



## takayna Tracks Appeal – briefing note

- " *The value of the [Western Tasmania Aboriginal Cultural Landscape] 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.*

Justice Mortimer in *TAC v Secretary, DPIPWE*, para 220

On 22 – 23 August 2016, the Full Court of the Federal Court will be hearing an appeal against the Honourable Justice Mortimer's earlier decision in *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment & Director National Parks*

The case concerns the Tasmanian government's proposal to re-open three off-road vehicle tracks (501, 503 and 601) within the National Heritage listed [Western Tasmania Aboriginal Cultural Landscape \(WTACL\)](#), all of which were closed by the former State government in 2012 in recognition of the damage being caused to significant Aboriginal cultural heritage.

The Tasmanian Aboriginal Centre successfully applied for an injunction to stop the tracks from being opened without approval under the EPBC Act.

### Why is this case important?

As the first case to consider indigenous heritage values under the EPBC Act, Justice Mortimer's decision is significant for the following reasons:

- It delivers a strong statement about the importance of protecting indigenous heritage values for all Australians, and that indigenous heritage values should not be treated as inferior to non-indigenous cultural values.
- It recognises the value to Aboriginal people of entire landscapes, rather than just specific sites and relics identified by government regulators. This could have significant implications for the management of National-Heritage listed indigenous heritage places across Australia.

Importantly, in announcing recently that the *Aboriginal Relics Act 1975* would be reviewed, Hon Matthew Groom MP described the current legislative practice of limiting protection to relics as "outdated" and "shamefully disrespectful". This is supported by Justice Mortimer's findings.

Justice Mortimer's decision also limits the application of the "government authorisation" exemption, designed to focus assessment attention not on broad government policy decisions, but on the individual actions that those decisions give rise to. Justice Mortimer's approach addresses the risk that exempting policy decisions that give rise to many small actions that may not, in themselves, have a "significant" impact, prevents the EPBC Act from considering inevitable cumulative impacts.

The Full Court will consider whether Justice Mortimer's decision should be upheld.

### Who is involved?

- Tasmanian Aboriginal Centre Inc
- Tasmanian Government (represented by the Secretary of DPIPWE and the Director of Parks)
- Commonwealth Government – the Commonwealth government was not party to the original case, but was given approval to make additional submissions in the appeal (called "intervening").

## **Background**

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

On 1 March 2016, Justice Mortimer held that the Secretary's decision to re-open off-road vehicles tracks was an action that could not proceed without approval under the EPBC Act.

Justice Mortimer was satisfied that:

- The indigenous heritage values of the WTACL attached to the entire landscape, rather than specific sites
- Re-opening the tracks would cause a significant impact on those indigenous heritage values
- The designation (i.e opening) of the tracks, issuing of permits and managing the tracks was collectively an "action" that required approval from the Commonwealth Environment Minister.

A copy of Justice Mortimer's judgment can be found [here](#), and a summary [here](#).

The Tasmanian Government appealed against Justice Mortimer's decision, and the Commonwealth Government was granted permission to intervene.

## **Key issues**

The Tasmanian Government and the Commonwealth Government will both argue that Justice Mortimer's decision should be overturned, because:

- **The designation of the tracks is not an "action"**

Both Governments argue that the designation itself is a regulatory step only, rather than an activity that has physical consequences. Even if the designation was an "action", they argue that it falls within the exemption given to "government authorisations".

The Commonwealth Government will argue that Justice Mortimer's broad interpretation of "action" will make it difficult to administer the EPBC Act because it will require a wide range of premature decisions (that is, decisions without details as to specific and localised impacts) to be referred to the Minister. In their submission, the cumulative impacts of individual actions is to be addressed primarily through State planning and land management legislation, rather than by requiring more actions to be approved under the EPBC Act.

- **The 'National Heritage values' of a National Heritage listed place are limited to values particularised in the listing document**

Both Governments will argue that Justice Mortimer was wrong to assess the values of the WTACL on the basis of evidence as to the broader significance of the area to Aboriginal people. Instead, Her Honour should have limited her consideration to those values expressly listed in the National Heritage List entry for the WTACL.

The Commonwealth Government will argue that, unless the "value" of a listed heritage place is limited to listed values, it will be impossible for individuals, and difficult for regulators, to determine whether any particular action will impact on the values of the place. They are concerned by the implications of this approach to management of heritage places across Australia.

## **What can the Full Court decide?**

The Full Court can uphold Justice Mortimer's decision, or overturn the decision and replace it with a fresh decision.

The Full Court will not hear new evidence, but may still refer to evidence presented in the original hearing when making its assessment as to the significance of impacts on indigenous heritage values in the WTACL.