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Environment Assessment Branch
Department of the Environment
GPO Box 787
Canberra ACT 2601

By email: epbc.referrals@environment.gov.au

Dear Madam / Sir,

2017/8038 – DPIPWE – Arthur Pieman Conservation Area off-road vehicle mitigation actions

The [Western Tasmania Aboriginal Cultural Landscape] is a special place for me, in particular because I've seen the rock engravings, the middens, the hut depressions, the seal hides – you have a connection with country – you always do – but you can go there and see what our old people did. You can pick up an artefact that may not have been held for hundreds of years. It allows me to connect with the old people. You are sitting there at a midden site and you could almost see the children and the women in the water getting abs (abalone) and diving. It's unbelievable, it's something you can't really describe. It's so beautiful, not only to Aboriginal people but to the world, it's largely intact.¹

Tasmanian Aboriginal Centre

This submission is made on behalf of our clients, the Tasmanian Aboriginal Centre Incorporated.

The Tasmanian Aboriginal Centre (**TAC**) is an Aboriginal community organisation developed in the early 1970s and funded by the federal government since 1973. The TAC represents the political and community development aspirations of the Tasmanian Aboriginal community, including negotiation of Aboriginal land returns, return of ancestral remains from overseas and Australian institutions, legislative recognition of Aboriginal cultural fishing rights, negotiation of land purchases for community ownership, retrieval and revival of Tasmanian Aboriginal language and improved accountability of Aboriginal heritage protection.

The TAC also delivers a statewide health service providing holistic support for the ongoing social, emotional and cultural wellbeing of Aboriginal people, with an underlining principle of maintaining strong connections to country as a healing process.

takayna / Tarkine tracks proposal

The Western Tasmania Aboriginal Cultural Landscape (**WTACL**), within the takayna / Tarkine coast area, is one of the richest and most significant Aboriginal cultural landscapes in Australia, exhibiting values of importance to Tasmanian Aborigines and to the nation as a whole. Off-road vehicle use in the area is recognised as a significant threat to these values. Rather than taking action to enforce an existing ban, the Tasmanian Government is proposing to authorise and facilitate the use of off-road vehicles in the area.

As a party to various legal proceedings (discussed below) relating to the proposal to re-open tracks 501, 503 and 601 in the WTACL, TAC has maintained that the re-introduction of off-road vehicles into this sensitive landscape will have a significant impact on the indigenous heritage values recognised by the inclusion of the area in the National Heritage List.

¹ Affidavit filed by Rocky Sainty on behalf of Tasmanian Aboriginal Centre in *Tasmanian Aboriginal Centre Inc v Secretary, DPIPWE (No 2)* [2016] FCA 168

These impacts include:

- Crushing and disturbance of cultural heritage materials
- Concealment of cultural heritage materials, causing disconnection from the cultural landscape
- Disturbance and disruption of recorded (and unrecorded) cultural heritage sites
- Vandalism and theft of cultural artefacts
- Damage to natural values intrinsic to the cultural landscape, including threatened species and ecological communities

Physical desecration of the landscape also has deeper cultural impacts for Tasmanian Aborigines connected to takayna / the Tarkine.

The referral documents state that the "fundamental purpose of the works is to protect cultural and natural values", and claim that the works will deliver a "net benefit" for heritage protection. This is disingenuous, ignoring that current use of the tracks, and resulting damage to cultural and natural values, is unlawful. The most effective protection for these values would be maintaining and enforcing the existing prohibition on off-road vehicles on tracks 501, 503, and 601.

While the current referral explicitly relates only to proposed mitigation works, the inescapable (and intended) consequence of those works and the related licensing and management regime is increased use of off-road vehicles in the WTACL. Pursuant to s.527E of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, the impact of off-road vehicles cannot be ignored in any assessment of the impact of the referred action on matters of national environmental significance.

The only assessment reports submitted in support of the proposed action are those relied upon to justify the track closures (or decision to keep tracks closed) in 2012 to avoid unacceptable damage to cultural heritage values. Those assessment reports pre-date the inclusion of the WTACL in the National Heritage List so do not explicitly address impacts on national heritage values. However, the conclusions of those reports are unambiguous – conservation of natural and cultural values is best achieved by excluding off road vehicles from the area of the proposed action.

The referral also fails to acknowledge the strong opposition of the Tasmanian Aboriginal community to the desecration caused by off-road vehicles in the area. The referral states that PWS "continues to liaise with affected stakeholders". However, despite TAC's clear interest in this issue, as evidenced by their legal proceedings and publicly stated position on the tracks, they were not consulted regarding the proposed mitigation works prior to the referral being made.

Given the significance and irreplaceability of the cultural heritage values likely to be impacted, there is not sufficient evidence to satisfy the Minister that the impact of the works, including the use of the tracks facilitated by the works and associated access regime, will not be significant.

TAC urges the Minister to exercise his powers under s.74B(1)(b) of the EPBC Act and decide that the proposed works, and the use of the WTACL that they facilitate, are 'clearly unacceptable'. The poor record of compliance and enforcement activity by the proponent should provide no comfort that direct and indirect impacts arising from the action will be avoided or adequately mitigated.

In the event that the Minister is not satisfied that the proposed action is 'clearly unacceptable', TAC seeks a determination that the works are a controlled action. Given the need, acknowledged in the referral, for more detailed cultural heritage and ecological surveys, the relevant impacts of the action must be assessed by an environmental impact statement under Pt 8, Div 6 of the EPBC Act.

Detailed comments in relation to the referral are set out below. If you would like to discuss any issue raised in this submission, please contact me on (03) 6223 2770 or Sharnie Reid (spokesperson, TAC) on 03 6234 0700.

Yours sincerely,

Environmental Defenders Office (Tas) Inc.



Jess Feehely
Principal Lawyer

2017/8038: DPIPWE – Arthur Pieman Conservation Area off-road vehicle mitigation actions – Tasmanian Aboriginal Centre Inc comments

The use of matting to cover up parts of middens on which there are tracks, or near tracks... alters in a fundamental way the appearance of the midden, and it conceals (in part) the very things that are of value to Aboriginal people about it – the evidence of the life of their ancestors. 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.

Justice Mortimer, Tasmanian Aboriginal Centre Inv v Secretary, DPIPWE [2016] FCA 168 at [254]

Scope of “action”

Whether, and to what extent, the proposed opening of off-road vehicle tracks 501, 503 and 601 (**the tracks**) within the Western Tasmania Aboriginal Cultural Landscape (**WTACL**) is a controlled action for the purposes of the EPBC Act has been the subject of the following Federal Court proceedings:

- *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment (DPIPWE) and Director, National Parks and Wildlife* [2014] FCA 1443
- *Tasmanian Aboriginal Centre Inc v Secretary, DPIPWE (No 2)* [2016] FCA 168 (**Federal Court decision**, per Justice Mortimer)
- *Secretary, DPIPWE v Tasmanian Aboriginal Centre Inc* [2016] FCAFC 129 (Full Court)
- *Secretary, DPIPWE v Tasmanian Aboriginal Centre Inc* [2016] FCAFC 137

In considering the scope of “action” for the purposes of the opening of the tracks in the WTACL, the Full Federal Court held that, while the decision to designate the tracks open was excluded, the following activities comprised “a coherent project or undertaking or activity or series of activities which are an ‘action’”²:

- *carrying out actions to implement conditions attached to the designation in relation to individual drivers by:*
 - *offering to the public for purchase a Recreational Driver – Special Pass for the Pieman River Track (south of Sea Devil Rivulet to the Pieman River) and Interview Mine Track;*
 - *collecting \$50 per driver for each pass sold;*
 - *ensuring a GPS device is fitted to the vehicle to be driven by each person who purchases a Recreational Driver – Special Pass;*
 - *collecting a \$100 bond for the GPS device from the person who purchases a Recreational Driver – Special Vehicle Pass;*
 - *removing the GPS device [from] the vehicle;*
 - *refunding the bond to the person who purchased the Recreational Driver – Special Pass.*³
- *carrying out, or directing their employees, officers, agents or representatives to carry out works in the WTACL in and around the tracks for the purposes of facilitating recreational vehicles to be driven on the tracks by:*
 - *constructing new sections of track;*
 - *spreading gravel over Aboriginal cultural heritage; and/or*
 - *placing rubber matting over Aboriginal cultural heritage with star pickets or other means of fastening the rubber matting in place;*
 - *installing culverts, fencing or track markers;*
 - *carrying out rehabilitation works; and/or*
 - *other works as directed.*

² *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129, at paras [41], [76] – [81]

³ **Note:** The current management regime described by the proponent in the referral documents no longer contemplates the use of GPS devices to monitor driver behaviour.

Adopting that approach, the “action” for the purposes of this referral includes not only the proposed mitigation works, but the whole integrated management regime, including administration of the permit system and compliance and education activities.

The referral document also notes (at [1.2]) that regulation of access is a component of the proposed action.

Therefore, we urge the Minister to consider the referred action to include not just the proposed physical works, but the ongoing authorisation and management of off-road vehicle (**ORV**) access to the tracks.

Matters of National Environmental Significance

National Heritage values

The Western Tasmania Aboriginal Cultural Landscape is a National Heritage place, listed for indigenous heritage values exhibiting a “remarkable expression of the specialised and more sedentary Aboriginal way of life” in the area.

The listing statement for the WTACL notes:

The sheer number of sites, the rich diversity of site types present, the comparative rarity of some of these site types and the comparatively intact nature of many of the sites makes this one of the richest and most significant Aboriginal cultural heritage landscapes present in Australia... The entire area is of great significance and importance for Tasmanian Aboriginal people.

The referral document recognises the context in which these values are to be considered:

The cultural heritage of the WTACL and the APCA more generally is important in terms of the wider story of the Aboriginal occupation of Tasmania and of western Tasmania in particular. Furthermore, that cultural heritage is not restricted to tangible evidence but also the intangible... It is also acknowledged that the cultural heritage of the area can only be fully known by Tasmanian Aboriginal people.

The various reports referenced in the referral document, including the Cultural Heritage Management Australia (**CHMA**) report and the 2007 Pedder et al report, describe the recorded values of the WTACL and confirm the scale and significance of the cultural heritage.

The Tasmanian Aboriginal community ascribe cultural values from a landscape perspective, rather than individual sites. However, even from a sites perspective, the richness of WTACL’s cultural heritage values is undeniable. The referral document itself recognises that “the individual ‘sites’ and associated archaeological material are considered collectively from a landscape perspective and in the context of the WTACL as a whole”.

Other values

While this submission focusses principally on the indigenous heritage values of the WTACL, those values are intrinsically linked with the broader natural values of the area as they reflect and contribute to the record of both historic Aboriginal occupation of the area and continuing connection to country.

In particular, we note the following matters of national significance within the WTACL:

- **Lowland native grasslands, *Themeda triandra***
Proposed construction works and off-road vehicle access will exacerbate the risk of weed infestation and spread of *Phytophthora cinnamomi* threatening the threatened ecological community.
- **Orange Bellied Parrots**
This critically endangered species forages in grasslands within the WTACL and is at clear risk of bird strike as a result of increased off-road vehicle activity
- **Green and Gold Frog**
This threatened species is likely to be present in small wetlands on and within the vicinity of the tracks.

- **Eastern Hooded Plovers**

The referral notes observations of 67 individual plovers in February 2017, which BirdLife Tasmania estimates as representing more than 2% of the global population of the species. The Conservation Advice for the vulnerable species notes the threat posed by increased vehicle and human activity in coastal nesting and foraging habitats.

- **Red-Necked Stints**

Contrary to the referral's conclusion that WTACL does not contain significant habitat for the species, BirdLife Tasmania estimates that the Arthur-Pieman Conservation Area supports a nationally significant population of this listed migratory species. Off-road vehicles in the WTACL will disturb feeding and roosting habitat, and compromise birds' strength for the northern migration.

- **Ruddy Turnstones**

BirdLife Tasmania considers that an internationally significant population of this migratory species is present within the WTACL. Despite the significance of the population, and the risk presented by ORVs, the referral fails to address impacts on Ruddy Turnstones.

Impacts

Information requirements

As a general comment, the referral documentation (including the appended reports) does not provide sufficient evidence to satisfy the Minister as to the likely impacts of the proposed action. The referral notes (at [4.1]) that a further Integrated Survey and Condition Assessment, comprising track assessments, cultural values survey, habitat condition assessment, biosecurity assessment and shore bird monitoring, will be undertaken to establish baseline data and "provide the most robust information given the dynamic nature of the area."

In particular, there are significant data deficiencies in relation to both ecological and cultural values in the vicinity of track 601.

In the absence of this information, the Minister does not have any basis to determine that the proposed action will not have a significant impact on relevant matters of national environmental significance.

The reports presented with the referral are up to 10 years old, and do not specifically address the indigenous heritage values of the WTACL. Even so, they uniformly support the conclusion that the tracks should be closed to protect cultural heritage values, and should satisfy the Minister that the proposed action is clearly unacceptable.

However, if the Minister does not accept that characterisation, he should adopt a precautionary approach in the absence of specific assessments of the proposal and determine that the action is a controlled action that requires assessment by environmental impact statement.

Impacts on cultural heritage

Direct impacts

The clear, direct impacts of the proposed action relate to the laying of plastic and geotextile matting, hardening of surfaces, establishment of campsites, and the erection of fencing, signage and track markers.

From an engineering perspective, the referral contains no evidence to satisfy the Minister that the installation of the proposed works will not have a significant impact, or that the works will be effective in mitigating the risk to any underlying cultural values.

More significantly, the referral fails to appreciate the intangible impact of concealment. The referral notes that concealment is an activity that requires a permit under the *Aboriginal Heritage Act 1975*, indicating the potential for the activity to compromise heritage values. However, no details are provided regarding that impact as it relates to the indigenous heritage values of the WTACL.

Affidavit evidence presented by members of the Tasmanian Aboriginal community during the Federal Court proceedings gives some insight into the potential impacts:

- *I also understand the government proposes to cover heritage sites. That's what they call concealment. What that does, it hides the heritage; so how are people supposed to see it – to gain an understanding and interact with the heritage if it is covered up? It loses its context. It's almost the same as taking it away.*⁴
- *But it's not just about the individual sites. The State Government over a number of years have thought if you conceal heritage you are protecting it. But what you are doing is destroying it also. It covers the relationship between the site and the broader landscape. Because they cover it up, what they are doing is they are interfering with that continuance, that connection. They are destroying the overall spiritual connection.*⁵

The referral states that the concealment of cultural material in the footprint of the tracks is not significant because there are “many other comparable examples in the landscape of accessible and naturally visible values.” This demonstrates a fundamental misunderstanding of the significance of connected cultural materials in the broader landscape context.

The indigenous heritage values for which the WTACL is listed recognise the contribution the landscape makes to understanding the unique and specialised Aboriginal way of life on Tasmania's west coast. Concealing areas of value, breaking the connection and compromising the context, will have a significant impact on the national heritage values of the WTACL.

Given that the area is one of Australia's most significant cultural landscapes, authorising damaging, discretionary recreational activities at the expense of indigenous heritage should be seen as clearly unacceptable.

Indirect impacts on cultural heritage

Section 527E(1)(b) of the EPBC Act provides that the “impact” of an action extends to indirect consequences that are substantially caused by the action. This requires the indirect consequence to be reasonably foreseeable, and result from a secondary action, taken by a third party, that is:

- facilitated to a major extent by the primary action
- within the contemplation of the proponent.

In the Federal Court, Justice Mortimer held:

*what individual vehicle recreational vehicle drivers do once they have obtained a permit to enter the newly designated area, and how they comply with the restrictions and conditions imposed upon them must, it seems to me, be characterised as the taking of another action as a consequence of the opening of the tracks to such drivers.*⁶

On that basis, Her Honour was satisfied that it was necessary to consider the impacts “likely to arise from the conduct of recreational vehicle drivers who use the tracks under the permit system which the respondents propose to introduce.” The relevant indirect consequences included:

- The consequences of vehicles driving over the tracks
- The consequences of likely deviations by drivers
- The consequences of non-compliance by drivers with directions and permits⁷

Her Honour held:

The actual driving of vehicles over the tracks is the intended consequence of the action proposed to be taken by Mr Whittington [the Secretary] in each of his capacities. The likely consequences of recreational vehicles driving over the tracks (including the need or tendency for vehicles to deviate from the tracks, together with high past levels of non-compliance – including recreational vehicles driving on tracks such as 601 which have always been closed) were well known to Mr Whittington, at least through his officers...⁸

⁴ Affidavit of Adam Thompson, dated 11 June 2015

⁵ Affidavit of Clyde Mansell, dated 9 June 2015

⁶ *Tasmanian Aboriginal Centre Inc v Secretary, DPI/PWE* [2016] FCA 168 (**Federal Court decision**) at [235]

⁷ Federal Court decision at [238]

⁸ Federal Court decision at [236]

While the Full Federal Court overturned Justice Mortimer's finding that the designation of the tracks was part of the "action", they agreed that the track work and implementation of the permitting system were part of the primary action. They did not displace Her Honour's analysis of s.527E, simply stating that a determination of what should be considered part of the "impact" of the action was properly a decision for the Minister.

If the regulation of access to the tracks is part of the referred action, as held by the Full Federal Court and acknowledged by the proponent, any assessment of the impacts of that action must include the consequences of vehicles using the tracks – such use is clearly facilitated by the permit system and contemplated by the government. Indeed, it is the only reason for undertaking the action.

Any assessment of impact must also include impacts associated with drivers deviating from the formalised tracks. In his evidence before the Federal Court, Dr Tim Stone, an experienced consultant archaeologist, stated that increased vehicle traffic resulting from track improvements will result in:

increased departures from the established track, as recreational users seek their 'own' space. The more measures that are put in place to restrict these users, the further will they drive off-road to avoid them. The extent of this impact, both direct and indirect, is likely to be unlimited in the dune field.⁹

Based on evidence of past and current use of the area, departures from established tracks are entirely foreseeable and within the contemplation of the proponent when implementing the action. For the reasons outlined below, mitigation measures proposed to address the impact of such departures will not prevent significant impacts on the indigenous heritage values of the WTACL.

The direct and indirect impacts of the proposed action are likely to:

- remove, destroy, damage or substantially disturb archaeological deposits, cultural artefacts, features or objects in the WTACL;
- involve activities in the WTACL with substantial and/or long-term impacts on values of the place;
- permanently diminish the cultural value of WTACL for Tasmanian Aborigines;
- alter the setting of the WTACL in a manner which is inconsistent with its indigenous heritage values.

For these reasons, the Minister should be satisfied that the proposed action is a controlled action, and one which is clearly unacceptable.

Impacts on threatened species, threatened ecological communities and migratory species

Lowland grassland

Grasslands are susceptible to weed and pathogen infestation. The referral sets out the plan for annual monitoring of the condition of the ecological community, but measures to protect against infestation are limited to the construction period, rather than the driving season.

For the reasons outlined above, the impacts of the increased use of the tracks must be considered. There is not sufficient evidence regarding the risk of weed and pathogen infestation for the Minister to be satisfied that the impacts of the proposed action will not be significant.

Orange Bellied Parrots

The measures outlined in the referral to minimise impacts on this critically endangered species rely on the adequacy of measures to protect habitat provided by the Lowland grasslands. As outlined above, potential for weeds and pathogen infestation is not adequately addressed in the referral.

The overlap of the ORV permit season and the parrot's breeding season also increase the risk to the species as a result of increased vehicle access to the area. Given the critically low number of breeding pairs, any heightened risk to the species should be characterised as a potential significant impact.

⁹ Stone, T. Written Statement of Evidence dated 12 June 2015.

Hooded Plovers, Red-Necked Stints and Ruddy Turnstones

Hooded plover chicks are particularly susceptible to being killed by ORVs given their camouflaged plumage and tendency to remain motionless when faced with threat will make them difficult for drivers to detect and avoid. The referral notes that efforts will be made to direct vehicles away from potential habitat "wherever practical", but acknowledges that "there is likely to be some unavoidable disturbance to foraging birds with heightened risks to foraging juvenile birds."

Furthermore, the proposal to require vehicles to travel below high-water mark will not be effective at times of high tide, when birds feeding at the water edge will be at risk. Given the international significance of the APCA population of plovers, this level of disturbance should be characterised as a significant impact.

The referral does not propose mitigation works specifically for listed migratory species as the proponent considers that the area is not significant habitat for these species. This is contradicted by Bird Life Tasmania's population estimates and surveys. Where the birds are present, similar risks as those posed to Hooded Plovers exist for the listed migratory species. Significantly, energy expended in avoiding or responding to disturbance from ORVs or humans could also detract from those birds' preparation for the northward migration at the end of the season.

Green and Gold Frog

Despite the statement in the referral that proposed works will avoid potential wetland habitat for this species, the Summary of Proposed Works identifies a lagoon on track 501 and states:

Re-route around this lagoon is not feasible, plastic matting and track markers will be required to consolidate appropriate route.

The 2014 Parks and Wildlife assessment report identifies as a management concern for track 501 that "wetlands are being used as 'skid pans'."¹⁰ Damage to the lagoon resulting directly from the works, and indirectly from the use of the track through the wetland, is likely to have a significant impact on any Green and Gold frogs inhabiting the lagoon.

Scale of impacts

The scale of damage done by past and current ORV activity in the WTACL is well documented.¹¹ Members of the Tasmanian Aboriginal community have repeatedly expressed their hurt regarding the damage to a place of cultural heritage significance, and the authorisation or facilitation of that damage by the State Government.

Significantly, a rigorous, comprehensive survey of cultural heritage values within the WTACL is yet to be undertaken, making an assessment of impacts on those values difficult. This was recognised by the Federal Court:

A further aspect of the evidence which contributes to the proper characterisation of the impacts of the opening of these three tracks as significant is the absence of any full surveys of the area. Knowledge of the nature and extent of sites in the WTACL is incomplete. [Stuart Huys']¹² evidence was clear on this point. In the past, surveys have been carried out for specific purposes only, with specific limits on what was to be surveyed... The fact is, knowledge about surviving manifestations of the way of life of Aboriginal people in that landscape is materially incomplete. In part this is because of a lack of surveys, but it is also due to the inherent character of the area, as a dune landscape where sands shift constantly and sites, artefacts and other surviving manifestations may be exposed for the first time, or temporarily covered up (and perhaps then susceptible to damage because no one realises they are there).¹³

The referral document also acknowledges (at [1.4]), that further detailed cultural heritage assessments will need to be completed. TAC believes the extent of cultural heritage values identified in future surveys, particularly along track 601, is likely to be greater than indicated by existing

¹⁰ Parks and Wildlife Service Internal Report, *Management Considerations of 15 Closed Tracks Within the Arthur Pieman Conservation Area*. 12 April 2014, p19

¹¹ See, for example, www.abc.net.au/news/2015-05-18/offroad-motorists-damage-tarkine-tracks-senator-says/6478178

¹² Note, Stuart Huys is an experienced heritage consultant, and author of the 2010 CHMA report submitted with the referral.

¹³ Federal Court decision at [290]

records. For example, recent community-led survey work undertaken by TAC and the Wilderness Society has identified numerous previously unrecorded sites of significance along a 5km transect within the WTACL (see Wilderness Society submission for details).

On currently available evidence, the Minister cannot be satisfied that the proposed works will not have a significant impact on indigenous heritage values.

The scale of impact resulting from consequential access to the area will also depend on the number of vehicles permitted. The referral documents note the intention to allow up to 12 permits to be issued each day, each valid for three days. As a result, it is possible to have 36 authorised vehicles using the tracks on any given day during the permit season.

The referral documents also provide for an additional allocation of up to 6 commercial tourism vehicles per day.

There is nothing in the referral documentation explicitly assessing the impact of 42 vehicles per day on the natural or cultural values, or the capacity of the proposed mitigation works to withstand that level of use. The lack of evidence to support the proposed cap was also raised by the Federal Court.¹⁴

Again, there is no basis for the Minister to be satisfied that the proposed action will not have a significant impact on matters of national environmental significance.

Mitigation measures for impacts on indigenous heritage values

The referral notes that damage to cultural heritage values within the WTACL has occurred through "continued illegal use" and "ORVs diverting from the main existing track either to seek alternative routes in an effort to seek driving challenges." This is consistent with the view expressed above that deviations from formed tracks are entirely foreseeable.

The referral proposes a range of mitigation measures to minimise these impacts and concludes that, with those measures in place, there will be no significant impact on indigenous heritage values arising from the action. In fact, the referral states (at [4.1] and [8.1]):

The overall intention of the proposed action is to reduce landscape scale impacts of the tracks through route stabilisation, closure of redundant track sections and avoidance of unplanned track development... The consolidation of a single route and the closure and rehabilitation of redundant track sections will have a net benefit for the aesthetics and integrity of the landscape...

The use of directional markers and signage will also... achieve a net benefit: the avoidance of cultural values

Levels of illegal use including 'off-track' or other inappropriate driving are expected to be reduced substantially and further reduced over time.

TAC disputes these claims on a number of grounds.

Effectiveness

Firstly, the referral presents no evidence to demonstrate that the proposed mitigation works will be effective in either the short or the long term. The proposal for annual surveys, regular re-location of star pickets, and adaptive management strategies highlight the lack of confidence that single tracks will be maintained.

The experience in implementing mitigation measures north of the tracks also give little cause for confidence in the effectiveness of such measures. Fencing around middens north of Sandy Cape have repeatedly been cut or pushed down to restore vehicle access to protected areas.

In his evidence to the Federal Court, based on the mitigation works proposed in 2014, many of which are reflected in the current referral, Dr Tim Stone was sceptical that such works would have a "lasting mitigative effect". While noting that barrier fencing and track closures may lead to short term,

¹⁴ Federal Court decision at [150]

localised improvements, he concluded that this would be offset in the longer term by a tendency to seek out off-road tracks:

The more measures that are put in place to restrict these users, the further will they drive off-road to avoid them...It follows that accelerated erosion caused by increased vehicle traffic will have a negative effect on Aboriginal cultural heritage.

Having regard to this and other evidence, Justice Mortimer held:

It is apparent from the Parks and Wildlife evidence...and following that the nature of the activity of recreational vehicle driving, the motivation of drivers to either experience particular challenges in their driving, or their motivation to access particular places, together with the inevitable consequences of weather in the area making certain parts of a track impassable at certain times of the year all combine to make it highly likely that there will be regular deviations by drivers of recreational vehicles from the specified tracks.¹⁵

Baseline

Secondly, comments regarding net benefits from the mitigation works misrepresent the reality that current use of these tracks is unlawful. The benefits of mitigation works (even assuming they are effective) should be measured against a baseline of no ORVs on the tracks, rather than a situation in which unlawful use has been allowed to persist.

Similarly, the conclusion that unlawful use will decrease is misleading as the proposed designation of the tracks and subsequent permitted system will make lawful activities that are currently unlawful. Therefore, reducing unlawful use will not directly reduce the damage caused by such use, it will simply authorise it.

Management issues

In relation to alternatives, the referral document (at [8.1]) states:

It is not feasible to take no action to manage vehicle use on the tracks. The only viable alternative to the proposed minor works is to put in place a higher level of built infrastructure, including more extensive re-routes to further formalise the tracks

Again, this explicitly ignores the viable alternative of maintaining the closure of the tracks, implemented following extensive consultation and survey work, and to use resources proposed for upgrading tracks to instead increase the proponent's capacity to enforce compliance with the ban and rehabilitate areas damaged by historic use.

The 2012 decision to close tracks 501 and 503, and to continue to prevent access to track 601 was informed by feedback from Parks and Wildlife Service staff with management responsibilities in the Arthur Pieman Conservation Area. The documents appended to the referral make it clear that closure was considered the most practical and effective approach to managing the impacts on natural and cultural values.

When the tracks were proposed to be opened in 2014, internal planning documents identified an ongoing concern within Parks regarding the challenges that presented, with one officer noting:

We have to accept that damage is going to occur and the emphasis will be on monitoring and the ability to measure whether allowing this type of recreational use is 'sustainable'.

Another Parks and Wildlife report noted a range of management issues, including:

Difficulty of running compliance on an open track in such a remote location, particularly as once people are down there they can disperse through dunes, incidentally which are full of significant Aboriginal heritage.

It is the strong view of Parks managers that it is easier to manage remote tracks closed than to manage them open. It is much more effective to either prevent people from entering a closed area by having a presence or apprehend culprits when they drive out of a closed area rather than driving around trying to catch perpetrators hooning off tracks in remote locations. Furthermore, no government will ever have the

¹⁵ Federal Court decision at [270]

resources to maintain tracks and protect natural and cultural values by engineering techniques in remote locations.¹⁶

For Parks to be able to ensure compliance in this region it is imperative to revert to the initial 2010 proposal and prevent vehicles travelling south of Sandy Cape by employing enforcement measures there.¹⁷

After considering this material, Justice Mortimer concluded:

*In other words, those state officers with the responsibility of managing these tracks so as to preserve and conserve their heritage values recommended their closure as the way to protect them, seeing their opening as likely to be too damaging to their heritage values. In the Court's opinion, that is a matter to be given weight in determining that the impact of the action is significant.*¹⁸

As noted above, the Full Federal Court decision reduced the scope of “the action” assessed by Justice Mortimer to exclude the designation of the tracks. However, where the impacts of ORVs are characterised as an indirect consequence of the track works and regulation of access, a similar conclusion must be reached.

Reliance on other assessments

The referral (at [1.12]) lists a number of other assessments and approvals that will be required before proceeding with the proposed action. TAC urges the Minister not to assume that such assessments will adequately address the impacts on matters of national environmental significance.

In particular, emphasis is placed on the requirement to obtain a Reserve Activity Assessment, and the indication that the proposed opening of the tracks will be treated as a Level 4 assessment and subject to public consultation. It is important to note that the Reserve Activity Assessment process is not statutory, and therefore provides no guarantees as to the issues to be considered, the process for consultation, and no opportunities to challenge the outcome.

The referral also notes that the Director is obliged to make management decisions in accordance with the *Arthur Pieman Conservation Area Management Plan 2002*, and the objectives for management of conservation areas under the *National Parks and Reserves Management Act 2002*.

The proponent states (at [1.5]) that all 13 management objectives must be considered equally, and cites the objectives as providing for recreational use consistent with the protection of natural and cultural values. Significantly, the referral omits that the objective provides for “appropriate” recreational use.

The referral also notes that the *Arthur Pieman Conservation Area Management Plan 2002* provides “benchmarks for an effective and sustainable off-road vehicle management system including... a substantial reduction in the rate of degradation of natural and cultural resources assessed by objective measures.” What the referral fails to note is that the Plan explicitly provides that there should be no off-road vehicle access south of Sandy Cape. The government has not indicated any intent to amend the Management Plan, therefore the referred action, and the access it will authorise, will be contrary to the governing management document.

Environmental record of the proponent

It is important that any discussion of the environmental record of the proponent in relation to management of cultural heritage acknowledges the damage done to Aboriginal cultural heritage within the Arthur-Pieman Conservation Act over a considerable period of time. The closure of tracks 501 and 503 was a positive step towards better management, but has been completely compromised by lack of enforcement and the uncertainty, since 2014, as to the future protection of the area.

Numerous reports have been made regarding unlawful use of the area, with little enforcement action. In part, this reflects compliance difficulties in remote areas, and we acknowledge the

¹⁶ Parks and Wildlife Service Internal Report, *Management Considerations of 15 Closed Tracks Within the Arthur Pieman Conservation Area*. 12 April 2014, p4

¹⁷ As above, p24

¹⁸ Federal Court decision at [293]

additional resources proposed in the referral. However, compliance resources remain limited and lack of compliance activity to date should discourage the Minister from relying on the proponent's enforcement regime to avoid significant damage to indigenous heritage values within the WTACL in future.

At [6.2], the referral lists the recent court proceedings in relation to the tracks. Notably, the Director of National Parks and Wildlife is a statutory role held by the Secretary of DPIPWE. The Secretary is currently party to proceedings in the Federal Court and Supreme Court of Tasmania regarding the regulation of salmon farming activities in Macquarie Harbour. The Federal Court proceeding relates to the alleged failure to comply with a particular manner decision under the EPBC Act, and resulting significant impacts on an endangered species and the World Heritage values of the Tasmanian Wilderness World Heritage Area

Though ultimately not involving court proceedings, the relatively recent circumstances at kotalayna/ Jordan River should also be noted. The Tasmanian Aboriginal Centre actively opposed the Tasmanian Government's decision to proceed with construction of the Brighton Bypass despite the site containing some of the oldest and most extensive evidence of Aboriginal occupation in Australia. The site was subsequently included on the National Heritage List both for its "outstanding heritage value to the nation because of its special cultural association with Tasmanian Aboriginal people and its exceptional symbolic importance arising from their collective defence of their identity in the face of the threats to their heritage." The heritage listing came too late to protect the site from construction, providing a salutary warning about the irreversible loss of cultural heritage where values are neither well understood nor respected.

Lack of consultation

At [1.13], the referral details the "considerable levels of public consultation" undertaken in response to the Arthur-Pieman Conservation Area Sustainable Vehicle Access report, and the high volume of submissions made in 2010-2011 as part of that process.

The referral document fails to mention that the outcome of that earlier consultation was the closure of tracks 501 and 503, and the decision to keep track 601 closed. There has not been any public consultation regarding the current proposal to open the tracks.

Furthermore, despite the statement in the referral that "DPIPWE continues to liaise with stakeholder groups with an interest in the management of ORV access in the APCA", and despite their clear legal interest in the management of WTACL, members of TAC were not contacted prior to this referral being made.