

# SUBMISSION TO THE EPBC ACT REVIEW

ANON-K57V-XQKY-T

## **Name**

Heather Sculthorpe

## **Organisation**

Tasmanian Aboriginal Centre

## **State or Territory**

Tasmania

## **Areas of interest**

The objects of the Act; International obligations; Indigenous Australians; Heritage; Matters of National Environmental Significance; Climate change; Decision making; Public participation in decision making; Biodiversity; Conservation

## **Attachment provided?**

Yes

## **Do you give permission for your submission to be published?**

Yes - with my name and/or organisation (if included)

## SUBMISSION RESPONSES

**This submission was provided as an attachment only. The attachment is provided on the following pages of this document.**

EPBC Act Review,  
Department of the Environment and Energy,  
GPO Box 787,  
CANBERRA ACT 2601

Via email: [epbcreview@environment.gov.au](mailto:epbcreview@environment.gov.au)

17 April 2020

Dear Professor Samuel and Review Panel,

The Tasmanian Aboriginal Centre (TAC) is the organisation representing the political and community development aspirations of the Tasmanian Aboriginal community. It was established in the 1970's and delivers a range of health, family, aged-care, heritage protection, training, welfare, child care, land management and other services to the Aboriginal Community. It currently manages land that has been returned to the ownership of the Aboriginal Community, including trawtha mukuminya, a 6878 ha cultural landscape immediately adjacent to the Tasmanian Wilderness World Heritage Area (TWWHA) in Tasmania's Central Highlands and much smaller cave sites embedded within the TWWHA.

The TAC notes the State of Emergency declared in Tasmania due to the global COVID 19 pandemic and highlights the unprecedented demands on our resources and constraints on our personal movement. The TAC believes it would be prudent and just for Government to defer consultation on the EPBC Act review until things return to normal.

Nonetheless we offer the following to the Review Panel.

The TAC has been strongly engaged in issues pertaining to the protection of Aboriginal heritage in the context of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). This includes advocacy for additional levels of protection to be afforded Aboriginal Cultural Landscapes via National and World Heritage listing, and legal action in the Federal Court. As outlined below, this action served to force referral for assessment a development under the EPBC Act, where a limited coverage of National Heritage listing has been achieved across the takayna Cultural Landscape, listed as the Western Tasmania Aboriginal Cultural Landscape.

The TAC shares the aspirations of the wider community to also see environmental values including biodiversity and other matters of National Environmental Significance (MNES) adequately protected. Given their interconnectedness, and the fact that Aboriginal people view our heritage at the Cultural Landscape level, it is impossible to separate Aboriginal and natural

values. It is our experience that a direct threat to one represents a threat to both. We address the majority of this submission however, on aspects pertaining to Aboriginal heritage.

### **Questions 12 and 19 of the Discussion Paper**

1. EPBC Act does not cover all Aboriginal cultural heritage. State-based legislation and its application by the Tasmanian Government demonstrably fails to protect Aboriginal heritage in its stead.

The EPBC Act deals poorly with Aboriginal cultural heritage despite the living culture of Aboriginal people being acknowledged as of national and indeed, world heritage significance.

The only two ways that Aboriginal cultural heritage is relevant under the EPBC Act are:

1. Where a National Heritage Place is listed, and the place is listed as nationally significant due to its Aboriginal heritage values, and;
2. Where a World Heritage Area is listed and its listing values include demonstration of outstanding universal values because of known Aboriginal cultural heritage.

These protections apply to only a small number of places. In Tasmania, there are only three such places: the Jordan River Levee, the Western Tasmania Aboriginal Cultural Landscape and the Tasmanian Wilderness World Heritage Area.

It is notoriously difficult to achieve national or World Heritage status. At the national heritage level, listings take too long: it can be many years before a place is listed. There should be statutory timeframes for nominations to the national heritage list, and interim protection for cultural values should be established while the listing process is being considered.

Though small in number, these listings are large in total size and acknowledge the Aboriginal Cultural Landscape value of Country in Tasmania, in turn reinforcing the existence of known (and unknown) cultural values outside the boundary of these listings.

Indeed, the 2012 National Heritage listing of the Western Tasmania Aboriginal Cultural Landscape proceeded across only a small portion of that area recommended listing by the Australian Heritage Council (AHC). In its final assessment report, the AHC recommended 439,000 ha of the broader takayna/Tarkine be placed on the National Heritage list.

Because of demonstrable political constraints as opposed to values identification and protection, only 22,000 ha of this 439,000 ha, a narrow coastal strip, was listed as the Western Tasmania Aboriginal Cultural Landscape. This is not how effective national heritage protection laws should, or were intended to operate.

We note that the national heritage provisions were put in place in 2003. In his second reading speech, the Minister for the Environment and Heritage stated:

*The National Heritage List creates opportunities to remember, celebrate and conserve places that recall significant themes in Australian history. We should respect and value the development of our industries by recognising and protecting early mining, industrial and pastoral sites. Our national historic built heritage includes places that give an insight into the development of our own sense of Australian identity and our sense of place and, as such, should be recognised and protected for their national heritage significance. Natural heritage places that may be considered by the Australian Heritage Council include those that tell the story of our continent's natural diversity and ancient past.*

*The bill moves forward in the protection of the heritage of Aboriginal and Torres Strait Islander people. Indigenous cultural heritage exists throughout Australia and all aspects of the landscape may be important to Indigenous people as part of their heritage. The effective protection and conservation of this heritage is important in maintaining the identity, health and wellbeing of Indigenous people. This bill provides new opportunities for developing agreed strategies to protect Indigenous heritage places after consultation and discussion with traditional owners on management arrangements. The rights and interests of Indigenous people in their heritage arise from their spirituality, customary law, original ownership, custodianship, developing Indigenous traditions and recent history.*

Consistent with the principles outlined by the then Minister for the Environment “all aspects of the landscape may be important to indigenous people as part of their heritage”. All aspects are important. Further, “*The effective protection and conservation of this heritage is important in maintaining the identity, health and wellbeing of Indigenous people*”.

The protection of Aboriginal heritage has many benefits.

The EPBC Act should recognise and protect the importance of all aspects of cultural heritage, by protecting all Aboriginal cultural heritage. Aboriginal culture reflects the oldest living civilisation on earth, with hundreds of nations, languages, stories and peoples. Our culture is all part of Australia's national heritage and is of acknowledged

national significance. The significance of culture to Australia should be protected in national laws.

The EPBC Act should include provision to cover Indigenous Protected Areas, of which there are 8 in Tasmania.

It is also important because State laws do not protect our culture. The Tasmanian law - the *Aboriginal Heritage Act 1975* – is recognised by legal scholars to be one of the two worst laws in the country.<sup>i1</sup> The Aboriginal Relics Act 1975 (deceptively renamed the Tasmanian Aboriginal Heritage Act with increased penalties but few other changes) has long been criticised for being “woefully outdated” and “shamefully disrespectful” of Tasmanian Aboriginal people, including by representatives of the Tasmanian government. Our lived experience of this law is that the Tasmanian Act waves through destruction of culture, with no consultation obligations, no assessment of cultural heritage impacts before key approvals are granted, and broad defences to destruction. Aboriginal cultural heritage is invariably placed last in assessment of development in Tasmania. The loss of tangible heritage requires urgent national attention.

## **2. Free prior and informed consent**

The EPBC Act does not require proponents to refer a proposed action to relevant Aboriginal peoples, or to have any genuine input from Aboriginal people.

Article 19 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) requires national governments to consult and cooperate to obtain ‘free, prior and informed consent before adopting and implementing legislative or administrative measures’ that may affect Indigenous peoples.

The EPBC Act must make clear requirements for ‘free, prior and informed’ consent from Indigenous peoples for all relevant actions that impact on our country. This is consistent with Articles 19 and 32(2) of the UNDRIP.

This should be a requirement for all actions that may impact on culture and country, consistent with our submission that all Aboriginal cultural heritage should be listed as of national significance.

This would allow for our people to be properly consulted and consent to actions that impact on our culture and country. It would also provide a mechanism for our people to raise and negotiate the return of land to our people as original owners.

Avenues to seek the return of land is particularly important for Aboriginal people in Tasmania, where genocide and forced dispossession of country was perpetrated on our people. In Tasmania, this has the consequence to deny Aboriginal people positive native title determinations, precluding means to negotiate land returns and Indigenous Land Use Agreements

Even in National and World heritage places that are listed because of their Indigenous values, there is no obligation to obtain free, prior and informed consent of Aboriginal people. It is contradictory that places can be listed because of their Aboriginal cultural values, but then there is no obligation to consult or obtain the consent of Aboriginal peoples before actions are taken that would impact on those values.

This is well demonstrated by the actions taken in the Western Tasmanian Aboriginal Cultural Landscape by the Tasmanian government, moving to construct tracks and allow recreational 4wd vehicles to drive over hut depressions and middens, known 'sites' within a Cultural Landscape and a core value of the national heritage place.

This is one of the only places in Australia where continuous settlement in huts is demonstrated, and is of international importance. The impacts of allowing off road vehicle activity was found by experts, and ultimately the Federal Court, to significantly impact (not just impact) the cultural heritage values of that place. Yet the Tasmanian Government proceeded in its action without consulting let alone obtaining the consent of Aboriginal people.

TAC was forced to take legal action to protect those values: *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and the Environment* [2016] FCA 168. This legal action could have been avoided if there was a consent requirement.

Similarly, the Lake Malbena development in the TWWHA has been progressed in the context of the EPBC Act despite explicit statutory heritage advice that it would impact important cultural values of World Heritage significance and should not proceed. Under the EPBC Act, it was determined 'not a controlled action' and therefore not even needing formal approval.

### **3. Right to legal redress to protect Aboriginal cultural heritage**

The open standing provisions in s487 of the EPBC Act and the injunction powers in s475 are critical. These support Aboriginal peoples to take legal proceedings to prevent impacts to culture in national heritage places and World Heritage places. Without these powers, TAC would not have been able to protect the Western Tasmania Aboriginal Cultural Landscape. These should be retained. It is consistent with the right to legal redress under Article 32(3) of the UNDRIP, and is a proper check on the exercise of State powers.

We want to make clear that the decision to taken legal proceedings was not taken lightly. TAC put itself under enormous pressures – bearing time, financial and other risks to take action to protect our (and national) heritage. Numerous members of the Aboriginal community were required to give evidence and subject themselves to cross-examination in the courts.

The TAC had to take action to protect heritage because the application of the EPBC Act was inadequate. Without a right to redress in the courts our culture would have been lost under the tyres of recreational 4wds.

The same standing rights should exist for all Aboriginal cultural heritage. Aboriginal peoples should have rights to redress where actions are taken, or proposed to be taken, that impact on our cultural heritage.

### **4. Aboriginal peoples' referral power**

Aboriginal people should be able to refer actions for assessment under the EPBC Act. The EPBC Act only allows for actions to be referred by the proponent or by a government agency that has decision-making responsibilities.

It is consistent with the principle of free prior and informed consent that Aboriginal peoples should be able to identify where there is impact on Aboriginal cultural heritage and trigger formal detailed assessment, without resorting to recourse in the courts.

The outcome of the legal proceedings TAC took in the Western Tasmania Aboriginal Cultural Landscape case was only that the State government had to refer the action for assessment under the EPBC Act, and that action is currently being assessed. If the TAC had had a referral power, the legal action we took at our expense would not have been required.

### **5. Requirement to take into account Indigenous knowledge**

Decision-makers under the EPBC Act must be required to take into account Indigenous knowledge in ways that appropriately safeguard Indigenous communities.

Not only should this include provisions of free, prior and informed consent discussed above, but it should be extended to the assessment of impacts.

The TAC believes the EPBC Act needs to be strengthened to increase protections for Aboriginal cultural heritage. It should enshrine a role for Aboriginal people in decisions that affect our heritage. Where there are provisions for Aboriginal communities to take action to protect heritage, such as the open standing provisions, they should be retained.

Given the stated benefits of the protection of Aboriginal heritage, the concept of ‘free, prior and informed consent’ and the undeniable injustice of invasion and dispossession of sovereign lands, the EPBC act should facilitate land returns through explicit mechanisms of consultation and negotiation.

Yours sincerely,

Heather Sculthorpe  
CEO  
Tasmanian Aboriginal Centre

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<sup>i</sup> <https://www.environment.gov.au/system/files/pages/c4bc7b64-3da4-4f7f-bcf0-4fd0c1bb9c5d/files/final-assessment.pdf>