Why Tasmania needs a statutory process to control development on reserved land and a possible mechanism for achieving this

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Glossary on final page

Background

At the time that most of Tasmania's current development control legislation was being drafted there was a consensus that national parks and reserves were out-of-bounds for development. Hence Tasmania has never had a process to control development on reserved land defined in legislation because it was seen as superfluous. This has now changed with the current State Government's policy of "unlocking" national parks and reserves for development.

Another possible mechanism to define a statutory assessment process is to define it in a statutory management plan; e.g. the *New Proposals and Impact Assessment Process* defined in the *1999 TWWHA Management Plan.* The 2016 *TWWHA Management Plan* contains no equivalent, only a description of the non-statutory Reserve Activity Assessment process. Hence the current situation is that no management plans define a comprehensive development assessment process although some still contain requirements for public consultation on an environmental impact assessment or site plan.

EOI Process

The process for the assessment of proposals submitted in response to the state government's call for expressions of interest (EOI) in tourism developments in national parks and reserves is described on the Coordinator-General's website http://www.cg.tas.gov.au/ and in the 2016 TWWHA Management Plan.

They describe the EOI process as "an administrative process within the existing legislative framework[1]". An assessment panel (the majority of whom are senior public servants) tests the proposal against the objectives of the relevant reserve class under the NPRMA and the purposes of reservation under the NCA. It appears that the panel also assesses the proposal against the terms of any management plan, and can make recommendations for amendments to the plan if they consider that the proposal has merit despite being contrary to current restrictions. This assessment informs the Minister's decision. The Minister may then enter into contractual negotiations for lease or licence arrangements. In addition, other State and Commonwealth approvals may be required.

Concerns regarding this process:

- The only publically available information on the proposal itself is the extremely brief description[2] provided on the Coordinator-General's website. **This would be quite inadequate as the basis for a development application to a Tasmanian council, for example.**
- **The assessment panel is unaccountable.** Neither their deliberations nor their report to the Minister are available to the public. Again, this contrasts with a council's assessment of a

[1] 2016 TWWHA Management Plan, page 84.

[2] For the Round 1. No information whatsoever appears to be made available for Round 2 proposals until they reach the "lease/licence under negotiation" stage.

discretionary development application in which the assessment documentation is available to the public, subject to public comment and (potentially) an appeal.

- The general public has a poor understanding of mainstream planning processes but these do attempt to inform the public and facilitate public involvement with requirements and standards for advertising of development proposals. In contrast, the description of the EOI process is confusing and it is fails to make clear what, if any, opportunities exist for public involvement. e.g. the proposal to extend Freycinet Lodge into the national park required a change to the Management Plan for Freycinet National Park which required public comment. If the proposal had not been revised to include only redevelopment within the existing lease, a site plan[3] would also have been required. This would also have been subject to mandatory public comment, but the EOI process contains no unambiguous commitment to undertaking a public RAA, which is the key assessment process – see below.

- A RAA is the normal process for assessing the impacts of a proposal against the requirements of the management plan and on the natural and cultural values of a reserve, including the social and recreational values (visitor experience) – these are the values most likely to be overlooked by the Assessment Panel's narrow focus on legislated requirements. If an RAA is not undertaken it is unclear how, or if, these impacts are assessed, and how the conditions of approval (contained in the lease or licence arrangements) are determined.
    - Verbal advice states that a RAA will be required for all EOI proposals subject to a management plan but the RAA is not statutory so there is no legal requirement to undertake one and no possibility of legal action to compel that one is undertaken.
    - The RAA is not statutory so, even if a RAA is undertaken, there is no possibility of appeal or legal challenge to its findings.
    - A RAA is not automatically made public, and public comment is only sought "for major proposal or if consultation is considered beneficial" so, even if an RAA is undertaken, it may never be released unless subjected to a Freedom of Information request.
- An EOI proposal may require assessment under LUPAA, particularly if it involves the construction of infrastructure. This is a statutory assessment process which may provide both public comment and appeal rights but it cannot be relied upon to do so because most planning schemes[4] now provide that a development that has received the necessary approvals from PWS will be permitted, so it will be advertised only if another discretion is triggered under the scheme. In any case, the LUPAA assessment is confined to the requirements of the council planning scheme, so it cannot be relied upon to address the impacts on the broad range of reserve values, which the purpose of the RAA.
- In cases where the EOI proposal is not permissible under the current reserve management plan the statutory process for amending a management plan still has to be followed but the three amendments proposed to date (Narawntapu, Freycinet and Tasman) included no reasoned justification or assessment of the impacts on the reserve.

Despite claims of openness and transparency, the EOI process amounts to ensuring that the approval meets the requirements of Tasmanian legislation while minimising opportunities for

[3] A site plan is subsidiary to a management plan. It provides additional detail on the management of a particular small area. The requirement to develop a site plan and make it available for public comment is contained in the current Freycinet Management Plan. Few other EOI proposals are likely to require the development of a site plan.

[4] This will be the case for the whole of Tasmania when the Statewide Planning Scheme takes effect.

scrutiny[5] and potentially avoiding any professional assessment of impacts on reserve values including the social and recreational values – the values most likely to affected by a tourism development.

The approval resulting from such a poorly considered process is likely to fail one of the key objectives of a good planning process – public acceptance. i.e. a social licence to operate, which is particularly necessary for potentially controversial developments on public land. This is not a good outcome for the PWS, the tourism industry, or, particularly, the proponent.

The vast majority of development proposals in Tasmania do not occur on reserved land and are guaranteed an open and transparent assessment by Tasmanian planning legislation. The minimal scrutiny provided by the EOI process is only possible in the absence of a corresponding statutory process for the assessment of development on reserved land in Tasmania. The final section of this paper proposes such a statutory process.

Commonwealth Approval

The challenge of obtaining Commonwealth government approval (which will be necessary for many of the EOI proposals if they have the potential for significant impacts on Matters of National Environmental Significance, most likely world heritage values or federally listed threatened species) appears to be left to the proponent.

Since the EOI process is not statutory and does not provide for public consultation it is possible that any proposal which does require Commonwealth government approval will separately require a full assessment conducted by the Commonwealth. This may come as a rude shock to proponents who were unaware of the implications of "other State and Commonwealth approvals may need to be obtained[6]".

Requirements for a process to control development on reserved land

The concept of needing to control development on reserved land may appear to be an oxymoron but visitor facilities (at some level) are generally considered necessary and appropriate in some locations in most national parks and reserves. Hence it is necessary to have **criteria** and a **process** to determine what can be permitted.

The **criteria** are usually set at two levels – the broad requirements contained in legislation and the detailed prescriptions contained in management plans. But even the best criteria are useless without a process to ensure that they are enforced …

If the **process** to implement these criteria is to have the confidence of the public, it needs not only to be fair but be seen to be fair:

1. It needs to be statutory (have a basis in legislation). Only a statutory process can by legally challenged. A statutory process cannot be changed without parliamentary approval, which provides opportunity for public scrutiny.

[5] Any opportunity for public comment arises from the other legally required processes such as changing a management plan or LUPAA assessment, not from the EOI process itself. Hence it is possible for a proposal such as the boat charter in Port Davey and Bathurst Harbour to be approved with no public involvement.
[6] 2016 TWWHA Management Plan, page 85.

2. It needs to be open and transparent (e.g. all information including a detailed description of the proposal and the assessment documentation readily available).
3. It needs to provide for public comment and require a considered response to this comment. This provides the opportunity for the planning authority to respond in detail to particular concerns and sometimes public comment may raise new issues that had not been considered. Public scrutiny usually results in a better decision and greater public acceptance of the decision.
4. It needs to provide for third party appeal rights. These provide the public with a mechanism for enforcement of the criteria. Vexatious appeals are rare despite some claims to the contrary and the decision-making authority is much less likely to "stretch" its interpretation of the law when it knows that it may be required to justify its decision to an independent umpire.

The following table compares the now superseded *New Proposals and Impact Assessment Process* defined in the 1999 TWWHAMP and the three planning processes currently utilised in Tasmania:

	1999 TWWHAMP	**RAA**	**EOI**	**RMPS**
Statutory	Yes	No	No	Yes
Public disclosure of information	Yes	Only if public comment is sought	No (only a very basic description of the proposal is available)	Yes
Public comment	Yes	Only for major proposal or if consultation is considered beneficial	Not as part of EOI process itself	Yes
Third party appeal rights	No	No	Not as part of EOI process itself	Yes

Since its inception in the 1990s the intention of Tasmania's RMPS has been to provide a single integrated application – assessment – approval process for all planning applications.

This integrated process is most widely used in the assessment of industrial developments which require approval under both EMPCA and LUPAA. These two acts are linked so that "planning" aspects of a proposal are assessed by local government and "environmental" aspects by the EPA and the public comment and appeal processes are coordinated. This process has worked well for many years; it ensures that only a single application is required, leading to a single public comment period, a single appeal (should there be one) and a single permit issued by the planning authority (the local council).

Unlike the specialist, coordinated assessment afforded to Level 2 industrial activities by EMPCA, the RMPS legislation does not set specific requirements for assessment of development on reserved land. Around 50% of Tasmania is now in some category of reservation and there is increasing pressure to provide facilities for tourists in these areas.

The main process for the assessment of developments on reserved land (the PWS' RAA) is not even statutory, and has no explicit status within the RMPS.

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Proposed assessment process

Without a rigorous and enforceable approach to assessment of development on reserved land, there is little consistency or public confidence in decision making. An obvious solution to this is to amend the NPRMA to:

1. Define an assessment process for proposals on reserved land within the NPRMA. This could be based on the RAA subject to the inclusion of stricter guidelines to ensure that only the most trivial proposals avoid public scrutiny.
2. Explicitly link the assessment process required by the NPRMA to LUPAA in a similar manner to EMPCA (see above). This could ensure that impacts on park values are assessed by PWS and other "planning" aspects are assessed by local government, and the public comment and appeal processes are coordinated.

Summary of benefits:

For Tasmanian public:

- Open and transparent process including public comment and appeal rights.

For developers:

- Social licence to operate – which they do not get when the process is not open and transparent.
- Clearly defined relationship to LUPAA.
- Shorter assessment timeframe because assessment of impacts on reserve values could occur simultaneously with Council's planning assessment.

For government:

- Minimal changes to existing procedures – proposed amendment to NPRMA would require little more than the incorporation of existing RAA process into legislation.
- Public comment and appeal rights provided via existing LUPAA processes. i.e. no new administrative arrangements or appeal body required.
- Could provide a clear separation of roles[7] (developer is responsible for preparation of Development Proposal and Environmental Management Plan; PWS is responsible for its assessment) and give PWS the right to recover assessment costs from developer (as does the EPA).
- Protects the Minister from accusations of corruption or cronyism (especially likely in relation to approvals resulting from EOI process).
- A statutory assessment process would potentially provide compliance with *Australian World Heritage Management Principles,* thereby reducing the likelihood of needing a separate assessment to meet the requirements of the [Commonwealth] *Environment Protection and Biodiversity Conservation Act 1999.*

[7] The PWS should not be placed in the position where it is required to both prepare a Development Proposal and Environmental Management Plan (DPEMP) for a private developer and to assess it, even if this is unavoidable when PWS is the proponent (a common situation).

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Glossary and explanation:

1999 TWWHAMP: the New Proposals and Impact Assessment Process is defined on page 67 of the recently superseded 1999 Management Plan for the Tasmanian Wilderness World Heritage Area. The process was statutory because it was defined in a statutory management plan. This is the process that led (in the early 2000s) to the rejection of additional commercial helicopter/floatplane landing sites and the approval of the (never constructed) Cockle Creek Lodge.

EMPCA: *Environmental Management and Pollution Control Act, 1994*. The Tasmanian legislation which specifies the assessment and regulation of industrial activities. It is unlikely to be triggered by a tourism development on reserved land but it is possible that a resort could need a sewage treatment plant large enough to require assessment under EMPCA (it is also possible that a major resort proposal could be declared a Project of Regional Significance, leading to an entirely different assessment process).

EOI: an Expression of Interest submitted in response to the Tasmanian Government's advertising of *Tourism investment opportunities in the Tasmanian Wilderness World Heritage Area, National Parks and Reserves*.

EPA: Environment Protection Authority. The Tasmanian government body with responsibility for the implementation of *EMPCA*.

LUPAA: *Land Use Planning and Approvals Act, 1993*. The Tasmanian legislation which specifies the process for local government assessment of any proposal which requires a development application (i.e. anything which involves construction of infrastructure).

NCA: *Nature Conservation Act 2002*. The Tasmanian legislation to provide for the declaration of national parks and other reserved land.

NPRMA: *National Parks and Reserves Management Act 2002*. The Tasmanian legislation to provide for the management of national parks and other reserved land.

RAA: Reserve Activity Assessment. The PWS' process for environmental and social impact assessment. This is a generally sound process but it is not statutory; it is defined by department policy, not by law, so it can be changed without parliamentary approval. It defines four levels of assessment according to the nature of the proposal and the magnitude of the likely impacts. There is no requirement for public release of a RAA and public consultation is optional for levels 2 and 3, mandatory only for level 4. This is the major weakness of the RAA because there have been instances where significant proposals have not been subject to public consultation so the RAA is just internal PWS documentation. Not only is there no public input into the assessment but the public may even be unaware of the proposal itself until far too late to influence the outcome.

RMPS: Tasmania's Resource Management and Planning System, which includes both LUPAA and EMPCA.

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