The assessment of ecotourism developments in Tasmania

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Tasmania’s beautiful natural environment hosts world renowned tourism. In 2014, the State government invited Expressions of Interest (EOI) for ecotourism developments in Tasmania’s national parks and reserve areas through a non-statutory process.² This raised an interesting legal issue that has not previously been thoroughly explored: to what extent does the planning regime apply to Tasmanian’s protected areas?

Development activities in Tasmania’s parks and reserves have often been controversial and drawn national and international attention. The ecotourism developments progressed through the EOI process will provide an interesting case study on how these projects will be assessed.

Ecotourism in Tasmania

There has been an unprecedented recent increase in tourism in Tasmania, with just over 1 million tourists visiting the island state during the year ending June 2015.³ The tourism industry is aiming to increase this number to 1.5 million visitors per annum by 2020.

A boost in proposed tourism developments has been spurred by the State Government’s expressions of interest process, with 37 projects submitted as part of this non-statutory process. However, one of the main criticisms about the EOI process is how little detail has been made publicly available.

The EOI Assessment Panel completed its Stage 1 assessment in January 2015 and the Minister invited 25 participants recommended by the Panel to proceed to Stage 2. Many of these developments have been proposed in some of Tasmania’s most iconic and unique areas including the Tasmanian Wilderness World Heritage Area, Freycinet National Park and the Tarkine. The developments range from low-impact guided walks to the construction of high-end ecotourism accommodation.

Statutory approval process

As at 20 December 2015, the Minister for Parks and Environment, Matthew Groom, has announced a total of 13 projects which have been accepted through the EOI process and will now proceed to the statutory approval stage. However, there is considerable uncertainty regarding what the ‘statutory approval’ stage entails.

Although the Minister had previously stated that proposals selected for further consideration would be subject to the required Commonwealth and State planning and approval processes,⁴ none of the projects have yet reached the stage where they need to apply for planning approval or be referred for consideration under the Environment Protection and Biodiversity Conservation Act 1999.

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² Limited details regarding the assessment process are set out on the Coordinator-General’s website: www.cg.tas.gov.au/?a=106818
Therefore, the extent to which the government believes that planning approval is, in fact, ‘required’ remains unclear.

This has reinvigorated debate as to whether the Land Use Planning and Approvals Act 1993 (LUPAA) applies to developments in reserve areas. Although this uncertainty has been an issue for well over a decade,\(^5\) the issue remains largely unresolved.\(^6\) It is acknowledged that many of the projects would not be classified as ‘development’ in any event, for example the guided bush walks. What is yet to be clarified is whether the projects which will involve use and development regulated under local planning schemes will go through the statutory approval process.

**Do you need a planning permit in reserve areas?**

Generally speaking, tourism ‘developments’ within a national park or reserve area are treated as requiring assessment in accordance with the local planning scheme pursuant to LUPAA. Reserve land is defined as all land declared as such under the Nature Conservation Act 2002 and includes national parks, the World Heritage area and other protected areas throughout Tasmania.

Section 4(2) of LUPAA provides that the Act applies to all parts of the State except such parts as may be excluded from the operation of the Act by regulation. There are currently no areas excluded under the Land Use Planning and Approvals Regulation 2014. The Resource Management and Planning Appeal Tribunal (the Tribunal) has narrowly interpreted the scope of this power.

In *Bates v Minister for Transport and Works*\(^7\), the Tribunal examined the objectives of LUPAA and noted that the power to exclude the application of LUPAA should be restricted to land which was subject to a separate planning regime consistent with the RMPS objectives. The Tribunal observed:

> To simply remove, by regulation, a part of the State from the provisions of the Land Use Planning and Approvals Act 1993, without more, irrespective of motive, would appear to be invalid... To adopt such a course would be to add a new and different means of carrying out the purpose of the Act and would be departing from or varying the plan which the legislature had adopted to obtain its ends. To do so would seem to be either or both beyond what is reasonable necessary or desirable for the achievement of the legitimate objects sought to be obtained by the Act, causing the adverse consequence of the removal of public involvement in the planning process, and beyond the ambit of the regulation making power by providing a new and different means of carrying out the purpose of the Act.

However, section 35 of the National Parks and Reserves Management Act 2002 provides a limitation on the exercise of other statutory powers in specific reserve areas, including national parks, State reserves, nature reserves, historic sites or game reserves:

> a statutory power\(^8\) may not be exercised in relation to any land in a national park, State reserve, nature reserve, historic site or game reserve

> (a) except where the exercise of the power is authorised by the management plan for that land....”

One interpretation of this provision is that it excludes the exercise of statutory powers (such as regulatory powers under LUPAA) within national parks, State reserves, historic sites or game reserves *unless* that power is explicitly authorised by the Management Plan. This provision creates a

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\(^5\) In 2001 Stage Designs Pty Ltd was granted approval to construct a tourism development in the Southwest National Park at Cockle Creek. There was debate about the requirement to seek planning approval.

\(^6\) Tasmania, Second Reading Speech for National Parks and Reserve Management Parks Act 2002, House of Assembly, Thursday 21 November 2002 (Mr GREEN, Member for Braddon - Minister for Primary Industries, Water and Environment). In the parliamentary debate that followed the second reading speech, there was considerable debate about the management of reserve areas to ensure the primary focus be on protecting the values of these areas and not encouraging tourism.

\(^7\) [1995] TASRMPAT 65.

\(^8\) Statutory power is defined in section 3 of the National Parks and Reserves Management Act 2002 to include “the carrying out of any works or other operations on any such land”.

degree of confusion as to whether LUPAA automatically applies, or whether it may only apply if specifically allowed for in the management plan.

This provision should be read in conjunction with sections 27(2) and (6) of the National Parks and Reserves Management Act 2002 which regulate the content of management plans for reserve areas. Section 27(2) states that management plans may make provision for the use or development of the land and may authorise the exercise in relation to that land, of any statutory power, such as LUPAA. Section 27(6) allows the management plan to explicitly prohibit the application of any statutory power in certain reserve areas. These powers give considerable scope for management plans to include or exclude a statutory power and seem to support an interpretation of s.35 in which the management plan determines whether and how LUPAA applies.

Interestingly, the Courts seem hesitant to exclude the application of LUPAA in the absence of explicit wording. In *Tasman Quest Pty Ltd v Evans* the Court held that the application of LUPAA could be suspended with explicit wording. During the introduction of the Crown Lands (Shack Sites) Bill 1997 the Minister responsible at the time, Mr Peter Hodgman, stated:

> The State Coastal Policy and the Land Use Planning and Approvals Act 1993 and Part 3 of the Local Government [Building and Miscellaneous Provisions] Act 1993 will be suspended from operation while these sites are being determined.

The Court placed considerable weight on the second reading speech in considering whether the regulation of shack sites should sit outside the scope of the Resource Management and Planning System.

Against this, the uncertainty is further amplified by the fact that many of the interim planning scheme maps cover areas classified as reserve areas. Many schemes provide that use and development on reserved land will be permitted provided a reserve area management plan applies to the area or a satisfactory Reserve Activity Assessment has been completed. The inclusion of these activities in the planning scheme indicates an assumption on the part of local planning authorities that LUPAA applies and that they have jurisdiction to regulate the activities.

**Management plans**

The most recent set of projects to be accepted through the EOI process will require amendments to a number of management plans before they can lawfully proceed.

One of the management plans to be amended is the *Narawntapu National Park, Hawley Nature Reserve Management Plan 2000*. The amendments proposed seek to extend the allowable activities to facilitate a proposed horse riding operation. The amendments do not seek to exclude LUPAA. In fact, the management plan states that the proponent must “ensure all applicable statutory requirements and approvals are met or obtained”.

Amendments have also been advertised for the *Freyceinet National Park Management Plan* (allowing for the expansion of the Freycinet Lodge). Substantial amendments are also anticipated to the *Tasman National Park Management Plan*.

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10 Glamorgan Spring Bay Interim Planning Scheme 2015
11 The Reserve Activity Assessment (RAA) is the Parks and Wildlife Service assessment process for activities on reserved land that could have a potential impact on reserve values. This is also a non-statutory process.
12 For example, see Huon Valley Draft Interim Planning Scheme 2014 and Tasman Interim Planning Scheme 2015.
13 All planning schemes undergo a rigorous approval process including assessment by the Tasmanian Planning Commission, and approval by the Minister which arguably indicates a State level policy that schemes apply to reserve areas.
14 The amendments have been incorporated into the new management plan - *Narawntapu National Park, Hawley Nature Reserve Draft Management Plan 2015*.
Of particular interest is how proposed activities within the World Heritage Area will be assessed. Presumably proposals will be assessed under the management plan in effect at the time of approval. The Draft Tasmanian Wilderness World Heritage Area Management Plan 2014 (TWWHA draft plan) has been proposed to replace the Tasmanian Wilderness World Heritage Area Management Plan 1999. Unlike the current plan, which sets out a process for assessment of major projects, the TWWHA draft plan simply defers to the assessment processes under existing legislation and the Reserve Activity Assessment process. A recent World Heritage Committee decision specifically referred to the need for the TWWHA draft plan to include a clear, rigorous process for assessment of tourist developments.16

The TWWHA draft plan also alludes to future amendments to the National Parks and Reserves Management Act 2002 to allow the Director to exclude the application of statutory powers (including LUPAA).17 To date, no Amendment Bill has been introduced, so the detail of what is proposed remains unclear. Any such amendment would need to pass both Houses of Parliament and is likely be subject to considerable scrutiny. 18

Does LUPAA apply?

Currently, developments within reserve areas are generally treated as requiring planning permits. Advice to the contrary would be open to legal challenge.

Given the diversity of projects proposed through the EOI process, it is understandable that uncertainty exists regarding approval requirements. The projects that have progressed through the EOI process to date are those they were unlikely to require a planning permit in any event. However, a number of projects submitted as part of the EOI process will involve substantial works and would certainly fall within the LUPAA definition of ‘development’. We are likely to see how the State Government will assess these projects in the coming months.

The risk of excluding LUPAA

The restriction of the application of LUPAA to developments within reserve areas is likely to hit a few hurdles. The risk is that projects that do not seek planning approval where required to by LUPAA may be subject to legal proceedings by those opposed to the project, including civil enforcement proceedings under LUPAA alleging that the permits were in fact required.

Given the sensitive nature of reserve areas and previous Tribunal decisions, any attempt by the government to exclude the application of LUPAA through legislative amendments would require explicit wording and may not protect projects from judicial review proceedings.

What are the implications of LUPAA not applying?

Changes to the enforcement powers under LUPAA came into effect on 2 February 2015.19 These amendments provide planning authorities (i.e. Councils) with increased enforcement powers to address planning contraventions. These powers allow authorities to issue infringement notices and enforcement notices and to cancel permits for contraventions of LUPAA.

If LUPAA doesn’t apply to reserve areas, issues around enforcement and compliance for non-adherence to development requirements and conditions will arise.

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17 Section 3.4 Draft Tasmanian Wilderness World Heritage Area Management Plan 2014, page 79.
18 It now seems that the government is not proceeding with that amendment, although they have not yet formally abandoned the proposal and the intention is still contained within the TWWHA draft plan.
19 See Land Use Planning and Approvals Amendment Bill 2013
Conclusion

It is normal practice for developments to be subject to concurrent assessment processes at a local, state and Federal level. Project proponents should independently consider the application of the legislative framework to their project to determine what approvals will be required.

In the absence of explicit wording, the Courts and the Tribunal seem hesitant to exclude the application of LUPAA, citing the importance of consistency and certainty to both proponents and the broader community. In that context, it is difficult to predict the outcome of any legal challenge.

Given the history of projects in Tasmania’s sensitive natural areas resulting in considerable community backlash, proponents would be wise to consider whether assuming that LUPAA does not apply would be more hassle than it’s worth.