COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12

PARTIES:
THE WILDERNESS SOCIETY (TASMANIA) INC
TASMANIAN NATIONAL PARKS ASSOCIATION INC
WEBB, Richard
SMITH, Paul
v
WILD DRAKE PTY LTD
DIRECTOR, NATIONAL PARKS & WILDLIFE

FILE NO: FCA 1830/2020

JUDGMENT APPEALED FROM: *The Wilderness Society v Wild Drake Pty Ltd* [2020] TASSC 34

DELIVERED ON: 15 September 2021

DELIVERED AT: Hobart

HEARING DATE: 2 October 2020

JUDGMENT OF: Blow CJ, Brett J, Porter AJ

CATCHWORDS:

Environment and Planning – Environmental planning – General matters – Operation and effect of controls – Validity of legislation and regulations – Where land to be developed reserved land under national parks legislation and under exclusive management of Director of National Parks & Wildlife – Reserve management plan in existence – Where permit required under planning statute for development on reserved land – Where planning scheme provided for grant of permit if use is undertaken in accordance with a reserve management plan – Whether planning legislation authorised making of scheme enabling planning authority to assess proposal for reserved land – National parks legislation does not override or repeal provisions of planning legislation that enable the making of the scheme.
Aust Dig Environment and Planning [2]

Environment and Planning – Environmental planning –Planning schemes and instruments – Tasmania – Other matters – Interpretation of planning scheme – Performance based scheme – Use standard complied with where acceptable solution met – Acceptable solution that "use is undertaken in accordance with a reserve management plan" – Reserve management plan in existence – Acceptable solution means use must comply with prescriptive requirements of the reserve management plan.
Mount Barker Properties Ltd v District Council of Mount Barker [2001] SASC 249, 80 SASR 449; *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66, 389 ALR 552, considered.
Aust Dig Environment and Planning [52]

REPRESENTATION:

***Counsel*:**

Appellants:	J Forsyth SC and R Muchinguri
First Respondent:	S B McElwaine SC
Second Respondent:	M E O'Farrell SC

Solicitors:

Appellants:	C Bookless
First Respondent:	Simmons Wolfhagen
Second Respondent:	Solicitor General

Judgment Number:	[2021] TASFC 12
Number of paragraphs:	178

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REASONS FOR JUDGMENT

FULL COURT
BLOW CJ
BRETT J
PORTER AJ
15 September 2021

Orders of the Court

1 Appeal allowed.

2 Order of Estcourt J dated 6 July 2020 set aside.

3 Decision of the Resource Management and Planning Appeal Tribunal dated 18 December 2019 set aside.

4 That the matter be remitted to the Resource Management and Planning Appeal Tribunal for reconsideration in accordance with a direction that, for the purposes of cl 29.3.1 of the Central Highlands Interim Planning Scheme 2015, the Tribunal may determine that the use of the relevant land proposed by the first respondent will be undertaken in accordance with the Tasmania Wilderness World Heritage Area Management Plan 2016 only if it is satisfied that the proposed use is compliant with or conforms to all the prescriptive requirements of that management plan.

Serial No 12/2021
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THE WILDERNESS SOCIETY (TASMANIA) INC, TASMANIAN NATIONAL PARKS ASSOCIATION INC, RICHARD WEBB, PAUL SMITH v WILD DRAKE PTY LTD DIRECTOR, NATIONAL PARKS & WILDLIFE

REASONS FOR JUDGMENT

FULL COURT
BLOW CJ
15 September 2021

1 This appeal concerns an application by the first respondent, Wild Drake Pty Ltd, for a permit under the *Land Use Planning and Approvals Act* 1993 ("the LUPA Act") for visitor accommodation on Halls Island in Lake Malbena. Halls Island is in the municipal area of the Central Highlands Council. The Council is the "planning authority" for the area for the purposes of the LUPA Act. The island is in the area to which the Central Highlands Interim Planning Scheme 2015 applies.

2 The history of the proceedings is essentially as follows:

- On 26 February 2019 the Council decided to refuse the application for the permit.
- Wild Drake appealed to the Resource Management and Planning Appeal Tribunal. On 18 December 2019 the Tribunal set aside the Council's decision and substituted a decision that a permit be issued, subject to certain conditions: *Wild Drake Pty Ltd v Central Highlands Council and Ors* [2019] TASRMPAT 28.
- The four appellants (The Wilderness Society (Tasmania) Inc, Tasmanian National Parks Association Inc, Richard Webb and Paul Smith) appealed to the Supreme Court of Tasmania, seeking orders for the Council's refusal decision to be restored.
- On 6 July 2020 Estcourt J dismissed that appeal: *The Wilderness Society v Wild Drake Pty Ltd* [2020] TASSC 34. This is an appeal from his Honour's decision.

3 One of the respondents' contentions in this appeal is that certain provisions in the *National Parks and Reserves Management Act* 2002 ("the NPRM Act") impliedly superseded provisions in the LUPA Act. Brett J and Porter AJ have concluded that that contention has no merit. I agree, for the reasons stated by them.

4 One of the appellants' contentions is that the relevant land was not subject to a reserve management plan under the NPRM Act as a result of the Minister having granted a business licence and a lease of the relevant area to Wild Drake pursuant to provisions in that Act. Brett J has concluded that the granting of the lease and licence does not override or detract from the effect of the relevant management plan. I agree, for the reasons stated by him.

5 The principal issue in this appeal concerns the meaning of the words "undertaken in accordance with a reserve management plan" in cl 29.3.1-A1 of the planning scheme. I agree with the conclusion reached by Porter AJ as to the meaning of those words. I agree with the entirety of his reasons for judgment, and with the orders he proposes.

File No FCA 1830/2020

THE WILDERNESS SOCIETY (TASMANIA) INC, TASMANIAN NATIONAL PARKS ASSOCIATION INC, RICHARD WEBB, PAUL SMITH v WILD DRAKE PTY LTD DIRECTOR, NATIONAL PARKS & WILDLIFE

REASONS FOR JUDGMENT

FULL COURT
BRETT J
15 September 2021

6 This appeal concerns a proposal by the first respondent to develop and use visitor accommodation in the Tasmanian Wilderness World Heritage Area ("the TWWHA"). The first respondent holds a lease over the relevant site, which is located on Halls Island in Lake Malbena, which is within the Walls of Jerusalem National Park. This land is also part of the Central Plateau Conservation Area. The proposal is comprised of a number of elements, including accommodation for a limited number of visitors and the use of helicopters to provide access to and resupply of the site.

7 The land is located within the Environmental Management Zone of the Central Highlands Interim Planning Scheme 2015 ("the scheme"). The relevant planning authority is the Central Highlands Council ("the Council"). The land is also reserved land within the meaning of the *National Parks and Reserves Management Act* 2002 ("the NPRM Act") and is subject to a management plan approved under that Act.

8 It is uncontroversial that, having regard to relevant provisions of the scheme, a permit under the *Land Use Planning and Approvals Act* 1993 ("the LUPA Act") is required in respect of the proposed development and use of the land. The first respondent applied for the required permit, but the grant of same was refused by the Council. Upon appeal, the Resource Management and Planning Appeal Tribunal ("the Tribunal") overturned the Council's decision, and directed the grant of a permit subject to conditions. On 6 July 2020, Estcourt J dismissed an appeal from the Tribunal's decision: *The Wilderness Society v Wild Drake Pty Ltd* [2020] TASSC 34. This appeal is from his Honour's decision.

9 Although the Council's reasons for refusal were relatively wide ranging and relied upon a number of provisions of the scheme, and these were reflected in the grounds of the appeal to the Tribunal, the argument before the Tribunal ultimately focussed on whether the proposal complied with a particular scheme standard, cl 29.3.1. That provision prescribes standards relating to the use of reserved land. On the appeal to the learned primary judge and then to this Court, the critical issue has become even more confined, that is, the proper meaning and operation of the acceptable solution within that standard. It is common ground that the scheme is in the usual format of a performance-based scheme, and that under such a scheme, a permit will only be granted if all scheme standards are met. Compliance with a standard may be achieved by compliance with either the acceptable solution or the performance criterion prescribed for that standard.

10 In this case, the proposed use was categorised within the use class "Visitor Accommodation". The use table under the Environmental Management Zone provides that visitor accommodation is a permitted use "only if a reserve management plan applies". Because a management plan is applicable to the relevant land, it seems to have been accepted by the Tribunal, and uncontroversial between the parties, that this qualification has been fulfilled, and the proposed use is therefore permitted under the use table. However, under cl 8.7.1 of the scheme, in order to be permitted in the sense that a permit

must be granted, the use or development must also comply with the acceptable solution arising under each applicable scheme standard.

11 Clause 29.3.1 provides as follows:

"**29.3.1 Use Standards for Reserved Land**

Objective:	
To provide for use consistent with any strategies for the protection and management of reserved land.	
Acceptable Solutions	**Performance Criteria**
A1	**P1**
Use is undertaken in accordance with a reserve management plan.	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 the *National Parks and Reserves Management Act 2002*; (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 or extent."

12 The Tribunal overturned the Council's decision because it ultimately found that the proposal met all applicable scheme standards. This included cl 29.3.1, on the basis that the proposal complied with the acceptable solution. In essence, the Tribunal concluded that the requirement that the use be undertaken in accordance with a reserve management plan means only that a management plan must be in existence, and that an assessment of the use in accordance with that management plan has been commenced and, subject to the grant of planning approval, will be successful. The Tribunal favoured this narrow view of the requirement contained in the acceptable solution, over that contended for by the appellants, which was that the planning authority must perform an independent evaluative assessment to ensure that the use complies and is consistent with the requirements of the reserve management plan. It is this fundamental point of construction which constituted the determinative issue before the primary judge, and now this Court.

13 At the heart of the argument is the interaction and relationship between the two legislative schemes applicable to the regulation and control of the potential use and development of the land. It is not in dispute that the LUPA Act applies to the land. Hence, the planning scheme will control the use and development of the land. Under s 51 of the LUPA Act, if the scheme requires a permit for a proposed use or development, then the use or development must not be commenced unless the relevant planning authority grants the permit. The grant of a permit will be determined in accordance with the provisions of the scheme: s 51(3).

14 However, because the land is reserved land within the meaning of the NPRM Act, it is also subject to the provisions of that Act. This legislation confers on the Director of National Parks and Wildlife ("the Director") responsibility and authority to manage reserved land. The Act also provides for the creation and approval of management plans. There are detailed processes relating to the preparation, public exhibition and notification, review by the Tasmanian Planning Commission and ultimately the Governor's approval of such a plan. Once a plan is in force, the Director, who is prescribed by the Act as the managing authority of reserved land, must manage the land "for the purpose of giving effect to the management plan and in accordance with that plan": s 30(1)(a). Section 27 deals with the

contents of a management plan. It prescribes a comprehensive list of aspects of management with which the plan may deal. It is clear that these can be properly construed to include the power to regulate and control the use and development of the land, although the aspects of management dealt with by the provision extend well beyond this question.

15 The management plan in this case is a lengthy and comprehensive document. It prescribes in considerable detail management objectives, and sets out requirements for the management of certain values, including cultural, historic, natural, social and economic values. It deals with specific aspects of management of the usage of the land, including access, safety and tourism. It provides processes for community engagement, and also for monitoring, evaluation and reporting. It also contains specific provisions for the control of use and development. In particular, it divides the relevant area into management zones and then provides a table of use which prescribes whether a particular use is permitted or prohibited within the relevant zone, although in some cases the table further qualifies the circumstances in which a use will be permitted. There is also a system of management overlays which identify "specialised management regimes for specific areas and locations". The purpose of the table of use is expressly stated to provide "guidance on the use of the TWWHA". In particular, the plan states that the indication that a particular use is permitted under the table of use does not mean that the use is "permitted as a right". It is clear that the conduct of any activity within the area to which the plan is subject is ultimately subject to the overriding discretion of the Director as the managing authority.

16 The plan also defines a process for assessment and approval of proposals for the use and development of the land. This process is entitled "Reserve Activity Assessment" (RAA). The operation of this process is described in the following passages of the Plan:

> "The Reserve Activity Assessment (RAA) is the PWS assessment process for activities on reserved land that could have a potential impact on reserve values. The RAA process has been in place for a number of years and has effectively replaced the New Proposals and Impact Assessment process prescribed in the 1999 TWWHA Management Plan. 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 objective.
>
> ...
>
> The RAA is an adaptive process that is intended to change over time in response to review and changing circumstances. Therefore while the process itself is the prescribed assessment process for activities and proposals in the TWWHA, the details of the current RAA process are provided for information only and are not prescribed in this Management Plan."

17 It seems clear from these provisions that the intention of the plan is to use the RAA to provide guidance and assistance to the Director in respect of the overall management of the relevant area. It is an administrative assessment process incorporated into the plan and is not provided for in legislation. The process itself is described in a flow chart contained in the management plan. There are 10 sequential steps which provide for both internal and external assessment, and then determination, notification, implementation, reporting and evaluation. The penultimate step before determination is described as "required external assessments". The management plan thereby acknowledges the applicability of coexistent statutory assessment processes, which include planning approval pursuant to the LUPA Act.

18 The interaction between the legislative schemes is engaged in this case by the purported incorporation of the management plan into the assessment under the planning scheme by reference in the acceptable solution. This reference underpins arguments about both jurisdiction and construction. In particular, the issue concerns whether, and if so to what extent, the decision-makers in respect of

planning approval under the LUPA Act have jurisdiction, or are required by the scheme, to assess a proposed use or development of land, on a merits basis, against a management plan approved under the NPRM Act, for the purpose of granting or refusing planning approval. At one end of the jurisdictional argument, it was contended before the Tribunal that the NPRM Act covered the field in respect of the management of reserved land, and the LUPA Act was impliedly excluded or repealed insofar as reserved land was concerned. Hence, the argument went, there was no jurisdiction to regulate the use or development of reserved land through a planning scheme and, consequently, no valid requirement for a permit in respect of such use or development. The Tribunal rejected that argument, and it has not been pursued before this Court. However, the respondents maintained the argument that the jurisdiction of the decision-makers under the scheme was limited because the LUPA Act did not permit a scheme to confer jurisdiction on a planning authority, and the Tribunal on appeal, to interrogate "the functions and powers of the Director".

19 Ultimately, the jurisdictional arguments merge in the fundamental question of the construction of the acceptable solution. The Tribunal rejected the jurisdictional arguments and determined that the proper interpretation of the acceptable solution only required:

(a) that a management plan be in existence; and

(b) that an assessment of use in accordance with the management plan has been undertaken and approved up to and including the penultimate step prior to determination of the RAA process. This was in accordance with evidence before the Tribunal that the process had been undertaken and approved up to and including that step, and awaited only the grant of a planning permit by the Council in accordance with the scheme.

20 The learned primary judge also considered the jurisdictional arguments, but framed the question as "whether the Tribunal has jurisdiction to entertain the interrogation of whether a particular use and development of reserved land for which provision is made in a management plan made pursuant to the provisions of the NPRM Act, answers the description given to it in the plan". While his Honour discussed the issue within a jurisdictional context, ultimately he also determined the appeal on the basis of the proper construction of the acceptable solution. His Honour concluded that the provision required only satisfaction "as a matter of fact, that the development was 'subject to' a reserve management plan". This did not involve an enquiry into the instrument itself, nor an evaluative merits assessment of the development against the content of the document.

21 The single ground of appeal to this Court asserts four separate errors on the part of the learned primary judge. The ground is as follows:

> "1 The primary judge erred by deciding that the decision made by the Resource Management and Planning Appeal Tribunal (the 'Tribunal') and delivered in Hobart on the 18th of December 2019 in proceeding numbered 20/19P was not affected by an error of law. In particular, the primary judge erred:
>
> a in holding that the Tribunal did not have 'jurisdiction' to assess the proposal against the *Tasmanian Wilderness World Heritage Area Management Plan 2016* (the 'Management Plan');
>
> b in his construction of 'in accordance with the Management Plan' in clause 29.3.1 A1 of the *Central Highlands Interim Planning Scheme 2015* (the 'Planning Scheme');
>
> c in holding that 'all that was necessary was for the planning authority, and on review, the Tribunal, to simply satisfy itself, as a matter of fact, that the development was "subject to" a reserve management plan';
>
> d (if all cl 29.3.1 A1 of the Planning Scheme required was that the proposal be 'subject to' the Management Plan) by failing to determine as a matter of fact or law whether the use was 'subject to' the Management Plan or to remit that question to the Tribunal for determination."

Ground 1(a) – Jurisdiction

22 Although the primary judge discussed the issue of jurisdiction in some detail, it is not correct to say, as asserted in the sub-ground, that his Honour held that the Tribunal did not have jurisdiction to assess the proposal against the plan. I accept the submission of Mr McElwaine SC that his Honour did not find it necessary to resolve the jurisdictional question because he concluded that the acceptable solution did not require an enquiry to an extent which would have engaged the jurisdictional argument. If it had done so, Mr McElwaine argues, then the question would be whether the planning scheme could validly confer upon the planning authority, and on appeal, the Tribunal, the power to undertake a merits assessment of the "land management function of the Director pursuant to the (NPRM) Act".

23 Having regard to the reasoning of the primary judge and the conclusion which I have ultimately reached as to the construction of the acceptable solution, I am also of the view that it is unnecessary to determine the jurisdictional question. However, my failure to deal directly with this question should not be taken as expressing implicit agreement with the jurisdictional arguments. In particular, I agree with the comments of the primary judge at [58] as follows:

> "[58] I accept the observation of the appellants in their written submissions in reply, that there are numerous authorities to support the proposition that multiple decisions may need to be made under different statutes notwithstanding that they consider the same, or similar, subject matter. To my mind however, that is not the issue here and the cases they cite, namely *State of South Australia v Tanner* (1989) 166 CLR 161; *Tasmanian Advanced Minerals Pty Ltd v Forestry Tasmania* [2012] TASSC 20, 197 LGERA 1 at [69]-[73] and *Royal Automobile Club of Australia v Sydney City* Council (1992) 27 NSWLR 282 per Kirby P at 294 are not in point. The present case is not one of inconsistent statutory provisions. It is a case of the extent of the Tribunal's jurisdiction where an external land management document is incorporated, simply by reference, into a planning scheme."

24 I see no reason why the conferral upon the Director under the NPRM Act of the authority to manage reserved land should override or detract from the application of planning regulation and processes provided by the LUPA Act with respect to such land. There is no express provision in either Act which excludes the operation of the LUPA Act in respect of reserved land, nor does the NPRM Act purport to expressly prescribe processes for the regulation of use and development on reserved land. It certainly does not contain the attributes of public participation and appeal processes which are an essential component of land use planning in Tasmania. Although the relevant management plan deals with the question of use and development, at least on a non-binding basis, there is nothing in the NPRM Act which mandates the inclusion of those provisions in a management plan. I see no reason in principle why a planning scheme could not prescribe a merits based assessment against an incorporated document such as a management plan. The determinative question in this case, however, is whether that is the effect of the acceptable solution.

25 It follows that this ground is without merit.

Grounds 1(b) and (c) – Construction of the acceptable solution

26 The primary judge determined that as a matter of construction, the only requirement of the acceptable solution was that the development be subject to a reserve management plan. His Honour described this as a question of fact which did not involve an enquiry into the instrument itself. In particular, his Honour observed that the question posed by the acceptable solution did not "call for a consideration of whether the RAA process is complete, or amounts to a decision". His Honour, in effect, considered that the Tribunal had erred in finding that the RAA process was relevant to the enquiry required by the acceptable solution, but ultimately determined that this did not affect or call into error the outcome arrived at by the Tribunal. Accordingly, he was not satisfied that the Tribunal had erred in law.

27 The appellants' argument in this case relies on a literal approach to the construction of the acceptable solution. It focusses on the words "in accordance with", and asserts that this phrase mandates the conclusion that the planning scheme has incorporated by reference the management plan as a test against which the proposed use must be assessed. In practical terms, the application of this test will require an evaluative assessment. It is submitted that there is nothing unusual or exceptional about the incorporation of a document into scheme provisions in this way, provided that the requirement of certainty is met: see *Williams v Law* (1987) 14 Tas R 149; *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41. It is argued that the intention to incorporate the document is confirmed by other provisions of the scheme, including acceptable solutions dealing with development standards such as building height and setbacks, which provide that a prescription of those matters in the management plan will satisfy the relevant acceptable solution. It is also consistent with the approach adopted under the performance criteria contained in cl 27.3.1. It is noted that these performance criteria expressly require an evaluative merits assessment in respect of matters which could be expected to come under the purview of the Director as the managing authority of the reserved land. Hence, it is argued, it is reasonable to impute the same intention to the corresponding acceptable solution.

28 Further, from a textual perspective, Ms Forsyth SC for the appellants, notes the contrast between the wording used in the acceptable solution and that used in the table of uses for this zone in the scheme. In particular, the qualification which brings "visitor accommodation" into the permitted category of the Table is "Only if a reserve management plan applies". The acceptable solution requires that the use be "undertaken *in accordance with* the reserve management plan" [my emphasis]. It is submitted that "applies" can be equated to the primary judge's phrase "subject to", and that these can be distinguished from the phrase "in accordance with" which introduces the need for an evaluative assessment.

29 The meaning of the phrase "in accordance with" has been considered by a number of authorities in varying statutory contexts. At the hearing of this appeal, Ms Forsyth relied upon the decision of Mortimer J in *Friends of Leadbeater's Possum Inc v Vic Forests* [2018] FCA 178, 260 FCR 1. In that case, consideration was required of the meaning and operation of legislative provisions in both the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) and the *Regional Forests Agreement Act* 2002 (Cth) that provided that important provisions of the former Act did not apply to an RFA forestry operation "that is undertaken in accordance with [a regional forest agreement]". Her Honour considered that the relevant provision presented a constructional choice, in that the phrase "in accordance with", "can be susceptible to different meanings in different statutory contexts". Her Honour's conclusion was that the phrase "in accordance with" should be interpreted to mean "consistently with", "in conformity with" or "in compliance with". Hence, an evaluative assessment was required in order to determine whether the activity had been compliant with the incorporated document. The alternative interpretation contended for in that case was that the phrase should simply mean that the activity had been conducted in a region to which an RFA was referable. Textual considerations, and the context and purpose of the relevant legislative scheme, were important factors in her Honour's reasoning.

30 Her Honour's decision on this question was applied by the Full Court of the Federal Court in *Montenegro v Secretary, Department of Education* [2020] FCAFC 210. That case was concerned with an appeal from a decision of the Administrative Appeals Tribunal in respect of a claim for re-crediting of a FEE-HELP debt in circumstances where a student was unable to meet course requirements due to a medical condition. The relevant legislation provided that the decision of a higher education provider in these circumstances "must be in accordance with" administration guidelines, if those guidelines were relevant in a defined way. Flick J, with whom the other members of the court agreed, said, at [25], of her Honour's approach in *Friends of Leadbeater's Possum*:

> "[25] It is a construction, with respect, which should also be applied to s 104-30(2) of the Higher Education Support Act. Where a provision thus requires that something is to be done 'in accordance with' the Administration Guidelines, what is required is

> that those Guidelines themselves become a 'substitute regime' which is to be complied with."

31 However, on the 10 May 2021, after the hearing of this appeal, a differently constituted Full Court upheld an appeal from Mortimer J's decision in *Friends of Leadbeater's Possum Inc v Vic Forests. VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66, 389 ALR 552. The Court rejected the primary judge's conclusion as to the meaning of the phrase, and in particular, that the use of these words incorporated the RFA as a test for the application of the exemption prescribed by the section in respect of relevant forestry operations. It said:

> "[114] These textual and structural considerations suggest that the use of the words 'in accordance with' in s 38(1) was intended to be descriptive of the forestry operation: that is, the operation is one covered by or permitted by the relevant RFA. The exclusion of those operations from Pt 3, by a provision in a separate Division altogether from that which contains Pt 3, reinforces the conclusion that the words 'in accordance with' are merely descriptive and not intended to be a class of exemption like the other provisions."

32 The Court concluded that the requirement that the forestry operation be "undertaken in accordance with" an RFA meant only that the forestry operation be conducted within an area on which the RFA permits forestry operations and does not require that the operation be "in accordance with any restrictions, limits, prescriptions, or contents of the" RFA or the Code of Practice applied by the RFA. Again, textual and contextual considerations arising from the specific legislative provisions in question were critical to the reasoning of the Full Court.

33 In the case before this Court, there is also a constructional choice in respect of the interpretation of the words "undertaken in accordance with the plan". As already noted, the appellants submit that those words should be interpreted to mean "in conformity with the plan". Hence, it is argued, the planning authority and the Tribunal are required to undertake an evaluative assessment of the proposal against the requirements of the plan. The primary judge, on the other hand, considered that the words simply mean that the proposal must be subject to a plan, and that that was a factual question not involving further enquiry. The respondents' submissions reflect the approach of the primary judge. For the reasons which follow, I am satisfied that the learned primary judge was, in substance, correct in his interpretation of this provision.

34 Similarly to the view taken in the Federal Court cases already discussed, I am of the opinion that textual and contextual considerations are important in the construction of the scheme provision relevant to this case. Both *VicForests* and *Montenegro* were concerned with legislation incorporating a non-legislative document into the operation of the legislative provisions. Of course, this appeal is concerned with the interpretation of a planning scheme. In *Raff Angus Pty Ltd v Resource Management and Planning Appeal Tribunal* [2018] TASSC 60, I dealt with the relative importance of contextual and textual considerations in respect of the interpretation of the provisions of a planning scheme, and in particular, a performance-based scheme:

> "[20] A planning scheme should be interpreted in accordance with the ordinary rules applicable to the interpretation of legislation, with the possible exception that the purposive approach specified in the *Acts Interpretation Act* 1931, s 8A, is not applicable. See *AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal* [2011] TASFC 5, per Blow J (as he then was) at [10]. 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) 194 CLR 355 at 384, per McHugh, Gummow, Kirby and Hayne JJ.

> [21] In *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9, 253 CLR 531, Gageler and Keane JJ expanded on the relevance and effect of context in the process of statutory construction:
>
> > '[65] Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always." Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.
> >
> > [66] Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.' [Footnotes omitted.]
>
> [22] Context derived from the overall structure and other relevant provisions of a planning scheme, is particularly important in the construction of a performance criterion in a performance-based planning scheme. The provisions under consideration in this case demonstrate attributes which are not unusual in such schemes. Such provisions often appear to be drafted by persons without legal training. They manifest an attempt to codify and establish general standards for the purpose of regulating an almost unlimited range of potential uses and developments. The words used are often intended to apply qualitative tests which require an evaluative judgment against standards which are nebulous, and often conceptual and/or aspirational. This uncertainty is inherent in the nature of planning. The majority of planning controls are intended to confine and regulate development in a general way, without imposing unnecessary restriction and prescription. This is typically so in respect of performance criteria contained within a performance-based scheme. Acceptable solutions, where provided, are by their nature, usually much more certain and quantifiable.
>
> [23] Accordingly, literal or grammatical meanings will, more often than not, not properly convey the meaning of the text used in performance criteria. The comments of Gageler and Keane JJ quoted above are apposite."

35 In my view, the construction of the acceptable solution at cl 29.3.1 should be undertaken with these comments in mind.

36 The first and most important consideration, in my view, is the intended role of an acceptable solution in a performance-based planning scheme. As Mr McElwaine submits, an acceptable solution is intended to provide a permitted pathway for compliance with the scheme standards. This particular function of an acceptable solution is critical to the overall operation of a performance-based planning scheme. In *Clarence City Council v Resource Management and Planning Appeal Tribunal* (above), I noted the operational importance of scheme standards at [56]:

> "A performance-based system employs a top down approach, where the various levels of objectives and principles are eventually distilled into a practical test defined by performance criteria and acceptable solutions. This approach provides a reasonable level of predictability which is the intended operation of such a scheme."

37 This factor weighs heavily in favour of the narrow interpretation of the acceptable solution. An interpretation contended for by the appellants would necessarily require a detailed evaluative assessment against a wide range of considerations which, in all probability, as they are in this case, are generally conceptual and/or aspirational. The need for such an assessment negates certainty of outcome and is inconsistent with the intended operation of an acceptable solution. That is not to say that an

acceptable solution can never provide for an evaluative judgment. However, in comparison with a performance criterion, its intended operation must be to provide a more certain pathway to approval.

38 A further matter affecting construction is the interaction between the acceptable solution and performance criteria contained in this particular standard. Mr McElwaine termed this argument "The inutile performance criterion." Clause 7.5.3 of the scheme provides that compliance with the scheme standard "consists of compliance with the acceptable solution or performance criterion for that standard". Hence, if the acceptable solution is not met, then an assessment must be conducted against the performance criterion to determine whether there is compliance with the scheme standard. A difficulty arises if the acceptable solution is interpreted as requiring an evaluative assessment against the plan. In that circumstance, the acceptable solution will not be met if that evaluative assessment determines that, having regard to all relevant aspects of management set out in the plan, the proposal is not in accordance with the plan. In that case, if the assessment is correct, the Director would contravene s 30(1)(a) of the NPRM Act by allowing the use or development on the land. In that circumstance, there would be no further point in conducting an assessment against the performance criterion. The performance criterion would serve no functional purpose.

39 However, if the acceptable solution is interpreted simply as requiring the use or development to be subject to a management plan, then the function of the performance criterion becomes clear. If there is a management plan which regulates use and development, then the acceptable solution is met. If there is not, then the acceptable solution cannot be met, but the performance criterion will be applicable.

40 This interpretation sits comfortably with a submission made by the Solicitor General, who appeared on behalf of the second respondent. Mr O'Farrell SC made the point that the apparent purpose of the text in the acceptable solution is to require the decision-maker to make a prediction, that is whether the use of the land will in the future be undertaken in accordance with a management plan. This prediction about the future cannot of necessity involve an evaluative assessment, but simply requires the decision-maker to be satisfied that there is a management plan in place, which will regulate the use. This requires a factual enquiry into two matters. Firstly, whether a management plan is in place which is applicable to the land. Secondly, whether the management plan provides for the ongoing regulation of the use of the land. In this regard, it is pertinent to note that a management plan need not deal with or purport to regulate use and development at all. It is not a specific requirement of the NPRM Act that a management plan perform this function. It is possible that a management plan might deal only with discrete aspects of management, completely unrelated to use and development. In such a case, the acceptable solution would not be met and resort would need to be had to the performance criterion to determine compliance with the scheme standard.

41 However, if the plan does regulate land use, then the acceptable solution will be met because it can be concluded that the use will be undertaken in accordance with the plan. This conclusion necessarily arises from the provisions of s 30(1)(a) of the NPRM Act which require the Director, as the managing authority, if a plan is in place, to manage the land in accordance with the plan. This is a legislative requirement which mandates ongoing compliance with the management plan, and hence provides the requisite degree of satisfaction.

42 An understanding of the operation of the management plan and its legislative context also explains the difference in terminology between the table of uses for the zone and the acceptable solution. The table of uses makes visitor accommodation permitted if a management plan applies. However, the acceptable solution will only operate if, as a matter of fact, the use will be undertaken in accordance with the plan. This requires not only the applicability of the management plan, but also a determination that the plan contains provisions which regulate the proposed use of the land.

43 I am satisfied that the acceptable solution should be construed as discussed, that is that it requires a factual enquiry as to whether there is a management plan which is applicable to the land, and further, whether the management plan provides for the ongoing regulation of the use of the land. If the answer to both is in the affirmative, then the acceptable solution has been met. The learned primary judge did not express his construction of the acceptable solution in these precise terms, but the effect of his decision is the same. A finding that the proposal is subject to the management plan necessarily involves a determination about both its applicability and its regulation of land use. Accordingly, his Honour did not err in his construction of the acceptable solution. These grounds are not made out.

Ground 1(d) – Failure to determine compliance with the acceptable solution

44 The appellants argue in the alternative that if the interpretation of the acceptable solution accepted by the primary judge is correct, neither the Tribunal nor his Honour made any factual findings that would engage the operation of the acceptable solution. The argument is predicated on the proposition that if the management plan prohibits the proposed use of the land, then the use is not subject to the plan, and the acceptable solution cannot be met. Ms Forsyth points out that under the table of uses in the plan, in the self-reliant recreation zone, which is the zone applicable to this development, new visitor accommodation is only permitted in respect of a standing camp. It is submitted that there is a live factual issue as to whether the proposed development is limited to a standing camp, or also includes accommodation in huts. If the latter, then the appellants submit that, on the proper interpretation and operation of the table of uses, the use is prohibited. It is submitted that neither the Tribunal nor the primary judge conducted the necessary factual enquiry, nor made findings about this question. Hence, it is argued that on this ground alone, the appeal should be upheld and remitted to the Tribunal for determination in accordance with law.

45 The fundamental difficulty with this argument is that, on the proper construction and operation of the acceptable solution, as I have explained it, the prohibition or potential prohibition of a proposed use in a management plan will not take that use outside the operation of the acceptable solution. The use will still be undertaken, if indeed it does proceed, in accordance with the management plan, and the question of whether it proceeds will be determined as a matter of management under that plan. In this situation, the use is still subject to the management plan and hence the acceptable solution is met. The grant of a planning permit may be pointless, because it will not change the effect of a decision made as a matter of management under the plan not to proceed with the development, or to amend the development so that it complies with the requirements of the plan. However, this does not seem to me to be relevant to the question of compliance with the scheme standard. It is not unusual for planning schemes to contemplate and make provision for use and development which may, in certain circumstances, be prohibited under other applicable legislation. Accordingly, provided that the plan purports to regulate the use in some way, it is not necessary nor pertinent to make factual findings about whether the use is prohibited by the plan.

46 The appellants argue that a further consideration which arises on the interpretation of the acceptable solution favoured by the primary judge, but which has not been taken into account by the Tribunal or his Honour, and hence requires remitter, is the effect of the grant by the Minister of a lease to the first respondent over the relevant land for the purpose of constructing and operating the proposed tourist accommodation. It is argued by the appellants that the use will not be undertaken in accordance with the management plan, because this particular development has been taken outside the ambit and jurisdiction of the plan by the grant of the lease. It seems to be uncontroversial on this appeal that the Minister has in fact granted a lease to the first respondent pursuant to the provisions of s 48 of the NPRM Act. The relevant provisions of that section are as follows:

> "(1) The Minister may grant leases of, or licences to occupy, reserved land that is Crown land.
>
> (2) …

(3) …

(4) ...

(5) The Minister may not grant a lease or licence that authorises or requires the lessee or licensee to erect a building on land within a national park, State reserve, nature reserve, game reserve or historic site unless the erection of the building is permitted under the management plan or the building is –

(a) a building appurtenant to a building already on the land; or

(b) a building that the Minister is satisfied is intended to be used primarily for providing –

(i) tourist accommodation or accommodation for people resorting to that land; or

(ii) facilities and conveniences for people resorting to that land."

47 The lease was placed in evidence at the Tribunal hearing. It was granted on 19 January 2018, well before the development application was submitted to the Council. The lease document also incorporates a business licence, granted by the Minister in respect of the proposed operation. The power of the Minister to grant a business licence arises pursuant to s 40 of the NPRM Act. Under s 38, there is a prohibition on the operation of certain business activities on reserved land that is also Crown land, without a relevant licence. Those activities include those contemplated by the proposed operation, including the provision of a service for monetary consideration.

48 The appellants' argument focusses on the provisions of s 48(5). Ms Forsyth points out that that provision prohibits the grant of the lease for the erection of a building unless the erection of the building is permitted under the management plan or falls under at least one of the exceptions contained in pars (a) and (b). The only exception relevant to this proposal is that contained in par (b)(i). The argument is that this provision authorises the erection, and by implication, the use of a building primarily for tourist accommodation, irrespective of the prohibition of the development, or aspects of it, by a management plan. It is submitted that, in this case, if the development in fact includes the erection and use of huts, the use will not be undertaken in accordance with the management plan because the erection of the huts, although prohibited by the management plan, is statutorily authorised under this exception. It will, therefore, not be undertaken under the management plan but rather, by force of statute, under an alternative document. Hence, the appellants argue that the matter should be remitted to the Tribunal to determine the factual question of whether the development relates only to a standing camp, or alternatively will include hut accommodation.

49 It is apparent on the face of the lease agreement that it contemplates and permits the potential construction of commercial hut accommodation, together with other infrastructure, in respect of the proposed operation. That is clear from the definitions of "approved use" and "development" in cl 1.1 of the lease. However, as the Solicitor General has submitted, s 48 is only concerned with the power of the Minister to grant a lease, and s 48(5) operates only to restrict the ambit of that power. There is nothing in the section that suggests or supports an interpretation that the grant of a lease will override other laws affecting and restricting the management and use of the land. In particular, the grant of a business licence or a lease does not affect or detract from the obligation of the Director under s 30 to manage the reserved land "for the purpose of giving effect to the management plan and in accordance with that plan". Although that obligation is expressed to be "Subject to this Act", there is nothing about the provisions contained in ss 40 and 48 that suggest it is intended to be an exception to the obligation contained in s 30. On the contrary, the grant of a business licence or a lease imposes a further obligation upon a person who intends to use Crown land, which is also reserved land in a particular way, and in my view, is clearly not intended to detract from or reduce the matrix of legal and regulatory obligations that would affect such use.

50 This view of the operative interaction between these provisions is reflected in the lease. Clause 1.8 provides that the operators' obligations and liabilities under the lease:

"are in addition to, and need not affect, limit, replace or exclude, the operators' obligations and liabilities under or in connection with:

(a) any existing or future law (including a law relating to land); or

(b) any authorisation relating to the land and the development (including any authorisation from time to time applicable to the design, construction, use and/or operation of the development."

51 The obligation to comply with other laws is also expressly provided for in cl 12. In particular, cl 12.3 provides as follows:

"12.3 Compliance with management plans

The Operator must comply with any management plans (approved under the Act) that may relate to the Land so far as such management plan concerns or affects a matter referred to in clause 12.1(a)."

52 I note that a matter referred to in cl 12.1(a) will include the following:

"(iv) the development

(v) the use of the land"

53 As the Solicitor General points out, the practical effect of the provisions of the statute, as well as those in the lease, can be demonstrated in respect of the proposed construction of huts, if huts are in fact prohibited under the management plan. In that case, it can be argued that the grant of the lease may still be authorised pursuant to s 48(5)(b)(i), and further there is no express prohibition in respect of a business licence for the operation of those huts. I accept the appellants' submission that in that case, the lease and licence would lawfully relate to aspects of the operation that would be prohibited, not simply from the point of view of development, but also in respect of the ongoing use of that infrastructure. The table of use clearly relates to the use of new visitor accommodation and restricts such accommodation to standing camps only in this zone. It contemplates the development of the accommodation as a prerequisite to its use. However, the critical point is that, although the grant of a lease and a licence contemplating such development and use may be authorised under ss 40, 41 and 48, this will not override nor detract from the effect of the management plan. Hence, if the management plan prohibits or restricts the proposed use, including by restricting visitor accommodation to standing camps only, then the fact that a business licence or lease has been granted will not alter that outcome. The management plan will still control the use and development of the land, if it purports to do so.

54 Accordingly, I am satisfied that the only factual findings necessary to determine whether the acceptable solution has been met are as follows:

(a) Whether there is a management plan in force which relates to the land upon which the proposed development will take place. This is not in dispute and clearly appears from the findings of the Tribunal, as accepted by the learned primary judge.

(b) Whether the proposed use will be undertaken in accordance with the plan. This can be determined from an inspection and comparison of the provisions of the development application and the management plan. It is abundantly clear from this exercise that the use of the land in the manner proposed in the development application is contemplated by and intended to be regulated by the management plan.

55 Accordingly, a finding that the use will be undertaken in accordance with the management plan is inevitable. Irrespective of the basis upon which the Tribunal and the primary judge approached this question, this Court has all the information it needs to determine this appeal. It is not necessary for the matter to be remitted to either forum for further determination.

56 It follows that this ground also is without merit. As none of the grounds have been established, I would dismiss the appeal.

File No FCA 1830/2020

THE WILDERNESS SOCIETY (TASMANIA) INC, TASMANIAN NATIONAL PARKS ASSOCIATION INC, RICHARD WEBB, PAUL SMITH v WILD DRAKE PTY LTD DIRECTOR, NATIONAL PARKS & WILDLIFE

REASONS FOR JUDGMENT

FULL COURT
PORTER AJ
15 September 2021

Introduction

57 Essentially, this appeal involves establishing the proper meaning to be given to the phrase "in accordance with" as it appears in "Acceptable Solutions – A1" as set out in cl 29.3.1 – Use Standards for Reserved Land – in the Central Highlands Interim Planning Scheme 2015. The full text of the acceptable solution is, "Use is undertaken in accordance with a reserve management plan". The question of construction is the end point of a wide-ranging debate that commenced with an application for a permit under the *Land Use Planning and Approvals Act* 1993 (the LUPA Act).

58 Wild Drake Pty Ltd wishes to pursue a development proposal for Halls Island in Lake Malabena which is in the Walls of Jerusalem National Park. That area is part of the Tasmanian Wilderness World Heritage Area (TWWHA). The area is reserved land within the meaning of the *National Parks and Reserves Management Act* 2002 (the NPRM Act), and is subject to the management of the Director of National Parks & Wildlife. There is in existence a reserve management plan for the TWWHA.

59 Wild Drake and the Minister administering the NPRM Act have entered into a "Lease and business licence agreement" in respect of the relevant land. An element of Wild Drake's proposal is accommodation on the island. Wild Drake applied to the Central Highlands Council for a permit for visitor accommodation. Many representations were received, and the Council refused the application.

60 Wild Drake appealed to the Resource Management and Planning Appeal Tribunal. The Director was made a party and the Attorney-General intervened. The Council was represented. One major issue was the construction of the acceptable solution A1 in cl 29.3.1 (cl 29.3.1-A1). The Tribunal set aside the Council's refusal and granted a permit subject to conditions.

61 Pursuant to s 25(1) of the *Resource Management and Planning Appeal Tribunal Act* 1993 which permits an appeal from a decision of the Tribunal on a question of law, the Wilderness Society (Tasmania) Inc and other representors appealed to a judge of the Supreme Court.

62 Estcourt J dismissed the appeal, and the appellants appealed to this Court. Both at first instance and in this Court Wild Drake and the Director were active respondents (collectively "the respondents"). The Council was a respondent at first instance and is in this appeal, but has taken no part in either proceedings. I have had the advantage of reading the reasons for judgment of Brett J. While I generally agree with much of what his Honour has written, I am respectfully unable to agree as to the ultimate outcome. For the reasons that follow I would allow the appeal, make consequential orders, and remit the matter to the Tribunal for determination in accordance with these reasons.

The Scheme and the legislation

63 The Scheme divides the planning area into zones. The relevant zone is the Environmental Management Zone, specifically dealt with in cl 29.

64 Clause 7.5.1 of the Scheme provides that a use or development must comply with each applicable standard in a zone. Clause 7.5.3 states that compliance for the purposes of cl 7.5.1 consists of complying with the acceptable solution or the performance criterion for that standard. The relevant standards are found in cl 29.

65 Clause 8 deals with assessment of applications for use or development. Clause 8.2 – Categorising Use or Development – requires each proposed use or development to be categorised into one of the use classes contained in Table 8.2.

66 The relevant use class in Table 8.2 is "Visitor Accommodation", the current definition of which is to be found in Planning Directive No 6 issued by the Minister.[1]

67 Clause 8.7 – Permitted Use or Development – provides that "a use or development must be granted [sic] if:

(a) the use is within a use class specified in the applicable Use Table as being a use which is permitted;

(b) the use or development complies with each applicable standard and does not rely on a performance criterion to do so; and

(c) the use or development is not discretionary or prohibited under any other provision of the planning scheme."

68 The Use Table in cl 29.2 provides that Visitor Accommodation is permitted, with the "Qualification" – "Only if a reserve management plan applies".

69 Clause 29.3 is headed "Use Standards". The only sub-clause is 29.3.1 which provides as follows:

"**29.3.1 Use Standards for Reserved Land**

Objective:	
To provide for use consistent with any strategies for the protection and management of reserved land.	
Acceptable Solutions	**Performance Criteria**
A1 Use is undertaken in accordance with a reserve management plan.	**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 the *National Parks and Reserves Management Act 2002*; (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 or extent."

[1] "… use of land for providing short or medium term accommodation, for persons away from their normal place of residence, on a commercial basis or otherwise available to the general public at no costs. Examples include a backpackers hostel, a bed and breakfast establishment, camping and caravan park, holiday cabin, holiday unit, motel, overnight camping area, residential hotel and serviced apartment."

The NPRMA

70 "Reserved land" is any land declared under the *Nature Conservation Act* 2002 to be reserved, or taken to have been so declared. Land may be declared to be reserved land in any one of 10 classes, national park being one of them. Section 19 of the NPRM Act provides for the approval by the Governor of plans for the use, development and management of any reserved land. Section 27 of the NPRM Act relevantly provides as follows:

> "**27 Contents of management plans**
>
> (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) …; and
>
> (d) ...; 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) ...
>
> (g) ...
>
> (h) ...
>
> (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."

71 Under the *Nature Conservation Act* 2002, the reserved land is declared to be in the class of "national park". As earlier noted, the Director of National Parks and Wildlife is the managing authority of reserved land. Section 30(1) of the NPRM Act provides as follows:

> "**30 Functions and powers of managing authority in relation to reserved land**
>
> (1) Subject to this Act, the managing authority –
>
> (a) for any reserved land for which there is a management plan is to manage that land for the purpose of giving effect to the management plan and in accordance with that plan; or
>
> (b) for any other reserved land is to manage that land –
>
> (i) in a manner that is consistent with the purposes for which the land was reserved; and
>
> (ii) having regard to the management objectives for the class of that reserved land."

The Reserve Management Plan 2016

72 Pursuant to s 19 of the NPRM Act, there is a reserve management plan for the TWWHA. It is called the Tasmanian Wilderness World Heritage Management Plan 2016 (the RMP). It is a very lengthy document. It has a section that sets out a basis for the management of the area, and one that deals with various "statements of values" including cultural and natural ones, and a Tasmanian Aboriginal perspective. It has a section entitled "Use and development controls", with sections that separately deal with the management of cultural values and of natural values.

73 Different sections address issues such as social and recreational values, commercial tourism, workplace health and safety, visitor information, interpretation and education, and visitor safety. In general terms, some of the document is explanatory and aspirational, some of it amounts to guidelines, while some of it is prescriptive.

74 As to use and development controls, s 3.1 is headed "Management Zoning and Overlay System". The TWWHA is divided into zones; Visitor Services, Recreation, Self-Reliant Recreation and Wilderness. Section 3.2 contains a Table of Use which "provides guidance on recreational and use activities". The relevant zone is the Self-Reliant Recreation Zone

75 Various activities are listed, with a single letter notation as to when, in each zone, an activity may occur, in the sense of it being allowed or not necessarily permitted as of right, ("Y"), or not permitted, ("N"). "Visitor accommodation" is an activity.

76 The entry for Visitor accommodation is:

Activity	Visitor Services Zone	Recreation Zone	Self-Reliant Recreation Zone	Wilderness
Visitor accommodation (new) New private (non-commercial) infrastructure is prohibited	Y	Y including huts and standing camps	Y standing camps only	N

77 The introduction to s 3.2 states that the allowance of a particular activity or use provides an opportunity for it to occur, and that it does not follow that the activity or use is permitted "as of right". It goes on to say that some activities, such as those involving the construction of infrastructure, while allowed for, will be required to undergo applicable assessment and approval processes to determine whether an individual proposal should be granted the authority to proceed.

78 Section 3.3 is headed "Assessment and Approval Processes". The introduction says that the management of areas covered by the Plan is to be "in accordance with its broad intent and its specific prescriptions." Section 3.3.1 contains details of a process called a Reserve Activity Assessment (RAA). This is described as the Parks and Wildlife Service assessment process for activities on reserve land that could have a potential impact on reserve values. An RAA is required for new or current works, and for activities that, over a period of time, have the potential to cause adverse environmental, social or economic impacts.

79 The Plan says the RAA is an adaptive process that is intended to change over time in response to review and changing circumstances. "While the process itself is the prescribed assessment process for activities and proposals in the TWWHA, the details of the current RAA process are provided for information only and are not prescribed in this Management Plan."

80 The Plan contains a flow chart that depicts the assessment process. There are 10 stages or "steps" as the Tribunal called them. The seventh step is "Required External Assessments", with "Final

Determination" the step immediately following. Although so titled, the explanation of the seventh step says "ie *Commonwealth Environment Protection and Biodiversity Act 1999*".[2] Section 3.3.2 states that proposals within the TWWHA may require a statutory assessment process provided for by the LUPA Act, and that some proposals may require public consultation as set out in that Act. Evidence before the Tribunal showed that the RAA process had, in relation to Wild Drake's proposal, progressed to step seven.

81 The RAA has no statutory basis in the sense that is not a delegated legislative instrument, but it is a managerial assessment tool that is authorised by the RMP: *Wilderness Society (Tasmania) Inc v Minister for the Environment* [2019] FCA 1842, 275 FCR 287 at [96]-[103].

The background to this appeal

82 Before the Tribunal, the Attorney-General contended that the Tribunal had no jurisdiction to entertain the appeal, as the NPRM Act covered the field with respect to the management of reserved land, and as specific provision is made for the use and development of such land in that Act. Wild Drake adopted the same position. The Tribunal held that the LUPA Act and the NPRM Act did not exclude the operation of the other.

83 The next major point of debate before the Tribunal was what cl 29.3.1-A1 meant; specifically, whether on its proper construction, a planning authority was required to carry out a separate assessment of compliance with the RMP. (For some reason, this contention was considered as an issue of whether it was open to the Tribunal to conduct a "merits review" of the RAA process.) The Tribunal noted Wild Drake as advocating that the inquiry was limited to a factual determination of whether there is a reserve management plan that applies, and if so whether the use will be undertaken in accordance with it.

84 The Tribunal held that what was necessary was an interpretation of cl 29.3.1-A1 which disallowed a planning authority from undertaking a separate assessment of compliance with a reserve management plan. It said cl 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. If the RAA process achieves final determination and approval, no further inquiry would be required, and cl 29.3.1-A1 would be met.

85 The Tribunal noted that if the RMP provided that there is no final determination of the RAA 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 any other external assessment), the acceptable solution at cl 29.3.1-A1 could never be met. It took the view the only sensible interpretation was that cl 29.3.1-A1 related to the assessment process that has achieved step seven approval. If such a determination under the RAA had been made and the proposal approved as compliant with the RMP subject to external assessment, the proposal satisfied cl 29.3.1-A1.

86 In the appeal to Estcourt J, no party sought to support the Tribunal's view of cl 29.3.1-A1. The respondents pursued a more confined jurisdictional point. That was, in essence, that the combined effect of certain LUPA Act provisions and the provisions of the NPRM Act relating to the Director's management functions, was that it was "not open to the Minister to make cl 29.3-A1 so as to confer authority on a planning authority to decide questions that relate to the management function …"; specifically to undertake a merits assessment of the land management function of the Director.

87 On that basis it was said to follow that the clause was said to be ultra vires. The construction of the clause was also a key issue. In that respect, the primary judge noted Wild Drake's primary contention as being that the acceptable solution turned on two uncomplicated factual enquiries: whether there is a

[2] The Tribunal's reasons show that the RAA process identified the LUPA Act as a matter for "external assessment", with the use being identified as discretionary requiring an application to be made.

management plan and "will the proposed use be undertaken in accordance with it or, phrased in a more satisfactory way, will the use be subject to a management plan?" As pursued by Wild Drake, the two questions seemed to have been very largely merged in the one argument about "jurisdiction", and are essentially dealt with as the one "jurisdictional point" in the primary judge's reasons.

88 His Honour disposed of the jurisdictional point by saying that the question was not so much one in those terms, but "whether the Tribunal has jurisdiction to entertain the interrogation of whether a particular use and development of reserve land for which provision is made in the management plan made pursuant to the provisions of the NPRM Act, answers the description given to it in the plan."

89 The primary judge went on to note that Wild Drake appeared to concede cl 29.3.1-A1 would not be ultra vires if, on its proper construction, all that was necessary was for the planning authority to simply satisfy itself, as a matter of fact, that the development was "subject to" a reserve management plan. His Honour said that must be correct; and adopted that as the preferred construction.

90 The ground of appeal to this Court alleges four errors on the part of the primary judge. The grounds are set out in Brett J's reasons. The first ground concerns the point about jurisdiction, two relate to the construction of cl 29.3.1-A1, while the fourth alleges that, even accepting his Honour's interpretation of the clause, there was an issue of fact that had to be determined and the matter ought to have been remitted to the Tribunal. In this appeal, the respondents maintain the jurisdictional point.

The question of jurisdiction

91 In my view it is necessary to deal with the jurisdictional point. For the reasons that follow, it has no merit.

92 In its written submissions, (adopted as to this aspect by the Director), Wild Drake argues that a planning authority – and hence the Tribunal – "does not have jurisdiction to review the land management function of the Director pursuant to the [NPRM Act]." In oral argument, Wild Drake put that the relevant Minister could not, in making an interim planning scheme pursuant to the LUPA Act (as it then stood), make a provision that "conferred jurisdiction on a planning authority to interrogate the land management function of the Director"; the Minister had no authority "to make a planning scheme investing a planning authority with jurisdiction to undertake a merits review of a management plan."[3]

93 As to these descriptions, the appellants note they do not suggest the planning authority reviews the land management function of the Director in terms of decisions made or opinions formed in the reserve activity assessment process. Their argument is that the planning authority makes its own assessment and forms its own judgment of whether the use is to be undertaken in accordance with the plan, assuming the proper meaning of the words of cl 29.3.1-A1 permits that to happen. Even so described, the respondents' point remains a live issue.

94 As to the scope of the argument, I note s 30(1) of the NPRM Act – set out above – which relates to the management, by the managing authority, of *both* reserved land for which there is a management plan, and for any *other* reserved land.

95 The respondents' argument seems better described as a proposition that the Minister had no authority to make a planning scheme investing a planning authority with the power to make any assessment or judgment about a proposal for an area of reserved land; accordingly, a planning authority has no power to do so and any provision purporting to give it such a power is ultra vires. I have not confined my restatement of the proposition to reserved land the subject of a reserve management plan.

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[3] At various times, this was put in slightly different ways: viz, the planning scheme cannot confer jurisdiction upon a planning authority "to interrogate in a merits way the land management function of the Director"; a planning authority cannot "interrogate for itself the management plan in an evaluative way."

While some expressions of the argument were so confined, the fundamental proposition was explicitly put otherwise, and it is also implicit.

96 I make the following observations about the submission. First, the respondents' proposition is essentially a statement of an outcome. The respondents have not identified the legal principles, the application of which gives rise to the position that is argued for. The legal basis for the respondents' argument can only be principles of statutory interpretation relating to implied repeal or amendment of a statute by later statute. The submission can only be taken as suggesting the provisions of the NPRM Act impliedly "repealed" provisions of the LUPA Act. In this context, as is pointed out in Pearce and Geddes, *Statutory Interpretation in Australia*, 9th ed at [7.10], the better language than "repeal" is to say that the later Act "displaces or supersedes the earlier".

97 Next, it seems to be inherent in this submission – as distinct from that put by the Attorney-General to the Tribunal and supported by Wild Drake – that the respondents accept Wild Drake does need a permit by virtue of s 51 of the LUPA Act.[4] Where the argument goes to from there is not explained.

98 The logical extension of it is that the implied modifications to the LUPA Act mean the Minister had no power to make a scheme that had, in the case of any proposed use or development on reserved land, any effect other than to make the application for a permit one under s 58 of the LUPA Act. That is, one which a planning authority is bound to permit, and bound to permit unconditionally. That includes activities of the managing authority who has the power to do, or arrange for the doing of, all things considered necessary including the erection or construction of any buildings or other works, and to provide and maintain facilities and conveniences for the use or benefit of persons resorting to reserved land: s 30(2) and (3)(a) of the NPRM Act.

99 However, the respondents seem to end up in the position of arguing for a situation in which a scheme could permissibly require a planning authority to satisfy itself that there is a management plan in respect of reserved land, and that the proposed use is subject to it, before it can grant a permit.

100 As to the principles of interpretation involved, they are well established. The following can be drawn from *Statutory Interpretation in Australia* at [7.11] and the cases cited:

- Courts do not readily accept that a repeal by implication has occurred.
- If there is open on the words of the later Act a construction by the adoption of which the earlier Act may be saved from appeal, that construction is to be adopted.
- In the absence of express words, an earlier statutory provisions is not repealed, altered or derogated from by a later one unless an intention to the effect is necessarily to be implied.
- The later of the two provisions must not be capable of sensible operation if the earlier provision still stands.
- There is a strong presumption that the one legislature does not intend to contradict itself, but intends both Acts to operate harmoniously within a given sphere.
- It may well be that provisions that appear in conflict are in fact intended to operate in parallel.

101 Section 20(2) of the LUPA Act, as it was at the time of the making of the Scheme, authorised the making of a planning scheme which made provision relating to the use, development, protection or conservation of any land, regulated or prohibited the use or development of any land, and applied,

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[4] "**51 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 or a major project permit has been granted in respect of that use or development and the permit is in effect."

adopted or incorporated any document which related to the use, development or protection of any land: see s 20(2)(aa), (b) and (g). Section 30F(1), as it then was, enabled the Minister to declare a draft interim planning scheme, an interim planning scheme. That could only be done if it complied with (among other provisions) s 20.

102 Details of the provisions of the NPRM Act said to give rise to this outcome appear in Wild Drake's written submissions set out at some length in the primary judge's reasons. The respondents rely on the following.

- Section 7(1)(a) which gives the Director the functions of acting as a managing authority as required, and preparing plans in relation to reserved lands with a view to their submission to the Governor for approval as management plans.
- Section 27(1)(a) which says that a management plan for any reserved land "may indicate the manner in which the powers of the managing authority under the Act are to be exercised".
- Section 30(1)(a) which provides that where a management plan operates, the Director is to manage that land for the purpose of giving effect to the management plan in accordance with that plan.
- Section 35(1) which prohibits a statutory power being exercised in relation to reserved land except where the exercise of the power is authorised by the management plan for that land.

103 I am not persuaded that an implied "repeal" of the relevant provisions of the LUPA Act has occurred. Brett J did not find it necessary to decide the point, but I generally agree with his Honour's observations. In particular, I agree that there is no apparent reason why the conferral under the NPRM Act of the powers of the Director, and the authority to manage reserved land, should override or detract from the application of planning regulation and processes provided by the LUPA Act with respect to such land.

104 As his Honour notes, the NPRM Act does not expressly prescribe processes for the regulation of use and development on reserved land, and it does not provide for public participation and appeal processes which are an essential component of land use planning in Tasmania. Although the RMP deals with questions of use and development, there is nothing in the NPRM Act that requires the inclusion of those provisions in a management plan.

105 Further, s 4(1) of the LUPA Act provides that the Act binds the Crown in right of Tasmania. By subs (2) it applies the Act, subject to subs (3), 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". Subsection (3) excludes the operation of the Act from public land within the meaning of the *Public Land (Administration and Forests) Act* 1991 that is the subject of a reference to the Tasmanian Planning Commission.

106 Given those provisions, Parliament might have been expected to specifically exclude reserved land under the relevant legislation, if that were the intent. Additionally, Schedule 1 to the LUPA Act contains objectives of the resource management and planning system of Tasmania. Schedule 2 to the NPRM Act contains identical objectives. An interpretation giving rise to contradictions and inconsistencies is to be avoided if possible.

107 Any suggested conflict must be truly irreconcilable, and a court will not look to hypothetical or possible conflicts: *Royal Automobile Club v Sydney City Council* (1992) 27 NSWLR 281 at 294 per Kirby P. Here, there is no difficulty in reconciling the provisions of the two statutes. Simultaneous effect can be given to the relevant areas of operation of both. Applying the proper principles, there is no good reason to modify the provisions of the LUPA Act as would be required by the respondents' argument. In passing, it cannot be overlooked that the RMP acknowledges the fact that external assessment under the LUPA Act may be required in a particular case.

Clause 29.3.1-A1 – the construction issue

108 In this section, it is more convenient to refer to cl 29.3.1-A1 as "the provision", and the words "in accordance with" as "the phrase". The appellants submit that the provision requires the planning authority, being the council or the Tribunal acting in its place, to make its own assessment of whether the proposed use of the land is to be undertaken in accordance with a reserve management plan.

109 They submit the phrase means that the use proposed is consistent with, or in conformity with, a reserve management plan, with the qualification that the provision is concerned with the rules in the management plan that relate to the proposed use, not the procedures or processes set out in the plan. The appellants accept that a planning authority is not required to assess a proposal against matters that are extraneous to issues of land use planning.

110 The primary judge held that all that is required is for the planning authority to "simply satisfy itself, as a matter of fact, that the development was 'subject to' a reserve management plan." What was put to his Honour was that the provision "turns upon two uncomplicated factual enquiries: one, whether there is a management plan and the other, will the proposed use be undertaken in accordance with it or, *phrased in a more satisfactory way*, will the use be subject to a management plan." [Emphasis added.]

111 As I will later explain, the respondents' arguments for the proposition that the provision means no more than "the use is subject to", involve an explanation of what that phrase means in its application. There is a qualification of some significance as to how it would apply.

The approach to construction

112 As a provision of a planning scheme, it should be interpreted in accordance with the ordinary rules of statutory interpretation: *AAD Nominees Pty Ltd v Resource Management and Planning Appeal Tribunal* [2011] TASFC 5 at [10]; *Raff Angus Pty Ltd v Resource Management and Planning Appeal Tribunal* [2018] TASSC 60, 28 Tas R 224 at [20].

113 That means starting with the ordinary and grammatical meaning of the text, with assistance to be gained from context; context includes surrounding provisions and the instrument as a whole, as well as purpose. The language actually employed is the surest guide: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41, 239 CLR 27 at [4] per French CJ, at [47] per Hayne, Heydon, Crennan and Kiefel JJ. Words that have an apparently clear, ordinary or grammatical meaning may be given a different legal meaning after the process of construction is complete: *R v A2* [2019] HCA 35, 373 ALR 214 at [32].

114 The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair: *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9, 253 CLR 531 at [65] per Gageler and Keane JJ (dissenting as to the outcome).

115 The use of dictionaries has been criticised,[5] but the resource is frequently used. As to the phrase, the *Oxford English Dictionary*, 2nd ed 1989, gives to "accordance" the primary meaning of "the action or state of agreeing; agreement; harmony; conformity". Under that definition the following appears: "**b.** *esp* in the modern phrase, *in accordance with*: in agreement or harmony with; in conformity to." As a verb, one of the meanings of the word "accord" given is "Of things; To agree, to be in harmony, be consistent. Const *with*." Of some interest may be that the *Macquarie Dictionary*, 8th ed, defines the phrase "in accordance with" as "in line with".

[5] See *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44 at [26]-[30] per Mason P; Stein and Giles JJA agreeing.

116 Forensically, as Reeves J noted in *Ramsay v Sunbuild Pty Ltd* [2014] FCA 54, 221 FCR 315 at [95], the phrase has been ordinarily held to mean – albeit in context specific situations – "consistently with" or "in conformity with".

117 An example is *Walker v Wilson* (1991) 172 CLR 195 at 208. The Court was examining workers compensation provisions that provided for compensation in the case of a journey where, among other things, it was undertaken in accordance with the terms and conditions of employment. Deane, Dawson, Toohey and McHugh JJ held that the phrase should be construed as meaning "in conformity with" or "consistently with".[6] The phrase has also been given the slightly different shade of meaning of "in compliance with". See generally *Re La* (1993) 41 FCR 151 at 158, *Pearson v Richardson* [2012] TASSC 71, 21 Tas R 461 at [36]-[37] and *Kolundzic v Quickflex Constructions Pty Ltd* [2014] NSWSC 1523 at [27].

118 The case of *Mount Barker Properties Ltd v District Council of Mount Barker* [2001] SASC 249, 80 SASR 449 may have some similarities with the present one. It involved a local council wanting to amend what is described as a "Development Plan" something which was described as a public document and a fundamental document in the administration of town planning and the regulation and control of building development. It expressed planning policy, prescribing proposals and objectives to be attained for prescribed areas. Amendments to it had to be made in accordance with a "Statement of Intent", something on which the council considering an amendment had to reach agreement with the Minister.

119 At 461, Debelle J noted the meaning of "according" as being in harmony or in correspondence, or to be consistent, with another thing. His Honour said a proposed amendment to the Development Plan would be in accordance with the Statement of Intent if it were consistent or corresponded with it. That was a matter of substance and not form, with each document viewed as a whole.

120 The appellants relied on *Friends of Leadbeater's Possum Inc v VicForests* [2018] FCA 178, 260 FCR 1. The case related provisions of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (the EPBC Act). Chapter 2, Pt 3 of that Act contained restrictions on actions that may adversely affect threatened species. The contention was that a particular forestry operation had not been undertaken in accordance with the Code of Practice for Timber Production 2014.

121 Section 38(1) of the EPBC Act exempted from the restrictions a Regional Forestry Agreement forestry operation "that is undertaken in accordance with" a regional forestry agreement (RFA). An RFA was defined as meaning an agreement as defined in the *Regional Forests Agreements Act* 2002 (Cth) (the RFA Act). There were provisions within Pt 3 of the EPBC Act that operated to remove the restrictions if Ministerial approval of the taking of the action was in operation under Pt 9.

122 At [202], Mortimer J adopted the trinity of meanings as set out above. In different statutory contexts, her Honour's approach to construing the phrase was approved of by the Court in *Montenegro v Secretary, Department of Education* [2020] FCAFC 210 at [24], and by Steward J in *Decleah Investments Pty Ltd and Prince Removal and Storage Pty Ltd v Commissioner of Taxation* [2018] FCA 717 at [12].

123 An appeal in the *VicForests* case was pending at the time of the hearing of this appeal, and the Full Court of the Federal Court later took a different view to the trial judge: *VicForests v Friends of Leadbeater's Possum Inc* [2021] FCAFC 66, 389 ALR 552. At [109] the Court noted it would have been a simple matter for Parliament to exclude from the ambit of Pt 3, an RFA forestry operation that is undertaken "in accordance with any requirements imposed by or through an RFA", but it did not do so. At [114], the Court held that the use of the words "in accordance with" in the relevant section was

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[6] Brennan J said at 200 that the phrase, in its context, meant "not inconsistently with".

intended to be descriptive of the forestry operation: that is, the operation was one covered by or permitted by the relevant RFA.

124 At [118], the Court went on to say that the words "in accordance with an RFA" were not redundant; they were shorthand for the list of features required for an agreement to meet the definition of a regional forestry agreement; that is, the words were descriptive of what was required for an agreement to be a regional forest agreement. Ultimately, at [130], the Court concluded that the primary judge's finding that the actual conduct of forestry operations must be undertaken in accordance with the contents of a regional forest agreement – that is, in accordance with any restrictions, limits, prescriptions or contents of the Code – in order to secure the benefit of the exemption, could not be sustained.

125 The respondents submit that by analogy the Court's reasoning confirms the correctness of the interpretation of the primary judge in this case; that the provision is satisfied if, as a matter of fact, the proposed development will be subject to a reserve management plan.

126 The appellants note that the Court found the consequences of Mortimer J's construction were as follows. A person could become liable to a civil or criminal penalty for conduct in circumstances where it is established that the forestry operation, which was undertaken in purported accordance with a regional forest agreement, was not compliant with each element of the forest management system as referred to in the relevant agreement, and where the person did not otherwise seek approval as provided for by the statute. At [21] the Court observed the only way a person could be confident about avoiding liability was to apply in every case for approval, thereby rendering the substitute regime of regulation under the RFA and s 38(1) of the EPBC Act itself, redundant.

127 Further, the appellants point out that the Court found a forestry operation is undertaken in accordance with an RFA if it is conducted in a region covered by an RFA where those operations are not prohibited by the RFA. The reference to "not prohibited by the RFA" arises due to the definition of RFA forestry operations in the RFA Act to mean those that are conducted in relation to land in a region covered by the RFA, being land where those operations are not prohibited by the RFA.

128 The appellants say the same reasoning is not open in this case because if all that the provision meant was that a reserve management plan "applied" in the geographic sense, then the acceptable solution would use the same formula as the cl 29.2 use table; that is, "if a reserve management plan applies". Alternatively cl 29.2 would simply state that *no permit* is required "if a reserve management plan applies". On those bases, the appellants say the Full Court's decision in *VicForests* does not affect the correctness of their contentions.

129 As the appellants' points demonstrate, the Court's determination was heavily dependent on statutory context. The case serves to show that the phrase "in accordance with" can, depending on its context, take on a different meaning from the usual trinity of meanings.

130 Starting with the broader aspects of context, much of the respondents' argument about the construction issue is what was argued in relation to jurisdiction. My reasons for rejecting that argument have some relevance. Of particular note may be that the Director is a potential user or developer of reserved land. As previously noted, the Director has the power to do, or arrange for the doing of, all things he or she or it considers necessary, including the erection or construction of any buildings or other works, and to provide and maintain facilities and conveniences for the use or benefit of persons resorting to reserved land. The Director may charge for the use of those facilities or conveniences.

131 In all of that, the Director is subject to the direction of the Minister, and must comply with those directions: s 7(2) of the NPRM Act.

132 In approaching the construction of the provision, care needs to be taken not to include as context, the particular reserve management plan. The Scheme preceded the RMP. Reserve management

plans are contemplated by the Scheme, but the provisions of a particular management plan cannot directly influence the construction of the provision. The Court's task is to settle the construction of the provision, and then to apply that construction to the facts of this case.

133 Of course, regard can be had to s 27 of the NPRM Act and the matters that might be dealt with by a reserve management plan. In particular, s 27(2) says a management plan can provide for the use or development of that land *otherwise than under the powers* conferred by the NPRM Act. However, it would be permissible to test a particular construction by assessing the consequences of it by reference to, as an example, the particular plan that presently exists.

134 The context within the Scheme is as follows. The Scheme states that it sets out the requirements for the use or development of land within the meaning of, and under the umbrella of, the LUPA Act. Clause 29 "Zone Purpose Statements" include to provide for the protection, conservation and management of areas with (among other things) ecological or aesthetic value, to only allow for complementary use or development where consistent with any strategies for protection and management, and to recognise and protect reserved natural areas as great natural assets

135 The objective set out in cl 29.3.1 "Use Standards" is to "provide for use consistent with any strategies for the protection of the management of reserved land". The provision, as an acceptable solution, provides a means of compliance with that standard, and it must be interpreted with the nature of acceptable solutions and their role in planning schemes in mind.

136 In *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41 at [56], Brett J said a performance-based system involved the various levels of objectives and principles being distilled into a practical test defined by performance criteria and acceptable solutions; that approach providing a reasonable level of predictability which is the intended operation of such a scheme.

137 In general terms, an acceptable solution is deemed to meet the objective and performance requirements of a planning scheme without a precise relationship being established by analysis. Almost invariably, an acceptable solution will provide a more certain and readily ascertainable means of establishing compliance than performance criteria which prescribe a qualitative test requiring an evaluative judgment: *Boland v Clarence City Council* [2021] TASFC 5 at [20] per Brett J, (Wood and Pearce JJ agreeing).

Discussion

138 In relation to the appellants' case, they argue that the reference to a "reserve management plan" – which is defined in the Scheme[7] – is not the incorporation of a specific document by reference. But even if that were to be the case, there is no difficulty. I agree. Section 20(2)(g) of the LUPA Act provided that a planning scheme may "apply, adopt or incorporate any document which relates to the use, development or protection of any land."

139 The principle of certainty applies to the incorporation of external material in relation to regulations and statutory rules: *Williams v Law* (1987) 14 Tas R 149. There is nothing to suggest that the same principle would not apply to a planning scheme. Here, there is a readily identifiable reserve management plan: *Clarence City Council v Resource Management and Planning Appeal Tribunal* (above) at [15]-[17].

[7] The definition is a management plan prepared under the NPRM Act, the *Wellington Park Act* 1993 or the *Living Marine Resources Management Act* 1995, or a plan of management prepared for an area reserved under the *Crown Lands Act* 1976.

140 I also agree with the proposition that it is not fatal to the appellants' case that on their construction of the provision, evaluative judgments may need to be made. The Scheme contains quite a few acceptable solutions that involve such an exercise. The most obvious relate to subdivisions in the Open Space Zone and the Local Business Zone. The acceptable solutions respectively require an assessment of "services capable of adequately serving the intended purpose" and "services adequate to support the likely future use and development of the land."

141 A fair degree of evaluation in determining the satisfaction of an acceptable solution is not uncommon in planning schemes: see for instance *Break O'Day Council v Resource Management and Planning Appeal Tribunal* [2009] TASSC 59, 19 Tas R 94 where the relevant acceptable solution involved consideration of whether a boundary adjustment amounted to an "improved division of land".

142 The next matter for discussion arises from the respondents' proposition, to the extent that it is fully maintained, that the phrase only means "subject to" in the simple factual sense of being covered by a plan, or addressed or provided for in it.

143 By virtue of cl 7.5, a use must comply with each applicable standard, and compliance consists of complying with the acceptable solution or the performance criterion. Clause 8.7.1(a) mandates a permit if, among other things "the use is within a use class" specified in the applicable use table. Visitor accommodation as a use class is permitted only if a reserve management plan "applies" – cl 29.2. Clause 8.7.1 and the cl 29.2 Use Table need to be examined.

144 The appellants argue the case on the basis that the words in the use table, "Only if a reserve management plan applies", require a geographic connection between the proposal and the management plan. The respondents did not argue otherwise; the point was not mentioned at all by them.

145 Because of the parties' position, I will consider the case on that basis. However, it seems to me at least arguable that where the Use Table uses the word "applies", it refers to an application to the use class as such. The Scheme sets out 12 zones, each with use tables. Those tables show where no permit is required, and where the use is permitted or discretionary. There is a column for the "Use Class" and a column for adjacent entries of "Qualification". With one exception, the qualifications all relate to the type or nature of use, not area or location.

146 Admittedly, the exception is within the cl 29.2 Use Table, the use class being Extractive Industry, with the qualification that it is only permitted in certain types of areas. However, there is one other entry in cl 29.2 which is a qualification on use type; all other entries are "Only if a reserve management plan applies".

147 Clause 8.7.1(a) refers to the use being *within* a specified use class. It may be more logical that, given the general role of the use tables, the cl 29.2 Use Table means an application of a management plan to the use class, rather than the use class is simply located within a particular area the subject of a plan. If a plan applies to a use class, the use class would be subject to the plan. If all of that is right, then by virtue of cl 8.7.1(a) and the cl 29.2 Use Table, by the stage consideration of compliance with the acceptable solution is reached, the proposed use must, by definition, be one to which a reserve management plan applies. The proposed use itself must be, of necessity, subject to a reserve management plan.

148 That argument may still have some force even if the situation is that put forward by the appellants; the reasoning is just a little indirect. If a reserve management plan applies to a relevant area, a use class within that area would be subject to it. A use within the use class would then also be subject to it. These observations suggest that the provision means something more than "the use is subject to a reserve management plan," in the simple factual sense.

149 The appellants argue that all of the words "Use is undertaken in accordance with ..." need to be considered, and point out that what needs to be in accordance with the plan is the *undertaking* of the use, not just the use; otherwise the drafter could simply have used the words said by the respondents to be the provision's meaning: "the use is subject to a reserve management plan".

150 Of course, a principle of construction is that generally no word or sentence should be regarded as superfluous or insignificant: *Statutory Interpretation in Australia* (above) at [2.26] and the cases cited. I would agree that the reference to the use being "undertaken" in accordance with a plan should not be overlooked.

151 There is a difficulty in adopting the construction that the provision means "the use is subject to" in the simple factual sense I have noted. The difficulty is that it gives rise to a mandated grant of a permit even where the use is prohibited by the terms of a management plan. The appellants submit that it would be nonsensical to say that a permit must be granted for a prohibited use. For my part, and with respect to those who hold a different view, a construction that produces such a consequence should be avoided if an alternative construction is reasonably open.

152 That leads to a close examination of what it is that the respondents argue about the provision and the meaning of "the use is subject to", which they seek to substitute for the provision's text. In written submissions Wild Drake argues that the provision means no more than where a management plan operates, a use will be, or will be required to be, undertaken in accordance with its terms.

153 In oral submissions, Wild Drake submitted the construction of the provision must be one that made the scheme operate harmoniously, with acceptable solutions meaning what they are supposed to mean under a planning scheme; "'In accordance with' must mean is it permissible under a management plan? Yes, move on."

154 On a number of occasions, senior counsel for Wild Drake advanced the proposition – using the terms of the RMP – that if a use was prohibited under a management plan it would not comply with the acceptable solution. Counsel said:

> "[I]f the management plan says that the visitor accommodation in a particular location is prohibited, … the acceptable solution is not satisfied because the use cannot be undertaken in accordance with the management plan. Then you move to the performance criteria.
>
> If [visitor accommodation] was an 'N', the acceptable solution would not have been met, and … one would then turn to the performance criteria. …. .
>
> [I]f there is a reserved management plan then the planning authority need not be concerned about its application, save for the two simple factual inquiries. One, is there a management plan? And two, *how* is the use subject to it? If the management plan says visitor accommodation in a self-reliant recreation zone is prohibited then the acceptable solution is not met. If it says it's a 'Y' then the acceptable solution is met and move on to the next test under the planning scheme." [My emphasis.]

155 In oral submissions the Director argued that the proper construction involves reading "Use is undertaken …" as "Use will be undertaken …", with the question being whether the use will be *regulated* by a management plan. However, the Director also submitted that under the provision, a planning authority needs to be satisfied of only two things:

> "The first is that there is a relevant management plant in existence. The second is that that management plan will apply to the use. There can be no management plan in respect of which a use will be undertaken in accordance with, if the management plan relevantly prohibits the use. The acceptable solution couldn't be satisfied because of that very fact. But … a use can be undertaken … in accordance with a management

> plan where under the management plan the use is either discretionary, and the repository of the discretion of course is the managing authority, or it's permitted."

156 It can be immediately seen that there is a qualification to the 'simple fact' construction as advanced by the respondents. The suggested approach draws a distinction between a use that is allowed or one that is conditionally allowed[8], and a use which is prohibited. The former are 'subject to the plan', while the latter is not. In the course of explaining the qualification, and in an exchange with the Bench, senior counsel for Wild Drake agreed that, on that view of things, "in accordance with" might mean "not prohibited by".

157 Obviously, this approach involves considering the proposed use and the terms of the management plan, and determining whether the use is or is not prohibited. If it is not prohibited, that is the end of the inquiry and the acceptable solution is met. If it is determined that the use is prohibited, that moves the use out of the mandated permit class provided for in cl 8.7, and into the discretionary realm of cl 8.8.[9] Wild Drake appeared to concede that in that scenario a decision by the planning authority to grant a permit would most likely not be supportable.

158 The appellants say the distinction is drawn in order to avoid the consequences of construing the provision to mean "use is subject to" in the simple factual sense. They submit that such a distinction is not supported in the provision's text. They say a prohibition is simply a form of regulation; if the use is prohibited by a plan, then it is as much 'subject to' a plan as a use that is prohibited by condition, or only allowed for on certain conditions or in certain locations.

159 Conceptually, a use that is only permitted in a certain area or in a certain form is otherwise prohibited. The question of whether a use is prohibited or falls into the permitted category often may not be easily answered. There may be a factual issue involved. Further, if the respondents' qualified approach is adopted, on the basis of the RMP a permit would have to be granted where the use is 'allowed' but had not been approved under the RAA. This may be because there was a determination that approval not be granted, or simply because the assessment process had not been started or completed at the time of the consideration of the application for the permit. A planning authority could grant a permit conditional on approval being given: *Howie v Clarence City Council* [2001] TASSC 53 at [14]-[17]. That situation may be less unsatisfactory than the unqualified approach.

Resolution

160 First, essentially for the reasons given by Brett J, I agree the provision does not authorise a full audit of compliance or conformity with all aspects of a reserve management plan. I agree that an important consideration is the intended role of an acceptable solution in a performance-based planning scheme. A detailed evaluative assessment against a wide range of considerations, some of which may involve the assessment of impact on various things or values, and some of which may be conceptual or aspirational, negates certainty of outcome and is inconsistent with the accepted role and intended operation of an acceptable solution.

161 Additionally, there is the associated difficulty in relation to the role of performance criteria in cl 29.3.1. If what is argued for extends, to use the example of this case, to all things considered and taken into account in the RAA process and the acceptable solution is not met, the performance criteria serve no functional purpose. Attempting to confine the assessment to the rules relating to land use planning, in those terms, does not remedy the difficulties.

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[8] Examples abound in the RMP. Many uses are allowed but restricted in area or form. Of course, the present case is an example. The use is allowed but only if it is a standing camp.

[9] There is a discretion to refuse a permit if the use or development complies with each applicable standard but relies upon a performance criterion to do so.

162 As to the respondents' case, in my respectful view the provision does not have the meaning given to it by the primary judge; that is, the use is subject to a reserve management plan in the simple factual sense. I am not able to construe the provision as meaning the acceptable solution is satisfied if the use is covered by a management plan, or addressed or provided for in it, irrespective of what is contained in the plan about it.

163 The intention for the acceptable solution to be satisfied – giving rise to compliance with the standard and the mandated grant of a permit – without any reference to what is in the reserve management plan, is not at all apparent to me. I would add that there is no justification to give to the words "a reserve management plan" the descriptive or definitional role that "RFA" was given in the *VicForests* case.

164 In any event, as I have discussed, the respondents have qualified the proposition that the provision means "the use is subject to" a plan in the simple factual sense. The respondents suggest that a use is subject to, and hence in accordance with, a reserve management plan if the plan allows for it to occur; that is, it is permissible. What is required is a determination of whether or not the use is prohibited. As I have said, on that construction consideration of the use, and the terms of the management plan is required in order to determine whether or not the use is prohibited. I note that in this case, the Tribunal did not make any determination of whether the use is prohibited.

165 I am satisfied that this construction of the provision is not open. It involves reading the provision as "the use is not prohibited by, and is thus subject to, a reserve management plan." It has no foundation in the text and cannot reasonably be drawn from the context. That said, as will be seen, the construction I favour, when applied to the RMP, gives rise to an outcome not without some parallels.

166 As to what the provision means, I would first note some other provisions of cl 29 – Environmental Management Zone. I think these are relevant as indicating the role of a reserve management plan in associated contexts. Clauses 29.4 is entitled Development Standards for Buildings and Works. It deals with matters of building height and setback. The acceptable solutions for those matters are "as proscribed [sic prescribed] in an applicable reserve management plan" or a quantitative measurement.

167 The matter of design is also dealt with, the acceptable solutions for which include "as prescribed in an applicable reserve management plan", with alternatives being matters of location or a readily identifiable feature. Clause 29.5 deals with development standards for subdivision. The acceptable solution mandates compliance with one or other of two matters, the second being: "be for lots proscribed [sic] in an applicable reserve management plan"; the other matter sets out specific purposes.

168 In the provision, the drafter of the Scheme has used a particular phrase that has a clear and established ordinary grammatical meaning, and has incorporated an applicable reserve management plan. Having regard to matters of text, context and purpose, my view is that, in broad terms, the provision operates in a way that requires an assessment to be made by the planning authority of the proposed use as it is regulated by the reserve management plan, while at the same time affording deference – at least potentially – to the land management functions of the Director.

169 I think the ordinary meaning of the phrase should prevail. I would hold that the provision means that for the acceptable solution to be met, the use must comply with, or conform to, the specific prescriptive requirements of the plan that relate to whether or not it can be undertaken. In my view, this construction is implicit in the words "the use is undertaken in accordance with" the plan. This means reading the provision using the ordinary meaning of the phrase "in accordance with" but confining the provision's operation. I do not think the provision can be properly given any other construction. In the course of the hearing, the appellants accepted that on their arguments this narrow view was open to the Court.

170 The planning authority needs to be independently satisfied that the use complies with, or conforms to, the prescriptive requirements relating to the use as such. The inquiry is confined to compliance with the prescriptive terms of the plan that determine whether the use can be undertaken. If, according to the prescriptive terms of the plan it can or cannot be undertaken, that is the end of the inquiry. Specific prescriptive requirements are to be distinguished from statements of values and aspirations, and of similar broad intent. Of course, the prescriptive requirements will vary from plan to plan. The need for a judgment to be exercised in some cases about what are the prescriptive requirements is inevitable.

171 I would add a comment about the nature of prescriptive requirements. Under the RMP, the proposal had to undergo the assessment regime of the RAA. If, in any management plan a proposal is required to undergo such a process and be granted an authority before the proposal can proceed, it seems to me that such a requirement is a prescriptive requirement. That is, it relates to whether or not the proposed use can be undertaken. The point was not argued but I would think the grant of an authority following the RAA is a prescriptive requirement under the RMP. That, of course, accommodates all relevant considerations relating to the various objectives and values set out in the RMP.

The RMP and the facts of this case

172 It will be recalled that the RMP operates so that activities are either allowed for, allowed for conditionally, or not permitted. It will also be recalled that an activity being allowed only provides an opportunity for it to be pursued and is not necessarily permitted as of right. Some activities are required to undergo applicable assessment and approval processes.

173 The RMP allows the activity of visitor accommodation if it is not new private (non-commercial) infrastructure, and the accommodation consists only of standing camps. They are prescriptive requirements. In order for the acceptable solution to be met, the proposal must fit those descriptions. There may not be much controversy about the first requirement, but the issue of whether the proposal consists only of "standing camps" was the subject of evidence and argument before the Tribunal, but no findings were made. Whether the proposed use meets the acceptable solution depends on those findings of fact. If it does not, the inquiry goes no further.

174 I have not scoured the entirety of the RMP but it appears to me as though the prescriptive requirements are confined to the section on Use and Development Controls. In my view, the only other requirement is the grant of approval under the RAA. As to that, the Tribunal's reasons show that the assessment process was complete up to step seven, with the Parks & Wildlife Service "signalling it plans to approve the activity subject to any further conditions that are imposed by external assessment", but that no final determination had been made because the LUPA Act external assessment had not been finalised. It seems clear that the reference to the LUPA Act external assessment is a reference to the application for a permit.

175 This means that if RAA approval is a prescriptive requirement, which I think it is, the matter becomes circular. That may be overcome by, as noted before, the planning authority granting a permit conditional on the grant of approval: see *Howie v Clarence City Council* (above). Alternatively, the planning authority may take the view that if step seven is reached, and all that is left is the grant of a permit under the LUPA Act, that is sufficient to meet the prescriptive requirement.

The Minister's lease to Wild Drake

176 As outlined at the outset, the Minister has granted a business licence and a lease of the relevant area to Wild Drake. This was done pursuant to the provisions of ss 40 and 48 of the NPRM Act respectively. The appellants' argument about the lease is put as an alternative. That is, if this Court holds that the primary judge was correct, then the appellants say the use was not subject to the reserve

management plan because the operation of the NPRM Act in relation to the granting of a lease takes it outside the purview of the RMP.

177 It follows from what I have written that there is no need for me to decide the point. That said, I will comment on it. The relevant parts of s 48 and the appellants' arguments are set out in the judgment of Brett J, and I need not repeat them. I agree with Brett J on this issue. As his Honour concluded, if the management plan prohibits or restricts the proposed use, then the fact that a business licence or lease has been granted will not alter that outcome.

Outcome

178 For those reasons I would allow the appeal, set aside the order of the primary judge, set aside the determination of the Tribunal, and remit the matter to the Tribunal for reconsideration in accordance with a direction that for the acceptable solution in cl 29.3.1 to be met, the proposed use must comply with, or conform to, the specific prescriptive requirements in the RMP that relate to whether or not it can be undertaken.