FEDERAL COURT OF AUSTRALIA

Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated [2016] FCAFC 129

Appeal from:	*Tasmanian Aboriginal Centre Incorporated v Secretary, Department of Primary Industries, Parks, Water and Environment (No 2)* [2016] FCA 168
File number:	TAD 9 of 2016
Judges:	**ALLSOP CJ, GRIFFITHS AND MOSHINSKY** JJ
Date of judgment:	16 September 2016
Catchwords:	**ENVIRONMENT LAW** - National Heritage places - Western Tasmania Aboriginal Cultural Landscape - Ministerial decision to include area in National Heritage List - proposal by Tasmanian Government to open three tracks in area to recreational vehicles - whether proposed designation of area and attaching of conditions under Tasmanian regulations would constitute a governmental authorisation within s 524(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) - whether project to open the three tracks constituted "action" - proper construction of expression "National Heritage values"
Legislation:	*Acts Interpretation Act 1901* (Cth), ss 15AB, 46(1)(a) *Crown Lands Act 1976* (Tas) *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth) *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3(1), 15B, 15C, 67, 67A, 68, 69, 70, 72(3), 75, 133(1), 134(1), 137A, 324C, 324D, 324JJ, 324P, 324Q, 324Y, 475, 523, 524, 527E, 528 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 10.01A *National Parks and Reserved Land Regulations 2009* (Tas), regs 18, 33 *National Parks and Reserves Management Act 2002* (Tas) *National Parks and Wildlife Act 1970* (Tas) *Nature Conservation Act 2002* (Tas)
Cases cited:	*Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408

Esposito v Commonwealth (2015) 235 FCR 1

Minister for Environment and Heritage v Queensland Conservation Council Inc (2004) 139 FCR 24

P & C Cantarella Pty Ltd v Egg Marketing Board for the State of New South Wales [1973] 2 NSWLR 366

Save the Ridge Inc v Commonwealth (2005) 147 FCR 197

Secretary, Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth) (2013) 209 FCR 215

Taikato v The Queen (1996) 186 CLR 454

Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment [2014] FCA 1443

Date of hearing:	22 and 23 August 2016
Date of last submissions:	24 August 2016
Registry:	Tasmania
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	98
Counsel for the Appellant:	Mr MF O'Farrell SC, Solicitor-General for the State of Tasmania, with Ms J Rudolf
Solicitor for the Appellant:	Office of the Solicitor-General (Tasmania)
Counsel for the Respondent:	Mr B Walters QC with Ms T Acreman
Solicitor for the Respondent:	Environmental Defenders Office (Tasmania)
Counsel for the Intervener:	Mr PRO Gray QC with Ms FI Gordon
Solicitor for the Intervener:	Australian Government Solicitor

ORDERS

TAD 9 of2016

BETWEEN: **JOHN WHITTINGTON, AS SECRETARY OF THE DEPARTMENT OF PRIMARY INDUSTRIES, PARKS, WATER AND THE ENVIRONMENT AND AS DIRECTOR OF NATIONAL PARKS AND WILDLIFE**
Appellant

AND: **TASMANIAN ABORIGINAL CENTRE INCORPORATED**
Respondent

MINISTER FOR THE ENVIRONMENT AND ENERGY
Intervener

JUDGES: **ALLSOP CJ, GRIFFITHS AND MOSHINSKY JJ**

DATE OF ORDER: **16 SEPTEMBER 2016**

THE COURT ORDERS THAT:

1. Within seven days the parties provide agreed minutes of proposed orders to give effect to these reasons (including as to costs) or, if they cannot agree, within a further seven days each party provide minutes of proposed orders to give effect to these reasons (including as to costs) together with a short written submission (no more than two pages) in suppoti of those proposed orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 On 7 February 2013, a Ministerial decision was made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) **(EPBC Act)** to include in the National Heritage List a coastal strip of land known as the Western Tasmania Aboriginal Cultural Landscape, which is approximately two kilometres wide and located on the northern part of the west coast of Tasmania. The decision, which was published in the Gazette, stated that the Minister for Sustainability, Environment, Water, Population and Communities (of the Commonwealth) was satisfied that the place had the National Heritage value specified in a schedule to the decision. Under a heading "Value", the schedule stated, in summary, that during the late Holocene, Aboriginal people on the west coast of Tasmania and the southwestern coast of Victoria developed a specialised and more sedentary way of life based on a strikingly low level of coastal fishing and dependence on seals, shellfish and land mammals; this way of life is represented by Aboriginal shell middens, which lack the remains of bony fish but contain 'hut depressions'; the area has "the greatest number, diversity and density of Aboriginal hut depressions in Australia"; and the "hut depressions together with seal hunting hides and middens lacking fish bones ... are a remarkable expression of the specialised and more sedentary Aboriginal way of life".

2 In 2014, the Tasmanian Department of Primary Industries, Parks, Water and Environment and the Parks and Wildlife Service developed a proposal to open three tracks in the Western Tasmania Aboriginal Cultural Landscape to recreational vehicles. The appellant, Mr John Whittington, is both the Secretary of the Department and the Director of the Service. It will be convenient to refer to the appellant in both capacities as the **Secretary** in these reasons.

3 In late 2014, the Tasmanian Aboriginal Centre Incorporated **(Tasmanian Aboriginal Centre),** the respondent to the appeal, commenced a proceeding in this Court seeking declaratory and injunctive relief in relation to the proposed opening of the three tracks. An interlocutory injunction was granted by a judge of the Court pending the trial and determination of the application: *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment* [2014] FCA 1443. That injunction remained in place until judgment below.

4 At the hearing below, the Tasmanian Aboriginal Centre contended that the Secretary's proposed conduct, in opening and managing the tracks, would have a significant impact on the National Heritage value protected by the EPBC Act. The primary judge held that what the Secretary proposed to do, by way of opening the three tracks to recreational vehicles and by managing the tracks and the area once open, was an "action" for the purposes of the EPBC Act and that the action was likely to have a significant impact on the National Heritage value of the place. Accordingly, the primary judge made a declaration to the effect that the opening of the three tracks to recreational vehicles by the Secretary, and the management of those tracks and the surrounding areas by constructing new sections of track, spreading gravel, laying rubber matting and installing culverts, fencing or track markers, was likely to have a significant impact on the National Heritage value of the place contrary to the EPBC Act. The primary judge did not consider that anything more than a declaration was required because, subject to the Secretary's right of appeal, the Secretary would abide by the law as declared by the Court.

5 The Secretary has appealed from the decision of the primary judge. The appeal raises two main issues:

(a) First, whether the primary judge erred in her construction of the word "action" in ss 523 and 524 of the EPBC Act. In particular, whether the primary judge erred in deciding that the Secretary's proposed designation of the three tracks for the driving of vehicles under reg 18 of the *National Parks and Reserved Land Regulations 2009* (Tas), and the attaching of conditions to that designation under reg 33 of those regulations, was not a "governmental authorisation (howsoever described) for another person to take an action" within the meaning of s 524(2) of the Act.

(b) Secondly, whether the primary judge erred in her construction of the expression "National Heritage values" in s 324D of the EPBC Act.

6 For the reasons that follow, the Secretary's appeal should be allowed. In respect of the two main issues identified above, our conclusions, briefly stated, are as follows:

(a) The primary judge adopted an overly narrow construction of s 524(2) of the EPBC Act. The proposed designation and attaching of conditions under the relevant regulations would be a decision by a government body (the Secretary) to grant a governmental authorisation for other people to take an action (such

as the driving of recreational vehicles). However, the primary judge was otherwise correct to characterise the Secretary's activities or proposed activities as an "action" or "actions" within the meaning of the Act. The relevant activities or proposed activities comprised a project, undertaking or series of activities and thus constitute an "action" or "actions".

(b) The primary judge erred in her construction of "National Heritage values". The primary judge held that the identification of value in the Ministerial decision was descriptive rather than definitional. Her Honour held that, while the description may have a role to play in deciding whether an action has or is likely to have a significant impact on a National Heritage value of a place, the description is not itself the value; the value is the broader statutory concept of indigenous heritage values. Using this foundation, her Honour saw the establishment or identification of the relevant value as a matter for proof at trial. We agree with the Secretary that this approach is contrary to the terms of s 324D(2) of the EPBC Act. The National Heritage values (here, there is only one) are the values included in the National Heritage List. In the present case, the National Heritage value of the Western Tasmania Aboriginal Cultural Landscape is specified in the paragraphs appearing under the heading "Value" in the schedule to the Ministerial decision, which paragraphs are included in the List. While we agree with the Secretary in this regard, we reject the submission of the Secretary that the expression of value in the List is incapable of explanation or contextualisation by other material.

Key legislative provisions

7 In order to provide context for the background facts, we first set out the key provisions of the EPBC Act of present relevance. The parties provided a version of the Act compiled on I July 2016; we will refer to this version of the Act.

8 Section !SB of the EPBC Act (located in Subdivision AA - National Heritage in Div I of Pt 3) is headed, "Requirement for approval of activities with a significant impact on a National Heritage place". Relevantly, sub-section (4) provides:

> (4) A person must not take an action that has, will have or is likely to have a significant impact on the National Heritage values, to the extent that they are indigenous heritage values, of a National Heritage place.
>
> Civil Penalty:

(a) for an individual-5.000 penalty units;

(b) for a body corporate-50,000 penalty units.

Note: For *il1digel1011s heritage value,* see section 528.

9 Section I5C(7) provides for a criminal offence relating to similar conduct, in the following terms:

(7) A person commits an offence if:

(a) the person takes an action; and

(b) the action results or will result in a significant impact on the heritage values, to the extent that they are indigenous heritage values, of a place; and

(c) the heritage values are National Heritage values of the place; and

(d) the place is a National Heritage place.

Note I: For *il1digel1011s heritage 1lalue,* see section 528.

Note 2: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

IO Sections 324C and 3240 (located ꞌin Subdiv B of Div IA of Pt 15 of the Act) relate to the National Heritage List and provide as follows:

324C The National Heritage List

(1) The Minister must keep a written record of places and their heritage values in accordance with this Subdivision and Subdivisions BA, BB and BC. The record is called the ***National Heritage List.***

(2) A place may be included in the National Heritage List only if:

(a) the place is within the Australian jurisdiction; and

(b) the Minister is satisfied that the place has one or more National Heritage values (subject to the provisions in Subdivision BB about the emergency process).

(3) A place that is included in the National Heritage List is called a ***National Heritage place.***

(4) The National Heritage List is not a legislative instrument.

324D Meaning of *National Heritage* values

(I) A place has a ***National Heritage value*** if and only if the place meets one of the criteria (the ***National Heritage criteria)*** prescribed by the regulations for the purposes of this section. The ***Natiollal Heritage value*** of the place is the place's heritage value that causes the place to meet the criterion.

(2) The ***National Heritage values*** of a National Heritage place are the National Heritage values of the place included in the National Heritage List for the place.

(3) The regulations must prescribe criteria for the following:

(a) natural heritage values of places;

(b) indigenous heritage values of places;

(c) historic heritage values of places.

The regulations may prescribe criteria for other heritage values of places.

(4) To avoid doubt, a criterion prescribed by the regulations may relate to one or more of the following:

(a) natural heritage values of places;

(b) indigenous heritage values of places;

(c) historic heritage values of places;

(d) other heritage values of places.

It is evident that the word "value" is used in the sense of the worth, importance or significance of the place and that the plural (values) reflects the fact that a place may have value in more than one way.

II Section 32411 provides in patt as follows:

324JJ Decision about inclusion of a place in the National Heritage List

Minister to decide whether or not to include place

(I) After receiving from the Australian Heritage Council an assessment under section 324JH whether a place (the ***assessed place)*** meets any of the National Heritage criteria, the Minister must:

(a) by instrument published in the *Gazette,* include in the National Heritage List:

(i) the assessed place or a part of the assessed place; and

(ii) the National Heritage values of the assessed place, or that part of the assessed place, that are specified in the instrument; or

(b) in writing, decide not to include the assessed place in the National Heritage List.

Note: The Minister may include a place in the National Heritage List only if the Minister is satisfied that the place has one or more National Heritage values (see subsection 324C(2)).

...

(5) For the purpose of deciding what action to take under subsection (1) in relation to the assessed place:

(a) the Minister must have regard to:

(i) the Australian Heritage Council's assessment whether the

assessed place meets any of the National Heritage criteria; and

(ii) the comments (if any), a copy of which were given to the Minister under subsection 324JH(1) with the assessment; and

(b) the Minister may seek, and have regard to, information or advice from any source.

...

12 Sections 523 and 524, which are contained in Subdiv A of Div I of Pt 23, provide as follows:

523 *Actions*

(1) Subject to this Subdivision, action includes:

(a) a project; and

(b) a development; and

(c) an undertaking; and

(d) an activity or series of activities; and

(e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

524 Things that are not *actions*

(I) This section applies to a decision by each of the following kinds of person ***(government bot(v):***

(a) the Commonwealth;

(b) a Commonwealth agency;

(c) a State;

(d) a self-governing Territory;

(e) an agency of a State or self-governing Territory;

(f) an authority established by a law applying in a Territory that is not a self-governing Territory.

(2) A decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an ***action.***

(3) To avoid doubt, a decision by the Commonwealth or a Commonwealth agency to grant a governmental authorisation under one of the following Acts is not an ***action:***

(a) the *Customs Act 1901;*

(b) the *Export Control Act 1982;*

(c) the *Export Finance and Insurance Corporation Act 199!*;

(d) the *Fisheries Management Act 1991;*

(e) the *Foreign Acquisitions and Takeovers Act 1975;*

(t) the *Offshore Petroleum and Greenhouse Gas Storage Act 2006;*

(g) the *Biosecurity Act 2015;*

(h) the *Competition and Consumer Act 2010.*

This subsection does not limit this section.

13 Section 528 contains the following definitions of present relevance:

> ***action*** has the meaning given by Subdivision A of Division 1 of Part 23.
>
> ***heritage value*** of a place includes the place's natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.
>
> ***indigenous heritage value*** of a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history.
>
> ***National Heritage place*** has the meaning given by subsection 324C(3).
>
> ***National Heritage value*** has the meaning given by section 3240.
>
> ***place*** includes:
>
> (a) a location, area or region or a number oflocations, areas or regions; and
>
> (b) a building or other structure, or group of buildings or other structures (which may include equipment, furniture, fittings and articles associated or connected with the building or structure, or group of buildings or structures); and
>
> (c) in relation to the protection, maintenance, preservation or improvement of a place-the immediate su1T0Lmdings of a thing in paragraph (a) or (b).

14 It is convenient to set out at this point the relevant regulation made for the purposes of s 324D of the EPBC Act. Regulation I0.01 A of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) **(EPBC Regulations)** (compilation date 1 July 2015) provides:

> **10.01A National Heritage criteria (Acts 324D)**
>
> (1) For section 324D of the Act, subregulation (2) prescribes the National Heritage crite1ia for the following:
>
> (a) natural heritage values of places;
>
> (b) indigenous heritage values of places;
>
> (c) historic heritage values of places.
>
> (2) The National Heritage criteria for a place are any or all of the following:
>
> (a) the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history;

(b) the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;

(c) the place has outstanding heritage value to the nation because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history;

(d) the place has outstanding heritage value to the nation because of the place's importance in demonstrating the principal characteristics of:

(i) a class of Australia's natural or cultural places; or

(ii) a class of Australia's natural or cultural environments;

(e) the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;

(f) the place has outstanding heritage value to the nation because of the place's importance in demonstrating a high degree of creative or technical achievement at a particular period;

(g) the place has outstanding heritage value to the nation because of the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;

(h) the place has outstanding heritage value to the nation because of the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history;

(i) the place has outstanding heritage value to the nation because of the place's importance as pa1t of indigenous tradition.

(3) For subregulation (2), the ***cultural*** aspect of a criterion means the indigenous cultural aspect, the non-indigenous cultural aspect, or both.

It will be observed that the regulation deals in a compendious way with the three matters referred to in s 324D(3); that is to say, the same criteria are prescribed for each of the three forms of value referred to in s 324D(3).

Background facts

15 The following summary of the background facts is largely drawn from the reasons of the primary judge (the **Reasons)** and the findings therein.

16 As noted above, the proceeding concerns an area known as the Western Tasmania Aboriginal Cultural Landscape. The three tracks in question are located in that area. Each of the tracks is also wholly located within the Arthur-Pieman Conservation Area, pa1t of which overlaps with the Western Tasmania Aboriginal Cultural Landscape. The three tracks the subject of the proceeding are:

- Pati of track 50 I. Track 501 is some 10 km in length and runs along the coast from Sandy Cape in the north to Interview River. Track 50 I then joins track 60 I. The section in issue is a section from Sea Devil Rivulet to Interview River.
- Track 503 - the Interview Mine Tracie This track is some 5 km in length running inland from track 50 I.
- Track 60 I - the Interview River to Pieman River Tracie This is some 7.15 km in length and runs along the coast from track 50 I to the Pieman River.

17 A map showing the three tracks and their location within the Western Tasmania Aboriginal Cultural Landscape was annexed as Annexure A to the Reasons.

18 The Atihur-Pieman Conservation Area comprises some 100, 135 hectares in the north-west of Tasmania. It was initially established as the Arthur-Pieman Protected Area under the *Crown Lands Act 1976* (Tas) in 1982 and declared a conservation area (a type of reserved land) on 30 April 1999 under the *Nature Conservation Act 2002* (Tas).

19 The Arthur-Pieman Conservation Area is managed by the Tasmanian Parks and Wildlife Service under the *National Parks and Reserves Management Act 2002* (Tas), which sets out the management objects for the Area. In his capacity as Director of Parks and Wildlife, Mr Whittington is the managing authority for the Arthur-Pieman Conservation Area. (As indicated above, for convenience we will refer to him as the Secretary even when acting in this capacity.) In January 2002, the Arthur-Pieman Conservation Area Management Plan 2002 (prepared pursuant to the predecessor *National Parks and Wildl(fe Act 1970* (Tas)) took effect. The Area is required to be managed in accordance with that Plan. Relevant patis of the Plan are extracted or referred to in the Reasons at [89]-[91].

20 In 2010, Cultural Heritage Management Australia was engaged by the Tasmanian Parks and Wildlife Service to undertake an Aboriginal heritage assessment and to develop an Aboriginal Heritage Management Plan in respect of vehicle tracks in the Arthur-Pieman Conservation Area. A repoli was prepared. It is described in the Reasons at [92]-[93].

21 On 7 February 2013, the Minister for Sustainability, Environment, Water, Population and Communities decided to include the Western Tasmania Aboriginal Cultural Landscape in the National Heritage List. The decision, as published in the Gazette, was in the following terms:

Environment Protection and Biodiversity Conservation Act 1999

INCLUSION OF A PLACE IN THE NATIONAL HERITAGE LIST

Western Tasmania Aboriginal Cultural Landscape

I, Tony Burke, Minister for Sustainability, Environment, Water, Population and Communities, having considered in relation to the place described in the Schedule of this instrument:

(a) The Australian Heritage Council's assessment whether the place meets any of the National Heritage criteria; and

(b) The comments given to the Council under sections 324JG and 324JH of the *Environment Protection and Biodiversity Conservation Act 1999;* and

being satisfied that the place described in the Schedule has the National Heritage values specified in the Schedule, pursuant to section 324JJ of the *Environment Protection and Biodiversity Conservation Act 1999,* include the place and its National Heritage value in the National Heritage List.

Dated 7/2/2013

[signed by]

Tony Burke
Minister for Sustainability, Environment,
Water, Population and Communities

22 The schedule to the decision set out geographical details for the Western Tasmania Aboriginal Cultural Landscape (noting five excluded areas) and then set out the following in relation to value:

Criterion	**Value**
The place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history.	During the late Holocene Aboriginal people on the west coast of Tasmania and the southwestern coast of Victoria developed a specialised and more sedentary way of life based on a strikingly low level of coastal fishing and dependence on seals, shellfish and land mammals (Lourandos 1968; Bowdler and Lourandos 1982). This way of life is represented by Aboriginal shell middens which lack the remains of bony fish, but contain 'hut depressions' which sometimes form semi-sedentary villages. Nearby some of these villages are circular pits in cobble beaches which the Aboriginal community believes are seal hunting hides (David Collett pers. comm.; Stockton and Rodgers 1979; Cane 1980; AHDB RNE Place ID 12060). The Western Tasmania Aboriginal Cultural Landscape has the greatest number, diversity and density of Aboriginal hut depressions in Australia.

> The hut depressions together with seal hunting hides and middens lacking fish bones on the Tarkine coast (Legge 1929:324; Pulleine 1929:311-3 I2; Hiatt 1967: 191; Jones 1974: 133; Bowdler 1974: 18-19; Lourandos 1970: Appendix 6; Stockton and Rodgers 1979; Ranson I980; Stockton I984b:61; Collett *et al* I998a and 1998b) are remarkable expressions of the specialised and more sedentary Aboriginal way of life.

For more information on the place search the Australian Heritage Database at 1.ill.Q://www.environment.ie:ov.au/cgi-bin/ahdb/search.pl using the name of the place.

23 We note the following matters about the above statement of value:

(a) The criterion specified in the schedule is the first of the criteria prescribed in reg 10.01A(2) of the EPBC Regulations, set out in [14] above.

(b) It is apparent from the above extract that, in respect of the Western Tasmania Aboriginal Cultural Landscape, one value (rather than multiple values) was specified.

(c) It was common ground at the hearing of the appeal that the National Heritage value set out in the schedule is wholly also an indigenous heritage value for the purposes of ss 15B(4) and 15C(7).

24 In a joint submission provided shortly after the hearing of the appeal, the parties provided details of how the above information is included in the National Heritage List. Consistently with s 324P of the EPBC Act (referred to below), the Department of the Environment and Energy of the Commonwealth keeps a website which includes webpages that are accessible through the following URL: https://www.environment.gov.au/heritage/places/national-heritage-list (the **national heritage list page).** The national heritage list page is accessible from the Department's home page by the following route:

- "Topics"
- "Heritage Places"
- "Australia's National Heritage List"

25 On the national heritage list page, there is a list of the places that have been included in the National Heritage List. The description of each place is also a hyperlink. If an internet user clicks on the hyperlink entitled "Western Tasmania Aboriginal Cultural Landscape" the user

is taken to another page specific to this area. On that page, under the heading "Listing information", there are hyperlinks described in the following terms:

- Location/Boundary plan
- Australian Heritage Council: Final assessment report
- Gazettal notice
- Australian Heritage Database record for this place

26 If an internet user clicks on the text "Australian Heritage Database record for this place", the user is taken to a web page headed "Western Tasmania Aboriginal Cultural Landscape, Arthur River Rd, Arthur River, TAS, Australia", a copy of which was Exhibit A70 at trial (the **database record).** The database record can also be accessed by searching the Australian Heritage Database using the name of the place, as suggested in the words at the end of the extract from the Gazettal notice set out in [22] above.

27 The database record, under a heading "Official Values" and a sub-heading "Criterion A Events, Processes", sets out three paragraphs which are identical to the three paragraphs appearing under the heading "Value" in the schedule to the Ministerial decision extracted in [22] above. The parties' joint submission following the hearing states that they agree that the text of these three paragraphs, appearing in the database record, is a written record of the value of the Western Tasmania Aboriginal Cultural Landscape included in the National Heritage List for the purposes of Subdiv 8 of Div 1A of Pt 15 of the EPBC Act.

28 The database record contains additional information about the history and significance of the Western Tasmania Aboriginal Cultural Landscape. Despite its length, we set out the following extract from the database record as it is relevant to our discussion, below, of the potential role of contextual materials in construing the statement of value:

> **Western Tasmania Aboriginal Cultural Landscape - History**
>
> The region in which the Western Tasmania Aboriginal Cultural Landscape occurs is commonly known as the Tarkine, which is named after the Tarkine [Tarkiner] tribe, the traditional owners of the Sandy Cape region located on the west coast of Tasmania (Mcfarlane 2008:220). The north west coast was also inhabited by three other tribes, namely the Pee.rapper (West Point), the Manegin (Arthur River mouth) and the Peternidic (Pieman River mouth) (Mcfarlane 2008:220). These Aboriginal tribes inhabited the coastal areas of the Tarkine for at least 4 000 years; the date for the oldest shell midden located at the mouth of the Arthur River (Stockton 1984b:61). During the last 2,000 years, Aboriginal tribes along the west coast, in particular the northwest tribes, exploited the rich and varied resources of the coast and the scrubby hinterland that fringed it.

During the summer months, semi-sedentary 'villages' were established at key resource rich locations such as West Point (known as Nongor) which was located next to a (sic) elephant seal colony (Plomley 1966: 184; Jones 1967). Excavation of West Point midden has provided an important insight into Aboriginal life on the northwest Tasmanian coast (Jones 1966). During the summer months food, in particular seals and coastal birds, was available in its greatest amount leading to the development of semi-sedentary villages (Jones 1974, 1975:3, 1978:36, 1981 :7/88). Winter on the other hand was a time when food was scarer (sic), forcing the village groups to disband into smaller groups which fanned out moving up and down the northwest coast (Jones 1978:36).

Aboriginal people also used the hinterland, an area thick with tea tree scrub in a complex of swamps, to hunt terrestrial mammals (wallabies, small marsupials), lizards and waterbirds, to gather plant foods, quarry spongolite for stone tools and to trade for ochre (Jones 1981 :7/88). The Western Tasmania Aboriginal Cultural Landscape also contains extensive scatters of stone artefacts, rockshelters, human burials, petroglyphs of geometric forms and stone arrangements which add to our knowledge of Aboriginal life during this time (Jones 1965 and 1980; Stockton and Rogers 1979; Lourandos and Bowdler 1982; Stockton 1982; Cosgrove 1983 and 1990; Flood 1983 and 1990; Richards and Sutherland-Richards 1992; Collett *et al* 1998).

The first recorded sighting of the Western Tasmania Aboriginal Cultural Landscape region by Europeans was when George Bass and Matthew Flinders circumnavigated Van Dieman's Land (Tasmania) in 1798. In 1803, British settlement began in Van Dieman's Land and explorations into the traditional lands of the Tasmanian Aboriginals were initiated (Plomley 1991 :3; Mcfarlane 2008:xi). Very quickly, Aboriginal people's land began to be acquired on the basis that Van Diemen's Land was without settled inhabitants (Mcfarlane 2008:xi).

James Kelly sailed up the west coast in 1815/16 and in 1823 Charles Hardwicke sailed from Launceston to the Arthur River, describing 'rich grass pasture'. Later in 1824, James Hobb landed at the Pieman River noting the stands of timber.

The ethnographic records from Jorgen Jorgenson and George Augustus Robinson make numerous references to Aboriginal huts including their location, construction, size and use along the entire west coast (Plomley 1966; 1991, Mitchell 1988:14). The frames of these huts were commonly made with pliable tree stems and less commonly with whale rib bones. The frame supported walls made of bark, grass or turf: ...

There is also a detailed account by Robinson on 28 February 1834 where the Tarkiner attacked the Tommyginny: ...

...

Even though Robinson successfully completed his mission in 1834, there was still a number of small family groups of Aboriginal people living in and around the region (Plomley 2008:959-960). On 10 December 1842 Mr William Gibson, the newly appointed Superintendent of the VDLC, informed the Court of Directors that:

> *[T]he natives who had hitherto been so troublesome were captured upon the 4th instant near the River Arthur and forwarded them yesterday to Launceston, their party consisted of a middle-aged man and female, two males about 18 and 20 years of age, and three male children betv.,een 3 and 7 years old (in Murray 1993:514).*

Records indicate that the man and woman were John Lanna (also spelt Lanne) and his wife Nabrunga and their five children Sanna, Pieti, Albert, William and Frank (Murray 1993:514). Gibson wrote that the Aboriginal family was captured near the A1ihur River by sealers and that they were the last Aboriginal people 'at large in ... [the] colony' to be removed (in Murray 1993:514). The family was removed to Flinders Island and by 1847 the removal of Aboriginal people f'om the Tasmanian mainland to Flinders Island ceased (Ryan 1996: 199, 202). William and Sanna were the only family members to have survived internment at Flinders Island (Plomey 1987:882). William was moved to Oyster Cove south of Hobaii with 46 other Aboriginal people (Ryan 1996:203). William lived until 1869, leaving behind his wife Truganini (Petrow \997:93, 94). At the time, William was considered to have been the last full-blood Aboriginal man to die in Tasmania (Ryan 1996:214).

Throughout the period of European colonisation of Tasmania, the land and sea in and around the Western Tasmania Aboriginal Cultural Landscape have always held a special significance for Tasmanian Aboriginal people (Ryan 1996). Ever since their removal f'om traditional lands the Aboriginal community has maintained a strong interest in and connection to their country, actively petitioning the British and Tasmanian Governments in pursuit of the return of land and recognition of land rights. In the 1970s the Aboriginal community formed representative organisations to actively campaign for their recognition as the first Tasmanians and for their rights. In 1973 and 1976, the Tasmanian Government recognised the cultural significance of the petroglyphs at Sundown Point and the shell middens and hut depressions at West Point by declaring them State Reserves (www.parks.tas.gov.au/index.aspx?id=5718). Aboriginal people continue to play a key role in the management of these places to ensure that they are preserved for future generations.

In 1977 a petition for the recognition of prior Aboriginal ownership, return of all sacred sites, mutton bird islands and Crown land in addition to compensation was presented to Queen Elizabeth II during her visit to Tasmania (Ryan \996: 166). Another attempt for land rights was made with the Tasmanian Government in 1985 which included the request to return Mount Cameron West, just to the no1th of the Western Tasmania Aboriginal Cultural Landscape (Ryan 1996:275-6). It wasn't until 1995, when the Tasmanian government passed the *Aboriginal Lands Act* that Perminghana (Mount Cameron West), was returned with another 11 places across Tasmania to the Aboriginal community because of their cultural importance. The Aboriginal community continue to pursue the return of land at West Point and Sundown Point as these places have a paiticularly strong connection for them.

Condition and Integrity

The condition of the Aboriginal shell middens along the west coast is varied; however the most common disturbance is related to off road vehicle and bike use, cattle grazing, development (telephone tower installation and shack construction) and deflation through exposure to wind and rain (Collett *et al* 1998a and 1998b). During inspections of some of these hut depressions sites by Collett *et al* in 1998, they found that a large number of the huts depressions and the middens where stable and in places covered by grass. Some of the hut depressions have been directly affected by the disturbance listed above (Collett *et al* 1998a and 1998b), however the current status of these sites is unknown and a source states that the middens at West Point have not been inspected since the 1990s but at the time were stable and covered in grass (O'Connor 2007). A number of hut depression sites have also been subject to archaeological excavation including a hut at Sundown Point (TASI 2421), completely excavated by Ranson in the 1970s (Jones 1980: 159; Stockton 1984a:28; Richards and Sutherland-Richards 1992:28, 31) and part of a hut depression at West Point midden was excavated by Jones between 1964-5 (Jones 1965).

29 As the primary judge found, in this patt of Tasmania, middens were living and socialising areas for Aboriginal people; in the words of one of the witnesses, they were "houses without walls". The middens in the area are likely to date from anywhere between two hundred years ago to five or six thousand years ago. The middens vary in size and visibility. Some palis are clearly visible with concentrated collections of shells. The movement of sand means there may be pockets of shells, and areas of sand without shells, but where the pockets of shells are clearly all part of one midden. The sand movements also make it obvious that parts of one midden may be entirely obscured from view. Equally probably, subsequent sand movements may expose palis never seen by non-Aboriginal people before.

30 The policy decision by the Tasmanian Government to open the three tracks was set out in a press release dated 8 November 2014 in which the Member for Bradden, Adam Brooks MP, stated:

> By Christmas this year, recreational off-road vehicle drivers will be able to access the full length of the Arthur-Pieman conservation area from the Arthur River in the north to the Pieman River in the south.
>
> ...
>
> The reopening of a 90 kilometre route along the remote, spectacular and wild West Coast will deliver one of the truly great off road experiences on offer in Australia.
>
> ...
>
> Our investment of $300,000 will ensure recreational off road vehicle users will once again be able to enjoy one of Australia's iconic off road vehicle experiences, while the unique natural and cultural values in the Althur Pieman are appropriately managed and protected.
>
> This decision is about striking a better balance between providing access to this area that the Tasmanian community has el oyed for generations, while also ensuring that the globally significant Aboriginal cultural heritage values are protected.
>
> The funding we are providing will facilitate the re-routing of some tracks to ensure natural and cultural values are protected.
>
> Access to this remote area will be subject to a range of conditions aimed at protecting the environmental and cultural values of the area. Conditions will include obtaining a special permit, adherence to strict rules around driver behaviour, and access only during the non winter months. For visitor safety and to assist with compliance, GPS vehicle tracking units will be trialled.

31 At the time of the proposal to open the tracks, it appears that there was an intention to limit the number of recreational vehicle depaitures to a maximum of 12 per day, as part of conditions to be imposed under the *National Parks and Reserved Land Regulations 2009* (Tas). As the passes were valid for a period of three days (although only for a single day trip

within that period), the effect was that there could be up to 36 vehicles on the tracks at any one time.

32 The legal method by which the Secretary proposed to open the part of track 501 south of Sea Devil Rivulet and tracks 503 and 601 was by designating parts of the Atthur-Pieman Conservation Area as "designated vehicle areas" in accordance with regs 18 and 33 of the *National Parks and Reserved land Regulations 2009* (Tas). Regulation 18 relevantly provides:

> **18. Use of vehicles**
>
> (1) The managing authority may designate areas for the driving of vehicles on reserved land in the class of conservation area, regional reserve or nature recreation area.
>
> (2) A person must not drive a vehicle on any reserved land except -
>
> (a) on a road on that reserved land; or
>
> (b) in a designated vehicle area.
>
> Penalty:
>
> Fine not exceeding 20 penalty units.
>
> (3) A person who drives a vehicle in a designated vehicle area must comply with the conditions of that designated area.
>
> Penalty:
>
> Fine not exceeding 20 penalty units.
>
> ...
>
> (8) In this regulation -
>
> ***designated vehicle area*** means an area of reserved land designated under subregulation (1) as an area where the driving of vehicles is permitted;
>
> ...

33 Regulation 33 provides:

> **33. Designated areas**
>
> (1) The managing authority may designate an area under the regulations by -
>
> (a) a public notice published in a newspaper; or
>
> (b) a sign on reserved land displayed in the area being designated.
>
> (2) The designation of an area may permit, restrict or prohibit a specified activity or use and may be subject to one or more of the following conditions as the managing authority considers appropriate:
>
> (a) restrictions or measures to minimise impact on -

(i) the area; or

(ii) the natural and cultural values of the reserved land; or

(iii) wildlife;

(b) precautions to be observed in carrying out the activity or use;

(c) the safety or convenience of any person;

(d) any other matter the managing authority considers appropriate.

(3) A designated area may -

(a) comprise all or part of a specified area or region, walking track, vehicular track or road, beach, or area of reserved land; and

(b) be a declared area at all times or during the periods specified.

(4) A public notice used to designate an area is to specify -

(a) that conditions may apply to the designated area; and

(b) where details of the designated area and conditions may be found if those details are not contained in the notice.

(5) If practicable, the managing authority is to erect and maintain at least one sign at the entrance of the reserved land, or in the vicinity of the designated area, indicating -

(a) that the area is a designated area and identifying the designated area; and

(b) the activities that are permitted, or prohibited, in the area by virtue of the fact it is a designated area; and

(c) where details of the designated area and conditions may be found if those details are not contained in the sign; and

(d) any relevant period where the area is, or is not, a designated area.

(6) The managing authority may do one or more of the following:

(a) amend or revoke any designated areas declared under subregulation (1);

(b) add a condition to a designated area declared under subregulation (1);

(c) amend or revoke any condition attached to a designated area declared under subregulation (1).

34 The conditions which were proposed to be attached to the designation were or related to: levying of fees on drivers; a requirement that drivers attach a GPS tracking device to their vehicle; and a requirement that each driver hold a recreational driver special pass.

35 The works which the Secretary proposed to have carried out in and around the three tracks for the purpose of facilitating recreational vehicle access were set out in a statement of agreed facts as follows:

> a. constructing new sections of track;
>
> b. spreading gravel over Aboriginal cultural heritage;
>
> c. placing rubber matting over Aboriginal cultural heritage using star pickets or other means of fastening the rubber matting in place;
>
> d. installing culverts, fencing or track markers;
>
> e. rehabilitation works; and/or
>
> f. other works as directed by the Respondents.

36 The primary judge observed that the term "Aboriginal cultural heritage" as used in the agreed facts appeared to be intended to refer to specific sites or places which had so far been identified as having significance to Aboriginal people by reason of their role in the Aboriginal history and occupation of the Western Tasmania Aboriginal Cultural Landscape.

37 At the time of the interlocutory injunction, no such works had yet taken place beyond erecting signage. The situation remained the same at the time of the trial.

38 A number of documents in evidence below and provided to us on appeal referred to the opening of the three tracks as a "project". For example, a departmental document dated 8 October 2014 was headed, "Arthur-Piernan Conservation Area Keeping Tracks Open Project 2014". The words "Project Plan" appeared as a sub-heading. Also in evidence was a document comprising the minutes of a planning meeting for the "[A1thur-Pieman Conservation Area] Track Opening Project" held on 19 November 2014.

The proceeding below

39 The proceeding was commenced by originating application. As noted above, in late 2014, an interlocutory injunction was granted. This provided that, until the hearing and determination of the proceeding, or further order, the Secretary by himself or by his servants or agents was restrained from giving permission for vehicular access to the relevant tracks by the public.

40 A statement of claim was filed. This was subsequently amended. Paragraph 4 of that document alleged that the Western Tasmania Aboriginal Cultural Landscape is a National Heritage place for the purposes of s 324C(3) of the EPBC Act by reason of indigenous heritage values. The particulars to that paragraph stated that on 7 February 2013, the

Commonwealth Minister placed the area on the National Heritage List pursuant to s 324JJ of the EPBC Act and that the National Heritage values of the area are included in the listing. The paiiiculars quoted the three paragraphs from the schedule to the Ministerial decision set out in [22] above and indicated that these were the National Heritage values of the area. Paragraph 4 of the amended statement of claim was admitted in the defence to that document.

41 Paragraph 7 of the amended statement of claim (which was also admitted) was in the following terms:

> The Respondents have engaged in, or propose to engage in conduct, namely:
>
> a. the Second Respondent, as managing authority of the [A1thur-Pieman Conservation Area], designating parts of the [Arthur-Pieman Conservation Area] as a "designated vehicle area" in accordance with Regulations 18 and 33 of the National Parks and Reserved Land Regulations 2009 (Tas).
>
> i. Such designation will provide for recreational vehicles to be driven on the tracks and/or any newly constructed tracks or sections of track in the [Western Tasmania Aboriginal Cultural Landscape];
>
> Tl. Conditions attached to the designation include:
>
> I. a fee being levied on each driver;
>
> 2. each driver attaching a GPS device to their vehicle; and
>
> 3. a Recreational Driver - Special Pass being issued to each driver.
>
> b. carrying out actions to implement conditions attached to the designation in relation to individual drivers by:
>
> i. 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;
>
> ii. collecting $50 per driver for each pass sold;
>
> iii. ensuring a GPS device is fitted to the vehicle to be driven by each person who purchases a Recreational Driver - Special Pass;
>
> lv. collecting a $100 bond for the GPS device from the person who purchases a Recreational Driver - Special Vehicle Pass;
>
> v. removing the GPS device [from] the vehicle;
>
> vi. refunding the bond to the person who purchased the Recreational Driver - Special Pass.
>
> c. carrying out, or directing their employees, officers, agents or representatives to carry out works in the [Western Tasmania Aboriginal Cultural Landscape] in and around the tracks for the purposes of facilitating recreational vehicles to be driven on the tracks by:
>
> i. constructing new sections of track;

ii. spreading gravel over Aboriginal cultural heritage; and/or

iii. placing rubber matting over Aboriginal cultural heritage with star pickets or other means of fastening the rubber matting in place;

iv. installing culverts, fencing or track markers;

v. carrying out rehabilitation works; and/or

vi. other works as directed by the Respondents.

42 For the trial of the proceeding, the parties prepared a statement of agreed facts which dealt with some, but not all, relevant matters. The Tasmanian Aboriginal Centre called a number of lay and expert witnesses to give evidence. No evidence was filed on behalf of the Secretary. The primary judge said that the absence of any evidence from the Secretary, and limited cross-examination of the Tasmanian Aboriginal Centre witnesses, meant that most of the factual foundation for the Tasmanian Aboriginal Centre's claims was not the subject of positive challenge.

The decision of the primary judge

43 The primary judge set out the relevant legislative provisions and legal principles at [19]-[54] of the Reasons.

44 The primary judge set out her factual findings at [85]-[172] of the Reasons. We have drawn heavily on this section of the Reasons in our summary of the background facts. In the course of that section of the Reasons, the primary judge also made some statements relating to the expression "National Heritage values". At [100], the primary judge stated, in relation to the Ministerial decision or declaration set out in [21]-[22] above: "As I explain in these reasons, in my opinion, the description given in the schedule to the declaration is just that: it is a description. It is not a statutory definition." The primary judge set out her reasoning on this point at [102]-[108]:

> 102 In my respectful opinion, the parties' competing contentions somewhat misunderstand the way this aspect of the legislative scheme operates. I accept the respondents' contention that there must be some certainty in the meaning of terms used in a Ministerial declaration, because the identification of national heritage values forms the basis for a statutory prohibition, and also creates a criminal offence.
>
> 103 The certainty comes, in my opinion, from reading the prescription of the meaning of "National Heritage values" in s 324D together with the regulations contemplated by s 324D(3). For a place to be registered, the Minister must be satisfied that at least one criterion prescribed by the regulations (relevantly here, *"outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's*

natural or cultural histmy") is met, and that must be because one or more of the three values set out in s 324D is present, or inheres, in the place to be registered. Here, the Minister decided the criterion in reg 10.01 A(2)(a) was met because of the indigenous heritage values of the [Western Tasmania Aboriginal Cultural Landscape], and that term is given a specific statutory meaning in s 528. That the [Western Tasmania Aboriginal Cultural Landscape] was listed for its indigenous heritage values is also apparent from the map attached to the Ministerial briefing note, as approved by the Minister. The whole of the hatched area - being the [Western Tasmania Aboriginal Cultural Landscape] - is specified to have "Aboriginal Values." The necessary certainty for the operation of the prohibition exists at this level.

104 The explanation or description given by the Minister in the right hand column of the schedule is thus not definitional (that work having been performed by a combination of the Act and the regulations) but it is descriptive. It fills out, by way of explanation or description, the particular content of one or more of the three values identified in s 3240(3) by reference to the place to be registered. It gives transparency to the Minister's decision to list a place under s 324JJ and assists in the understanding of the place's values.

105 The distinction is that while the description may have a role to play in deciding whether an action has or is likely to have a significant impact on a national heritage value of a place, the description is not itself the value. The value is the broader statutory concept: here, indigenous heritage values.

106 This construction is confinned by the terms of provisions such as s 324JL. Sub-section (1) provides:

> (1) lfthe Minister believes that:
>
> (a) a place has or may have one or more National Heritage values; and
>
> (b) any of those values is under threat of a significant adverse impact; and
>
> (c) that threat is both likely and imminent;
>
> the Minister may, by instrument published in the Gazette, include in the National Heritage List the place and the National Heritage values the Minister believes the place has or may have.

107 The reference to "one or more National Heritage values" is a reference to the three specific National Heritage values set out in s 324D(3). See also the similar terms of s 324JQ(3) and (8); s 324N(l); and in particular s 324Q, which expressly indicates that an entry in a schedule to a Ministerial declaration (or in the Australian Heritage List itself) is a "description" and that, where the Minister considers that the heritage values of a place could be "significantly damaged" by the disclosure of, *inter alia,* those he1itage values, the description can be "general" in order to prevent that damage.

108 For those reasons whether one looks at the entry in the schedule to the Ministerial declaration, or the longer entry appearing on following the hyperlink in the Ministerial declaration, both have the same character - they are descriptions or explanations of the National Heritage value of the [Western Tasmania Aboriginal Cultural Landscape]. The National Heritage

> value itself is the [Western Tasmania Aboriginal Cultural Landscape's] outstanding heritage value to the nation because of its importance and significance to Aboriginal people in accordance with their practices. observances, customs, traditions, beliefs or history (being the meaning of indigenous heritage values in the Act). That value attaches to the whole of the [Western Tasmania Aboriginal Cultural Landscape] as a landscape in which Aboriginal people lived.

45 The primary judge dealt with the resolution of the issues at (172]-(295]. Her Honour considered whether there was an action for the purposes of the EPBC Act. In relation to the word "action" in s 523 of the Act, the primary judge said at [181]-[182]:

> 181 Even from the inclusive definitions in s 523, it is clear the statutory concept of "action" is deliberately broad. It may, as I have outlined above, be constituted by a series of steps, conduct and processes that are properly to be considered as a whole rather than individually and in isolation from one another. On the other hand, an "action" may comprise a single piece of conduct - to take an extreme example, the bulldozing of a building which is a national heritage place. Save for recognising the role of the express exclusions, there is in my opinion no warrant in the text, context or purpose of the EPBC Act for confining the statutory concept. Each case will raise its own particular evidentiary considerations in order to reach an appropriate characterisation of what is, or is not, the "action" of a respondent or respondents: see, for example, *Esposito v Commonwealth* [(2015) 235 FCR I], in which the Full Court held at [104] that a legislative amendment to a zoning rule, replacing a prohibition on development with a prohibition on development without Council approval, was not an "action" within the meaning of s 523 of the EPBC Act.
>
> 182 The identification of the "action" is a separate and anterior stage to any assessment of significant impact. The "action" must be identified before it will be possible to answer the question posed by the statute about significant impact: it is important these two stages are neither confused nor conflated. In the present circumstances, for the reasons I develop below, it would not be accurate to characterise the respondents' conduct as simply the making of a decision - whether it be a decision to open the three tracks or a decision to designate the relevant area as a "designated vehicle area" under the *National Parks and Reserved Land Regulations.*

46 Applying these principles to the facts of the case, the primary judge concluded that it was correct to characterise the opening of the three tracks as an "undertaking" (if one wishes to apply one of the expressions in the inclusive definition in s 523) or simply as an action constituted by a number of steps or stages (Reasons, [187]). After referring to the physical works to be carried out, the change in status or character of the three tracks (pursuant to the regulations), and the ongoing administration and management of the area, the primary judge said at [188]:

> In my opinion, each of these steps, stages or activities is properly seen as forming a connected series (although, as I have said, not necessarily occurring in any particular order in respect of the physical works) of smaller activities or instances of conduct,

> that form a greater whole. There is a single subject matter which connects all these smaller activities - namely, the opening of the three tracks in the [Western Tasmania Aboriginal Cultural Landscape] and [Atlhur-Pieman Conservation Area] to recreational vehicle use and the consequent management of the area with the tracks open. Just like the construction and operation of a power station, that whole subject matter can be broken down into a series of stage or steps but that would be to deprive the conduct of its appropriate character. Its appropriate character is as a whole undertaking, with a particular outcome: namely, that recreational vehicles will be driving on these three tracks under conditions set by or on behalf of the respondents.

47 The primary judge thus concluded that the Secretary, as the authority responsible for implementing the decision of the Tasmanian Government as expressed in the press release, proposed to take an "action" within the meaning of that concept in s 523 of the EPBC Act (Reasons, [190]).

48 The primary judge next considered whether s 524 of the EPBC Act applied to the Secretary's conduct. After setting out a passage from and discussing *Save the R;dge Inc v Commonwealth* (2005) 147 FCR 197 ***(Save the Ridge),*** the primary judge said (at [196]) that the very use of the word "authorisation" to describe the kind of government decision exempted by s 524 confirms a legislative intention to exclude decisions in the nature of planning and assessment decisions. The primary judge then said at [197]:

> In such cases, the authority or permission is given by a government body, as the language of the exclusion indicates, "for" another person to take an action. The exclusion expressly contemplates there will be an "action" as that term is used in the Act, whether by reference to the examples set out in s 523 or otherwise. What is excluded is the determination to allow or permit the action to occur, and (as Black CJ and Moore J in *Save the Ridge* found) any deliberative processes leading up to such a determination. The exclusion contemplates that the scheme of the Act will otherwise regulate the "action" which a government body has authorised, and so the protected subject matter of the Act will not be endangered. In that way, although a government decision may be a necessary precursor to conduct which is likely to have a significant impact on a protected matter, the scheme of the Act revolves around the Minister's assessment of the conduct itself within the structure and purpose of the Act, in a sense regardless of whether another government body has decided to permit the conduct. Similarly, where a government decision is the culmination or aftetmath of an impact or risk assessment process outside the EPBC Act, the scheme of this Act is not to require a fullher assessment of that government decision, and s 524 can operate to ensure that does not occur. The "action" authorised by the government decision may nevertheless still be a controlled action, but that will depend on specific facts. This approach does not necessarily lead to the entire controlled action assessment process occurring. The Minister is able to endorse other management arrangements or authorisation processes for approval of actions by the Commonwealth or a Commonwealth agency if the Minister is satisfied those management options offer the requisite protection: see ss 33 and 348A of the EPBC Act. State or TetTitory management arrangements or authorisation processes may be similarly endorsed by bilateral agreements between the Commonwealth and the State or Territory in question: sees 29 of the Act.

49 After referring to the Secretary's submissions, the primary judge said at (200)-(203]:

> 200 A designation under reg 18(1) is not in my opinion an "authorisation". It is not a permission, which is in my opinion what the word "authorisation" means in s 524. It is, by an exercise of executive power, a change in the character of an area from "reserved land" on which a prohibition against driving vehicles operates to '·reserved land" which is a "designated vehicle area". By that change in character, any and all persons are able to drive vehicles in that area, provided they adhere to the restrictions and conditions imposed.
>
> 20 I Further, the designation is not the grant of permission to an individual driver. Section 524(2) applies to the grant of "a governmental authorisation (however described) for *another person* to take an action" (my emphasis), indicating that a decision by a government body will fall within the sub-section only if it authorises an action by another "person". The use of the word "grant" ins 524(2) also conveys an intention to give to another person a kind of permission specific to that person, and to what that person intends to do. That is not what occurs through an exercise of power under reg 18, read with reg 33.
>
> 202 Rather, what will occur if the [Western Tasmania Aboriginal Cultural Landscape] becomes a designated vehicle area under reg 18(1) cannot be asce1iained by reference to any identifiable person, nor what that person will do. While there is evidence of a proposed upper limit to the number of vehicles which will be permitted at any one time to be driving in the [Western Tasmania Aboriginal Cultural Landscape] (i.e. 12), there is no evidence about how many vehicles are likely to be driven in the area on a weekly, monthly, six monthly, or yearly basis, nor where they might drive within the [Western Tasmania Aboriginal Cultural Landscape]. There is a real element of speculation in identifying how many vehicles may use the area, and over what period of time. Such a situation is not in my opinion a decision to grant an authorisation to another person to take an action, even if the driving of an individual vehicle might be considered an activity or conduct. There is a decision to designate. There is a decision to attach certain conditions to the designation, including requirements for drivers to obtain passes, and to obey certain restrictions and conditions. But the specificity which in my opinion s 524 requires is absent - both as to what the designation decision "grants" and to whom it is granted. Section 524 is not intended to operate in the absence of such specificity. Its text requires specificity, and for good reason. The purpose of the exclusion is, as I have explained above, to ensure that the controlled action provisions do not attach to decisions about actions, but rather to the actions themselves. The EPBC Act is not intended to require an assessment of an assessment process or its outcome. For that reason, s 524 assumes a clear line can be drawn between a decision to grant permission to a person to do something, and the doing of that thing by the person. No such clear line exists with the respondents' conduct here: rather their conduct is a series of steps beginning with the change of the character of reserved land, involving regulation of vehicle drivers but also involving a series of activities by or on behalf of the respondents to manage the area in which the tracks are located, and to attempt to mitigate the effects of the conduct of those vehicle drivers.
>
> 203 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 respondents' contentions in this proceeding. If the respondents are 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 [Western Tasmania Aboriginal Cultural Landscape]. The extension of s 524 to such circumstances does not fulfil, and indeed frustrates the purpose of the scheme established by the EPBC Act. The conclusion I have reached on an application of the text of s 524 to the respondents' conduct is also supported by a consideration of the purpose of s 524.

50 The primary judge then turned to consider whether, assuming there to be an "action", there would be any impact on protected subject matter. In this part of the Reasons, the primary judge again expressed her view regarding the meaning of the expression "National Heritage values" (see the Reasons, [209]-[217] and [226]). For example, the primary judge said at [209]-[210]:

> 209 ... the indigenous heritage values of the [Western Tasmania Aboriginal Cultural Landscape] (being the National Heritage place for the purposes of s 15B) are (applying the language of the definition of indigenous heritage values in s 528) the significance of that area to Aboriginal people in accordance with their practices, observances, customs, traditions, beliefs or history. That is the subject matter protected by s 15B(4). It is because of the significance of the area to Aboriginal people in accordance with their practices, observances, customs, traditions, beliefs or history that the [Western Tasmania Aboriginal Cultural Landscape] has *"outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history"*. The legislative scheme leaves the determination of the value, and the reason for its value, to the executive. However having carefully considered all relevant material, and once the Minister makes a declaration under s 324JJ what occurs is the identification of the value which becomes the subject matter of the protection under s 15B, and integral to that value is the reason the Minister has identified for the value of the place. Here, the Minister identified the reason as the significance of the [Western Tasmania Aboriginal Cultural Landscape] to Aboriginal people in accordance with their practices, observances, customs, traditions, beliefs or history.
>
> 210 The assessment of significant impact must be directed at that subject matter.

51 The primary judge proceeded to assess whether or not there was (or would be) a significant impact by reference to the protected subject matter as so identified. This required a consideration of the statutory meaning of "impact" in s 527E of the EPBC Act, set out below. The primary judge concluded that the Secretary's proposed actions were likely to have a significant impact on the indigenous heritage values of the Western Tasmania Aboriginal Cultural Landscape (Reasons, [289]-[295], [298]).

The appeal

52 The Secretary's notice of appeal sets out five grounds of appeal as follows:

> 1. The learned trial judge erred in law in determining that opening tracks 50 I, 503 and 60 I ("the tracks") could be characterised as an undertaking within the meaning of s 523(1)(c) of the [EPBC Act] or more generally as an action constituted by a number of steps or stages or activities forming a connected series of smaller activities or instances of conduct, that form a greater whole.
>
> 2. The learned trial judge erred in law in determining that the appellant's designation of the tracks under reg 18 of *National Parks and Reserved Land Regulations 2009* (Tas) was not a governmental authorisation (however described) for another person to take an action within the meaning of s 524(2) of the EPBC Act.
>
> 3. The learned trial judge erred in law in finding that s 158(4) of the EPBC Act protects the intangible concept of the value of a National Heritage Place, which for the purposes of this case, is the indigenous heritage values of the place.
>
> 4. The learned trial judge erred in law in failing to determine that under s 3240(2) of the EPBC Act the National Heritage values of the Western Tasmania Aboriginal Cultural Heritage Landscape ("WTACL") as a National Heritage Place were the National Heritage values of the WTACL included in the National Heritage list for the WTACL.
>
> 5. The learned trial judge failed to properly identify the indigenous heritage values which [s 15C(4)(b)] of the EPBC Act was intended to protect by reason of her failure to properly identify the National Heritage values of the WTACL as a National Heritage place.

53 The Tasmanian Aboriginal Centre filed a notice of contention contending that the judgment should be affirmed on the following ground other than those relied on by the Court:

> If the activities proposed by the Appellant and described in paragraph 7 of the Amended Statement of Claim are not an "undertaking" within the meaning of s 523 of the [EPBC Act], the activities described at paragraph 7 (a), (b) and (c) of the Amended Statement of Claim are individually or collectively "actions" for the purpose of the Act.

54 The Minister for the Environment and Energy of the Commonwealth was granted leave to intervene in the appeal to make submissions in relation to the construction of provisions of the EPBC Act.

55 It is apparent from the notice of appeal that the appeal raises two main issues: the first concerns the construction of the word "action" in ss 523 and 524 of the EPBC Act, including the provision relating to a governmental authorisation in s 524(2); the second concerns the construction of the expression "National Heritage values". We will first make some observations about the scheme of the EPBC Act and then address each of these issues in turn.

We will then address some other matters relating to the proceeding and the orders to be made following the publication of these reasons.

The scheme of the EPBC Act

56 As originally enacted in 1999, the EPBC Act did not contain provisions directed to national heritage places. The provisions relating to such places were introduced later, by the *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth) (the **2003 Amending Act).** The overall structure of the Act remained the same, with the provisions relating to national heritage places being inse1ted into that scheme.

57 The objects of the EPBC Act, set out in s 3(1), relevantly include "to provide for the protection and conservation of heritage" (s 3(1)(ca)).

58 Part 3 of the Act deals with requirements for environmental approvals. Division 1 of that Part deals with requirements relating to matters of national environmental significance. These include, for example, World Heritage prope1ty (Subdiv A); National Heritage places (Subdiv AA); wetlands of international importance (Subdiv B); and listed threatened species and communities (Subdiv C).

59 Subdivision AA, dealing with National Heritage places, comprises ss 15B and ISC. These sections were introduced by the 2003 Amending Act. Section 15B contains a series of prohibitions relating to the National Heritage places to which civil penalties attach. As indicated in the explanatory memorandum for the Bill which became the 2003 Amending Act, the section is structured so as to rely upon the available heads of constitutional power to the greatest extent possible: see the explanatory memorandum to the *Environment and Heritage Legislation Amendment Bill (No 1) 2002* (Cth) at [9]; *Secretary, Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)* (2013) 209 FCR 215 at [125] per Kenny J. Section ISB(4), which is relevant for present purposes, is set out in [8] above. It is impo1tant to note that the prohibitions in sub-sections (1) to (5) of s ISB do not apply to an action in ce1tain circumstances, set out in s 158(8). These include if an approval of the taking of the action by the person is in operation under Pt 9 for the purposes of the section: s 15B(8)(a).

60 Section ISC contains a series of offences relating to National Heritage places. These prohibitions broadly mirror those in s 15B. The offence which corresponds to s 15B(4) is contained in s 15C(7), set out in [9] above. As with s ISB, s ISC provides that the

prohibitions do not apply in certain circumstances: see s 15C(16). Again, these include if an approval of the taking of the action by the person is in operation under Pt 9 for the purposes of the section: s 15C(16)(a).

61 Part 4 of the EPBC Act deals with cases in which environmental approvals are not needed. These include actions covered by bilateral agreements.

62 Parts 6 to 11 of the EPBC Act relate to environment assessments and approvals. Part 7 concerns deciding whether approval of actions is needed. Division I within that Part deals with referral of proposals to take action and comprises ss 67-74AA. We set out some of the provisions of this Division as they are relevant to the issues discussed below. Section 67 contains a definition of "controlled action" as follows:

> **67 What is a *controlled* action?**
>
> An action that a person proposes to take is a ***controlled action*** if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28AB, be) prohibited by the provision. The provision is a ***controlling provision*** for the action.

63 Section 67A contains a prohibition on taking controlled action without approval in the following terms:

> **67A Prohibition on taking controlled action without approval**
>
> A person must not take a controlled action unless an approval of the taking of the action by the person is in operation under Part 9 for the purposes of the relevant provision of Part 3.

64 Section 68 deals with referral of a proposed action. Sub-section (1) of s 68 provides:

> **68 Referral by person proposing to take action**
>
> (I) A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.

65 Section 69 relates to the position of a State or Territory or an agency of a State or Territory, and provides as follows:

> **69 State or Territory may refer proposal to Minister**
>
> (I) A State, self-governing Territory or agency of a State or self-governing Territory that is aware of a proposal by a person to take an action may refer the proposal to the Minister for a decision whether or not the action is a controlled action, if the State, Territory or agency has administrative responsibilities relating to the action.

(2) This section does not apply in relation to a proposal by a State, self-governing Territory or agency of a State or self-governing Territory to take an action.

Note: Section 68 applies instead.

It is apparent from the terms of s 69(2) and the note following that subsection that in a case where action is proposed to be taken by a State or Territory or an agency of a State or Territory, s 68(1) is the relevant provision.

66 Division 2 of Pt 7 concerns the decision to be made by the Minister following referral. Specifically, under s 75, the Minister is to decide whether the proposed action is a controlled action and which provisions of Pt 3 (if any) are controlling provisions for the action.

67 Pati 8 deals with assessing the impacts of controlled actions.

68 Part 9 deals with approval of actions. After receiving the assessment documentation relating to a controlled action, the Minister may approve for the purposes of a controlling provision, the taking of the action by a person (s 133(1)). The Minister may attach conditions to an approval (s 134(1)). Section 137A provides that, in deciding whether or not to approve for the purposes of s 158 or I5C the taking of an action, and what conditions to attach to such approval, the Minister must not act inconsistently with the National Heritage management principles, or certain other matters as there set out.

69 Part 15 of the EPBC deals with protected areas and contains a series of Divisions relating to the different types of protected areas. Division IA relates to managing National Heritage places and comprises ss 324A--324ZC. These sections provide for the keeping of a record known as the National Heritage List (s 324C, set out above) and the meaning of National Heritage values (s 3240, set out above, and discussed further below). Processes are set out for the inclusion of places in the National Heritage List (ss 324E--324JJ, being the usual process, and ss 324JK--324JQ, being an emergency process). Section 324P deals with publication of the National Heritage List, providing as follows:

324P National Heritage List must be publicly available

The Minister must ensure that:

(a) up-to-date copies of the National Heritage List are available for free to the public on request; and

(b) an up-to-date copy of the National Heritage List is available on the internet.

However, s 324Q provides that celtain information may be kept confidential in certain circumstances. Section 324Y(I) provides that the regulations must prescribe principles for managing National Heritage places, referred to as the National Heritage management principles.

70 Part I7 deals with enforcement of the Act. It is not necessary to refer to these provisions in any detail, save to note that s 475 provides for injunctions to be granted where a person proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the Act. An injunction may be sought by an "interested person", an expression which is defined in s 475(6) and (7).

71 Pait 23 deals with definitions. It includes ss 523 and 524, which have been set out above. Key definitions contained in s 528 have also been set out above. Section 527E (introduced after the decision of this Court in *Minister for Environment and Heritage v Queensland ConservaUon Council Inc* (2004) 139 FCR 24) deals with the meaning of "impact" and is in the fo llowing terms:

> (I) For the purposes of this Act, an event or circumstance is an ***impact*** of an action taken by a person if:
>
> (a) the event or circumstance is a direct consequence of the action; or
>
> (b) for an event or circumstance that is an indirect consequence of the action-subject to subsection (2), the action is a substantial cause of that event or circumstance.
>
> (2) For the purposes of paragraph (I)(b), if:
>
> (a) a person (the ***primary person)*** takes an action (the ***prinuu:i, action);*** and
>
> (b) as a consequence of the primary action, another person (the ***secondary person)*** takes another action (the ***secondary action);*** and
>
> (c) the secondary action is not taken at the direction or request of the primary person; and
>
> (d) an event or circumstance is a consequence of the secondary action;
>
> then that event or circumstance is an ***impact*** of the primary action only if:
>
> (e) the primary action facilitates, to a major extent, the secondary action; and
>
> (f) the secondary action is:
>
> (i) within the contemplation of the primary person; or
>
> (ii) a reasonably foreseeable consequence of the primary action; and

(g) the event or circumstance is:

(i) within the contemplation of the primary person; or

(ii) a reasonably foreseeable consequence of the secondary action.

The meaning of "action"

72 The first main issue in the appeal concerns the meaning of "action" in ss 523 and 524 of the EPBC Act. This issue is raised by grounds I and 2 of the notice of appeal. It is convenient to deal with these grounds together.

73 The Secretary's submissions can be summarised as follows:

(a) Neither the proposed designation under reg 18(I) of the *National Parks and Reserved Land Regulations 2009* (Tas), nor the implementation of conditions made under reg 33, amounts to an action. Each is a regulatory action as distinct from a development activity.

(b) Section 523 provides a basic definition of "action" but it is only a starting point. The definition is inclusive and so is taken to extend, enlarge or amplify the ordinary meaning of "action". But it does not displace its ordinary meal11ng.

(c) The designation of the tracks by the Secretary adjusts the use to which the tracks can be put, subject to the grant of a permit to an undefined applicant. Like the rezoning proposal in *Esposito v Commonwealth* (2015) 235 FCR I ***(Esposito),*** the designation and its administration by a permit system is a regulatory function and not an action under s 523.

(d) It is inconsistent both with the opening words of s 523 and the objects of s 524 to bundle a governmental authorisation with physical works, call it an undertaking, or a series of activities, and thus deprive s 524 of any work in respect of an activity that is a governmental authorisation.

(e) If any patl of the Secretary's conduct is an action, it is, neve1lheless, a governmental authorisation under s 524(2). The purpose of s 524 is to take the process of authorisation by governments or governmental agencies outside the reach of the EPBC Act by excluding ce1lain decisions by those bodies from the concept of relevant action; it reflects a policy to remove governmental decisions made with statutory authority; it excludes the deliberative processes

directly connected with those decisions as well as the formal and operative decision itself: *Save the Ridge* at [19]-[21].

(t) The designation of the tracks is a governmental authorisation (howsoever described). It is in the nature of a legislative act, permitting persons who would otherwise be prohibited by regulations from driving on the tracks to do so. There is no reason to confine s 524 to permission to an individual. A designation under reg 18(1) falls squarely within the description of a grant of an authorisation "for" a person to take an action: *Save the Ridge* at [19].

(g) Actions which are excluded by reason of s 524 are not confined to the immediate decision; they extend to the execution or implementation of the decision. This includes implementing the conditions attached to the designation and undertaking physical works. That is consistent with the policy of the section to remove from the reach of the EPBC Act government decisions made with statutory authority.

74 The Minister's submissions in relation to "action" can be summarised as follows:

(a) The primary judge construed s 524 narrowly (as applying only where the authorisation was to a named person) and saw its presence as a reason to give a broad construction to the notion of "action", to include governmental authorisations to the public generally. Therefore, so the reasoning went, government decision-making could be an action, as it was in this case because it was part of a broader undertaking.

(b) The designation is not an action within the ordinary meaning of that term, understood having regard to s 523 and the broader context of the EPBC Act. None of the things listed in s 523(1) is a decision. Each of them has a physical dimension. Even granted that the list is not expressed to be exhaustive, this is a significant limitation, and assuming an *ejusdem generis* approach to what may constitute "action", it would seem unlikely, without some powerful contrary indication, that decisions would ever qualify as actions.

(c) It is impottant to note the centrality of the notion of "action" in the regulatory scheme erected by the EPBC Act. That scheme relevantly proceeds on the familiar pattern of enacting a number of general prohibitions of "actions" subject to certain exceptions (some contained in Pt 3, others in Pt 4) and

approval mechanisms (Pts 7, 8 and 9). Most of the relevant provisions of Pt 3 have headings that refer to "activities". Many of them are couched in terms that make no sense if "action" extends to decision-making because the action is at a particular location. Section 72(3) of the EPBC Act, which concerns the form and content of referrals, gives a sense of what would usually be involved in taking an action for the purpose of the Act, which is not readily reconciled with the proposition that the designation would be an action. The conclusion that a physical dimension is required is unsurprising, for it is not decisions that impact on the protected subject-matter of the EPBC Act, but their implementation. It is of particular contextual importance that a proposed action that comes within the scope of being a "controlled action" by virtue of a prohibition under Pt 3 must be referred for assessment (see ss 68 and 70) and such action must not be taken without an approval under Pt 9 being in operation for the person who proposes to take the action (see, in paiiicular, ss 67 and 67A). This requirement applies across the full gamut of activities covered by the prohibitions in Pt 3. If governmental decision-making were to be characterised as the taking of controlled actions, then premature and unnecessary referrals of proposed or potential decisions are likely to result.

(d) Section 524 confirms that the designation is not an action. On the face of it, the designation falls within the description in s 524(2). In the relevant Tasmanian regulation, "designated vehicle area" is described as an area "where the driving of vehicles is permitted". Therefore, the designation in substance and effect involves a governmental authorisation for others to take action.

(e) The primary judge reasoned that the designation and conditions did not meet the criteria of s 524(2) because of insufficient specificity as to the grantees of the authorisations and as to the "action" so authorised (Reasons, [198]-[205]). Her Honour held that s 524 only applied where the authorisation was for an identified "other person" to take an action, the purpose of the provision being to "ensure that the controlled action provisions do not attach to decisions about actions, but rather to the actions themselves" (Reasons, [201]-[202]). Two matters appear to have motivated her Honour's approach: the reference in s 524 to "for another person" and the proposition that it could not have been

the legislative intention for s 524 to exclude from the Act's purview decisions permitting numerous unnamed persons to do things, because this would mean that the cumulative effect of the actions of these persons would be unregulated by the Act. As to the first, there is no textual foundation for concluding that the reference to "another person" in s 524(2) requires *ex ante* identification of the person. Subject to any contrary intention, words in the singular include the plural: *Acts Interpretation Act 1901* (Cth), s 23. There is no contrary intention here, subject to her Honour's second concern. As to the second, while her Honour's concern has initial appeal, the proposition that the result could not have been intended by the legislature is contrary to statements in the explanatory memorandum to the 1998 Bill that became the EPBC Act: see the explanatory memorandum to the *Environment Protection and Biodiversity Conservation Bill 1998* (Cth) **(1998 Explanatory Memorandum),** [51], [61].

(f) The approach of treating the designation as part of a broader undetiaking involves division between, on the one hand, the designation, including the imposition of the conditions and, on the other, what is proposed to be done (works and operations). It is not permissible to bring within the Act's purview any environmental consequences of the designation not otherwise subject to the Act's provisions by regarding the designation as part of a broader undertaking. In this regard, s 523 is of no assistance. It was included in the Act "to ensure a person cannot avoid the provisions of the Act by breaking one action into many actions" by making clear that "an action may be a series of activities carried out over a particular time period (for example, under a licence or permit)": see the 1998 Explanatory Memorandum, [685].

75 The Tasmanian Aboriginal Centre's submissions in relation to "action" were, in summary, as follows:

(a) Section 523 was intended to prevent an action being dissected into its constituent palis to avoid the operation of the Act: 1998 Explanatory Memorandum, [685]. It was intended that activities which are ultimately and inextricably linked would be bundled up and assessed together as a single action. There is no requirement that each part of a dissected action, or each activity, be an action in itself.

(b) In the present case, the Secretary's proposed conduct, as pleaded in paragraph 7 of the amended statement of claim (see [41] above), constitutes a project or undetiaking because: the conduct was conceived as a project by or on behalf of the Secretary; the conduct is directed to achieving the single objective of opening certain tracks within the Arthur-Pieman Conservation Area to recreational vehicles; the whole course of conduct (that is, all of the constituent parts to achieve that goal) is to be carried out by the Secretary or his employees; there was to be a short time-frame between the designation step and achievement of the objective of opening of the tracks and the operation of the tracks as designated recreational vehicle areas; the timing of the works and the designation phase is interchangeable - the works phase may precede the designation phase and vice versa.

(c) Section 524 removes from the concept of "action" governmental authorisations for another person to do something. If a governmental authorisation is caught by s 524, the decision itself is removed from the purview of the Act; the physical actions that follow the authorisation are not.

(d) The designation of an area by public notice pursuant to the regulations is not the granting of an authorisation to another person. Designation is a statement made to the whole world as to a state of affairs regarding whether an activity is permitted, restricted or prohibited in a particular area: reg 33 of the *National Parks and Reserved Land Regulations 2009* (Tas). It is a change in the status of an area to a "designated vehicle area". The focus is on the area of land, not who will be driving on it. The designation, whether individually or in conjunction with the operation and works phase, is a primary action for the purposes of the Act which facilitates to a major extent the secondary action of recreational vehicles being driven on the tracks.

(e) Regardless of whether the designation is a governmental authorisation of the kind described in s 524, it cannot immunise from the provisions of the Act all activities that follow the designation. The operation and works phases are, individually and when taken together, actions within the meaning of the Act and their impact on the protected values falls for consideration. Assuming, without conceding, that the designation is caught by s 524, the physical activities of affixing GPS devices to vehicles, providing a special vehicle pass

> and information booklet to drivers, collecting money for the pass and GPS device bond, removing the GPS and refunding the bond are all management activities directed to facilitating vehicles driving on the tracks. Similarly, the carrying out of works to re-route parts of the tracks, or spread gravel over the tracks, or install culverts are all physical actions.

76 Having regard to these submissions, in our view the primary judge erred in adopting an overly narro,v construction of s 524(2) of the Act. The proposed designation and attaching of conditions by the Secretary pursuant to regs 18 and 33 of the *National Parks and Reserved Land Regulations 2009* (Tas) would be a decision by a government body (the Secretary) to grant a governmental authorisation for other people (the singular reference to "another person" includes the plural) to take an action (such as the driving of recreational vehicles). When one examines the proposed designation in the context of the Tasmanian Government's decision to open tracks in the Arthur-Pieman Conservation Area to recreational off-road vehicles and the formulation of a "project" to this effect, there can be no doubt that the designation would be one made "for" people to take action (driving a vehicle) in a given area.

77 Nevertheless, the activities of the Secretary and those whom he manages, which would occur after and be authorised by the designation, would all be actions. Those activities are described in paragraphs 7(b) and (c) of the amended statement of claim, set out in [41] above. We reject the Secretary's submission to the effect that the actions which are excluded by s 524 are not confined to the immediate decision and extend to the execution or implementation of the decision. In suppotl of this submission the Secretary sought to rely, by way of analogy, on *Save the Ridge,* in which Black CJ and Moore J said at [21]:

> Since s 524(2) is intended to exclude from the purview of the EPBC Act conduct which constitutes a formal and operative decision it is almost inevitable that it was also intended to exclude decisions made in the deliberative processes directly connected to the making of that decision. It would be quite inconsistent with the object of the provision, if the decisions and related deliberative processes that might be made or undertaken in the course of those processes were intended to be subject to the EPBC [Act], by being "actions" outside the scope of s 524, where the substantive decision itself was within the scope of the section. The principal object of s 524(2) being to exclude the final or operative decision, that object would be frustrated if the decisions made along the way were not also excluded.

78 However, we reject an analogy with *Save the Ridge* in characterising the activities described in paragraphs 7(b) and (c) of the amended statement of claim as so closely connected with the designation (which is not action) as not to be actions themselves. First, the attempt to draw an analogy with the reasons of Black CJ and Moore J in *Save the Ridge* was misconceived.

Their Honours were directing themselves to the deliberative steps leading up to the decision, not to actions consequential on the decision. Their refusal to separate prior deliberative steps from the "action" being the decision (if it be legitimate so to refer to the decision linguistically) can be accepted and seen to be supportive of the evident policy, purposes and terms of s 524. No such conformity with the policy, purposes or terms of s 524 exists by not viewing subsequent acts as actions. Secondly, the suggested analogy is contrary to the very terms of s 524(2), which distinguishes between the decision and consequent action. Thirdly, even if the suggested analogy were not directly contrary to the terms of the provision, it has no foundation in the Act. Fourthly, the suggested analogy finds no support in the 1998 Explanatory Memorandum, which stated as follows under the heading "Clauses 523 and 524" at [684]-[685]:

> 684 The intention of this clause is to ensure that the assessment and approval process in this Act does not apply to a broad range of decisions that operate as indirect triggers for the *Environment Protection (Impact of Proposals) Act 1974.* Accordingly, the definition of 'action' in this clause does not cover a decision by a government to grant approval for another person to take an action. For example, a decision to approve operations for the recovery of petroleum under the *Petroleum (Submerged Lands) Acr 1967* is not an 'action' - **the petroleum operations are, in this case, the 'action'.** Similarly, a decision not to object to a proposed foreign investment or acquisition under the *Foreign Acquisitions and Takeovers Act 1975* is not an action. The examples of decisions which are not actions are included to provide certainty-_these examples are not exhaustive.
>
> 685 An action may be a series of activities carried out over a particular time period (for example, under a licence or permit). This is intended to ensure a person cannot avoid the provisions of the Act by breaking one action into many small actions.
>
> (Emphasis added.)

79 Fifthly, if the submission were correct, it would remove many governmental activities from the operation of the EPBC Act without apparent policy foundation in the Act, and where the Act is expressly intended to cover actions of governmental bodies: the Act binds the Crown (s 4); and see the note to s 69(2) (set out in [65] above). A more confined policy, consistent with the removal of governmental decision-making, is not to interfere with the decision-making processes of government but to have the Act engaged at the point of physical implementation or activity. Lastly, we note that the Minister in his submissions at the hearing of the appeal did not seek to contend that subsequent works would not be actions and accepted that subsequent management of the area may constitute action.

80 In relation to s 523 of the Act, as a matter of language, and consistently with *Esposito* at [103], we have difficulty with a government decision being "action" in the context of the EPBC Act. It is not necessary to accept everything the Minister submitted about requiring physical activity for there to be an action, to conclude that a government decision is unlikely to constitute action in this context. Given the way we have dealt with s 524(2), it is unnecessary to say anything more about s 523, except the following. The action contemplated by paragraphs 7(b) and (c) of the amended statement of claim (see [41] above) can be seen to be effectively a project or undertaking or activity or series of activities, being the so-called "Arthur-Pieman Conservation Area Keeping Tracks Open Project", even if as a matter of statutory force the government decision cannot be taken to be part of that action. That there was a prnject being undertaken, or a coherent activity or series of activities, can be seen in the evidence referring to the "project" (see [38] above).

81 In conclusion, in relation to "action": the primary judge erred in her construction of s 524(2); the proposed designation and attaching of conditions under the relevant regulations would satisfy s 524(2); nevertheless, all the activities listed in paragraphs 7(b) and (c) of the amended statement of claim comprise a coherent project or undettaking or activity or series of activities ,vhich are an "action" or "actions".

82 In view of the way we have dealt with the meaning of "action", it is unnecessary to deal separately with the notice of contention.

The meaning of "National Heritage values"

83 The second main issue concerns the meaning of "National Heritage values" in the EPBC Act. This issue is raised by grounds 3, 4 and 5 of the notice of appeal. It is convenient to deal with these together.

84 The issue for decision is where one finds the identification of the relevant National Heritage value or values, being in this case the indigenous heritage value.

85 The primary judge considered that the National Heritage List is just a description of the National Heritage values, and one looks to the definition in s 3240, to reg 10.0 IA of the EPBC Regulations and to the definition of "indigenous heritage value" in s 528: see [44] and [50] above. Her Honour held that, while the description may have a role to play in deciding whether an action has or is likely to have a significant impact on a National Heritage value of a place, the description is not itself the value; the value is the broader statutory concept of

indigenous heritage values. Using this foundation, her Honour saw the establishment or identification of the relevant value as a matter for proof at trial.

86 We agree with the Secretary that that approach is contrary to the terms of s 324D(2), set out in [10] above. The National Heritage values (here there is only one value) *are* the values included in the National Heritage List. It is important for there to be certainty in the identification of the value or values having regard to the civil penalty and criminal offence provisions: see *Taikato v The Queen* (1996) 186 CLR 454 at 466 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Director of Public Prosecutions (Cth) v Poniatowska* (2011) 244 CLR 408 at [44] per French CJ, Gummow, Kiefel and Bell JJ. Such certainty is facilitated by focusing upon the identification of the value or values in the List, a point which is reinforced by the Minister's obligation to make the List available to the public (s 324P). In this case, the National Heritage value included in the National Heritage List is set out in the three paragraphs under the heading "Value" in the schedule to the Ministerial decision (see [22] above) which paragraphs are included in the National Heritage List. Ultimately, in argument, the Tasmanian Aboriginal Centre accepted that the value in the National Heritage List is the value under consideration because of the terms of s 324D(2).

87 Whilst we agree with the Secretary in this regard, we reject the Secretary's submission that the expression of value in the List is incapable of either explanation or contextualisation by other material. The point is best illustrated by one of the arguments, indeed a central argument, in the appeal. The relevant National Heritage value (and indigenous heritage value) is described in the three (necessarily prosaic) paragraphs set out in [22] above. The Secretary submitted that the tracks south of Ordnance Point (which point is located north of all three tracks in issue) had no observable hut depressions. That factual submission was not in contest. The contested submission built on it was that the value as textually expressed required three inter-connected and proximate things: hut depressions; shell middens lacking fish bones; and seal hunting hides. We reject that submission. The three paragraphs set out in [22] above point to the importance of each and all of these indications of the way of life described in the first sentence of those three paragraphs. The three paragraphs are not a statute. They are an expression of a value that is both sophisticated and complex. That is why it may need to be understood or explained, as we discuss below. In any event, no fair reading of the three paragraphs would require a construction that would see no damage to the value by obliteration of all shell middens because of a lack of proximity of observable hut depressions.

88 To appreciate the nature of the National Heritage value (and indigenous heritage value) of a place may require some context and background. This is given by other material in, or referred to in, the National Heritage List, being the history of the area and the full cultural and historical significance of what can still be found there. For instance, the history and significance of the Western Tasmania Aboriginal Cultural Landscape are described in the database record (see (28] above). The document makes plain that the value of the area goes beyond hut depressions and that there is value in shell middens in their own right. More generally, the database record provides a resource which assists in understanding the statement of value. To appreciate this context and the cultural history of the area is not to depart from the value in the List; it is to explain it, or at least to understand it.

89 Such an explanation or understanding can, it seems to us, be drawn legitimately from information referred to in the National Heritage List: see *Acts Interpretation Act 1901* (Cth), ss 15AB, 46(I)(a). The primary judge went more widely and evaluated expert and lay evidence as to value. It is perhaps unwise to be dogmatic about what kind of evidence would be permissible to explain or to understand a statement of value in the National Heritage List; for instance, there would seem little offence in an expeli explaining what a "hut depression" or "midden" was if the referenced material in the National Heritage List did not do so. However, one can envisage some evidence effectively taking value beyond that which is expressed in the National Heritage List; that would, for that purpose, be illegitimate.

90 By way of conclusion in relation to "National Heritage values", it is not permissible to identify the relevant National Heritage value (and indigenous heritage value) by evidence in a patiicular case - the National Heritage value (and the indigenous heritage value) is the value included in the National Heritage List. Fwiher, to understand and explain that value, recourse may be had, at least, to material in, or referred to in, the National Heritage List.

Other matters including the appropriate form of orders

91 As noted above, shortly after the commencement of the proceeding, the Tasmanian Aboriginal Centre obtained an injunction to the effect that, until the hearing and determination of the proceeding, or forth.er order, the Secretary by himself, servants or agents be restrained from giving permission for vehicular access to the relevant tracks by the public. An injunction of this nature was supported bys 475(5) of the EPBC Act.

92 By its originating application, the Tasmanian Aboriginal Centre sought both declaratory and injunctive relief. This was subsequently reformulated in the amended statement of claim. As

reformulated, the Tasmanian Aboriginal Centre sought declarations that the action as described in the pleading was a controlled action for the purposes of s 67 of the Act and that driving vehicles along the three tracks would have a significant impact on the National Heritage values of the Western Tasmania Aboriginal Cultural Landscape to the extent that they are indigenous heritage values. By way of injunctive relief, the Tasmanian Aboriginal Centre sought prohibitory injunctions restraining the Secretary: (a) from undertaking the action unless an approval of the taking of the action was in operation under Pt 9 for the purposes of s 158(4) of the Act; and (b) from allowing or permitting any person to drive recreational vehicles along the three tracks.

93 Given the scheme of the Act, as described above, the type of declaratory and injunctive relief sought by the Tasmanian Aboriginal Centre may not be appropriate. The Act reposes in the Minister the decision whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action, if there is a referral. The Act does not contemplate an *ex ante* decision in exercise of judicial power of what would be or would not be a contravention of the Act if action (as yet not fully identified) took place. The primary judge embarked on an analysis of impact. The process required a weighing of evidence in the context of the complexities of s 527E. These questions of assessment of impact, such as dealt with in Pt 8, may best be seen as the task of the Commonwealth executive not judiciary, at least in the context of an *ex ante* analysis involving a party who does not threaten to break the law (as to which, see below).

94 That having been said, when this case began, the Tasmanian Government was threatening to go ahead with the project with significant dispatch (see the press release quoted in [30] above). That was the reason the injunction was granted. The primary judge was invited to make a declaration because the Secretary submitted that he would comply with the law of the Parliament and any declaration by the Cowt of it. The point, however, now, is that the relevant action and the relevant National Heritage value in the circumstances have been the subject of a reasoned decision of this Court (though not yet perfected in order). An appropriate course of action would be for the Secretary to consider the now explained proper construction of ss 524(2) and 523, the existence of a project, undertaking, activity or series of activities, and the now explained limits of National Heritage value, in order to assess whether a referral under s 68 is required by a law of the Parliament. It should be said that at all times the Secretary has expressed a view entirely in conformity with the classic expression of the

duty of the state as expressed by Mahoney J (as he then was) in *P & C Cantarella Pry Ltd v Egg Marketing Board.for the State of New South Wales* [1973] 2 NSWLR 366 at 383:

> The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the oppo1lunity of approaching the court, to clarify the matter. Where the matter is before the coul1 it is the duty of the executive to assist the coul1 to arrive at the proper and just result.

95 It seems to us that, subject to hearing from the parties, the correct framework of analysis is to embody the decision of this Court either in declarations or in answers to questions, and permit the Secretary and the State of Tasmania to consider the question of referral. If there be any necessity then for further litigation it can be seen in its proper statutory context. Nothing we have said is intended to discourage the Secretary or the State of Tasmania from referring the action to the Minister without further submission to this Coult. If the matter needs to go back to the primary judge for further hearing, the proper framework of analysis would appear to be whether a party in the position of the Secretary, acting rationally and reasonably, could think other than that the action must be referred to the Minister.

96 Although we disagree with the primary judge on a question of construction, we note that the primary judge did not have the benefit of the submissions of the intervener, as we did. And although we disagreed on construction, we had the benefit of the helpful reasons of the primary judge, and the helpful submissions of the parties.

97 We will hear from the parties, by way of written submissions, in relation to costs. We note that the Minister accepted that he should pay the costs of the Tasmanian Aboriginal Centre of the second hearing day.

Conclusion

98 In light of the above, we will order that within seven days the parties provide agreed minutes of proposed orders to give effect to these reasons (including as to costs) or, if they cannot agree, that within a further seven days each party provide minutes of proposed orders to give effect to these reasons (including as to costs) together with a short written submission (no more than two pages) in support of those proposed orders.

I cet1ify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and the Honourable Justices Griffiths and Moshinsky.

Associate:

Dated: 16 September 2016