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Whither forests of the Tasmanian Wilderness World Heritage Area?

Tom Baxter UNIVERSITY OF TASMANIA

As Tim Bonyhady concluded over two decades ago:

Forests declared as national parks ... can be stripped of these protections ... Because government cannot be trusted to protect even those areas identified as the common heritage of mankind, conservationists are destined to fight again and again for places they believe worth keeping.¹

The Abbott Government's early approach to World Heritage properties, such as the Great Barrier Reef and Tasmanian forests, demonstrates Professor Bonyhady's foresight. This article briefly explains how Australia has asked the World Heritage Committee of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to excise forests from the Tasmanian Wilderness World Heritage Area (TWWHA), in order to reopen them for forestry. In particular, the article summarises:

- the addition to the TWWHA of iconic Tasmanian forests World Heritage listed in June 2013;
- the Abbott government's requested excision of 74,000 ha of these forests in January 2014;
- the World Heritage Convention² process for boundary modification; and
- the legal consequences of the excision effort.

The article also touches briefly on impacts of excision for:

- Australia's international reputation;
- Tasmania's clean, green brand; and
- demand for Tasmanian forestry products.

Background — Tasmanian forests World Heritage listed: June 2013

In June 2013, the World Heritage Committee (which consists of a 21-member subset of the 190 nation states parties to the World Heritage Convention) approved Australia's request (lodged in January 2013) to expand the TWWHA by some 170,000 ha.³ This "TWWHA extension" comprised:

... over 50,000 hectares of existing public and private reserves (...such as Mt Field National Park and additional parts of the Mole Creek Karst National Park), along with nearly 120,000 hectares of land due to be reserved via the processes outlined in the Tasmanian Forests Agreement Act 2013 [(Tas)].⁴

The latter 120,000 ha included tracts of forest along the TWWHA's former northern (Great Western Tiers) and eastern (for example, valleys of the Huon, Weld, Styx and upper Florentine rivers) boundaries.⁵

Information released by the federal Environment Department stated that, in addition to listing alpine areas (such as Mt Field National Park):

The extension [protects] additional areas of exceptional beauty, particularly majestic stands of tall eucalypt forests ... increases the extent of wet eucalypt forests within the property and will enhance the connectivity between its tall eucalypt forest and rainforest.

Additional important habitat for rare and threatened species such as the endangered wedge-tailed eagle and the Tasmanian devil are also included in the boundary extension.⁶

The TWWHA extension addressed repeated requests from the World Heritage Committee to Australia for the addition of such forest areas adjacent to the TWWHA.⁷ The new boundaries of the expanded TWWHA have been gazetted under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) to incorporate the TWWHA extension.⁸

Federal Government seeks World Heritage excision for logging: January 2014

At the end of January 2014, Environment Minister Greg Hunt submitted to the World Heritage Centre the Australian Government's "Proposal for a minor modification to the boundary of the Tasmanian Wilderness World Heritage Area" (Excision Proposal). The Excision Proposal's 15 pages (including maps and Minister Hunt's covering letter):

- requested that the World Heritage Committee excise from the TWWHA 74,039 hectares of the extension;⁹ and
- contrasted (in both depth and message) with voluminous documentation associated with the 2013 TWWHA extension.¹⁰

The proposed excisions did not include any areas that were in National Parks as at 1 February 2013 (when the TWWHA extension application was submitted).¹¹ But nearly half the excision area (some 36,000 ha) had been added to the following National Parks in the year to 1 February 2014:

- Franklin–Gordon Wild Rivers National Park;
- Hartz Mountains National Park;
- Mount Field National Park; and
- Southwest National Park.¹²

The Excision Proposal argued that the TWWHA extension included areas degraded by forestry to such an extent as to “detract from the Outstanding Universal Value and the overall integrity of the [TWWHA]”.¹³ This ignored Australia’s World Heritage Convention duty of rehabilitation,¹⁴ which is feasible in previously logged areas.¹⁵

Given the small scale of degraded areas compared to the 74,000 ha proposed for delisting, there is little doubt that (re)opening excised areas to forestry is the underlying reason for the Excision Proposal. The primacy of such domestic economic and political considerations is clear from Australian political debate and is reflected in the Excision Proposal — for example, the following extracts under its heading “6. Implications for management arrangements”:

... *The Australian Government does not support the creation of any new reserves in Tasmania’s forest.* This request for excisions from the boundary of the Tasmanian Wilderness is part of the Australian Government’s *Economic Growth Plan for Tasmania* which was a commitment taken to the recent Australian election as part of a plan to boost Tasmania’s competitiveness, particularly in the resources, *forestry*, fisheries, tourism and agriculture sectors.

The Australian Government believes there should be a long term sustainable forest industry in Tasmania. *The proposed amendment to the World Heritage Area boundary extension will assist the long term viability of the special species timber sector and local communities that rely on these areas for their wellbeing.*¹⁶

The Excision Proposal was opposed by the former Tasmanian government (reversing the federal-state government positions of Australia’s 1980s World Heritage cases, in which the High Court thrice upheld the Commonwealth’s power to override recalcitrant states in order to protect World Heritage).¹⁷ However, the new Liberal Tasmanian government elected in March 2014 supports the excision. The Tasmanian Premier, Will Hodgman, stated pre-election that his government would facilitate the state-owned corporation Forestry Tasmania logging in the TWWHA extension for special species timbers. These are legally defined to include endemic Tasmanian rainforest species, mostly slow-growing and hence found predominantly in old-growth forest (but can include any other timber prescribed by regulation).¹⁸ For example, Mr Hodgman said:

We’d allow that to happen and to provide that resource that’s needed to grow the industry ... including in the recently listed world-heritage area.¹⁹

World Heritage boundary modification process

Australia sought the TWWHA excision by a “minor modification”²⁰ to the boundary. A minor modification is defined as “one which has not a significant impact on the extent of the property, nor affects its Outstanding Universal Value”.²¹ The TWWHA extension was added as a minor modification so, logically, removing 74,000 ha of it would seem unlikely to have “a significant impact on the extent of the property”. However, the second limb is more problematic for Australia, as there is a strong argument that excising TWWHA extension forests would “affect” the Outstanding Universal Value (OUV) of the (current, expanded) TWWHA. If so, the Committee would not approve the Excision Proposal as a minor modification, but could still consider it as a “significant” modification.²²

If the Excision Proposal is accepted as a minor modification, or rejected outright, then the World Heritage Committee could rule on it at its June 2014 annual meeting in Doha, Qatar. Alternatively, if the Committee treats the Proposal as a “significant” modification, then the Proposal’s fate would not likely be finally determined before the Committee’s 2015 meeting.

Usually, in deciding the above matters, the Committee would be guided by the evaluations and recommendations of its natural and cultural heritage advisory bodies.²³

Legal consequences of World Heritage excision

Under Australian law

The Excision Proposal argued that excised forests would still enjoy legal protection, stating under a heading “Implications for legal protection” that:

Importantly, [the EPBC Act] also aims to protect matters of national environmental significance, such as World Heritage properties, from impacts even if they originate outside the property or if the values of the property are mobile (as in fauna). *The Act* forms an additional layer of protection which will protect the Outstanding Universal Value of the Tasmanian Wilderness from external impacts that could arise through the proposed excision of areas from the property.²⁴

The first sentence above reflects *Booth v Bosworth*.²⁵ However, contrary to the second sentence, the EPBC Act will *not* protect either the TWWHA property, or its OUV, or “world heritage values”²⁶ from impacts by forestry operations in excised forests, since, as the Excision Proposal continues:

Under the EPBC Act, approvals are not required for certain forestry operations if they are within a Regional Forest Agreement region; this applies to harvesting of forest

products and related land clearing, land preparation, regeneration (including burning) and transport operations if they are taken in accordance with the Regional Forest Agreement; however *this does not apply in a property included in the World Heritage List*.

...

*The EPBC Act provides an exemption from the environmental approval process to forestry operations undertaken in accordance with Regional Forest Agreements...*²⁷

All of Tasmania is a Regional Forest Agreement (RFA) region. The exemption for RFA forestry operations (EPBC Act, s 38) to which the government refers above, combined with s 42(a) of the EPBC Act regarding World Heritage, mean as follows in the TWWHA context:

1. Only forestry operations “in a property included in the World Heritage List”²⁸ which do or are likely to significantly impact its “world heritage values” require approval under the EPBC Act. Any approval for forestry operations *inside* the TWWHA must not be granted inconsistently with “Australia’s obligations under the *World Heritage Convention*”.²⁹
2. If forests are excised from the TWWHA, they lose the protection of point 1 above and can be logged without EPBC Act approval, *despite* significant impacts on world heritage values:
 - (a) within the excised forests; or
 - (b) of the (smaller) TWWHA.

The Excision Proposal implicitly acknowledges that excision would remove EPBC Act and any other federal protection from excised areas in stating:

Under the Australian federation, future land tenure and management arrangements for the areas proposed for excision are predominantly a matter for the Tasmanian Government.³⁰

Hence, World Heritage Committee approval of the Excision Proposal would place excised forests at the mercy of the Tasmanian government, which intends logging in them.

Furthermore, it is logically inconsistent for Australia to argue that excised forests will be protected by Tasmanian law and the RFA regime, both of which permitted logging that the government simultaneously argues degraded long-documented OUV to such an extent as to warrant excision.

Duties under the World Heritage Convention

Excision would thus leave the Australian government without any statutory power over excised forests. By washing its hands of them, the government would abandon fundamental duties under the World Heritage Convention — for example, duties under Arts 4–5 to:

- “do all it can, to the utmost of its own resources to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated within its territory”,³¹ and
- “ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country ... to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and *rehabilitation* of this heritage”.³²

Australia is a well-resourced nation, to which the above obligations stringently apply. Allowing excision for economic and political reasons (such as set out in the Excision Proposal at “6. Implications for management arrangements”) would contravene the above Convention duties (including that of rehabilitation in degraded areas, as noted earlier) and set a dangerous precedent. It would open the way for other states parties to also selectively pick and choose which component parts of their natural and/or cultural heritage (of OUV) they protect, allowing them to exploit other parts for commercial gain at the expense of OUV.

The Excision Proposal runs counter to the positive duties imposed by Arts 4 and 5. The Convention also contains prohibitions — for example, relevantly requiring that state parties not take any deliberate measures that directly or indirectly damage listed heritage within their territory.³³

Furthermore, the World Heritage Convention’s *Operational Guidelines*³⁴ contain more specific requirements, such as for a World Heritage property’s “integrity”.³⁵ In addition, a World Heritage property “must have an adequate protection and management system to ensure its safeguarding”.³⁶ Protection and management³⁷ includes requirements regarding:

- “Legislative, regulatory and contractual measures for protection”,³⁸
- “Boundaries for effective protection”,³⁹
- “Buffer zones”,⁴⁰ and
- “Sustainable use” (“The State Party ... must ensure that such sustainable use or any other change does not impact adversely on the Outstanding Universal Value of the property”).⁴¹

By removing EPBC Act protection, excision would undermine the above, including not only for the excision but also for the remaining TWWHA.

Other consequences of World Heritage logging

World Heritage in Danger risk for entire TWWHA

If Australia's excision effort fails, but it consents to logging in the TWWHA regardless, the EPBC Act requires any such approval to be consistent with the World Heritage Convention. Absent that, World Heritage expert Professor Peter Valentine has flagged that the World Heritage Committee would see "any threat to [TWWHA extension forests as] a threat to the entire World Heritage area in Tasmania" and could decide to place the entire TWWHA property on the List of World Heritage in Danger.⁴²

The *Operational Guidelines*⁴³ set out a range of grounds on which the Committee can list a property as "In Danger",⁴⁴ a precursor to exercising its ultimate sanction of removing⁴⁵ a property from the World Heritage List. The grounds for "In Danger" listing relevantly include "Severe deterioration of the natural beauty or scientific value of the property, as by ... logging, firewood collection, etc".⁴⁶

Traditionally, Australia has fought in World Heritage fora to keep its World Heritage properties *off* the List of World Heritage in Danger. For example, Australia has previously made efforts to avoid this outcome when concerns were raised in relation to the impacts of uranium mining in Kakadu and rabbit infestation on Macquarie Island.⁴⁷

Given its excision effort, however, the Abbott government might countenance such a move. If so, Australia could risk "In Danger" listing not only of the Great Barrier Reef World Heritage Area,⁴⁸ but also, potentially, the TWWHA. Either would raise more questions in respect of Australia's commitment to the World Heritage Convention and the Vienna Convention on the Law of Treaties.⁴⁹

Australia's international reputation

Of the 193 UN member nations, 190 are parties to the World Heritage Convention. They have thereby recognised that natural heritage and cultural heritage (of OUV) are:

... among the priceless and irreplaceable assets, not only of each nation, but of humanity as a whole. The loss, through deterioration or disappearance, of any of these most prized assets constitutes an impoverishment of the heritage of all the peoples of the world.⁵⁰

Accordingly, deteriorating the TWWHA by delisting the extension forests and/or logging in them could be seen as impoverishing the heritage of all peoples. At the very least, it would damage Australia's international reputation for upholding treaty commitments and its claim to call itself a good global citizen. Inclusion of a

property on the List of World Heritage in Danger would be a further international embarrassment.

Environment Minister Greg Hunt has said of international concerns regarding the management of Tasmanian forests: "We can work with the international community on this. It's not difficult. That's what governments do all of the time."⁵¹

It is true that diplomacy in relation to heritage management issues regularly occurs. However, Australia's Excision Proposal is highly unusual. For example, the more drastic step of the World Heritage Committee removing a property from the World Heritage List has occurred on only the following two occasions:⁵²

- The Arabian Oryx Sanctuary in Oman was removed from the List in 2007, after the World Heritage Committee determined that the Omani government had failed to manage impacts on the Oryx. Arabian Oryx populations on the property had drastically declined as a result of poaching, and the Omani government had responded by legislating to reduce the size of the protected area by approximately 90% to enable mining operations.
- The Elbe Valley in Dresden, Germany was removed from the List in 2009 when the World Heritage Committee determined that a bridge through the property would compromise the OUV for which the area was inscribed.

Another example of deliberate damage to OUV is the Taliban's dynamiting of two giant Bumiyan Buddha statues in 2001 (albeit the statues were not World Heritage listed).⁵³ While it is hoped that Australia is far from this point, it is not company with which we should risk any association.

Social and economic impacts

The extension of the TWWHA was a key outcome of the Tasmanian Forests Agreement (TFA), which sought to resolve the "forest wars" that divided the island's communities for decades.⁵⁴ Many are vociferously opposing World Heritage excision.⁵⁵ Excision for logging would enliven forest conflict and jeopardise the prospects of Forestry Tasmania achieving Forest Stewardship Council certification.

Controversy over excision would also threaten the credibility of Tasmania's clean, green brand,⁵⁶ damaging other sectors of the state's economy.⁵⁷

Rethink required

The federal government's push to delist forests from the TWWHA undermines the World Heritage Convention and Australia's international reputation. Logging those forests would be a further radical and retrograde

move (even if Australia succeeds in delisting them first). It would damage Tasmania's brand, as well as market demand for Tasmanian forestry products and those of other industries. Its drastic environmental, economic and social costs outweigh the gains argued by the government in its Excision Proposal.

As a book review of Professor Bonyhady's *Places Worth Keeping* noted, the price of conservation is "eternal vigilance".⁵⁸

Post script: Senate Committee Inquiry

The Senate Standing Committee on Environment and Communications inquired into the natural world heritage values of the TWWHA, its 2013 minor boundary extension and related matters — including the Excision Proposal.⁵⁹ Evidence to the Committee in relation to the Excision Proposal included, for example, that it was prepared entirely "in-house", without external review:

Departmental staff provided advice on the values and the requirements for the Australian Government's submission. No independent scientific or heritage expert peer review was undertaken.⁶⁰

The Senate Committee's report on the Excision Proposal, due in May 2014, and those of the World Heritage Committee's advisory bodies, should make interesting reading.

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This article draws in part on the following:

- T Baxter "Logging World Heritage listed forests: unlawful and uneconomic" (2013) 3 *National Environmental Law Review* 55;
- T Baxter "New danger for Australian World Heritage wilderness" *The Conversation* 13 September 2013, available at theconversation.com; and
- T Baxter "Australia going backwards on World Heritage listed forests" *The Conversation* 16 December 2013, available at theconversation.com.

The author gratefully acknowledges the anonymous reviewer's helpful comments and suggestions.

Footnotes

1. T Bonyhady *Places Worth Keeping: Conservationists, Politics and Law* Federation Press 1993 p 146.
2. Convention Concerning the Protection of the World Cultural and Natural Heritage, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) (World Heritage Convention). See, for example, Arts 4–5.
3. Decision 37 COM 8B.44, available at whc.unesco.org; see also Tasmanian Government, Department of Infrastructure, Energy and Resources "World Heritage planning", available at www.forestsagreement.tas.gov.au.
4. See Australian Government, Department of the Environment "World Heritage Places — Tasmanian Wilderness — More information", available at www.environment.gov.au.
5. Ibid.
6. Ibid.
7. World Heritage Committee Decision 37 COM 8B.44 at [2], available at whc.unesco.org. This recalled Decision 32 COM 7B.41, Decision 34 COM 7B.38, Decision 34 COM 8B.46 and Decision 36 COM 8B.45.
8. Tasmanian Government, Department of Infrastructure, Energy and Resources "World Heritage Planning", available at www.forestsagreement.tas.gov.au.
9. Australian Government "Proposal for a minor modification to the boundary of the Tasmanian Wilderness World Heritage Area, January 2014" (Excision Proposal), available at www.environment.gov.au.
10. Contrast 2014 and 2013 information at Australian Government, Department of the Environment "World Heritage Places — Tasmanian Wilderness — Resources", available at www.environment.gov.au.
11. Excision Proposal, above, n 9, p 5.
12. Parliament of Australia "Answer to Question on Notice: Department of the Environment — Response to Written Questions Taken on Notice" 7 March 2012, Q9, p 4, available at www.aph.gov.au.
13. Excision Proposal, above, n 9, p 5.
14. World Heritage Convention, Art 5.
15. See, for example, the Tasmanian Forest Landscape Restoration project, which was federally funded to the tune of \$1.2 million over two years (July 2013–June 2015): H Martin "Foes unite to revive forest" *The Mercury* 29 March 2014, available at www.themercury.com.au.
16. Excision Proposal, above, n 9, at pp 8–9 (emphasis added).
17. *Commonwealth v Tasmania (Tasmanian Dam case)* (1983) 158 CLR 1; 46 ALR 625; 57 ALJR 450; BC8300075; *Richardson v Forestry Commission (Tasmanian Forests Case)* (1988) 164 CLR 261; 14 ALD 485; 77 ALR 237; BC8802591; *Queensland v Commonwealth (Wet Tropics Rainforests Case)* (1989) 167 CLR 232; 86 ALR 519; 63 ALJR 473; [1989] HCA 36.
18. Tasmanian Forests Agreement Act 2013 (Tas), s 19(1) definition — note the unfettered (g):

special species timber includes the wood of the following species:

 - (a) blackwood (*Acacia melanoxylon*);
 - (b) myrtle (*Nothofagus cunninghamii*);
 - (c) celery-top pine (*Phyllocladus aspleniifolius*);
 - (d) sassafras (*Atherosperma moschatum*);
 - (e) huon pine (*Lagarostrobos franklinii*);
 - (f) silver wattle (*Acacia dealbata*);

- (g) *any other timber that is prescribed by the regulations* (emphasis added).
19. T Shine “Liberals set to log world heritage forests” *ABC* online, 10 September 2013, available at www.abc.net.au.
 20. UNESCO World Heritage Centre *Operational Guidelines for the Implementation of the World Heritage Convention* Paris 2012 at paras 163–64, available at whc.unesco.org.
 21. *Ibid*, para 163.
 22. *Ibid*, paras 165, 168.
 23. *Ibid*, para 164–65.
 24. Excision Proposal, above, n 9, p 7 (emphasis added).
 25. *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453; BC200106306 at [99], discussed in C McGrath “The Flying Fox case” (2001) 18 *Environmental and Planning Law Journal* 540 pp 548, 549–54.
 26. “World heritage values” are defined in s 12(3) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) to be the “natural heritage” and “cultural heritage” of the property, as defined in the World Heritage Convention. The Convention’s Arts 1–2 define “cultural heritage” and “natural heritage”, both requiring OUV.
 27. Above, n 9, pp 7–8 (emphasis added, citations omitted).
 28. Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 42(a).
 29. *Ibid*, s 137.
 30. Excision Proposal, above, n 9, p 9.
 31. World Heritage Convention, Art 4.
 32. World Heritage Convention, Art 5 (emphasis added).
 33. World Heritage Convention, Art 6(3).
 34. Above, n 20.
 35. See, for example, above, n 20, Ch II.E (Integrity and/or authenticity), paras 87–95.
 36. Above, n 20, para 78.
 37. Above, n 20, Ch II.F (Protection and management).
 38. Above, n 20, para 98.
 39. Above, n 20, paras 99–102.
 40. Above, n 20, paras 103–07.
 41. Above, n 20, para 119.
 42. M Smith “Tasmania’s entire World Heritage area under threat if protected areas rolled back” *The Mercury* 12 September 2013, available at www.themercury.com.au.
 43. Above, n 20.
 44. Above, n 20, paras 177–91.
 45. Above, n 20, paras 192–98.
 46. Above, n 20, para 180(a)(ii).
 47. As to Macquarie Island, see, for example, J Scott, J Kirkpatrick and T Baxter “Macquarie Island in danger”, WWF-Australia, Sydney 2007. The successful Macquarie Island Pest Eradication Project was celebrated by the Governor of Tasmania: see Governor of Tasmania “Vice Regal news and photos — 9 April 2014”, available at www.govhouse.tas.gov.au.
 48. See, for example, T Stephens “A reprieve, but the Great Barrier Reef remains on Death Row” *The Conversation* 20 June 2013, available at www.theconversation.com; S Marsden “Is the Great Barrier Reef ‘in danger’?” (2013) 28(9) *Australian Environment Review* 766.
 49. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 26 requires states parties to perform their treaty obligations in good faith.
 50. Above, n 20, para 4.
 51. A Darby “Coalition push for third ever World Heritage reversal” *Sydney Morning Herald* 3 September 2013, available at www.smh.com.au.
 52. Above, n 51.
 53. B Brown “What do Abbott and the Taliban have in common?” *The Age* 5 September 2013, available at www.theage.com.au.
 54. See, for example, this author’s evidence to the Senate Standing Committee on Environment and Communications, Inquiry into the Tasmanian Wilderness World Heritage Area, as reported in the *Mercury* on 1 April 2014 and syndicated in the *Herald Sun*: H Martin “Federal government barking up the wrong tree by trying to cut back United Nations protection, Senate hearing told” *Herald Sun* 1 April 2014, available at www.heraldsun.com.au.
 55. See, for example, www.bobbrown.org.au.
 56. See, for example, www.brandtasmania.com.
 57. For further detail on social and economic impacts of excision, see, for example, T Baxter “Logging World Heritage listed forests: unlawful and uneconomic” (2013) 3 *National Environmental Law Review* 55, available at www.pams.com.au.
 58. “The price of conservation: eternal vigilance” *The Australian*, review of *Places Worth Keeping: Conservationists, Politics and Law* by Tim Bonyhady, Federation Press 1993.
 59. See Parliament of Australia “Parliamentary business — Tasmanian Wilderness World Heritage Area”, available at www.aph.gov.au.
 60. Above, n 12, Q11, p 4.

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