## Explanatory Statement

## Issued by authority of the Minister for the Environment

**Aboriginal and Torres Strait Islander Heritage Protection(Bellwood Sacred Site) Emergency Declaration 2018-Extension**

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*(the **Act**) preserves and protects significant traditional areas, objects and remains, that are of particular significance to Aboriginal and Torres Strait Islanders, from injury or desecration. This includes an area of land in Australia or beneath Australian waters, an area of water in Australia or an area of Australian waters.

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 therein, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

**The Declaration**

Part II of the Act (Part II) provides for the protection of significant Aboriginal areas and objects. Under section 9 of the Act, the Minister 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.

The *Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Emergency Declaration 2018-Extension* (the **Declaration**) is an emergency declaration extension made under section 9(3) of the Act to preserve or protect Bellwood Sacred Site (the **specified area**).

On 16 December 2016, the former Minister for the Environment, the Hon Josh Frydenberg MP, received an application from the Nambucca Heads Local Aboriginal Land Council (the **applicant**) seeking the preservation or protection of the specified area from injury or desecration.

On 18 November 2018, the Minister made an initial emergency declaration to protect the specified area for 30 days.

In making the initial emergency declaration, the Minister considered the application and was satisfied that the specified area is a significant Aboriginal area and that it is under serious and immediate threat of injury or desecration from a proposed subdivision and residential development.

There has been no relevant change in circumstances and consequently, in making the Declaration the Minister continued to be satisfied that the specified area is a significant Aboriginal area and that it is under serious and immediate threat of injury or desecration from a proposed subdivision and residential development.

The purpose of the Declaration is to continue in effect the initial emergency declaration in relation to the specified area for further period of 30 days beyond the day on which it would otherwise cease to have effect in accordance with its terms.

Broad consultation was not undertaken as the Declaration was required to be urgently made.

The Declaration is intended to be an interim measure and only provides for the initial emergency declaration to remain in effect for a further period of 30 days while further assessment is undertaken. If appropriate, consultation will occur as related applications are duly processed.

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

The Declaration commences on the day after registration.

**Description of provisions**

*Part 1—Preliminary matters*

Part 1 sets out the preliminary matters of the Declaration.

**S**ection 1 provides the name of the Declaration.

Section 2 provides the commencement information for the Declaration.

Section 3 provides the authority under which this Declaration is made.

Section 4 provides the definitions used in this Declaration.

*Part 2—Declaration*

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

Subsection 5(1) declares that the initial emergency declaration shall remain in effect for a period of 30 days beyond the day on which it would otherwise cease to have effect in accordance with its terms. As a result, the initial emergency declaration will remain in force until the expiration of 60 days after the day on which it cam into effect, which is the maximum period allowed by subsection 9(3) of the Act.

Subsections 5(2) and (3) provide for the repeal date of the initial emergency declaration to be extended until the day after the end of the 60 day period for which it will remain in force under subsection 5(1).

Under section 6, this Declaration is self-repealing and ceases to be in force the day after the period of effect ends.

## 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* (Bellwood Sacred Site) Emergency Declaration 2018**

This Declaration 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 Declaration

Section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* allows the Australian Government Minister for the Environment to make emergency declarations in relations to areas where the Minister receives a valid application, and is satisfied that the area is a significant Aboriginal area, and that it is under serious and immediate threat of injury or desecration, he or she may, by legislative instrument, make a declaration in relation to an area.

This Declaration preserves and protects the significant traditional area of Bellwood Sacred Site from injury or desecration attributed to a proposed subdivision and residential development by Waifap Pty Ltd.

### Human rights implications

The Declaration engages the following rights:

1. the right to self-determination;
2. the right to enjoy and benefit from culture;
3. the right to freedom of thought, conscience and religion or belief;
4. the right to freedom of movement;
5. 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.

The Declaration promotes the right to self-determination for people of Aboriginal and Torres Strait Islander descent, and in particular for the Gumbaynggirr people, as it enables them to observe and take part in cultural practices on their own terms. Protection of the declared area against unauthorised access, development or other threats enables the social and cultural development of the Gumbaynggirr people without outside interference. This is particularly important as the declared area is currently under threat by housing developments, land clearing and other measures that would increase public access to the declared area.

Relevantly, the Gumbaynggirr people have been involved in the process which has led to the Declaration. The application for the Declaration was made by the Nambucca Heads Local Aboriginal Land Council on behalf of the Gumbaynggirr people, and a number of Gumbaynggirr people made representations in support of the application.

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 promotes the right to enjoy culture as it protects the land and natural resources within the declared area and preserves it for the Gumbaynggirr people to use and enjoy in accordance with Gumbaynggirr tradition. The Declaration ensures that sacred and spiritual places such as the ‘mumbirri’/Diamond Tree are not viewed or accessed in a manner inconsistent with Gumbaynggirr tradition. The Declaration also enables the Gumbaynggirr people to engage in traditional activities, and supports the preservation and development of their unique cultural identity and the passing down of cultural connection from generation to generation.

*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 a declared area that is a spiritually significant place for the Gumbaynggirr people, and in particular, Gumbaynggirr men. The Declaration allows the local Indigenous community to express their spiritual and cultural connection to the area, and practice those beliefs, privately and without outside interference.

*The right to freedom of movement*

Articles 12 and 13 of the ICCPR protect the rights of individuals to move freely.

The Declaration potentially limits this right by prohibiting public access to the declared area in a manner that would adversely affect the use or significance of the specified area in accordance with Aboriginal tradition.

However, the right to freedom of movement may be restricted on any of the grounds in article 12(3) of the ICCPR, namely national security, public order, public health or morals or the rights and freedoms of others. Limiting access to the area would promote the rights and freedoms of the Gumbaynggirr people to enjoy, practice and benefit from their culture and traditional practices, and exercise the right to self-determination.

The limitation is necessary in pursuit of a legitimate objective. Any restriction on access to the area serves the legitimate purpose of preserving and protecting the declared area, as a significant Aboriginal area, from injury or desecration. The declared area is currently under threat by, amongst other things, residential development plans by Waifap Pty Ltd, and forestry activity from the Forestry Corporation of New South Wales. If public access is not restricted, there is a serious and pressing concern that the area would be treated in a manner inconsistent with Aboriginal tradition.

The limitation on the right has a strong and rational connection to the objective to be achieved. Limiting access would also maintain the private use of the area by the Gumbaynggirr people in accordance with their traditions. This is particularly important with respect to the nature of those traditions, which involve that the declared area is a ‘meeting place’ and a place of ceremonial activity for men, and especially initiated males. Limiting access may be necessary to ensure the area is not entered by women and non-initiated males, and that they are unable to view the significant ‘mumbirri’/Diamond Tree at its core, which is considered spiritually dangerous.

The limitation against the freedom of movement is reasonable, necessary, proportionate and sufficiently precise to address the threat of harm to the declared area. This is because the Declaration only restricts movement that would adversely affect the use or significance of the specified area in accordance with Aboriginal tradition.

As such, the limitation on the right to freedom of movement is a permissible limitation and is reasonable, necessary and proportionate.

*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, by specifying the declared area as a significant Aboriginal area and prohibiting any action that will or is likely to adversely affect the use or significance of the declared area in accordance with Aboriginal tradition, favours the interests of Gumbaynggirr people over those of other persons. In doing so, the Declaration treats the Gumbaynggirr people differently on the basis of their race, with the result that other persons do not benefit from being able to take particular actions in or near the declared area.

While the 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’ 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.

The Declaration meet these criteria. The Declaration:

* preserves and protects the declared area for the benefit of the Gumbaynggirr people
* has the sole purpose of protecting the rights of the Gumbaynggirr people to continue to enjoy their own culture and undertake traditional activities in the declared area
* is necessary, otherwise the rights of the Gumbaynggirr people will not be preserved in relation to the declared area
* continue for a period of 30 days, which is intended to preserve and protect the declared area from current threats of injury or descretation.

### Conclusion

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