RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

Citation:	Wild Drake Pty Ltd v Central Highlands Council and Ors [2019] TASRMPAT 21	
Parties:	*Appellant*:	Wild Drake Pty Ltd
	Respondent:	Central Highlands Council
	First Parties Joined:	Tasmanian National Parks Association Inc., Richard Webb & Paul Smith The Wilderness Society (Tasmania) Inc.
	Second Party Joined:	John Whittington, Director, National Parks & Wildlife
	Intervenor:	The Hon. Elise Archer, Attorney-General
Subject Land:	Halls Island, Lake Malbena, Walls of Jerusalem National Park	
Appeal No:	20/19P	
Jurisdiction:	Planning Appeal	
Hearing Date(s):	24 – 28 June and 8 & 9 August 2019	
Decision Date:	21 October 2019	
Delivered At:	Hobart	
Before:	M Duvnjak, Chairperson F Healy, Member K Loveday, Member	
Counsel:	*Appellant*:	S McElwaine SC
	Respondent:	D Morris / A Beeson
	First Joined Parties:	J Forsyth
	Second Joined Party:	P Turner
	Intervenor – Attorney General:	P Turner
Solicitors:	*Appellant*:	Shaun McElwaine & Associates
	Respondent:	Simmons Wolfhagen
	First Joined Parties:	EDO (Tasmania) Inc.
	Second Joined Party:	Office of the Solicitor General
	Intervenor – Attorney General:	Office of the Solicitor General
Catchwords:	Planning Appeal – jurisdiction – *Environment Protection and Biodiversity Conservation Act 1999*, *National Parks and Reserves Management Act 2002*, *Land Use Planning & Approvals Act 1993*, Central Highlands Interim Planning Scheme 2015, Clause 29.3.1	

REASONS FOR DECISION

Introduction

1. This is an appeal against a refusal of a permit for a proposal for visitor accommodation on Halls Island, Lake Malbena in the Walls of Jerusalem National Park (the WJNP) and the Central Plateau Conservation Area (the CPCA). The WJNP and CPCA are part of the Tasmanian Wilderness World Heritage Area (the TWWHA).

2. The proposal has a number of elements which include visitor accommodation at Halls Island, access over Lake Malbena, a walking track, a helicopter landing site on the eastern shore of Lake Malbena and Mount Oana, and a helicopter flight route from Derwent Bridge to the helicopter landing site (the Proposal).

3. Halls Island is approximately 10ha in area and is located at the eastern end of Lake Malbena. It is within 27m of the shoreline of Lake Malbena at its closest.

4. The proposed route to cross over Lake Malbena for the purpose of the proposal is approximately 160m in length.

5. An existing Hut (the Hut) is located on the island about 50m from the proposed site of the four visitor accommodation buildings. The Hut was built by a private individual in the 1950s. Mr Daniel Hackett, Director of the Appellant, has a lease over the Hut. The Appellant has a lease over Halls Island.

6. In summary, the activity associated with the Proposal comprises the following:

    a) Access to and accommodation on Halls Island for six customers and two guides per trip between November and May in each 12 month period;

    b) Customers will be brought into the CPCA / TWWHA approximately 550m to the east of the visitor accommodation building;

    c) Customers will walk from the helicopter landing site to the shore of Lake Malbena and be transported to Halls Island via private boat;

    d) Customers will spend three nights and four days on Halls Island;

    e) Customers will walk back to the helicopter landing site and depart the area via helicopter;

    f) The activities proposed for customers include:

        i. The helicopter flight – to provide an aerial overview and interpretation of the cultural landscape and Outstanding Universal Value of the TWWHA;

        ii. Kayaking on Lake Malbena;

        iii. European cultural interpretation; and

        iv. Unguided walking on Halls Island.

    g) Helicopters will be used to transport customers, guides, building contractors, gas for heating and cooking, cleaning products and equipment, emptying containers for grey water, emptying containers for black water, food for customers and guides, equipment for use by customers

and guides, and building materials to either the visitor accommodation site or the helicopter landing site to the east.

h) Helicopters will be required to hover over Halls Island whilst dropping off empty waste containers, full gas bottles, equipment and supplies, long lines or sling lines may be used;

i) The proposal is for four habitable buildings, identified in the plans for the proposal incorporating the following elements:

   (a) Electric heating and lighting;

   (b) Shower;

   (c) Toilet;

   (d) Vanity basin;

   (e) Decking between the amenities area and sleeping area;

   (f) External cladding of "FRP flat panel" covering a battened cavity;

   (g) A waterproof membrane in the internal surface of the battened cavity;

   (h) A "SIPS insulation wall panel" (comprising an external wall and internal insulation) behind the waterproof membrane;

   (i) Internal cladding attached to the "SIPS insulation wall panel";

   (j) A settle frame flooring structure attached to a steel post which is secured to the ground with a rock bolt. Installation of the rock bolt requires drilling a hole into the rock;

   (k) A 6mm cement sheet floor structure under the floor panel;

   (l) A "SIPS insulated floor" (comprising an external wall and internal insulation);

   (m) An unknown floor finish over the "SIPS insulated floor";

   (n) A proposed finished floor level of 710mm above natural ground level;

   (o) An aluminium plate awning over the decking;

   (p) Glazed windows; and

   (q) Solar panels.

j) The foot print of the buildings in total will be 87m^2;

k) Water will be collected from the building roofs;

l) Hot water will be provided (using a combination of gas and electricity for heating);

m) The toilet waste and grey water will be collected in separate containers. Each pod will have have separate toilet waste and grey water containers. The containers will have dimensions of 810mm x 810mm x 720mm and have a capacity of 360l.

n) Some clearing of native vegetation is required to accommodate the proposal.

o) The proposal involves exclusive use of Halls Island for customers. The general public may only use Halls Island with the approval of the Appellant.[1]

7. It was agreed between the parties that:

a) There is a sphagnum peatland between the boat landing site and proposed buildings and between the proposed buildings and the rocky ridge to the north. Myrtle forest occurs to the west of the Hut and between the proposed buildings and island highpoint. Eucalypt forest/woodland dominates the rest of the island;

b) Halls Island is currently used for conservation and for recreation activities, specifically bushwalking, fishing and camping. The Hut on Lake Malbena has been accessed and used as accommodation by bushwalkers and fishers for decades; and

c) Bushwalkers/fishers camp on the island near the Hut or stay in the Hut. There is some camping close to the helicopter landing site. Bushwalkers/fishers also camp at Mary Tarn (2km west of Lake Malbena) on the journey to Halls Island;

d) Lake Malbena is approximately 185ha in extent (including islands). It is approximately 3km in the longest east-west axis and 1.2km in the longest north-south axis;

e) The lake is currently used for conservation and for recreational activities, specifically pack-rafting and fishing. Pack-rafts are used on Lake Malbena for general recreation, to access Halls Island and also to move through the Walls of Jerusalem (as an alternative to walking);

f) Lake Malbena – at the edge approximate to Halls Island – can be accessed by walking from:

i. Trawtha Makuminya - south of Olive Lagoon (10km);

ii. From Lake Ina, north to meet Nive River near Lake Tidler and up the Nive River to Lake Malbena (12km);

iii. Lake Ada (13km);

iv. Dixon's Kingdom (14km) which is on the western end of the PWS tracks and facilities in the Walls of Jerusalem National Park;

v. Over Chairman's Plains from Lake Meston (9km); and

vi. The Traveller Range (12km). This range is accessed from the Overland Track.

g) The proposed helicopter landing site and walking route is currently used for conservation and for recreational activities, specifically bushwalking.

h) The proposed helicopter landing site is located 50m to the north of the primary walking route to Halls Island.

[1] The development application states prospective users must have a history of being respectful of the owners, past and present, will be required to indemnify the Appellant and provide identification. The development application states a maximum of three groups per year will be granted access to visit.

The Statutory Controls

8. The site is subject to the Central Highlands Interim Planning Scheme 2015 (the Scheme).

9. The site is in the Environmental Management Zone.

10. The Zone Purpose Statements for the Environmental Management Zone are as follows:

"29.1.1.1 To provide for the protection, conservation and management of areas with significant ecological, scientific, cultural or aesthetic value, or with a significantly likelihood of risk from a natural hazard;

29.1.1.2 To only allow for complementary use or development where consistent with any strategies for protection and management;

29.1.1.3 To facilitate passive recreational opportunities which are consistent with the protection of natural values in bushland areas;

29.1.1.4 To recognise and protect highly significant natural values on private land;

29.1.1.5 To recognise and protect reserved natural areas as great natural assets."

11. There are no local area objectives or desired future character statements.

12. Visitor accommodation use is a permitted use under the Scheme "only if a reserve management plan applies".

13. The Management Plan 'applies', hence the visitor accommodation use is permitted.

14. The application meets all acceptable solutions except the following for which it relies on the performance criteria at Clause 29.3.1 A1 and Clause 29.4.3.

15. There is a dispute between the parties as to whether the application meets the Acceptable Solution at Clause 29.3.1 of the Scheme.

16. The evidence established that there is a dispute between the parties with respect to whether the application meets the Performance Criteria at Clause 29.4.3, Clause E7.7.1 A1/P1 and Clause E11.7.1 A1/P1, although these matters were not the subject of submissions of the parties and appear not to have been contested on appeal.

17. The development application for the Proposal was the subject of 1,338 representations received by the Central Highlands Council (the Council). Council refused the application on 28 February 2019.

18. Council's Grounds of Refusal of the Proposal, incorporating the First Parties Joined's successful application to enlarge, those grounds (showing matters abandoned) are as follows:

"1. The proposal is not compliant with Clause 29.3.1 A1 of the Central Highlands Interim Planning Scheme 2015 (the Scheme) because the use will not be undertaken in accordance with the Tasmanian Wilderness World Heritage Area (TWWHA) Management Plan 2016. The proposal is not complaint with Clause 29.3.1 P1(a), (b), and (c) of the Scheme.

Particulars

a) The Proposal is not compliant with Clause 29.3.1 P1(a) because the use will not be complementary to the use of:

i) The Walls of Jerusalem National Park;

ii) The Central Plateau Conservation Area;

iii) The Tasmanian Wilderness World Heritage Area.

b) The proposal is not compliant with Clause 29.3.1 P1(b) of the Scheme because the use is not consistent with the applicable objectives for management of Reserved Land provided by the National Parks and Reserves Management Act 2002 (the NPRM Act):

i) The proposal is not consistent with the management objectives for the Walls of Jerusalem National Park in Schedule 1 of the NPRM Act because it will not:

(a) Conserve natural biological diversity;

(b) Preserve the quality of water and protect catchments;

~~*(c) Conserve sites or areas of cultural significance;*~~

~~*(d) Encourage education based on the purposes of reservation of natural and cultural values;*~~

(e) Protect or rehabilitate the National Park;

(f) Encourage tourism, recreational use and enjoyment consistent with ~~the purposes of reservation and other management objectives~~ conservation of the National Park's natural and cultural values;

(g) Encourage cooperative management programs with Aboriginal people in areas of significance to them in a manner consistent with the purposes of reservation and the other management objectives;

(h) Preserve the natural, primitive and remote character of wilderness areas.

ii) The proposal is not consistent with the management objectives for the Central Plateau Conservation Area in Schedule 1 of the NPRM Act because it will not:

a) Conserve natural biological diversity;

b) Preserve the quality of water and protect catchments;

~~*c) Conserve sites or areas of cultural significance;*~~

~~*d) Encourage education based on the purposes of reservation of natural and cultural values;*~~

e) Protect or rehabilitate the Conservation Area;

f) Encourage appropriate tourism, recreational use and enjoyment (including private uses) consistent with the conservation of the Conservation Area's natural and cultural values; and

~~*g) Encourage cooperative management programs with Aboriginal people in areas of significance to them in a manner consistent with the purposes of reservation and other management objectives.*~~

c) The proposal is not compliant with Clause 29.3.1 P1(c) of the Scheme because the use will have an unreasonable impact on the amenity of surrounding area through commercial vehicle movements and noise – in particular the movement of helicopters by virtue of the timing, duration and extent of helicopter movements to, from and around the subject site.

2. The Proposal is not compliant with Clause 29.4.3 A1. The proposal is not compliant with Clauses 29.4.3 P1(a) or (c).

Particulars

a) The building and works are located in an area that requires clearing of native vegetation.

b) It has not been demonstrated that there are no sites clear of native vegetation and clear of significant site constraints such as access difficulties or excessive slope (P1(a)(i)).

c) The location of clearing does not have the least environmental impact. (P1(a)(iii)).

d) The location of buildings and works does not have regard to the landscape such that it is consistent with the objectives to Clause 29.4.3 (P1(c)).

3. The Proposal is a prohibited use.

Particulars

The proposal includes helicopter flights and a helicopter landing area. This activity is best categorised as a Transport depot and distribution use. The helicopter flights are directly associated with but are not subservient to the visitor accommodation use and hence is to be categorised separately pursuant to Clause 8.2.5 of the Scheme. Transport depot and distribution is a prohibited use in the Environmental Management Zone.

4. The application is not a valid application for the purposes of s51(1AC) of the Land Use Planning & Approvals Act 1993.

Particulars

i. The use involves off-island activities, including kayaking, hill-walking, bushwalking, cultural interpretation, wildlife viewing, fishing, 'citizen science' style field trips or otherwise described as "Stage 2" in the Reserve Activity Assessment and Environment Protection and Biodiversity Conservation Act 1999 referral (Stage 2 activities);

ii. The stage 2 activities are integral and necessary components to the use and development applied for;

iii. The application ails to provide details of the location(s) of the proposed Stage 2 activity(s) as required by 8.1.2(a) of the Scheme;

iv. *The application fails to provide a full description of the proposed Stage 2 activity(s) as required by clause 8.1.2(c) of the Scheme;*

v. *The application fails to provide a description of the manner in which the proposed Stage 2 activity(s) will operate as required by Clause 8.1.2(d) of the Scheme."*

19. The Appellant's amended Grounds of Appeal dated 15 May 2019 are as follows:

"1. Contrary to the grounds of refusal, the proposal is compliant with clause 29.3.1 A1 of the Central Highlands Planning Scheme 2015 (the Planning Scheme) in that the use will be undertaken in accordance with the Tasmanian Wilderness World Heritage Area Management Plan 2016;

2. Alternatively, and contrary to the alternative ground of refusal relied upon, the proposal is compliant with clause 29.3.1P1(a), (b) and (c) of the Planning Scheme;

3. Contrary to the grounds of refusal, the proposal is compliant with clause 29.3.1 P1(c) of the Planning Scheme;

4. Contrary to the grounds of refusal, the proposal is compliant with clause 29.4.3 A1 of the Planning Scheme;

5. Alternatively, and contrary to the grounds of refusal, the proposal is compliant with clause 29.4.3P1(a) or (c) of the grounds of refusal;

6. Contrary to the grounds of refusal, the proposal is not for a transport depot and distribution use, and is not therefore prohibited pursuant to clause 8.2.5 of the Planning Scheme.

7. Contrary to enlarged ground 4.2(a) the proposal is consistent with the conservation of the National Park's natural and cultural values;

8. Contrary to paragraph 4.2(b) of the enlarged grounds, the proposal is not likely to cause adverse effects such as fire, introduced species, diseases and soil erosion on the natural and cultural values in and adjacent to the National Park and Conservation Area;

9. Contrary to the enlarged ground 4.2(c) the proposal is not non-compliant with clause 29.3.1P1(c) of the Planning Scheme, whether or not noise is a valid consideration after the reference to commercial vehicle movements;

10. Contrary to enlarged ground 4.2(d) none of the particularised items there referred to lead to the proper conclusion that the application was not a valid application within the meaning of s.51(1AC) of the Land Use Planning & Approvals Act 1993."

20. At hearing, the only Scheme provision in issue was Clause 29.3.1. A proper interpretation of that provision is central to a determination of this appeal.

21. The expert planners who gave evidence at the hearing agreed that the key points of difference could be summarised as follows:

- Whether the helicopter landing component of the use is part of the use Visitor Accommodation, or is separately defined as a Transport Depot, which is prohibited;
- Whether the Proposal complies with the Use Standard for Reserved Land – Clause 29.3.1;

- Whether the Proposal complies with Acceptable Solution A1;
- Whether the Proposal complies with Performance Criteria P1;
- Whether the Proposal is a standing camp;
- Whether the Proposal complies with the PWS's Standing Camp Policy;
- Whether helicopter access for customers to a standing camp is anticipated in the Management Plan;
- Whether helicopter access to a standing camp is anticipated in the Standing Camp Policy; and
- Whether the Proposal is located in a Wilderness Area, as distinct from a Wilderness Zone.

22. The evidence before the Tribunal comprised:

For the Appellant:

- Mr Daniel Hackett;
- Mr Andrew North, expert in flora and fauna;
- Mr Frazer Read, expert planner;
- Mr Todd Henderson, architect and designer; and
- Mr Nick Mooney, expert in fauna.

For the Council:

- Mr Alex Brownlie, expert planner;
- Dr Phil Bell, expert flora and fauna;
- Mr Steve Curtain, who prepared three videos of the areas within which the proposal and associated activities would be carried out;[2]
- Mr Jason Wiersma, expert fauna.

For the First Parties Joined

- Mr Martin Hawes, wilderness expert;
- Mr David Barnes, planning expert;
- Mr Gustaf Reutersward, acoustical engineering; and
- Mr David Jordan, aviation safety.

23. In addition, the Tribunal had before it all of the representations made to the Council with respect to the Proposal.

[2] Exhibit C9

Jurisdictional Issues

24. The Attorney-General and the Appellant have raised a number of jurisdictional issues required to be considered by the Tribunal prior to the consideration of the grounds of appeal.

25. A determination with respect of the jurisdictional issues raised requires a consideration of the different statutory regimes that apply or might apply to the proposal.

26. The Proposal seeks to be located in the WJNP and the CPCA, being "Reserved Land" within the meaning of the *National Parks & Reserves Management Act* 2002 (the Management Act) and is therefore subject to the provisions of that Act which provide for the management of Reserved Land.

27. The Director of National Parks & Wildlife (the Director) is the managing authority for all Reserved Land.[3]

28. Part 3 of the Management Act provides for the creation of "management plans" for the managing of Reserved Lands. The Tasmanian Wilderness World Heritage Area Management Plan "Management Plan" was created pursuant to the provisions of the Management Act and is the management plan applicable to the area, the subject of the proposal.

29. There is no dispute as to the application of the Management Act and the Management Plan to this proposal. In contention in this appeal is the applicability of, the legality of, and the interpretation of the relevant provisions of the *Land Use Planning & Approvals Act 1993 (the LUPA Act)* and the local planning statutory controls.

30. The area the subject of the Proposal falls for consideration under the Scheme and is within the Environmental Management Zone. Visitor accommodation use is permitted in the Environmental Management Zone "only if a reserve management plan applies". By definition, the TWWHA is the reserve management plan applicable to the Proposal.

31. The issue on appeal is whether the Proposal meets the Acceptable Solution under Clause 29.3.1. If the Acceptable Solution is not met, compliance is required with the relevant Performance Criteria.

32. Clause 29.3.1 of the Scheme provides:

29.3.1 – Use Standards for Reserved Land

<table>
<tr><td colspan="2">Objectives</td></tr>
<tr><td colspan="2">To provide for use consistent with any strategies for the protection and management of Reserved Land.</td></tr>
<tr><td>Acceptable Solutions</td><td>Performance Criteria</td></tr>
<tr><td>A1

Use is undertaken in accordance with a reserve management plan.</td><td>P1

Use must satisfy all of the following:

(a) Be complementary to the use of the Reserved Land;

(b) Be consistent with any applicable objectives for management of Reserved Land provided by</td></tr>
</table>

[3] Section 29

	the *National Parks & Reserves Management Act 2002*; and (c) Not have an unreasonable impact upon the amenity of the surrounding area through commercial vehicle movements, noise, lighting or other emissions that are unreasonable in their timing, duration of extent.

33. The Tribunal is not deprived of jurisdiction to hear and determine appeals under the LUPA Act in circumstances where an invalid decision may have been made by a planning authority.[4]

Does the LUPA Act apply?

34. The Attorney-General intervened in the proceedings before the Tribunal. The Attorney-General contends that the Tribunal does not have jurisdiction to entertain this appeal as the *National Parks & Reserves Management Act* 2002 (Management Act) covers the field with respect to the management of Reserved Land as specific provision is made for the use and development of Reserved Land in the Management Act. It was submitted that those specific provisions are set out in Part 3 and must be construed such that the LUPA Act has no work to do. It was submitted that 'Reserved Land' which is the subject of the management plan is taken outside the provisions of the LUPA Act that would otherwise apply. In essence, the Attorney-General's submissions, if accepted, mean that there was no obligation by the Appellant pursuant to s51(1) of the LUPA Act to apply for a planning permit. That the Reserve Activity Assessment carried out pursuant to the Management Plan identified a requirement for that external assessment as part of the overall assessment under the Management Plan, it was submitted, is of no significance.

35. The Appellant joined with and adopted the position of the Attorney-General.

36. The WJNP and CPCA within which the Proposal is to be carried out is within the TWWHA and the subject of the Management Plan.

37. The Management Act which commenced on 31 December 2002 provides for the management of Reserved Land.

38. 'Reserved Land' is defined in the Management Act as having the same meaning as in the *Nature Conservation Act* 2002:

> *"**Reserved Land** means:*
>
> *(a) any land declared under this Act to be Reserved Land; and*
>
> *(b) any land taken to have been so declared."*

39. The land the subject of this Proposal is 'Reserved Land'.

40. Part 3 of the Management Act provides for the creation of 'management plans" for the managing of Reserved Land. It sets out the process for the preparation, public exhibition, consultation and submission to the Governor for approval of the management plan.

41. S27 of the Management Act provides:

> ***"27. Contents of management plans***

[4] *Meander Valley Council v RMPAT* (2018) 27 TAS.R. 342 at [48].

(1) A management plan for any Reserved Land –

(a) may indicate the manner in which the powers of the managing authority under this Act are to be exercised in relation to that land, or any part of that land; and

(b) may prohibit or restrict, in relation to that land or any part of that land, the exercise of those powers; and

(c) if the land is a private sanctuary or private nature reserve, may specify the cases and the circumstances in which the owner of the land is bound by the regulations; and

(d) is to specify the purposes for which that land was reserved; and

(e) if the management plan relates to particular land of a single class, is to specify any or all of the management objectives which apply to land of that class as the objectives for which the land is to be managed; and

(f) if the management plan relates to particular land of a single class, is to specify the reasons for which any management objectives for that class of Reserved Land –

(i) have been specified in the management plan as the objectives for which that land is to be managed; and

(ii) have not been specified in the management plan as the objectives for which that land is to be managed; and

(g) if the management plan relates to more than one class of Reserved Land, is to specify any or all of the management objectives for each class of Reserved Land as the objectives for which the land in that class is to be managed; and

(h) if the management plan relates to more than one class of Reserved Land, is to specify the reasons for which any management objectives for any of those classes –

(i) have been specified in the management plan as the objectives for which the land in that class is to be managed; and

(ii) have not been specified in the management plan as the objectives for which the land in that class is to be managed; and

(i) may specify any condition that applies to the application of any management objective specified in the management plan; and

(j) is to specify the manner in which the management objectives specified in the management plan are to be achieved; and

(k) may contain any other provisions that are authorised by this Act to be contained in that plan.

(2) A management plan for any land within a national park, State reserve, nature reserve, game reserve or historic site may make provision for the use or

development of that land otherwise than under the powers conferred by this Act and for that purpose may authorise the exercise in relation to that land, subject to any restrictions specified in the plan, of any statutory power.

(3) Any provisions in a management plan giving an authority referred to in subsection (2) are of no effect unless the inclusion of those provisions in that plan is approved by each House of Parliament.

(4) For the purposes of this section, a House of Parliament is taken to have approved the inclusion of provisions in a management plan giving an authority referred to in subsection (2) if a copy of the plan with the provisions clearly indicated has been laid on the table of that House and –

(a) the inclusion is approved by that House; or

(b) at the expiration of 5 sitting days after the plan was laid on the table of that House –

(i) no notice has been given of a motion to disallow the inclusion; or

(ii) if such notice has been given, the notice has been withdrawn or the motion has been negatived; or

(c) if a notice of a motion to disallow the inclusion has been given but not withdrawn or negatived during that period of 5 sitting days, the notice is withdrawn or the motion is negatived after the expiration of that period.

(5) Notice of approval under subsection (3) of the inclusion in a management plan of provisions referred to in subsection (2) are to be published in the Gazette by the Clerk of the House which has granted approval as soon as practicable.

(6) A management plan for any land within a conservation area, nature recreation area, regional reserve, private nature reserve or private sanctuary may prohibit or restrict the exercise in relation to that land of any statutory powers.

(7) Any restriction imposed by a management plan under this section on the exercise of a statutory power may be a restriction specifying the conditions subject to which it may be exercised, or the circumstances in which it may or may not be exercised.

(8) Any condition imposed by a management plan under this section on the exercise of a statutory power may be a condition requiring the carrying out, or designed to facilitate or promote the carrying out, of works and other operations during or after the exercise of that power, or requiring the entering into of contracts or the making of any other arrangements designed to secure the carrying out of those works or operations."

42. Under s29, the Director of the National Parks & Wildlife is the managing authority for all Reserved Land other than those set out in s29(1)(a) and (b). The Director is required to manage the Reserved Land for the purpose of giving effect to the management plan in accordance with the provisions of that plan.[5]

[5] See s30.

43. Clause 1 of Schedule 1 of the Management Act sets out the objectives for the management of Reserved Land classed as a national park and provides as follows:

Column 1 **Class of Reserved Land**	**Column 2** **Management objectives**
National Park	The following objectives: (a) to conserve natural biological diversity; (b) to conserve geological diversity; (c) to preserve the quality of water and protect catchments; (d) to conserve sites or areas of cultural significance; (e) to encourage education based on the purposes of reservation and the natural or cultural values of the national park, or both; (f) to encourage research, particularly that which furthers the purposes of reservation; (g) to protect the national park against, and rehabilitate the national park following, adverse impacts such as those of fire, introduced species, diseases and soil erosion on the national park's natural and cultural values and on assets within and adjacent to the national park; (h) to encourage and provide for tourism, recreational use and enjoyment consistent with the conservation of the national park's natural and cultural values; (i) to encourage cooperative management programs with Aboriginal people in areas of significance to them in a manner consistent with the purposes of reservation and the other management objectives; (j) to preserve the natural, primitive and remote character of wilderness areas.

44. In preparation of the management plan, the Director is to have regard to the purposes of the reservation and those management objectives set out in Clause 1 of Schedule 1.[6] The management plan is a plan for the use, development and management of any Reserved Land.[7]

The Tasmanian Wilderness World Heritage Management Plan 2016

6 S20(11).
7 S19(2).

45. Importantly, the Management Plan itself provides[8] that:

> *"The Management Plan sets out what uses may occur within the TWWHA, where they may occur and under what circumstances, including the application of applicable assessment processes and criteria. Guidance is provided primarily through a zoning and overlay system with an associated Table of Use, as well as through a number of specific prescriptions. The Plan is expected to provide a strategic direction for the management of the TWWHA for at least the next seven years."*

46. At page 11 the Management Plan provides that:

> *"The Plan prescribes criteria for the assessment of activities in the TWWHA to ensure the protection of World Heritage and other natural and cultural values of the TWWHA. The criteria ensure that indirect and cumulative impacts are considered in addition to social and economic impacts. Additional criteria are also prescribed for commercial tourism proposals in the TWWHA. These provide certainty for stakeholders and tourism industry and provide for appropriate considerations of the sustainability of any proposal."*

47. At page 14 the Management Plan provides:

> *"Use and potential development in the TWWHA are primary regulated and controlled through a system of four management zones and nine management overlays… a Table of Use is associated with the Management Zone and Management Overlay system. The Table helps to clarify the types of permitted activities, the circumstances under which they may occur and the spacial area where they may generally occur, including the application of assessment processes and criteria."*

48. The Management Plan recognises, at Part 1.4, two key pieces of legislation that provide for the proclamation and management of the protected areas. The *Nature Conservation Act* 2002 provides the mechanism for proclamation of land as Reserved Land. The Management Act provides for the management of Reserved Land. The LUPA Act is not identified in Clause 1.5 of the Management Plan as applying to the TWWHA.[9] However, the Management Plan identifies on page 32 that a number of Acts apply throughout the TWWHA and at page 85, at paragraph 3.3.5 of the Management Plan, a number of other Acts which may apply other regulatory process are identified. The LUPA Act is not included.

49. At paragraph 3.3.2 of the Management Plan, there is reference to Local Government planning approval. The Management Plan provides:

> *"In Tasmania, the Land Use Planning & Approvals Act 1993 (LUPAA) regulates land use and development through the planning scheme administered by local councils. Proposals within the TWWHA may require a statutory assessment process that is provided by LUPAA. Depending on the type of use or development being proposed, the provisions of the planning scheme may require public consultation as set out under LUPAA."*

50. The Management Plan provides for a reserve activity assessment (RAA) process for new and recurrent works, and for activities that over a period of time have the potential to cause adverse environmental, social or economic impacts.[10]

---

[8] Page 8.
[9] The State Coastal Policy and Projects Act 1993, the Threatened Species Protection Act 1995 and the Weed Management Act 1999 are referred to.
[10] Page 81 of the Management Plan.

51. The RAA process is set out in Figure 3.1 of the Management Plan.[11] Additional criteria set out at page 82 of the Management Plan are required to be satisfied in the RAA process.

52. Nothing in the LUPA Act or the Management Act expressly exclude the operation of the other in relation to a proposal located within the TWWHA.

53. It was as a result of the advice of the Director (Parks & Wildlife having undertaken the RAA), that the Appellant sought approval for a grant of a permit for the proposal pursuant to the LUPA Act.

54. The site of the Proposal is within an area subject to the Central Highlands Interim Planning Scheme 2015 (the Scheme), located in the Environmental Management Zone. Accepting that the proposal involves visitor accommodation use[12], such a use is permitted "only if reserved management plan applies". Visitor accommodation use is therefore a permitted use.

55. The Acceptable Solution at Clause 29.3.1 of the Scheme requires that the use is undertaken in accordance with a reserve management plan. If the proposal fails to meet the Acceptable Solution, the Performance Criteria set out at Clause 29.3.1 P1(a), (b) and (c) must all be satisfied. The criteria under Clause 29.3.1 P1 require consistency with the objectives for the management of the Reserved Land provided for in the Management Act, that there be no unreasonable impact on amenity through vehicle movements, noise etc., and the use must be complementary to the use of the Reserved Land.

56. If Clause 29.3.1 of the Scheme contemplates an additional assessment to that proposed under the Management Plan, Mr Turner's submits that, in substance, a dual assessment regime is created and the Management Plan and the Scheme cannot sensibly co-exist.

57. A consideration of both Acts is required. S51(1) of the LUPA Act provides:

> *"S51 Permits*
>
> *(1) A person must not commence any use or development which, under the provisions of a planning scheme, requires a permit unless the planning authority which administers the scheme, the Commission or the Tribunal, has granted a permit in respect of that use or development and the permit is in effect."*

58. The provisions of the LUPA Act require a permit with respect to this Proposal. As already noted, no provisions in the Management Plan specifically exclude the operation of the LUPA Act. As noted by Council the Crown is bound by the provisions of the LUPA Act. S4 of the LUPA Act provides:

> ***"4. Application of Act***
>
> *(1) This Act binds the Crown in right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities.*
>
> *(2) Subject to subsection (3) , this Act applies to all parts of the State except such parts as may from time to time be prescribed in the regulations and, in particular, applies to land in Wellington Park, as defined in the Wellington Park Act 1993 .*
>
> *(3) Part 3 of this Act does not apply to public land, within the meaning of the Public Land (Administration and Forests) Act 1991 that is the subject of a reference to the Commission."*

[11] Page 83.
[12] Council's argument that a transport depot use is also part of the proposal is discussed later.

59. Council submitted that s4(2) provides a pathway to exclude parts of the State from the ambit of the Act. No such exclusion exists. Council referred the Tribunal to the decision in *Bates and The Wilderness Society Inc. v the Minister for Transport & Works, The Honourable Ian Braid*[13]. The Tribunal, in that decision, in its consideration of the proper interpretation of s4, had regard to the Clause Notes associated with the *Land Use Planning & Approvals Bill* 1993 and a second Reading Speech. The relevant Clause 4 said:

> *"Note that it is possible to exclude certain parts of the State from the operation of the Act, by means of proclamation. A comparable provision is found in the current law. It is conceivable that an area of public land – for example a State reserve – could be excepted from the operation of planning schemes, if those schemes do not reflect a management plan prepared by the State Government."*

The Tribunal then said:

> *"To that end I accepted the tender by the representatives of both the applicants and the respondent of the Clause Notes to the Land Use Planning and Approvals Bill 1993 and the relevant sections of the Hansard Parliamentary Debates for the Legislative Council which detail the speech of Mr Fletcher, Member for Russell and Deputy Leader for the Government, in moving that the Land Use Planning and Approvals Bill 1993 be read the second time."*
>
> *"Interpreted with the aid of that extrinsic material it would appear that Parliament intended to limit the use of Section 4(2) to avoiding a duality of planning controls or a conflict between a planning scheme and a State management plan."*

60. The TWWHA has not been excluded from the application of the LUPA Act. The Management Plan contemplates external assessment pursuant to LUPA Act, as does the RAA. An inconsistency could arguably arise if a particular interpretation of the Acceptable Solution was adopted but on a consideration of the ordinary words of the Management Plan and the Scheme evidences that co-existence was both contemplated and intended.

61. The First Parties Joined submitted that with respect to State laws, there is a strong presumption that a single legislature does not intend to contradict itself, but the intention is that both Acts operate.[14]

62. The presumption is concisely set out in the decision of Fullagar J in Butler v Attorney-General[15] for the State of Victoria as follows:

> *"It should be pointed out in this connexion that the position where contrariety is suggested between an earlier and a later State statute is not quite the same as the position where inconsistency, within the meaning of s. 109, is suggested between a Commonwealth Act and a State Act. The Commonwealth Parliament is, within its sphere of power, a paramount legislature, and there can be no presumption either that it did, or that it did not, intend by its own Act to supersede or preclude from operation a State Act. But, where the comparison to be made is between two State Acts, there is a very strong presumption that the State legislature did not intend to contradict itself, but intended that both Acts should operate."*

63. As noted by Gaudron J in *Saraswati v R*[16]:

> *"It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that*

[13] [1995] TASRMPAT 65.
[14] *Butler v Attorney-General for the State of Victoria* [1961] 106 CLR 268 per Fullagar J at page 276, per Kitto J at page 280, and per Taylor J at page 285.
[15] [1961] 106 CLR 268 at page 276.
[16] [1991] 172 CLR 1 at page 17.

implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other."

64. What is required for an implied repeal is an irreconcilable inconsistency between the earlier and the later statute.[17]

65. The Tribunal does not accept that the provisions of the Management Act and the LUPA Act are irreconcilable. While overlap exists between the power of the managing authority with respect to use and development and control over activities under the Regulations and the power of a planning authority in issuing a permit, the overlap is not such as to create an inconsistency to displace the presumption that the legislature intended that both provisions should operate. As noted by Kirby J in *Ferdinands v Commissioner for Public Employment*[18]:

> *"The most enduring of the canons of construction that have been applied throughout the history of this Court is that which enjoins the decision-maker, faced with apparent statutory intersection, to endeavour, to the fullest extent permitted by the language, to read the two statutes so that each, within its own sphere, can continue to operate, such that no part of either is taken to be repealed or inoperative, for Parliament has not said so."*[19]

66. The position of the Attorney-General is that, with respect to Reserved Land where a reserve management plan applies, the provisions of Part 3 of the Management Act displaces the LUPA Act as, Part 3 of the Management Act establishes a framework for the management of Reserved Land by the Director. That framework is comprehensive. S27 provides that a management plan for any Reserved Land may indicate the manner in which the powers of the managing authority under this Act are to be exercised in relation to that land, or any part of that land and may prohibit or restrict in relation to that land, or any part of that land, the exercise of those powers.[20] Other functions of the Director include the care and management of Reserved Land, which includes construction of buildings and carrying out works, maintaining facilities, conveniences and managing fire. The *National Parks & Reserved Lands Regulations* 2009 provide for other matters that a managing authority can control.[21]

67. The LUPA Act is concerned with what the dominant use of land should be having regard to the Objective in Schedule 1 of the Act. The LUPA Act requires a planning permit for the use and development of the land in the manner proposed. While the Management Act requires a number of prerequisites to be met before an approval[22] (the business licence or lease) to the extent that it provides the Minister with power to control the use and development of the Reserved Land, there is an overlap with the planning system.

68. The First Parties Joined submitted that the situation in this appeal is no different to any other situation in which a person who owns or controls land regulates (through contract) the use and development of land (e.g. through a private lease). It was submitted that no overlap causes "conflicting commands that cannot be obeyed".[23]

69. The LUPA Act does not displace any express words appearing in the Management Act. The LUPA Act does expressly exclude the operation of a planning scheme or special planning order with respect

---

17 Butler v Attorney-General for the State of Victoria [1961] 106 CLR 268 per Fullagar J at page 276, per Kitto J at page 280, and per Taylor J at page 285.
18 (2006) 225 CLR 130; [2006] HCA 5 at [49].
19 At paragraph [105]-[110].
20 S26(1)(a) and (b).
21 Designated dog walking areas - Regulation 8; horse riding areas – Regulation 9; fuel stove areas – Regulation 10; camping areas – Regulation 11.
22 Granting of a business licence or lease to occupy Reserved Land.
23 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] 228 CLR 566 at [2].

to a number of Acts and activities.[24] No similar exclusions have been made for use and development in Reserved Land subject to a Management Plan under the Management Act.

70. The provisions of the LUPA Act empower a planning scheme to provide for, prohibit, and regulate use and development of "any land".[25] The definition of land does not exclude Crown Land or Reserved Land.[26]

71. The Management Plan itself contemplates the applicability of the LUPA Act and relevant planning scheme. Part 3.3 of the Management Plan states:

> *"Where the plan allows for a use to potentially occur (for example, new visitor infrastructure), that activity may be subject to a number of assessment and approval processes …The relevant assessment and approval processes determine if a specific proposal is compatible with the Vision and Management Objectives set out in the Management Plan, in addition to any other lawful requirements. This section of the plan outlines assessment and approval processes that may apply to a range of possible activities within the TWWHA."*

And further, at 3.3.2 of the Management Plan:

> *"In Tasmania, the Land Use Planning and Approvals Act 1993 (LUPAA) regulates land use and development through the planning scheme administered by a local council. Proposals within the TWWHA may require a statutory assessment process that is provided by LUPAA. Depending on the type of use or development being proposed, the provisions of the planning scheme may require public consultation set out under LUPAA."*

72. No other guidance or indeed no other reference to the application of planning schemes or the LUPA Act are referred to in the Management Plan. No guidance is provided as to when the provisions of the LUPA Act would apply to a proposal within the TWWHA and when it would not. The external assessments required as per Figure 3.1 of the Management Plan forms part of the RAA process.

73. The Scheme provisions specifically reference Reserved Land and make provision for use and development where a reserved management plan exists. In its Table of Uses, a number of uses are identified as permitted only if a reserved management plan applies. Tourism operation use is one of those permitted uses. A number of those permitted uses, if a reserve management plan applies, become discretionary if no such plan applies. Again, the visitor accommodation use is such a use.

74. The objective of the Use Standard at Clause 29.3 of the Scheme is "to provide for use consistent with any strategies for the protection and management of Reserved Land. The Acceptable Solution

---

[24] Paragraphs 43 + 44 of the First Parties Joined's jurisdictional submissions:
"43. The LUPA Act expressly states that a planning scheme or special planning order does not apply to:
a) Forestry operations on land which is a private timber reserve under the Forest Practices Act 1985;
b) Mineral exploration under the Mineral Resources Development Act 1995 if compliant with the relevant Code of Practice;
c) Fishing; and
d) Marine farming in State waters.
44. In addition:
a) A planning scheme cannot prohibit or require a discretionary permit in a 'proclaimed wharf area' for 'port and shipping purposes";
b) A permit is not required for dam works if a period is in force under the Water Management Act 1999; and
c) A permit is not required for development by water entities in specified circumstances;
d) Part 3 of the Act does not apply to public land which has been referred to the Commission under the Public Land (Administration and Forests) Act 1991."

[25] S20(2).

[26] ***land*** includes –
(a) buildings and other structures permanently fixed to land; and
(b) land covered with water; and
(c) water covering land; and
(d) any estate, interest, easement, servitude, privilege or right in or over land;

at Clause 29.3.1 requires that a use is undertaken in accordance with the reserved management plan. The Performance Criteria, amongst other things, require consistency with any applicable objectives for the management of Reserved Land and provided by the Management Act.

75. Likewise, in Clause 29.4.3 A1 of the Scheme, the location of buildings and works must be "as prescribed in an applicable reserve management plan."

76. The Tribunal accepts the submissions of the Council and the First Parties Joined, that both the Management Plan and the provisions of the Scheme contemplate the other's assessment process and can co-exist. How comfortably they can do so, however, may depend on the interpretation of Scheme provisions. No inconsistency is evident which would justify an implied repeal.

77. The LUPA Act and the Management Act do not exclude the operation of the other. In the Tribunal's view, had Parliament intended the provisions of the LUPA Act be excluded from operation with respect to Reserved Land, simple mechanisms existed for doing so. The reference to the applicability of the LUPA Act, although not well defined, in the Management Plan supports this interpretation.

Preliminary matters raised by the Appellant

78. The Appellant adopted the Attorney-General's submissions but also raised four additional matters which it submitted deprive the Tribunal of power to hear and determine this appeal or limit the scope of the inquiry required to be made. They are:

    a) That the effect of the operation of the *Environment Protection & Biodiversity Conservation Act 1999* (EPBC Act) is to limit the scope of any merits assessments that the Tribunal may be authorised to undertake.

    b) That it is not open to the Tribunal to conduct a merits review of the assessment process provided for in the Management Plan being the Reserve Activity Assessment (RAA) provided for by Clause 3.3 of the Management Plan.

    c) Alternatively the Appellant argues that if Clause 29.3.1 of the Scheme purports to authorise a merits review of the RAA assessment process then Clause 29.3.1 is *ultra vires*.

    d) Alternatively if Clause 29.3.1 of the Scheme is not ultra vires, then upon a true construction its meaning is limited to a determination of whether the use class visitor accommodation will be undertaken in accordance with the Management Plan.

Does the EPBC Act limit the scope of any merits assessments that the Tribunal may be authorised to undertake?

79. It was submitted by the Appellant that it is not open to the Tribunal to make a decision on the same subject matter that is covered by determination of the Minister pursuant to the EPBC Act.

80. On 31 August 2018, the Federal Environment Minister's delegate determined that the proposed action "to construct and operate a small-scale tourist operation, including a standing camp on Halls Island, Lake Malbena and helicopter access, approximately 20 km north east of Derwent Bridge, Tasmania, as described in the referral received by the Department on 28 March 2018"[27] was not a "controlled action" as defined in s75 of the EPBC Act.

81. The Appellant's referral to the Minister was made pursuant to s68 of the EPBC Act which provides as follows:

[27] See EPBC Act referral 2018-8177.

"68 Referral by person proposing to take action

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

(2) A person proposing to take an action that the person thinks is not a controlled action may refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.

(3) In a referral under this section, the person must state whether or not the person thinks the action the person proposes to take is a controlled action.

(4) If the person states that the person thinks the action is a controlled action, the person must identify in the statement each provision that the person thinks is a controlling provision.

(5) Subsections (1) and (2) do not apply in relation to a person proposing to take an action if the person has been informed by the Minister under section 73 that the proposal has been referred to the Minister.

(6) This section is affected by section 68A."

82. What constitutes a "controlled action" is defined at s67.

"67 What is a controlled action?

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

83. The EPBC Act provides, at s12, that a person must not take an action that has or would have a significant impact on World Heritage values of a declared World Heritage property or is likely to have a significant impact on World Heritage values of a declared World Heritage property. An action is a "controlled action" and requires approval pursuant to the provisions of the EPBC Act if it would otherwise be prohibited by Part 3 of the Act, i.e. actions which will have or are likely to have a significant impact on a matter of national environmental significance (MNES). The EPBC Act has its own assessment and approval requirements. If, following a referral under the EPBC Act, the Minister decides that the action is a "controlled action" then the assessment and approval requirements under the Act must be met. If the decision, as in this case, is that the action is not a "controlled action" then the action may lawfully be taken without such assessment or approval.

Part 3 of the Act

84. The Appellant's EPBC Act referral report discloses / considers a number of potential '*matters of national environmental significance*' (MNES) as follows:

a) Wedge Tailed Eagle

b) Alpine sphagnum bogs and associated fens

c) The Spotted Tail Quoll

d) World Heritage properties; and

e) Natural heritage places.[28]

85. Importantly the EPBC Act provides protection where there is a 'significant impact' on the 'World Heritage values' of a 'declared World Heritage property' and by way of definition[29] such protection extend only to the 'natural heritage' or 'cultural heritage' contained in the declared world heritage property.

86. The effect of the determination of 31 August 2018 is that the action, the subject of the referral, would not or was not likely to have a 'significant impact' within the meaning of the EPBC Act.

87. S10 of the EPBC Act provides:

> ***"10 Relationship with State law***
>
> *This Act is not intended to exclude or limit the concurrent operation of any law of a State or Territory, except so far as the contrary intention appears.*

88. Nowhere within the provisions of the EPBC Act there is a contrary intention with respect to the provisions of either the Management Act or LUPA Act.

89. The Tribunal is not tasked with determining whether this proposal is a 'controlled action' as defined by the EPBC Act. The Tribunal is not required, assuming it has jurisdiction to otherwise hear and determine the matter, to undertake any assessment of whether or not the proposal constitutes a 'controlled action' and all that entails by virtue of the provisions of the EPBC Act. Given the provisions of s10 of the EPBC Act and that no 'contrary intention' is identified, given the absence of any express or implied inconsistency between the EPBC Act and the LUPA Act, there is nothing to suggest or inform the Tribunal that the two assessment processes under the EPBC Act and the LUPA Act cannot comfortably co-exist.

90. The EPBC Act does not confer jurisdiction on the Tribunal. Conferral would only be required in circumstances where the Tribunal was tasked with undertaking an identical assessment. The Tribunal is not satisfied that this is such a case.

91. The Appellant's submission is that the Tribunal does not have, and must not purport to exercise any jurisdiction in this case that amounts to a merits assessment of the impact of the proposal upon the MNES including, without limitation, whether the proposal is or is likely to have a significant impact within the meaning of any of the relevant controlling provisions of the EPBC Act.

92. The Tribunal in its assessment of compliance with provisions of the Scheme is not undertaking a merits review of whether there is a significant impact[30] by the proposal upon, for example, the Wedge Tailed Eagle, the sphagnum bogs and associated fens, world heritage properties, natural heritage places and the spotted tail quoll. That similar considerations may arise in the Tribunal's assessment of compliance with the Scheme provisions is evident from the provisions in the Act, however, the assessment is not the same. In assessing compliance with Clause 29.3.1 A1 the Tribunal is required to ensure the 'use' is undertaken in accordance with the Management Plan. If the performance criteria become relevant, no assessment of 'significant impact' of the use is required, rather the performance criteria speaks to the use being 'complementary' to the use of the Reserved Land, consistent with applicable objectives of the management plan and that the amenity of the surrounding area not be unreasonably impacted by the use through vehicular movements, and noise with respect to their time and duration or extent.

[28] S12, 15B, 18 & 20 of EPBC Act.
[29] S12 (3), 2(4).
[30] As defined in the EPBC Act.

93. Similar observations can be made with respect to the assessment required in consideration of compliance with Clause 29.4.3.

94. Mr McElwaine for the Appellants referred the Tribunal to the EPBC Act referral decision assessment with respect to Wedge Tailed Eagles to illustrate that the Tribunal, in an assessment of the proposal against the relevant Scheme provisions, would be embarking on a merits assessment of whether the proposal is or is likely to have a significant impact on that threatened species.

95. The Appellant made the following submissions:

> *"27. By way of example, the potential impact of helicopter use upon the Wedge-tailed Eagle has been the subject of much evidence. The Eagle is an endangered species within the meaning of s.18(3) of the EPBC Act. The Referral Decision draws attention to the Departmental Significant Impact Referral Guidelines 2013.8. That document provides that an action is likely to have a significant impact on, inter alia, an endangered species 'if there is a real chance or possibility that it will:*
>
> - *lead to a long-term decrease in the size of a population;*
> - *reduce the area of occupancy of the species;*
> - *adversely affect habitat critical to the survival of a species;*
> - *disrupt the breading cycle of a population; or*
> - *interfere with the recovery of the species."*
>
> *28. The Referral Decision proceeds on the basis that:*
>
> *'A population decline is inferred due to loss of nesting habitat, nest disturbance from land clearance and other inappropriate land management practices and from unnatural mortality, including persecution.'*
>
> *29. Attention is drawn to the Threatened Tasmanian Eagles Recovery Plan 2006-2010. Page 16 of that document lists a number of threats to the species including nest disturbance.*
>
> *30. The Referral Decision notes that most of the active nests are known and recorded by the Tasmanian Department and that mapping indicates that known nesting sites are approximately 2kms from Halls Island and 4kms from the proposed helicopter flight route. The Referral Decision then lists the intended avoidance and mitigation measures that are included in the Reserve Activity Assessment including adoption and implementation of the Fly Neighbourly Advice. On the question of likely significant impact the delegate accepted the following Departmental reasoning:*
>
> > *'the Department notes that there are currently no known Eagle nests within 1km of the flight route and the proponent's FNA provides measures to reduce the likelihood of disturbance to the species. The plan states that if new nests become known, the flight path will maintain a 1km buffer so as to avoid those nests. With reference to the Department's Significant Impact Referral Guidelines…the Department considers that the proposed action is unlikely to adversely affect habitat critical to the survival of the species or disrupt the breeding cycle of a population. The Department concludes that the proposed action is unlikely to have a significant impact on the species.'*

31. For the reasons above, it is not open to this Tribunal to form an opinion that contradicts this reasoning and conclusion on the question of whether the proposed use will or will likely have a significant impact on the Wedge-tailed Eagle."

96. No assessment of significant impact as contemplated by the EPBC Act is required to be made upon a consideration of compliance of the Proposal with Clause 29.3.1 of the Scheme. The EPBC Act does not therefore limit the scope of any merits assessment that the Tribunal may otherwise be authorised to undertake.

Is it open to the Tribunal to conduct a Merits Review of the RAA assessment process?

97. The Appellant's asserts that the inquiry, when considering compliance with Clause 29.3.1 A1 of the Scheme, does not permit a separate assessment of compliance of the proposal with the Management Plan; that is, a merits review of the RAA. Rather the inquiry is one limited to a factual determination as to whether there is a reserve management plan that applies to this proposal, and if so whether the use will be undertaken in accordance with it.

98. The Tribunal needs to determine what is the extent of the inquiry authorised by Clause 29.3.1 A1. The inquiry requires an interpretation of the meaning of the use "being undertaken in accordance with" the Management Plan.

99. As per Brett J in *Raff Angus Pty Ltd v Resource Management Planning & Appeals Tribunal:*[31]

> *"The starting point of any process of statutory construction is the plain and ordinary meaning of the text, read in the context of the surrounding provisions and the legislative scheme. The aim of the process is to derive from the statutory words read in context, the meaning "that the legislature is taken to have intended them to have"; Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 at 384, per McHugh, Gummo, Kirby and Hayne JJ."*

100. This appeal comes to the Tribunal pursuant to s61(4) of the LUPA Act as a result of the Council's refusal to issue a permit.

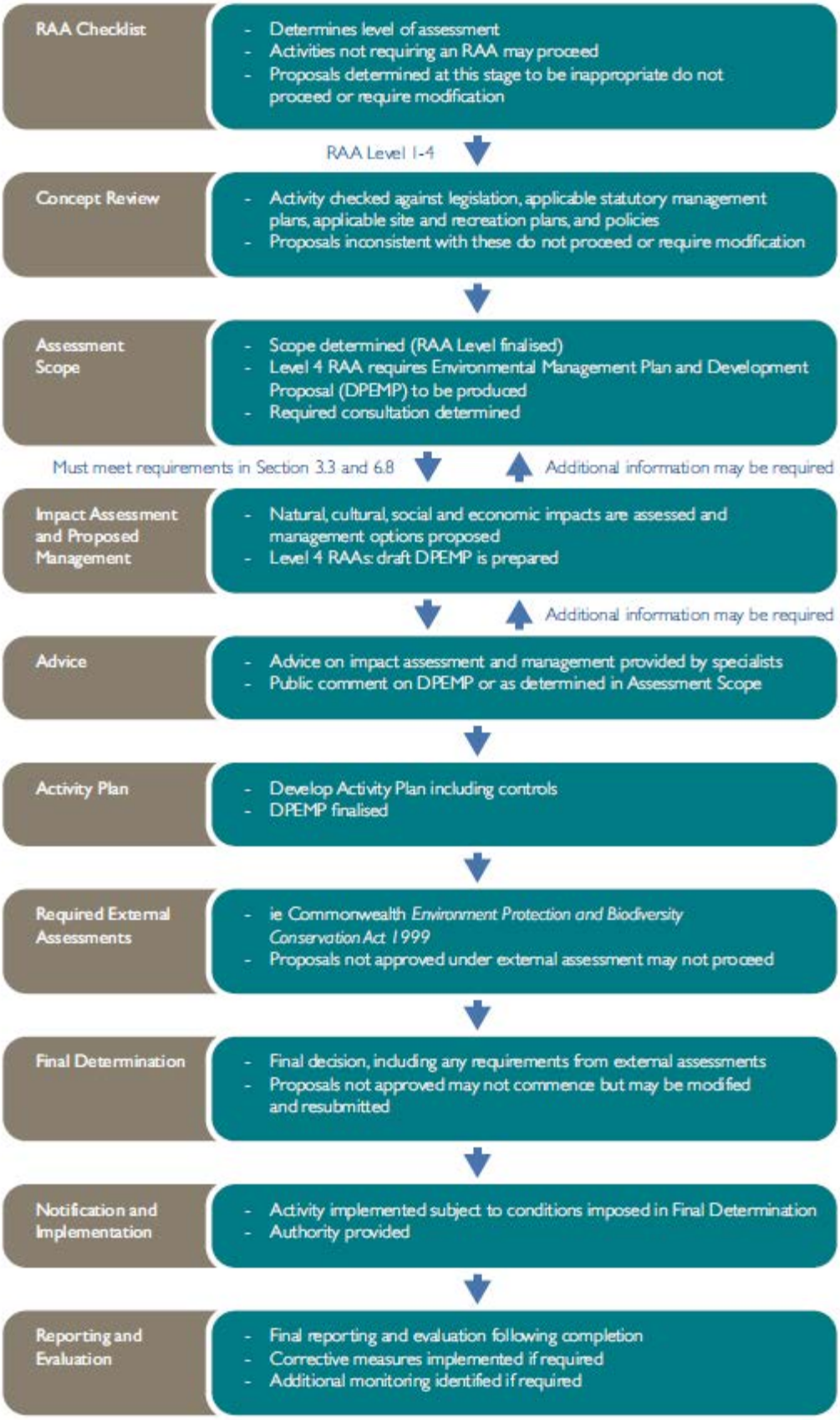
101. Clause 29.3.1 A1 requires the 'use' to be undertaken in accordance with a Reserve Management Plan. Clause 3.3 of the Management Plan sets out the assessment and approvals processes under Clause 3.3.1 and identifies the RAA as "the Parks Wildlife Service Assessment Process for activities on Reserved Land that could have a potential impact on reserved values". Further, the Management Plan provides that "an RAA helps the PWS to assess and document:

- an activity's compliance with relevant statutes, policies and plans;
- an activity's environmental, social and economic benefits and impacts;
- the actions to be taken to maximise benefits and minimise impacts;
- whether a proposal is approved, approved with conditions or not approved; and
- whether the activity, when completed, achieved its stated objectives.

102. The RAA "is required for new or recurrent works, and for activities of that, over a period of time, have the potential to cause adverse environmental, social or economic impacts".

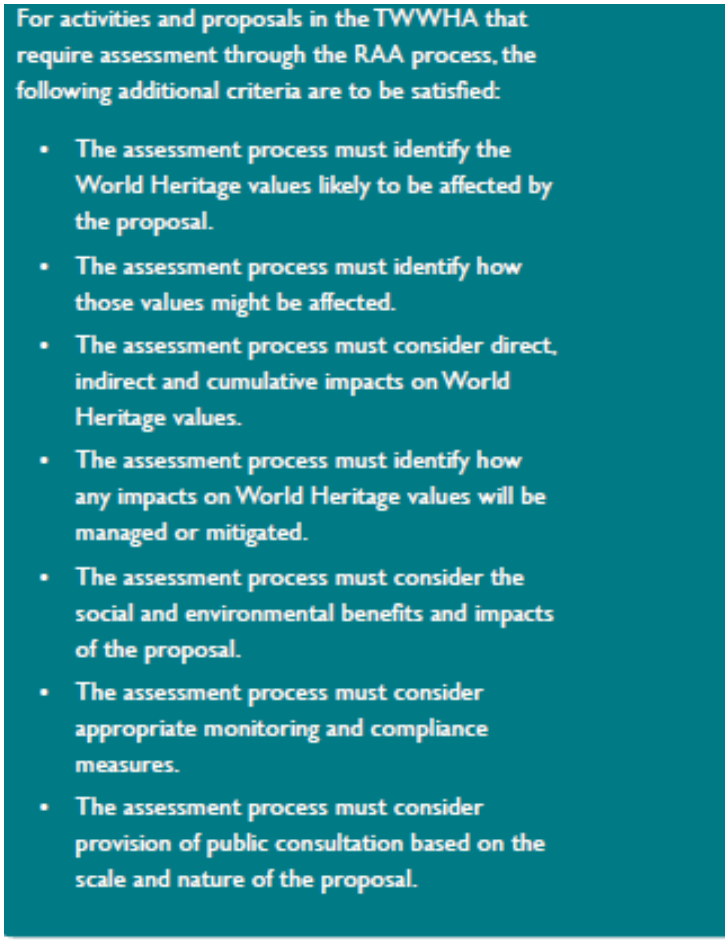
[31] [2018] TASSC 60 at [20].

103. The Management Plan sets out an "RAA process flow chart" at figure 3.1 reproduced below:



104. At the 'concept review' stage of the RAA assessment, the 'activity' is "checked against legislation, applicable statutory management plans".

105. The Management Plan also provides that "in recognition of the particular circumstances and management obligations in the TWWHA an additional set of assessment criteria are prescribed below and apply to any assessment in the TWWHA undertaken through the RAA process or any future equivalent". The Management Plan Table setting out the additional criteria is reproduced below:


For activities and proposals in the TWWHA that require assessment through the RAA process, the following additional criteria are to be satisfied:

- The assessment process must identify the World Heritage values likely to be affected by the proposal.
- The assessment process must identify how those values might be affected.
- The assessment process must consider direct, indirect and cumulative impacts on World Heritage values.
- The assessment process must identify how any impacts on World Heritage values will be managed or mitigated.
- The assessment process must consider the social and environmental benefits and impacts of the proposal.
- The assessment process must consider appropriate monitoring and compliance measures.
- The assessment process must consider provision of public consultation based on the scale and nature of the proposal.

106. Clause 3.3.1 of the Management Plan provides for activities in the TWWHA.

107. A consideration of the RAA process undertaken with respect to this proposal identifies that the proposal required a Level 3 RAA assessment, a final determination of which has yet to be made. The flow chart identified at figure 3.1 (reproduced above) identifies that any required external assessments including an assessment pursuant to the EPBC Act and any statutory assessment process provided by LUPA Act, must be undertaken prior to a final determination under the Reserve Activity Assessment process.

108. It is inescapable that the Management Act and the Management Plan provide for a separate regime for assessment incorporating consideration of matters specifically identified in the Management Act and some matters not ordinarily identified in the LUPA Act. An interpretation of Clause 29.3.1 A1 which disallows a planning authority to undertake a separate assessment of compliance with a Management Plan is, in the Tribunal's view, necessary when regard is had to the following:

a) A merits assessment would, in effect, be a review, or a de novo consideration, of the Management Plan approval process. No power is conferred on this Tribunal to undertake such a review under the Management Act. S5(2) of the *Resource Management & Planning Appeal Tribunal Act 1993* (the RMPAT Act) provides:

S5(2) The Appeal Tribunal has such jurisdiction as may be conferred on it by any other Act.

b) The Management Act and the Management Plan operate as the particular development, use and management control that applies to Reserved Land. In the Tribunal's view, this is consistent with the interpretation that the Acceptable Solution does not permit a review and the objective to provide for use consistent with any strategies for the protection and management of Reserved Land. An interpretation allowing no separate assessment is therefore not inconsistent with the relevant Objective.

c) Such an interpretation does not render the Performance Criteria meaningless. If no applicable management plan existed, then the inquiry to determine compliance with the Performance Criteria is capable of being undertaken.

d) As submitted by the Appellants, the activity that is regulated pursuant to the Management Plan includes, but is broader than, the assessment of use and development pursuant to the LUPA Act. A detailed consideration of the RAA illustrates this point.[32]

e) The Management Plan identifies subject matter considerations that are not normally within the province of councils and, on appeal, this Tribunal. As submitted by the Appellant, many provisions of the Management Plan require an assessment against criteria not normally related to land use, planning and development. The following examples are provided:

- Cultural values management (Part 4 of the Management Plan);
- Visitation (Clause 6.1 of the Management Plan);
- Diversity and quality of experience (Clause 6.2 of the Management Plan);
- Access (Clause 6.3 of the Management Plan);
- Aircraft use (Clause 6.3.3 of the Management Plan);
- Commercial tourism (Clause 6.8 of the Management Plan);
- Visitor safety (Clause 6.9 of the Management Plan);
- Information, interpretation, education (Clause 6.10 of the Management Plan); and
- Economic viability of the Proposal (Clause 1.2 of the Management Plan).

The Tribunal accepts the Appellant's submission that a merits review of much of the matters identified above are in many respects foreign to the regulation of land use and development contemplated by the LUPA Act.

f) If a merits review were permissible, what in essence this Tribunal would be required to do on a hearing de novo is to undertake a consideration of compliance with the Management Plan having regard to all of the evidence presented at the hearing of this appeal. In this appeal, that evidence was extensive. Such a consideration constitutes an entirely different assessment than that undertaken under the RAA process in accordance with the Management Plan. As already noted, the Management Act does not grant a right of appeal or

[32] Step 4 of the RAA requires an assessment of 'natural, cultural, social and economic impacts.' That assessment is set out at pages [22] to [47] of the RAA with respect to this Proposal.

review to this Tribunal. Indeed, the Management Act provides for no right of appeal associated with the approvals process or decisions of the Director.

109. Other provisions in other planning schemes were identified by Mr Brownlie, who gave planning evidence on behalf of the Council, in which it is expressly provided that where there has been an approval of a process pursuant to the RAA, the Acceptable Solution is met. The wording of Clauses 29.3.1 A1 of the Launceston Interim Planning Scheme 2015 and the Central Coast Interim Planning Scheme 2013 do not permit a merits review of the RAA process.[33] A number of other schemes have a provision identical to Clause 29.3.1 A1 of the Scheme.[34]

110. It is regrettable that there is not uniformity in the provisions of all planning schemes within the State in relation to the interaction between the Management Act, Management Plan, the LUPA Act and the planning schemes.[35] The Tribunal accepts the Appellant's submission as set out in paragraphs 79-80 as properly identifying that the use standards at Clause 29.1 were left to each individual Council to determine what clause to insert into its scheme:

> *"79. The making of the Planning Scheme was authorised, as an interim document, in the exercise of the Ministerial power that was conferred by s30F of LUPAA. It was not open to the Minister to exercise that power unless each of the procedural provisions were complied with. Section 30E required that an interim planning scheme:*
>
> - *Must contain the mandatory common provisions;*
> - *May contain optional common provisions; and*
> - *May contain a local provision that is not a common provision.*
>
> *80. Clause 29.3.1 us a local provision that is not a common provision."*[36]

33

Table 1 Comparison Table – Use in the Environmental management Zone

Launceston City Council	Central Coast Council	Central Highlands Council
Use Table: Permitted (no qualification)	Use Table: If for patrons of a conservation, sports and recreation or tourist operation use on land in the zone.	Use Table: Only if a reserve management plan applies.
Use Standard: A1 Use is in accordance with: (a) A Reserve Activities Assessment approved under the *National Parks and Reserves Management Act 2002*, or *Nature Conservation Act 2002* (b) The approval of the Director General of Lands under the Crown Lands Act 1976	Use Standard: A1 The relevant conservation management agency must advise – (a) The use is in accordance with any applicable reserve management plan (b) It is satisfied the health and safety of people, property and the environment is not at risk from the use (c) Any conditions and requirements for protection, conservation, or management	Use Standard: A1 Use is undertaken in accordance with a reserve management plan.

**Extracted from the evidence of Mr Brownlie, page 9.*

34 Hobart Interim Planning Scheme 2014 and Tasman Interim Planning Scheme 2015. The Circular Head Interim Planning Scheme 2013 and the West Coast Interim Planning Scheme 2013 have different provisions again but those provisions also exclude a requirement to undertake a merits assessment of the compliance with any applicable Management Plan.

35 Clause 29.3.1 is a 'local provision' but is not a common provision.

36 Planning Directive 1, in its initial form published on 18 June 2014 and in its amended form published on 17 February 2016, provided for, inter alia, zones in part D including an Environmental Management Zone at Clause 293. But it did not provide for the mandatory content of the subclauses within that zone. The drafting provided for mandatory zone purpose statements at Clause 29.1, Local area objectives and desired future character statements were

111. Such uniformity would have provided the parties with greater certainty and potentially limit the time and expense of legal argument and proceedings. However, notwithstanding the absence of the express words in Clause 29.3.1 A1 in the Scheme, for all the reasons set out, the Tribunal finds that upon a purposive and contextual interpretation of the LUPA Act and the Scheme, and adopting an approach to interpretation that enables both the Management Act, Management Plan, the LUPA Act and the Scheme to continue to operate within their own sphere, all that is required to determine compliance is an evaluative decision as to whether a Management Plan exists and whether the Proposal's use is in accordance with the use and development assessment process as provided for in that that Management Plan. As said by Fullagar J in *Butler*[37], that, when considering inconsistency between laws of a particular State, it was to be assumed that a State would not wish to contradict itself and therefore that such inconsistency would not have been intended. And, as such, every attempt should be made to reconcile competing statutes.[38]

112. Accepting that Clause 29.3.1 A1 must be construed as being limited to a factual determination of whether there is a Reserve Management Plan that applies to the proposed use and whether the use would be undertaken in accordance with its procedures, then if the RAA Assessment Process undertaken achieves final determination and approval, in the Tribunal's view, no further inquiry would be required and A1 would be met.

Has the RAA process concluded?

113. Both the LUPA Act and the Management Act operate concurrently. The RAA assessment undertaken with respect to the proposal provides at "Step 2 – Concept Review." At Step 2.1 the RAA identifies "core Acts" of which LUPA Act is one. The proposal is identified as being a "discretionary use" with a discretionary application required.

114. At Step 3.4 of that RAA headed "Additional External Assessment", the RAA identifies that "the most commonly integrated external assessments are the LUPA Act and EPBC Act but others are also possible – refer to the RAA manual". The "activity" is identified as a discretionary use requiring a development application to be made. The RAA for the proposal identified that Step 7 – External Assessment, has been reached. It provides; "at this point the assessment from a PWS perspective is complete and PWS is signalling it plans to approve the activity plan (for a level 2-3 RAA, or a DPEMP for a Level 4 RAA) subject to any further conditions that are imposed by external assessment."

115. No final determination has been made as the LUPAA external assessment has not been finalised. It is apparent from the RAA process provided for by the Management Plan, that the required external assessments form part of the RAA process. No 'final' determination can be made under the RAA absent completion of those assessments. This is evident from the words set out at Step 7 of the flow chart in figure 3.1 which reads "proposal not approved under external assessment may not proceed".

116. The proposed use will not be undertaken in accordance with the reserve management plan in circumstances where no final determination under the RAA process has occurred. The consequence is an absurd one. If the Management Plan provides that there is no final determination of the RAA for approval until an external assessment is complete (as the external assessment is incorporated within the RAA), then where an external assessment is required through the LUPA Act (or indeed any other external assessment), the acceptable solution at Clause 29.3.1 A1 can never be met. The only sensible interpretation of Clause 29.3.1 A1 is that the words 'in accordance with a reserve management plan' must relate to the assessment process

option at Clause 29.1.2 and 29.1.3. The Use Table, Clause 29.2, left it to each individual council to insert a use clause with or without a qualification. Likewise, the use standards at Clause 29.1 left it to each council to determine a range of acceptable solutions and performance criteria.

37 Ibid FN 14.

38 As referred to in Pearce & Geddes – Statutory Interpretation in Australia, page 330 at paragraph 7.12.

under the Management Plan which has achieved Step 7 RAA approval. If such a determination has been made then, in the Tribunal's view, A1 is satisfied.

117. Having found that compliance with Clause 29.3.1 A1 does not require a merits review by this Tribunal of whether use is in accordance with the Management Plan, and having found that the RAA at Step 7 establishes that an assessment under the Management Plan has been undertaken and that the Proposal has been approved as compliant with the Management Plan (subject to external assessment), the Tribunal finds the Proposal satisfies Clause 29.3.1 A1.

118. No further consideration is therefore required of the preliminary matters raised by the Appellant. A preliminary issue was raised by Council with respect to the requirement for a separate use categorisation to apply to the helicopter use associated with the Proposal, that is a transport depot and distribution use. Such use is a prohibited use under Clause 29.2 Use Tables.

Additional use categorisation – does the Proposal require an additional categorisation of use directly relating to the helicopter landing site being a categorisation of use as a transport depot and distribution?

119. Ground 3 of the Council's Grounds of Refusal asserts that the Proposal involves a transport depot use which is prohibited use. The Scheme requires proposals to be categorised into use classes via a step-by-step processes as identified by Brett J in *Meander Valley Council v Resource Management & Planning Appeal Tribunal*[39] and as set out in Clause 8.2 of the Scheme. Clause 8.2.5 of the Scheme, contemplates more than one use class where there is not a direct association with a subservient use to another use on the same site. Clause 8.2.5 of the Scheme provides:

> *"8.2.5 If more than one use or development is proposed, each use that is not directly associated with and subservient to another use on the same site must be individually categorised into a use class."*

The process of categorisation of use involves a consideration of the activity proposed.[40]

120. The position of Council is that the helicopter use that forms part of the Proposal; which incorporates the delivery via helicopter of passengers to and from the helicopter landing site, should be separately categorised as a 'transport depot and distribution' use. The Council's submissions are that such use is not subservient to the visitor accommodation use and, as such, a separate use categorisation is required. 'Transport depot and distribution' use is a prohibited use under the Scheme.

121. 'Subservient' is not defined in the Scheme. The Tribunal was referred to dictionary definitions.

122. The Tribunal accepts that to be subservient, the helicopter use must serve the visitor accommodation use. In the Tribunal's view, such an interpretation is consistent with both the Supreme Court decision of *Kempster v Manning*[41], and the Tribunal's decision in *Butorac and Pearshouse v Kingborough Council and Tasmania Travel and Culture Group Pty Ltd*[42].

123. The position of Council is that while other aspects associated with the visitor accommodation use are accepted as being directly associated with and subservient to the visitor accommodation use, being on the same site, it submits that the helicopter landing site is not one that is directly

[39] [2018] TASSC 9 at [31] and [58].
[40] *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASFC 14.
[41] [2006] TASSC 31.
[42] [2018] TASRMPAT 24.

associated with or subservient to the visitor accommodation. Council relies on the evidence of its planning expert, Mr Brownlie. Mr Brownlie's evidence is in the following terms:

"3.3.1 The Planning Report submitted with the application has assessed the helicopter use as "...directly associated with and a subservient part of the use and in accordance with Clause 8.2.2 categorise those activities as the same Visitor Accommodation Use Class." (AllUrbanPlanning Report [P3])

3.3.2 In my opinion the correct classification for the helicopter use is as a "Transport depot and distribution" which is defined in the Scheme as:

"means land for distributing goods or passengers, or to park or garage vehicles associated with these activities, other than Port and shipping. Examples include airport, bus terminal, council depot, heliport, mail centre, railway station, road or rail freight terminal and taxi depot."

3.3.3 While I would accept that helicopter use is associated with the Visitor Accommodation use, in my opinion it does not fulfil the subservient test. I take subservient to mean:

1. *serving or acting as a helper: subordinate.*
2. *(of persons, their conduct, etc) very submissive, servile; obsequious. (Macquarie Dictionary).*

In my opinion, the helicopter use is substantially more than a subservient component of the Visitor Accommodation. It is a use that in the RAA Assessment Report is described as a "...key element of the product, facilitating high-quality aerial overview and interpretation of the Cultural Landscape, and Outstanding Universal Values found in the area" (RAA Assessment Report [P7 of 54]). Apart from the delivery of customers to the site, helicopters will be used to transport:

- *Building materials contractors during construction*
- *Guides*
- *Full and used Gas bottles*
- *Empty and used Greywater and Blackwater tanks*
- *Food and other supplies*
- *Equipment for use by customers*
- *Rubbish*

3.3.4 Without the support of helicopter transport as proposed the visitor accommodation use scale of operation and levels of management and logistical support required would not be possible.

3.3.5 I contrast this to other uses typically associated with visitor accommodation such as food preparation (Food services a defined term under the Scheme), recreation (Passive recreation a defined term under the Scheme). 'citizen-science' and related activities (Tourist operation a defined term under the Scheme), appreciating and

learning about the natural and cultural values of the site and area (Natural and cultural values management a defined term under the Scheme). These are all uses that can be separately classified; however, given their scale and direct correlation with visitor accommodation I believe they better fulfil the 'subservient' test envisaged in the Scheme.

3.3.6 In my opinion there is as clear difference between the scale and impact of helicopter use compared to the more intimate and subservient uses that one would ordinarily associate with visitor accommodation such as enjoying a meal, using equipment supplied to undertake recreational activities, learning more about the locality and environment in which you are staying and so on.

3.3.7 Taking all of the above into consideration it is my opinion that the helicopter use does not fit the qualifications provided in Cl 8.2 of the Scheme and should be classified as 'Transport depot and distribution' as defined in the Scheme, a use that is prohibited in the Environmental Management Zone."

124. Mr Read in his evidence takes a different view. His evidence is in the following terms:

"11.18 As discussed in Section 8 above I approach the associated helicopter access as directly associated with and a subservient part of the use in that:

- *Helicopter access is necessary to provide equity of access to the remote characteristics of this site and to cater to a predominantly urbanised customer-demographic who have neither the physical or mental fitness nor ability, experience or lifestyle factors to undertake in a cross-country, hike-in style product;*
- *The landing site will only be used for access to the standing camp. It will not serve other uses;*
- *The helicopter access to the landing site will be infrequent temporal events;*
- *As discussed in Section 6 above, helicopter access to standing camps in the Self-Reliant Recreation is anticipated by the Management Plan; and*
- *Aircraft access is also an anticipated part of standing camps under the PWS Standing Camp Policy.*

11.21. The Transport depot and distribution Use Class is described in Table 8.2 of the Planning Scheme as:

> *"Use of land for distributing goods or passengers, or to park or garage vehicles associated with those activities, other than Port and shipping. Examples include an airport, bus terminal, council depot, heliport, mail centre, railway station, road or rail freight terminal and taxi depot."*

11.22. A heliport is not a defined term under the Planning Scheme. I understand that the term describes a small airport suitable for use by helicopters. A heliport would typically contain one or more touchdown and liftoff areas and may also have limited facilities such as fuel or hangars.

11.23. In my opinion the proposed helicopter access to an area of exposed bedrock with no infrastructure is not similar to an airport/heliport or the other transport logistics

related examples described in Table 8.2. The impact of the use of the landing site would be at a scale and duration well below that of a Transport depot and distribution use."

125. The helicopter use identified by Council as constituting a requirement for a separate categorisation, is located at a different site, albeit close to the proposed visitor accommodation. Council submitted that to determine whether the helicopter use is 'directly associated with and subservient to another use', those uses must be on the 'same site'. The helicopter landing site is 550m west of the visitor accommodation site. The definition of 'site' in the Scheme incorporates 'the lot or lots' upon which the proposal is undertaken. The evidence establishes, and the Tribunal is satisfied that the helicopter use will deliver customers to the site as well as guides and contractors, food, supplies and equipment for use by both guides and customers. The helicopter use will also assist with service delivery and removal of equipment (including building materials), rubbish and other materials related to the visitor accommodation use. All of this activity serves the visitor accommodation use. But for the visitor accommodation use, the helicopter use would not be required. This was Mr Hackett's evidence. In this respect, the Tribunal prefers the evidence of Mr Read. That the helicopter landing site is not located at the precise location of the proposed visitor accommodation is not, in the Tribunal's view, a key determinant of whether the helicopter use serves the visitor accommodation use, nor are all aspects of the Proposal required to be within the same parcel of land, whether such land is the subject of a single title, multiple titles or indeed no title at all. The Tribunal finds that the helicopter use is a use which is directly associated with and a subservient part of the visitor accommodation use. Therefore, categorisation as contemplated by Clause 8.2.2 of the Scheme, requires a categorisation of the helicopter use into the visitor accommodation use class.

Compliance with Clause 29.4.3

126. To the extent that compliance with Clause 29.4.3 remains an issue in this appeal, the Tribunal is satisfied that the Proposal does not comply with Clause 29.4.3 A1 but that the evidence establishes that the Proposal complies with the Performance Criteria. The Tribunal prefers Mr Read's evidence in that regard. The Tribunal also accepts the development application for the Proposal is valid and records no planning permit for Stage 2 activities referred to in the application document is sought.

Conclusion

127. Having determined that a proper interpretation of Clause 29.3.1 A1 of the Scheme only requires:

    a) That a Management Plan is in existence; and

    b) That an assessment of use in accordance with the Management Plan has been undertaken and approved up to and including Step 7 of the RAA process,

    the Tribunal finds that Clause 29.3.1 A1 is satisfied and that the Proposal is otherwise compliant with Scheme provisions.

128. Before the Tribunal can make orders setting aside Council's refusal to grant a permit with respect to the Proposal, Council is required to provide to the Tribunal and the parties, draft conditions of approval. The Tribunal will afford the parties an opportunity to be heard with respect to those draft conditions.

129. The Tribunal makes the following directions:

a) That Council's draft conditions be filed with the Tribunal and served on each other party within 14 days of the date of this decision;

b) Each party is then afforded 14 days to file any submissions in response;

c) Liberty to apply is granted to all parties for the matter to be relisted for hearing in relation to the final determination of conditions; and

d) The Tribunal may determine a further hearing is required in the exercise of its own discretion.