Tasmanian National Parks Association

An independent Voice for Tasmania's Parks

9 April 2024

TNPA Submission RAA Reform – Overview

In January 2024 the state government called for public comment on two discussion papers:

- *Reserve Activity Assessment Process Reform - Statutory Environmental Impact Assessment Process Consultation Paper* – this proposes a "reform" of the Reserve Activity Assessment (RAA) process used by the Tasmanian Parks and Wildlife Service (PWS) to assess development proposals on reserved land; and
- *Information Sheet - Proposed Management Planning Processes* – this proposes major changes to the process for the preparation and amendment of management plans for reserves.

The TNPA's position is that the provision of commercial infrastructure in Tasmania's reserves is not compatible with their primary roles of protecting nature and providing for nature-based recreation.

Key concerns:

- The intent of the proposed changes appears to be to remove transparency in decision making and any credible opportunity for public involvement in the assessment of a proposed development on reserved land.
- If an assessment process is to provide a proposal with a social licence to operate it needs to be seen as fair by all parties. This requires that the public have confidence that their concerns have been considered. This will not be achieved by any process (e.g. the proposed "Independent Assessment Panel") which does not include the right for the public to challenge a decision in a planning appeal based on the merits of the proposal (merits review).
- The pre-existing right under the *Land Use Planning and Approvals Act, 1993* (LUPAA) for the public to comment on, and seek merits review of, the assessment of a development proposal in a Tasmanian national park or other reserve will be lost when all councils have adopted the State Planning Provisions (SPPs)[1].
- The state government's proposed "reform" of the RAA process proposes an entirely separate alternative to the RAA for the assessment of large and/or controversial proposals by an "Independent Assessment Panel"

[1] The intent of the SPPs appears to be the removal of development proposals on reserved land from any consideration under LUPAA.

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but no change to the existing RAA process for all other proposals. The proposed new process includes an opportunity for public comment but not the crucial right to merits review.

- The state government has simultaneously proposed major changes to the currently rigorous process for the preparation and amendment of statutory management plans for reserves which prioritise short-term flexibility over long-term certainty and reduce the opportunity for public involvement.

Key responses

- The right to merits review of RAAs for significant development proposals is essential.
- If a proposed development requires a permit under LUPAA the RAA should be integrated with the LUPAA assessment process. This could include the provision of opportunities for public comment and mediation and the right to merits review.
- RAAs currently in progress (especially those related to the Expressions of Interest process) should be halted until these concerns are addressed.

Vanishing Opportunities for Public Involvement in the Future of Tasmania's National Parks

The SPPs have now been adopted by a majority of Tasmanian councils with the remainder likely to follow soon. This apparently mundane news has major, and alarming, implications for the future of Tasmania's national parks and other reserves. A council which has adopted the SPPs is obliged to issue a permit for a proposed development on reserved land if the requisite authority has been granted by the PWS. This removes the only meaningful opportunity for public involvement[2] in the statutory process of assessing a proposed development on reserved land.

The RAA process (equivalent to an environmental impact assessment) plays a major role in determining the future of our parks but it has major shortcomings which, amongst other concerns, facilitate the state government's controversial Expressions of Interest process for tourism developments on reserved land. The TNPA first raised concerns about the inadequacies of the RAA in 2016. We called for a statutory process (prescribed in legislation) which included meaningful public scrutiny, appeal rights, and clearly defined relationship with other legislation. These concerns remain despite some minor tweaks to the process announced in 2019 as the outcome of an earlier review.

The title of the state government's recently announced ***Reserve Activity Assessment Process Reform - Statutory Environmental Impact Assessment Process Consultation Paper*** suggests that it might be the long-awaited proposal to address all of the concerns described above – but it is nothing of the sort!

The proposed process is an entirely separate alternative to the existing RAA process for the assessment of large and/or controversial proposals[3]. It proposes assessment by an "Independent Assessment Panel" and without any right to merits review. It does not propose any reform of the existing RAA process which will still be used to assess the vast majority of development proposals on reserved land and remains subject to the concerns first raised by the TNPA in 2016.

Of equal concern, the consultation paper is accompanied by an ***Information Sheet - Proposed Management Planning Processes*** which proposes major changes to the currently rigorous statutory process for the preparation and amendment of management plans[4] for reserves.

Both proposals (the new RAA process and the changes to management planning) were advertised on the NRE website on 11 January 2024 with comment closing on 8 March although the closing date was subsequently extended to 29 March. It is not apparent why the two proposals were advertised simultaneously; they are almost unrelated. There has been no obvious attempt to draw attention to the proposed changes to management planning; it is not even explicitly stated in the Information Sheet that comment is sought.

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[2] All of the legal action under Tasmanian legislation by TNPA and others which has successfully halted the proposed helicopter-accessed tourism development on Lake Malbena in the TWWHA originated from the right to appeal the council's decision, which is now lost.

[3] The state government's motivation is most likely the perceived need to "fast-track" the approval of transmission lines or wind farms within conservation areas or regional reserves but the proposed "reform" could be applied to any type of development on any type of reserved land (e.g. a resort in a national park).

[4] A management plan for a national park or other reserve is a statutory document which sets out the "rules" which determine what activities and developments can occur within a park, analogous to the role of a planning scheme in local government.

The TNPA is aware that some groups and individuals who had not met personally with the NRE Policy Advisor had not realised that they had the opportunity to comment on the proposed changes to management planning. This should be rectified by providing further opportunity for public comment.

The right to merits review

The TNPA's fundamental concern is that any process to assess proposed developments on reserved land which does not include the right to merits review lacks both integrity and credibility:

- The loss of the right to merits review as remaining councils adopt the SPPs is unacceptable because this could lead to the situation where a controversial proposal on reserved land avoids any credible scrutiny.
- Assessment by an "Independent Assessment Panel" whose decision cannot be challenged is not an acceptable substitute for the loss of the right to merits review:
    - Humans are fallible. Any decision by a group, however well-informed and well-intentioned, may contain errors of fact or overlook the importance of some issues.
    - The knowledge that their decision may be subject to independent review is, on its own, enough to constrain any decision making panel from blatant disregard of its responsibilities, which could take the form of "bending the rules" or worse. The NSW Independent Commission Against Corruption (ICAC) has recommended the expansion of merit-based planning appeals as a deterrent to corruption.
    - There is no guarantee that any "independent assessment panel" will be, or will be seen to be, independent of the state government (see below).

Proposed Management Planning Processes – summary of major specific comments and concerns

- A major role of a management plan for reserved land has traditionally been to provide long-term certainty on management intent. The proposed changes have the potential to prioritise short-term flexibility over long-term certainty.
- The proposal that an environmental impact assessment for a particular proposed development could be used to justify the amendment of a management plan is unacceptable. Management planning for reserved public land is a holistic process which is intended to provide long-term certainty on management intent. It should not be undermined by changes driven by a particular proposed development. This proposal (that an environmental impact assessment can be used to justify the amendment of a management plan) is somewhat analogous to the LUPAA combined development application and planning scheme amendment process (for private land) but reserved public land has a generally has a broader range of values and a much higher level of public interest than private land.
- The TNPA appreciates that it is unrealistic to expect that the resources

will be available to make (according to current processes) individual statutory management plans for every reserve in Tasmania.

- The current rigorous processes for making and amending management plans are appropriate, and should continue, for national parks and other significant reserved lands (such as those within a World Heritage Area).
- There may be scope for a simpler management planning process for reserved lands other than national parks and other significant reserved lands. If this is the role of the proposed management statements, they should be subject to public comment as proposed in the information sheet.
- The proposed process for making "minor amendments" of management plans could lead to major changes in the guise of "minor amendments". A much tighter definition of a "minor amendment" than the one contained in the information sheet is required.
- If the management planning process is to maintain public credibility it is essential that the PWS provides a considered public response to public comment. It should be clarified that the review of comments by Tasmanian Planning Commission must address the adequacy of the PWS response.
- The EPBC Act includes requirements for the making of management plans for world heritage areas. Some of the proposed changes may not meet these requirements.

Proposed Reserve Activity Assessment Process Reform – summary of major specific comments and concerns

The proposed new statutory environmental impact assessment process is unacceptable.

- It does not address long-standing concerns with the existing RAA process, despite claiming to be a "reform" of this process.
- It does not include the basic right to merits review[5] (see above).
- Application of the process is discretionary. It will apply only if the Minister decides it should, after taking into account some very vague criteria. Accordingly, before a decision there will be considerable uncertainty as to whether the process will apply.
- There is no guarantee that the "independent assessment panel" will be, or will be seen to be, independent of the state government since the Tasmanian Planning Commission is generally subject to direction by the Minister. If the rules for the appointment of the panel members reflect the current provisions for Development Assessment Panels in LUPAA the Minister has significant influence over the appointment of 2 members of a panel, who could constitute the majority of a quorum of the panel.
- The new statutory environmental impact assessment process is proposed to displace assessment and approval processes under the LUPAA. This would exclude planning authorities (generally local councils) from making decisions on matters on which they may have

[5] TNPA's interpretation of Section 3.6 of the consultation paper is that the only "appeal right" is the right to administrative review under the *Judicial Review Act 2000.*

considerable expertise. It would also exclude the possibility of using the provisions in LUPAA to provide for merits review of decisions of planning authorities.

- The proposal to require proponents to lodge bonds or bank guarantees to cover the costs of addressing environmental harm caused by the proposed development is welcome but it is essential that the bond is adequate to address foreseeable environmental harm.
- Leases, licences and other authorities required for a proposed development should take effect only after the granting of all other approvals. The proposed publication of leases and licences is welcome but a form of this is already in operation.

Suggestions for a different statutory assessment process – general principles

- A major component of the rationale for having an assessment is to provide the proponent with a social licence to operate. This requires the process to be seen as fair by all parties. It will not be achieved by any process which does not include an appropriate level of public scrutiny. In particular, assessment by an "Independent Assessment Panel" without the right to merits review will not be seen as fair.
- The existing PWS RAA process defines three levels of assessment. The entire RAA system needs to be revised and made statutory, not just a process for the assessment of "major" proposals.
- To provide transparency and give the public confidence that all RAAs are being assessed at an appropriate level, all proposals which are to be the subject of a RAA should be published on the PWS website. The information provided should include a brief description of the proposal and its likely impacts, and the proposed level of RAA. The public should be able to comment on the proposed level of RAA[6]. This will also enable PWS to gauge the degree of public interest which can be considered when determining the level of RAA[7].
- The criteria for determining which level of RAA will be required should be as objective as possible in order to provide a high degree of certainty for the public, the proponent and PWS.
- The process should be integrated with (not separated from) processes under LUPAA. This could include the provision of the opportunity for mediation and the right to merit appeal.
- The process should require a clear separation between the persons responsible for the preparation of the environmental impact statement and the persons responsible for its assessment.
- For significant development proposals there needs to be a reasonable opportunity for the public to comment on:
    a) the criteria for assessment; and
    b) a draft report on the assessment; and

[6] The lower levels of RAA assessment do not necessarily need to be subject to further public scrutiny but it is essential that the public are aware of their existence.

[7] e.g. the history of the Lake Malbena proposal would probably have been very different if the original RAA had been subject to public comment before being signed off.

c) the information on which the draft assessment report is based.

- The criteria for assessment of the activity or development proposal need to include whether it is consistent with:
    a) the purpose(s) for which the land was reserved; and
    b) the management objectives for the land; and
    c) the management plan (if any) for the land.
- The final assessment report must be published.
- The proponent and anyone who commented as part of the assessment process should be able to seek merits review of the outcomes of the process.
- To facilitate the comment and review processes for RAAs which also require a permit under LUPAA the RAA assessment could be integrated with the LUPAA assessment in a similar manner[8] to the assessment of major industrial proposals by the Board of the Environment Protection Authority under the *Environmental Management and Pollution Control Act 1994*.
- Leases, licences and other authorities should take effect only after the granting of all other approvals.
- If the proposal proceeds it must be subject to the monitoring of compliance with the authorisation and any conditions to which it is subject.

[8] The EPA's assessment of the proponent's environmental impact statement and the council's assessment of compliance with the planning scheme are published jointly for public comment.

TNPA Submission RAA Reform

Proposed management planning processes and statutory environmental impact assessment process for reserved land

Introduction

This document sets out comments by the Tasmanian National Parks Association Inc. (the ***TNPA***) on proposals in the following documents published by the Department of Natural and Resources and Environment Tasmania in January 2024:

a) *Proposed Management Planning Processes Information Sheet* (the ***information sheet***);
b) *National Parks and Reserves Management Act 2002 Reserve Activity Assessment Process Reform Statutory Environmental Impact Assessment Process Consultation Paper* (the ***consultation paper***).

Terms that are used in these comments and defined in the *National Parks and Reserves Management Act 2002* (the ***NPRM Act***) have the same meaning in these comments as they have in that Act.

Representatives of the TNPA would be happy to meet staff from the Department to explain and elaborate on these comments, if desired.

Given the lack of detail in the information sheet and consultation paper on what they propose, public comment should be sought on a draft of any Bill to legislate for the proposals, before the Bill is introduced to Parliament.

Management planning processes

Introduction

The TNPA is concerned about the absence of management plans for many areas of reserved land and the outdated nature of management plans for many other areas of reserved land. This is especially concerning given that the Director has under the NPRM Act both the function of preparing such plans and keeping them under review and a duty to prepare such plans.

A major role of a management plan has traditionally been to provide long-term certainty on management intent. For example:

> The vision for the Park and the Reserve gives a picture of how they will be in the future and provides direction to management. The vision helps avoid inappropriate development and management, and the "tyranny of small decisions", guiding management not just for the short term, but for the benefit of future generations. (Section 2.1. The Vision for the Park and Reserve. Parks and Wildlife Service 2016, *Narawntapu National Park, Hawley Nature Reserve Management Plan 2016*, Department of Primary Industries, Parks, Water and Environment, Hobart.)

This role is also acknowledged on the first page of the information sheet. The TNPA considers it important that this focus on the long term should remain. The TNPA acknowledges that there may be some scope for changes to the management planning processes (see the discussion below) but is concerned that the proposed changes have the potential to prioritise short-term flexibility over long-term certainty.

The TNPA considers that the current rigorous processes for making and amending management plans are appropriate, and should continue, for national parks and other

significant reserved lands (such as those within a World Heritage Area). However, there may be some scope to simplify the making of genuinely minor amendments (see the comments below) of management plans for such parks and lands.

The TNPA acknowledges that it is unrealistic to expect that the resources will be available to make individual management plans for every reserve in Tasmania. Therefore there needs to be a simpler management planning process for reserved lands other than national parks and other significant reserved lands. This simpler process could perhaps be along the lines of the proposed management statements (subject to the comments below on those statements).

Planning for management of a particular area of reserved land (whether the planning is embodied in a management plan or another document such as one of the proposed management statements) should be a holistic process, taking account of the purpose(s) for which the area was reserved, all the management objectives for the reserved land, the full range of values of the land relevant to those objectives and all uses of the land that are consistent with those objectives, reasonably foreseeable and legally permissible. Planning should not be driven by particular proposed developments, such as those that will be the focus of environmental impact assessment.

The information sheet seems to propose 4 mechanisms to address the dearth of management plans that are up to date:

a) management statements with statutory effect; and
b) a new statutory process for minor amendments of management plans (and perhaps also management statements);
c) statutory policies developed by the Director and incorporated (by reference) in management plans or management statements; and
d) a combined environmental impact assessment and management plan amendment process.

The information sheet refers to a “fuller broadscale planning approach” that would go “alongside” “full planning coverage of National Parks, State Reserves, Nature Reserves, Game Reserves and Historic sites and high use protected areas”. It is not at all clear what this “fuller broadscale planning” would involve, and whether such planning would apply to all reserved land.

Management statements

The information sheet does not make clear what the intended legal effect of management statements is to be. However, the TNPA understands that management statements are intended to be analogous to management plans, in that the managing authority for reserved land for which there is a management statement will be required to manage the land for the purpose of giving effect to the statement and in accordance with the statement (cf. paragraph 30(1)(a) of the NPRM Act), so that paragraph 30(1)(b) of the NPRM Act will not apply to the management of the land (and require the managing authority to have regard to all the management objectives for the reserved land of the relevant class that are specified in Schedule 1 to that Act).

The information sheet refers to management statements changing “the balance of achieving … management objectives in individual reserves”. It should not be possible for a management statement to override the inherent limitation of some management objectives as set out in Schedule 1 to the NPRM Act by implicit reference to other objectives. So, for example, a management statement for a State reserve should not be able to provide for encouragement of tourism, recreational use and enjoyment that is not consistent with the conservation of the reserve’s natural and cultural values.

The TNPA assumes that management statements are not intended to affect the exercise of statutory powers (by persons other than the managing authority), so that is why there is no reference in the information sheet to a parliamentary stage in the process of adopting management statements.

If legislative provision is made for management statements, the TNPA strongly supports the proposal in the information sheet that public comment on a management statement should be sought before the statement is adopted. The legislation should provide for a reasonable opportunity for that comment. Also, the legislation should require:

a) the Director to respond publicly to comments from the public, explaining which comments have affected the statement and how they have affected it, and which comments have not affected it and why they have not; and
b) require the Commission (i.e. the Tasmanian Planning Commission) to review whether the Director's response and the statement (with any changes made following those comments) adequately address those comments.

The reference in the information sheet to the Director holding public hearings as part of the process of adopting a management statement is surprising, given that there is not such a requirement for management plans (although the Tasmanian Planning Commission may hold hearings relating to public comments on a draft of a management plan).

The information sheet suggests that the proposed minor amendment process could apply to management statements. Depending on the nature of the process for adopting a management statement, there may be no need for a special minor amendment process for a management statement (especially if the process for adopting a management statement is quite streamlined, so that the minor amendment process is not significantly simpler).

Proposals for amending management plans

Minor amendments

The information sheet proposes a process for making "minor amendments" of management plans that would differ from the current process under the NPRM Act for formulating and adopting such plans. It is not very clear from the sheet what this process would involve, but it seems implicit that it would be less elaborate and time-consuming than the existing process for formulating and adopting management plans.

If a minor amendment process is adopted, it should retain provision for a reasonable opportunity for public comment on a draft of the minor amendment before the amendment is made. This is important, because public comment may bring to light implications of a draft amendment that may indicate it would not have merely a minor effect. Also, the Australian World Heritage Management Principles under the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth), which the Commonwealth needs to comply with when co-operating with the Tasmanian Government for the preparation and implementation of management plans for World Heritage Areas, provide that there should be public consultation on management plans and community input to management.

Legislation for a minor amendment process should also require:

a) the Director to respond publicly to comments from the public, explaining which comments have affected the amendment and how they have affected it, and which comments have not affected it and why they have not; and

b) require the Commission (i.e. the Tasmanian Planning Commission) to review whether the Director's response and the amendment (with any changes made following those comments) adequately address those comments.

The information sheet proposes that the Director would make a minor amendment but that it would not take effect until the Minister had published a gazette notice. While an amendment should not take effect until it is published, it is not clear why the Minister should be responsible for an essentially administrative act giving public notice of what the Director has done. Is the intention that the Minister should be able to determine whether the Director's act should have legal effect? If so, it would seem more appropriate for the Minister to make the amendment, by means (such as publication of a gazette notice) that ensures that the amendment has effect only once it is published.

The information sheet recognises that "[m]inor amendments would need to be clearly defined" and suggests that they may include:

a) "correcting an error in the plan"; and
b) "amendments to ensure the management plan … remains uniform or complementary to another Act or a law of the Commonwealth"; and
c) "amendments to adopt an Australian or international protocol, standard, code or intergovernmental agreement"; and
d) "updating of management intent and statements of regular review"; and
e) "provision for timely implementation of reserve management recommendations arising from completed EIA processes".

The TNPA believes that minor amendments to correct errors in plans should be limited to correction of errors that are apparent on the face of the plan. An assertion of an "error" that really reflects a change in intention should not be a ground for using the proposed new amendment process.

Making a management plan consistent with a changed law may involve significant changes to the plan. The TNPA believes that the minor amendment process should be available only for amendments that are just fixing references (in the plan) to the law that have become outdated because of changes to the law.

Likewise, significant changes to a management plan may be needed for the plan to adopt "an Australian or international protocol, standard [or] code or intergovernmental agreement". The TNPA believes that the minor amendment process should be available only for amendments that are just fixing references (in the plan) to such a protocol, standard, code or agreement that have become outdated because of changes to the protocol, standard, code or agreement.

An amendment should not be regarded as minor (for the purposes of going through the minor amendment process) merely because it is to update management intent or reflect a statement of regular review of a management plan. This is because those criteria (updating management intent and reflecting a review) could cover significant changes as well as minor ones. As the information sheet recognises, "management plans by their nature are statements of management intent". Therefore almost any change to a management plan could be regarded as "updating of management intent". A regular review might result in recommendations for a fundamental change to a management plan.

As stated above, management planning should be holistic and not driven by particular proposed developments. By contrast, environmental impact assessment focuses on particular developments. Therefore it is not appropriate that changes to a management plan to implement recommendations from an environmental impact assessment process should be made using the minor amendment process.

The TNPA agrees with the view expressed in the information sheet that amendments affecting statutory powers (of persons and bodies other than the Director) are not suitable for the minor amendment process.

The TNPA does not believe there should be any other amendments of management plans that should be able to be made using the minor amendment process.

Amendments that are not "minor"

The information sheet refers to "significant amendments", without explaining clearly what they are (apart from giving a few examples), and says they "would continue to be dealt with by the existing management plan process". The TNPA believes all amendments of management plans should go through that process unless the amendments are "minor" for the purposes of the minor amendment process.

Curiously, the information sheet says "Approval of significant amendments would be by the Minister …", even though the existing management plan process explicitly provides for the Governor to approve management plans (including plans that amend other plans), albeit that the Minister determines what is submitted to the Governor for approval. The TNPA assumes it is not intended to change the role of the Governor in the process of making management plans (except perhaps for the making of minor amendments).

Statutory policies

The information sheet provides little information on the proposal for statutory policies that could be incorporated in, or referred to by, a management statement or plan.

The TNPA assumes that the intention of the proposal is to allow the effect of a management statement or plan that incorporates a statutory policy by reference to be changed by changing the policy without making a textual change to the statement or plan. However, it should not be possible to circumvent the processes for public consultation to amend a management statement or plan by adopting or changing a policy referred to in the statement or plan so as to change the effect of the statement or plan.

Therefore, legislation for statutory policies should provide for a reasonable opportunity for public comment on a draft policy or draft changes to a policy before the policy or changes are adopted. Also, the legislation should require:

a) the person who formulated the draft policy to respond publicly to comments from the public, explaining which comments have affected the policy and how they have affected it, and which comments have not affected it and why they have not; and
b) require the Commission (i.e. the Tasmanian Planning Commission) to review whether that person's response and the policy (with any changes made following those comments) adequately address those comments.

Combined environmental impact assessments and amendments of management statements or plans

The TNPA opposes the proposal (in the information sheet and the consultation paper) to combine an environmental impact assessment and an amendment of a management statement or plan. Of its nature, an environmental impact assessment focuses on a particular proposed development. By contrast, planning for management should be more holistic (as described above). Therefore it is inappropriate for a change to a management statement or plan to be driven by a particular proposed development.

Other matters relating to management planning

If the NPRM Act provisions relating to management planning are to be amended to deal with any of the matters mentioned in the information sheet, the Department may wish to consider including amendments to address some other matters relating to management planning.

It would be desirable to clarify whether subsection 19(12) of the NPRM Act (which provides for a specific management plan for an area of reserved land to override a more general management plan covering reserved land that includes that area) operates regardless of the order in which the plans are made or only if the specific plan is made after the general plan. The Parks and Wildlife Service (PWS) website suggests that some management plans for particular reserves (e.g. Mt Field National Park and Mole Creek Karst National Park) that are now included in the Tasmanian Wilderness World Heritage Area are still in force, despite having been made more than 10 years before the current management plan for that World Heritage Area and in some cases before the reserves were included in that World Heritage Area. It is not at all clear whether this is appropriate.

It would be worth considering whether provision should be made for a management plan to operate to take account of changes in the status of areas as reserved land or particular kinds of reserved land after the plan is made. A number of management plans include material anticipating such changes affecting parts of the areas to which the plans apply, but it is not clear (as a matter of law) how the plans operate after the changes occur.

It would be desirable to clarify that a review under section 22 of the NPRM Act needs to address the appropriateness (in the Commission's view) of the Director's response to representations relating to the draft management plan.

Statutory environmental impact assessment process

This proposed process is an entirely separate alternative to the existing reserve activity assessment (RAA) process, for large and potentially controversial proposals. It does not propose any reform of the existing RAA process which will presumably still be used to assess the vast majority of development proposals on reserved land and remains subject to the concerns first raised by the TNPA in 2016: see https://tnpa.org.au/wp-content/uploads/2017/08/Need-for-process-to-control-development-on-public-land-2016.pdf.

If an assessment process (whether statutory or not) is to provide a proposal with a social licence to operate it needs to be seen as fair by all parties. This requires that the public have confidence that their concerns have been considered. This will not be achieved by any process that does not include the right for the public to seek review of the process and its outcomes, based on the merits of the proposal.

Opposition to process proposed in consultation paper

The TNPA opposes the statutory environmental impact assessment process proposed in the consultation paper for the reasons set out below.

Discretionary application of process

The consultation paper proposes that the statutory impact assessment process will apply only if the Minister decides it should, after taking into account some very vague criteria. Accordingly, before a decision there will be considerable uncertainty as to

whether the process will apply. Also, there is likely to be controversy and criticism of the Minister over many decisions as to whether the process is to apply. This will be the case whether the decision is to apply the process or not, and whether the decision is made by the Minister or a delegate.

As the application of the statutory impact assessment process is proposed to be discretionary, the process is not guaranteed to fix problems with the existing (non-statutory) reserve activity assessment process, which does not guarantee either independence of assessors or an opportunity for public comment and does not give rise to rights for either judicial or merits review of the process.

Other limits on application of process

The consultation paper proposes that the statutory environmental impact assessment process will not apply to:

a) "[a] proposal that is declared a Major Project under [the *Land Use Planning and Approvals Act 1993* (the ***LUPAA***)] or a Major Infrastructure Project under the *Major Infrastructure Development Approvals Act 1999*"; or
b) "[a] proposal that will be subject to a determination by an independent Development Assessment Panel appointed by the Tasmanian Planning Commission should proposed amendments be made to [the LUPAA] via the [proposed] Land Use Planning and Approvals (Development Assessment Panel) Amendment Bill 2024".

The major projects provisions of the LUPAA do not provide for assessment of matters that relate to a proposed major project and are peculiarly relevant to reserved lands, do not provide for special input to the assessment panel from managing authorities or others specifically concerned with reserved lands and provide that a major project permit does not take effect until after the grant of all other approvals required for the project (including, relevantly for such a project wholly or partly on reserved land, leases, business licences, other licences under the NPRM Act or other authorities under regulations under the NPRM Act).

The *Major Infrastructure Development Approvals Act 1999* is concerned primarily with planning schemes and permits for the purposes of the LUPAA and is not concerned with whatever leases, business licences, other licences or other authorities under the NPRM Act or regulations under that Act may be needed for a major infrastructure project to proceed lawfully on reserved land. Thus there will still be a need for a separate, thorough assessment before the grant of such leases, licences or other authorities.

Although the text of the proposed Land Use Planning and Approvals (Development Assessment Panel) Amendment Bill 2024 has not been published, it seems reasonable to assume that it will also deal primarily with permits for the purposes of the LUPAA and not with whatever leases, business licences, other licences or other authorities under the NPRM Act or regulations under that Act may be needed for a proposed use or development to occur lawfully on reserved land.

Thus in all these cases, there will still be a need for a separate, thorough assessment before decisions are made about granting or refusing such leases, licences or other authorities. That assessment and a decision about such a grant or refusal, will need to take account of matters such as any management plan for the reserved land concerned or the purposes of reservation and management objectives for that land.

Lack of independence of assessors

The consultation paper proposes that an "independent assessment panel" be appointed by the Tasmanian Planning Commission to carry out the assessment.

Appointment by the Tasmanian Planning Commission is no guarantee that the panel will be, or will be seen to be, independent of the State Government. The Commission is generally subject to direction by the Minister administering the *Tasmanian Planning Commission Act 1997*. The Commission is also subject to a statement of Ministerial expectations.

The provisions of the LUPAA for a development assessment panel for a major project to be appointed by the Tasmanian Planning Commission are not a good model for an independent assessment panel. Those provisions allow the Minister administering that Act significant influence over the appointment of 2 members of a panel, who could constitute the majority of a quorum of the panel.

At a practical level, it is likely to be difficult to find panel members who do not have a conflict of interest. There is a small pool of professional expertise in urban planning from which to select members of development assessment panels established under the LUPAA but there are relatively few professionals with expertise in planning for reserved land and many of them are employed by PWS. PWS is the land manager for any development proposal on reserved land and may be the proponent so PWS staff are unlikely to be available to serve on an "independent assessment panel".

Displacement of the LUPAA

The consultation paper proposes that the new statutory environmental impact assessment process displace assessment and approval processes under the LUPAA.

This would exclude planning authorities (generally local councils) from making decisions on matters on which they may have considerable expertise.

It also excludes provision for merits review of decisions of planning authorities.

Lack of merits review

Even if an independent assessment panel has considerable expertise relevant to the development it is assessing, this does not ensure that its assessment and decision will not contain errors of fact. Those errors may be made after the proposed period for public comment. In the absence of merits review of the panel's decision, there will not be an opportunity to detect and correct the errors before the decision takes effect, with potentially significant environmental impacts.

Merits review of the decision would provide an opportunity to detect and correct those errors.

The possibility of judicial review does not guarantee an opportunity to detect and correct such errors.

The TNPA also notes that an awareness that their decision may be subject to merits review provides an incentive for the independent assessment panel to ensure that their decision can be justified.

Authorities on administrative review recognise that the expertise of a decision-maker is not a valid justification for denying merits review of the decision. (For example, see

Chapter 5, and especially paragraphs 5.17 to 5.19, of the Administrative Review Council's publication "What decisions should be subject to merits review?".)

Unconvincing justifications for the proposed process

The possibility of judicial review of a panel's decision in the proposed statutory environmental impact assessment process does not really introduce a significant new possibility for judicial review (by comparison with existing arrangements). As decisions under the NPRM Act or associated regulations, a decision of the Director or the Minister to grant an authority (whether by lease, licence, business licence or otherwise under the Act or regulations) is already subject to judicial review under the *Judicial Review Act 2000*.

The consultation paper suggests that the Parking and Sustainable Transport Code and the Bushfire-Prone Areas Code and (under the State Planning Provisions under the LUPAA) are problematic in their application to developments on reserved land and that this justifies a separate statutory environmental impact assessment process that excludes the assessment and approval process under that Act. However, the Parking and Sustainable Transport Code provides for performance criteria that are heavily dependent on the reasonable needs of the use, the nature of the use and the nature of the site, and thus can reasonably be expected to be able to be met for developments on reserved land without causing over-development of that land contrary to the purposes of reservation or management objectives. The Bushfire-Prone Areas Code applies only to a very limited range of activities and uses, none of which are likely to occur on reserved land (see clause C13.2.1 and the definitions of "hazardous use" and "vulnerable use" in clause C13.3.1 of the Code).

Suggestions for a different statutory assessment process

Although the TNPA opposes the statutory environmental impact assessment process proposed in the consultation paper, the TNPA has for many years advocated a statutory assessment process for developments on reserved land. The appendix to this document contains some suggestions for such a statutory assessment process.

Cost recovery and financial risks

Cost recovery

The TNPA welcomes the proposal in the consultation paper to recover costs associated with a statutory environmental impact assessment process.

Subsection 93(3) of the NPRM Act already authorises regulations to provide widely for fees. Therefore it may not be necessary to amend the Act (but merely to make regulations) to provide for fees for cost recovery, especially if the provisions for the statutory environmental impact assessment process are included in the NPRM Act.

Bonds to cover financial risks

The TNPA welcomes the proposal in the consultation paper to consider the financial capacity of proponents of developments on reserved land to cover the costs of addressing environmental harm caused by the proposed development.

The TNPA welcomes the proposal to require proponents to lodge bonds or bank guarantees to cover those costs (at least in part), but notes that the bonds or guarantees need to ensure the availability of funds to address costs incurred after the life of the lease, licence or authority as well as costs incurred before the end of the lease, licence or authority.

Publication of leases and licences

The TNPA welcomes the creation of the Leases and Licences Portal, and looks forward to its expansion and updating.

Given that the portal is in operation, it is not clear why legislation is needed for it, unless the plan is for legislation to authorise the publication of personal information in the lease and licence documents so that the documents could be published unredacted on the portal. The TNPA would welcome publication of unredacted documents on the portal.

The TNPA suggests that consideration should also be given to expanding the scope of the portal to cover authorities granted under regulation 28 of the *National Parks and Reserves Management Regulations 2019* or corresponding provisions of previous or future regulations if those authorities have effect now or in future.

Appendix – Suggestions for a different statutory assessment process

Introduction

This Appendix sets out broadly some suggestions for a statutory assessment process for activities that occur (at least in part) on reserved land. It does not go into the level of detail that would be needed to formulate instructions for drafting legislation. However, representatives of the TNPA would be happy to discuss in further detail the suggestions made in this Appendix if that would be helpful in developing policy and formulating drafting instructions.

General principles

Certainty as to when process will apply

There should be a statutory requirement to publish, for public comment:

a) a brief description of each proposal for authorisation (however described) of an activity for the purposes of the NPRM Act or associated regulations; and
b) the means by which it is suggested that the proposal be assessed.

(The response to the publication will provide useful guidance as to the means of assessment, particularly for non-statutory RAA processes as many of them are affected by the level of public or stakeholder interest, although the response would not override any legislative requirement for the proposal to be assessed in a particular way.)

The circumstances in which a proposal is to be assessed in a particular way (whether through a statutory or non-statutory process) should be as objective as possible.

It would be desirable for a statutory assessment process to be triggered automatically (by operation of law depending on characteristics of the proposed activity) so far as practicable, rather than by a discretionary decision. However, there are likely to be other cases in which it would be desirable to trigger the statutory assessment process and it is important that in those cases that the considerations in making a decision whether to trigger the process are as clearly expressed in the legislation as possible.

Once an assessment process is triggered, it should not be possible to “switch it off” or circumvent it (for example by granting authorisations for the activity before the process is complete).

Integration with LUPAA processes

The process should be integrated with, rather than displacing, processes under the LUPAA.

Independence of assessors

Whoever assesses an activity needs to be clearly separate from, and not subject to the influence of, the proponent of the activity being assessed and whoever prepares documents for the assessment (other than the assessment report).

Public comment

There needs to be a reasonable opportunity for the public to comment on:

d) the criteria for assessment; and
e) a draft report on the assessment; and
f) the information on which the draft report is based.

Criteria for assessment

The criteria for assessment of the activity need to include whether it is consistent with:

a) the purpose(s) for which the land was reserved; and
b) the management objectives for the land; and
c) the management plan [or equivalent, such as a management statement proposed in the information sheet] (if any) for the land.

Publication of assessment

The final assessment report needs to be published and to include conclusions on whether a lease, licence or other authority under the NPRM Act and associated regulations (and, if relevant, a permit under the LUPAA) should be granted to authorise the proposed activity and the conditions to which any such authorisation should be subject and reasons for the conclusions.

Decision-makers to act consistently with outcome of assessment

Decision-makers (especially the Minister administering the NPRM Act, the Director and, where relevant to the activity, each planning authority for the land where the activity is proposed to occur) must act consistently with the conclusions of the final assessment report. If the report advised that the proposed activity be authorised (whether subject to conditions or not), the decision-makers could impose additional conditions (so far as consistent with any conditions advised in the report).

Taking effect of leases, licences and authorities

Leases, licences and other authorities under the NPRM Act and associated regulations for activities should take effect only after the giving of all other approvals (however described) that are needed for the activity to occur lawfully. This would ensure that other uses of reserved land are not affected while it is uncertain whether the proposed activity will be allowed to proceed.

Merits review of assessment and subsequent decisions

The proponent and anyone who commented as part of the statutory assessment process should be able to seek merits review of the process and the decisions made as a result of the process.

Monitoring and enforcement of authorisations and their conditions

The grantor of an authorisation (such as a lease, licence or other authority under the NPRM Act and associated regulations, or a permit under the LUPAA) for an activity on reserved land should monitor compliance with the authorisation and any conditions to which it is subject. Although the monitoring should be done by the grantor, the costs of monitoring should be recoverable from the person carrying on the activity.

Some specific issues

Triggering the statutory assessment process

An example of an objective trigger (by operation of law) for the statutory assessment process is that the activity requires a permit under the LUPAA to proceed. This will generally be clear on the face of the law (including the Tasmanian Planning Scheme). Reserved land will generally be Environmental Management Zone under the State Planning Provisions under that Act (once they apply in all local government areas). Under those provisions, the uses of "natural and cultural values management" and "passive recreation" in that zone do not require a permit. This should ensure that the statutory assessment process will not apply to routine activities on reserved land that do not warrant undergoing such a process. A degree of flexibility for the assessor to determine the assessment criteria and possibly the timetable for steps of the assessment process (while preserving reasonable opportunities for public comment) could help ensure that the statutory assessment process would not be unduly onerous for activities that do not need much assessment.

Consideration should be given to whether future changes to the State Planning Provisions should affect the trigger for the process. If it is desired that they should not, the trigger could be expressed directly (rather than by reference to requirements under the LUPAA) in the Act that provides for the process (possibly the NPRM Act). That Act would then need to describe explicitly the activities that trigger the process. The drafting of that description might be inspired by (but not necessarily exactly replicate) wording of the State Planning Provisions as in force at the time of the drafting.

Another example of an objective trigger for the statutory assessment process is that the management plan (or equivalent, such as a management statement proposed in the information sheet) provides for the triggering. This would allow the process to be used for activities that may not be dealt with by the LUPAA but would be clearly and publicly identified. (For example, page 59 of the *Tasmanian Wilderness World Heritage Area Management Plan 2016* says "alteration of Management Overlays will be subject to a Reserve Activity Assessment (RAA) and an opportunity for public comment provided", so it would be desirable to trigger the process for this purpose.)

Integration with LUPAA processes

Integrating the statutory assessment process with processes under the LUPAA has a number of advantages.

First, it promotes the objectives of the resource management and planning system of Tasmania (especially those mentioned in paragraphs 1(b), (c) and (e) of Schedule 2 to the NPRM Act).

Secondly, it promotes greater certainty, given that the LUPAA and Tasmanian Planning Scheme are well known to parties likely to be interested in the statutory assessment process.

Thirdly, it provides mechanisms for public comment and merits review of decisions (although it would be necessary to provide separately for merits review of the statutory assessment process and decisions to grant leases, licences and other authorities under the NPRM Act and associated regulations following that process).

Fourthly, it facilitates integration with processes involving other expert assessors (such as the Tasmanian Heritage Council and the Board of the Environment Protection Authority). A permit under the LUPAA for the activity would be required to be refused if

any of the expert assessment bodies advised that it should be refused (consistently with the approach in subsection 60ZZM(6) of the LUPAA).

Fifthly, it allows for a planning authority to impose additional conditions (beyond any recommended by the statutory assessment process) on a permit under the LUPAA to deal with matters in which the authority has particular expertise.