

Departmental Analysis

1. Purpose

- 1.1 The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) is the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.
- 1.2 This document sets out the Department of Agriculture, Water and the Environment's (**department**) analysis and recommendations as to whether it is open to you to make a declaration under section 10 of the ATSIHP Act in relation to a specified area of Wahluu, Mount Panorama, in Bathurst, New South Wales. This document also sets out what you are required to consider in the process of making a decision under section 10.
- 1.3 Any decision under the ATSIHP Act can be challenged under the *Administrative Decisions (Judicial Review) Act 1977*.

2. Summary of the department's analysis

- 2.1 For the reasons set out in this document, the department considers that:
- (a) you have received an application for the purposes of section 10(1)(a) of the ATSIHP Act;
 - (b) the specified area is a 'significant Aboriginal area' for the purposes of section 10(1)(b)(i) of the ATSIHP Act; and
 - (c) at least part of the significant Aboriginal area is 'under threat of injury or desecration' for the purposes of section 10(1)(b)(ii) of the ATSIHP Act.
- 2.2 On the basis that you are satisfied of the above, the department recommends that you agree it is open to you to make a declaration under section 10 of the ATSIHP Act.

3. Background

- 3.1 On 20 December 2018 (executed 11 January 2019), the Wiradyuri Traditional Owners Central West Aboriginal Corporation (**applicant**), made an oral application under section 9 of the ATSIHP Act (**Attachment F**) to the then Minister for the Environment, the Hon Melissa Price MP. The applicant sought an emergency declaration to protect an area of Wahluu from injury or desecration from Bathurst Regional Council's (**Council**) proposed go-kart track.
- 3.2 The applicant is represented by the following people: **s. 47F(1)**
s. 47F(1)
- 3.3 On 8 February 2019 (executed 18 February 2019), the applicant made an oral application under section 10 of the ATSIHP Act (**application**) (**Attachment A-A47**), seeking to protect a larger area of Wahluu, Mount Panorama (**specified area**) (shown at page 3 of **Attachment B**) from injury or desecration arising from the development of a go-kart track proposed by Council.
- 3.4 On 22 March 2021, **King & Wood Mallesons** (KWM) (the applicant's legal representatives) indicated that the area over which the applicant sought protection had been reduced to a smaller area within the initial specified area (**Attachment X**) (**amended specified area**). The amended area is shown at Figure 1 below and as the combined red and green shaded area on page 1 of **Attachment B**.

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Your visit to Bathurst and subsequent submissions received

- 3.8 On 11 and 12 March 2021, you visited Bathurst to meet with key stakeholders in relation to this application and to visit Wahluu (MB21-000187).

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

- 3.19 On 16 March 2021, the applicant also provided an affidavit (filed in proceedings between the applicant and Council commenced on 4 March 2021) from s. 47F(1) that was sworn on 4 March 2021 (**Attachment U**). The affidavit included new information about the ceremonies conducted in the specified area, further information about how long these practices had been performed and detailed information about plants in the specified area and their uses.
- 3.20 On 22 March 2021, s. 11C(1)(a) provided, via email, a document named 'evidence of Wiradjuri artefacts' (**Attachment V**). s. 11C(1)(a) said that the information in the attachment is to be considered 'absolutely confidential'. Neither the document nor s. 11C(1)(a) identifies the author of the document and as such there is an issue of credibility. It is also unclear if the stone objects / artefacts discussed and displayed in the pictures come from on or near the specified area and as such the department considers that the information has limited value and advised s. 11C(1)(a) accordingly.
- 3.21 On 22 March 2021, KWM provided a further submission on behalf of applicant (**Attachment X**). The submission amended the section 10 specified area to a smaller specified area (shown as the combined red and green shaded area on page 6 of **Attachment B**). The submission also provided the applicants notes of the site visit, and summarised information regarding the significance of the specified area and the threat to that area.

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 47E(d)

s. 22(1)(a)(ii)

S. 47E(d)

S. 47E(d)

S. 47E(d)

s. 47E(d)

s. 47E(d); s. 47F(1)

s. 47E(d); s. 47F(1)

s. 47E(d)

s. 47E(d); s. 47F(1)

s. 47E(d); s. 47F(1)

s. 22(1)(a)(ii)

S. 47E(d)

S. 47E(d)

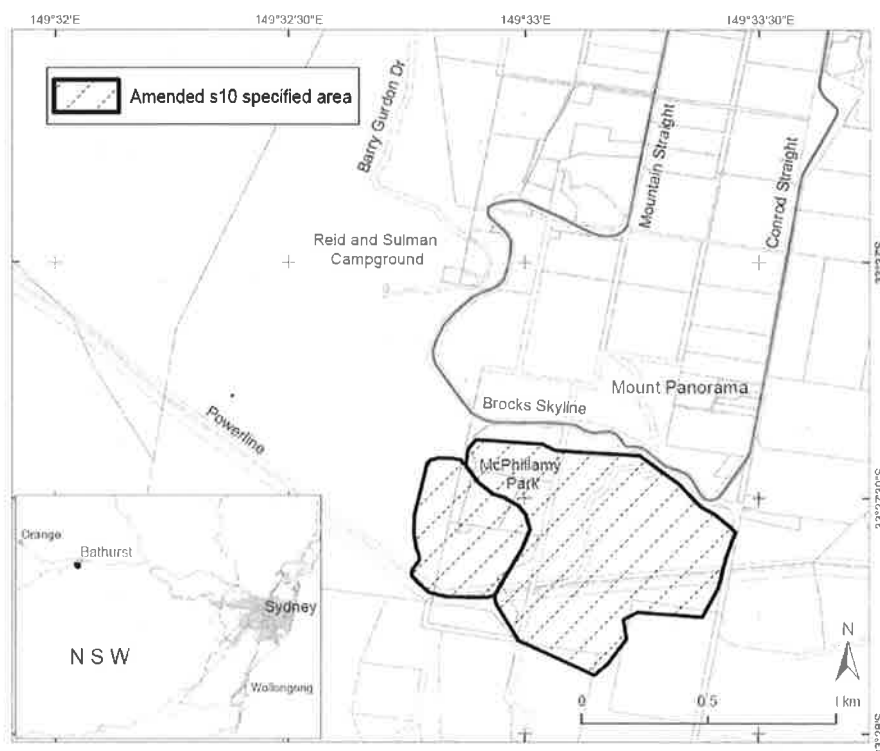
5. Making a declaration in relation to an area

The Application

The specified area

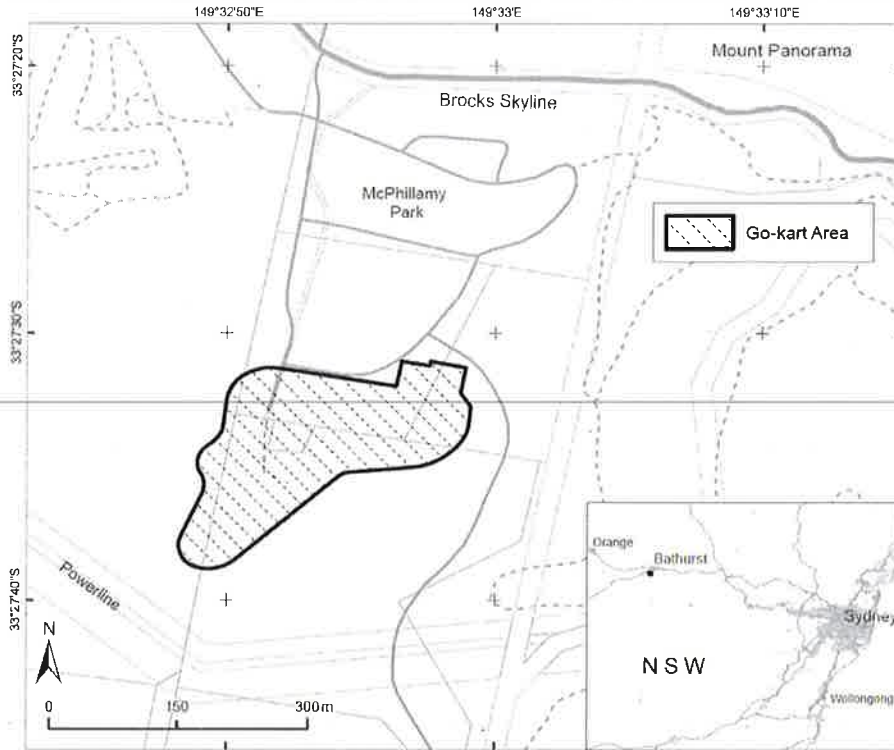
- 5.1 Wahluu, also known as Mount Panorama, is a prominent hill which forms the backdrop of the Mount Panorama car racing circuit overlooking Bathurst, New South Wales. The car racing circuit consists mostly of roads that are publicly accessible when racing is not in progress.
- 5.2 On 10 April 2015, the New South Wales Government through the Geographical Name Board assigned the dual name 'Wahluu' for the area known as Mount Panorama (or Bald Hill) in the Bathurst Local Government Area. The name 'Wahluu' is an Aboriginal word and the name of a young Wiradyuri warrior. The incorporation of Wahluu as a dual name for the mountain was and is considered by Wiradyuri Elders to be an important acknowledgment of Aboriginal tradition and history of this area.
- 5.3 Initially, the specified area in relation to the applicant's section 10 application made orally on 8 February 2019 (executed 18 February 2019) was the area outlined on page 3 of **Attachment B**.
- 5.4 However, on 22 March 2021, KWM indicated that the area over which the applicant sought protection had been reduced to a smaller area within the initial specified area (**Attachment X**). The amended area is shown at Figure 1 below and as the combined red and green shaded area on page 1 of **Attachment B**.

Figure 1. The amended section 10 specified area.



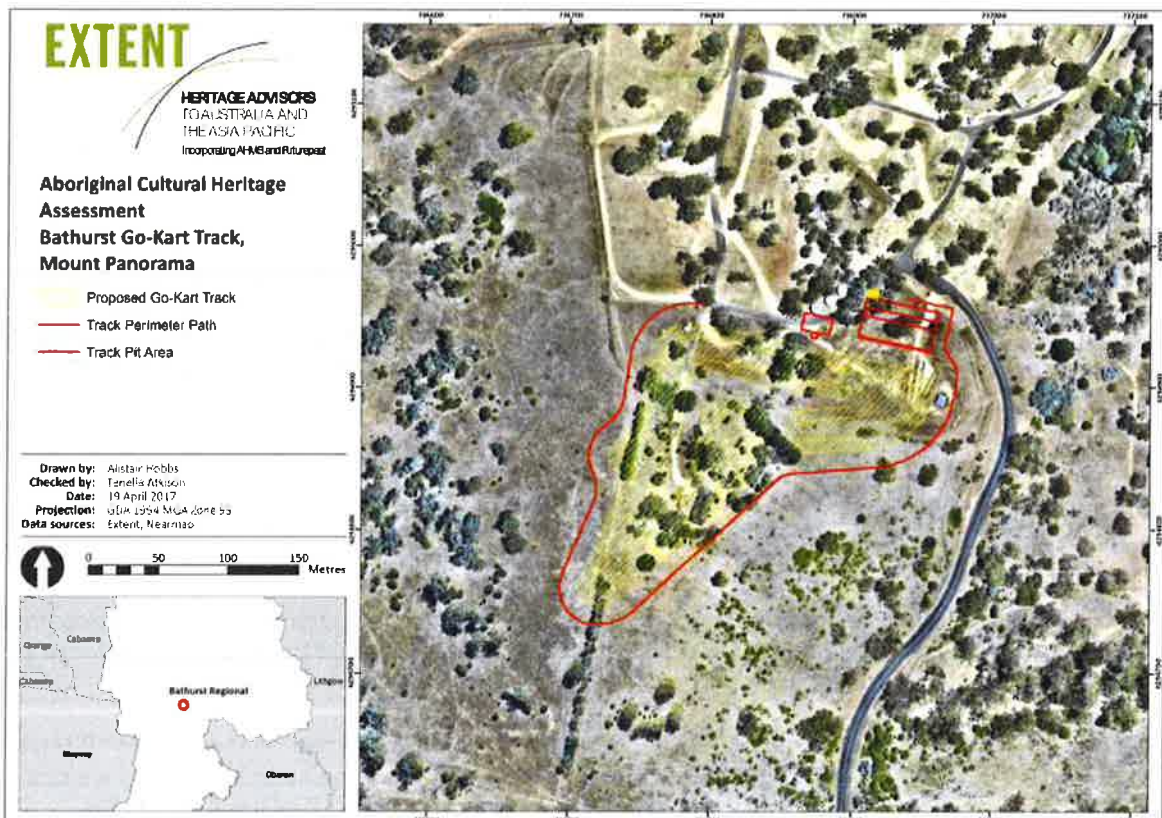
- 5.5 For reasons set out in this analysis document, the department considers the area over which it would be open to you to make a declaration is smaller again. That area is shown in the figure below.

Figure 2. Map showing the smaller area that the department has identified as the area over which the Minister can make a declaration.



5.6 For your information, a map of the proposed go-kart track is provided below.

Figure 3. Plan of proposed go-kart track (taken from page 23 of [Attachment D22-A6-2](#)).



5.7 Council is the land manager for part of the specified area and has a number of leases with community groups such as the Panorama Motorcycle Club (20 year lease, expiry date not provided), Bathurst Cycling Club, Bathurst Clay Target Club (20 year lease renewed until

2039), V8 Supercars Australia Pty Ltd and Bathurst Kart Club (the club the go-kart track is being built to host). The list of lands and land ownership within the specified area is at Table A of this document (below paragraph 5.116, derived from information in Attachment D22).

Report under s10(4)

- 5.8 Section 10 of the ATSIHP Act requires you to receive and consider a report prepared in accordance with section 10 prior to considering making a declaration under section 10. On 30 August 2019, in accordance with statutory obligations under section 10(1)(c) of the ATSIHP Act, you appointed Mr Terry Bailey as the reporter (**the reporter**) for the purposes of the application.
- 5.9 On 10 October 2019, in accordance with section 10(3)(ii) of the ATSIHP Act, the reporter sought representations from interested parties by publishing a notice (Attachment C) in the Commonwealth Government Notices Gazette and Bathurst's *Western Advocate* newspaper. The closing date for representations was advertised as 1 November 2019 and, owing to requests from interested parties, extended twice to a final date of 7 February 2020.
- 5.10 On 1 May 2020, the reporter submitted his section 10 report to you (Attachment D). On 9 October 2020, the reporter corrected an error relating to the map (corrected map and description at page 89 of the section 10 report). On 15 October 2020, the reporter provided an addendum responding to a request by the department for clarification around the reporter's interpretation of particular significance (page 90-92 of the section 10 report). The section 10 report at Attachment D incorporates these revisions.
- 5.11 In order to determine whether to make a section 10 declaration you will be required to consider the section 10 report and any representations attached to the section 10 report. While you are required to consider that material, you are not bound by the conclusions set out in the section 10 report and may depart from them.

s. 22(1)(a)(ii)

s. 47E(d)

S. 47E (d)

S. 47E(d)

Significant Aboriginal area - s10(1)(b)(i)

Applicant's views

- 5.25 The applicant made a number of claims as to why the specified area is a significant Aboriginal area.
- 5.26 The reporter noted that the applicant's claims to intangible cultural significance were not always limited to the boundary set by the specified area (for example the entire mountain is a part of the Wiradyuri Wahluu songline), but the broader intangible concepts remain important contextual information in forming a view regarding the particular significance of the specified area.
- 5.27 The department has grouped the applicant's significance claims, from Attachment A, in Attachment ZHa. Numbers in parentheses correspond to the applicant's significant sites map at Attachment A46.

S. 11C(1)(c)

- 5.28 Extent's *Aboriginal Cultural Heritage Assessment Report* provided in draft by the applicant (Attachment A3) and final report provided by Council (Attachment D22-A6-1) state that the, 'area [go-kart track area] has intangible cultural heritage values to the local Aboriginal community. As part of Mt Panorama Wahluu, it is associated with the creation story of Wahluu and Gaahna Bulla 'the two brothers', which connects Mt Panorama with Mt Canobolas. Mt Panorama Wahluu is also associated with other important topographic features such as Mount Stewart and Evans Crown. Mt Panorama Wahluu was likely a place of mythological and spiritual importance to Wiradjuri people prior to contact, as with other similar prominent topographic features across Wiradjuri country. It has contemporary cultural values to the local Aboriginal community due to these traditional associations'.
- 5.29 The section 10 report outlines that the applicant has a traditional association in connection with the specified area for thousands of years and the period that preceded the colonisation of the Bathurst region in the early 1800s. The applicant states that the connection is through the presence of Aboriginal objects in the form of scar trees, stones from bora rings, an initiation

site and gravesites. The applicant also asserts a spiritual and mythological connection to the specified area through songlines and cultural mythology (for example the Wahluu Dreamtime story).

- 5.30 The application indicates the broader Bathurst region was part of the 'Wiradyuri nation' prior to colonisation in the early 1800s and there is evidence of the cultural history of the region prior to the destruction of the Wiradyuri nation as a consequence of introduced disease and conflict. Aboriginal occupation of the Central West region, including in the granite rock shelters located near Bathurst, date back at least 7,150 years (**Attachment A7**).
- 5.31 The Aboriginal Heritage Study & East Kelso Residential Expansion Area Aboriginal Cultural Heritage Assessment (2016) outlines that Wiradyuri people were present on the Bathurst plains and surrounds prior to colonisation, 'the earliest settlers rarely encountered the Wiradyuri people, instead observing their traces in the landscape: fires and hearths, bark huts and broken canoes, blackened shells and burial mounds, stone arrangements and notches in trees....Bora rings where initiations and other important ceremonies were held, marked the river valleys and mountain tops, and stone monuments associated with men's business were encountered across the Bathurst plains, including Mount Pleasant' (**Attachment A12**).
- 5.32 Professor of Anthropology, David Trigger's ethnographic research (summary at **Attachment A7**, full report (**Trigger Report**) at **Attachment A28**) finds that, '*there is some disagreement among those consulted as to details about the cultural significance of Mt Panorama. However, there is broad agreement that the mountain is and has always been an important place in Wiradjuri cultural traditions*' and, '*The interpretations of features of the McPhillamy Park... as culturally significant derive from general convictions that Wiradjuri spirituality inheres in the landscape. This is a body of religious belief that is not productively amenable to attempts seeking to 'prove' or 'disprove' the convictions of people*' (**Attachment A28**).

Reporter's findings

- 5.33 The reporter organised the applicant's claims into claims of tangible and intangible significance (Table A of **Attachment D**), noting the potential for overlap between the categories. In correspondence of 26 February 2021, KWM was critical of this approach and claimed that it introduced an improper legal test (see paragraphs 5.21(b) and 5.24).
- 5.34 The reporter's approach in discussing the significance of the specified area in these terms is consistent with the application and reports accompanying the application, which also use the distinction 'tangible' and 'intangible' in describing Aboriginal heritage.
- 5.35 The department understands the distinction made by the reporter between tangible and intangible elements of significance to be one of convention, and contrary to the opinion expressed by KWM, does not recognise that it implies any improper 'legal test'. The department does not agree with KWM that the reporter gave different weighting to elements of tangible and intangible significance, noting that after discussion of the legal definitions and tests relevant to the ATSIHP Act, he concluded that the specified area falls short of 'particular significance' in both its tangible and intangible elements. In any case, the department affirms that for the purposes of making your decision, the differentiation between tangible and intangible claims is irrelevant and that the issue is whether, in considering the applicant's claims, you are satisfied that the specified area is a 'significant Aboriginal area'.
- 5.36 The Extent Report, which references the anthropological study conducted by Professor Trigger and Dr Gaynor McDonald concludes that the specified area has intangible cultural heritage values to the local Aboriginal community and confirms the association with the creation story of Wahluu (**Attachment A3**).
- 5.37 Extent found that the Aboriginal community consultation process indicated that different views are held by the Registered Aboriginal Parties (**RAPs**) regarding potential impacts to intangible cultural heritage values as a result of the proposed works. Given the level of previous disturbance within the study area, one of the four local RAPs considered that intangible cultural heritage values will not be impacted whilst the other local RAPs suggest the proposed

development will cause further impact. Extent notes that no comments were provided from non-Bathurst RAPs in relation to the intangible cultural heritage values of Wahluu (Attachment A3).

- 5.38 While Professor Trigger identified that there was some disagreement among those consulted as to the details about the cultural significance of Wahluu, he concluded that there was broad agreement that the mountain has always been an important place in Wiradyuri cultural traditions (Attachment A7).

S. 47F(1)

- 5.40 Professor Trigger indicates that where there is disagreement as to cultural significance, the disagreement relates to the location of the women's site and its proximity to the location of the men's site (Attachment A7).
- 5.41 Intangible cultural beliefs and values in the form of dreaming or creation stories and spiritual pathways can meet the criteria of particular significance under the ATSIHP Act. The reporter concludes that anthropological information provided to the reporter in this process fails to substantiate that the specified area itself is of particular significance in accordance with Aboriginal tradition. There are several references to the importance to Wiradyuri people of the whole of the mountain in respect to the Dreaming and creation stories of Wahluu, and Professor Trigger said:

I am confident to say that the whole of Wahluu-Mount Panorama would have been of sacred significance, and one of a series of connected sacred mounts, which would have included Mount Pleasant and Mount Canobolas. (Attachment A7).

- 5.42 The reporter notes that references to the particular significance and sacredness of the specified area and the individual sites within the specified area in the application and respondent materials was limited and not detailed. The reporter is of the view that the applicant was given sufficient opportunity to add to the application following its initial submission in February 2019, including in relation to this.
- 5.43 The reporter considers that the specified area is of mythological and spiritual importance to the Wiradyuri people that is neither minimal or ephemeral but concludes that it does not meet the particular significance threshold of the ATSIHP Act.
- 5.44 The reporter notes that the lack of tangible evidence in the archaeological record does not mean that tangible cultural heritage never existed but rather that as a consequence of development it is likely that it has been lost or destroyed. In making this conclusion the reporter notes that further archaeological studies may find tangible cultural heritage.

Council's views

- 5.45 Council indicated a strong opposition to the application, questioning the antiquity and validity of some of the values associated with Wahluu (Attachment D22).
- 5.46 Council identified the following points in their submission to the reporter that are relevant to whether the specified area is of particular significance to Aboriginal people:
- (a) Investigations to date have revealed a lack of archaeological evidence to support the historic use of Wahluu for more than ephemeral use.
 - (b) Anthropological research to date has identified many uncertainties and questions around the antiquity and validity of some of the intangible cultural heritage values associated with the Mountain.

- (c) The specified area has undergone substantial change as a result of past and current land uses and ongoing erosion and therefore lacks intactness and integrity.
- (d) The Aboriginal Cultural Heritage Assessment (**ACHA**) completed for the application to modify the consent for the go-kart track, proposed within part of the specified area, reassessed all existing registered Aboriginal sites within the study area and determined that they did not contain Aboriginal objects as defined under the *National Parks and Wildlife Act 1974 (NSW) (NPW Act)*.
- (e) No additional / new Aboriginal sites or objects were identified within the go-kart track study area as part of the ACHA process.
- (f) Investigations to date have not identified the specified area as being rare or of research potential.
- (g) The potential impacts of the go-kart track development might better be classified as impacts on social significance rather than spiritual significance and efforts to 'reconnect' could continue even if the go-kart track development proceeds.
- (h) Relevant State legislation is in force which provides appropriate protection of Aboriginal Cultural Heritage in New South Wales. The New South Wales Aboriginal Cultural Heritage Advisory Committee (**the committee**, established under the NPW Act) considered the proposed heritage listing of Wahluu, inclusive of the specified area for either an Aboriginal Place or State Heritage Register listing. The Committee acknowledged the likely Aboriginal cultural values of Wahluu but resolved to close the nomination until the Community Elders who can speak for Country present a unified voice on the tangible and / or intangible heritage significance of Wahluu.
- (i) Council's Heritage Interpretation Strategy included the Story of Wahluu. Council also engaged consultants, Extent, to undertake further consultation and engagement with the Wiradyuri Elders in relation to the Wahluu Story to inform a future interpretation plan for the Mount Panorama Boardwalk.

- 5.47 Council engaged Extent to undertake several Aboriginal cultural heritage assessments and to assist with the preparation of Council's response to the section 10 application. Extent also coordinated preparation of the anthropological investigations to document the beliefs of those Aboriginal people identifying as Wiradyuri, particularly with respect to Wahluu. The Extent documents are: *Extent Heritage. Aboriginal Cultural Heritage Assessment Report – Go Kart Track Development (Attachment D22-A6-1)*; and *Extent Heritage Mount Panorama Wahluu Boardwalk – Wahluu Interpretation Story (Attachment D22-A13)*; and *Extent Heritage 2019, Report to Council in response to the application made pursuant to section 10 of ATSIHP Act 1984 (Attachment D22-A16)*.
- 5.48 Council's submission highlighted the findings of the anthropological investigations and the differences of opinion that exist concerning important details about how and where values may be embodied in the place. Extent conclude that some Wiradyuri people are actively incorporating Wahluu into contemporary efforts to reconnect with country. This reconnection is part of an ongoing and conscious process of 'reinvigoration' of cultural beliefs and practices (**Attachment D22-A16**).
- 5.49 Council's submission, prepared by Extent, qualified some of the previous findings and recommendations in reports by highlighting the differing beliefs by Aboriginal people who were interviewed by the reporter. Some examples are:

For some Wiradyuri people, Mount Panorama-Wahluu evinces strong emotions, because it is believed to embody important spiritual values. It is not clear whether or not this is a commonly held view within the Wiradyuri community or the view of a minority of Wiradyuri people. Only a modest number of Wiradyuri made themselves available for consultation and there is disagreement within the Aboriginal community in the area.

There appear to be Wiradyuri people who do not necessarily consider Mount Panorama-Wahluu to embody spiritual values. It is difficult to quantify that number, because, for various reasons, people with this point of view are arguably the least likely to make themselves available for anthropological consultation.

In any event, some Wiradyuri people, possibly from both of the above groups, are actively incorporating Mount Panorama-Wahluu into contemporary efforts to reconnect with country. This reconnection is part of an ongoing and conscious process of 'reinvigoration' of cultural beliefs and practices.

- 5.50 Council questioned whether the conscious 'reinvigoration' of cultural beliefs and practices including the ways in which recent efforts to 'reconnect' and 'reinvigorate' constitute 'Aboriginal tradition'.
- 5.51 In relation to the spiritual beliefs associated with the stones in the stone hut, Extent **(Attachment D22-A6-1)** stated that:
- Council's records indicate that a 1939 costing provided to the State Government for construction of the cottage includes a line item for 'excavation stone'. This suggests, but does not prove, that the stone was likely obtained from a quarried source.*
- 5.52 The above view is also supported by Professor Trigger who commented that while there are beliefs that stones from previously existing Aboriginal stone arrangements were used in the construction of the caretaker's cottage, other information indicates the stones for the building were brought from one or more local quarries **(Attachment D22-A7)**.
- 5.53 In relation to the spiritual belief associated with the stones in the stone hut, Council stated that it was 'unlikely that the hut and associated stone structures were built using stone recycled from demolished Aboriginal structures (e.g. 'bora stones')' **(Attachment D22-A16)**.
- 5.54 Council also stated "some Wiradyuri people today do not draw directly from transmitted traditional knowledge to identify heritage places of spiritual significance. Rather, they are 'reinscribing' the landscape with places that they identify as significant by reference to intuitive and highly personal responses to natural phenomena and landforms" **Attachment D22-A16)**.
- 5.55 Further, as mentioned above, Crennan Legal on behalf of the Council provided additional submissions on 15 April 2021. In short, Council submitted that:
- (a) the declared area is not of particular significance, because it has general significance but not particular significance;
 - (i) the distinction between "tangible" and "intangible" cultural heritage needs to be observed. There is an absence of "tangible" cultural heritage on it; and the "intangible" cultural heritage on it is of general significance but not of particular significance.
 - (b) there are doubts about the existence of a sacred women's site. On the basis of the available material, the Minister cannot be satisfied that the declared area contains a sacred women's site, in circumstances where:
 - (i) there is a lack of agreement as to the existence of the site;
 - (ii) the Applicants have not strongly asserted that the site, if it exists, possesses "particular significance;
 - (iii) the Applicants' (including Leanna Carr-Smith's) authority to speak on the existence of the site is far from uncontroversial; and
 - (iv) the Applicants are not credible (see 3.9.1).

Representations from others

- 5.56 Aside from the applicant and Council, the reporter received submissions from 29 other respondents in the first round of submissions. None provided information that was decisive in determining whether the specified area is of *particular* significance, as required under the ATSIHP Act, to Aboriginal people. However more than half of the respondents, including Heritage NSW (**Attachment D25**), noted the significance of the area to Aboriginal people.
- 5.57 BLALC submitted, in their letter dated 14 April 2021, that prior to 2017 the claimed women's site did not exist on Wahluu, which is supported by the lack of topographic evidence that would usually be present for a women's site (**Attachment ZB**).
- 5.58 One respondent (**s. 47F(1)**), **Attachment D24**) submitted research papers regarding her view that the site held significant cultural values and should be protected. This respondent identified as Aboriginal.
- 5.59 Several respondents stated that many non-Aboriginal people in the region are aware of the importance of Wahluu (see for example **Attachments D4, D28, D25**). Some respondents accepted that the specified area was 'significant'.
- 5.60 Included in **Attachment D25**, is the draft statement of significance that was prepared by Heritage NSW in consultation with key stakeholders in June-July 2019, and was considered by the Aboriginal Cultural Heritage Advisory Committee:

Wahluu (Mount Panorama) may be of state heritage significance as a traditionally sacred place of the Wiradjuri people. The traditional owners of the Bathurst region, the Wiradjuri community, believe that the summit of Wahluu was traditionally the location of a bora ring site for the initiation of men and the teachings of lore and men's business. Although ground disturbance and use throughout the 20th century has compromised the integrity of the traditional Aboriginal cultural heritage of Wahluu, the mountain may be of state heritage significance as a representative example of a sacred place of the Wiradjuri people for men's business. The natural attributes of the Wahluu - its height and panoramic views - provided a suitable environment for ceremonial rituals and facilitated a divine connection between the everyday world and the spiritual realm of the land and sky.

- 5.61 The reporter noted that some respondents cited the lack of archaeological evidence as indicative that the specified area was not a significant Aboriginal area, but did not address the intangible cultural values outlined in the Gazette Notice (**Attachment D1, D11 and D15**).
- 5.62 Many of the 17 respondents who object to the go-kart development cited concern with Council prioritising development over the cultural values associated with Wahluu.

Department's views

- 5.63 The department has considered the position of the applicant, Council, other representations and the section 10 report for the purpose of assisting you to form a view in relation to whether it is open to you to make a section 10 declaration.
- 5.64 The department notes there is some disagreement between Wiradyuri people on the existence or location of some sites within the specified area, however there is agreement between Wiradyuri people that Wahluu is a place of cultural heritage significance and this is related to the shape of Wahluu.
- 5.65 The department is of the view that, contrary to the conclusion of the reporter, the specified area is of 'particular significance' for the purposes of section 10(1)(b)(i). This is primarily on the basis of the creation story of Wahluu, Mount Panorama, which is explained as the form of the fallen warrior, Wahluu (see paragraph 5.28 for details). As well as explaining the origins of Wahluu, Mount Panorama, this story makes a unique contribution to broader creation narratives and songlines explaining other landmarks and linking the Wiradyuri to other Aboriginal nations. This story of Wahluu, and its relationship to other important topographic features including Mount Stewart and Evans Crown, has intangible cultural heritage and this is

broadly agreed by Wiradyuri people and acknowledged by a range of non-Aboriginal experts (for example Attachment A28, Attachment A6-1 and Attachment D22-A16).

5.66 In addition, while there is disagreement amongst Wiradyuri people about the nature and location of traditionally important sites on Wahluu, Mount Panorama, (including whether a women's site existed) there is general agreement that there is intangible significance associated with the shoulder of Wahluu being a high point of Mount Panorama, see for example Attachment A and Attachment A26.

5.67 The department therefore recommends that you form the view that the specified area is a significant Aboriginal Area for the purposes of section 10 of the ATSIHP Act. It is open to you to reach a different conclusion on the question of 'particular significance' based on the information in the section 10 report.

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Alternative conclusion

- 5.91 The department acknowledges that the information in this departmental analysis and the documents you are required to consider might lead you to a different conclusion than is outlined above.
- 5.92 If you disagree with any of the department's findings in relation to significance, threat or any other relevant matter, and decide not to make a declaration to protect the specified area, the department will brief you separately.

Other relevant matters

The extent of the area that should be protected

Applicant's views

- 5.93 The applicant submitted that a section 10 declaration should be made over the entire specified area.

Reporter's finding

- 5.94 The reporter concludes that the specified area is not of particular significance and therefore does not recommend a declaration over the specified area.
- 5.95 The reporter notes that if you should be satisfied that the area is a significant Aboriginal area and resolve to make a declaration, then the reporter considers the declaration should only be for part of the specified area (shown at Figure 2, page 89 of the section 10 report, **Attachment D**).

Council's views

- 5.96 The Council submitted that a declaration should not be made. Its submission of 5 December 2019 (**Attachment D22**) specifically notes:

*Council is of the opinion that a section 10 Declaration is not required over any lands at Mount Panorama (Wahluu). ... Council continues to ensure appropriate assessment and protection of the cultural heritage of the Mountain in accordance with relevant State legislation (**Attachment D22**).*

Representations from others

- 5.97 BLALC noted in their procedural fairness response on 14 April 2021 that Media articles bring into question the validity of intangible cultural evidence offered by the applicant as they highlight significant variations in intangible evidence over time (**Attachment ZB**) and 10 enclosures (**Attachment ZBa to ZBi**).
- 5.98 Of the other representations, aside from ACHA recommending that the track be moved to a site "less likely to result in harm to intangible cultural values", none commented specifically on the extent of the area to be protected. However, of the representations that support a declaration it is inferred that they mean for a declaration to encompass the entire specified area.

Department's views

- 5.99 The department has considered the position of the applicant, Council, other representations and the section 10 report for the purpose of assisting you to form a view about the specified area.
- 5.100 As noted above, the department considers on balance that the amended specified area is a significant Aboriginal area for the purposes of the ATSIHP Act, specifically in that it contributes to the form of the fallen warrior Wahluu, which is generally accepted as an important creation story for the Wiradyuri people. Furthermore, as noted above, the department considers that the only threat of injury or desecration to a significant Aboriginal area is posed by the construction of the proposed go-kart track.
- 5.101 As noted at paragraph 5.5, the department therefore considers that it is open to you to make a declaration over the area of the proposed go-kart track (being part of the specified area) in order to protect that area from the threat of injury or desecration faced by the proposed track.
- 5.102 The department notes that this conclusion is contrary to the recommendation of the section 10 report, and is also different to the alternative area put forward in the section 10 report as a secondary recommendation. It also does not fully protect the area specified by the applicants

(although correspondence dated 22 March 2021 suggests that they might be satisfied by the protection of this smaller area).

The prohibitions and restrictions to be made with respect to the area - s10(4)(d)

Applicant's views

5.103 The applicant calls for prohibitions and restrictions to be made with respect to the area, including:

- (a) the proposed go-kart development;
- (b) actions or activities that constrain or remove access to sacred sites, including women's sites;
- (c) machinery damage; and
- (d) dumping of materials (including tyres).

Figure 5. Map showing Lot numbers in and around proposed go-kart site, not to scale (from page 4 of Attachment A1).

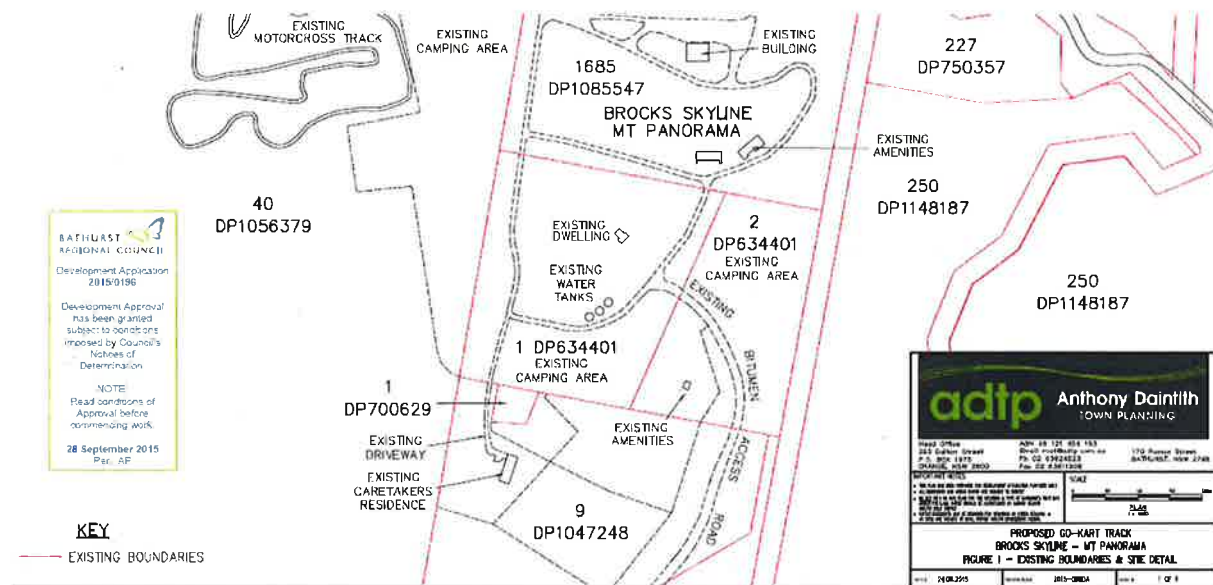


Table A: extract of Lands within the specified area (derived from information in Attachment D22).

Land Parcel	Owner	Zoning
Part Lot 40 DP1056379*	Bathurst Regional Council	SP3 - Tourist
Lot 1 DP634401*		
Lot 2 DP634401*		
Lot 1 DP700629*		
Part lot 9 DP1047248*		
Part lot 89 DP750357		
Lot 2 DP801666	BLALC	Ru2 - Rural Landscape
Part lot 3 DP700629		
Lot 250 DP1148187		

Land Parcel	Owner	Zoning
Lot 3 DP773864	Telstra Corporation	SP3 - Tourist
Pt Por 92 DP750357 Lot 1685 DP1085547 Lot 227 DP750357 Lot 251 DP1148187 Lot 3 DP254943	Crown	SP3 - Tourist
*The development relates to these Lots		
**A full table of lot ownership and current and future use is at Table 2 of Attachment D22 (pages 6-7).		

The Reporter's findings

- 5.104 Should you be satisfied that the specified area is a significant Aboriginal area and resolve that it is open to you to make a declaration under section 10, the reporter considers that the prohibitions and restrictions to be made with respect to the area should be limited to:
- (a) activities and/or developments, including machinery damage, that directly threaten the topography of Wahluu; and
 - (b) the taking of actions or activities that constrain or remove access to the women's site.
- 5.105 A prohibition or restriction regarding the dumping of materials (including tyres) is not required as this issue is regulated under New South Wales law.⁴
- 5.106 Council, in its submission of 4 February 2020 (**Attachment D31**) advised that the contemporary house has been demolished. The reporter does not consider that a prohibition or restriction regarding demolishing the contemporary house would have been required as the house does not contain any fabric that is of particular significance to Aboriginal people. The reporter notes that should a declaration be made, any future similar demolitions would be required to be carried out in accordance with that declaration.

s. 22(1)(a)(ii)

⁴ Protection of the Environment Operations Act 1997 (NSW) s143

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

6. Consultation with state or territory minister

- 6.1 Section 13(2) of the ATSIHP Act provides that you cannot make a declaration in relation to an area in a state or territory unless you have consulted with the appropriate minister of that state or territory as to whether there is, under a law of that state or territory, effective protection of the area from the threat of injury or desecration. However, section 13(4) of the ATSIHP Act provides that any failure to comply with subsection 13(2) does not invalidate the making of a declaration.
- 6.2 On 8 October 2020 you wrote to the Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, the Hon Don Harwin MLC, who has joint responsibility along with the Minister for Energy and Environment, the Hon Matthew Kean, for administering the NPW Act (**MS20-001297**).
- 6.3 On 30 October 2020 you received a response from Minister Harwin. The response stated that Aboriginal objects within the specified area are protected under part 6 of the NPW Act. The response also outlined that owing to divergent views of community elders, applications for Aboriginal Place and State Heritage listing were not progressed. Minister Harwin stated that, 'there is no current legislative framework in place to specifically protect the intangible Aboriginal cultural heritage values for the specified area' (**Attachment G**).

7. Conclusion

- 7.1 The department has considered the section 10 application made by the Wiradyuri Traditional Owners Central West Aboriginal Corporation, the section 10 report and representations provided to you in compliance with section 10(1)(c) of the ATSIHP Act, as well as the additional submissions provided to you and the department in relation to the section 10 application.
- 7.2 In relation to the section 10 application, the department is of the view that it is open to you to conclude that:
- (a) you have received an application for the purposes of section 10(1)(a) of the ATSIHP Act;
 - (b) the specified area is a 'significant Aboriginal area' for the purposes of section 10(1)(b)(i) of the ATSIHP Act; and
 - (c) at least part of the significant Aboriginal area is 'under threat of injury or desecration' for the purposes of section 10(1)(b)(ii) of the ATSIHP Act.
- 7.3 Based on the material noted above, the department is of the view that your power to make a declaration under section 10 is enlivened. You are not bound to accept the department's view in making your decision.

See MS21-000561 for attachments

MS21-000561

To: Minister for the Environment (For Decision)

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (ATSIHP ACT) – WAHLUU (GO-KART TRACK), NEAR BATHURST, NEW SOUTH WALES – DECISION UNDER SECTION 10

Timing: Before section 9 declaration expiry on 4 May 2021.

Recommendations:

1. That you consider the materials in Attachments A to ZM.

Considered / Please discuss

2. That you agree with the department's analysis at Attachment ZH, and in particular the department's view that it is open to you to be satisfied that:

- a. the specified area is a 'significant Aboriginal area' for the purposes of section 10(1)(b)(i) of the ATSIHP Act; and
- b. part of the specified area is under 'threat of injury or desecration' for the purposes of section 10(1)(b)(ii) of the ATSIHP Act.

Agreed / Not agreed

3. That, if you agree with recommendation 2, you agree to make a declaration to protect part of the specified area in the terms set out at in the declaration at Attachment ZI and explanatory statement at ZIa.

Agreed / Not agreed

4. That you sign the declaration at Attachment ZI.

Signed / Not signed

5. That you sign the letters at Attachment ZJ, to notify affected parties of your decision.

Signed / Not signed

Minister:



Date:

Comments:

30/4/21

Clearing Officer: Sent: 27/04/2021	James Barker	Assistant Secretary, Heritage Branch	Ph: 02 6274 2015 s. 47F(1)
Contact Officer:	s. 22(1)(a)(ii)	Director, Indigenous Heritage Section	s. 22(1)(a)(ii)

Key points

1. On 8 February 2019 (executed 18 February 2019), the Wiradyuri Traditional Owners Central West Aboriginal Corporation (**applicant**), made an oral application under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (**the ATSIHP Act**) (**application, Attachment A-A47**), seeking to protect an area of Wahluu, Mount Panorama (**specified area**, shown at page 3 of **Attachment B**) from injury or desecration arising from the development of a go-kart track proposed by Bathurst Regional Council (**Council**).
2. The applicant originally described the area for protection as an area of Wahluu from the 820-metre contour up to the high voltage powerlines and inclusive of McPhillamy Park; the Sir Joseph Banks Nature Park; and Reid and Sulman campgrounds. On 22 March 2021 (**Attachment X**), the applicant amended the section 10 application area to be the same as the section 9 application area. Accordingly, the amended section 10 area is the combined red and green shaded area shown on page 1 of **Attachment B** (**amended specified area**).

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Section 10 findings

11. The department analysed the application against the requirements of section 10 of the ATSIHP Act. This includes an analysis of the report, representations and other information received in relation to the section 10 application (**Attachment ZH**).
12. The report concluded there was insufficient information in the application, representations and material received in the reporting process to establish that the specified area is of particular significance.
13. Since the report was submitted, you visited Bathurst to meet key stakeholders in relation to the application and to visit Wahluu. In addition, you received further information in relation to the application since the report was submitted, including at and following the Bathurst visit. All further information and submissions have been addressed in the department's analysis at **Attachment ZH**.
14. Having regard to all this evidence, including the further information since the independent report was submitted, the department considers that you can be satisfied that:
 - (a) the specified area has particular significance as an Aboriginal area for the purposes of section 10(1)(b)(i) of the ATSIHP Act, based on the creation story of Wahluu, Mount Panorama, which is explained as the form of the fallen warrior, Wahluu. As well as explaining the origins of Wahluu/Mount Panorama, this story (which is broadly agreed by Wiradyuri people and acknowledged by a range of non-Aboriginal experts) makes a unique contribution to broader creation narratives and songlines explaining other landmarks and linking the Wiradyuri to other Aboriginal nations; and
 - (b) part of the specified area is under threat of injury or desecration for the purposes of section 10(1)(b)(ii) of the ATSIHP Act from the proposed go-kart track, including through vegetation clearing and bulk earthworks, which would have a visible and material impact on the form of Wahluu.
15. On this basis, the department makes the recommendations as set out above at page 1. The department recommends the declaration commences on 5 May 2021, to avoid interfering with the section 9 declaration that is in place until 4 May 2021.
16. You are not bound by the department's analysis and may reach your own alternative conclusions.

Sensitivities and handling

17. The department will provide media talking points separately.

Consultation: YES

18. On 8 October 2020 you wrote to the Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, the Hon Don Harwin MLC, who has joint responsibility along with the Minister for Energy and Environment, the Hon Matthew Kean, for administering the New South Wales *National Parks and Wildlife Act 1974* (NPW Act).
19. On 22 December 2020 you received a response from Minister Harwin confirming information that was provided to the section 10 reporter. Minister Harwin confirmed that Aboriginal objects within the specified area are protected under part 6 of the NPW Act and that discussions are continuing with relevant stakeholders in relation to protection of intangible Aboriginal cultural heritage values of the specified area (**Attachment G**).
20. On 30 March 2021, you sent consultation letters (**Attachment Y**) attaching the draft section 10 declaration (**Attachment YA**) to 8 parties identified as having proprietary and pecuniary interest in a declaration being made, with comments requested by 15 April 2021. The 8 parties were the applicant, Bathurst Regional Council, Bathurst Local Aboriginal Land Council; **s. 47F(1)** ; Bathurst Kart Club; Panorama Motorcycle Club; V8 Supercars Australia Pty Ltd; and Bathurst Light Car Club.
21. On 1 April 2021, for procedural fairness, the department shared 11 recently received documents with 7 of the parties above with responses requested by 15 April 2021. The Department did not consider it necessary to consult further with **s. 47F(1)**. The procedural fairness email is at **Attachment YB**. The 11 documents shared were **Attachments G, I10, M, O** (construction certificate only), **Q, W** and **D**. The affidavits at **Attachments T** and **U** were provided in summary only (**Attachment YC**).

S. 42(1)

S. 42(1)

Financial impacts: N/A

Attachments:

A	Application under section 10 of the ATSIHP Act
A1	Application-Director Environmental Planning and building services report
A2	Application-Neale Draper report
A3	Application-ACHA Report - Proposed Go Kart track
A4	Application-CULTURE SENSITIVE-Survey debrief 20MAR2018-part 1 [USB]
A5	Application-CONFIDENTIAL - Review of complaint against Council by Conduct
A6	Application-Bathurst Regional Council - Statement of environmental effects - Go Kart development
A7	Application-Mt Panorama Trigger Report
A8	Application-Letter to Council regarding the MOU
A9	Application-Letter to editor re Go Kart track on Wahluu
A10	Application-Flora and fauna report of the Mt Panorama region
A11	Application-Emails from s. 47F(1) to Bathurst Regional Council
A12	Application-Bathurst Regional LGA Aboriginal Heritage Study
A13	Application-letter to Bathurst Regional Council - Cr Aubin
A14	Application-Bathurst Regional Council meeting minutes - 19.12.18
A15	Application-Response from Bathurst Council on Aboriginal Place nomination
A16	Application-Assessment of the prehistoric heritage in the Evans Shire
A17	Application-Typed articles relating to the Aborigines principally archaeological sites of Bathurst district
A18	Application-Archaeological survey Bathurst-Raglan-Mt Panorama
A19	Application-hyperlinks from oral application-three
A20	Application-Article-proposed Mount Panorama facility
A21	Application-Article-Cultural heritage claims have councillors fired up
A22	Application D023-19004-02-CAMP-MCPHILLAMY_compressed
A23	Application D022-19004-02-CAMP-REID-SULMAN_compressed
A24	Application-Applicant Letter to Western Advocate Bathurst
A25	Application-Applicant email to Council re MoU_ILUA_Council response
A26	Application-OEH draft Assessment-Wahluu Heritage Listing
A27	Application-Essay Go Kart Track on Mount Panorama Wahluu
A28	Application-CULTURAL SENSITIVE-full Trigger Report-Bathurst Wiradyuri Anthro Assessment
A29	Application-Council email to applicant-re survey commencement
A30	Application-Wahluu-s9-Specified Area
A31	Application-Secretary's Environmental Assessment Requirements
A32	Application-Access Track Realignment Methodology 26July2019 (1)
A33	Application-Wahluu-s9-2nd track (1)
A34	Application-numerous media articles relating to the issue
A35	Application-CULTURE SENSITIVE-men only-Ceremony [USB]
A36	Application - Deliberately blank
A37	Application-Email complaint re Council
A38	Application-DPIE letter to applicant re complaint (1)
A39	Application-Ceremonial Ground Wambool sign text

A40	Application-Bathurst Region Aboriginal Heritage Interpretation Strategy
A41	Application-Bathurst Region Heritage Reference Group-alternative site proposal
A42	Application-Letter NSW Govt re Nomination for Heritage Listing
A43	Application-HCNSW Proposed full curtilage for investigation map
A44	Application-HCNSW Partial curtilage for investigation map
A45	Application-Email exchange Applicant_DOEE-5 Nov 2019_Redacted
A46	Application-CULTURE SENSITIVE-maps of specified area showing app sites
A47	Application-CULTURE SENSITIVE-Survey debrief 20MAR2018-part 2 [USB]
B	Map of the Specified Area
C	Gazette Notice
D	Section 10 Report including corrected figure 2 map and particular significance addendum
	Appendix A - Application and attachments (see Attachment A - A47)
	Appendix B - Gazette Notice (see Attachment C)
	Appendix C - Representations Section 10 report (see Attachment D1 - D36)
D1	Representations 1-s. 47F(1)
D2	Representations 2-Project Zone Pty Ltd
D3	Representations 3-Bathurst Tours
D4	Representations 4-s. 47F(1)
D5	Representations 5-s. 47F(1)
D6	Representations 6-s. 47F(1)
D7	Representations 7-s. 47F(1)
D8	Representations 8-s. 47F(1)
D9	Representations 9-s. 47F(1)
D10	Representations 10-s. 47F(1)
D11	Representations 11-Panorama Motorcycle Club
D12	Representations 12-s. 47F(1)
D13	Representations 13-s. 47F(1)
D14	Representations 14-s. 47F(1)
D15	Representations 15-Bathurst Kart Club
D16	Representations 16-Bathurst Cycling Club
D17	Representations 17-Bathurst Clay Target Club
D18	Representations 18-Rahamim Ecology Centre
D19	Representations 19-Supercars Championship
D20	Representations 20-s. 47F(1)
D21	Representations 21-Bathurst Light Car Club
D22	Representations 22-Bathurst Regional Council
D22-A1	Representations 22-BRC-A1-Location Plan-Mount Panorama Boardwalk
D22-A2	Representations 22-BRC-A2-Reports to May and Sept 2019 Council meetings
D22-A3-1	Representations 22-BRC-A3_1-Minutes-Elders Meeting 7 March 2017
D22-A3-2	Representations 22-BRC-A3_2-Minutes-BLALC meeting 7 March 2017

D22-A3-3	Representations 22-BRC-A3_3-Minutes-Elders meeting 4-7-2019
D22-A3-4	Representations 22-BRC-A3_4-Minutes-Elders Meeting 22 November 2019
D22-A4	Representations 22-BRC-A4-WRI Economic Impact of Mount Pan
D22-A5	Representations 22-BRC-A5-2012 Supercheap Auto Bathurst 1000 Economic Impact Report
D22-A6-1	Representations 22-BRC-A6_1-Go-Kart Track ACHAR FINAL
D22-A6-2	Representations 22-BRC-A6_2- Go-Kart Track ACHAR Appendices [USB]
D22-A7	Representations 22-BRC-A7-Bathurst Wiradyuri Anthro Assessment FINAL
D22-A8	Representations 22-BRC-A8-Map References for specified area
D22-A9	Representations 22-BRC-A9-OEH -Draft assessment of significance
D22-A10-1	Representations 22-BRC-A10_1-Proposed full curtilage AP nomination
D22-A10-2	Representations 22-BRC-A10_2-Proposed partial curtilage AP nomination
D22-A11	Representations 22-BRC-A11-Council response-draft DPC assessment of significance
D22-A12	Representations 22-BRC-A12-DPC advice on AP nomination
D22-A13	Representations 22-BRC-A13-Wahluu interpretation story
D22-A14	Representations 22-BRC-A14-OEH advice-Contemporary site cards
D22-A15	Representations 22-BRC-A15-Report to Council-Aboriginal Interpretation Strategy
D22-A16	Representations 22-BRC-A16-Extent Heritage report to Council
D22-A17	Representations 22-BRC-A17-SHI Form stone cottage
D22-A18	Representations 22-BRC-A18-Section 136 outcome
D23	Representations 23-s. 47F(1)
D24	Representations 24-s. 47F(1)
D25	Representations 25-Department of Premier and Cabinet
D26	Representations 26-s. 47F(1)
D27	Representations 27-Bathurst Community Climate Action Network
D28	Representations 28-Bathurst and District Branch National Trust of Australia
D29	Representations 29-s. 47F(1)
D30	Representations 30-s. 47F(1)

D31	Response 1 - Bathurst Regional Council response
D32-1a	Response 1a - Applicant response summary
D32-1b	Response 1b - Applicant response to submissions 1-21 and 23-30
D32-1c	Response 1c - Applicant response to 22
D32-1d	Response 1d - Applicant additional response material
D32-1e	Response 1e - Applicant additional response material
D33	Response 2 - Applicant
D34	Response 2 - BRC
D35	Response 2 - DPC
D36	Response 3 - BRC
E1	Late representation-BRC-2nd Cct ACHAR-cover letter- ACHAR-Appendices [USB]
E2	Late representation - BRC Councillor Morse
E3	Late representation - s. 47F(1)
E4	Late representation - s. 47F(1)
E5	Late representation - King and Wood Mallesons-letters to Minister and BRC
E6	Late representation - BRC Councillor Morse support of section 9
F	Section 9 Application [and s9 Specified Area]
G	NSW Minister Harwin correspondence
H	ATSIHP Act - selected extracts
I	KWM-response to procedural fairness
I1	Trigger and Macdonald Report
I2	Draper Report
I3	Extent Submission
I4	ACHAR
I5	Letter ex KWM to BRC dated 26 October 2020
I5.1	Map attachment
I6	Letter ex Crennan Legal to KVM dated 12 February 2021
I6.1	Gantt chart
I6.2	Colour-coded plan
I7	Copy of NSW LC Motion passed 17 February 2021
I8	Letter ex Josh Wilson MP to the Hon Sussan Ley MP dated 18 February
I9	Niche Heritage comments dated 24 February 2021
I10	Hyperion Report <i>Aboriginal Cultural Values Interpretation Strategy Mount Panorama Wahluu Boardwalk</i> February 2020
I11	Extent Heritage Mount Panorama Wahluu Proposed Boardwalk - Aboriginal Heritage Due Diligence Assessment 17 March 2020
I12	Schedule of other possible sites for the go-kart track
J	Bathurst Regional Council advise of intention to start works, dated 12 February 2021
K	submission-BLALC-Email-re Minister coming to Bathurst-11 Mar 2021

L	submission-Friends of McPhillamy Park-Email and Attachments-11_14 and 21 Mar 2021
M	submission-Applicant-Vegetation of proposed go kart site-provided on site-12 Mar 2021
N	submission-BRC-Go-Kart footprint provided by BRC
O	submission-BRC Councillors-12 and 15 Mar 2021
P	Dept-meeting notes-all Bathurst meetings 11 and 12 Mar 2021
Q	submission-BRC Mayor to PM Morrison
R	Email-Applicant and Department-report of possible s9 breach and response-15 Mar 2021
S	Letter-Council to Minister-re s9 declaration-attaches motocross-17 Mar 2021
T	Affidavit of s. 47F(1) - Sworn 4 March 2021 - Sealed
U	Affidavit of s. 47F(1) - Sworn 4 March 2021 - Sealed
V	s. 11C(1)(a)email-attaches-CONFIDENTIAL-Evidence of Wiradjuri Artefacts on Wahluu
W	submission-Bathurst Kart Club 19 Mar 2021
X	KWM to CU-22 March 2021
Y	Ley s10 consultation letters - signed 31 March 2021
YA	s10 proposed Declaration and Explanatory Statement-Wahluu Mount Panorama
YB	Email-Wahluu s10 - Procedural Fairness 1 April 2021
YC	Summaries of affidavits of s. 47F(1) both dated 4 March 2021
ZA	Response-Panorama MCC-14 April 2021
ZB	Response-BLALC-14 April 2021
ZBa	Response-BLALC-14 April 2021 Central Western Daily article 1
ZBb	Response-BLALC-14 April 2021 The Guardian article 1
ZBc	Response-BLALC-14 April 2021 Western Advocate article 1
ZBd	Response-BLALC-14 April 2021 Western Advocate article 2
ZBe	Response-BLALC-14 April 2021 Western Advocate article 3
ZBf	Response-BLALC-14 April 2021 Traditional Land Ownership status-Federal Court Decision
ZBg	Response-BLALC-14 April 2021 s. 47F(1) Affidavit unsigned
ZBh	Response-BLALC-14 April 2021 Birth records WTOCWAC
ZBi	Response-BLALC-14 April 2021 Guardian article for share of fee
ZBj	Response-BLALC-14 April 2021 Original story of Wahluu by s. 47F(1)
ZC	Response-Bathurst Kart Club-15 April 2021
ZD	Response-KWM-15 April 2021
ZDa	Response-KWM-15 April 2021 Enclosure 1 20210212 - Letter ex Crennan Legal - re works
ZDb	Response-KWM-15 April 2021 Enclosure 2 20210226 - Letter ex KWM to D Harwin
ZDc	Response-KWM-15 April 2021 Enclosure 3 20210311 - letter ex BRC re costs
ZE	Response-BRC-15 April 2021
ZEa	Letter Crennan Legal obo BRC-request extn-14 April 2021
ZEb	Email dept response to Crennan Legal-BRC-19 April 2021
ZF	Response-s. 47F(1) -16 April 2021

ZFa	Letter Crennan Legal obo s. 47F(1)-request extn and pf docs-14 April 2021
ZFb	Email dept response to Crennan Legal-s. 47F(1) 15 April 2021
ZG	Response-BRC Hanger-19 April 2021
ZH	Department Analysis
ZHa	Department-Applicant's significance claims A1 in ref to A46
ZI	Section 10 declaration – FOR SIGNATURE
ZIa	Section 10 declaration – explanatory statement
ZJ	Letters to interested parties – FOR SIGNATURE

s. 42(1)



Australian Government
**Department of Agriculture,
 Water and the Environment**

PDR no.

MS21-000561

Adviser

Ministerial Submission Coversheet

Subject	ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (ATSIHP ACT) – DECISION UNDER SECTION 10 – WAHLUU (GO-KART TRACK), NEAR BATHURST, NEW SOUTH WALES		
Client (if applicable)			

Division	Heritage Reef and Wildlife Trade Division (HRWT) G4		
Contact officer	s. 22(1)(a)(ii)	Telephone	s. 22(1)(a)(ii)
Cleared by (SES)	James Barker	Telephone	02 6274 2015

Finance Division	Name of contact:	NA	Date approved: NA
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The Finance Division is satisfied that all due processes have been followed and agree to the financial data/information contained in the submission.

Legal Division	Name of contact:	s. 22(1)(a)(ii)	Date approved: 27 / 04 / 2021
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The Legal Division is satisfied that the summary of legal advice contained in the submission is an accurate summary of the legal advice that was provided.

FOR MO/AMO USE ONLY:	Scheduled date	Actual date
Date registered		06 April 2021
Dept to Minister's Office		
DLO to Adviser(s)		
Adviser(s) to Chief of Staff		
Chief of Staff to Minister		

MO/AMO COMMENTS:

**Report to the Hon Sussan Ley MP
Minister for the Environment**

***Application under section 10 of the Aboriginal and Torres Strait Islander
Heritage Protection Act 1984***

**For the specified area within Wahluu or Mount Panorama, Bathurst,
New South Wales**

1 May 2020

**Reporter
Terry Bailey
O&G-Rosedale Pty Ltd**

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EXECUTIVE SUMMARY

On 18 February 2019, the Wiradyuri Traditional Owners Central West Aboriginal Corporation (**the Applicant**) made an application for protection of Wahluu, Mount Panorama near Bathurst New South Wales (**the application**) under s10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**). The application names [s. 47F\(1\)](#), and notes that these four individuals are Wiradyuri Traditional Owners and/or Elders.

The application sought to protect a part of Wahluu, Mount Panorama (**the specified area**) from injury or desecration, which the applicant considers would be caused by a proposed Go-Kart track. The specified area is shown in Figure 1 of this Report.

In compliance with s10(3)(a) of the ATSIHP Act, a Notice was published in the Federal Register of Legislation and the Western Advocate Bathurst on 10 October 2019 (**the Notice**). Thirty individuals or organisations made representations in relation to the Notice.

Based on the information provided in the application and representations, the specified area which is part of Wahluu, Mount Panorama, is considered by the Reporter to have **intangible** cultural heritage that is of significance to the Wiradyuri people, but there is insufficient evidence available in the material to establish that this significance reaches the **particular significance** threshold required by the ATSIHP Act. Further, the Reporter concludes, based on the information provided, that there is insufficient evidence of **tangible** cultural heritage within the specified area to meet the criteria of particular significance required under the ATSIHP Act. The lack of tangible evidence in the archaeological record does not mean that tangible cultural heritage never existed but rather that as a consequence of development it is likely that it has been lost or destroyed. In making this conclusion the Reporter notes that further archaeological studies may find new tangible cultural heritage.

Having given due consideration of the material in the application, the material provided through the representations, the Reporter's own investigations, and the requirements of the ATSIHP Act, the Reporter concluded there is insufficient evidence to determine that the specified area is of particular significance. Therefore the Reporter recommends that the Minister **does not** make a declaration under the ATSIHP Act in relation to the specified area.

Should the Minister not accept the Reporter's recommendation and is satisfied that the area is a significant Aboriginal area and resolves to make a declaration, the Reporter considers that the 'declaration area' should be limited to part of Lot DP 1056379, see shown in Figure 2 of this Report, and not the whole of the specified area.

The Reporter recommends that the declaration area should more directly reflect the area that is under threat of injury or desecration where:

- the activities and/or developments to construct a Go Kart facility, including machinery damage, that will disturb the ground and will directly threaten the shape and form of the current topography of Wahluu, Mount Panorama
- the taking of actions or activities that constrain or remove access to the women's site(s).

Regardless of whether the Minister is satisfied or not satisfied that the area is a significant Aboriginal area and resolves to make or not make a declaration, the Reporter notes that it would open to the Minister to advise the State that before making a final decision regarding the s10 application, the Minister would like the State to provide advice in relation to the protection of 'intangible cultural heritage', which is available through an Aboriginal place assessment under s84 of the *National Parks and Wildlife Act 1974* (NSW).

THE APPLICATION

1. On 18 February 2019, the Wiradyuri Traditional Owners Central West Aboriginal Corporation (**the Applicant**) made an application¹ for protection of a specified area within Wahluu, Mount Panorama near Bathurst New South Wales (**the application**) under s10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**). The application was lodged with the Hon Sussan Ley MP, Minister for the Environment (**the Minister**). This Report addresses the application made under s10 of the ATSIHP Act.

The Applicant

2. The Applicant named the following contact people and members: s. 47F(1)
in the application. The application notes that the four members are Wiradyuri Traditional Owners and/or Elders. The Applicant is a not for profit corporation. The website for the Applicant identifies its vision statement as:

Our vision is to advance our people and preserve the oldest living culture in the world. To achieve this, the Bathurst Wiradyuri Elders recognise that they need to create and develop a viable commercial enterprise for generations to come. This will enable our Not for Profit Corporation, Wiradyuri Traditional Owners Central West Aboriginal Corporation (ICN 7184), to achieve positive educational outcomes for our youth and provide ongoing employment in a variety of areas.²

s. 22(1)(a)(ii)

¹ The application is dated 8 February 2019 and signed on 18 February 2019

² Accessed on 29 February 2020 at 12:40 p.m. https://www.facebook.com/pg/WTOCWAC/about/?ref=page_internal

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Content of the Application

19. The application was made in oral form to the then Department of the Environment and Energy (**the Department**) and signed on 18 February 2019.
20. The application seeks the preservation or protection of the specified area within Wahluu or Mount Panorama from injury or desecration within the meaning of s10(1)(b)(ii) of the ATSIHP Act.
21. The application was accompanied by a number of attachments including: a series of maps; archaeological and anthropological reports; oral and video footage recordings of Elders, an Aboriginal Cultural Heritage study and other historical and extraneous material provided for context.
22. A claim for confidentiality was initially made over two of the attachments by the Applicant namely **A4** (audio recording of Elders) and **A35** (video footage of Elders undertaking ceremony). When the Applicant was provided with guidance regarding the procedural fairness obligations in the process and the Reporter's reliance on this material if it was not available to the Respondents, the claim for confidentiality was withdrawn by the Applicant. The Applicant requested that all documents it considered to be culturally sensitive were to be labelled as such and instructions on how to treat this information was to be stipulated to all Respondents. The Reporter agreed to implement this approach. How confidentiality was managed in this process, including the use of a Dropbox to hold the material, is discussed further in the treatment of confidential material section of this report beginning at paragraph 60.
23. Bathurst Regional Council requested that **A5** of the Application (which related to a complaint and investigation of a local councillor) be treated as confidential in this process. The Reporter agreed on the basis that the content of A5 was not relevant to this process and having determined there were no procedural fairness implications arising by treating it as such.
24. Each aspect of the application and attachments are analysed in this Report.
25. A map of the specified area is at **Appendix B**. It is noted that the specified area in the initial s10 application was varied by the Applicant after it was signed on 18 February 2019. An email from the Department clarifying this variation was sent to the Applicant on 23 May 2019. The

s. 22(1)(a)(ii)

Applicant confirmed the revised specified area via email on 27 May 2019. It is noted that all four of the individuals nominated as contact people in the application were copied into these emails.

s. 22(1)(a)(ii)

27. To afford the Applicant adequate opportunity to provide information relevant to their application, the Reporter continued to accept the supplementary information submitted by the Applicant during the period 10 October 2019 to 25 November 2019.
28. For the purpose of this Report, the application is taken to comprise of the application for protection made under s10 of the ATSIHP Act, signed on 18 February 2019 with attachments **(A1 to A19)** and the supplementary material provided by the Applicant in support of the application after the Notice was published on 10 October 2019. The supplementary materials are attachments **A20 to A47**. The application and the list of attachments and supplementary material (hereafter referred to as attachments) is at **Appendix A**.
29. Due to a numbering error a blank attachment (**A36**) was provided to the Applicant and Bathurst Regional Council in the Dropbox. To avoid confusing respondents during the submissions process the Reporter chose to leave **A36** as a blank attachment.

Validity of the Application

30. The application is valid and meets the requirements set out in s10(1)(a) of the ATSIHP Act.¹⁵ The application was made by or on behalf of a group of Aboriginals being the Wiradyuri Traditional Owners Central West Aboriginal Corporation. The application and subsequent email confirmation of 27 May 2019 from the Applicant clearly defines the specified area that is the subject of this application and in addition clearly states the reasons as to why the Applicant considers the specified area to be in need of protection from injury or desecration.

s. 22(1)(a)(ii)

¹⁵ Section 10 (1)(a) Where the Minister receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration

Location of the Area for which protection is sought

31. Wahluu, Mount Panorama is a prominent hill which forms the backdrop of the Mount Panorama racing circuit overlooking the City of Bathurst. It is approximately 2kms west of Queen Charlotte Creek and 1.5km north of Perth Trigonometrical Station.¹⁶
32. The application seeks to protect the specified area which is detailed by the area within the bold line in Figure 1 of the Notice (Figure 1 is replicated below). The specified area is a portion of the Wahluu, Mount Panorama area.
33. The specified area includes the majority of the lowest elevation outline (820 metres) up until the high voltage powerlines and is inclusive of the whole of the Sir Joseph Banks Nature Park, McPhillamy Park, and Reid and Sulman campgrounds.
34. The specified area forms a part of Wahluu, Mount Panorama and comprises part of the summit of the mountain. The specified area does not intersect or overlap with the Bathurst racing circuit but is adjacent to it.
35. Parts of the specified area are utilised for camping during race meetings and for a range of other community activities.
36. Bathurst Regional Council is the land manager for part of the specified area and has a number of leases with community groups such as the Panorama Motorcycle Club (20 year lease, expiry date not provided); Bathurst Cycling Club; Bathurst Clay Target Club (20 year lease renewed until 2039); V8 Supercars Australia Pty and Bathurst Kart Club (the club the Go Kart track is being built to host).
37. There are a number of other land owners within the specified area. Land parcel, ownership and zoning details are set out in Table A.

Table A: Lands within the Specified Area

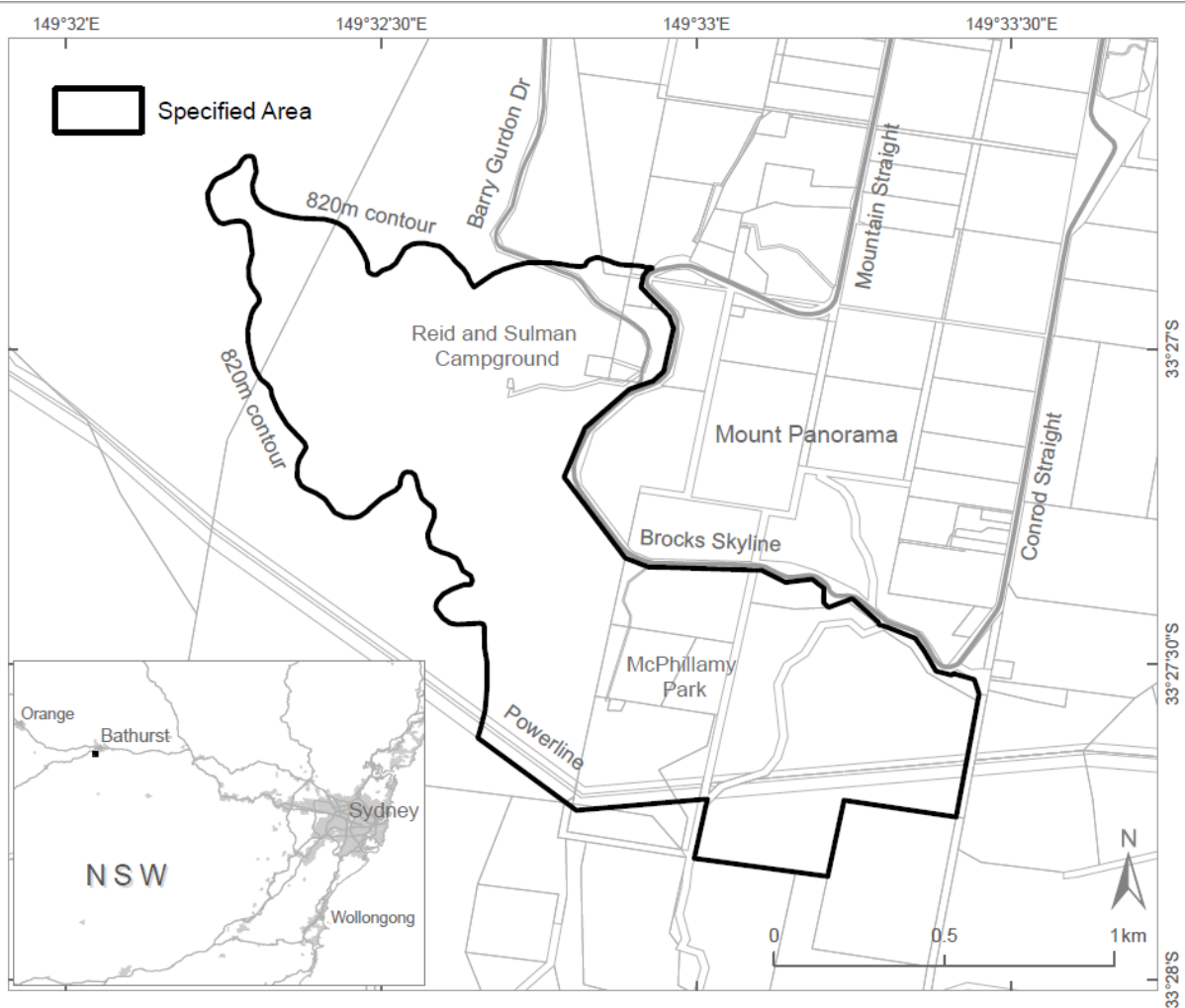
Land Parcel	Owner	Zoning
Part Lot 31 DP 871410	PH & LE Arnold	RU1 - Primary Production
Part Lot 10 DP 1215971	T J and RG Fish	RU2 - Rural Landscape
Lot 1 DP801666	DG Riddiford	RU2 - Rural Landscape
Part Lot 40 DP 1056379 Part lot 89 DP750357 Lot 2 DP801666 Lot 1 DP 634401	Bathurst Regional Council	SP3 - Tourist

¹⁶ Accessed on 29 February 2020 at 12:49 p.m.
https://www.gnb.nsw.gov.au/place_naming/placename_search/extract?id=MnckIMtLuj

Lot 2 DP634401 Lot 1 DP700629 Part lot 9 DP1047248 Part lot 3 DP700629 Council road not constructed		
Lot 3 DP773864	Telstra Corporation	SP3 - Tourist
Pt Por 92 DP750357 Lot 1685 DP1085547 Lot 227 DP750357 Lot 251 DP1148187 Lot 3 DP254943	Crown	SP3 - Tourist
Lot 250 DP 1148187	Bathurst Local Aboriginal Land Council	Ru2 - Rural Landscape

(Source: Bathurst Regional Council)¹⁷

Figure 1: Map of the Specified Area



¹⁷ Bathurst Regional Council Submission to the application under Section 10 ATSIHP Act, Mount Panorama (Wahluu), Bathurst dated 5 December 2019

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

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s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

S10(4)(A) – THE PARTICULAR SIGNIFICANCE OF THE AREA TO ABORIGINAL PEOPLE**Applicant**

106. The Applicant asserts that the specified area holds particular significance to the Wiradyuri people. The specified area is said to contain a number of sites and objects that are of particular significance (tangible significance) and also holds particular significance based on spiritual beliefs (intangible significance) associated with the Wahluu songline and Wahluu creation story. The Applicant's claims of particular significance are therefore categorised into tangible and intangible significance claims, see Table C.
107. It is noted that the Applicant's claims to intangible cultural significance are not always limited to the boundary set by the specified area (for example the mountain is a part of the Wiradyuri Wahluu songline), but these broader intangible concepts remain important contextual information in forming a view regarding the particular significance of the specified area. Although attempts have been made to categorise each element of the Applicant's claim into tangible or intangible significance, it is noted that there is also potential for overlap to occur between these categories.

Table C: Summary of tangible and intangible significance claims

Tangible	Intangible
There is a Bora Ring along one of the significant pathways.	The Mountain is a part of the Wiradyuri Wahluu songline which is part of a wider story that connects Wiradyuri to neighbouring Aboriginal nations.
Stone cairns use to be on the women's site but have since been removed.	The Dreaming is linked to the topographic shapes of the Mountains.
There are trees that are markers, being indicators of gravesites.	The top on the mountain is called Wahluu by the local Wiradyuri community. Wahluu is a part of a creation story as he is one of Baiame's warriors who helped create the land.
There are also areas that are known to be gravesites.	Elders have shared their knowledge of the initiation rituals down to s. 47F(1) – there are five parts to the story, this is also confidential information.
There is a stone hut within the Specified Area using stone from the quarry which the inhabitants of the area had quarried themselves and stones from the paths that the women would use to access the different	The knowledge of the area, stories and traditions have been passed from the older women and elders in the community down to the present generations. Some of the elders have over 74 years of knowledge of the area.

ceremony areas making it both a women's and men's site.	
There is a pathway on the Specified Area that links the Women's Business Area to the Men's area, the pathway is culturally significant and was lined with artefacts (some of which are now in the Stone Hut). They were also lined with 'ancestral trees' which were what defined the two different paths. Some of these trees have been destroyed (the scars and modifications removed) but their trunks remain.	The site is spoken about in the neighbouring community of Orange, as the creation story of Wahluu is connected to one of their stories.
There is a traditional camp oven that has been destroyed by modern development of the area however evidence of it still remains. It was used by the women to prepare food for the celebration site.	The location of the sites on the Mountain provided views of Country and brought them closer to Baiame.
There is an additional area for ceremony that is like a viewing platform, where you can look out across the Country and speak to Baiame.	They have knowledge of the flora and fauna of the area, their special medicine plants and bush tucker are on the Mountain near the sites.
The path from the women's area leads to a celebration site where the elders would gather and to discuss lore. This was a community site where both men and women could be. A site nearby the celebration site was designated for women who were unmarried. The men would choose/request a wife from the women here which would contribute to the men's initiation. There are markings on trees at this site.	There are several related documents and audio files describing the significance of the site, the rituals and ceremonies and talking about significant places throughout the whole area.

108. The location of the various sites listed in Table C was provided in the form of a map by the Applicant after a request from the Reporter and was treated as supplementary material to the application. The map is at **A46** - Maps of specified area showing sites.

109. The Wiradyuri Traditional Owners Central West Aboriginal Corporation application claims a traditional association in connection with the specified area for thousands of years and period that preceded the colonisation of the Bathurst region in the early 1800s. They state that the connection is both **tangible** through the presence of Aboriginal objects in the form of physical

objects such as scar trees, stones from bora rings, initiation site and gravesites and **intangible** through a spiritual and mythological connection to the specified area through songlines and cultural mythology (for example the Wahluu Dreamtime story).

110. It is well accepted that the broader Bathurst region was known as the 'Wiradyuri nation' pre colonisation in the early 1800s³⁹ and there is evidence of the cultural history of the region prior to its decimation as a consequence of introduced disease and conflict.⁴⁰ Aboriginal occupation of the Central West region, including in the granite rock shelters located near Bathurst, dates back at least 7150 years.⁴¹

111. The Aboriginal Heritage Study & East Kelso Residential Expansion Area Aboriginal Cultural Heritage Assessment (2016)⁴² states that Wiradyuri people were present on the Bathurst plains and surrounds prior to colonialisation:

When European's first ventured over the Blue Mountains onto the Bathurst Plains in 1813, they were entering the country of the Wiradyuri nation.⁴³

and

The earliest settlers rarely encountered the Wiradyuri people, instead observing their traces in the landscape: fires and hearths, bark huts and broken canoes, blackened shells and burial mounds, stone arrangements and notches in trees...Bora rings where initiations and other important ceremonies were held, marked the river valleys and mountain tops, and stone monuments associated with men's business were encountered across the Bathurst plains, including Mount Pleasant....⁴⁴

112. Wiradyuri people in the Bathurst area suffered great depletion of numbers during conflict and a period of martial law in the colonial period. Dr Gaynor Macdonald points out that those who survived, possibly no more than 25 per cent of the population at the time of European settlement, continued to adapt their traditional law and customs to change, congregating as 'local Aboriginal communities' on reserves and at pastoral stations across Wiradyuri country.⁴⁵

113. This background helps to provide the context for current Wiradyuri beliefs and practices that reflects a history of change and disruption since European colonisation.

³⁹ Bathurst Regional Local Government Area Aboriginal Heritage Study & Kelso Residential Expansion Area Aboriginal Cultural Heritage Assessment, 26 May 2016, AHMS Archaeological & Heritage Management Solutions, page 26

⁴⁰ *Ibid* pages 26 - 27

⁴¹ *Ibid* page 36

⁴² Bathurst Regional Local Government Area, Aboriginal Heritage Study & East Kelso Residential Expansion Area Aboriginal Cultural Heritage Assessment, 26 May 2016 AHMS Archaeological & Heritage Management Solutions

⁴³ *Ibid* page 26

⁴⁴ *Ibid* page 27

⁴⁵ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

114. The period of martial law and subsequent dislocation of Wiradyuri, although clearly devastating, did not eradicate all Wiradyuri people. Within this context and the context of the white Australia policies, Wiradyuri people were often discouraged from asserting their traditions and cultural beliefs.⁴⁶
115. In spite of the disruption and dislocation, Wiradyuri survivors and their descendants continued to live on country and many of those who had been displaced from country, returned when it was safe to do so.⁴⁷
116. On 10 April 2015, the New South Wales Government through the Geographical Name Board assigned a dual name for the area known as Mount Panorama (or Bald Hill) in the Bathurst Local Government Area.⁴⁸ The name 'Wahluu' is an Aboriginal word and the name of a young Wiradyuri warrior. The incorporation of Wahluu as a dual name for the mountain was and is considered by Wiradyuri Elders to be an important acknowledgment of Aboriginal tradition and history of this area.
117. The recognition of Aboriginal tradition and history at the time of the dual naming was further explained in a newspaper article by a Wiradyuri Elder, s. 47F(1) (and one of the contact people in this application). s. 47F(1) reported:
- Wahluu means young man's initiation place.
- Wahluu was the name of a young Wiradyuri warrior who was killed by his older brother Ganhabula in a dispute over a migay (young unmarried woman)," he said.
- When he was killed by his brother he fell to the ground – blood flowed over the ground and into the cracks of the Earth which then made Biame (Wiradyuri word for God) very angry.
- He made a volcano erupt and lava spewed out flowing over Wahluu's body. This is the shape of the mountain as it stands today.
- This is a moral story about jealousy and envy and how wrong it is to kill.
- Wahluu is part of a three brothers' creation story that connects with Mount Canobolas in Orange and Mount Macquarie in Carcoar.
- Ganhabula is pronounced in the Wiradyuri language as garnha-bula and is the traditional name for Mount Canobolas.
- Ganha means shoulder and Bula means two. Two shoulders is a feature of Mount Canobolas.
- s. 47F(1) said Wiradyuri and other Aboriginal people had campaigned for the dual naming for more than 40 years.

⁴⁶ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

⁴⁷ *Ibid*

⁴⁸ Accessed on 29 February 2020 at 12:49 p.m.

https://www.gnb.nsw.gov.au/place_naming/placename_search/extract?id=MnckIMtLuj

Wahluu has been the name for thousands of years and today Wahluu is still seen as an initiation place for young men, he said.

It is used today by a number of other tribes including Ford and Holden, which come here every October and February, when young drivers are guided by their elders to navigate the track to complete their challenge.

This naming decision has been welcomed by the Wiradyuri Council of Elders who have waged a tireless campaign for decades.

This was a longtime dream of the Elders in the past that has been carried forward by today's Elders.

I wish my uncle s. 47F(1), an Elder also known as s. 47F(1) , had lived to see this.

It is an important acknowledgement of Aboriginal tradition and history. This decision is not about ownership but about connection with country and sharing the knowledge of Wahluu.

Both Wahluu and Mount Panorama are recorded in the Geographical Names Register as dual names.⁴⁹

Representations

Bathurst Regional Council

118. Bathurst Regional Council addressed both the tangible and intangible values of the specified area in their response dated 5 December 2019. In doing so Council indicated a strong opposition to the application, questioning the antiquity and validity of some of the values associated with Wahluu, Mount Panorama.⁵⁰

119. Council identified the following points in their submission that are relevant to particular significance to Aboriginal people:

- investigations to date have revealed a lack of archaeological evidence to support the historic use of Mount Panorama (Wahluu) for more than ephemeral use
- anthropological research to date has identified many uncertainties and questions around the antiquity and validity of some of the intangible cultural heritage values associated with the Mountain
- the specified area has undergone substantial change as a result of past and current land uses and ongoing erosion and therefore lacks intactness and integrity
- the Aboriginal Cultural Heritage Assessment (ACHA) completed for the application to modify the consent for the Go Kart track, proposed to be located within part of the specified area, reassessed all existing registered Aboriginal sites within the study area and

⁴⁹ Accessed on 29 February 2020 at 12:53 p.m. <https://www.theguardian.com/australia-news/2015/apr/19/mount-panorama-in-bathurst-given-indigenous-name-wahluu>

⁵⁰ Bathurst Regional Council, submission to Section 10 Notice dated 5 December 2019 (cover letter from General Manager D Sherley)

determined that they did not contain Aboriginal objects as defined under the *National Parks and Wildlife Act 1974* (NPW Act)

- no additional/new Aboriginal sites or objects were identified within the Go Kart track study area as part of the ACHA process
- investigations to date have not identified the specified area as being rare or of research potential
- the potential impacts of the Go Kart track development might better be classified as impacts on social significance rather than spiritual significance and that efforts to 'reconnect' could continue even if the Go Kart track development proceeds
- relevant State legislation is in force which provides appropriate protection of Aboriginal Cultural Heritage in NSW. The NSW Aboriginal Cultural Heritage Advisory Committee (established under the NPW Act) considered the proposed heritage listing of Mount Panorama (Wahluu), inclusive of the specified area for either an Aboriginal Place or State Heritage Register listing. In its discussion, the Committee acknowledged the likely Aboriginal cultural values of Mount Panorama (Wahluu) but resolved that this matter will not be progressed and the nomination will be closed until the Community Elders who can speak for Country present a unified voice on the tangible and/or intangible heritage significance of Wahluu. The determination of the Committee (and therefore of the NSW Department of Premier and Cabinet) clearly reflects the results of the anthropological investigations that there remain questions around the antiquity and validity of some of the values associated with the Mountain
- an application under Section 136 of the NSW *Heritage Act 1977* was lodged by the Applicants and is similar to an application under Section 9 of the ATSIHP Act, both seeking to prevent short term harm to an Aboriginal place. Section 136 enables the NSW Minister to issue a 40 day stop work order. The s136 application was considered on 30 July 2019 by way of the Chair of the NSW Heritage Council who determined not to make the order. The determination clearly indicates there is no immediate substantiated threat of injury to or desecration of Aboriginal Cultural Heritage within the specified area, despite the consents in place for future development within the specified area
- Council's Heritage Interpretation Strategy includes the Story of Wahluu. Council also engaged consultants, Extent Heritage, to undertake further consultation and engagement with the Wiradyuri Elders in relation to the Wahluu Story to inform a future interpretation plan for the Mount Panorama Boardwalk.

120. Extent Heritage was engaged by Bathurst Regional Council to undertake several Aboriginal Cultural Heritage Assessments. Extent Heritage also coordinated preparation of the anthropological investigations to document the beliefs of those Aboriginal people identifying as Wiradyuri, particularly with respect to Wahluu, Mount Panorama.

121. Extent Heritage was engaged to assist the Bathurst Regional Council to prepare their response to the s10 application (see Council's submission of 5 December 2019, Attachment 16). Attachment 16 to Council's submission highlights the findings of the anthropological investigations and the differences of opinion that exist concerning important details about how and where values may be embodied in the place. Extent Heritage conclude that some Wiradyuri people are actively incorporating Wahluu, Mount Panorama into contemporary efforts to reconnect with country. This reconnection is part of an ongoing and conscious process of 'reinvigoration' of cultural beliefs and practices.
122. The Extent Heritage Report prepared for Bathurst Regional Council for the purpose of responding to the Section 10 Notice (see Council's submission of 5 December 2019, Attachment 16) appears to qualify some of the previous findings and recommendations in previous reports by highlighting the differing beliefs held by Aboriginal people who were interviewed. Some examples of this are:

For some Wiradyuri people, Mount Panorama-Wahluu evinces strong emotions, because it is believed to embody important spiritual values. It is not clear whether or not this is a commonly held view within the Wiradyuri community or the view of a minority of Wiradyuri people. Only a modest number of Wiradyuri made themselves available for consultation and there is disagreement within the Aboriginal community in the area.

There appear to be Wiradyuri people who do not necessarily consider Mount Panorama-Wahluu to embody spiritual values. It is difficult to quantify that number, because, for various reasons, people with this point of view are arguably the least likely to make themselves available for anthropological consultation.

In any event, some Wiradyuri people, possibly from both of the above groups, are actively incorporating Mount Panorama-Wahluu into contemporary efforts to reconnect with country. This reconnection is part of an ongoing and conscious process of 'reinvigoration' of cultural beliefs and practices.

123. Bathurst Regional Council raises questions about the reconnection as part of an ongoing and conscious process of 'reinvigoration' of cultural beliefs and practices including regarding the ways in which recent efforts to 'reconnect' and 'reinvigorate' constitute 'Aboriginal tradition'.⁵¹
124. In relation to the spiritual beliefs associated with the stones in the stone hut, the Extent Heritage Report states that:

⁵¹ Attachment 16 of Bathurst Regional Council's submission (Mount Panorama-Wahluu Submission to Council in Response to an Application Made Pursuant to Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) p. 4. Extent Heritage), dated 5 December 2019

Council's records indicate that a 1939 costing provided to the State Government for construction of the cottage includes a line item for 'excavation stone'. This suggests, but does not prove, that the stone was likely obtained from a quarried source.⁵²

125. Extent Heritage's view is supported by Professor Trigger who comments that whilst there are beliefs that stones from previously existing Aboriginal stone arrangements were used in the construction of the caretakers cottage, other information indicates the stones for the building were brought from one or more local quarries.⁵³

126. Council in response to the s10 application states in relation to the spiritual belief associated with the stones in the stone hut:

It is unlikely that the hut and associated stone structures were built using stone recycled from demolished Aboriginal structures (e.g. 'bora stones').⁵⁴

127. Further, Council in their response to the Section 10 application provide the following commentary in relation to the intangible spiritual belief:

Since invasion, Wiradyuri people have experienced dislocation and dispossession, with significant impacts on their knowledge and practice of traditional laws and customs. Those traditional laws and customs that have passed down to contemporary generations have typically been much changed and adapted from traditional forms. For example, some Wiradyuri people today do not draw directly from transmitted traditional knowledge to identify heritage places of spiritual significance. Rather, they are 'reinscribing' the landscape with places that they identify as significant by reference to intuitive and highly personal responses to natural phenomena and landforms.⁵⁵

Representations from others

128. While none of the Respondents noted the area to be of particular significance to Aboriginal people, of the 29 other representations from the first round, 17 Respondents, including Heritage NSW, noted the general significance of the area to Aboriginal people.

129. One Respondent (Annette Gainsford) made a representation to the Reporter in the form of submitting a number of research papers regarding her view that the site held significant cultural values and should be protected.⁵⁶

⁵² Aboriginal Cultural Heritage Assessment Report, Proposed Go Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, for Bathurst Regional Council (June 2018), Extent Heritage Pty Ltd, page 1

⁵³ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

⁵⁴ Attachment 16 of Bathurst Regional Council's submission (Mount Panorama-Wahluu Submission to Council in Response to an Application Made Pursuant to Section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) p. 4., Extent Heritage, dated 5 December 2019

⁵⁵ *Ibid* page 12

⁵⁶ Annette Gainsford, submission to the Section 10 Notice, dated 27 November 2019

130. Several of these submissions stated that many non-Aboriginal people in the region had become aware of the importance of Wahluu through cultural re-emergence activities. These Respondents did not, or only broadly considered the significance of the specified area in accordance with Aboriginal tradition. Examples from these Respondents are provided below:

The Mount is a place for education. Universities have a mandate to teach students about First Nation Australian culture. Students from Charles Sturt University, Sydney University and other universities in NSW use the Mount to educate students about culture. Educators take students to the Mount as it is a site of significant culture and history. It was once a place for initiation of men and for both men's and women's business. There are numerous bora rings on the site, as well as scar trees and artefacts – all signs of the rich history and cultural significance of the area. Putting a go kart track over the top of this would desecrate this area and make it inaccessible to students.⁵⁷

and

... Bathurst Regional Council has concentrated on the search for 'tangible' evidence to the exclusion of giving proper regard to the 'intangible' cultural heritage of the site. The National Trust regards Wahluu/Mt Panorama as a cultural site of continuing significance and use by Wiradyuri people of the Bathurst area and of the community generally....⁵⁸

and

The NSW Department of Premier and Cabinet advised that the NSW Aboriginal Cultural Heritage Advisory Committee (established under the *National Parks & Wildlife Act 1974*) considered the proposed heritage listing of Mount Panorama, inclusive of the specified area, for either an Aboriginal Place or State Heritage Register listing at its meeting held on 22 August 2019. In its discussion, the Committee acknowledged the likely Aboriginal cultural values of Mount Panorama – Wahluu but resolved that this matter will not be progressed and the nomination will be closed until the Community Elders who can speak for Country present a unified voice on the tangible and/or intangible heritage significance of Wahluu.⁵⁹

131. Many of the Respondents who objected to the Go Kart development cited their concern with Bathurst Regional Council prioritising development over cultural values, without identifying or noting if Wahluu, Mount Panorama had a particular significance, rather than a general significance to Aboriginal people.
132. Of the 29 other representations from the first round, four Respondents questioned the significance of the area to Aboriginal people.
133. Respondents who questioned the significance of the specified area to Aboriginal people, cited the lack of archaeological evidence as being indicative that the specified area was not a

⁵⁷ Dr Jillene Harris, Charles Sturt University, submission to the Section 10 Notice dated 25 October 2019

⁵⁸ Mr Iain McPherson, President The National Trust (New South Wales) Bathurst and District Branch, submission to the Section 10 Notice dated 29 November 2019

⁵⁹ Pauline McKenzie, Executive Director Heritage NSW, submission to the Section 10 Notice dated 2 December 2019

significant area to Aboriginal people. Many of these submissions did not address the intangible cultural values outlined in the Notice. Example responses include:

Our club understands that parts of Mount Panorama have been subjected to a number of cultural and heritage assessments by Bathurst Regional Council with, we understand no objects of Aboriginal Heritage being found.⁶⁰

and

Due process, including heritage & cultural Reports, flora & fauna Reports and other Council due diligence, has already been applied to the proposed development.⁶¹

and

Hundreds of thousands of dollars have been invested to ensure council complies with its commitment to respect, protect and promote Bathurst Aboriginal Heritage assets. Further our club has spent \$50,000 to progress this project to this point.⁶²

134. Eight of the 29 other Respondents from the first round did not make comment regarding the particular significance to Aboriginal people, regardless of whether they were supportive or not supportive of the Go Kart development.
135. Many of the 17 Respondents who object to the Go Kart development cited concern with Bathurst Regional Council prioritising development over the cultural values associated with Wahluu, Mount Panorama.
136. One other person identifying as Aboriginal (Annette Gainsford) made a representation that the site held significant cultural values and should be protected.⁶³
137. No other Aboriginal group or individual made a submission in this process.

Discussion

Legal principles

s. 22(1)(a)(ii)

⁶⁰ Bruce Morgan, President Panorama Motor Cycle Club, submission to the Section 10 Notice dated 31 October 2019

⁶¹ Andrew Dunshea, submission to the Section 10 Notice dated 10 October 2019

⁶² Mark Dunbar, Bathurst Kart Club President, submission to the Section 10 Notice dated 28 October 2019

⁶³ Annette Gainsford, submission to the Section 10 Notice, dated 27 November 2019

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

147. Ethnographic reports provided by both the Applicant and Bathurst Regional Council identify other Aboriginal people in the region as having knowledge of the cultural significance of Wahluu, Mount Panorama. It is clear that more than one Aboriginal person holds knowledge of

s. 22(1)(a)(ii)

high cultural significance of the specified area and that 'broadly' Aboriginal people agree as to the important significance of Wahluu.

148. However the differing views between Aboriginal people in the region about the significance of Wahluu, Mount Panorama and the specified area was raised by a number of Respondents, including Bathurst Regional Council, as a reason why the specified area lacks particular significance. The need to speak with a unified voice on the tangible and/or intangible heritage significance of Wahluu is the basis provided by Heritage NSW for not progressing the application for protection as an Aboriginal Place.⁷³

149. Bathurst is a region that is known as a place where Aboriginal people from various places across Australia have co-located.⁷⁴

150. Wiradyuri Traditional Owners and Elders claim that other Aboriginal people who reside in the region do not have the requisite knowledge to comment on the cultural significance of the specified area. s. 47F(1) also speaks about some Wiradyuri people having disconnected from culture as a result of colonisation and therefore are not aware of the cultural significance of Wahluu, Mount Panorama.⁷⁵

151. In s. 47F(1) view, while there are a lot of people of Wiradyuri descent in Bathurst, some do not identify publicly or strongly with their cultural heritage, and others have not been taught about the significance of Wahluu, Mount Panorama.⁷⁶

152. The concerns raised by a small number of Respondents regarding differences of opinion of Aboriginal people as to the cultural significance of the specified area are not clear and conclusive. These concerns are not considered to detract from the Applicant's account.

s. 22(1)(a)(ii)

⁷³ Pauline McKenzie, Executive Director Heritage NSW, submission to the Section 10 Notice dated 2 December 2019

⁷⁴ Aboriginal Cultural Heritage Assessment Report, Proposed Go Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, for Bathurst Regional Council (June 2018), Extent Heritage Pty Ltd

⁷⁵ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

⁷⁶ *Ibid* p 3

s. 22(1)(a)(ii)

154. Wiradyuri have engaged in a process of cultural resurgence in recent years. This process has involved a reinvigoration of who has the cultural right to speak for country, and a reinvigoration of ceremonial practices.
155. Several submissions were made from people who, as part of the cultural resurgence activity, had experienced a cultural immersion program run by Wiradyuri Traditional Owners and Elders through or in conjunction with Charles Sturt University.
156. The Applicant provided video footage (**A35**) of ceremony conducted on the Juniper ceremony ground in October 2018, during the alignment of Jupiter, the moon and Mars. The Applicant states that this ceremony is held every 110 years and is based on a long-standing tradition. The Reporter notes that existing ethnographic reports provided as part of this process do not refer to this ceremony.
157. Some Respondents, including Bathurst Regional Council and Andrew Dunshea, questioned the authenticity and antiquity of the contemporary practices in their submissions.
158. The cultural significance of the specified area raised by the Applicant is not considered to be “a manifestation of the contemporary re-inscription”⁷⁹ of the land. Instead it is seen as the progressive evolution of Aboriginal tradition in the context of dispossession and colonisation practices. Cultural education activities are grounded in this tradition and in addition, there are clear accounts from the members of the Applicant group and the ethnographic records as to how this knowledge was transmitted or handed down to them by ancestors.
159. It is the Reporter’s view that the cultural resurgence activities should not be viewed as a new invention by a small group of people seeking to find meaning in their Aboriginality. Rather, cultural resurgence is based on the traditional knowledge and practices that were passed down by the Wiradyuri Traditional Owners and Elders.

s. 22(1)(a)(ii)

⁷⁹ Aboriginal Cultural Heritage Assessment Report, Proposed Go Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, for Bathurst Regional Council (June 2018), Extent Heritage Pty Ltd page 76

160. Evidence of the cultural knowledge of the region and the specified area is demonstrated in the number of cultural heritage studies undertaken in the region in recent years and in the Application and supplementary material in support of the application.⁸⁰
161. Extent Heritage (2018) note that Wahluu, Mount Panorama is known to have high cultural heritage values for the local Aboriginal community.⁸¹ Further, Extent Heritage identified that the Registered Aboriginal Parties (RAPs) all expressed the view that Wahluu, Mount Panorama is a culturally significant place where ceremony and initiation was undertaken.⁸²
162. The Applicant asserts that cultural knowledge in relation to the significance of the specified area is held by a small group of Aboriginal people including them.
163. It is clear from the ethnographic reports that Wahluu's cultural knowledge is held at varying levels by the individuals named in the application. Male Elders holding cultural knowledge of men's sites in the specified area include s. 47F(1) . A small number of women associated with the Wirradjuri Traditional Owners Central West Aboriginal Cooperation hold knowledge of a women's ceremonial site in the specified area.⁸³
164. s. 47F(1) provided information to Professor Trigger regarding their Wiradyuri heritage and both claim a link to the great Wiradyuri warrior Windradyne. s. 47F(1) are well known in the local community as being senior men who have the cultural knowledge and right to speak for country, including Wahluu, Mount Panorama and the specified area. s. 47F(1) are frequently called on to provide cultural leadership in education programs run by Charles Sturt University and represent the Wiradyuri Traditional Owners at other formal occasions.
165. Other Wiradyuri people are also quoted in the Professor Trigger's Report and Associated Professor Draper's Report as supporting the accounts provided by s. 47F(1) to varying levels.⁸⁴

⁸⁰ Aboriginal Cultural Heritage Assessment Report, Proposed Go Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, for Bathurst Regional Council (June 2018), Extent Heritage Pty Ltd; and Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7; and Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama) Bathurst NSW, Associate Professor Neale Draper 30 January 2019

⁸¹ Aboriginal Cultural Heritage Assessment Report, Proposed Go Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, for Bathurst Regional Council (June 2018), Extent Heritage Pty Ltd page 33

⁸² *Ibid* page 34

⁸³ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7; and Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama) Bathurst NSW, Associate Professor Neale Draper 30 January 2019 page 6

⁸⁴ *Ibid*

166. s. 47F(1) are both applicants on behalf of the Wiradyuri Traditional Owners Central West Aboriginal Corporation. The other two applicants s. 47F(1) hold general knowledge of the cultural significance of the specified area.
167. Women's cultural knowledge regarding the women's role and sites on Wahluu, Mount Panorama was provided through Wiradyuri women s. 47F(1) .⁸⁵
168. s. 47F(1) , and other Aboriginal women, are noted in the Extent Heritage Report (2018) as holding knowledge specific to women's issues in respect to the specified area.
169. Other Wiradyuri Traditional Owners and Elders were also known to hold varying degrees of cultural knowledge but either do not engage with traditional knowledge practices or have passed away.⁸⁶
170. The small number of people asserting cultural knowledge is consistent with a wide body of anthropological evidence about how such knowledge is held. It is also reasonable to accept that the impact of colonisation on the Wiradyuri has contributed to a small number of Aboriginal people holding cultural knowledge for the specified area.

s. 22(1)(a)(ii)

⁸⁵ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

⁸⁶ Aboriginal Cultural Heritage Assessment Report, Proposed Go Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, for Bathurst Regional Council (June 2018), Extent Heritage Pty Ltd
s. 22(1)(a)(ii)

Discussion

172. In commencing this discussion, the Reporter notes that he spoke with members of the Applicant group on a number of occasions and was able to form a view of the high level of integrity of the Applicant members, including in relation to their spiritual beliefs of the significance of Wahluu, Mount Panorama.
173. The Applicant's integrity and authenticity is also evidenced in a number of anthropological reports including those by Professor Trigger, Associate Professor Draper and Extent Heritage.
174. Aboriginal tradition is to be interpreted as dynamic and evolutionary. Aboriginal tradition can adapt and respond to the circumstances of colonisation.⁸⁸

The impact of change on Aboriginal customs and beliefs brought about by contact with European settlement has been considered by this Court in a number of cases in the context of native title claims. His Honour observed that it was wrong to treat "traditional" as, of its nature, a concept concerned with what is dead, frozen or otherwise incapable of change. Far from being concerned with what is static, the very notion of "tradition" as involving the transmission from generation to generation of statements, beliefs, legends and customs orally or by practice implies recognition of the possibility of change.⁸⁹

In the context of a native title claim, one of the considerations to be borne in mind was that:

The laws presently acknowledged and the customs presently observed must be shown to be 'traditional' but laws and customs that are adapted or evolved may still be 'traditional'. They will be 'traditional' if, in their essence, they still reflect a continuity of tradition and are rooted in the laws and customs that provided the foundation for the native title that burdened the radical title acquired by the Crown.⁹⁰

175. The cultural knowledge held by Wiradyuri Traditional Owners and Elders according to the application is based on a long tradition, whereby stories and knowledge have been handed down by ancestors.
176. For Wiradyuri Traditional Owners and Elders cultural knowledge and spiritual beliefs continued to be passed down to younger Aboriginal generations, often through discrete means. This was described by s. 47F(1) who spoke about learning his cultural knowledge about Wahluu from his Uncle s. 47F(1) who in turn learnt his knowledge from Elders in the Cowra mission "though it was not easy for such matters to be discussed openly".⁹¹

⁸⁸ *Chapman v Luminis Pty Ltd (no 4)* [2001] FCA 62; (2001) 123 FCR 62, [397]–[399]

⁸⁹ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 at [35]

⁹⁰ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2001] FCA 45 at [49]

⁹¹ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7, page 3

177. s. 47F(1) who also identifies as a Wiradyuri woman in Professors Trigger's Report says she has known, about the name Wahluu 'all my life', as her grandfather told her about it.⁹²
178. Although traditional practices were clearly changed as a consequence of colonisation, the essence of the beliefs and practices has not changed. A number of individuals identified in the ethnographical reports as Wiradyuri 'Bathurst' people have stated that knowledge was passed on to them by their Wiradyuri relatives over a period of time.⁹³
179. Some of the knowledge passed on by Wiradyuri relatives, relates to the cultural significance of Wahluu, Mount Panorama, including, as outlined in the application, the men's initiation site, the women's sacred site and gravesites and other objects within the specified area.
180. The passing on of knowledge continues in contemporary times and Professor Trigger identified in his report that s. 47F(1) are now passing knowledge to s. 47F(1) .

s. 22(1)(a)(ii)

⁹² *Ibid*

⁹³ *Ibid*

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

Intangible cultural heritage

191. The Aboriginal Heritage Study Report commissioned by Bathurst Regional Council, included details regarding consultations with Aboriginal stakeholders to ascertain and map cultural

s. 22(1)(a)(ii)

values for the region. s. 47F(1) were both consulted as part of this process and provided advice that Wahluu, Mount Panorama has mythological and ceremonial value. The cultural mythological and ceremonial values they identified for Wahluu, Mount Panorama as set out in Table 9 of that Report are:

- Aboriginal Ceremony and Dreaming site - Ceremonial Ground
- Aboriginal Ceremony and Dreaming site - Men's initiation site
- stone arrangement - cairn
- Aboriginal Ceremony and Dreaming site relating to three brothers story
- stone arrangement, bora ring (now destroyed) and ceremonial site
- reused stone arrangement.¹⁰¹

192. The Wahluu Dreamtime story has been communicated by several Traditional Owners and Elders of how certain aspects of the landscape in the Bathurst Region were formed and named. Traditional Owners and Elders have consistently advised both anthropologists and archaeologists of the Dreamtime story that relates to how Wahluu was formed.

193. One of the Applicants, s. 47F(1) , notes that:

When he [Wahluu] was killed by his brother he fell to the ground – blood flowed over the ground and into the cracks of the Earth which then made Biame (Wiradyuri word for God) very angry. He [Biame] made a volcano erupt and lava spewed out flowing over Wahluu's body. This is the shape of the mountain as it stands today.¹⁰²

194. Wahluu was formally recognised by the New South Wales Government in 2015 when Mount Panorama was dual named Wahluu, Mount Panorama.

195. The Geographical Names Register of NSW includes the following description of Wahluu and the Wahluu Dreamtime story:

A prominent hill which forms the backdrop of the Mount Panorama racing circuit overlooking the City of Bathurst. Approximately 2kms west of Queen Charlotte [Charlotte] Creek and 1.5km north of Perth Trig. Station. Wahluu was the name of a young Wiradyuri warrior who was killed by his older brother Ganhabula in a dispute over a migay (young unmarried woman). When he was killed by his brother he fell to the ground blood flowed over the ground and into the cracks of the Earth which then made Biame (Wiradyuri word for God) very angry. He made a volcano erupt and lava spewed out flowing over Wahluu's body.

¹⁰¹ Bathurst Regional Local Government Area, Aboriginal Heritage Study & East Kelso Residential Expansion Area Aboriginal Cultural Heritage Assessment, 26 May 2016 AHMS Archaeological & Heritage Management Solutions. page 59

¹⁰² Accessed on 29 February 2020 at 12:53 p.m. <https://www.theguardian.com/australia-news/2015/apr/19/mount-panorama-in-bathurst-given-indigenous-name-wahluu>

Wahluu means young man's initiation place. Wahluu was the name of a young Wiradyuri warrior who was killed by his brother in a fight over a girl.

Wahluu was the name of a young Wiradyuri warrior who was killed by his older brother Ganhabula in a dispute over a migay (young unmarried woman).

Part of three brothers story which also includes young Canobolas (which means two shoulders) and Mount Macquarie at Carcoar.¹⁰³

196. Professor David Trigger describes the mythological belief of Wiradyuri, in a report commissioned by Bathurst Regional Council, as follows:

While such perceptions are 'in the eye of the beholder', to address the proposition that the mountain is now in the shape of a young felled man (Wahluu) after he was covered in rock and remained in the position he fell... It seems the 'head' is perceived in the vicinity of Sulman Park, the 'belly' between there and McPhillamy Park, and the drawn up legs or knees adjacent to the edge of the high ground at McPhillamy Park before the race track hits the S's. The Figures do not necessarily show that shape unambiguously but we present here the beliefs of those Wiradyuri people who say they see it quite clearly.¹⁰⁴

197. Professor Trigger also comments that spiritual beliefs cannot be 'proven' or 'disproven' and the conceptual language used to express them varies from technical observation and scientific methods of inquiry.

198. More limited information is provided in the ethnographic material relating to songlines.

A traditional travel route between Wiradyuri and Wonnarua country that approximately follows the route of the Golden Hwy...across to Denham...this pathway follows a traditional songline [dreaming track] that runs from Warloo [sic] on the far side of Bathurst/Mt Panorama and goes through the Byalog Valley to Denham.¹⁰⁵

199. The Extent Heritage Report, which references the anthropological study conducted by Professor Trigger and Dr Gaynor McDonald conclude that the specified area does have intangible cultural heritage values to the local Aboriginal community and confirms the association with the creation story of Wahluu.¹⁰⁶

200. The Extent Heritage Report further found that the contemporary cultural values associated with the stones in the hut (believed to have come from a bora ring) and a number of trees that

¹⁰³ Accessed on 3 November 2019 at

https://www.gnb.nsw.gov.au/place_naming/placename_search/extract?id=MnckIMtLuj

¹⁰⁴ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

¹⁰⁵ Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama) Bathurst NSW, Associate Professor Neale Draper 30 January 2019, p.1

¹⁰⁶ Extent Heritage Pty Ltd- proposed Go-Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, Aboriginal Cultural Heritage Assessment Report, Confidential Report, Final (June 2018)

mark burial sites, although there is no archaeological evidence to support that they are Aboriginal objects under the NPW Act, found a strong contemporary spiritual value associated with these objects.¹⁰⁷

201. These beliefs are also identified in the Extent Heritage Report commissioned by Council as part of the proposed Go Kart development has the following key findings:

- the anthropological study found the study area has intangible cultural heritage values to the local Aboriginal community. As part of Wahluu, Mount Panorama, it is associated with the creation story of Wahluu and Gaahna Bulla ‘the two brothers’, which connects Mount Panorama with Mount Canobolas. Wahluu, Mount Panorama is also associated with other important topographic features such as Mount Stewart and Evans Crown
- Wahluu, Mount Panorama is likely to be a place of mythological and spiritual importance to Wiradyuri people prior to contact, as with other similar prominent topographic features across Wiradyuri country
- Wahluu, Mount Panorama has contemporary cultural values to the local Aboriginal community due to these traditional associations, and also as part of a movement of cultural re-vitalisation and reconnection currently underway across Wiradyuri country
- the identified contemporary cultural values may be represented in part in the stones used in the construction of the former Caretaker’s Cottage and fence. Some members of the Aboriginal community are of the belief, and assert, that the stones were taken from bora rings which were present in the area. Note: Extent Heritage advise that there is currently no physical or documentary evidence to indicate they are Aboriginal Objects as defined by the NPW Act
- the identified contemporary cultural values may be represented in part in trees and stones, which are present in the study area. Following our [Extent Heritage] investigation of these features during the archaeological survey, we conclude that these items are not Aboriginal objects according to the definition used in the NPW Act. However, they are thought by some of the Aboriginal community representatives to be physical manifestations of the spiritual values of the location.¹⁰⁸

202. Extent Heritage found the Aboriginal community consultation process indicated that different views are held by the Registered Aboriginal Parties (RAPs) regarding potential impacts to intangible cultural heritage values as a result of the proposed works. Given the level of previous disturbance within the study area, one of the four local RAPs considered that intangible cultural heritage values will not be impacted whilst the other local RAPs suggest the proposed development will cause further impact. Extent Heritage notes that no comments were

¹⁰⁷ *Ibid*

¹⁰⁸ Extent Heritage Pty Ltd- proposed Go-Kart Track, McPhillamy Park, Mount Panorama Wahluu, Bathurst, Aboriginal Cultural Heritage Assessment Report, Confidential Report, Final (June 2018) page pages 1-2

provided from non-Bathurst RAPs in relation to the intangible cultural heritage values of Wahluu, Mount Panorama.¹⁰⁹

203. Although the specified area and surrounds have been subject to varying levels of historical disturbance since the early nineteenth century,¹¹⁰ the Extent Heritage Report considered that the Aboriginal heritage of the Bathurst region can include places of spiritual, traditional, historical or contemporary cultural significance and it need not contain material evidence of Aboriginal use or occupation.¹¹¹
204. Associate Professor Neale Draper met with Wiradyuri Elders in May 2017 and attended a site visit of the specified area. Although he acknowledges his report is not comprehensive; he does conclude based on 40 years of anthropological experience that the Elders¹¹² to whom he spoke were highly credible and reliable custodians of a considerable body of traditional cultural knowledge and history. He identifies s. 47F(1) as having legitimate bona fides; as sincere and having considerable depth of cultural and historical knowledge of Wiradyuri people.
205. Associate Professor Draper also concludes that in his opinion that the outline of the very high cultural significance of Wahluu is genuine, and those cultural values deserve proper consideration and protection.¹¹³
206. In his report Associate Professor Draper indicates that further anthropological assessment needs to be conducted regarding the women's site, which is located on the top of the shoulder of the mountain behind the stone house within a fenced area. He also comments on the veracity of the cultural knowledge and authority of the Wiradyuri women regarding the information shared in respect to the women's site.
207. While Professor David Trigger, identified that there was some disagreement among those consulted as to the details about the cultural significance of Wahluu, Mount Panorama, he concluded that there was broad agreement that the mountain has always been an important place in Wiradyuri cultural traditions.¹¹⁴
208. Professor Trigger indicates that the where there is disagreement as to cultural significance, that disagreement relates to the location of the women's site and its proximity to the men's site.

¹⁰⁹ *Ibid*

¹¹⁰ *Ibid* page 14

¹¹¹ *Ibid* page 78

¹¹² Identified Elders as s. 47F(1)

Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama), Bathurst NSW (5 May 2017) Associate Professor Neale Draper date of Report 30 January 2019, page 6

¹¹³ Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama), Bathurst NSW (5 May 2017) Associate Professor Neale Draper date of Report 30 January 2019 page iv-v

¹¹⁴ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7

209. Professor Trigger draws a conclusion that the interpretations and features of the McPhillamy Park, Sulman Park and Charles Sturt University (CSU) Engineering Building (noting CSU is not part of the specified area) are derived from general convictions that Wiradyuri spirituality inheres in the landscape. Given this is a body of religious belief, he acknowledges that these beliefs are not productively amenable to attempts to prove or disprove the convictions of people:¹¹⁵

The beliefs about spiritual connections between the creation story of Wahluu and other significant places in the region is similar to many documented cultural landscapes across Aboriginal Australia.¹¹⁶

and

I am confident to say that the whole of Wahluu-Mount Panorama would have been of sacred significance, and one of a series of connected sacred mounts, which would have included Mount Pleasant and Mount Canobolas.¹¹⁷

210. Associate Professor Neale Draper found that ethnographic information is not generally known and that there is no awareness in relation to local government, police, businesses or the motor racing industry of the high cultural significance of Wahluu (Mount Panorama) to the Wiradyuri. This lack of awareness combined with the mandate of the NSW heritage legislation addressing the **tangible** preservation of relics (which involves the assessment processes using archaeologists rather than anthropologists) only, meant that Aboriginal sacred mythological and ceremonial sites, that often do not have many overt artificial landscape features and artefacts to mark their presence were overlooked.¹¹⁸

211. In its submission Bathurst Regional Council highlighted that their Heritage Interpretation Strategy includes the Story of Wahluu. Council also engaged consultants, Extent Heritage, to undertake further consultation and engagement with the Wiradyuri Elders in relation to the Wahluu Story to inform a future interpretation plan for the Wahluu, Mount Panorama Boardwalk.¹¹⁹ This in part demonstrates that Council accepts the validity of the spiritual beliefs associated with the Wahluu dreamtime story.

212. Evidence of the intangible cultural heritage of Wahluu, Mount Panorama is acknowledged in the Bathurst Regional Council's Heritage Interpretation Strategy¹²⁰, the Geographical Names Registration Extract¹²¹, and the draft statement of significance was prepared by Heritage NSW

¹¹⁵ *Ibid* page 2

¹¹⁶ *Ibid* page 15

¹¹⁷ *Ibid* pages 28 and 29

¹¹⁸ Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama), Bathurst NSW 5 May 2017 (Report dated 30 January 2019) Associate Professor Neale Draper

¹¹⁹ Bathurst Regional Council, submission to the Section 10 Notice dated 5 December 2019

¹²⁰ *Ibid*

¹²¹ Accessed on 29 February 2020 at 12:49 p.m.

https://www.gnb.nsw.gov.au/place_naming/placename_search/extract?id=MnckIMtLuj

in consultation with key stakeholders in June/July 2019 in relation to the Aboriginal Place assessment.¹²²

213. The Reporter considers that Wahluu, Mount Panorama has intangible significance to the Wiradyuri, including the Applicant, and is associated with Wiradyuri ‘traditions, observances, customs or beliefs’.
214. In accepting that the Wiradyuri have a spiritual belief connection with Wahluu, Mount Panorama, there is a requirement to consider whether the intangible cultural heritage of the specified area is of **particular significance**.
215. Each individual named in the Application asserts they hold cultural knowledge in respect to Wahluu and has consistently and over the course of several years provided this information, including culturally sensitive information, to consultants, both archaeologists and anthropologists, engaged by Bathurst Regional Council and others in an attempt to have the significance of the specified area recognised and protected.
216. Intangible cultural beliefs and values in the form of dreaming or creation stories and spiritual pathways can meet the criteria of particular significance under the ATSIHP Act. Guidance provided by the courts on the definition of **particular significance** requires the area to be something special or out of the ordinary. It also imbues an element of sacredness in relation to any specific part of the whole of the area. The anthropological information provided to the Reporter in this process, fails to substantiate that the specified area is of **particular significance** in accordance with Aboriginal tradition. Although there are several references to the importance of the whole of the mountain in respect to the Dreaming and creation stories of Wahluu to Wiradjuri people, Professor Trigger is the only expert that has referenced sacredness when he said:
- I am confident to say that the whole of Wahluu-Mount Panorama would have been of sacred significance, and one of a series of connected sacred mounts, which would have included Mount Pleasant and Mount Canobolas.¹²³
217. It is noted that Professor Trigger’s reference to sacred significance does not refer to the specified area or the individual sites identified within it. Limited information has been put forward by the Applicant regarding the ‘more than ordinary’ or ‘sacredness’ of the specified area as a whole or of the identified sites within the specified area, that in the Reporter’s opinion meet the criteria of particular significance under the ATSIHP Act.

¹²² Pauline McKenzie, Executive Director Heritage NSW, submission to the Section 10 Notice dated 2 December 2019

¹²³ Ethnographic research by Professor David Trigger, and Dr Gaynor McDonald (2017) provided in part by the Applicant at A7 – Application and by Bathurst Regional Council in their submission dated 5 December 2019 at attachment 7. pages 28 and 29

218. It is further noted that Associate Professor Draper identifies the need for additional anthropological research to be undertaken in respect of the women's site(s) within the specified area.¹²⁴
219. In considering whether the specified area is of **particular significance**, it is clear from the Applicants that Wahluu, Mount Panorama holds cultural significance for them in accordance with Aboriginal tradition. It is also apparent in part, but not wholly, that the significance is related to the various sites identified in the application A 46 – map of the specified area showing sites.
220. The Reporter notes that references to the particular significance and sacredness of the specified area and the individual sites within the specified area in the application and respondent materials was limited.
221. The materials provided to the Reporter indicate that Wahluu, Mount Panorama, inclusive of the specified area, does have significance to the Wiradyuri, including the Applicant, and that significance is associated with Wiradyuri 'traditions, observances, customs or beliefs'.
222. That significance is embedded in the Wiradjuri belief system that tangible objects, in the form of the stones in the stone hut, grave sites, the women's area and the men's site, have relevance to their cultural spiritual beliefs. It is also embedded in the intangible significance of the Wahluu dreamtime story and songlines. Although the evidence relating to the tangible significance of the specified area does not exist in the current archaeological record, given the level of development and use of the area in recent decades, this is not conclusive proof that the site was not of cultural significance historically.
223. The Reporter further notes that the significance to Wiradjuri is intangible in nature and is not amenable to proof by scientific means. That does not mean that the area is **not of particular significance** to Aboriginal peoples past or present but simply that the Reporter considers that the information provided in this process is insufficient to draw this conclusion.
224. The Reporter considers that the inability to undertake a site visit, which was cancelled due to national travel restrictions with Covid-19, did not detract from the assessment in respect to particular significance. It is the view of the Reporter that the Applicant was given sufficient opportunity to add to the application following its initial submission in February 2019, including in relation to the sacredness of the specified area.

¹²⁴ Ethnographic notes from a site visit with Wiradyuri Elders to Wahluu (Mt Panorama), Bathurst NSW 5 May 2017 (Report dated 30 January 2019) Associate Professor Neale Draper

Conclusion

225. In presenting this conclusion the Reporter firstly considered both the tangible and intangible cultural heritage of the specified area and its relationship to Aboriginal tradition.
226. In this regard, Wahluu, Mount Panorama is considered by the Reporter to be a place of mythological and spiritual importance to Wiradyuri people.
227. The Applicant's claim to **particular significance** has been assessed through the tangible and intangible cultural heritage aspects of its claim. The Reporter has assessed the information provided by the Applicants; the information from Respondents, and the Reporters own investigations of the body of traditions, observances, customs and beliefs of the Wiradyuri, including such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.
228. The Reporter concludes there is insufficient evidence to recommend to the Minister that the specified area is of particular significance.

The Reporter's engagement requires, at clause 3(b), that:

The Reporter must deal with each of the matters set out in section 10(4) of the Act.

Having addressed s10(4)(a) "the particular significance of the area to Aboriginals" and having recommended to the Minister that the specified area is not of particular significance, the Reporter has, in the subsequent sections of this report addressed ss10(4)(b) to (h) as the Minister is not bound by the recommendation of the Reporter regarding s10(4)(a).

s. 22(1)(a)(ii)

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CONCLUSION/SUMMARY AND RECOMMENDATIONS

350. The Reporter considered the application, representations, the requirements of the ATSIHP Act and the terms of the Reporter's engagement by the Department in making this recommendation.
351. The Reporter concluded, based on the all information provided in the application and representations, that there is insufficient evidence of tangible Wiradyuri cultural heritage within the specified area, as tangible cultural heritage has been lost or destroyed.
352. In making this conclusion the Reporter notes that further archaeological studies may find new tangible cultural heritage.
353. The Reporter concluded that Wahluu, Mount Panorama, inclusive of the specified area, has intangible significance to the Wiradyuri, including the Applicant, which is associated with Wiradyuri 'traditions, observances, customs or beliefs' and that the significance of Wahluu, Mount Panorama is neither minimal nor ephemeral.
354. However, the Reporter concluded there is insufficient evidence to determine that the specified area is of particular significance.
355. In concluding there is insufficient evidence to determine that the specified area is of particular significance, it is clear from the Applicant that Wahluu, Mount Panorama holds cultural significance for them in accordance with Aboriginal tradition. It is also apparent in part, but not wholly, that the significance is related to the various sites identified in the application **A46** – map of the specified area showing sites.
356. The Reporter notes that references to the particular significance of the specified area and the individual sites within the specified area in the application and respondent materials was limited.
357. The materials provided to the Reporter indicate that Wahluu, Mount Panorama, inclusive of the specified area, does have significance to the Wiradyuri, including the Applicant, and that significance is associated with Wiradyuri 'traditions, observances, customs or beliefs'.
358. The Reporter notes that the significance to Wiradjuri is intangible in nature and is not amenable to proof by scientific means. That does not mean that the area is not of particular significance to Aboriginals but simply that the Reporter considers that the information provided is insufficient to draw this conclusion.
359. In consideration of the material in the application, the material provided through the representations, the Reporter's own investigations, and the requirements of the ATSIHP Act,

the Reporter recommends that the Minister **does not** make a declaration under the ATSIHP Act in relation to the specified area.

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)

s. 22(1)(a)(ii)