

EXPLANATORY STATEMENT

Issued by authority of the Minister for the Environment

Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Declaration 2019

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 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 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.

The Declaration

Part II of the Act provides for the protection of significant Aboriginal areas and objects. Under section 10 of the 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 (Bellwood Sacred Site) Declaration 2019* (the **Declaration**) is made under section 10 of the Act. The purpose of the Declaration is to preserve and protect parts of the Bellwood Sacred Site in Nambucca Heads, New South Wales from injury or desecration posed by residential development, logging, and access by the public. The Bellwood Sacred Site is a significant Aboriginal area that is of particular significance to the Gumbaynggirr Nation.

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

The Declaration commences the day after registration and is stated to have effect for 25 years. Under the *Legislation Act 2003* (Legislation Act), legislative instruments ordinarily sunset after 10 years. The Department of the Environment and Energy (Department) will investigate whether the Declaration should be made exempt from sunset (for example, via regulations made for the purposes of paragraph 54(2)(b) of the Legislation Act) in order to provide for the continued protection and preservation of the declared area from injury or desecration beyond the normal sunset period.

Background

On 16 December 2016, the former Minister for the Environment and Energy, the Hon Josh Frydenberg MP, received a letter from the Nambucca Heads Local Aboriginal Land Council (the **Applicant**) seeking the preservation and protection of an area known as Bellwood Sacred Site in Nambucca Heads, New South Wales from injury or desecration. The application was subsequently varied to seek protection of a larger area in June 2018.

The initial letter and subsequent correspondence together constituted a single application in respect of the larger area (the **application area**).

On 22 June 2018, the then Minister nominated Mr Daniel Leo (the **reporter**) to prepare a report for the purposes of paragraph 10(1)(c) and subsection 10(4) of the Act. The report was provided to the Minister on 19 September 2018.

Consultation

On 26 June 2018, in accordance with section 10(3)(a)(ii) of the Act, the reporter sought representations from interested parties by publishing a notice in the (Commonwealth) Government Notices Gazette and the Nambucca Guardian News (newspaper).

On 27 July 2018, a correction to the original Gazette notice was issued, clarifying the relevant state law (NSW), and extending the period for submission of representations.

The reporter accepted representations until 7 September 2018.

Representations received by the reporter

During the consultation process, representations were received from the Applicant (including members of the Gumbaynggirr people on whose behalf the application was submitted), Waifap Pty Ltd and its owner / major shareholder (the landowner of a part of the application area zoned for residential development), Forestry Corporation of New South Wales (FCNSW, the landowner of Nambucca State Forest, including the Western half of the application area), and the New South Wales Aboriginal Land Council.

The New South Wales Office of Environment and Heritage (landowner of a part of the application area) and the Nambucca Shire Council (landowner of a part of the application area) were invited to make submissions to the reporter, but declined to do so.

Outcomes of the consultation

The vast majority of the representations received by the reporter supported the application, and the particular significance of the application area to the Gumbaynggirr people. The representations constituted strong evidence supporting the Gumbaynggirr's historic and continued cultural use of the application area, and that the application area represents a cultural landscape which is the focal point of cultural belief of the Gumbaynggirr Nation.

FCNSW broadly supported the application, albeit it proposed a modification to the area to be protected that would reduce the impact on FCNSW's timber production.

Waifap Pty Ltd and its owner / major shareholder representative opposed the application.

Protection under State legislation

An area of 1.2 hectares at the centre of the specified area is protected as a declared Aboriginal area under the *National Parks and Wildlife Act 1974* (NSW). In accordance with section 13 of the ATSIHP Act, on 18 December 2018, the Minister sought to consult with the NSW Minister for the Environment and Minister for Heritage as to whether there is effective protection of the application area under NSW law. The NSW Minister for the Environment and Heritage has not yet responded.

Emergency declaration

On 18 November 2018, the Minister for the Environment, the Hon Melissa Price MP, made the *Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Emergency Declaration 2018* to protect a part of the specified area for a period of 30 days. The emergency declaration was made on the basis that part of the application area was under serious and immediate threat of injury or desecration from a proposed subdivision and residential development. The emergency declaration commenced on 19 November 2018. On 18 December 2018, the Minister made the *Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Emergency Declaration 2018-Extension* to extend the emergency declaration for a further period of 30 days. The emergency declaration will cease to have effect on 18 January 2019.

Decision to make the Declaration under s 10 of the Act

The Minister was satisfied that part of the application area is a significant Aboriginal area that is under threat of injury or desecration. 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.

Description of provisions

Part 1—Preliminary matters

Part 1 of the Declaration sets out the preliminary matters of the Declaration.

Section 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 those matters required to be covered under sections 10 and 11 of the Act.

Section 5 provides for the area to which the Declaration applies (the declared area, which is part of the application area described above).

- Subsection (1) provides that the area is identified as the area known as ‘Bellwood Sacred Site’ in Nambucca Heads in New South Wales, and it consists of three parts (Part 1, Part 2 and Part 3), the coordinates of which are specified in 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 Act, and provides for and in relation to the protection and preservation of the declared area from injury or desecration.

- Subsection (1) provides that the declared area is to be preserved and protected from injury or desecration under section 10 of the 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;
 - 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;
 - the damaging of trees in the declared area; and
 - causing projectiles or aerial devices, such as drones, to enter into the declared area.
- Each of the prohibitions and restrictions in subsection (3) are directed to protecting and preserving the declared area from injury or desecration. The inclusion of a prohibition on aerial devices within the declared area is intended to prevent a person from observing the declared area from the outside using a device such as a drone.
- 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.
- Subsection (5) provides that a person is an authorised person in relation to the doing of an act if:
 - the person is an elder of the Gumbaynggirr Nation; or
 - the person has received permission to do the act from:
 - an elder of the Gumbaynggirr Nation; or
 - the Nambucca Heads Local Aboriginal Land Council; or
 - the person is authorised or required by law to do the act.
- Subsection (4) and (5) are intended to provide for control over access to the declared area by Gumbaynggirr elders and the Nambucca Heads Local Aboriginal Land Council. Paragraphs (4)(c) and (5)(c) 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 is required or authorised by other legislation. However, this exemption is subject to subsection (6).
- Subsection (6) provides that for the purposes of paragraph (5)(c), 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 activities covered by approvals and the like under State planning laws (such as a development approval) are excluded from the category of activities that may be

authorised or required by law for the purposes of the exemptions from subsections (2) and (3).

Section 7 provides that the Declaration has effect for 25 years. Under the *Legislation Act 2003* (Legislation Act), legislative instruments ordinarily sunset after 10 years. The Department will investigate whether the Declaration should be made exempt from sunset (for example, via regulations made for the purposes of paragraph 54(2)(b) of the Legislation Act) in order to provide for the continued protection and preservation of the declared area from injury or desecration beyond the normal sunset period.

Section 8 provides that the Declaration is repealed the day after the end of the period specified in section 7. However, the Declaration will be repealed earlier under the Legislation Act if it is not exempted from sunset as described above.

Schedule 1—Parts 1, 2 and 3 of the declared area

Schedule 1 sets out the detailed coordinates for Part 1, Part 2 and Part 3 of the declared area.

Item 1 of Schedule 1 sets out that Part 1 of the declared area consists of the area bounded by a line that commences at the point in item 1 of the table, and proceeds through each of the coordinates in column 1 of the table in the manner described in column 2 of the table. The directions included in the table (which relate to the manner in which the line proceeds through each set of coordinates) are indicative only.

Items 2 and 3 of Schedule 1 provide similarly to Item 1 in relation to Part 2 and Part 3 of the declared area, respectively.

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) 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

The Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Declaration 2018 (the Declaration) is made under section 10(1) 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.

The Declaration is made in relation to an area known as ‘Bellwood Sacred Site’ in Nambucca Heads in New South Wales (the declared area). The Declaration provides a map to illustrate the declared area.

The Declaration contains provisions for and in relation to the protection and preservation of the declared area from injury or desecration. Specifically, the Declaration provides that a person must not do any act or thing in, on or near the declared area that will, or is likely to, injure or desecrate the declared area. The ATSIHP Act relevantly provides that an area is 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.

The Declaration provides a non-exhaustive list of prohibited conduct, which includes that a person must not:

- pass through or over, or enter, the declared area;
- bulldoze, grade, drill, dig, excavate, cut, fill, blast, clear, demolish, tunnel, burn, remove, or otherwise damage land in the declared area;
- build or construct any road, building or structure in, or intruding into, the declared area;
- kill, cut down, poison, deface, burn, remove or otherwise damage any tree in the declared area; or

- cause any projectile or aerial device to enter into the declared area.

The Declaration provides for exceptions where an authorised person engages in prohibited conduct for specified purposes. An authorised person is defined in the Declaration as a person who is an elder of the Gumbaynggirr Nation, a person who has received permission from a Gumbaynggirr elder or the Nambucca Heads Local Aboriginal Land Council, or a person authorised or required by law. The prohibitions do not apply to acts or things done by an authorised person:

- for the purposes of practising or observing Aboriginal traditions, observances, cultural practices, customs, or beliefs;
- for the purposes of education, research, management, monitoring, revegetation, restoration or rehabilitation; or
- where doing the act or thing is authorised or required by law, however a person is not authorised or required by law to do an act or thing merely because the person has received an approval, permission, authority or consent to undertake activities in connection with developing land in, on or near the declared area.

A person who engages in conduct that contravenes the Declaration commits an offence under the ATSIHP Act.

The Declaration is made following the *Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Emergency Declaration 2018* (the Emergency Declaration), which commenced on 19 November 2018. The Emergency Declaration was extended by the *Aboriginal and Torres Strait Islander Heritage Protection (Bellwood Sacred Site) Emergency Declaration 2018-Extension*, and is due to expire on 18 January 2018. The Emergency Declaration was made on the application of the Nambucca Heads Local Aboriginal Land Council (the applicant). The application for the Declaration was also made by the applicant.

The Declaration promotes the objective of the ATSIHP Act to preserve and protect from injury or desecration areas and objects in Australia that are of particular significance to Aboriginals in accordance with Aboriginal tradition. The declared area is currently under threat by, among other things, proposed residential development, forestry activities and public access. If the Declaration is not made, there is a serious concern that the declared area would be subject to injury or desecration.

Human rights implications

The Declaration engages the following rights:

- (a) the right to self-determination;
- (b) the right to enjoy and benefit from culture;
- (c) the right to freedom of thought, conscience and religion or belief;
- (d) the right to freedom of movement;
- (e) 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. The Declaration also, in effect, gives control of access to the declared area to Gumbaynggirr elders and the Nambucca Heads Local Aboriginal Land Council, which in turn protects the cultural integrity of the area. 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 prohibition on entering the declared

area ensures that sacred and spiritual places such as the ‘mumbirri’/Diamond Tree at the centre of the area are not viewed or accessed in a manner inconsistent with Gumbaynggirr tradition. The Declaration also supports the Gumbaynggirr people to engage in traditional activities, and 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 limits this right by prohibiting public access to the declared area unless by authorised persons for specific purposes.

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. The objective of restricting access to the area serves the legitimate purpose of preserving and protecting the declared area, as a significant Aboriginal area, from injury or desecration. 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 is 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 allows for access by Gumbaynggirr elders for certain purposes relating to Aboriginal tradition, practice or monitoring and rehabilitation, as well as those permitted by elders or the Nambucca Heads Local Aboriginal Land Council for those purposes. Further, access is not restricted for persons who are authorised or required by the law to do relevant acts, such as to provide essential services (for example, firefighting or police services).

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 meets 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 25 years, which is intended to preserve and protect the declared area from current threats of injury or desecration.

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.