declaration promotes the right to freedom of thought, conscience and religion or belief under Article 18 of the ICCPR.

Conclusion

This Legislative Instrument is compatible with human rights because it promotes the protection of the human rights as set out above. To the extent that it may limit certain human rights, those limitations are reasonable, necessary and proportionate.

**The Hon. Tanya Plibersek MP
Minister for the Environment and Water**