

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 (Butterfly Cave, West Wallsend, NSW) Declaration 2019

Purpose and Operation

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the **ATSIHP Act**) preserves and protects significant traditional areas and objects (including Aboriginal remains), that are of particular significance to Aboriginal persons 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 ATSIHP Act recognises the body of traditions, observances, customs and beliefs of Aboriginal persons 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.

The Declaration

Part II of the ATSIHP Act (Part II) provides for the protection of significant Aboriginal areas and objects. Under section 10 of the ATSIHP Act, the Minister may, by legislative instrument, make a declaration to preserve or protect a significant Aboriginal area that is under threat of injury or desecration.

The *Aboriginal and Torres Strait Islander Heritage Protection (Butterfly Cave, West Wallsend, NSW) Declaration 2019* (the **Declaration**) is made under section 10 of the ATSIHP Act. The purpose of the Declaration is to preserve and protect Butterfly Cave, the surrounding native bushland, and the catchment and gully system which directly feeds into and drains from the Butterfly Cave that formed Butterfly Cave (the declared area) from injury or desecration.

Butterfly Cave and its surrounds are a significant Aboriginal area that is of particular significance to Awabakal women. The purpose of the Declaration is to protect the Butterfly Cave and its surrounds from threats of injury or desecration posed by development activities.

Background

In 2016, the then Minister for the Environment and Energy, the Hon Josh Frydenberg MP received an application from the New South Wales Aboriginal Land Council (NSWALC) on behalf of the Awabakal Local Aboriginal Land Council (the **applicant**) seeking the preservation or protection of Butterfly Cave and its surrounds from the development footprint of the proposed residential development of the Appletree Grove Estate – Stage 7, 8 and 9, West Wallsend, NSW (the **application area**) from injury or desecration.

On 11 May 2017, the then Minister for the Environment and Energy, the Hon Josh Frydenberg MP nominated Dr Susan McIntyre-Tamwoy to prepare a report in accordance with subsection 10(4) of the Act. The report was provided to the Minister on 5 September 2017.

Consultation

In accordance with subsection 10(3)(ii) of the ATSIHP Act, Dr McIntyre-Tamwoy published a notice in the *Government Notices Gazette* (Commonwealth) and in the *Newcastle Herald* inviting interested persons to make representations in connection with the report by 12 June 2017. An amendment to this notice to reflect an updated map submitted by the applicant was published in the *Government Notices Gazette* (Commonwealth) and the *Newcastle Herald* on 30 June 2017. The latter notice extended the consultation period from 12 July 2017 until 21 July 2017.

Thirty-seven representations were received in addition to the original application, including representations from the developer of the Appletree Grove residential development, Hammersmith/Roche Group, and Lake Macquarie City Council.

The Department undertook separate consultations with the applicant and the Hammersmith/Roche Group in relation to matters raised by the application.

On 30 July 2018, Dr McIntyre-Tamwoy met with the Awabakal women at the Awabakal Land Council's Office in relation to matters raised by the application.

On 21 August 2018, Dr McIntyre-Tamwoy met with representatives of Hammersmith/Roche Group in relation to matters raised by the application.

Protection under State legislation

Butterfly Cave and a boundary of 20 metres around the centre of the cave are protected as a declared Aboriginal Place under the *National Parks and Wildlife Act 1974* (NSW). In accordance with section 13 of the ATSIHP Act, on 21 December 2017, the Minister consulted with the NSW Minister for the Environment, Local Government and Heritage as to whether there is effective protection of the application area under NSW law. The NSW Minister for the Environment, Local Government and Heritage advised that the protections afforded by the *National Parks and Wildlife Act 1974* (NSW) provide a high level of protection for the Butterfly Cave and its surrounds, and create strict liability offences for the harm or desecration of the Aboriginal area.

Decision to make the Declaration under section 10 of the ATSIHP Act

The Minister was satisfied that the declared area is a significant Aboriginal area that is under threat of injury or desecration. The Minister was not satisfied that the declaration of the Butterfly Cave Aboriginal Place under section 84 of the *National Parks and Wildlife Act 1974* (NSW) provided effective protection of the declared area. The Minister has made the Declaration under section 10 of the ATSIHP Act to protect the declared area from the threat of injury or desecration.

The Office of Best Practice Regulation determined that the Instrument will have a minor regulatory impact on business, community organisations or individuals, and therefore a Regulation Impact Statement is not required.

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

The Declaration commences the day after registration.

Explanation of provisions

Preliminary matters

Part 1 sets out the preliminary matters of the Declaration.

Name of Instrument

Section 1 of the Instrument states the name of the Instrument, which is the *Aboriginal and Torres Strait Islander Heritage Protection (Butterfly Cave, West Wallsend, NSW) Declaration 2019*.

Commencement

Section 2 of the Instrument specifies that the Instrument commences on the day after it is registered.

Authority

Section 3 of the Instrument specifies the authority for the Instrument, which is subsection 10(1) of the ATSIHP Act.

Definitions

Section 4 of the Instrument defines the terms used in the Instrument.

Part 2—Declaration

Part 2 of the Declaration provides for those matters required to be covered under sections 10 and 11 of the ATSIHP Act.

Section 5 provides the area to which the Declaration applies (the declared area).

- Subsection (1) provides that the declared area is identified by reference to the boundary line, the coordinates of which are specified in item 1 of Schedule 1.
- Subsection (2) provides that the position of the declared area is to be determined by reference to the Geocentric Datum of Australia (GDA94 geocentric data set).
- Subsection (3) provides an illustrative map of the area.

Section 6 is a provision for the purpose of paragraph 11(b) of the ATSIHP Act and provides for and in relation to the protection and preservation of the area from injury or desecration.

- Subsection (1) provides that the specified area is to be preserved and protected from injury or desecration under section 10 of the ATSIHP Act. This provision is declaratory in nature, and does not contain any prohibitions or restrictions.
- Subsection (2) provides that a person must not do any act in, on or near the declared area that will, or is likely to, injure or desecrate the declared area. This is the principal prohibition within the Declaration, which applies generally to acts in, on or near the declared area.
 - Note 1 to subsection (2) describes when an area shall be taken to be injured or desecrated.
 - Note 2 to subsection (2) explains that under subsection 22(1) of the Act, 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.
- Subsection (3) provides that, without limiting subsection (2), a person must not undertake certain activities. In summary, these prohibitions and restrictions are directed at preventing:
 - public access to the declared area;
 - activities that damage or deface rock or land in the declared area;
 - the conduct of development, clearing, earthworks, or related activities in the declared area;
 - the building of roads, buildings or structures in, or intruding into, the declared area; and
 - activities that disturb soil or vegetation in the declared area.
- Subsection (4) provides that subsections (2) and (3) do not apply to acts done by an authorised person for certain purposes. These include:
 - the purposes of practising or observing Aboriginal traditions, observances, cultural practices, customs, or beliefs;
 - the purposes of education, research, management, monitoring, revegetation, restoration or rehabilitation; and

- where doing the act is authorised or required by law, or by a plan of management made under the *National Parks and Wildlife Act 1974* (NSW).
- Subsection (5) provides that a person is an authorised person in relation to the doing of an act if:
 - the person has received permission to do the act from the Awabakal Local Aboriginal Land Council; or
 - the person is authorised or required by law to do the act.
- Subsections (4) and (5) are intended to give control over access to the declared area to Awabakal women and the Awabakal Local Aboriginal Land Council. Paragraphs (4)(c) and (5)(b) provide an exemption for acts that are authorised or required by law to be done, which is intended to facilitate lawful access, such as by essential services (such as firefighters, police, ambulance / rescue) or as required or authorised by other legislation. However, this exemption is subject to subsection (7).
- Subsection (6) provides that for the purposes of paragraph (5)(b), a person is authorised or required by law to do an act if a plan of management under the *National Parks and Wildlife Act 1974* (NSW) that has been developed in consultation with the Awabakal Local Aboriginal Land Council authorises or requires the doing of the Act. This provision is intended to recognise that in participating in the development of a plan of management, the Awabakal Local Aboriginal Land Council may authorise the doing of certain acts, that would otherwise be prohibited under subsections (2) and (3), if those acts are conducted in a particular manner. This could include activities that may result in the disturbance of vegetation or soil, or access to the declared area in a manner that is consistent with Aboriginal traditions.
- Subsection (7) provides that for the purposes of paragraph (5)(b), but subject to subsection (6), a person is not authorised or required by law to do an act merely because the person has received an approval, permission, authority or consent to undertake activities in connection with using or developing land in, on or near the declared area. This is intended to clarify that approvals (however described) under State planning laws (such as a development approval) are excluded from the category of activities that are authorised or required by law for the purposes of the exemptions from subsections (2) and (3).

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 (Butterfly Cave, West Wallsend, NSW) Declaration 2019

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

The *Aboriginal and Torres Strait Islander Heritage Protection (Butterfly Cave, West Wallsend, NSW) Declaration 2019* (the Declaration) is made under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act). Section 10(1) of the ATSIHP Act allows the Minister to make a declaration if the Minister: has received an oral or written application by or on behalf of an Aboriginal or a group of Aborigines, is satisfied that the area is a significant Aboriginal area and that it is under threat of injury or desecration, has received and considered a report from a nominated person, and has considered such other matters as he or she thinks relevant.

Section 5 of the Declaration specifies an area (the declared area), which includes Butterfly Cave, the native bushland that provides privacy, aesthetics and cultural resources, and the catchment and gully system which directly feeds and/or drains from the Butterfly Cave and that formed Butterfly Cave rock-shelter and its water features.

Under section 6(1) of the Declaration, the declared area is declared under section 10 of the ATSHIP Act to be preserved and protected from injury or desecration in the manner specified in subsection 6(2).

Subsection 6(3) prohibits particular actions:

- that will adversely affect the use or significance of the specified area in accordance with Aboriginal tradition
- that will, or is likely to injure or desecrate the declared area
- that will, or is likely to impact the structure of the Butterfly Cave rock-shelter.

Subsection 6(4) provides that subsections 6(2) and (3) do not apply to particular activities conducted for particular purposes.

Human rights implications

The Declaration engages the following rights:

- the right to enjoy and benefit from culture
- the right to freedom of thought, conscience and religion or belief
- the right to education
- the right to equality and non-discrimination

- the right to self-determination.

The right to enjoy and benefit from culture

The right to enjoy and benefit from culture is contained in Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (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. Article 15 of the ICESCR protects the right of all persons to take part in cultural life.

The United Nations Human Rights Committee has stated that culture can manifest itself as a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples, which may include such traditional activities as fishing or hunting and the right to live on lands protected by law.¹

The UN Human Rights Committee has considered cases which call into question the impact of the right of minorities to enjoy their own culture on the rights of others. It has stated that commercial activity on lands belonging to minorities that has a limited impact on the right of minorities to enjoy their own culture may not be incompatible with Article 27. In these cases, the Committee has been influenced by the fact that consultation with affected minority representatives has taken place in the process of deciding to approve the activity.²

The United Nations Committee on Economic, Social and Cultural Rights has stated that Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected.³ The Committee has stated that limitations on the right to take part in cultural life may be necessary in certain circumstances, in particular in the case of practices attributed to customs and traditions which infringe upon other human rights.⁴

The declared area is a significant Aboriginal area because the Awabakal people, in particular the Awabakal women, use the declared area for traditional activities. The Declaration will protect the rights of the Awabakal people, and in particular the rights of the Awabakal women, to continue to enjoy and benefit from their culture by preserving and protecting the declared area from injury or desecration.

The declared area is located within a larger area of land owned by Hammersmith Management Pty Ltd, which intends to undertake commercial activity on the land. A possible effect of the Declaration is that Hammersmith Management Pty Ltd may be able to proceed with undertaking some commercial activities near the declared area and such commercial activity might have some impact on the Awabakal people's right to enjoy their own culture. As part of consultations conducted prior to the making of the Declaration, the Awabakal women expressed concerns that the boundary of the declared area did not address all of their

1 United Nations Human Rights Committee, General Comment No 23 (1994).

2 United Nations High Commissioner for Human Rights, Individual Report on the International Covenant on Civil and Political Rights, Report No 2 (2013).

3 The Committee on Economic, Social and Cultural Rights, General Comment No 21 (2009).

4 The Committee on Economic, Social and Cultural Rights, General Comment No 21 (2009).

concerns relating to the impact of proposed development by Hammersmith Management Pty Ltd. The Awabakal women preferred that the Declaration specify a larger area and the proposed development by Hammersmith Management Pty Ltd not proceed.

The boundary of the declared area means that the traditional activities of the Awabakal people could still be undertaken within the boundaries of the declared area and therefore the impact of any commercial activity on the Awabakal people's right to enjoy their own culture will be limited. The Declaration strikes an appropriate balance between the interests of the Awabakal people and Hammersmith Management Pty Ltd.

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 a culturally significant place for the Awabakal people, and in particular, Awabakal women. 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 education

The right to education is contained in Article 13 of the ICESCR. The Declaration engages the right to education by preserving and protecting the declared area, so that the traditional activities of the Awabakal people can be continue to be undertaken in the declared area. Some of those traditional activities include educational activities.

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 Awabakal people over those of other persons. In doing so, the Declaration treats the Awabakal people differently on the basis of their race, with the result that other persons do not benefit from being able to take particular actions that might affect 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 meets these criteria. The Declaration:

- preserves and protects the declared area for the benefit of the Awabakal people
- has the sole purpose of protecting the rights of the Awabakal people to continue to enjoy their own culture and undertake traditional activities in the declared area
- is necessary, otherwise the rights of the Awabakal people will not be preserved in relation to the declared area
- continues indefinitely, given that the the declared area will need to be preserved and protected from injury or descretion in perpetuity.

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 Articles 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 right to self-determination is also contained in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). While the UNDRIP is not included in the definition of ‘human rights’ under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context on how human rights standards under international treaties apply to the particular situation of Indigenous peoples.

The Declaration promotes the right to self-determination for people of Aboriginal and Torres Strait Islander descent, and in particular for the Awabakal people, as it enables them to observe and take part in cultural practices on their own terms. The Declaration protects the specified area from actions that will adversely affect the use of the area for traditional Aboriginal activities, and preserves activities undertaken for the purposes of tradition, cultural practice, education, management, research, monitoring or rehabilitation undertaken by or led by Awabakal women. In this way, the Declaration enables the Awabakal people to determine how to enjoy their own culture in the declared area and to protect the cultural integrity of the area. This is particularly important as the declared area is currently under threat by development, land clearing and other measures that will increase public access to the declared area and the potential for disturbance to traditional activities within the declared area.

Relevantly, the Awakabal people have been involved in the process which has led to the Declaration. The application for the Declaration was made by the New South Wales Aboriginal Land Council (NSWALC) on behalf of the Awabakal Local Aboriginal Land Council.

Conclusion

The Declaration is compatible with human rights because it promotes the right to enjoy and benefit from culture, the right to education, and the right to equality and non-discrimination

through the protection and preservation of the declared area, and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.