NOTICE OF FILING

Details of Filing

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File Number:	TAD15/2025
File Title:	BOB BROWN FOUNDATION INC. v MINISTER FOR THE ENVIRONMENT (COMMONWEALTH)
Registry:	TASMANIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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Form 59
Rule 29.02(1)

Affidavit

No. of 20

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

Affidavit of: **Roland Browne**

Address: Lev 2, 115 Collins Street, Hobart

Occupation: Legal Practitioner

Date: 31 March 2025

Contents

Filed on behalf of (name & role of party) Applicant, Bob Brown Foundation Inc.
Prepared by (name of person/lawyer) Roland Browne
Law firm (if applicable) FitzGerald and Browne
Tel 03 6224 6777 Fax 03 62246755
Email rolandbrowne@fablawyers.net.au
Address for service (include state and postcode) Lev 2, 115 Collins Street Hobart, 7000, Tasmania

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I Roland Alexander Browne, Legal Practitioner, affirm:

1. I am the solicitor for the Applicant with care and conduct of this matter on behalf of the Applicant.

2012 Decision

2. On 3 October 2012, the then Minister for Sustainability, Environment, Water, Population and Communities made a decision under ss 75 and 77A of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**), determining that a proposed action was not a controlled action provided it was undertaken in the manner set out in the decision (**2012 Decision**).

3. The proposed action that was the subject of the 2012 Decision was the expansion of marine farming operations in Macquarie Harbour on the west coast of Tasmania, as described in EPBC Act referral 2012/6406. The three proponents of the proposed action were Huon Aquaculture Group Pty Ltd (**Huon**), Petuna Aquaculture Pty Ltd (**Petuna**) and Tassal Operations Pty Ltd (**Tassal**). Now produced and shown to me and marked **RAB-1** is a copy of the 2012 Decision.

Request for reconsideration

4. On 25 July 2023, I wrote to the Minister for Environment and Water on behalf of the Applicant requesting the Minister to reconsider the 2012 Decision pursuant to ss 78 and 78A of the EPBC Act. Now produced and shown to me and marked **RAB-2** is a copy of

my letter dated 25 July 2023, including the Interim Report on Macquarie Harbour Maugean Skate Population Status and Monitoring by David Moreno and Jayson Semmens of the University of Tasmania Institute for Marine and Antarctic Studies, dated 2 May 2023, which was annexed to my letter.

5. The request was made on the basis of s 78(1)(a), (aa) and (b) of the EPBC Act.

6. On 30 November 2023, an official from the Minister's Department responded to my letter of 25 July 2023, confirming that the Minister had received two other requests for reconsideration of the 2012 Decision, and that each of the three requests met the requirements of the EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations 2000* (**the Regulations**). Now produced and shown to me and marked **RAB-3** is a copy of the letter from Rachel Short of the Minister's Department dated 30 November 2023.

7. The two other requests referred to in Ms Short's letter were attached to her letter of 30 November 2023. They comprised:

   (a) Letters from the Australia Institute, dated 8 June 2023 and 31 July 2023, with attachments; and

   (b) Letters from the Environmental Defenders Office on behalf of the Australian Marine Conservation Society and Humane Society International Australia, dated 23 August 2023 and 20 November 2023.

   Now produced and shown to me and marked **RAB-4** is a copy of the letters from the Australia Institute dated 8 June 2023 and 31 July 2023 (less enclosures to this letter). Now produced and shown to me and marked **RAB-5** is a copy of the letters from the Environmental Defenders Office dated 23 August and 20 November 2023.

8. The letter from the Minister's Department stated that as at the date of the letter, 30 November 2023, the Minister had already provided the requests to the relevant State and Commonwealth Ministers and invited comments and/or information on the requests, and had already provided the requests to those undertaking the action, namely Huon, Tassal and Petuna, "who will be given an appropriate opportunity to consider and comment on the reconsideration requests."

9. The time for other Commonwealth and State Ministers to provide comments or information to the Minister in response to the invitation, pursuant to s 78B(4) and (5) of the EPBC Act was 10 business days after the invitation was given, which expired on 14 December 2023 at the latest.

10. The time for each of the designated proponents, Huon, Tassal and Petuna, to provide comments or information to the Minister in response to the invitation, pursuant to s

78B(2) of the EPBC Act was 10 business days after the invitation was given, which expired on 14 December 2023 at the latest.

11. The letter from the Minister's Department further stated that the Minister would publish the requests on the Department's website under EPBC reference 2012/6406 for consideration and public comment from 4 December 2023 to 2 February 2024, being a period substantially longer than the 10 business days stipulated in s 78B(6) of the EPBC Act. It is my understanding that the public consultation was advertised in the manner and for the period that the Minister had foreshadowed in that letter.

Correspondence regarding the failure to make a decision

12. On 22 December 2023, I wrote on behalf of the Applicant to the Minister, pointing out her obligation under s 78C of the EPBC Act to make a decision as soon as practicable after the expiry of the periods for consultation stated in s 78B of the EPBC Act, highlighting the urgency of the subject matter of the decision given the latest evidence about the plight of the Maugean skate, and objecting to the extended period of public consultation that the Minister had advertised. My letter stated that the Applicant considered that the close of business on 23 February 2024 would be a date that would be considered as soon as practicable after the close of the consultation period for the making of the reconsideration decision, as required by s 78C of the EPBC Act. Now produced and shown to me and marked **RAB-6** is a copy of my letter to the Minister dated 22 December 2023.

13. On 16 January 2024, I received a letter from Clayton Utz, acting as solicitors for the Minister, stating that the Minister would reconsider the 2012 Decision pursuant to ss 78 and 78C of the EPBC Act and make a decision as soon as practicable. The letter stated that it was "not possible to indicate a particular date by which time this will occur." Now produced and shown to me and marked **RAB-7** is a copy of the letter from Clayton Utz dated 16 January 2024.

14. On 13 September 2024, I wrote on behalf of the Applicant to the Minister, pointing out that over 14 months had then passed since the request for reconsideration, and again highlighting the urgency of the decision due to the significant impact that the ongoing salmon farming in Macquarie Harbour was having on the threatened species of the Maugean skate, which potentially faced extinction if the action of salmon farming in Macquarie Harbour continued unabated. My letter requested an urgent explanation from the Minister within 21 days as to the reasons for the delay in making the reconsideration decision. Now produced and shown to me and marked **RAB-8** is a copy of my letter to the Minister dated 13 September 2024.

15. On 26 September 2024, I received a letter from Clayton Utz, acting as solicitors for the Minister. That letter stated that the Minister's instructions were that the reconsideration process was ongoing and that a decision would be made as soon as practicable in a manner that accords with the legal requirements. Now produced and shown to me and marked **RAB-9** is a copy of the letter from Clayton Utz dated 26 September 2024.

16. On 20 December 2024, by when a decision had still not been made, I wrote on behalf of the Applicant to Clayton Utz on behalf of the Minister. My letter stated that a bare reference to the volume and complexity of material could not explain a delay of almost 11 months since the close of the consultation period, and sought a more considered explanation for the delay. My letter also sought confirmation as to whether the Minister was waiting to make her decision on the reconsideration until after the Threatened Species Scientific Committee had provided its assessment on the potential recategorisation of the Maugean skate from "threatened" to "critically endangered", which was due to be provided by 30 October 2025. Now produced and shown to me and marked **RAB-10** is a copy of my letter to the Minister dated 20 December 2024.

17. On 21 January 2025, I received a letter from Clayton Utz, acting as solicitors for the Minister. That letter confirmed that the Minister was not waiting for the decision of the Threatened Species Scientific Committee before making her reconsideration decision, and otherwise restated the position that the reconsideration decision would be made as soon as practicable and provided no further explanation for the delay. Now produced and shown to me and marked **RAB-11** is a copy of the letter from Clayton Utz dated 21 January 2025.

18. As at the date of this affidavit, no decision has been made on the request for reconsideration, more than 1 year and 8 months after the request was made, and more than 1 year and 1 month since the completion of the processes for public comment and comment from the designated proponents and Commonwealth and State Ministers.

Affirmed by the deponent)
at Hobart)
in Tasmania)
on 31 March 2025)
Before me:)

Roland Browne
Signature of deponent

Signature of witness

TIARNI STACEY BARR of Level 2, 115 Collins St, Hobart, TAS 7000
A legal practitioner with a current Tasmanian practising certificate

Federal Court of Australia

District Registry: Tasmania

Division: General

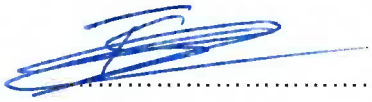
Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-1 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025



.....

A legal practitioner with a current Tasmanian practising certificate

Notification of
REFERRAL DECISION – not controlled action if undertaken in a particular manner

Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406)

This decision is made under sections 75 and 77A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Proposed action

person named in the referral	1. Huon Aquaculture Group Pty Ltd (ABN: 79 114 456 781) 2. Petuna Aquaculture Pty Ltd (ABN: 62 009 485 581); and 3. Tassal Operations Pty Ltd (ABN: 38 106 324 127).
proposed action	The expansion of marine farming operations in Macquarie Harbour, on the west coast of Tasmania [as described in EPBC Act referral 2012/6406].

Referral decision: Not a controlled action if undertaken in a particular manner

status of proposed action	The proposed action is not a controlled action provided it is undertaken in the manner set out in this decision.

Person authorised to make decision

Name and position	The Hon Tony Burke MP Minister for Sustainability, Environment, Water, Population and Communities
signature	Tony Burke
date of decision	3.10.12

manner in which proposed action must be taken

The following measures must be taken to avoid significant impacts on:

- World Heritage properties (sections 12 and 15A);
- National Heritage places (sections 15B and 15C); and
- Listed threatened species and communities (sections 18 and 18A).

To ensure there are no significant impacts to the **Maugean Skate** or to the **Tasmanian Wilderness World Heritage Area,** the person taking the action must undertake the action in accordance with the **Macquarie Harbour Marine Farming Development Plan October 2005**. In particular, the person taking the action must undertake the following measures:

1. To ensure there are no significant impacts to the **Maugean Skate** as a result of changes to the benthic environment, the person taking the action must:

    a. Take measures to prevent **substantial benthic visual, physio-chemical** or **biological changes** attributable to marine farming operations at, or extending beyond 35 metres from the boundary of any **lease area**;

    b. Undertake a baseline environmental survey of all new **lease areas** and **compliance sites** prior to commencement of marine farming operations;

    c. Undertake a **benthic video assessment** of **lease areas** and **compliance sites** in accordance with **marine farming licence conditions**;

    d. If a **substantial benthic visual**, **physio-chemical** or **biological impact** is detected as a result of **benthic video assessment**, **targeted management responses** must be implemented within 10 weeks of the assessment;

    e. Following any **targeted management responses** undertaken in accordance with 1(d) relating to a **substantial benthic visual impact** within a **lease area**, a follow up **benthic video assessment** must be undertaken at the **lease areas** prior to restocking;

    f. Following any **targeted management responses** undertaken in accordance with 1(d) relating to a **substantial benthic visual**, **physio-chemical** or **biological impact** at a **compliance site**, a follow up **benthic video assessment** must be undertaken at the **compliance site** to monitor benthic recovery within four months of the **targeted management response**; and

    g. 1(e) and 1(f) must be undertaken until the **benthic video assessment** identifies that a **substantial benthic visual**, **physio-chemical** or **biological impact** is no longer occurring.

2. To ensure there are no significant impacts on the **Tasmanian Wilderness World Heritage Area** and the **Maugean Skate** as a result of water quality changes, the person taking the action must:

   a. Undertake a water quality monitoring program for the assessment of the water quality indicators ammonia, nitrate and dissolved oxygen at the **monitoring sites** in accordance with **marine farming licence conditions**. Monitoring must occur at these **monitoring sites** on a monthly basis until 30 June 2013, when the number and location of monitoring sites will be reviewed;

   b. Take measures to prevent the **rolling annual median value** of quarterly water quality indicator values for ammonia, nitrate and dissolved oxygen, as recorded within the **compliance region,** from exceeding the identified **limit levels**;

   c. If the water quality monitoring program identifies that the **rolling annual median value** for any of the water quality indicators ammonia, nitrate and dissolved oxygen, within the **compliance region**, exceed the identified **limit levels** and that this is attributable to marine farming operations, **targeted management responses** must be implemented within 10 weeks of the most recent quarterly monitoring report;

   d. Following any **targeted management responses** undertaken in accordance with 2(c), a follow up monitoring assessment of the water quality indicators ammonia, nitrate and dissolved oxygen must be undertaken at the **monitoring sites** to monitor water quality recovery within four months of the **targeted management response**;

   e. 2(c) and 2(d) must be undertaken until the monitoring assessment of the water quality indicators ammonia, nitrate and dissolved oxygen identifies that the identified **limit levels** are not being exceeded; and

   f. The total biomass held across all **lease areas** must not exceed 52.5 percent of the modelled **maximum sustainable biomass** until limit levels are reviewed in mid 2013, and must not exceed any such altered levels as may be identified thereafter by the **Tasmanian Government**.

3. To ensure there are no significant impacts on the **Tasmanian Wilderness World Heritage Area**, including as a result of changes to viewfields, the person taking the action must:

   a. Undertake marine farming debris cleanup activities within Macquarie Harbour at regular intervals of every 12 months at a minimum. Marine debris cleanup activities must also occur on an as needs basis when members of the public or other stakeholders notify the person taking the action of areas, within Macquarie Harbour, requiring particular attention. These activities must be conducted in accordance with any applicable biosecurity control requirements and regulations, including relevant management guidelines relating to *Phytophthora cinnamomi* and Chytrid fungus (*Batrachochytrium dendrobatidis*), to prevent the spread of weeds or pathogens into the **Tasmanian Wilderness World Heritage Area**; and

   b. Ensure that all fish cages, buoys, netting and other floating marine structures and equipment, other than that required for navigational purposes, are grey to black in colour, or as otherwise specified in the **marine farming licence conditions**.

Definitions

Benthic video assessment must be undertaken in accordance with the video assessment specifications as prescribed in marine farming licence conditions.

Compliance sites means a location 35 metres outside of any **lease areas** used for monitoring purposes. At least one compliance site must be identified and monitored for each of the **lease areas**.

Compliance region means monitoring sites 4, 6, 8, 9 and 10 identified in Attachment 1, or any other group of sites as prescribed in marine farming licence conditions.

Lease area means marine farming leases granted under the provisions of the *Marine Farming Planning Act (Tas) 1995* within the area defined in the **Macquarie Harbour Marine Farming Development Plan October 2005**.

Limit levels for water quality indicators are set at the following interim levels:

- Ammonia (at 2 metres depth) = 0.033 mg/L
- Ammonia (at 20 metres depth) = 0.024 mg/L
- Nitrate (at 2 metres depth) = 0.053 mg/L
- Oxygen (at 2 metres depth) = 6.82 mg/L

Interim limit levels will be reviewed in mid 2013. Subsequent modifications to limit levels as a result of future reviews must be prescribed in marine farming licence conditions.

Marine farming licence conditions means conditions prescribed in marine farming licences issued pursuant to the *Living Marine Resources Management Act (Tas) 1995* relating to lease areas.

Macquarie Harbour Marine Farming Development Plan October 2005 means the plan approved under the *Marine Farming Planning Act (Tas) 1995* and includes Amendment No.1 to the **Macquarie Harbour Marine Farming Development Plan October 2005** and future amendments.

Maugean Skate means *Zearaja maugeana*, listed as endangered under the *Environment Protection and Biodiversity Conservation Act 1999*.

Maximum sustainable biomass is currently modelled to be 29,500 tonnes.

Monitoring sites means the 11 water quality monitoring sites identified in Attachment 1.

Rolling annual median value is the median of the quarterly values from sites within the **compliance region**, updated quarterly, or as otherwise prescribed in **marine farming licence conditions**.

Secretary means the Secretary of the department administering the *Marine Farming Planning Act (Tas) 1995* and the *Living Marine Resources Management Act (Tas) 1995*.

Substantial benthic visual impact at a **compliance site** may include:

- the presence of fish feed pellets on sediment surface;
- the presence of bacterial mats (e.g. *Beggiatoa spp.*) on sediment surface;
- the presence of gas bubbling arising from the sediment, either with or without disturbance of the sediment;
- the presence of numerous opportunistic polychaetes (e.g. *Capitella spp.*, *Dorvilleid spp.*) on the sediment surface.

Or as otherwise prescribed in marine farming licence conditions.

Substantial benthic visual impact within a **lease area** may include:

- Excessive feed dumping;
- extensive bacterial mats (e.g. *Beggiatoa* spp.) on the sediment surface prior to restocking;
- spontaneous gas bubbling from the sediment.

Or as otherwise prescribed in marine farming licence conditions.

Substantial benthic physio-chemical impact at a compliance site may include:

- a corrected redox value which differs by more than 10 percent from the reference site(s) and baseline conditions or is < 0mV at a depth of 3 cm within a core sample;
- a corrected sulphide level which differs by more than 10 percent from the reference site(s) and baseline conditions or is >250 µM at a depth of 3 cm within a core sample.

Or as otherwise prescribed in marine farming licence conditions.

Substantial benthic biological impact at a compliance site may include:

- a 20 times increase in the total abundance of any individual taxonomic family relative to reference sites;
- an increase at any compliance site of greater than 50 times the total Annelid abundance at reference sites;
- a reduction in the number of families by 50% or more relative to reference sites complete absence of fauna.

Or as otherwise prescribed in marine farming licence conditions.

Targeted management responses may include a direction by the **Secretary** to undertake one or more of the following actions:

- reduction in biomass;
- reduction in nitrogen output;
- redistribution of biomass.

Tasmanian Government means the Tasmanian Agency responsible for administering and regulating the **Macquarie Harbour Marine Farming Development Plan October 2005**.

Tasmanian Wilderness World Heritage Area means the World Heritage listed property and National Heritage listed place.

Map 2: Water Quality Monitoring

Monitoring Sites

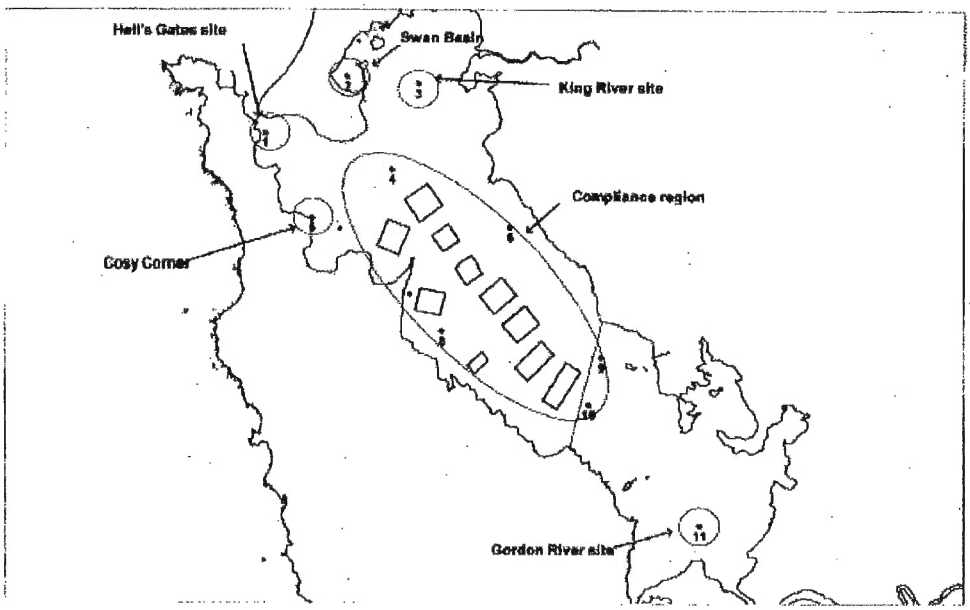


Table 1: Sample site descriptions. Coordinates are Map Grid of Australia 1994 (MGA94) Zone 55.

Site No	Type	Location	Easting	Northing
1	Water	Hell's Gates	353712	5323353
2	Water	Swan Basin	357871	5326207
3	Water	King River	361455	5325885
4	Water	Compliance Region	360144	5321607
5	Water	Cosy Channel	356107	5319158
6	Water	Compliance Region	366157	5318703
8	Water	Compliance Region	362734	5313569
9	Water	Compliance Region	370850	5312281
10	Water	Compliance Region	370224	5309960
11	Water	Gordon River	375845	5303913

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-2 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

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A legal practitioner with a current Tasmanian practising certificate

FITZGERALD AND BROWNE

LAWYERS

Our Ref: RAB:8360

25 July 2023

The Hon. Tanya Plibersek
Minister for the Environment and Water
PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

By email: minister.plibersek@dcceew.gov.au

Dear Minister,

MARINE FARMING EXPANSION, MACQUARIE HARBOUR, TASMANIA (EPBC 2012/6406)

I act for Bob Brown Foundation Inc. I refer to the decision of the Hon. Tony Burke MP made on 3 October 2012, contained in a notification of that date by reference to ss.75 and 77A of the *Environment Protection and Biodiversity Conservation Act 1999* ("the decision") made on the above referral ("the referral").

Without prejudice to the rights of Bob Brown Foundation Inc. to dispute the validity of part of Regulation 4AA.01, the Foundation requests that you reconsider the decision. This request is made pursuant to ss. 78 and 78A of the *EPBC Act*.

Brief Background

The decision was made in 2012, and in the past 11 years, significant work has been done on the impact of marine farming activities in Macquarie Harbour upon the Maugean Skate.

As is clear from the **attached** decision, one requirement of the decision was that there was to be no significant impact to the Maugean Skate as a result to changes to the benthic environment. The person taking the action was also required to take

PARTNERS
Roland Browne
Oona Fisher
Richard Griggs

ASSOCIATE
Stephen Cronin

GPO Box 1951, Hobart 7001
Level 2, T & G Building,
115 Collins Street, Hobart 7000
Tel: (03) 6224 6777
Fax: (03) 6224 6755
www.fitzgeraldandbrowne.com.au
E: thefirm@fablawyers.net.au

particular measures including survey, assessment of lease areas and targeted management responses.

This application for reconsideration is brought about following the publication of an interim report from Tasmania's Institute of Marine and Antarctic Studies – Macquarie Harbour Maugean Skate Population Status and Monitoring dated 2 May 2023 by Moreno and Semmens ("Moreno and Semmens (2023)"). It is attached to the email carrying this letter.

The Maugean skate is an endangered species listed on the EPBC Act List of Threatened Fauna.

According to the report, the skate is now only found in Macquarie Harbour on the west coast of Tasmania, Australia.

Grounds for Reconsideration – Reg 4AA.01 Requirements

The grounds relied upon to make this request are those identified in s.78(1)(a), s.78(1)(aa) and s.78(1)(b) of the Act.

The source of information is the publication - *Institute of Marine and Antarctic Studies Interim report – Macquarie Harbour Maugean skate population status and monitoring* - dated the 2nd of May 2023

The information became available shortly after 2 May 2023.

The changed circumstances are that the action - salmon farming and aquaculture in Macquarie Harbour - is impacting and threatening the survival of the Maugean Skate. (see the attached report). This report shows with a high degree of certainty that aquaculture operations are significantly impacting the Maugean Skate. The impacts are no longer likely; they have occurred and are occurring.

The substantial new information available (or change in circumstances) establishes that the impacts of the actions are having (or will have or is likely to have) significantly impacts on matters protected by Part 3 of the EPBC Act. The report found a 47% decline from 2014 to 2021 in Maugean skate numbers in Macquarie Harbour and the authors stated:

The scale of the overall decline and the scarcity of new recruits creates significant concern for the conservation of the species and implies the need for immediate action. Furthermore, our results highlight the vulnerability of the species to degraded environmental conditions and the need for further monitoring of the population.[1]

[1] Page 1

At page 2 the authors identify and acknowledge the risk of extinction facing the Maugean Skate:

Given the results of Moreno et al. (2020) suggest that the extinction risk for Maugean skate has increased since netting surveys first commenced in 2012, additional surveys were funded by the Tasmanian sustainable marine research collaboration agreement (SMRCA) for a further three years from February 2021 to December 2023. However, the risk to the species makes it prudent to provide an interim report of results prior to the project's completion, such that an updated assessment of Maugean skate population changes in Macquarie Harbour can be outlined and fed into current/planned federal (Environment Protection and Biodiversity Conservation Act 1999) and state (Threatened Species Protection Act 1995) conservation actions.

The report identifies the key parameter as dissolved oxygen and attributes the decline in dissolved oxygen levels to 'anthropogenic inputs'. The principal input is, of course, the large-scale development of salmonid aquaculture. The report also refers to river flows and environmental events (which may be increasing in frequency due to climate change).

The authors continue:

The unique hydrology of Macquarie Harbour results in a naturally challenging habitat. While anthropogenic activities since European colonisation have long impacted the harbour, in the past 15 years altered river flows (growing reliance on hydroelectric generation and production demand) and large-scale development of salmonid aquaculture have resulted in considerable changes to the environment. The Maugean skate has been shown to have behavioural and physiological mechanisms that allow it to survive in the challenging conditions of Macquarie Harbour. However, recent changes to the environment (particularly DO levels and mixing dynamics) mean that high impact environmental events have increased in duration, magnitude, and frequency (e.g., duration and severity of low DO periods).[2]

It must also be noted that upon the release of this study in may 2023, the University of Tasmania declared publicly there was a need for urgent conservation action:

https://www.imas.utas.edu.au/news/news-items/under-pressure-scientists-call-for-urgent-conservation-action-to-save-maugean-skate

As to the request under s.78(1)(b)(ii) of the Act, the decision required the persons taking the action "To ensure there are no significant impacts to the Maugean Skate...". Under paragraph 1 of the decision, certain measures were identified.

[2] Page 9

The decision also required there to be "no significant impacts on the Tasmanian Wilderness World Heritage Area and the Maugean Skate as a result of water quality changes...". Other measures were identified at paragraph 2(a)-(f) of the decision.

Put simply, each person taking the action was obliged in the clearest terms to ensure there was to be no significant impact to the Maugean Skate. The attached study clearly demonstrates that significant impacts are being inflicted upon the Maugean Skate, an endangered species listed under the Act. A 47% decline in the population in Macquarie Harbour between 2014 and 2021 as identified in the attached report establishes beyond any doubt that there has been a significant impact and the significant impact is continuing. And this statement needs to be read in light of the 2020 by Moreno et al[3] referred to by Moreno and Semmens (2023).

Given the new evidence in Moreno and Semmens (2023) report from IMAS, all three companies that operate fish farms in Macquarie Harbour, being the action(s) in question, are not taking the action in the manner identified in the original decision of EPBC 2012/6406 that requires the companies to: *Take measures to prevent substantial benthic visual, physio-chemical or biological changes attributable to marine farming operations at, or extending beyond 35 metres from the boundary of any lease area.*

And neither are the companies taking measures to ensure there is no significant impact to the Maugean Skate.

The decision must be reconsidered.

Yours faithfully,
FITZGERALD AND BROWNE

Roland Browne
E:rolandb@fablawyers.net.au

[3] Moreno, D., Lyle, J., Semmens, J., Morash, A., Stehfest, K., McAllister, J., Bowen, B. & Barrett, N. (2020). Vulnerability of the endangered Maugean skate population to degraded environmental conditions in Macquarie Harbour. Final Report, Fisheries Research and Development Corporation Project No. 2016-068, Institute for Marine and Antarctic Studies, University of Tasmania, Hobart.

UNIVERSITY of TASMANIA | IMAS INSTITUTE FOR MARINE & ANTARCTIC STUDIES

Interim report - Macquarie Harbour Maugean skate population status and monitoring

David Moreno and Jayson Semmens

2/05/2023

Institute for Marine and Antarctic Studies, University of Tasmania, Private Bag 49, Hobart TAS 7001

Enquires should be directed to:
Dr. David Moreno or Professor Jayson Semmens
Institute for Marine and Antarctic Studies
University of Tasmania
Private Bag 49, Hobart, Tasmania 7001, Australia
david.moreno@utas.edu.au, jayson.semmens@utas.edu.au
Ph. 0404335962; 0409488520

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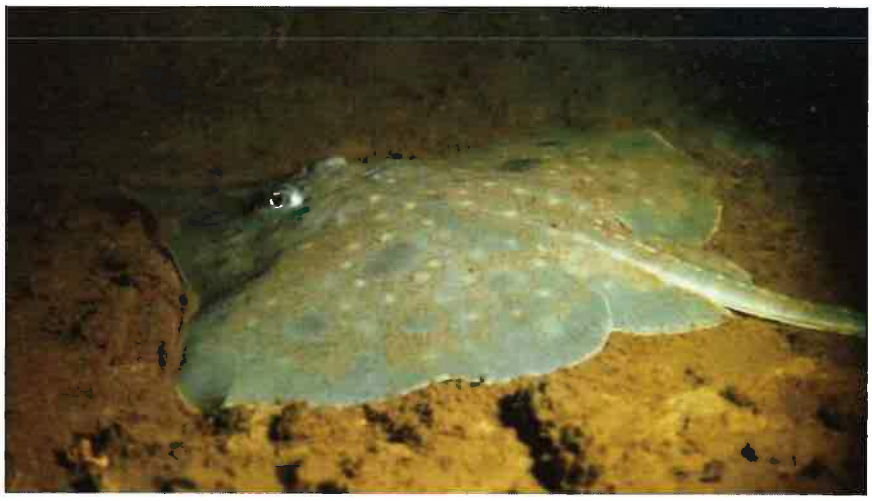
Executive summary

The Maugean skate (*Zearaja maugeana*) is an endangered species, now restricted to Macquarie Harbour on the west coast of Tasmania, Australia. The environmental conditions in the harbour, particularly dissolved oxygen levels, have been impacted by anthropogenic inputs. Recent research has detected a potential decline in the skate population, raising concerns for the conservation status of the species. In response, this project developed a gillnet survey monitoring program to provide information on the status of the last known population of the species. Results presented here cover the first year of sampling (2021) in a three-year (2021-2023) monitoring program.

Size composition data collected between 2012 and 2021 indicated that the median size of females had significantly increased, and the proportion of juveniles captured had significantly decreased, consistent with recruitment failure. Using catch per unit effort (CPUE) as a measure of relative abundance, we demonstrated a substantial decline in CPUE between 2014 and 2021 of 47%.

The scale of the overall decline and the scarcity of new recruits creates significant concern for the conservation of the species and implies the need for immediate action. Furthermore, our results highlight the vulnerability of the species to degraded environmental conditions and the need for further monitoring of the population.



Introduction

The endangered micro-endemic Maugean skate (*Zearaja maugeana*) is only known from two isolated estuarine systems located on the west coast of Tasmania, Australia, Bathurst and Macquarie Harbours, representing one of most restricted distributions of any elasmobranch (Last and Gledhill, 2007). However, a recent environmental DNA study (Moreno et al., 2022) demonstrated that the vast majority, if not all, of the remaining Maugean skate live only in Macquarie Harbour. These findings highlight the vulnerability of the species and the need for urgent conservation action to ensure the persistence of this unique species.

The physicochemical conditions in Macquarie Harbour have changed markedly since European settlement, influenced by anthropogenic activities in and around the estuary (e.g., mining, forestry, hydro-electricity generation, and marine farming operations), as well as the more general effects of climate change. Of recent concern, has been a significant decline in deep water (>10 m) dissolved oxygen (DO) conditions in the Harbour (Ross et al., 2020).

There is mounting evidence that these low DO conditions are impacting the Maugean skate population, including inducing mortality events (Moreno et al., 2020). Furthermore, analysis of research gillnet data collected between 2012 and 2018 strongly suggests that this changed environment has reduced the relative abundance of juvenile and sub-adult individuals, likely due to lower egg hatching success and/or juvenile survival (Moreno et al., 2020)

Given the results of Moreno et al. (2020) suggest that the extinction risk for Maugean skate has increased since netting surveys first commenced in 2012, additional surveys were funded by the Tasmanian sustainable marine research collaboration agreement (SMRCA) for a further three years from February 2021 to December 2023. However, the risk to the species makes it prudent to provide an interim report of results prior to the project's completion, such that an updated assessment of Maugean skate population changes in Macquarie Harbour can be outlined and fed into current/planned federal (Environment Protection and Biodiversity Conservation Act 1999) and state (Threatened Species Protection Act 1995) conservation actions. Here we report on data from the 2021 net surveys and a reanalysis of the entire data set from 2012 to 2021.

Objectives

The primary aims of this interim netting survey assessment are to:

1. Use the size composition of Maugean skate catches as an indicator of population change, in particular recruitment variability.
2. Compare catch per unit effort (CPUE) changes across the netting surveys to describe any declines in relative abundance.
3. Assess the implications of declining environmental conditions in Macquarie Harbour on the future viability of the Maugean skate population.

Methods

1. Sampling methodology and historical data

Gillnet surveys were conducted at roughly three-month intervals between February and December 2021 to coincide with the austral seasons. Each survey sampled three primary areas based on previous knowledge of the movement and distribution of the skate around Macquarie Harbour (a) the Table Head / Liberty Point area, b) the World Heritage Area, and c) the Swan Basin / Pine cove area (Figure 1). Maugean skate were captured using standard monofilament graball nets (50 m long by 33 mesh drop; 114 mm stretched mesh). Nets were set during daytime and soak times were restricted to under 2 hrs. All Maugean skate captured were measured (total length (TL)) and sexed before being released.

Preceding this study, there had been a near continuous sampling effort that commenced in 2012 and was carried out through three Fisheries Research and Development Corporation (FRDC) studies (Bell et al., 2016, Lyle et al., 2014; Moreno et al., 2020).

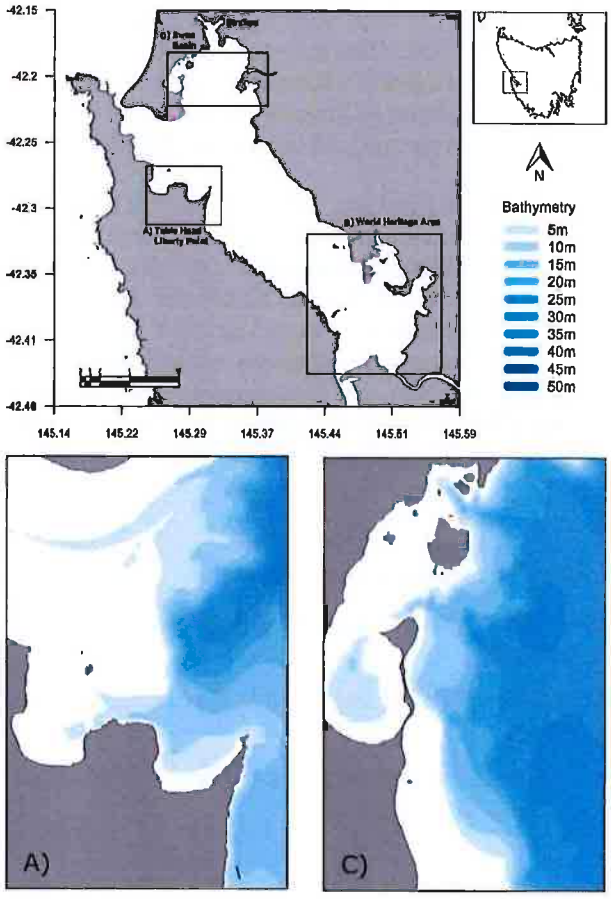


Figure 1. Map showing the primary sampling areas for Maugean skate population monitoring with inserts showing the complex bathymetry of Table Head (a) and Swan Basin (c).

2. Size composition

The sampling gear (gillnets) and broad methodology used throughout the current and previous studies has not changed, allowing for direct comparison of catch size structure across sites and through time. However, the distribution of fishing effort in the previous studies varied based on the individual research objectives, with the Table Head / Liberty point area being the only site that was consistently sampled throughout.

There is strong evidence that Maugean skate in Macquarie Harbour constitute a single population (Weltz et al., 2018), and that there are no site-specific differences in sex or size distribution (Bell et al., 2016). In contrast, there are clear differences in site specific abundance patterns, with the Table Head / Liberty point area containing a significantly higher proportion of skate than any other site in Macquarie Harbour (Bell et al., 2016). Therefore, to account for potential site-specific biases introduced by changes in the fishing effort across the different studies, analysis of size frequency data was conducted for both total catch across all sites (2014 and 2021 data only), and the Table Head/ Liberty Point area only (all years).

Size frequency data for each study, FRDC 2010-016 (April to November 2012), FRDC 2013-008 (October 2013 to November 2014), FRDC 2016-068 (October 2017 to November 2018) and the SMRCA 2021 data set (February to December 2021), was separated by sex and plotted alongside each other to explore possible changes in the size distribution (based on TL) of the population through time. Changes in size distributions were tested using bootstrapped Kolmogorov-Smirnov tests with a Bonferroni adjusted alpha value to account for multiple comparisons. Likewise, sex-specific median total lengths were compared using a Wilcoxon rank test.

3. Relative abundance

In the SMRCA and FRDC 2016-068 (Moreno et al., 2020) studies, a maximum set duration of two hours was applied, with fishing limited to daytime sets only. By contrast, longer daytime set durations, along with overnight sets, were applied in the earlier studies (Bell et al., 2016, Lyle et al., 2014). Several skate mortalities were linked to these longer set durations, necessitating a more conservative approach to gear usage to reduce the likelihood of negative impacts on the skate (and other bycatch).

While necessary to ensure animal welfare, these changes in methodology could affect catchability and gear efficacy, potentially introducing methodological biases that would affect CPUE calculations. Accordingly, in order to explore changes in relative abundance through time, only data from 2014 and 2021 were used. Sampling in both years was restricted to daytime only and had a similar spatial and temporal design (4 seasonal surveys targeting the same sites). There was a small number of longer duration deployments in 2014, with ten outlier deployments where soak times were greater than 5 hrs. These ten deployments were excluded from CPUE calculations to account for potential effects of increases in catch from extended soak times. Mean soak time for the analysed deployments was 2.6 and 1.9 hrs respectively for 2014 and 2021.

CPUE was estimated as the number of Maugean skate caught per net metre per hour (N/m/hr). As with the size frequency data, CPUE metrics were calculated for the entire Harbour and the Table Head / Liberty point area separately.

Results

1. Size composition

There was a total of 260 individual gillnet deployments in Macquarie Harbour, with 112 in the Table Head / Liberty Point area between February and December 2021. A total of 45 individual skate were captured (female=20, male=25), of those, 33 were captured in the Table Head / Liberty point area (females=13, males=20). The smallest individual captured was 568 (male) mm TL and the largest was 840 (female) mm TL (Fig. 2). Data were also available for 84 individuals sampled in 2012 (FRDC 2010-016), 131 individuals sampled in 2013 and 2014 (FRDC 2013-008) and 54 individuals sampled in 2017 and 2018 (FRDC 2016-068) (Fig. 2.)

As outlined in Moreno et al. (2020), median size and size distributions at the Table Head / Liberty Point area did not differ between the 2012 and 2014 sampling periods for either sex (Wilcoxon rank sum test [Males, $W=1230$, $p=0.29$; Females, $W=1180.5$, $p=0.98$], Kolmogorov-Smirnov test [Males, $D=0.21$, $p=0.12$; Females, $D=0.14$, $p=0.63$]), but there was a significant difference between 2014 and 2017-18 for both median size and size distributions (Wilcoxon rank sum test [Males, $W=1387$, $p=0.02$; Females, $W=957.5$, $p=0.01$], Kolmogorov-Smirnov test [Males, $D=0.29$, $p<0.01$; Females, $D=0.25$, $p=0.05$]). 2021 median size and size distributions of females at the Table Head / Liberty Point area were significantly different from those for the 2014 baseline period ($W=447.5$, $p>0.005$; $D=0.34$, $p=0.034$), but non-significant for males ($W=998$, $p=0.39$; $D=0.22$, $p=0.20$). Furthermore, there was a significant difference in the proportion of juvenile and sub-adult size classes ($\leq$ 600 mm; Bell et al., 2016) between sampling periods at the Table Head / Liberty Point area ($\chi2=7.03$, $p=0.03$), with the lowest proportion (3%) for the 2021 data set, compared with ~17-21% in the 2012 and 2013-2014 studies and 9.3 % in the 2017-2018 study (Fig. 2).

In the Harbor wide data (all sites), median size and size distributions of females were significantly different between 2014 and 2021 ($W=447.5$, $p<0.005$; $D=0.34$, $p=0.02$). Conversely, median size and size distributions of males were not significantly different between 2014 and 2021 ($W=998$, $p=0.39$; $D=0.22$, $p=0.2$) (Fig. 3). Furthermore, there was a significant difference in the proportion of juvenile and sub-adult size classes ($\leq$ 600 mm; Bell et al., 2016) between sampling periods at the Table Head / Liberty Point area ($\chi2=7.03$, $p=0.03$), with the lowest proportion (3%) for the 2021 data set, compared with ~17-21% in the 2012 and 2013-2014 studies and 9.3 % in the 2017-2018 study (Fig. 2).

2. CPUE comparison

In 2014, CPUE was 0.17 and 0.25 N/m/hr for all sites and the Table Head / Liberty Point area, respectively. In 2021, CPUE was 0.09 and 0.14 N/m/hr for all sites and the Table Head / Liberty Point area, respectively. These numbers represent a 47 % decline in relative abundance across the harbour and a 44% decline in the Table Head / Liberty point region.

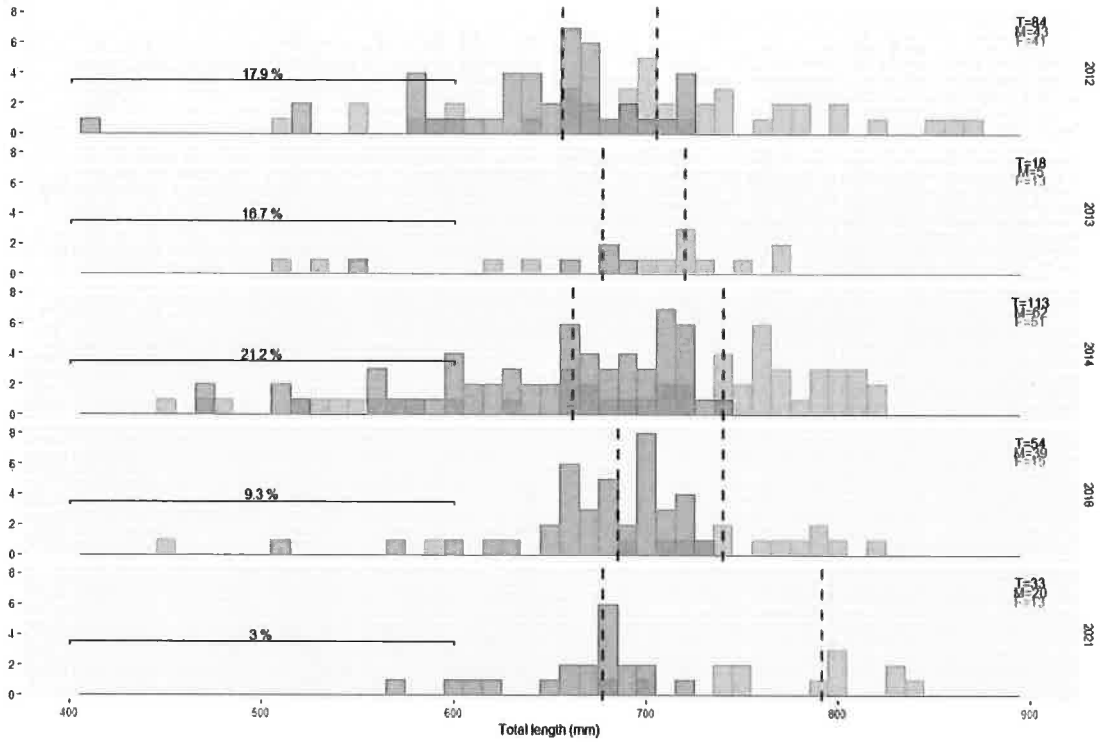


Figure 2. Size distribution of male (blue) and female (red) Maugean skate sampled from Table Head/Liberty Point during 2012 (top panel; FRDC 2010-016), 2013-14 (second panel; FRDC 2013-008), 2017-18 (third panel; FRDC 2016-068) and 2021 (bottom panel; current SMRCA study). Vertical dashed lines indicate median lengths of males (blue) and females (red). Sample sizes are indicated (T= sexes combined, M = males, F = females), value above the horizontal bracket indicates the proportion of individuals < 600 mm present in each sample.

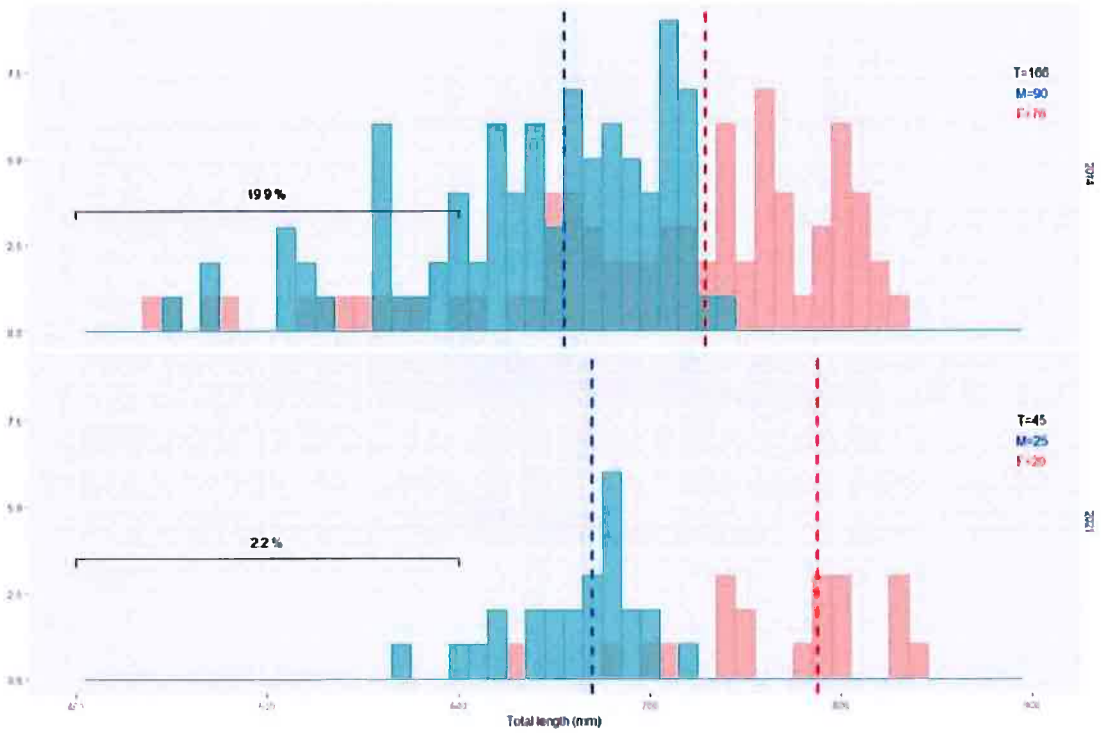


Figure 3. Size distribution of male (blue) and female (red) Maugean skate sampled from all sites during 2014 (top panel; FRDC 2013-008) and 2021 (bottom panel; current SMRCA study). Vertical dashed lines indicate median lengths of males (blue) and females (red). Sample sizes are indicated (T= sexes combined, M = males, F = females), value above the horizontal bracket indicates the proportion of individuals < 600 mm present in each sample.

Discussion

1. Size composition

Catch data from the present study, Lyle et al. (2014), Bell et al. (2016) and Moreno et al. (2020) represent a near continuous sampling record of the species in the Table Head / Liberty Point area since 2012. Size composition data indicated that the median size of females has increased since 2012. Likewise, the overall length frequency distribution of both sexes has shifted to the right, reflecting a reduction in the relative abundance of juvenile and sub-adult individuals (≤ 600 mm), along with an increase in the size of the larger females (adults) in the catches. The gillnets used in these surveys are size selective and most Maugean skate tend to be lightly entangled in the meshes by the rostrum (and rostral spines), such that some individuals have been observed to drop out of the meshes while the net is under tension during hauling. Small individuals (< 500 mm TL) with a less pronounced snout (and very small rostral spines) are thus less likely to be caught or retained in the meshes and thus expected to be underrepresented in the gillnet samples even when present. However, given that the same nets have been used in all four studies, any size selectivity bias is expected to have been constant through time, justifying an examination of temporal trends in size composition for inferences about changing population status.

Interestingly, unlike females, male median size has not significantly increased over time. This is likely due to the fact that even in early surveys, male median size was already close to the maximum known size for males. There is clear evidence for sexual dimorphism in the species, with males being considerably smaller than females despite reaching sexual maturity at similar sizes (Bell et al., 2016). Therefore, the size frequency distribution of adult males is more compact and skewed towards the upper end when compared with females, making it impossible for median sizes to increase much more.

Despite uncertainty as to the significance for the population, a recent decline in recruitment, possibly due to lower hatching success or juvenile survival, coupled with the growth of existing adults (i.e., an ageing population) would result in changes in catch size structure like those observed here. Unvalidated estimates of age and growth for the Maugean skate (Bell et al., 2016) are not inconsistent with the observed data in that if a period of reduced recruitment is assumed, then the continued growth of juveniles and adults over a three-to-four-year period (e.g., between 2013-14 and 2017-18) would give rise to a comparable change in size structure.

While the analysis presented herein is not definitive, the high likelihood that changes in population structure have occurred in the Maugean skate population within the past 10 years should be considered very seriously, particularly within the context of the other findings in FRDC 2016-068, namely; (i) the vulnerability of developing embryos to the environmental conditions experienced during the protracted incubation period, (ii) the vulnerability of early life stages to environmental stressors, and (iii) the evidence of adult mortalities linked with environmental factors (Moreno 2020).

2. CPUE comparison

Effort data from the first year of sampling in this current study show that a significant decline of up to 47% in the relative abundance of Maugean skate has occurred since 2014. While not directly comparable due to methodological inconsistencies, catch rates from 2017 and 2018 were relatively consistent with 2014 values (Moreno et al., 2020). However, Moreno et al. (2020) reported two environmental events in 2019 that resulted in high mortality (~44%) of individuals being electronically tracked. Therefore, the observed declines in relative abundance presented herein, are likely the result of high impact environmental events, and longer-term demographic effects resulting from changes in the size structure of the population and apparent decline in recruitment.

The unique hydrology of Macquarie Harbour results in a naturally challenging habitat. While anthropogenic activities since European colonisation have long impacted the harbour, in the past 15 years altered river flows (growing reliance on hydroelectric generation and production demand) and large-scale development of salmonid aquaculture have resulted in considerable changes to the environment. The Maugean skate has been shown to have behavioural and physiological mechanisms that allow it to survive in the challenging conditions of Macquarie Harbour. However, recent changes to the environment (particularly DO levels and mixing dynamics) mean that high impact environmental events have increased in duration, magnitude, and frequency (e.g., duration and severity of low DO periods). Likewise, there is an increased potential for overlap of multiple stressors that may have compounding effects (DO, salinity, temperature). Based on animal-borne environmental sensors and high-resolution environmental monitoring data of the system, Moreno et al. (2020) observed that Maugean skate mortalities were linked to two environmental events. The first occurred during summer (Jan-Feb 2019) when bottom water (<15 m) DO levels were extremely low (<25%), coinciding with high freshwater volumes that deepened the halocline and very high surface water temperatures (up to 22 °C). The second event occurred in April 2019 when a large westerly system forced a large volume of marine water into the system, causing a rapid displacement of the low DO water mass at the bottom of the harbour into shallow depths. Accordingly, it is apparent that the species is already being pushed beyond their adaptive threshold. This highlights one of the unique challenges of managing micro-endemic, hyper-specialised species, which is that the viability of the species is intrinsically linked to the health of their restricted habitat. Therefore, in the case of the Maugean skate, the ongoing impacts to DO levels and mixing dynamics are of extreme concern for the persistence of the species.

Previous investigations into the distribution, movement, and habitat use of the Maugean skate show that Table Head and Liberty Point constitute a critical habitat for the species within the harbour. This observation is in line with the differences in CPUE seen between the Table Head / Liberty Point area data and the harbour wide data in this study. Furthermore, despite the general decline in relative abundance seen between 2014 and 2021, the CPUE ratio between Table Head and the rest of the system remained consistent. This provides further supporting evidence to the conclusions in Moreno et al. (2020), who reported that movement and habitat use patterns in adults have remained consistent through time regardless of changes in environmental conditions or in the structure of the population. Therefore, the abundance and size structure patterns seen in the Table Head / Liberty Point area appear to be indicative of broader, population wide patterns.

As mentioned above, there is a size selectivity bias associated with the fishing gear used across all Maugean skate studies included here (see section 1 of discussion). The reported change in size structure (fewer juveniles and generally larger individuals) means that the current structure of the population has a higher proportion of individuals in the size ranges selected by the gear. Therefore, it is possible that the observed declines in relative abundance may underestimate the reduction in size of the overall population.

Implications

Results presented here cover only the first year (2021) and a small facet of a multi-year (2021-2023) assessment of the population. Further work is needed to understand long term trends in absolute population size, as well as the demographic consequences of the observed changes in size composition. However, we have opted to present this interim report because the magnitude of the observed decline in relative abundance is likely to have significant implications for the status of the population and therefore its conservation and management needs. Our results highlight not only a significant population decline having already occurred (based on changes in relative abundance), but also the ongoing risk of further large-scale declines as a result of sudden, high-impact environmental events.

Maugean skate are known to have an already restricted genetic diversity (Weltz et al., 2018), so any subsequent declines in the population are likely to have a considerable impact on the viability of the species, increasing their risk of extinction. Therefore, there is an urgent need to consider this new information in any future management action, particularly those actions that can help directly address habitat degradation in the harbour. It is also recommended that the current federal listing status (endangered) and both state and federal conservation advice for the species be re-assessed to incorporate these findings. Likewise, development of ex-situ conservation plans should be considered to ensure the persistence of the species and support on-site conservation management action.

We are fortunate that information has been collected on Maugean skate in Macquarie Harbour since 2012, as the decline in relative abundance could easily have gone undetected. This project emphasises the need for ongoing monitoring beyond 2023, as this will be critical for detecting any further declines or the impact of any mitigation strategies.

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Ross J., Wild-Allen K., Andrewartha J., Beard J. & Moreno D. (2020). Environmental research in Macquarie Harbour. Understanding oxygen dynamics and the importance for benthic recovery in Macquarie Harbour. Final Report, Fisheries Research and Development Corporation Project No. 2016-067, Institute for Marine and Antarctic Studies, University of Tasmania, Hobart.

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Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-3 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

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A legal practitioner with a current Tasmanian practising certificate

Australian Government
Department of Climate Change, Energy, the Environment and Water

EPBC Ref: 2012/6406

Bob Brown Foundation Inc /
Mr Roland Browne
Fitzgerald and Browne Lawyers
GPO Box 1951
Hobart TAS 7001

Email: rolandb@fablawyers.net.au

Dear Mr Browne

Request for reconsideration of decision – Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406)

Requests for reconsideration of a decision

By letter dated 25 July 2023, you requested under section 78A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) that the Minister for the Environment and Water, the Hon Tanya Plibersek MP, reconsider the decision of 3 October 2012 that the "Marine Farming Expansion, Macquarie Harbour, Tasmania" (EPBC 2012/6406) is not a controlled action if undertaken in a particular manner **(the decision)**. A copy of the decision made on 3 October 2012 is **enclosed** for your reference.

In addition to your request, the Minister has received the following other requests under section 78A of the EPBC Act for the Minister to reconsider the decision. The requests are **enclosed** and were made by the following entities on the following dates:

- The Australia Institute, by way of letters dated 8 June 2023 and 31 July 2023
- Australian Marine Conservation Society and Humane Society International Australia, by way of letters from the Environmental Defenders Office dated 23 August 2023 and 20 November 2023

I consider that each of the requests meet the requirements of the EPBC Act and the Environment Protection and Biodiversity Conservation Regulations 2000.

As all three of the requests relate to the same action, the department proposes to undertake one consistent decision-making process. This proposes that the Minister makes a single decision with respect to the three requests. In making a decision in relation to the requests for reconsideration, the Minister may confirm the 2012 decision, or may revoke the decision and substitute the decision with a new decision.

Invitations for comment on the requests and next steps

In accordance with section 78B of the EPBC Act, the Minister has provided the requests to relevant State and Commonwealth Ministers and invited comments and/or information on the requests. The Minister will also publish the requests on the department's website (epbcpublicportal.awe.gov.au) under EPBC reference 2012/6406 for consideration and public comment, from 4 December 2024 to 2 February 2024.

In addition, the requests have been provided to those undertaking the action (being Huon Aquaculture Group Pty Ltd, Tassal Operations Pty Ltd and Petuna Aquaculture Pty Ltd), who will be given an appropriate opportunity to consider and comment on the reconsideration requests.

If you have any questions, please contact the project manager, Madeleine Fletcher, by email to madeleine.fletcher@dcceew.gov.au, or 0468 571 932 and quote the EPBC reference number at the beginning of this letter.

Yours sincerely

Rachel Short
Branch Head
Environment Assessments (Vic and Tas) and Post Approvals Branch
Nature Positive Regulation Division

30 November 2023

Enclosed:

- Decision on referral EPBC 2012/6406 dated 3 October 2012
- Reconsideration requests – to be published on the department's website for consultation from 4 December 2023:
    - Letters from The Australia Institute, dated 8 June 2023 and 31 July 2023, with attachments.
    - Letter from Fitzgerald and Browne Lawyers, on behalf of the Bob Brown Foundation Inc, dated 25 July 2023, with attachments.
    - Letters from the Environmental Defenders Office, on behalf of the Australian Marine Conservation Society and Humane Society International Australia, dated 23 August 2023 and 20 November 2023, without attachments.

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-4 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

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A legal practitioner with a current Tasmanian practising certificate

The Australia Institute
Research that matters.
Tasmania

Ground Floor
71 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

8 June 2023

Hon Tanya Plibersek MP
Minister for the Environment and Water
House of Representatives
Parliament House
Canberra ACT 2600

Copied to Secretary of Dept of Climate Change, Energy, the Environment & Water
Mr. David Fredericks PSM

Dear Minister Plibersek,

Request for reconsideration of decision EPBC 2012/6406

1. We refer to our letter dated 26 May 2023 regarding the Maugean skate *Zearaja maugeana*. In that letter we described new evidence from the Institute of Marine and Antarctic Studies *Interim report – Macquarie Harbour Maugean skate population status and monitoring* dated 2 May 2023 (the report) that was based on 2021 sampling.[1] The sampling was undertaken at three sites including one site within the Tasmanian Wilderness World Heritage Area (**TWWHA**).[2]

2. On the basis of the report (and other new evidence since the relevant decision) we request you reconsider **the decision** on referral EPBC 2012/6406 dated 3 October 2012.[3] The decision determined the actions were not controlled actions. It was made pursuant to sections 75 and 77A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

3. This request is made pursuant to s 78A EPBC Act. On the evidence available to us we submit that the correct decision is for the actions to be controlled actions and, subsequently, that the Minister act to immediately and fully protect the Maugean skate by cessation of the relevant actions.

4. The substantial new information available (or change in circumstances) establishes that the impacts of the actions are having (or will have or is likely to have) significant impacts on matters protected by Part 3 of the EPBC Act.

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[1] David Moreno and Jayson Semmens (2023) *Interim report - Macquarie Harbour Maugean skate population status and monitoring.* IMAS. https://imas.utas.edu.au/__data/assets/pdf_file/0007/1655611/Maugean-skate-2021-interim-report-FINAL.pdf

[2] Report, p3.

[3] Notification of Referral Decision – not controlled action if undertaken in a particular manner. Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406) http://www.environment.gov.au/epbc/notices/assessments/2012/6406/2012-6406-referral-decision.pdf

5. As background for you to make the correct decision and take the correct actions in this letter we also draw your attention to risks of:

   (a) you (or the Commonwealth or a Commonwealth agency) not acting in accordance with sections 321 and 322 of the EBPC Act;

   (b) the accountable authority of **the Department** of Climate Change, Energy, the Environment and Water not acting in accordance with ss 15, 21 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**).

Request for reconsideration of decision EPBC 2012/6406

6. The Maugean skate is an endangered species listed on the EPBC Act List of Threatened Fauna.[4] According to the report, the skate is now only found in Macquarie Harbour on the west coast of Tasmania, Australia.[5] The report found a 47% decline from 2014 to 2021 in Maugean skate numbers in Macquarie Harbour and concluded:

> The scale of the overall decline and the scarcity of new recruits creates significant concern for the conservation of the species and implies the need for immediate action. Furthermore, our results highlight the vulnerability of the species to degraded environmental conditions and the need for further monitoring of the population.

7. The report attributes to the decline in dissolved oxygen levels caused by 'anthropogenic inputs' being the large-scale development of salmonid aquaculture.[6] The report also refers to river flows and environmental events (which may be increasing in frequency due to climate change). These events logically may mean water areas under the aquaculture with low dissolved oxygen moves around Macquarie Harbour, including into the World Heritage areas, creating a significant impact on the skate and World Heritage values. The report states:[7]

> The unique hydrology of Macquarie Harbour results in a naturally challenging habitat. While anthropogenic activities since European colonisation have long impacted the harbour, in the past 15 years altered river flows (growing reliance on hydroelectric generation and production demand) and large-scale development of salmonid aquaculture have resulted in considerable changes to the environment. The Maugean skate

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[4] Species Profile and Threats Database EPBC Act List of Threatened Fauna https://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl#fishes_endangered

[5] Report, p2. Confirmed by *Zearaja maugeana* – Maugean skate – Tasmanian Threatened Species Listing Statement, v2 (December 2022), p9: https://nre.tas.gov.au/Documents/Maugean%20skate%20-%20Listing%20Statement%20-%20final.pdf

[6] Report pp iii, 9

[7] Report, p 9.

The Australia Institute
Research that matters.
Tasmania

Ground Floor
71 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

has been shown to have behavioural and physiological mechanisms that allow it to survive in the challenging conditions of Macquarie Harbour. However, recent changes to the environment (particularly DO levels and mixing dynamics) mean that high impact environmental events have increased in duration, magnitude, and frequency (e.g., duration and severity of low DO periods).

8. For further examples of substantial new evidence or change in circumstances, the report states:[8]

> The endangered micro-endemic Maugean skate (*Zearaja maugeana*) is only known from two isolated estuarine systems located on the west coast of Tasmania, Australia, Bathurst and Macquarie Harbours, representing one of most restricted distributions of any elasmobranch (Last and Gledhill, 2007). However, a recent environmental DNA study (Moreno et al., 2022) demonstrated that the vast majority, if not all, of the remaining Maugean skate live only in Macquarie Harbour. These findings highlight the vulnerability of the species and the need for urgent conservation action to ensure the persistence of this unique species.
>
> The physicochemical conditions in Macquarie Harbour have changed markedly since European settlement, influenced by anthropogenic activities in and around the estuary (e.g., mining, forestry, hydro-electricity generation, and marine farming operations), as well as the more general effects of climate change. Of recent concern, has been a significant decline in deep water (>10 m) dissolved oxygen (DO) conditions in the Harbour (Ross et al., 2020).
>
> There is mounting evidence that these low DO conditions are impacting the Maugean skate population, including inducing mortality events (Moreno et al., 2020). Furthermore, analysis of research gillnet data collected between 2012 and 2018 strongly suggests that this changed environment has reduced the relative abundance of juvenile and sub-adult individuals, likely due to lower egg hatching success and/or juvenile survival (Moreno et al., 2020)
>
> Given the results of Moreno et al. (2020) suggest that the extinction risk for Maugean skate has increased since netting surveys first commenced in 2012, additional surveys were funded by the Tasmanian sustainable marine research collaboration agreement (SMRCA) for a further three years from February 2021 to December 2023. However, the risk to the species makes it prudent to provide an interim report of results prior to the project's completion, such that an updated assessment of Maugean skate population changes in Macquarie Harbour can be outlined and fed into

[8] Report, p 2.

current/planned federal (Environment Protection and Biodiversity Conservation Act 1999) and state (Threatened Species Protection Act 1995) conservation actions. Here we report on data from the 2021 net surveys and a reanalysis of the entire data set from 2012 to 2021.

9. The "*Zearaja maugeana* – Maugean skate – Tasmanian Threatened Species Listing Statement" dated December 2022 also references recent studies, (including Moreno et al. 2022) and concludes that the Maugean skate is at risk from the aquaculture industry.[9]

10. The report by the Senate Environment and Communications References Committee on *Regulation of the fin-fish aquaculture industry in Tasmania* dated August 2015 made the following recommendation:

> **Recommendation 22**
>
> **1.69 That the referral decision Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406) is reconsidered in accordance with section 78 of the EPBC Act on the basis of emerging evidence regarding dissolved oxygen and nitrate limit levels over the range of depths for which the Maugean Skate is known to inhabit.**
>
> 1.70 Formal identification of Macquarie Harbour as a critical habitat for the Maugean Skate and formal identification of salmon farming as a threat would precipitate the development of a national threat abatement plan and would further help improve management practices to protect biodiversity, listed species, and other world heritage properties.

11. On February 2022, the prior Australian Government in its response to the Committee report noted the recommendation above.[10] It was not apparent that a formal request under s 78A EPBC Act was made. **This is such a request.**

12. The TWWHA is a declared World Heritage property under the EPBC Act. It contains Macquarie Harbour. The world heritage values include "natural values" which are described by the Tasmanian and Commonwealth governments in the "Statement of Values" of the TWWHA Management Plan, as including:[11]

---

[9] *Zearaja maugeana* – Maugean skate – Tasmanian Threatened Species Listing Statement, v2 (December 2022), p9: https://nre.tas.gov.au/Documents/Maugean%20skate%20-%20Listing%20Statement%20-%20final.pdf

[10] Notification of Referral Decision – not controlled action if undertaken in a particular manner. Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC 2012/6406) https://www.aph.gov.au/DocumentStore.ashx?id=48ded9b0-c497-403b-9e2a-df35d5878dcf

[11] Tasmanian Wilderness World Heritage Area Management Plan (2016). P 47. https://nre.tas.gov.au/Documents/TWWHA_Management_Plan_2016.pdf

The Australia Institute
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Tasmania

Ground Floor
71 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

> The endangered Maugean skate (*Zearaja maugena*) found only in Bathurst Harbour and Macquarie Harbour, is the world's only brackish-water skate. Its closest relatives are found in New Zealand and Patagonia.

13. The new information and change in circumstances lead us to conclude that the decision actions in EPBC 2012/6406 will cause significant impacts to Matters of National Environmental Significance under Part 3 of the EPBC Act, in particular:

    (a) an endangered species, *Zearaja maugena*, per s 18(3) EPBC Act;

    (b) world heritage values of a World Heritage property.

Non-compliance with sections 321 and 322 of EPBC Act

14. The TWWHA on the UNESCO World Heritage List, is in Tasmania and not within any Commonwealth areas. The TWWHA Management Plan (2016) is to be prepared and implemented by the Commonwealth and Tasmania. The Commonwealth must use its best endeavours to ensure the plan for managing the TWWHA is not inconsistent with:

    (a) Australia's obligations under the World Heritage Convention;

    (b) the Australian World Heritage management principles.

15. The World Heritage Convention (**WHC**) defines "natural heritage" to include:[12]

> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation.

16. Australia's obligations under the WHC include, pursuant to Article 5, to ensure effective and active measures are taken for the protection and conservation of natural heritage:

> to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage

17. Australian World Heritage management principles appear in Schedule 5 to the EPBC Rules. The first general principle is:

> 1.01 The primary purpose of management of natural heritage and cultural heritage of a declared World Heritage property must be, in

[12] Article 2

accordance with Australia's obligations under the World Heritage Convention, to identify, protect, conserve, present, transmit to future generations and, if appropriate, rehabilitate the World Heritage values of the property.

18. The transmission to future generations of World Heritage values includes taking effective and active measures to prevent the extinction of threatened species, including where the World Heritage Area comprises an important part of the only habitat in which viable populations remain.

19. We submit that, to the extent that the TWWHA Action Plan (2016) does not require immediate action by the Commonwealth to effectively protect the Maugean skate, the Commonwealth is in breach of s 321 EPBC Act.

20. Pursuant to s 322 of the EPBC Act, the Commonwealth, and each Commonwealth agency (including the Minister as defined by s 528 EPBC Act) must take all reasonable steps to ensure it exercises its powers and performs its functions in relation to a property that is not inconsistent with:

    (a) the World Heritage Convention;

    (b) the Australian World Heritage management principles;

    (c) the TWWHA Management Plan (2016).

21. Above we have set out values, requirements and obligations under the World Heritage Convention, Australian World Heritage management principles and the TWWHA Management Plan (2016). We submit that if the Minister fails to act to immediately and effectively protect the Maugean skate she, as responsible Minister, will be in breach of s 322 EPBC Act. Others may be in breach.

Non-compliance with duties under the PGPA Act

22. You, the Minister for the Environment and Water, are the responsible Minister for the relevant actions of **the Department** of Climate Change, Energy, the Environment and Water. David Fredericks PSM, the Department's **Secretary**, is the accountable authority of the Department. Pursuant to section 15 of the PGPA Act the Secretary must govern the Department in a way that:
    (a) promotes the proper use and management of public resources for which the authority is responsible;

    (b) promotes the achievement of the purposes of the entity.

23. Additionally, the Secretary must govern the Department in a way that is not inconsistent with the policies of the Australian Government: s 21 PGPA Act. Of

The Australia Institute
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Tasmania

Ground Floor
71 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

critical relevance is the Australian Government policy to stop the extinction of Australia's plants and animals by taking action on difficult problems.[13]

24. We also note that a purpose of the Department is to 'conserve, protect and sustainably manage our environment and water resources through a nature positive approach'.[14] Acting (or failing to act) in a way that does not effectively save the Maugean skate from extinction by removing aquaculture from Macquarie Harbour would put the Secretary at risk of breaches of the PGPA Act which can be remedied by those with a special interest.[15]

25. We have copied this letter to the Secretary and suggest you seek their assistance in accordance with their obligations under the PGPA Act for the Department to assist you immediately and effectively act to prevent the actions under EPBC 2012/6406 - and any other relevant actions – that are contributing to the decline of the Maugean skate.

Next steps

26. We suggest a meeting to discuss these issues. We are continuing to speak to experts and would appreciate being contacted before any decision is being made if you decline a meeting. Further, should any relevant decision be made we request, in advance, you publish a statement of reasons.

We look forward to hearing from you.

Yours sincerely,

Eloise Carr

Tasmanian Director
The Australia Institute

[13] Minister for the Environment and Water (2022) *Minister launches Threatened Species Action Plan: Toward Zero Extinctions*
https://minister.dcceew.gov.au/plibersek/media-releases/minister-launches-threatened-species-action-plan-toward-zero-extinctions
[14] DCCEEW Corporate Plan 2022-23, p4:
https://www.dcceew.gov.au/sites/default/files/documents/corporate-plan-2022-23.pdf
[15] *O'Donnell v Commonwealth of Australia* [2021] FCA 1223 at [135]-[142]

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Tasmania

Level 10 / 65 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

31 July 2023

Hon Tanya Plibersek MP
Minister for the Environment and Water
House of Representatives
Parliament House
Canberra ACT 2600

Dear Minister Plibersek,

Request for reconsideration of decision EPBC 2012/6406

1. We refer to our letter dated 08 June 2023, in relation to decision EPBC 2012/6406 dated 03 October 2012 (**Decision**).

2. As you know our letter was a request (**Request**), under section 78A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

3. We imagine this will have been apparent from the language we used in [4] of our letter, but for abundant clarity we confirm that the Request is made relying on the grounds in:

   (1) EPBC Act section 78(1)(a) (substantial new information); and/or

   (2) EPBC Act section 78(1)(aa) (unforeseen substantial change in circumstances).

4. We provided you with new evidence from the Institute of Marine and Antarctic Studies, being Moreno & Semmons, "*Interim report – Macquarie Harbour Maugean skate population status and monitoring*"(2023) (**Moreno (2023)**).

5. The purpose of this letter is to provide you with further material relevant to our Request. In particular, we enclose together with this letter the following material, the significance of which we explain below.

Material	Abbreviation
Moreno *et al.*, "*Vulnerability of the endangered Maugean Skate population to degraded environmental conditions in Macquarie Harbour*" (2020)	**Moreno (2020)**

Ross *et al.*, "*Understanding the Ecology of Dorvilleid Polychaetes in Macquarie Harbour*" (2016)	**Ross (2016)**
Wild-Allen *et al.*, "*Macquarie Harbour Oxygen Process model (FRDC 2016-067)*" (2020)	**Wild-Allen (2020)**
Ross & MacLeod, "*Environmental Research in Macquarie Harbour Interim Synopsis of Benthic and Water Column Conditions*" (2017)	**Ross (2017)**

Further scientific material

6. In [7]–[8] of our letter we said that the report attributed a 47 per cent decline in Maugean Skate numbers in Macquarie Harbour to dissolved oxygen (**DO**) levels in the Harbour. These in turn were attributed to "*anthropogenic inputs*," in particular including the large-scale development of salmonid aquaculture—*i.e.*, salmon and trout farming.

7. The additional material provided together with that letter supports that proposition, as we explain below. The overall picture and chronology of the research is, at a high level, as follows:

   (1) Ross (2016) identified that finfish cages lead to elevated oxygen consumption, which may result in lower DO levels—in particular nearer to cages;

   (2) Ross (2017) highlighted the very low levels of DO in the harbour, and the possibility of indirect interactions between salmonid farming and the Maugean Skate by virtue of decreased DO;

   (3) Moreno (2020) examined the sensitivity of the Maugean Skate to decreased oxygen levels, and found that chronic exposure to hypoxic conditions leads to (*inter alia*) deleterious effects on reproduction;

   (4) Wild-Allen (2020) modelled DO in Macquarie Harbour absent salmonid aquaculture and found a 50 per cent reduction in hypoxic volume, and a 43 per cent increase in healthy water would result from elimination of salmonid farming.

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Level 10 / 65 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
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Ross (2016)

8. Ross (2016) was predominantly concerned with different species: Dorvilleid Polychaetes, being species of worms.

9. In the context of an examination of the ecology of those species in the harbour, however, the authors made findings about environmental characteristics of the harbour, including in relation to DO. At 21, the authors said as follows:

> "At the lease scale, there was also a pattern in bottom water dissolved oxygen saturation with distance from cages at two of the leases. Dissolved oxygen at leases 266 and 219 showed a gradient of lower dissolved oxygen saturation at cage sites that increased to background levels by approximately 100m, Figure 5-9. These two leases also had more sites with low (<25%) or extremely low (<5%) bottom water dissolved oxygen. At lease 133 and 267 there was no clear pattern with distance."

10. And, at 43, they observed that "*it is not surprising, and in fact expected that the enrichment under finfish cage will lead to elevated oxygen consumption, and as a consequence, in areas where there is reduced water exchange or high levels of enrichment this could result in localised drawdown of bottom water oxygen concentrations.*"

Ross (2017)

11. Ross (2017) is an interim synopsis of the science and current status of the benthic (*i.e.*, harbour floor) and water column environments in Macquarie Harbour.[1] It was performed in a context of, as outlined on page 3, a steady increase in caged finfish in the harbour.

12. The critical finding in Ross (2017), in the context of the Request, is that although <u>direct</u> interactions between the Maugean Skate and aquaculture operations appear to be limited, there may be indirect interactions—including that the production of organic wastes from the farming activities increase biological oxygen demand and hence decreased DO.[2]

---

1 Ross (2017), 3.
2 Ross (2017), 10.

13. Further, Ross & MacLeod found the following in relation to DO levels in comparison with past levels:[3]

> "In mid-2014 there was some respite from the steady decline in bottom water DO levels that had been occurring since 2009 (Figure 23). However, DO levels were and still remain well below the levels recorded between 1993 and 2009 (Figure 23). DO levels are now extremely low throughout the Harbour, but most notably in the southern part of the Harbour. All of the independent data sets (industry, EPA, Sense-T, Parks, IMAS and CSIRO) are providing the same picture; DO levels in bottom waters are now worryingly low."

14. Even small changes in DO levels are important:[4]

> "The study also shows that very small changes in DO, particularly at low levels, can have a major effect on the ecological response – this is particularly relevant to the levels of DO currently seen in Macquarie Harbour, suggesting that even slight declines/ improvements where levels are so low can have quite marked consequences."

15. Figure 28 (reproduced below) shows that even short-term reductions in DO levels lead to behavioural modification and death:

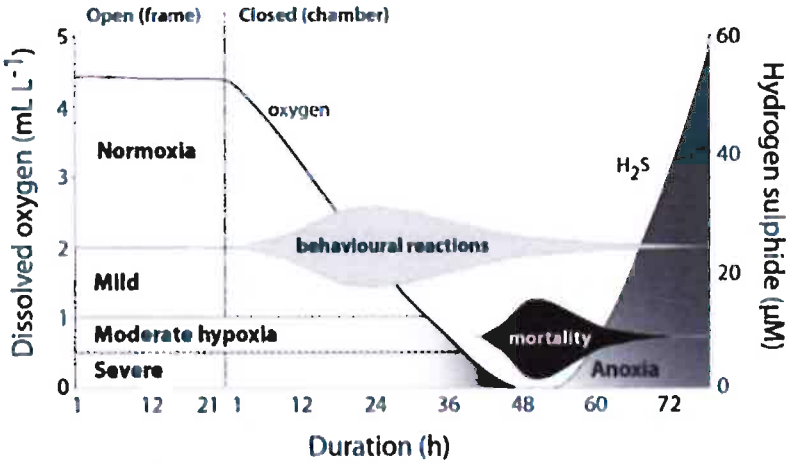

Figure 28 Schematic diagram reproduced with permission from Riedel at al. (2014) highlighting the effects of DO concentrations and exposure duration on behaviour and mortality.

16. Ross (2017) proposed further research in relation to the effect of farming on DO levels in the Harbour.[5]

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3 Ross (2017), 23.
4 Ross (2017), 29.
5 Ross (2017), 33.

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Level 10 / 65 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

Moreno (2020)

17. Moreno (2020) is an examination of *"the vulnerability of the Maugean Skate, across all its life history stages, to a range of environmental stressors,"* in the context of, *"anthropogenic activities in and around the estuary (e.g. mining, forestry, hydro-electricity generation, and marine farming operations) as well as the more general effects of climate change."*[6]

18. As background, deoxygenation is likely to be of particular importance for elasmobranchs (such as the Maugean Skate), because of their comparatively high oxygen demands.[7] Increasing temperatures result in higher oxygen consumption rates in elasmobranchs.[8]

19. In this context, critical findings in Moreno (2020) include that the Maugean Skate is vulnerable to degraded and variable environmental conditions in Macquarie Harbour,[9] and has little ability to tolerate low DO.[10] Skates in Macquarie Harbour move through areas that are severely oxygen deprived,[11] and are capable of surviving chronic exposure to hypoxic (*i.e.*, inadequate oxygen) conditions (<20% DO) only by using metabolic depression as a survival strategy.[12] This cannot be sustained long-term, because it occurs at the cost of other energy-intensive life history processes such as growth, foraging, and reproduction.[13] Accordingly, levels of DO in bottom waters in Macquarie Harbour is likely to represent a crucial factor in the future well-being of the skate population.[14]

20. In particular, given the Skate's maturation and asynchronous reproductive strategy, lengthy periods of depressed metabolic rates could *"greatly reduce its growth/maturation rate and capacity to reproduce, limiting any increases in the population under these conditions."*[15]

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6 Moreno (2020), viii.
7 Moreno (2020), 47.
8 Moreno (2020), 48.
9 Moreno (2020), 43.
10 Moreno (2020), 1.
11 Moreno (2020), 47–48.
12 Moreno (2020), x, 43, 51, 55.
13 Moreno (2020), x, 52, 55. See also Ross (2017) at 8.
14 Moreno (2020), 1, 55.
15 Moreno (2020), 52.

21. A factor contributing to the environmental conditions in Macquarie Harbour, in particular to the levels of DO in bottom waters, is aquaculture (*i.e.*, salmonid farming).[16]

Wild-Allen (2020)

22. Moreno (2023) and Moreno (2020) both find that aquaculture contributes to environmental conditions (*i.e.*, lower DO levels in Macquarie Harbour). Wild-Allen (2020) discusses modelling performed to identify the degree to which DO would improve were it not for salmonid farming.

23. Farmed fish respiration is the third greatest contributor to loss in DO in Macquarie Harbour (accounting for 3 per cent of loss).[17] Modelling based on reduced anthropogenic loads (*i.e.*, omission of fish farm respiration and nutrient loads) resulted in a 50 per cent reduction in hypoxic water and a 40 per cent reduction in hypoxic sediment.[18] Various other scenarios were modelled;[19] the *"reduced anthropogenic load scenarios showed a larger reduction in hypoxia under comparable ocean oxygen influx c.f. all other scenarios."*[20]

24. It is worthwhile quoting from the discussion of Harbour water quality under reduced anthropogenic load at some length (emphasis added):[21]

> "To explore the impact of anthropogenic loads on dissolved oxygen conditions in the harbour, a scenario simulation was run omitting fish farm oxygen drawdown and dissolved and particulate waste. [Note that the small amount of waste from Strahan sewerage treatment plant remained in the simulation.] To investigate persistent changes in the environment the simulation was also extended for a further 2 years by repeating the 2017-18 hydrodynamic conditions.
>
> Monthly mean distributions of dissolved oxygen (Figure 4.40) show an increase in dissolved oxygen in all seasons, particularly in mid water for the simulation with reduced anthropogenic load. The extended model scenario showed a greater increase in dissolved oxygen (>2mg/l) in a similar pattern throughout the harbour in particular in

16 Moreno (2020), 56.
17 Wild-Allen (2020), 6, 43
18 Wild-Allen (2020), 6, 51..
19 See the list of modelled scenarios at Wild-Allen (202), 52.
20 Wild-Allen (2020), 7.
21 Wild-Allen (2020), 62–63.

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Tasmania

Level 10 / 65 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

> the mid and southern part of the harbour.
>
> Classification of oxygen conditions as anoxic (<1% oxygen saturation), hypoxic (1-30% oxygen saturation), intermediate (30-80% oxygen saturation) and healthy (>80% oxygen saturation) showed a 50% reduction in hypoxic volume and a 40% reduction in hypoxic sediment area under reduced anth[r]opogenic loads c.f. conditions in 2017-18 (Figure 4.41). For the extended scenario run hypoxia was further reduced; healthy water volume increased from 46% in 2017-18 to 56% and healthy sediment area increased from 32% in 2017-18 to 36% of the total harbour area."

25. These improvements can be visually discerned in Figure 4.40,[22] which shows actual DO levels in the left-hand column, modelled DO levels over the same 2017–2018 period but with "*no farms*" in the middle column, and modelled DO levels over an extended two-year period, again with "*no farms*," in the right-hand column. The degree of improvement in the "*no farms*" scenario is obvious.

26. These differences were "*primarily due to the omission of fish farm oxygen drawdown.*" [23] "*[R]educed anthropogenic load scenario and persistent reduced anthropogenic load scenario suggest that the net oxygen deficit would be reduced by >50% compared to 2017-18 conditions*" (emphasis added).[24]

Conclusion as to further scientific material

27. In short, the conclusions that are to be drawn from the material summarised above, together with Moreno (2023) (which we summarised in our earlier letter), are these:

    (1) Maugean Skate are vulnerable to lower levels of DO in Macquarie Harbour, in the sense that it may cause behaviour modification, may reduce reproduction, and may lead to death;

    (2) absent salmonid aquaculture, there would be a dramatically higher volume of healthy DO water in the harbour, and (correspondingly) a dramatically lower volume of hypoxic water;

22 Wild-Allen (2020), 63.
23 Wild-Allen (2020), 64.
24 Wild-Allen (2020), 64.

(3) accordingly, absent salmonid aquaculture, there would be a dramatically less harmful environment for the Maugean Skate.

28. These findings, together with the analysis in Moreno (2023) itself, justify the conclusion in Moreno (2023) that the 47 per cent decline in Maugean Skate numbers in Macquarie Harbour is substantially attributable to salmonid farming.

Submission based on this conclusion

29. It is apparent from the Decision that the then-Minister proceeded on the basis that the conditions therein set out would enable salmonid farming to occur without any significant impacts on the Maugean Skate (see in particular point 1 on page 2).

30. The research summarised above, and in our earlier letter, shows that that basis was wrong. Assuming (which we do for the sake of this Request) that the conditions in the Decision have been complied with, the only available conclusion is that, despite this, salmonid aquaculture has had a significant impact on the Maugean Skate.

31. All of the research referred to in our previous letter, and in this one, is "*new information*," in the sense that it was published after (in most cases long after) the Decision. It is "*substantial*" because it is the product of serious scientific inquiry and goes directly to the correctness (or otherwise, as the case has turned out to be) of the Minister's assumption that the conditions imposed would prevent a significant impact.

32. The new information shows that the adverse impacts of the action are very substantially greater than the Minister thought at the time of making the Decision. That may be concluded with a high degree of certainty.

33. Alternatively, the circumstances as at today's date are materially different from the circumstances in place at the time of the Decision, in at least two respects:

34. *First*, as Ross (2017) shows, there has been a continued decline in the DO levels in Macquarie Harbour such that they were "*worryingly low*" (lower than they were as at the time of the Decision).

35. *Second*, as Moreno (2023) shows, the Maugean Skate population has decreased by nearly half. That is, the population that may be (or, we submit, is) affected by the

The Australia Institute
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Tasmania

Level 10 / 65 Murray Street
Hobart TAS 7000

mail@australiainstitute.org.au
australiainstitute.org.au

ABN 90 061 969 284
ACN 061 969 284

relevant activity of salmonid farming is now very much more vulnerable than it was at the time of the original Decision.

36. These matters were plainly unforeseen: the Decision is precisely predicated on the notion that, as long as conditions are complied with, there should be no significant effect on the Maugean Skate. There has now, as Moreno (2023) shows, been a very significant effect on the Skate. For reasons articulated above, the change in circumstances is substantial, and relates to the adverse impacts of the action (salmonid farming) on the protected matter (the Maugean Skate).

37. In these circumstances, both of the grounds stated in section 78(1)(a) and (aa) exist. Revocation and substitution is plainly warranted: unless the effect of salmonid farming on the Maugean Skate is arrested (and reversed), it is very likely to become extinct.

Next steps and urgency

38. Above, we drew attention to the fact of hotter weather meaning higher oxygen demand in elasmobranchs (like the Maugean Skate)—see at [18]. If anything, in this light, the past several years of *La Niña* weather patterns (with cooler, wetter, weather) have likely prevented even worse declines in Maugean Skate populations.

39. But, as is widely known:

    (1) the forthcoming summer is very likely to be characterised by *El Niño* weather conditions;[25] and

    (2) *El Niño* weather conditions are characterised by warmer-than-average temperatures.[26]

40. The forthcoming summer, therefore, is likely to be extremely damaging for the Maugean Skate. To say that it is at extinction risk is not to overstate the peril it faces.

41. In these circumstances, we urge you to reconsider the original Decision, and make a new decision precluding salmonid aquaculture in Macquarie Harbour, as a matter of the highest urgency. We reserve our rights in this connection.

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25 See, *e.g.*, http://www.bom.gov.au/climate/enso/outlook/ .

26 See, *e.g.*, http://www.bom.gov.au/climate/updates/articles/a008-el-nino-and-australia.shtml .

42. Please do not hesitate to contact us should you require any further information.

Yours sincerely,

Eloise Carr

Tasmanian Director

The Australia Institute

Federal Court of Australia

District Registry: Tasmania

Division: General

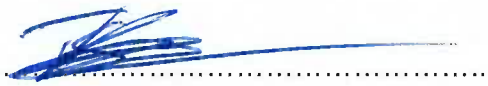
Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-5 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025



A legal practitioner with a current Tasmanian practising certificate

Environmental Defenders Office

23 August 2023

Hon Tanya Plibersek MP
Minister for the Environment and Water
House of Representatives
Parliament House
Canberra ACT 2600

By email: Minister.Plibersek@dcceew.gov.au

Dear Minister Plibersek,

Requests for reconsideration of decision on referral numbered EPBC 2012/6406 and investigation into compliance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Environmental Defenders Office writes on behalf of the Australian Marine Conservation Society and Humane Society International Australia to seek your urgent action to respond to the impacts of finfish farming on the endangered Maugean Skate (*Zearaja maugean*) and the Tasmanian Wilderness World Heritage Area.

Our clients request you take the following actions to respond to the immediate threats posed by finfish farming on these matters of national environmental significance:

1. Reconsider and revoke the Controlled Action Decision relating to the Marine Farming Expansion in Macquarie Harbour (EPBC referral no. 2012/6406) on the basis of substantial new information about the impacts the action has or will have, or is likely to have on a matter protected by a provision in Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (section 78(1)(a)), and/or a substantial change of circumstances that were not foreseen at the time of the first decision, and which relates to the impacts the action has or will have, or is likely to have on a matter protected by a provision in Part 3 of the EPBC Act (section 78(1)(aa)).

2. Direct the Department to investigate compliance with the Particular Manner Notice requirements attached to the Controlled Action Decision for EPBC referral no. 2012/6406.

3. Direct the Department to investigate whether the finfish farming currently being undertaken in Macquarie Harbour is the same as the Action that was the subject of EPBC referral no. 2012/6406.

Further detail concerning each of these requests is outlined below.

T +61 3 6223 2770 W edo.org.au
E hobart@edo.org.au
1/114 Bathurst St, Hobart, Tas 7000
ABN: 72002 880 864

1. Reconsideration of controlled action decision

As you are aware, on 3 October 2012 the former Federal Environment Minister, the Hon Tony Burke MP, decided that the "Marine Farming Expansion in Macquarie Harbour" (the **Action**) outlined in EPBC referral no. 2012/6406 (**Referral**) was not a controlled action under sections 75 and 77A of the EPBC Act. In this letter, this is referred to as the **Controlled Action Decision**. As the then-Minister considered the action could be carried out in a particular manner, no assessment or approval was required under the EPBC Act.

Under section 78A of the EPBC Act, our clients request that you reconsider the Controlled Action Decision. We note the mandatory requirements in section 78B of the EPBC Act that now apply regarding the need to inform interested persons of the request and invite comments within 10 business days. Given the significance of this reconsideration request, pursuant to section 78B(6), we urge you to publish this request and an invitation to comment on the internet as a matter of urgency.

We understand that the Australia Institute have already written to you on 8 June 2023 requesting the reconsideration of the Controlled Action Decision. Our clients strongly support that request and, to the extent that the two requests overlap, do not seek to repeat or detract from its content.

1.1 Limitation under section 78(3) of the EPBC Act does not apply in this case

Section 78(3) of the EPBC Act prohibits the reconsideration of controlled action decisions where an action has been "taken".

As a preliminary issue, we note the Department of Climate Change, Energy, the Environment and Water (**Department**) has previously expressed a view that the Action the subject of the Referral has been "taken". [1] On this view, it would not be open for you to reconsider the controlled action decision due to the operation of the prohibition in section 78(3) of the EPBC Act.

We note that the Department's position on whether the Marine Farming Expansion in Macquarie Harbour has been "taken" does not accord with the Federal Court's decision in *Huon Aquaculture Group Ltd v Minister for the Environment*. [2] In that case, Huon Aquaculture had argued that the controlled action decision concerning the Marine Farming Expansion in Macquarie Harbour could not be reconsidered due to the operation of section 78(3) of the EPBC Act.

However, his Honour Justice Kerr relevantly found at [221]-[223]:

> …Such a construction is implausible: it would neuter the substantive provision. Moreover as a matter of pure text such a construction is inconsistent with the language in which the prohibition is expressed. Section 78(3) prohibits the Minister revoking a decision "**after** … the action is taken". Thus for so long as an action is ongoing, the prohibition has no application.
>
> In this matter, the short description of the "action" (the subject of the Minister's decision) encompassed not only the construction of sea pens but also the ongoing operation of

[1] Question SQ23-000926 asked by Senator Whish-Wilson in Budget Estimates Outcome 2 on 23 May 2023 and the responses of Mr Edwards of the Department of Climate Change, Energy, the Environment and Water.
[2] [2018] FCA 1011; BC201805846. See at [221]-[222].

marine farming. The action was still ongoing in mid 2014. It has remained ongoing to the present.

I am satisfied that as at the end of September 2014 it was open to Huon [Aquaculture] to have requested that the Minister reconsider the decision. ...

Plainly, given this finding of the Federal Court, you have the power to reconsider the controlled action decision.

We provide further detail concerning the bases for the reconsideration of the controlled action decision below.

1.2 Bases for the Reconsideration of the Controlled Action Decision

The Controlled Action Decision recorded that the controlling provisions (under Part 3 of the EPBC Act) were:

(a) Section 18 and 18A of the EPBC Act, due to the action's potential impact on the Maugean Skate which is an EPBC Act-listed endangered species; and

(b) Sections 12 and 15A of the EPBC Act, due to the action's potential impacts on the world heritage values of the Tasmanian Wilderness World Heritage Area (**TWWHA**), which includes parts of Macquarie Harbour; and

(c) Sections 15B and 15C of the EPBC Act, due to the action's potential impacts on the National Heritage values of the TWWHA which includes parts of Macquarie Harbour.

Section 78 of the EPBC Act provides that the Minister may revoke a decision where there is:

(a) substantial new information about the impacts the action has or will have, or is likely to have on matters protected by a provision in Part 3 of the EPBC Act (section 78(1)(a)), and/or

(b) a substantial change of circumstances that was not foreseen at the time of the first decision, and which relates to the impacts the action has or will have, or is likely to have on matters protected by a provision in Part 3 of the EPBC Act (section 78(1)(aa))

Our clients request your reconsideration of the controlled action decision based on **both** the above provisions.

1.2.1 Section 78(1)(a) - Substantial new information

There is substantial new information about the impacts that the action has or will have, or is likely to have on matters protected by a provision in Part 3.

This substantial new information includes the 2 May 2023 report by the Institute of Marine and Antarctic Studies, *Interim report – Macquarie Harbour Maugean Skate population status and monitoring* (**the 2023 IMAS report**).[3] The 2023 IMAS report was based on 2021 sampling undertaken at three sites, including one within the TWWHA. The 2023 IMAS report followed the funding of additional surveys by the Tasmanian sustainable marine research collaboration agreement (SMRCA) for a further three years from February 2021 to December 2023. However,

[3] David Moreno and Jayson Semmens (2023) *Interim report - Macquarie Harbour Maugean Skate population status and monitoring.* IMAS. https://imas.utas.edu.au/_data/assets/pdf_file/0007/1655611/Maugean-Skate-2021-interim-report-FINAL.pdf

such was the extinction risk to the Maugean Skate that IMAS issued an interim report of results before the project's completion. Of itself, this is substantial new information.

The 2023 IMAS report findings are of grave concern and call for urgent action. The report found there has been a 47% decline from 2014 to 2021 in Maugean Skate numbers in Macquarie Harbour.

It is important to emphasise that, at the time of the Controlled Action Decision, it was thought a viable Maugean Skate population also lived at Bathurst Harbour. However, a separate IMAS report by David Moreno *et al*[4] (**2022 IMAS report**) found extremely low levels of Maugean Skate DNA traces in Bathurst Harbour indicating that a viable population in that location is unlikely, and uncertainty as to there ever being an established population there. The 2022 IMAS report, therefore, constitutes substantial new information as it demonstrates the importance of protecting the Macquarie Harbour Maugean Skate population.

The 2023 IMAS report is substantial new information as it expresses clear scientific information not known at the time of decision EPBC 2012/6406 that Macquarie Harbour Maugean Skate has declined markedly in a short period, in an area that is now the only site where the species remains. The 2023 IMAS report noted a 'scarcity of new recruits,' adding 'the reduction in the relative abundance of juvenile and sub-adult individuals'[5] to the broader concern about the almost 50% decline in the Macquarie Harbour Maugean Skate population.

Against this backdrop, the 2023 IMAS report raises alarm bells at the extent to which 'high impact environmental events' threaten the 'viability' of the Maugean Skate as a species. The report's conclusion that the extinction risk of the Maugean Skate is 'intrinsically linked to the health of their restricted habitat'[6] is also substantial new information.

In this regard, the 2023 IMAS report notes a decline in dissolved oxygen levels caused by 'anthropogenic inputs,' including the large-scale development of salmonid aquaculture, and that '[dissolved oxygen] levels and mixing dynamics are of extreme concern for the persistence of the species'.[7]

This attribution of the likely contribution to the low dissolved oxygen levels in Macquarie Harbour aligns with a 2020 report by Wild-Allen *et al*[8] (**Wild-Allen report**) which considered, amongst other things, the extent to which finfish farms contribute to lower dissolved oxygen levels in Macquarie Harbour.

The Wild-Allen report detailed several model scenario simulations to provide insight into future harbour conditions. One of these scenarios explored the impact of a reduction in anthropogenic nutrient load on water quality by the degree to which dissolved oxygen would improve were it not for finfish farm waste loads and fish farm oxygen respiration. The Wild-Allen report found that a scenario simulation omitting finfish farm oxygen drawdown and dissolved and particulate waste showed 'a 50 per cent reduction in hypoxic water and a 40 per cent reduction in hypoxic sediment

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[4] David Moreno, Jawahar Patil, Bruce Deagle & Jayson Semmens (2022) *Application of environmental DNA to survey Bathurst Harbour (Tasmania) for the Endangered Maugean Skate (Zearaja maugeana)*. IMAS. https://www.imas.utas.edu.au/__data/assets/pdf_file/0009/1615788/Project-1.33-Final-Report.pdf

[5] David Moreno and Jayson Semmens (2023), p.8.

[6] David Moreno and Jayson Semmens (2023), p.9.

[7] David Moreno and Jayson Semmens (2023), p.9.

[8] Karen Wild-Allen, John Andrewartha, Mark Baird, Lev Bodrossy, Elizabeth Brewer, Ruth Eriksen, Jenny Skerratt, Andrew Revill, Kendall Sherrin, Dan Wild. (2020), *Macquarie Harbour Oxygen Process model (FRDC 2016-067)* : CSIRO Final Report. CSIRO Oceans & Atmosphere https://www.frdc.com.au/sites/default/files/products/FRDC_MH_Final_Rep_June_2020.pdf

area.'[9] Significantly, when this scenario simulation was extended for a further two years, 'hypoxia was further reduced; healthy water volume increased from 46% in 2017-18 to 56% and healthy sediment area increased from 32% in 2017-18 to 36% of the total harbour area.'[10]

The Wild-Allen report is substantial new information. It constitutes clear and categorical scientific evidence as to the impact of finfish farming on the decline of dissolved oxygen levels in Macquarie Harbour. It was not in the possession of the Minister for consideration when making the original referral decision.

In addition to the impact of marine farming in Macquarie Harbour on dissolved oxygen levels across the whole of the Harbour (including the TWWHA), compliance monitoring undertaken by the Tasmanian Environment Protection Authority has also documented cases of benthic bacterial matting spreading from Tassal's lease MF266 into the TWWHA on the eastern side of the Harbour.[11] This information was not available at the time of the original Controlled Action Decision and provides clear evidence of the substantial impacts of finfish farming on the abundance of opportunistic species within areas of Macquarie Harbour within the TWWHA.

The Wild-Allen report, along with the 2023 IMAS report, the 2022 IMAS report and the EPA compliance monitoring data, show that the adverse impacts of the action on both the habitat of the Maugean Skate and the World Heritage and National Heritage values of Macquarie Harbour are substantially more significant than originally determined by the then-Minister.

Our clients therefore submit that it is appropriate to revoke the original Controlled Action Decision based on this substantial new information.

1.2.2 Section 78(1)(aa) - Substantial unforeseen change in circumstances

In addition to the substantial new information warranting the revocation of the Controlled Action Decision, there has also been a substantial change in circumstances that were not foreseen at the time of the original decision.

The scientific evidence referred to in section 1.2.1 above also details external influences that affect the impacts the action is having and will continue to have.

The 2023 IMAS report was prepared in the decade after the Controlled Action Decision. It notes a significant decline in deep water (>10 m) dissolved oxygen conditions in Macquarie Harbour (Ross et al., 2020) during that time.[12] This is a substantial change in circumstance that was not foreseen at the time of the original Controlled Action Decision.

In addition, the 2023 IMAS report notes 'mounting evidence that these low dissolved oxygen conditions are impacting the Maugean Skate population, including inducing mortality events (Moreno et al., 2020).' Of grave concern, the 2023 IMAS report found a 47% decline from 2014 to 2021 in Maugean Skate numbers in Macquarie Harbour noting the 2016 Bell et al estimate of

[9] Wild-Allen (2020), p. 62.
[10] Wild-Allen (2020), p. 62.
[11] Environment Protection Authority (2017) *Macquarie Harbour Tasmanian Wilderness World Heritage Area Environmental Status Report*, May 2017, EPA, Tasmania at p 13, accessed at https://epa.tas.gov.au/Documents/Macquarie%20Harbour%20TWWHA%20Environmental%20Status%20Report,%20EPA,%20May%202017.pdf .
[12] David Moreno and Jayson Semmens (2023), p.2.

3,200 individuals .[13] Again, this is a substantial change in circumstances that was not foreseen at the time of the original decision.

The 2023 IMAS report attributes the decline in dissolved oxygen conditions to anthropogenic activities, including fish farming activities. This correlates with the Wild-Allen report, which demonstrated the degree to which dissolved oxygen would improve were it not for fish farm waste loads and fish farm oxygen respiration. The Wild-Allen report showed the extent to which dissolved oxygen has been impaired by fish farming, specifically the expansion of fish farming under the Controlled Action Decision. The causal link between fish farming and dissolved oxygen decline is a further substantial change in circumstances that was not foreseen at the time of the original decision.

Significantly, the 2023 IMAS report is an interim report, covering results from only the first year of a three-year study. The authors decided to present an interim report 'because the magnitude of the observed decline in relative abundance is likely to have significant implications for the status of the [Maugean Skate] population.'[14] Scientific evidence clearly shows a substantial change in circumstances and impact since the time of the original decision.

The changes in circumstances outlined above were unforeseen at the time of the original decision. It was not envisioned by the Minister when making the Controlled Action Decision that dissolved oxygen levels would significantly decline notwithstanding the Particular Manner Notice requirements. It was also not foreseen by the Minister that the significant decline in dissolved oxygen levels would induce mortality events in the Maugean Skate population, or that the already threatened Maugean Skate population would further decline by almost half from 2014 to 2021. Our clients consider that the evidence establishes that changes in the potential impacts of the Action with a high degree of certainty.

Our clients therefore submit that it is appropriate to revoke the original Controlled Action Decision based on this substantial unforeseen change in circumstances.

1.3 Outcome upon the Reconsideration of the Controlled Action Decision

Our clients consider that, if all of the scientific information now available had been known at the time of the Controlled Action Decision in 2012, there would have been a finding that the Action would have a significant impact on the matters protected under Part 3 of the EPBC Act, namely an endangered species, the Maugean Skate, the World Heritage values and National Heritage values of the TWWHA.

Specifically, the current scientific evidence is the Action has had a significant impact on the endangered Maugean Skate, including by: [15]

- leading to a long-term decrease in the size of the Maugean Skate population;
- reducing the area of occupancy of the species;

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[13] Bell, J; Lyle, Jeremy; Semmens, Jayson; Awruch, Cynthia; Moreno, David; Currie, S; et al. (2016). *Movement, habitat utilisation and population status of the endangered Maugean skate and implications for fishing and aquaculture operations in Macquarie Harbour*. University Of Tasmania. Report. https://figshare.utas.edu.au/articles/report/Movement_habitat_utilisation_and_population_status_of_the_endangered_Maugean_skate_and_implications_for_fishing_and_aquaculture_operations_in_Macquarie_Harbour/23168198

[14] David Moreno and Jayson Semmens (2023), p.10.

[15] Department of Climate Change, Energy, the Environment and Water, *Significant Impact Guidelines 1.1 – Matters of National Environmental Significance*, accessed at: https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf

- adversely affecting habitat critical to the survival of the species;
- disrupting the breeding cycle of a population of the Maugean Skate;
- modifying, destroying, removing, isolating or decreasing the availability or quality of habitat to the extent that the species is likely to decline; and
- interfering with the recovery of the species.

The evidence is that the Action is also significantly impacting the World Heritage and National Heritage values of the TWWHA in the following ways:

- contributing to the decline in dissolved oxygen in Macquarie Harbour, substantially damaging the habitat important for the conservation of biological diversity (including but not limited to the endangered Maugean Skate) within the TWWHA;
- causing a long-term reduction in the rare, endemic and unique population of the Maugean Skate within the TWWHA; and
- substantially increasing concentrations of suspended sediment, nutrients, and other pollutants in Macquarie Harbour within the TWWHA, with substantial, long-term and/or permanent impacts on both the harbour and its relevant values.

Therefore, upon the reconsideration of the Controlled Action Decision, our clients urge you to find that the Action will have (and has had) significant impacts on matters protected under Part 3 of the EPBC Act and so should be comprehensively assessed under Part 8 of the EPBC Act. Our clients anticipate at the conclusion of such an assessment that you would refuse to grant an approval to the Action.

2. Investigate compliance with Particular Manner Notice requirements

The Controlled Action Decision was made on the basis that the Action would be carried out in a particular manner. The Particular Manner Notice attached to the Controlled Action Decision sets out how the Action must be undertaken. The stated aim of the Particular Manner Notice requirements is to "ensure there are no significant impacts" arising from the Action on the Maugean Skate and the TWWHA.

Given the significant impacts of the Action on both the Maugean Skate and TWWHA that have been documented in the scientific studies cited in section 1 of this letter, our clients have serious questions about whether the requirements in the Particular Manner Notice have been complied with.

We note that section 77A of the EPBC Act provides that it is an offence to fail to comply with the requirements set out in a Particular Manner Notice, with a maximum corporate penalty of 10,000 penalty units or $2,750,000 if prosecuted. The failure to comply with a Particular Manner Notice requirement also exposes the person undertaking an action to the possibility of committing civil or criminal offences if their action is having or is likely to have a significant impact on a matter of national environmental significance, like a threatened species or World Heritage values.

If the Department discovers that there have been breaches of the Particular Manner Notice requirements that have resulted in a significant impact on a matter of national environmental significance, the EPBC Act also provides avenues for you to make remediation determinations or apply to the Federal Court for remediation orders and/or injunctions. Such information may also be another basis upon which you can reconsider the Controlled Action Decision under section 78 of the EPBC Act.

We therefore request that you urgently direct the Department to investigate whether Particular Manner Notice requirements have been complied with by the marine farming companies the subject of the Controlled Action Decision, namely Huon Aquaculture Group Pty Ltd, Petuna Aquaculture Pty Ltd and Tassal Operations Pty Ltd.

3. **Investigate whether the marine farming expansion in Macquarie Harbour is the same action as what was originally referred in 2012**

Separately to the issue of whether the Action is being carried out in accordance with the Particular Manner Notice, our clients have real questions as to whether the marine farms currently operating in Macquarie Harbour are the same action as what was originally referred and described in the Controlled Action Decision.

The Particular Manner Notice refers to and relies upon the regulation of marine farming under Tasmanian regulatory instruments. We note that these instruments have substantially changed since the Controlled Action Decision. For example:

- marine farming licences issued under the *Living Marine Resource Management Act 1995* (Tas) no longer provide for any water quality monitoring program;
- the Secretary of the department administering the *Marine Farming Planning Act 1995* (Tas) and the *Living Marine Resource Management Act 1995* (Tas) no longer has a role in setting biomass or pollution limits (that is now undertaken by the Director of the Tasmanian Environment Protection Authority); and
- the Tasmanian regulators no longer use the presence of numerous opportunistic polychaetes as an indicator of "substantial benthic visual impact", meaning that the so-called "targeted management responses" mentioned in the Referral and the Particular Manner Notice are not occurring in the way that was originally proposed.

Furthermore, our clients expect that there have been significant changes to the type of equipment and practices employed by the finfish farming operations since the Action was originally referred.

If the marine farming that is occurring in Macquarie Harbour is not the same as the Action as was originally referred under the EPBC Act, our clients are concerned that the marine farming companies operating in Macquarie Harbour may have committed or are continuing to commit offences under the EPBC Act.

If it is discovered that the marine farming that is occurring in Macquarie Harbour is not the same as the Action, the marine farming companies may either be prosecuted or fined for offences under the EPBC Act. You may also require the marine farming companies to make a fresh referral of their actions for assessment and approval under the EPBC Act.

In these circumstances, our clients request that you direct the Department to urgently investigate whether the salmon farming companies are operating within the confines of the Action as referred in 2012.

4. **World Heritage obligations to protect the World Heritage Values of Macquarie Harbour, including its inhabitant the Maugean Skate**

Approximately one-third of Macquarie Harbour is on the World Heritage Register as part of the Tasmanian Wilderness World Heritage Area. As outlined in section 1 above, there is evidence that marine farming in Macquarie Harbour is having a detrimental effect on dissolved oxygen levels across the whole of the Harbour, including the TWWHA, and there have been documented cases of

benthic bacterial matting spreading from marine farming areas into the TWWHA on the eastern side of the Harbour.[16]

The Australian Government has international obligations to protect and conserve World Heritage properties under the World Heritage Convention. Australia's obligations under the World Heritage Convention include ensuring effective and active measures are taken for the protection and conservation of natural heritage (Article 5). These obligations are, in turn, given effect through the EPBC Act.

Australia's World Heritage Convention obligations require you to effectively and actively exercise your powers under the EPBC Act to protect the Maugean Skate and the TWWHA from further harm arising from marine farming. Our clients urge you to exercise your powers under the EPBC Act to reconsider the Controlled Action Decision and investigate the compliance of marine farming in Macquarie Harbour with the EPBC Act consistently with Australia's World Heritage Convention obligations.

Next steps

Through this letter, our clients have urged you to consider three distinct courses of action. Given the ongoing and urgent nature of the matters canvassed in this letter, we request **by no later than 4 pm, 15 September 2023** you:

(a) Reconsider and revoke the Controlled Action Decision under section 78 of the EPBC Act;

(b) Urgently direct the Department to investigate whether Particular Manner Notice requirements have been complied with by the marine farming companies the subject of the Controlled Action Decision, namely Huon Aquaculture Group Pty Ltd, Petuna Aquaculture Pty Ltd and Tassal Operations Pty Ltd; and/or

(c) Urgently direct the Department to investigate whether the marine farming companies are operating within the confines of the Action as referred in 2012.

Should you have any questions concerning matters raised in this letter, please contact Claire Bookless on (03) 6223 2074 or by email at claire.bookless@edo.org.au

Yours sincerely,

Environmental Defenders Office

Claire Bookless
Managing Lawyer – lutruwita/Tasmania

Reference numbers: S5617 and S5619

[16] Environment Protection Authority (2017) Macquarie Harbour Tasmanian Wilderness World Heritage Area Environmental
Status Report, May 2017, EPA, Tasmania at p 13, accessed at https://epa.tas.gov.au/Documents/Macquarie%20Harbour%20TWWHA%20Environmental%20Status%20Report,%20EPA,%20May%202017.pdf .

Copied to:

Mr. David Fredericks PSM,
Secretary of the Department of Climate Change, Energy, the Environment & Water
By email: ***david.fredericks@dcceew.gov.au***

Senator the Hon Murray Watt, Minister for Agriculture, Fisheries & Forestry
By email: ***minister.watt@aff.gov.au***

Environmental Defenders Office

20 November 2023

Hon Tanya Plibersek MP
Minister for the Environment and Water
House of Representatives
Parliament House
Canberra ACT 2600

By email: Minister.Plibersek@dcceew.gov.au

Dear Minister Plibersek,

Further information regarding requests for reconsideration of decision on referral numbered EPBC 2012/6406 and investigation into compliance with the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Environmental Defenders Office Ltd writes on behalf of our clients, the Australian Marine Conservation Society and Humane Society International Australia, to seek your urgent action to respond to the impacts of finfish farming on the endangered Maugean Skate (*Zearaja maugean*) and the Tasmanian Wilderness World Heritage Area.

We refer to our letters dated 23 August 2023 and 20 September 2023 (**enclosed**) in which we requested the following:

1. Reconsider and revoke the Controlled Action Decision relating to the Marine Farming Expansion in Macquarie Harbour (EPBC referral no. 2012/6406) on the basis of substantial new information about the impacts the action has or will have, or is likely to have on a matter protected by a provision in Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (section 78(1)(a)), and/or a substantial change of circumstances that were not foreseen at the time of the first decision, and which relates to the impacts the action has or will have, or is likely to have on a matter protected by a provision in Part 3 of the EPBC Act (section 78(1)(aa));

2. Direct the Department to investigate compliance with the Particular Manner Notice requirements attached to the Controlled Action Decision for EPBC referral no. 2012/6406; and

3. Direct the Department to investigate whether the finfish farming currently being undertaken in Macquarie Harbour is the same as the Action that was the subject of EPBC referral no. 2012/6406.

T +61 3 6223 2770 W edo.org.au
E hobart@edo.org.au
1/114 Bathurst St, Hobart, Tas 7000
ABN: 72002 880 864

Since the writing of the above-mentioned letters, we have obtained further scientific advice relevant to the basis for reconsideration under s78(1)(aa) of the EPBC Act regarding substantial change of circumstances not foreseen at the time of the first decision. We provide further details below.

Further science information

The oceanic region around Tasmania is a global hotspot, with surface seawaters characterised by anomalously high warming. This is also reflected in coastal waters that are influenced seasonally on both the east and west coasts by warm-water currents. Just offshore Macquarie Harbour on the west coast, the fastest rate of warming is observed (0.5°C per decade) for Tasmanian coastal waters.[1] This peak rate may arise from outflow from Macquarie Harbour. Unfortunately, the authors were unable to obtain a reliable estimate of the trend within the harbour due to some significant data gaps after 2012. However, unequivocally inshore bays and protected waters of Tasmania, including Macquarie Harbour, show heightened seasonal changes (warmer in summer and cooler in winter). With the onset of both El Nino and a positive Indian Ocean dipole confirmed, a warmer than usual summer is predicted around the continent including Tasmania.[2] The National Oceanic and Atmospheric Administration's monthly diagnostic report indicates that there is a strong possibility that this El Nino could become a historically strong event (>2.0°C).[3] The outlook for water temperatures in Macquarie Harbour is, therefore, dire this summer. It follows that the drawdown of dissolved oxygen in subsurface waters of the harbour will be greatly exacerbated—by both the warmer waters decreasing the solubility of oxygen and the warmth also enhancing the rate of microbial decomposition processes exhausting dissolved oxygen. The warming of ocean temperatures, particularly during summer heat events, is a substantial change in circumstance not foreseen at the time of the first decision.

We have provided this further information to Mr Jacobi, Secretary for the Tasmanian Department of Natural Resources and Environment, and Mr Brooksbank, CEO of Hydro Tasmanian to inform their decision-making regarding Macquarie Harbour and the Maugean Skate. We have **enclosed** those letters for your ready reference.

Request for correspondences

We understand, in reference to an article in The Mercury,[4] that correspondence has occurred between yourself and Premier Rockliff regarding a letter sent from Premier Rockliff to Prime Minister Albanese in September regarding finfish farming in Macquarie Harbour and impacts on the Maugean Skate. We request copies of correspondence between yourself, Prime Minister Albanese and Premier Rockliff regarding finfish farming and the Maugean Skate.

Our client has a right to request access to this information under section 11 of the Freedom of Information Act 1982 (**FOI Act**). We make this request informally in the understanding that you may choose to provide access to this information outside of the formal request process while meeting the principles and objectives of the FOI Act.

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[1] Ridgway, K.R. and Ling, S.D., 2023. Three decades of variability and warming of nearshore waters around Tasmania. Progress in Oceanography, 215, 103046.

[2] http://www.bom.gov.au/climate/outlooks/#/temperature/summary. Accessed 1 Nov 2023.

[3] https://www.abc.net.au/news/2023-11-16/holder-nsw-el-nino-set-to-peak-as-one-of-the-strongest/103104264. Accessed 17 November 2023.

[4] Inglis, 7 November 2023, Pause on Salmon Farming Possible, The Mercury.

Should you have any questions concerning matters raised in this letter, please contact Claire Bookless on (03) 6223 2074 or by email at claire.bookless@edo.org.au

Yours sincerely,

Environmental Defenders Office

Claire Bookless
Managing Lawyer – lutruwita/Tasmania

Reference numbers: S5617 and S5619

Copied to:

Mr. David Fredericks PSM,
Secretary of the Department of Climate Change, Energy, the Environment & Water
By email: david.fredericks@dcceew.gov.au

Senator the Hon Murray Watt, Minister for Agriculture, Fisheries & Forestry
By email: minister.watt@aff.gov.au

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-6 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

.....

A legal practitioner with a current Tasmanian practising certificate

FITZGERALD AND BROWNE

LAWYERS

Our Ref: RAB:8360

22 December 2023

The Hon. Tanya Plibersek
Minister for the Environment and Water
PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

By email: minister.plibersek@dcceew.gov.au

Dear Minister,

MARINE FARMING EXPANSION, MACQUARIE HARBOUR, TASMANIA
(EPBC 2012/6406)

I refer to my letter to you dated 25 July 2023 requesting a reconsideration of the decision made on 3 October 2012 to permit marine farming expansion in Macquarie Harbour in Tasmania.

I further refer to your media announcement on 30 November 2023 which was followed approximately one day later by correspondence from Ms Rachel Short, Departmental Branch Head, further explaining your response to the reconsideration request made by my client, but also the reconsideration requests made by others.

Under the Act, you have a statutory obligation under s. 78C to make a decision as soon as practicable after the expiry of 10 business days from the invitation for public comment being issued. Your decision to open up an extensive public commentary process for a lengthy period of time runs counter to the latest evidence about the plight of the Maugean skate. That advice has originated from IMAS within the University of Tasmania, but also from your own department. As has been pointed out, the Maugean skate is merely one significant event away from extinction.

On my client's behalf, I would like to record that it objects to the extensive public consultation process, given you already have all necessary information. The plight of the skate is dire and urgent action is needed from you as minister.

PARTNERS
Roland Browne
Oona Fisher
Richard Griggs

ASSOCIATE
Stephen Cronin

GPO Box 1951, Hobart 7001
Level 2, T & G Building,
115 Collins Street, Hobart 7000

Tel: (03) 6224 6777
Fax: (03) 6224 6755

www.fitzgeraldandbrowne.com.au
E: thefirm@fablawyers.net.au

In the above circumstances, we urge you to make a decision as soon as possible. Given the consultation process you have now unleashed, my client regards close of business on 23 February 2024 as a date by which a Court would regard a reasonable period of time to have to have elapsed for the purpose of you discharging your responsibilities under the Act.

I look forward to your earliest response.

Yours faithfully,
FITZGERALD AND BROWNE

Roland Browne
E:rolandb@fablawyers.net.au

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-7 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

.....

A legal practitioner with a current Tasmanian practising certificate

CLAYTON UTZ

Confidential

Email

16 January 2024

Mr Roland Browne
Partner
Fitzgerald and Browne
thefirm@fablawyers.net.au

Dear Mr Browne

Marine Farming Expansion, Macquarie Harbour, Tasmania (EPBC2012/6406)

We refer to your letter of 22 December 2023 addressed to the Honourable Tanya Plibersek, Minister for the Environment and Water.

We act of the Minister in relation to the reconsideration of the decision made of 3 October 2012 (the "**Decision**") in relation to the expansion of marine farming in Macquarie Harbour under s 75 of the *Environmental Protection and Biodiversity Conservation Act 1999* (the "**EPBC Act**").

Our client will, as soon as practicable, reconsider the Decision pursuant to ss 78 and 78C of the EPBC Act in accordance with law. It is not possible to indicate a particular date by which time this will occur.

As a person who has made a request for reconsideration, your client will be notified of the outcome of the reconsideration in accordance with s 78C(2)(a) of the EPBC Act.

Yours sincerely

Caroline Bush, Partner
+61 2 6279 4029
cbush@claytonutz.com

David Blencowe, Senior Associate
+61 2 6279 4042
dblencowe@claytonutz.com

Our ref 251/18335

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-8 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

.....

A legal practitioner with a current Tasmanian practising certificate

FITZGERALD AND BROWNE

LAWYERS

Our Ref: RAB:8360

13 September 2024

The Hon. Tanya Plibersek
Minister for the Environment and Water
PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

By email: minister.plibersek@dcceew.gov.au

Dear Minister,

MARINE FARMING EXPANSION, MACQUARIE HARBOUR, TASMANIA (EPBC 2012/6406)

On 25 July 2023, I wrote to you on behalf of Bob Brown Foundation Inc., for which organisation I act, requesting a reconsideration of the decision made on 3 October 2012 to permit marine farming expansion in Macquarie Harbour in Tasmania. On 30 November 2023, I received a letter from Rachel Short, Branch Head, Environment Assessments (Vic and Tas) and Post Approvals Branch, Nature Positive Regulation Division, informing me that my client's request for reconsideration met the requirements of the Act and that you were embarking upon, or had embarked upon, the reconsideration process.

About 10 months have now passed since that notification and over 14 months have passed since the request for reconsideration. The request was based in part on the interim report from Tasmania's Institute of Marine and Antarctic Studies – Macquarie Harbour Maugean Skate Population Status and Monitoring Report dated 2 May 2023, referred to in my letter of 25 July 2023.

As stated in that letter, the study demonstrated that significant impacts were and are being inflicted upon the Maugean Skate and that the significant impact is continuing.

The plight of the Skate requires urgent attention because marine farming for salmon continues in Macquarie Harbour, unabated, with ongoing and significant impacts to the Maugean Skate.

PARTNERS
Roland Browne
Oona Fisher
Richard Griggs

ASSOCIATE
Tiarni Barr

GPO Box 1951, Hobart 7001
Level 2, T & G Building,
115 Collins Street, Hobart 7000
Tel: (03) 6224 6777
Fax: (03) 6224 6755
www.fitzgeraldandbrowne.com.au
E: thefirm@fablawyers.net.au

Given the urgency surrounding the plight of the Skate, I write to ask for an explanation for your delay in completing the reconsideration of the 2012 decision. My client is extremely anxious to see progress in the reconsideration of that decision and protection for the Skate. As each week passes, the process of extinction continues. Your duty under the *Environment Protection and Biodiversity Conservation Act* 1999 is, in fact, to protect such critically endangered species and to facilitate recovery. Discharge of those duties requires you to make the decision.

Accordingly, I ask for an explanation from you within 21 days as to the reason or reasons for the delay in making your decision. Absent that explanation, I will seek instructions from my client to apply for orders pursuant to s. 7 of the *Administrative Decisions (Judicial Review) Act* 1977 and s.39B *Judiciary Act* 1903, for the decision to be made, on the basis that you have failed to make a decision that in these circumstances is required to be made.

I look forward to your response.

Yours faithfully,
FITZGERALD AND BROWNE

Roland Browne
E:rolandb@fablawyers.net.au

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-9 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

A legal practitioner with a current Tasmanian practising certificate

CLAYTON UTZ

Email 26 September 2024

Mr Roland Browne
Fitzgerald and Browne Lawyers
GPO Box 1951
HOBART TAS 7001
RolandBrowne@fablawyers.net.au

Dear Mr Browne

Reconsideration of decision EPBC2012/6406

We refer to your correspondence addressed to the Minister for the Environment and Water (**Minister**) on 13 September 2024 in which you requested an update on the Minister's reconsideration of EPBC decision 2012/6406 – Marine farming expansion, Macquarie Harbour, Tasmania (**reconsideration**). We act for the Minister.

In your letter, you seek an explanation in relation to progress of completion of the reconsideration of the 2012 decision.

We are instructed that the reconsideration process is ongoing. As you may be aware, public consultation in relation to the reconsideration took place between December 2023 and February 2024. A substantial volume of information and material was submitted in response to the public consultation. Information has also been received from those undertaking the action as part of the statutory process prescribed by the (Cth) (**EPBC Act**). The information submitted in relation to the reconsideration is both voluminous and complex in nature, and the department is progressing its consideration of that material as a matter of priority.

The Minister will make a decision in relation to the reconsideration in the manner required by the EPBC Act. Consistent with this position (and in particular, the requirements as prescribed in ss 78 and 78C of the EPBC Act), a decision will be made in relation to the reconsideration as soon as practicable and in a manner which accords with legal requirements, including any requirement to afford procedural fairness to those undertaking the action.

As a person who has made a request for reconsideration, your client will be notified of the outcome of the reconsideration in accordance with s 78C(2)(a) of the EPBC Act.

Please direct all future correspondence in relation to this matter to Clayton Utz.

Yours sincerely

Caroline Bush, Partner
+61 2 6279 4029
cbush@claytonutz.com

Deborah Mak, Senior Associate
+61 2 6279 4025
demak@claytonutz.com

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-10 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

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A legal practitioner with a current Tasmanian practising certificate

FITZGERALD AND BROWNE

LAWYERS

Our Ref: RAB:8360

20 December 2024

Ms Caroline Bush
Clayton Utz

By email: cbush@claytonutz.com

Dear Ms Bush,

Reconsideration of decision EPBC2012/6406

I refer to your letter of 26 September 2024 proffering a justification for the delay in your client, the Minister, making her reconsideration decision under ss 78 and 78C of the EPBC Act.

The consultation process ended on 2 February 2024. The Minister is under a statutory duty under s 78C(1) of the EPBC Act to make a decision as soon as practicable after that process ended. A bare reference to the volume and complexity of the material may explain some delay, but it goes nowhere near explaining a delay of almost 11 months since the close of consultation. Can you please explain why the decision cannot be made now?

Further, can you confirm:

(a) whether your client is waiting to make her decision until after the Threatened Species Scientific Committee (TSCC) has provided its assessment on the categorisation of the Maugean skate on 30 October 2025;
(b) if so, why it is not practicable for the Minister to make her decision on the assessment before receiving the TSCC decision; and

PARTNERS
Roland Browne
Oona Fisher
Richard Griggs

SENIOR ASSOCIATE
Abigail Bindoff

ASSOCIATE
Tiarni Barr

GPO Box 1951, Hobart 7001
Level 2, T & G Building,
115 Collins Street, Hobart 7000

Tel: (03) 6224 6777
Fax: (03) 6224 6755

www.fitzgeraldandbrowne.com.au
E: thefirm@fablawyers.net.au

(c) if the Minister is waiting on the TSCC assessment, and assuming that report is provided on time, do you agree that a decision is likely not going to be made by the Minister on the reconsideration until early 2026, at the earliest?

My client is contemplating seeking a writ of mandamus against your client to compel her to make the decision. Before a decision is made to commence proceedings, we would be grateful to receive a more considered explanation for the delay than that which has been provided to date.

Please provide a response by 4:00 pm on 22 January 2025.

Yours faithfully,
FITZGERALD AND BROWNE

Roland Browne
E:rolandb@fablawyers.net.au

Our office will close at 12:00pm on Friday 20 December 2024 and will re-open at 8:30am on Monday 6 January 2025. We wish you the compliments of the season.

Federal Court of Australia

District Registry: Tasmania

Division: General

Bob Brown Foundation Inc

Applicant

Minister for the Environment and Water

Respondent

This is the annexure marked RAB-11 referred to in the affidavit of Roland Alexander Browne affirmed before me the 31st March 2025

.....

A legal practitioner with a current Tasmanian practising certificate

CLAYTON UTZ

Confidential

Email 21 January 2025

Mr Roland Browne
Partner
Fitzgerald and Browne Lawyers
GPO Box 1951
HOBART TAS 7001
rolandb@fablawyers.net.au

Dear Mr Browne

Reconsideration of decision EPBC2012/6406

As indicated in our letter dated 26 September 2024, the reconsideration is progressing in accordance with the EPBC Act. The Minister will not comment on the conduct of the reconsideration process while it is underway.

However, we observe that the TSSC process and the reconsideration process are distinct statutory processes. The Minister is not deferring the reconsideration decision until the TSSC has provided its assessment.

As indicated in our letter dated 26 September 2024, and as you are aware, the completion of the reconsideration process requires the consideration of voluminous and complex material and the completion of various administrative decision-making processes, including appropriate natural justice processes. Having regard to those matters, the decision will be made as soon as practicable.

Our client reserves all her rights with respect to any proceedings commenced by your client.

Yours sincerely

Caroline Bush, Partner
+61 2 6279 4029
cbush@claytonutz.com

Deborah Mak, Senior Associate
+61 2 6279 4025
demak@claytonutz.com

Our ref 251/21530/81044569