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Protecting indigenous heritage values on Tasmania's west coast

On 1 March 2016, the Honourable Justice Mortimer handed down her decision in the matter of *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment and Director National Parks and Wildlife*.

A copy of the judgment can be found [here](#).

What was it all about?

In 2012, the then State government closed three off-road vehicle tracks in the Arthur Pieman Conservation Area (Tracks 501, 503 and 601 – between Sandy Cape and Pieman River), following consultation and a number of reports indicating that the tracks were causing irreparable damage to significant Aboriginal heritage sites.

In 2013, the then Federal Government included a 2km wide strip along the west coast (in which all the tracks are located) on the National Heritage List. The area, known as the [Western Tasmania Aboriginal Cultural Landscape \(WTACL\)](#), was declared on the basis of its significant indigenous heritage values.

In November 2014, the new Tasmanian Government proposed to re-open the tracks, and announced that \$300,000 would be invested to ensure that "globally significant Aboriginal cultural heritage values are protected".

The Tasmanian Aboriginal Centre Inc (**TAC**) applied for an injunction to prevent the Director of National Parks and Wildlife from re-opening the tracks. TAC argued that opening the tracks would have a significant impact on the national heritage values of the WTACL, and that mitigation measures proposed by the government would not adequately protect those values. On 23 December 2014, the Federal Court issued an interim injunction to prevent any works being undertaken until the matter was heard in full by the Federal Court.

The full hearing took place on 12-16 October 2015.



Key legal issues for the Federal Court to decide

Under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, any action that will, or is likely to, have a significant impact on the values of a National Heritage listed place must be referred to the Commonwealth Minister for the Environment for assessment.

The case addressed the following key issues:

What were the “national heritage values” protected by the WTACL heritage listing?

TAC argued that the WTACL was included on the National Heritage List in recognition not only of specific heritage places within the area (middens, hut depressions, petroglyphs etc), but of the broader cultural heritage landscape and its importance to the Tasmanian Aboriginal community in accordance with their practices, beliefs and history.

The State government argued that the heritage values protected by the inclusion of the WTACL in the National Heritage list were limited to specifically identified sites and features within the area.

Was opening the tracks an “action”?

TAC argued that the decision to declare the tracks open to off-road vehicles, undertaking mitigation works and issuing permits for use of the tracks would be an action under s.523 of the EPBC Act.

The State government’s primary contention was that declaring the tracks open was a “government authorisation” which, under s.524 of the EPBC Act, is not an “action”. They also argued that the various decisions and activities involved in opening the tracks could not individually be characterised as “actions”, and that the relevant “action” was the use of the tracks by individual drivers.

Would the decision to open the tracks have a significant impact on national heritage values?

TAC argued that the decision to open the tracks, the specific mitigation works proposed to be undertaken and the use of the tracks facilitated by the government’s decision would significantly impact on national heritage values in the WTACL.

The State government argued that, with mitigation measures in place, the opening of the tracks would not have a significant impact on national heritage values.

What did the Court decide?

National heritage values

Justice Mortimer heard evidence from a range of Tasmanian Aboriginal community members, cultural heritage and archaeological experts. The State government did not call any witnesses. Her Honour held that the WTACL was listed because its significance to Aboriginal people, its ‘indigenous heritage values’, caused it to “have importance in the course, or pattern, of Australia’s natural or cultural history”.

Her Honour considered that those values attached to the entire landscape, rather than specific sites, and also noted that no comprehensive archaeological survey of the area had been undertaken:

- “ *The value of the WTACL is not to be found only in what can be seen at specific sites that have been identified through an incomplete survey of the area’s archaeological history. The area has been recognised as having the value it does as an entire landscape: the whole of the area being identified as an area in which Aboriginal people lived, hunted, fished, traded and cared for their land in a way which was significantly more sedentary than the way of life adopted by Aboriginal people in other areas.* [para 220]

“Action”

Justice Mortimer did not consider the declaration of the tracks fell within the “government authorisation” exemption, as it did not have the specificity required of an authorisation – the declaration itself did not set limits on the number of drivers, grant permission for individuals to use the tracks or control the subsequent use of the tracks.

- “ *It is no part of the purpose of s 524 to confer on the taking of an action any immunity from assessment under the EPBC Act. Yet, that would be the effect of accepting the [State Government’s] contentions in this proceeding. If the [State Government is] correct, the opening of the three tracks to a presently imprecise number of vehicles, driven in a presently unknown manner by a presently unknown cohort of drivers, with a presently unclear suite of mitigation measures which may or may not be properly funded and capable of completion before vehicles are allowed onto the three tracks would not be assessed for any impact these activities are likely to have on the indigenous values of the WTACL. The extension of s 524 to such circumstances does not fulfil, and indeed frustrates the purpose of the scheme established by the EPBC Act.* [para 203]

Her Honour was satisfied that the series of steps, decisions and activities involved in opening the tracks, including the designation of the area under the *National Parks and Reserved Land Regulations 2009*, the issuing of permits and managing of the tracks, were collectively an “action” and required approval under the EPBC Act.

Significant impact

Justice Mortimer concluded that the State Government’s action in opening the tracks and facilitating their use will have a significant impact on the national heritage values of the WTACL. That impact would not be restricted to physical damage caused by protective measures or the off-road vehicles themselves; it would also include damage and harm to the integrity and character of the landscape in the WTACL as a whole, and therefore to its significance to Aboriginal people.

” *[M]uch of the evidence concentrated on the likely physical impact of the driving of recreational vehicles over the three tracks, and on such matters as drivers deviating from the tracks and creating braiding. Such physical impact is not to be discounted or disregarded. It is part of what makes up an impact on a value.*

But just as the desecration of a holy temple by the drawing of graffiti on one wall of the temple has a physical impact, so the impact on the significance of that temple to those who believe it to be sacred is not necessarily measured by the extent of the graffiti: it is measured by, at least in part, the effect of the act of desecration itself. In determining the question of impact, it is important to recall that what is protected is the value of an entire landscape. [para 211]

Justice Mortimer discharged the interim injunction, on the basis that the State Government will abide by her ruling. Her Honour also ordered the State Government to pay TAC’s costs.

Why is this decision important?

Justice Mortimer’s decision delivers a strong statement about both indigenous connection to country and the importance of protecting indigenous heritage values for all Australians:

” *[T]he strong and enduring sense of connection and continuity that Tasmanian Aboriginal people have to a landscape in which their ancestors lived a particular and unique way of life will be adversely affected by the alteration of the landscape and the intrusion into it of things foreign to its natural condition, and the characteristics it possessed when, for thousands of years, Aboriginal people lived in and from that landscape. By this, the outstanding heritage value of the area to the Australian nation as a whole is also damaged. [para 298]*

The decision questions the justification for allowing off-road vehicle access, given what various government reports have already indicated regarding impacts on indigenous heritage values:

” *The impression, even to a non-Aboriginal person, is in my opinion that the Aboriginal heritage is being subjugated to the needs of the non-Aboriginal community to pursue their recreational desires. Aboriginal heritage is covered up so non-Aboriginal activity can occur. [para 254]*

Justice Mortimer also provides a detailed explanation of the limitations of the “government authorisation” exemption, and the need for a series of decisions and activities which are likely to result in an adverse impact on matters of national environmental significance to be properly assessed and approved.

What happens now?

The State government has **21 days** to decide whether to appeal against Justice Mortimer’s decision.

Unless the decision is successfully appealed, the State Government cannot open the tracks without approval from the Commonwealth Minister for the Environment under the EPBC Act. Such approval could only be granted after consideration of the impacts on the national heritage values of the WTACL, which Justice Mortimer concluded would be significant.

The State government may also decide to undertake a detailed analysis of those impacts and develop a more comprehensive package of mitigation measures to protect indigenous heritage values.

The adequacy of any mitigation measures would be considered by the Commonwealth Minister in determining whether to approve any future proposal to open the tracks.

