Environmental
Defenders Office

# Submission in response to proposed Reserve Activity Assessment (RAA) Process Reforms (lutruwita/Tasmania)

## 10 April 2024

**About EDO**

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

***Successful environmental outcomes using the law.*** With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

***Broad environmental expertise.*** EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

***Independent and accessible services.*** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

**www.edo.org.au**

**Submitted to:**

Natural Resources and Environment Tasmania
By email: RAAReform@nre.tas.gov.au

**For further information on this submission, please contact:**

Claire Bookless
Managing Lawyer – lutruwita/Tasmania
T: (03) 6223 2770
E: claire.bookless@edo.org.au

## Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

## A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term Tasmanian Aboriginal. We acknowledge that not all Tasmanian Aboriginal people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

## Executive Summary

Reflecting lutruwita/Tasmania's unique reputation for its natural estate, approximately 50.4% of lutruwita/Tasmania's land mass is reserved.[1] This reserve estate includes many places of international and national significance, with three World Heritage–listed areas (the Tasmanian Wilderness World Heritage Area (**TWWHA**), Macquarie Island, and the Australian Convict Sites), 13 National Heritage-listed sites (some of which are also on the World Heritage list), and 10 RAMSAR-listed sites. Lutruwita/Tasmania's natural environment and cultural heritage are among its greatest assets. Proper management and protection of the reserved land is fundamental to protecting these values and to the wellbeing of all Tasmanians, including future generations.

Environmental Defenders Office (**EDO**) therefore welcomes the opportunity to comment on the *Consultation Paper: National Parks and Reserves Management Act 2002 - Reserve Activity Assessment Process Reform – Statutory Environmental Impact Assessment Process* (**Consultation Paper**), and on proposed changes to the management planning process as outlined in the *Information Sheet: Proposed Management Planning Processes* (**Information Sheet**). We collectively refer to these proposed changes as the Reserve Activity Assessment Amendments (**RAA Amendments**) in the following submission.

The Consultation Paper says that the RAA Amendments are proposed to 'create a statutory process under the NPRMA for significant proposals to ensure that those proposals are subject to a statutory assessment process that provides for similar processes to that required for discretionary use and development under the *Land Use Planning and Approvals Act 1993* (**LUPA Act**), including a public representation process.' The Information Sheet also proposes a suite of changes relating to reserve management plans, to 'provide a less onerous process' for minor amendments to the plans, to introduce statutory 'management statements', and to allow a management plan to be amended as part of an RAA process.

The RAA Amendments are proposed by the Tasmanian Government to establish a statutory assessment process under the *National Parks and Reserves Management Act 2002* (**NPRM Act**) for development and activities in reserves 'as a means of increasing transparency and independent decision making'. The Government intends to 'provide greater confidence to both proponents and the broader community that complex, and ecologically and culturally significant proposals will receive fair, objective and transparent consideration.'

While EDO agrees that there is a great need for increased transparency and public confidence in decisions relating to developments and other activities in National Parks and reserves, EDO is concerned that the RAA Amendments will not achieve these objectives. These concerns are amplified by the fact that the RAA Amendments may in many cases, make the current system less transparent by removing existing opportunities for public comments and appeals provided by processes under the LUPA Act.

[1] This figure includes certain parcels of Crown land, private land and other types of reserves not covered by the NPRM Act. See https://nre.tas.gov.au/conservation/development-planning-conservation-assessment/planning-tools/tasmanian-reserve-estate-spatial-layer

EDO is particularly concerned with elements of the RAA Amendments that:

- fail to provide meaningful opportunities for Tasmanian Aboriginal people to provide their free, prior and informed consent (**FPIC**) and to be properly involved in reserve management decisions including those that affect their cultural heritage;
- diminish the already limited opportunities for the community to be notified about, object to or appeal against proposals for developments and activities within reserves that may impact environmental values;
- affect the overall planning and management of parks and reserves;
- reduce or remove any existing third-party merits appeal rights to the Tasmanian Civil and Administrative Appeals Tribunal (**TASCAT**);
- further fragment and prevent effective integration between assessment of activities in parks and reserves under the NPRM Act and other related statutory assessment processes including those under the LUPA Act, *Aboriginal Heritage Act 1975*, *Historic Cultural Heritage Act 1995*, *Environmental Management and Pollution Control Act 1994* and *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**); and
- reduce transparency and public involvement in the amendment of reserve management plans.

EDO's submission addresses elements of the RAA Amendments in the sequence outlined in the Consultation Paper, as well as proposed changes to management planning processes as outlined in the Information Sheet, as follows:


**General comments**

1. **Purpose of new statutory impact assessment process**
    1.1. **Why create a new statutory impact assessment process?**
    1.2. **Current RAA process and review of process**
    1.3. **Which proposals would be subject to a statutory RAA process?**
2. **Statutory Environmental Impact Assessment (EIA) process for 'significant' RAA decisions**
    2.1. **Assessment principles**
    2.2. **Fit with other statutory processes**
3. **Proposed process**
    3.1. **Eligibility Phase**
    3.2. **Determining Assessment Criteria**
    3.3. **Preliminary Assessment**
    3.4. **Final Consultation and Assessment**
    3.5. **Transparency and Opportunities for Public Comment and Submissions**
    3.6. **Appeal rights**
    3.7. **Cost recovery and financial risks**
    3.8. **Leases and licences**
4. **Proposed changes to the management planning process.**


EDO makes the following recommendations in response to the RAA Amendments.

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations' self-determination, EDO has provided high-level key recommendations for western law reform to empower Tasmanian Aboriginal people to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

**Summary of Recommendations**

**Recommendation 1:** The Tasmanian Government should undertake a comprehensive review of the parks management system and NPRM Act to develop the optimum framework for reserve management and nature conservation in lutruwita/Tasmania.

**Recommendation 2:** The Expression of Interest (**EOI**) policy and process should be suspended pending the development and implementation of an appropriate statutory RAA process.

**Recommendation 3:** The statutory RAA process should feed into and integrate with the existing LUPA Act planning permit assessment process rather than substitute it.

**Recommendation 4:** To ensure that all appropriate considerations have been taken into account and an appropriate level of public notice and consultation undertaken, including with Tasmanian Aboriginal people, a new, statutory RAA process should be created and applied both to the grant of authorities under the NPRM Regulations and to the grant of leases and licences under the NPRM Act.

**Recommendation 5:** There should be a permanent, sufficiently independent and qualified decision-making body in the new statutory RAA process.

**Recommendation 6:** The outcomes of the Parks and Wildlife Service (**PWS**) review of the RAA process be made public.

**Recommendation 7:** An independent audit of the outcomes and impacts of developments and activities subject to the RAA process be undertaken to inform the development of the structure of the new statutory RAA process and criteria for decision-making.

**Recommendation 9:** Any future reforms to the NPRM Act should clearly articulate the process for assessing and approving *all* activities and developments on reserved land, not just those deemed 'significant'.

**Recommendation 10:** Criteria for determining the level of assessment of all proposals, including those that will be ineligible for assessment or not requiring assessment should be set

within the statute. Activities within levels 2 and 3 of the current RAA process should fall within a level of assessment that provides for public comment and appeals.

**Recommendation 11:** The initial decision on the categorisation of the appropriate level of assessment for a proposal should be subject to public notice and opportunity for comment.

**Recommendation 12:** At a minimum, a statutory RAA process should provide:

1. **Integration** – Integration between the statutory RAA process and:
    a. Tasmanian Aboriginal-led cultural heritage management; and
    b. the Resource Management and Planning System of laws including, but not limited to, the LUPA Act (including the Tasmanian Planning Scheme (**TPS**)) and the *Environmental Management and Pollution Control Act 1994*.
2. **Clear criteria** – Clear and restrictive criteria for developments, uses and activities in reserves and public lands must be provided, including by specifying:
    a. the developments, uses and activities that are prohibited in reserves and public lands;
    b. the developments, uses and activities that may be permitted subject to the successful completion of an RAA;
    c. the criteria to be met for any development, use or activity subject to an RAA, including compliance with the purposes for which the land was reserved, any statutory management plan and management objectives for the reserve; and
    d. the minimum information required for an application for a permissible development, use or activity (including, for example, the boundaries of the development, use or activity, timing, likely impacts on the values of the reserve such as Tasmanian Aboriginal or European cultural heritage, flora or fauna, water, land, air or other users of the reserve).
3. **Publicly available documentation** – An application for a permissible development, use or activity subject to an RAA is to be made publicly available.
4. **Public comment** – A real opportunity for public comment on the merits of any proposal undergoing the RAA must be provided. There should also be an opportunity for public comment on the initial determination of the appropriate level of assessment, including but not limited to the decision that an activity will be assessed as a significant proposal.
5. **Independent assessment** – Assessment is to be undertaken by a body (independent from the proponent) comprising persons with suitable qualifications (for example, parks management, planning, ecology etc) against statutory criteria and in consideration of public comments received. Reasons for decisions are to be published and provided to the proponent and those who commented on the proposal.
6. **Merits appeal rights** – Merits appeal rights are to be provided to anyone who comments on the proposal. Appeals will be heard by an independent tribunal empowered to assess the merits of the proposal. (e.g. TASCAT).

To complement the formalisation of the RAA process, the following reforms are required to improve transparency and robustness of related aspects of the NPRM Act:

7. **No lease or licence before approvals** – The Minister is to be prohibited from granting or transferring a lease or licence to a person to facilitate any development, use or activity until all authorisations (from any level of government) the person needs to carry on the development, use or activity have been granted.
8. **Register of RAAs, authorities, leases and licences** – There is to be a searchable public register of all RAAs conducted, authorities, leases and licences granted for reserves, with details of those RAAs, authorities, leases and licences freely available for inspection by members of the public.
9. **Compliance and enforcement** – There are to be statutory requirements for the Director of National Parks and Wildlife to undertake annual reviews of compliance with any conditions of authorities, leases or licences issued under the NPRM Act, the results of which must be published within 1 month of completion. Meaningful penalties for non-compliance with authority, lease or licence conditions must be provided, together with a civil enforcement option for third parties where the Director fails to take enforcement action.

**Recommendation 13:** The new statutory RAA process should recognise and give effect to the principles of FPIC and self-determination of Tasmanian Aboriginal people concerning their cultural heritage.

**Recommendation 14:** The criteria for both eligibility for assessment and the different levels of assessment should be further refined and clarified from those criteria suggested in the Consultation Paper.

**Recommendation 15:** Standard assessment criteria for all RAAs should be prescribed in the NPRM Act. If the Panel develops specific assessment criteria for a proposal, they should only do so after any public comment received on those criteria is taken into account.

**Recommendation 16:** The new statutory RAA process should only allow the Panel to review a draft EIS once before final submission to identify if the draft EIS has addressed all the criteria and may be accepted. The only guidance the Panel should be able to provide to the proponent at this stage is a request for further information.

**Recommendation 17:** The new statutory RAA process should provide a deadline for the preparation of the draft EIS.

**Recommendation 18:** If the proposed statutory RAA process proceeds without integrating with the LUPA Act development assessment process:

- There should be greater clarity about the role of other regulators and authorities in the proposed RAA process.
- The Panel should not prepare a draft decision on the proposal before public submissions are invited.

- The Panel's decision should be bound by any applicable management plan, and it should not make any recommendations for changes to the management plan.
- There should be an opportunity for merits appeals to TASCAT from the Panel's decision for members of the public who made submissions.

**Recommendation 19:** If recommendation 3 (that the new statutory RAA process integrate with the LUPA Act process) is not adopted, the amendments to the NPRM Act should provide guaranteed rights of merits appeal against a decision of the Panel by any person who has made a submission during the assessment of a proposal under the EIA process.

**Recommendation 20:** All costs associated with the administration of the statutory RAA process should be fully met by developers.

**Recommendation 21:** Considerations should also be given to mechanisms that ensure that proponents also contribute to ongoing compliance and enforcement costs of PWS.

**Recommendation 22:** It should be a standard condition of all leases, licences and authorities that the holder pays a bond to cover the potential harms or impacts of that activity. The legislation should set out the percentage or rate of the bond by reference to statutory criteria that reflect risk and should also prescribe the circumstances upon which the bond can be drawn.

**Recommendation 23:** In addition to publishing leases and licences issued for public lands, Natural Resources and Environment Tasmania (**NRE**) should publish completed RAAs for all approved activities and relevant PWS policies or guidelines.

**Concerning the proposed changes to management planning:**

**Recommendation 24:** A high level of public scrutiny and scientific rigour should be applied in any management planning process. If there are to be any changes to the process for management planning, then they should incorporate the principle of non-regression, whereby amendments to the plans must not reduce environmental protections, community engagement or transparency.

**Recommendation 25:** The Tasmanian Government should further consider and consult on the potential for minor amendments to management plans, and set out the proposed parameters for a minor amendment. A minor amendment should not be substantive and may follow a truncated process that nevertheless includes public notice and an opportunity to make submissions.

**Recommendation 26**: Amendments to management plans should be made by the Governor, not the Director.

**Recommendation 27**: No amendments to the NPRM Act should be made to provide for a combined project proposal/management plan amendment process.

**Recommendation 28**: The Tasmanian Government should consult further concerning the types of matters proposed to be dealt with by management statements. Management statements must be consistent with and complementary to, management plans.

## General comments

When the NPRM Bill was tabled in Parliament in 2002, the then-Minister for Primary Industries, Water and Environment acknowledged that it did not provide 'the optimum framework for nature conservation in this state' and was an 'interim measure' pending the finalisation of a 'wide-ranging review' of the parks management system. [2]

Over 20 years later, as far as EDO is aware, no such review has been undertaken, and Tasmanians are left with an Act that is increasingly not up to the task of managing lutruwita/Tasmania's world-class parks, reserves and the natural and cultural values they hold.

In 2014, the then-Hodgman Government committed to opening lutruwita/Tasmania's national parks and reserves to commercial exploitation through a controversial policy called 'unlocking the potential in our parks'.[3] Under this policy, Expressions of Interest (**EOIs**) were invited for commercial activities and developments within reserves.[4] This policy has continued under successive governments with over 71 proposals now at some stage of the process, with over 25 within the TWWHA.[5]

The RAA Amendments focus on one component of the system for permitting development and other activities within reserves, presumably at least in part to further the 'unlocking the potential in our parks' policy.

Recent EOI proposals have highlighted that the existing, non-statutory process for the assessment and approval of uses and developments in lutruwita/Tasmania's public lands (including national parks and reserves) fails to deliver good environmental or social outcomes and lacks community support. While EDO does not support the 'unlocking the potential in our parks' policy, it does support the development of a statutory process to improve transparency and greater accountability around the use of the discretionary powers to grant leases, licences and permits within parks and reserves.

Given the sub-optimal and interim nature of the NPRM Act, **EDO recommends the reforms to the RAA process be undertaken following a broader review of the Act and reserve management system with the object of ensuring that it is fit-for-purpose and up to the task of providing for**

[2] Second Reading Speech Bryan Green MP, National Parks and Reserves Management Bill 2002.
[3] A copy of this policy is available here: https://www.yumpu.com/en/document/read/33072155/unlocking-the-potential-in-our-parks
[4] https://www.premier.tas.gov.au/releases/unlocking_the_tourism_and_economic_potential_of_our_parks
[5] Office of the Coordinator General EOI statistics, accessed at https://www.stategrowth.tas.gov.au/ocg/investment_opportunities/tourism_eoi_process/eoi_statistics on 5 April 2024.

**the best-practice management of lutruwita/Tasmania's internationally recognised natural and cultural heritage.**

This broader review should consider whether the NPRM Act adequately addresses the following issues:

- best-practice reserve management, including, for example, the International Union for the Conservation of Nature (**IUCN**) reserve management principles;[6]
- Australia's international obligations under the World Heritage Convention, Convention on Biological Diversity and Sustainable Development Goals;
- Australia's Strategy for Nature 2019–2030, Commonwealth of Australia 2019, including our Aichi targets;
- any accreditation requirements for environmental assessments under reforms to the EPBC Act;
- any National Environmental Standards for World Heritage and National Heritage-listed areas, threatened species and communities under incoming EPBC Act reforms;
- the reviewed/updated Threatened Species Strategy under the *Threatened Species Protection Act 1995* (Tas);
- trends and recommendations identified in lutruwita/Tasmania's State of the Environment report and Statewide Climate Change Risk Assessment, both due to be published mid-year;
- emerging threats such as climate change and the need to plan for climate adaptation and resilience in lutruwita/Tasmania's reserve estate;
- the need for the FPIC of Tasmanian Aboriginal people over matters that may affect their cultural heritage, in line with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**); and
- a much greater role for Tasmanian Aboriginal people in the management of Country within lutruwita/Tasmania's reserve estate.[7] The *Reimagining Conservation* report provides useful context on what needs to change to centre First Nations peoples and their knowledges in conservation and caring for Country, including through managing Country together. [8]

EDO also strongly urges the Tasmanian Government to **suspend the EOI process pending the outcomes of consultation, development and implementation of any new RAA process**. This will give the public some confidence that their participation in consultation on the proposed RAA

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[6] The IUCN reserve management principles are adopted for Commonwealth reserves under the *Environment Protection and Biodiversity Conservation Act 1999*, section 348.

[7] Recommendation 20 of the 2015 joint ICOMOS/ IUCN Reactive Monitoring mission on the TWWHA was for "State Party should support and consolidate the emerging joint management of the Tasmanian Wilderness World Heritage Area with the Tasmanian Aboriginal community'. This recommendation has yet to be fully implemented. Elsewhere, the Australian Government has adopted the general principle of Joint Management for Commonwealth reserves where "reserve or zone is wholly or partly owned, by Aboriginal people", *Environment Protection and Biodiversity Conservation Regulations 2000,* r10.04 and schedule 8.

[8] Chapple R, Wilson J, McCreedy E, Archer R, Gore-Birch C, Hunter B, Davey K, Malcolm L, Cochrane P, Humann D (2023) 'Reimagining Conservation: Working Together for Healthy Country', report of 3-day Reimagining Conservation Forum, Meanjin / Brisbane, November 2022, produced by the North Australian Indigenous Land & Sea Management Alliance, Australian Committee for IUCN, and the Protected Areas Collaboration, Australia. Accessible at https://assets.nationbuilder.com/aciucn/pages/29/attachments/original/1702530790/969371_ACIUCN_reimagining_conversation_forum_report_FIN_WEB.pdf?1702530790

Amendments will be given meaningful consideration by the Tasmanian Government, rather than the process being driven by a select few with vested commercial interests in developing publicly-owned parks and reserves.

**Recommendation 1:** The Tasmanian Government should undertake a comprehensive review of the parks management system and NPRM Act to develop the optimum framework for reserve management and nature conservation in lutruwita/Tasmania.

**Recommendation 2:** The Expression of Interest (**EOI**) policy and process should be suspended pending the development and implementation of an appropriate statutory RAA process.

## 1. Purpose of new statutory impact assessment process

### 1.1 Why create a new statutory impact assessment process?

The Consultation Paper sets out (at pp 11, and 12) the proposed RAA Amendments intend to create a statutory process under the NPRM Act to subject 'significant proposals' to a statutory assessment process similar to that required for discretionary use and development under the LUPA Act, including a public representation process. A new Independent Assessment Panel (**Panel**) is to be established by the Tasmanian Planning Commission. Once constituted for a particular proposal, the Panel would determine how the assessment would proceed and be the decision maker on the proposal.

The further stated intent of the RAA Amendments (from p 12 of the Consultation Paper) is to remove the so-described 'duplication' of having proposals assessed under the new statutory RAA process as well as under the LUPA Act and TPS. According to the Consultation Paper, proposals approved under the new statutory RAA process would not require a planning permit under the LUPA Act. Instead, the Panel would be able to consider which requirements of any planning scheme codes should be considered in the assessment in consultation with the relevant councils.

**EDO does not support the proposal to remove the assessment of all 'significant' development proposals on reserved land (or indeed any proposals) from the scope of the LUPA Act. Such a move could effectively limit the operation of the LUPA Act to only half the land in the state[9] and would have significant implications for the achievement of good planning and environmental outcomes.**

If the proposed changes proceed, they will substantially fragment the planning framework which is used to assess most land uses and developments, and would undermine the objectives of the LUPA Act and the broader Resource Management and Planning System (**RMPS**), including the objectives of:

- promoting the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity;

[9] Based on the figures of land within public reserves on the NRE website as at 28 March 2024.

- providing for the fair, orderly and sustainable use and development of air, land and water;
- encouraging public involvement in resource management and planning;
- promoting the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State;
- requiring sound strategic planning and co-ordinated action by State and local government;
- establishing a system of planning instruments to be the principal way of setting objectives, policies and controls for the use, development and protection of land;
- requiring land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;
- providing for the consolidation of approvals for land use or development and related matters, and co-ordinating planning approvals with related approvals;
- promoting the health and wellbeing of all Tasmanians and visitors to Tasmania by ensuring a pleasant, efficient and safe environment for working, living and recreation;
- conserving those ... areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
- protecting public infrastructure and other assets and enabling the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community; and
- providing a planning framework which fully considers land capability.

The land use planning process under the LUPA Act has been designed specifically to further the above objectives and ensure appropriate assessment and approval of developments and uses on land, including effective public notification and comment rights. The planning process allows for proper consideration of relevant environmental, social and economic factors, including as requested by other entities that have a regulatory role in the proposed development (e.g. the Environment Protection Authority (**EPA**), TasWater, the Tasmanian Heritage Council etc). By contrast, reserve management plans under the NPRM Act cannot deal with all the relevant planning considerations provided for under the planning process under the LUPA Act.

In EDO's view, the shortcomings in the process for assessment of development in parks and reserves lie not with the fact that permission under the LUPA Act is also required for some activities; rather, they lie with the wide-ranging and non-transparent discretionary powers under the NPRM Act to grant leases, licences and authorities for activities within parks and the lack of integration between those decisions with related assessments and approvals.

The Consultation Paper states (at pp 3 and 12) that the current process leads to duplication because a proposal for an activity of development in a reserve may have to be assessed by the PWS through an RAA, while 'discrete elements' of a proposal may also need to be assessed under the LUPA Act as a 'discretionary' use.

We note that the TPS already includes provisions designed to avoid duplication of existing assessment processes on land within parks and reserves. For example, clause 23.2 (Use Table) of the State Planning Provisions (**SPPs**) allows various uses within Environmental Management Zones (**EMZ**), which is the zoning applied to most reserved land, to be a permitted use 'if an

authority under the *National Parks and Reserve Management Regulations 2019* [**NPRM Regulations**] is granted by the Managing Authority, or approved by the Director-General of Lands under the *Crown Lands Act 1976*.' Under the SPPs, permitted uses must be approved by councils, provided they meet other applicable standards within the SPPs.

This fact appears to be recognised in the Consultation Paper where it states (at p 11) that the TPS allows the Director of National Parks and Wildlife (**Director**) 'to authorise use and development (which is currently assessed through the RAA process) […] which could then be deemed a 'permitted' activity under LUPAA'.

Whilst there has already been limited recognition of PWS approval processes in the TPS, EDO does consider there needs to be improved integration between processes under the NPRM Act and LUPA Act in line with the shared objectives of both Acts.

**The simplest and most effective way to remove duplication between the RAA and planning assessment processes for activities that require approval under both the NPRM Act and the LUPA Act is for the RAA process to be incorporated as an assessment that feeds into the LUPA Act process in much the same way as the EPA and Historic Cultural Heritage assessments currently integrate with planning assessments under the LUPA Act.** To facilitate this integration, the EMZ of the SPPs would also need to be amended to provide for certain activities on reserved land to be 'discretionary' uses, and subject to standard public comment and appeal rights.

The Consultation Paper proposes the Panel determine what matters should be considered in an assessment under the new RAA process and be the decision maker on applications. Given the proponent of many proposals in parks and reserves is likely to be the PWS or another Government Business Enterprises (e.g. TasNetworks, Hydro Tasmania etc), EDO considers that there is merit in having sufficiently independent and qualified parks, environmental and planning professionals determining whether the proposals satisfy statutory assessment criteria (EDO provides further comments on these criteria below). For this reason, EDO is supportive of there being an independent panel for the new statutory RAA process. However, EDO does not support the design of the Panel as outlined in the Consultation Paper.

The Consultation Paper recommends (at p12) that the Panel be established by the Tasmanian Planning Commission (**TPC**) and consist of 'members with qualifications and expertise relevant to the assessment process'. As it is presently conceived, in addition to carrying out the statutory RAA, the Panel assessment will also take the place of local councils by undertaking assessments and decision-making for activities that currently would also require approval under the LUPA Act, and possibly for other, related Acts. EDO considers that the proposal to replace councils in this way with an indeterminant TPC-appointed (and potentially ad hoc) panel does not satisfy principles of transparency and good governance.

Further, EDO does not support decisions relating to activities in reserves being determined solely by the Panel. This is because there are no rights of merits appeal from a Panel decision to the TASCAT. The failure to have an independent merit appeal option significantly undermines the principle of access to environmental justice. We provide further comment on appeals below.

As outlined above, in EDO's view, there is no reason for the new statutory RAA process to duplicate procedures already applying under the LUPA Act and the simplest way for this to be avoided is to ensure that the RAA process is a component of the LUPA Act assessment.

**Recommendation 3:** The statutory RAA process should feed into and integrate with the existing LUPA Act planning permit assessment process rather than substitute it.

**Recommendation 4:** To ensure that all appropriate considerations have been taken into account and an appropriate level of public notice and consultation undertaken, including with Tasmanian Aboriginal people, a new, statutory RAA process should be created and applied both to the grant of authorities under the NPRM Regulations and to the grant of leases and licences under the NPRM Act.

**Recommendation 5:** There should be a permanent, sufficiently independent and qualified decision-making body in the new statutory RAA process.

### 1.2 Current RAA process and review of process

The Consultation Paper notes (at p 15) that the PWS has 'undertaken an extensive review of the RAA system in recent years, implementing improvements to the system for greater transparency and consistency'. The improvements have focused on administrative aspects; increasing opportunity for public consultation and comment, and providing a formal decision report in respect of decisions made. The Paper claims that as a result, the RAA is a 'robust process successfully applied to hundreds of proposals over many years'.

If a review of the RAA process has been undertaken by the PWS, it has not been done so in public. Without the opportunity to read the PWS review and analysis of the RAA process, there is no way of objectively determining the merit of the claimed improvements in transparency, consistency and success.

EDO **recommends that the outcomes of PWS's review of the RAA process be made public.**

We further recommend that there be an **independent audit of the outcomes and impacts** of developments and activities to which the RAA process has been applied to determine how successful the process has been at achieving good environmental, economic and social outcomes. This work would help to inform the success or otherwise of changes to the RAA process and assist in developing an appropriate statutory process.

**Recommendation 6:** The outcomes of the PWS review of the RAA process be made public.

**Recommendation 7:** An independent audit of the outcomes and impacts of developments and activities subject to the RAA process be undertaken to inform the development of the structure of the new statutory RAA process, and criteria for decision-making.

### 1.3 Which proposals would be subject to a statutory RAA process?

The Consultation Paper states (at p 15) that making all RAAs subject to a statutory process 'is not in the public interest and risks significantly delaying essential and time critical works that are typically low impact and a regular part of the management reserved land' – that is, activities or works that are currently designated under the RAA Guidelines as 'No RAA process required', 'level 1' or 'level 2' assessments. The Consultation Paper gives the following examples of these types of activities and works:

- level 1 - upgrades to an existing road, minor repairs to existing infrastructure; small scale new infrastructure such as a toilet pod; or short-term events or volunteering activities in a discrete area;
- level 2 - major repairs or renewal of existing assets; new boardwalks, bridges, lookouts and communications infrastructure; feral animal control programs; or activities held over large areas over multiple days.

The Consultation Paper proposes that only 'some' proposals currently assessed as 'level 3' in the current RAA process would be expected to meet the criteria for the proposed statutory assessment. Examples of 'level 3' activities and works include:

- level 3 - construction and operation of new infrastructure or uses that have a high potential for significant environmental or social impacts.

EDO notes that there is a lack of clarity on the criteria that have been used in the past for designating activities with the various levels of assessment purposes in the administrative RAA process. For instance, Wild Drake's helicopter-accessed luxury tourist accommodation at Halls Island, Lake Malbena within the TWWHA was assessed as a level 3 RAA of what was, at the time, a 4-level process, and no public comment was invited through the RAA for that significant proposal. Given the thousands of public submissions that were received concerning this proposal under the LUPA Act and EPBC Act processes, the PWS assessment that there would be a low level of public interest in the proposal was inaccurate and flawed.

Similarly, many of the activities referred to in the Consultation Paper as examples of level 2 activities, depending on their circumstances, could require detailed assessment and opportunities for public comment. EDO is also very concerned at the suggestion that only some of the projects categorised as level 3 might be subject to a statutory assessment. Activities reaching this level are clearly in the category of most significance, and should therefore trigger a statutory RAA process.

Many of the 'significant' proposals contemplated to be captured by the new statutory process, should be automatically ineligible for approval in most reserves. For example, proposals comprising 'large-scale development', or with the potential for environmental impacts across a 'wide area' of reserved land. Other criteria for ineligibility should include activities that:

- are proposed for locations that contain sensitive natural or cultural values, or
- have the potential to significantly increase pressure on a threatened species, or
- may have an extreme impact in a small area.

**To create a clear and transparent process for the assessment of activities in reserves, any future reforms to the NPMR Act should provide a process for *all* activities and developments on reserved lands, not just those deemed 'significant'**. The new process should then provide for different levels of assessment for these activities and developments depending on their level of impact and public interest. There should be an opportunity for public comment on the relevant level of assessment that should apply to the proposal for activities and developments that fall outside anything but the most usual categories of PWS reserve management (as outlined in statutory guidelines).

Activities within levels 2 and 3 of the current RAA process should fall within a level of assessment that provides for public comment and appeals under the new statutory RAA process.

**Recommendation 9:** Any future reforms to the NPRM Act should clearly articulate the process for assessing and approving *all* activities and developments on reserved land, not just those deemed 'significant'.

**Recommendation 10:** Criteria for determining the level of assessment of all proposals, including those that will be ineligible for assessment or not requiring assessment should be set within the statute. Activities within levels 2 and 3 of the current RAA process should fall within a level of assessment that provides for public comment and appeals.

**Recommendation 11:** The initial decision on the categorisation of the appropriate level of assessment for a proposal should be subject to public notice and opportunity for comment.

## 2. Statutory EIA process for 'significant' RAA decisions

### 2.1 Assessment principles

Section 2 of the Consultation Paper outlines the proposed statutory EIA process for 'significant' RAA decisions.

The Consultation Paper states (at p 17) that the new statutory EIA process will provide certainty to the government, the community and proponents about how certain proposals will be assessed and will 'deliver on the government's commitment for all significant RAA decisions to be more informed, justified, transparent and accountable'. The Paper lists a range of ways the new process will meet 'best practice' principles.

EDO has already commented on the principles relating to the independent assessment panel and the aim to 'remove duplication' with the LUPA Act processes above. Concerning the remaining assessment principles listed on p 17 of the Paper, EDO makes the following observations set out below.

- **Clarifying eligibility criteria and assessment criteria.** EDO supports a statutory process that results in more informed, justified, transparent and accountable decisions on activities within parks and reserves but is not confident that the proposed RAA reforms will achieve that intent.

In particular, *all* decisions to grant licences, leases, permits or other authorities for activities within reserves should be subject to a formalised, statutory RAA process, not just those that are deemed 'significant'. It is essential that a statutory process applies to the initial determination of the appropriate level of assessment for an activity – including whether it falls into a category 'significant' enough to warrant an EIA. There should be:

- clear criteria for decisions determining the appropriate level of assessment. Criteria should be statutory (for example, made under regulations) and referrable back to reserve management plans (where they exist);
- a mechanism for determining that certain types of proposals are so unacceptable that they will not be assessed; and
- formal public exhibition for all but the most minor of proposals to ensure the community can be informed and participate in the RAA process. For activities that constitute uses or development under the LUPA Act, the LUPA Act process provides for public comment and appeal rights, and there is no need for it to be duplicated.

- **Administrative appeals.** EDO also agrees that there should be the opportunity for administrative appeals of assessment processes and authority decisions, but does not agree with limitations on these proposed in the Paper (see our comments below concerning appeals).
- **Consistent assessment process, timelines and outcomes.** EDO agrees that these should be basic features of a statutory assessment process.
- **Providing for assessment outcomes to be incorporated into the management of the reserve to ensure reserve objectives/management plan objectives are achieved**. It is not clear what is intended in relation to this assessment principle. If this is a reference to the proposal to be able to amend management plans as part of an RAA, please see EDO's comments concerning that topic below.
- **Cost recovery**. EDO agrees that proponents should pay all costs associated with the RAA process. This should be on a full cost-recovery basis, not simply applied through a system of prescribed fees. The Tasmanian Government should consider mechanisms that ensure that proponents also contribute to ongoing compliance and enforcement, for instance through the provision of monitoring and regular reporting.

We have outlined criteria for a suitable statutory RAA process in the recommendations.

**Recommendation 12:** At a minimum, a statutory RAA process should provide:

1. **Integration** – Integration between the statutory RAA process and:
    a. Tasmanian Aboriginal-led cultural heritage management; and
    b. the Resource Management and Planning System of laws including, but not limited to, the LUPA Act (including the TPS) and the *Environmental Management and Pollution Control Act 1994*.
2. **Clear criteria** – Clear and restrictive criteria for developments, uses and activities in reserves and public lands must be provided, including by specifying:

a. the developments, uses and activities that are prohibited in reserves and public lands;

b. the developments, uses and activities that may be permitted subject to the successful completion of an RAA;

c. the criteria to be met for any development, use or activity subject to an RAA, including compliance with the purposes for which the land was reserved, any statutory management plan and management objectives for the reserve; and

d. the minimum information required for an application for a permissible development, use or activity (including, for example, the boundaries of the development, use or activity, timing, likely impacts on the values of the reserve such as Tasmanian Aboriginal or European cultural heritage, flora or fauna, water, land, air or other users of the reserve).

3. **Publicly available documentation** – An application for a permissible development, use or activity subject to an RAA is to be made publicly available.

4. **Public comment** – A real opportunity for public comment on the merits of any proposal undergoing the RAA must be provided. There should also be an opportunity for public comment on the initial determination of the appropriate level of assessment, including but not limited to the decision that an activity will be assessed as a significant proposal.

5. **Independent assessment** – Assessment is to be undertaken by a body (independent from the proponent) comprising persons with suitable qualifications (for example, parks management, planning, ecology etc) against statutory criteria and in consideration of public comments received. Reasons for decisions are to be published and provided to the proponent and those who commented on the proposal.

6. **Merits appeal rights** – Merits appeal rights are to be provided to anyone who comments on the proposal. Appeals will be heard by an independent tribunal empowered to assess the merits of the proposal. (e.g. TASCAT).

To complement the formalisation of the RAA process, the following reforms are required to improve transparency and robustness of related aspects of the NPRM Act:

7. **No lease or licence before approvals** – The Minister is to be prohibited from granting or transferring a lease or licence to a person to facilitate any development, use or activity until all authorisations (from any level of government) the person needs to carry on the development, use or activity have been granted.

8. **Register of RAAs, authorities, leases and licences** – There is to be a searchable public register of all RAAs conducted, authorities, leases and licences granted for reserves, with details of those RAAs, authorities, leases and licences freely available for inspection by members of the public.

9. **Compliance and enforcement** – There are to be statutory requirements for the Director of National Parks and Wildlife to undertake annual reviews of compliance with any conditions of authorities, leases or licences issued under the NPRM Act, the results of which must be published within 1 month of completion. Meaningful penalties for non-compliance with

authority, lease or licence conditions must be provided, together with a civil enforcement option for third parties where the Director fails to take enforcement action.

### 2.2 Fit with other statutory processes

The Consultation Paper identifies that the major challenge with designing a new statutory assessment process is that there are other statutory assessment processes relevant to developments and activities on reserved land. The Government intends that the new statutory RAA process should not duplicate or replace a suitable assessment process (p 18). Other statutory processes noted in the paper include the LUPA Act, *Aboriginal Heritage Act 1975*, *Historic Cultural Heritage Act 1995*, *Environmental Management and Pollution Control Act 1994* and EPBC Act.

As currently proposed, the statutory RAA process would replace the whole planning process for 'significant proposals', not just the RAA component for the approval of activities in reserves. This would remove the role of local councils in decision-making around parks and reserves. As we have already outlined above, this is inconsistent with the objectives of the RMPS, as it does not promote the sharing of responsibility for resource management and planning processes between different spheres of government (rather it seems to seek to exclude local government from having a deciding say) and creates a special class of process for the assessment of developments in national parks and reserves whereas the vast majority of other developments, including mining, require a development assessment and permit under the LUPA Act.

A better solution would be for the new statutory RAA process for significant proposals to integrate with the development permit assessment process under the LUPA Act, such as for projects that require approval under the *Environmental Management and Pollution Control Act 1994*.

We repeat our earlier recommendations 3 and 12 in this regard.

#### *Aboriginal cultural heritage considerations*

According to the Consultation Paper (at p 19), early engagement with Tasmanian Aboriginal people and any statutory Aboriginal representative body will be a 'key consideration' in determining whether a proposal is accepted for assessment.

EDO agrees that early engagement with Tasmanian Aboriginal people is crucial, however, we question whether the current proposal adequately provides for Tasmanian Aboriginal people to be genuinely engaged and empowered to participate in decision-making concerning proposals with potential impacts on Aboriginal cultural heritage. It is of concern to EDO that comment is being sought on the RAA reforms when the proposed new Aboriginal Cultural Heritage Protection Bill is not publicly available. It is therefore impossible to understand how the new RAA process will interface with the new Aboriginal Cultural Heritage Protection Bill.

The Dhawura Ngilan Report outlines the "Best Practice Standards for Indigenous Cultural Heritage Management Legislation".[10] These principles draw upon international legal principles articulated in the UNDRIP. Consistent with the Dhawura Ngilan Report's recommendations, a reformed RAA process should, at a minimum, recognise as fundamental principles that:

- Tasmanian Aboriginal people will be the ultimate arbiters of the management of the cultural heritage aspects of any proposal that will affect that heritage.
- The adoption of the principle of FPIC means that affected Tasmanian Aboriginal communities must have adequate information, time and resources to consider that information in making any decision that may affect their cultural heritage.

**Recommendation 13:** The new statutory RAA process should recognise and give effect to the principles of FPIC and self-determination of Tasmanian Aboriginal people concerning their cultural heritage.

## 3. Proposed process

The proposed statutory RAA process outlined in the Consultation Paper is an EIA process (comprising the phases: eligibility, determining assessment criteria, preliminary assessment, final consultation and assessment). We provide the following specific comments in response to each of the phases. In doing so, EDO's position remains that the new process should integrate with the LUPA Act development assessment, and the Panel should provide its recommended decision and any proposed conditions for the development permit to the council. Merits appeal rights to TASCAT for proponents and the public should be provided through the LUPA Act process.

### 3.1 Eligibility phase

The Consultation Paper states (p 21) that the decision whether a proposal is eligible to be assessed as a 'significant' proposal under the statutory RAA process will be based on criteria set out in the NPRM Act and any statutory guidelines developed.

As EDO has recommended above, any future reforms to the NPRM Act should clearly articulate the process for assessing and approving *all* activities and developments on reserved land, not just those deemed 'significant', with delineation of different levels or tiers of assessment (including EIA) to be applied depending on the likely impacts of the activity. The new process should also provide clear criteria for high-impact or large-scale proposals on reserved land to be rejected as clearly unacceptable at the outset as ineligible, or otherwise trigger a requirement under the TPS for a LUPA Act development permit.[11]

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[10] Heritage Chairs of Australia and New Zealand 2020, *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra, September, at Part 3 from p 30. Accessed at: https://www.dcceew.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf

[11] Refer to recommendations 9, 10 and 11.

As the initial determination of the level of assessment required for an activity is critical to the subsequent process (including opportunities for public comment and appeals), EDO supports the NPRM Act being amended to provide clear guidance on when these different levels of assessment will be triggered, and use of statutory guidelines to provide finer detail where required for specific reserve types or activities.

The decision on eligibility for assessment (i.e., application of the statutory criteria) should be made by the Panel and not by the Director or the Minister (as suggested in the Consultation Paper). The Panel's decision on the level of assessment should be made in consideration of public comment. Giving the Panel responsibility for this decision will remove any potential for the process to be politicised and will allow for the Panel to provide consistency in the levels of assessment it applies to different activities and developments.

EDO agrees that the eligibility and assessment level decisions and reasons should be published.

The eligibility criteria proposed in the Consultation Paper seem to capture only a very small number of 'significant projects' and are open to interpretation (and potential misinterpretation) due to the use of subjective terms and phrases. For example, what is the 'significant leasing of, or a significant occupation of' a reserve? What is a 'very high' level of public interest? Furthermore, some of the proposed criteria – for example, environmental or cultural impacts 'over a wide area' should render a proposal ineligible for assessment.

**Recommendation 14:** The criteria for both eligibility for assessment and the different levels of assessment should be further refined and clarified from those criteria suggested in the Consultation Paper.

### 3.2 Determining assessment criteria

The Consultation Paper proposes (at p 22) that once it is decided a proposal is eligible for assessment under the new RAA process, it will be referred to the Panel. The Panel would then prepare assessment criteria which they will use to determine the acceptability of the proposal.

As required by the NPRM Act, these criteria would require the proposal to be consistent with any approved Management Plan and management objectives for that type of reserve, as well as the RMPS objectives. The Consultation Paper notes that 'there would usually be other policies and standards that apply depending on the type of development or use, including relevant use and development provisions of the applicable planning scheme'.

It is proposed that the Panel would undertake a consultation process with relevant regulators and authorities and receive advice to determine the draft assessment criteria. The draft criteria would be released for public comment before being finalised.

The acknowledgement that, for activities that would otherwise trigger the LUPA Act, the Panel would have to apply the use and development provisions of the applicable planning scheme highlights that the proposal attempts to supplant an existing framework for assessment,

effectively excluding nearly half of Tasmania from the existing land use planning framework. As we have already said, any statutory RAA process under the NPRM Act should not replace the development permit assessment under the LUPA Act for proposals that would otherwise be captured by that framework.

The Consultation Paper mentions that 'standard assessment criteria' would always be applied to all assessments under the new process, with additional special criteria determined by the Panel and released for public comment.

It is EDO's position that any standard criteria (including the requirement for the activity or development to be consistent with the statutory reserve management plan) should be prescribed under the legislation. At a minimum, the criteria should prescribe new buildings in national parks, State reserves, nature reserves, game reserves or historic sites unless the erection of the building is permitted under the management plan.[12] Concerning specific criteria, any public comment received must be taken into account in setting the final criteria.

| **Recommendation 15:** Standard assessment criteria for all RAAs should be prescribed in the NPRM Act. If the Panel develops specific assessment criteria for a proposal, they should only do so after any public comment received on those criteria is taken into account. |
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### 3.3 Preliminary assessment

The Consultation Paper (at p 23) proposes that once the Panel has issued the assessment criteria, the next phase in the RAA process would be for the proponent to prepare a 'draft EIS' and associated documentation, within a timeframe determined by the Panel.

It is unclear why the proponent's EIS would only be a 'draft' at this stage of the process. This implies that the Panel may have a role in giving the proponent direction or feedback as to the adequacy of the documentation.

EDO has reservations about any proposal for the Panel to be involved in the development of the proponent's case for assessment, through for example providing feedback on drafts.

EDO is aware of an RAA for a significant proposal where it was unclear who was responsible for completing the RAA documentation (i.e., which parts were completed by the proponent or PWS). There were also multiple amendments made to the proposal as it proceeded through the RAA process, however, it was unclear if those changes were made by the proponent or at the direction or suggestion of the PWS (presumably to allow the proposal to proceed). Clearly, providing such assistance to proponents by the PWS is entirely inappropriate if the RAA is intended to have credibility as a rigorous and independent assessment process.

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[12] Consistent with the restrictions on the Minister's current powers to grant leases and licences at NPRM Act, section 48(5).

As an independent body with statutory responsibility for assessing proposals, the Panel's role in reviewing draft EISs under the new statutory RAA process should be limited to identifying whether the EIS has addressed all the assessment criteria (not how well – as this question is relevant to the Panel's final assessment). The only guidance the Panel should be able to provide to the proponent at this stage is through a request for further information.

EDO also has concerns about the length of time it has taken for some of the proposals to proceed through RAAs by the PWS. The current, drawn-out RAA process has led to confusion about what stage of assessment a proposal is at and whether it has the necessary approvals (including lease and licence and authorities under the NPRM Regulations). This uncertainty contributes to perceptions that the RAA process lacks transparency. For this reason, we recommend that the new statutory RAA process provide a maximum deadline for the preparation of the EIS by the proponent.

**Recommendation 16:** The new statutory RAA process should only allow the Panel to review a draft EIS once prior to final submission with a view to identifying if the draft EIS has addressed all the criteria and may be accepted. The only guidance the Panel should be able to provide to the proponent at this stage is a request for further information.

**Recommendation 17:** The new statutory RAA process should provide a deadline for the preparation of the draft EIS.

### 3.4 Final consultation and assessment

The Consultation Paper proposes (at p 23) that:

- 'the draft EIS' would be assessed by the Panel and 'other relevant regulators and authorities';
- a draft environmental assessment report (**EAR**) would then be prepared by the Panel and advertised together with the draft EIS and draft EAR for the purpose of public submissions;
- once public submissions are received, the Panel will review them and determine whether to hold public hearings 'to provide the opportunity for persons to present information to the Panel';
- the public submissions would be provided to the proponent, who would be invited to submit the final EIS and respond to the submissions;
- the Panel would then assess the final EIS and make a decision as to whether the proposal should be rejected, approved, approved with conditions or not approved;
- the Panel would then prepare a final EAR which would outline the Panel's decision and reasoning for that decision;
- the Panel's decision may also include recommendations, for example, to amend an existing reserve management plan, implement or 'resource' parts of a management plan, or otherwise 'advance the development of a new' management plan or management statement;
- the Panel's decision and final EAR would be published;
- there would be no option to appeal the Panel's decision on its merits, but the decision may be 'subject to challenge under judicial review';

- the Panel would inform the Minister, Director and any other managing authority of its decision, and they would be bound by it. The Minister would not have any other role in the process.
- the relevant managing authority would issue either a lease, licence or authority providing approval to the proponent inclusive of any conditions determined by the Panel;
- a range of other permits and approvals may still be required including building approval.

EDO provides the following comments on the proposed process:

- it is unclear from the Consultation Paper what 'other regulators and authorities' would be invited to assess the draft EIS, and what role (if any) they would have in contributing to the draft EAR, and public hearings and final decision of the Panel;
- EDO opposes the proposal to have the Panel and other, as yet, unidentified regulators and authorities assess the proposal before public comment is invited. In this respect, the proposed RAA process appears to mirror the Major Projects process under the LUPA Act. The issue with having the Panel form a preliminary assessment is that it may result in the Panel being less open to considering any public comments it later receives;
- the discretionary nature of any Panel hearings is concerning, particularly as it is currently proposed that these hearings will replace any other merits appeal opportunities that may exist under the current applicable processes (EDO makes further comments on appeals below);
- EDO is concerned that the Panel's decision may also more broadly deal with matters such as recommendations about the amendment of the management plans etc, as this appears to be beyond the scope of the Panel's role to assess proposals against the plans. By way of analogy, you would not ordinarily expect a council assessing a specific development to make recommendations to amend its planning scheme at the same time as it decides to approve a particular development (unless the original proposal included a proposal to amend the planning scheme – there is a separate process for such combined permit and scheme amendments);
- the Consultation Paper acknowledges that the Minister should not be involved in decision-making concerning RAAs - this supports EDO's recommendation that the initial decision determining eligibility for assessment should likewise not be made by the Minister;
- EDO strongly objects to the removal of the option for merits appeals from decisions concerning developments and uses on reserved land. **Judicial review is far too limited a right of review particularly given the Panel's decisions relate to public land, some of which has the highest levels of environmental protection under Tasmanian, Australian and International law. Only providing for judicial review has been acknowledged to lead to an unnecessary focus on the procedural and technical legal aspects of proposals rather than on their meaningful details and improving environmental outcomes**[13]; and
- the acknowledgement in the Consultation Paper of the need for other approvals and processes demonstrates that the proposed EIA process does not eliminate duplication at all, but arguably simply adds to the complexity.

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[13] Samuel, G 2020, Independent Review of the EPBC Act – Final Report, Department of Agriculture, Water and the Environment, Canberra, October, at p 85. Accessed at https://epbcactreview.environment.gov.au/resources/final-report

**Recommendation 18:** If the proposed statutory RAA process proceeds without integrating with the LUPA Act development assessment process:

- There should be greater clarity about the role of other regulators and authorities in the proposed RAA process.
- The Panel should not prepare a draft decision on the proposal before public submissions are invited.
- The Panel's decision should be bound by any applicable management plan, and it should not make any recommendations for changes to the management plan.
- There should be an opportunity for merits appeals to TASCAT from the Panel's decision for members of the public who made submissions.

### 3.5 Transparency and opportunities for public comment and submissions

The Consultation Paper acknowledges (pp 22, 23) that the proposed amendments should provide for Tasmanian Aboriginal people, the broader public, relevant State agencies, environmental non-government organisations and other key stakeholders involvement 'as early as possible' during decision-making and impact assessment processes.

In addition, it is proposed that the Panel will be required to consult with relevant local councils during the preparation of the assessment criteria and also during the final assessment of the proposal (p 23).

EDO makes the following observations:

- **Early involvement of the public**. It is unclear whether the proposed reforms will, in fact, provide for early public involvement in the process. The earliest substantive involvement appears to be after the Minister has already decided that a proposal is categorised as significant and potentially subject to the statutory EIA process, and determined that it is eligible for assessment. Although the Minister's reasons are proposed to be published, there is no opportunity for public involvement in that decision. Furthermore, having substantive public comment on a 'significant' proposal *after* the Panel has already drafted its EAR risks that the Panel may be less open to taking those comments on board.
- **Integration with other statutory processes**. The Consultation Paper does not indicate how it is proposed that the RAA process will speak to, or be integrated with other processes such as under the *Aboriginal Heritage Act 1975* and *Historic Cultural Heritage Act 1995*, or the EPBC Act.
- **Role of local councils**. The proposal is that the new process will allow for local councillors 'to advocate issues on behalf of their community across a range of matters, including engineering issues, planning issues, social/community issues and political issues'. This overlooks the fact that the involvement of local councils in planning decisions is the whole basis for the TPS and processes under the LUPA Act, which are proposed to be replicated or replaced by the new RAA process. Denying councils their proper role in statutory assessment and planning decisions is inconsistent with the TPS, undemocratic and will result in poor and uncoordinated decisions.

- **Excluding proposals in reserves**. Excluding activities within reserves from the LUPA Act process could lead to extraordinary outcomes such as potential mines (which are allowed in conservation areas, nature recreation areas and regional reserves) no longer needing to go through the LUPA Act process and integrated EPA assessment that occurs under the *Environmental Management and Pollution Control Act 1994*.

### 3.6 Appeal rights

The Consultation Paper notes (at p 24) that there is currently limited ability to seek a review of, or to appeal, decisions made under the RAA process and the proposed amendments to the legislation would provide for 'administrative appeals of the Panel's EIA processes and authority decisions' (such appeal rights would relate to matters such as whether a proposal's assessment process has been undertaken in keeping with the process set out in the NPRM Act).

While EDO agrees that there is presently limited opportunity to challenge RAA decisions on their merits through appeals, this does not mean that there are limited merits appeal opportunities relating to those proposals on reserved land requiring assessment under the LUPA Act.

As we have previously noted, the SPPs provide some recognition of PWS processes by providing a 'permitted' pathway if an authority under the NPRM Regulations is granted by the Managing Authority, or approved by the Director-General of Lands under the *Crown Lands Act 1976*. Activities that may be authorised by the Director under the NPRM Regulations include the use of vehicles, group activities etc. The NPRM Regulations **do not** provide for the leasing or licensing of occupation of land within reserves or construction of buildings and the like, which is the function of the Minister in granting leases and licences under s 48 of the NPRM Act.

It is not clear from the Consultation Paper whether NRE considers that licences or leases granted by the Minister under s 48 of the NPRM Act are included within the ambit of the 'permitted' use pathway under the LUPA Act. In any event, the PWS *Reserve Activity Assessment (RAA) Process Overview Guideline 2022* (**RAA Guidelines**) suggest (at pp11 and 13) that currently the RAA process is not finalised and no authority is granted before the LUPA Act and, if applicable, the EPBC Act processes are completed. If the RAA Guidelines operate as described, it would appear to be an exceptional or rare circumstance where a proposal that required a development permit would proceed through the 'permitted' pathway under the LUPA Act. The significance of this is that these proposals would therefore be 'discretionary' uses or developments under the LUPA Act, meaning that there would be formal opportunities for public representations and merits appeals to TASCAT.

The so-called 'appeals' referred to in the Consultation Paper are limited to administrative grounds, rather than the merit of the proposal. While the Paper seems to suggest that these 'appeals' would be provided for in the amendments to the NPRM Act, the earlier section entitled "Final Consultation and Assessment" (at p 23) explicitly states that any challenge to the Panel's decision would be limited to judicial review.

The Consultation Paper attempts to justify the lack of merits appeal against a decision of the Panel, on the basis that when making its decisions, the Panel be acting under a process similar to that of the TASCAT.

**The assertion that the Panel process would provide a similar process to TASCAT is entirely misleading.** Even a superficial comparison of the proposed discretionary hearing process held by the Panel while making its assessment with the merits hearings held by TASCAT acting in its planning jurisdiction will reveal that the two processes are very different.

The current proposal is that the Panel will not be required to hold public hearings and that if it does, the hearings would occur before the EIS and the Panel's assessment are finalised. The TASCAT appeal process is a review 'de novo' (i.e., with the TASCAT panel sitting in the place of the original decision-maker) that occurs *after* a decision has been made at the first instance (by the local council), so parties have access to all the relevant information and reports, and the opportunity to present their own expert evidence.

There would have to be a lot of work to ensure any equivalency between the Panel assessment and TASCAT proceedings, and such work would inevitably produce simply another layer of duplication and complexity over the existing LUPA Act processes.[14]

**If the proposed statutory RAA process replaces the LUPA Act process, then the proposed limited right of appeal would be a very significant reduction from the current rights of appeal provided by the LUPA Act. EDO strongly opposes any such reduction in community rights currently provided under the LUPA Act.**

To revert once again to the example of a mine within a reserve (most mines must be assessed as 'discretionary' for the purposes of the LUPA Act,[15] meaning that there are guaranteed public comment and appeal rights) – the proposed changes would mean that a mine assessed and approved by the Panel on public reserved land could not be the subject of an appeal on its merits. This would be a substantial reduction in current community appeal rights.

**Recommendation 19:** If recommendation 3 that the new statutory RAA process integrate with the LUPA Act process is not adopted, the amendments to the NPRM Act should provide guaranteed rights of merits appeal against a decision of the Panel by any person who has made a submission during the assessment of a proposal under the EIA process.

[14] EDO notes that similar "specialist" panels, like the Marine Farming Planning Development Assessment Panel, have been criticised in recent years due to their lack of process, rigour and independence, and how they fail to adequately consider local planning issues – see the Legislative Council Government Administration Committee "A" Sub-Committee Report on Finfish Farming in Tasmania, (2022) at pp 131-132.

[15] *Environmental Management and Pollution Control Act 1994*, Section 25(1)(A).

### 3.7 Cost recovery and financial risks

**Cost recovery**

PWS presently bears all costs of assessments under the RAA process. EDO agrees that this should not continue. It is entirely inappropriate for developers of public land to burden the government with the expense of assessing their proposals to exploit it.

**Recommendation 20:** All costs associated with the administration of the statutory RAA process should be fully met by developers.

**Recommendation 21:** Considerations should also be given to mechanisms that ensure that proponents also contribute to ongoing compliance and enforcement costs of PWS.

**Bonds**

EDO strongly supports the use of bonds to ensure that there is sufficient money to pay for the remediation of any environmental harm caused by the authorised activity, or to remove assets on default or termination of a lease or licence. There are too many examples, in the form of abandoned resort developments along the Queensland coastline, of what can happen when there is a failure to properly account for remediation of public or reserved land.

**Recommendation 22:** It should be a standard condition of all leases, licences and authorities that the holder pays a bond to cover the potential harms or impacts of that activity. The legislation should set out the percentage or rate of the bond by reference to statutory criteria that reflect risk and should also prescribe the circumstances upon which the bond can be drawn.

### 3.8 Leases and licences

The Consultation Paper proposes amendments to the NPRM Act to enable all future leases and licence agreements for reserves to be made public. NRE has already developed a portal to publicly release all active agreements (redacted to protect personal information). The portal can be used to find and download active agreements on reserve land.

EDO considers it a basic requirement for the transparent administration of public lands that all leases and licences over those lands should be published. It is unclear why there is a need for legislative change given that this is already occurring.

In any event, EDO strongly supports the publication of all leases and licences for the use of public and reserved lands. We further recommend that this transparency be extended to the RAAs for activities that have already been approved within lutruwita/Tasmania's reserves and public lands. Where those RAAs rely on PWS policies or guidelines, those policies should also be publicly available.

**Recommendation 23:** In addition to publishing leases and licences issued for public lands, NRE should publish completed RAAs for all approved activities and relevant PWS policies or guidelines.

## 4. Information sheet - Proposed changes to management planning processes

The *Information Sheet: Proposed Management Plan Planning Processes* (**Information Sheet**) sets out proposals to amend the NPRM Act to provide additional pathways to update or amend a statutory management plan or create a new kind of statutory management statement for reserved lands. The Information Sheet proposes that the reserve management plan amendment processes would 'be relative to the scale of the change that is being sought'. There are two related proposals:

- a 'less onerous' process for minor amendments of reserve management plans; and
- a proposal to allow plan amendment as part of the statutory RAA process.

### 4.1 General comments

Reserve management plans are central to ensuring that management accords with the objectives for the particular category of reserved land (set out in Schedule 1 to the NPRM Act). The rigorous statutory requirements around the preparation and approval of plans, and the requirement that they be approved by the Governor, reflect the legal significance of these instruments.

EDO generally supports the principle of adaptive management, which uses a cycle of monitoring, evaluation and review to improve management over time. EDO also agrees that management plans should be kept up-to-date to reflect the latest science and deal with new and emerging threats. However, EDO is concerned at the real risk that flexibility in amending management plans will primarily be exercised in favour of projects for the further development or exploitation of parks and reserves (by private proponents or PWS), to the exclusion of the interests of the broader public or changes that are desirable to promote the statutory objectives for management of reserved land (i.e., NPRM Act, Schedule 1). The proposal to be able to amend a plan via the RAA process is weighted towards revisions that water down protections in existing management plans because the instigator for amendments would be development proposals that, by definition, would be likely to have a 'significant' impact on a park or reserve and be *contrary to requirements in the existing management plan*. There is no proposal for an equivalent process for those who might wish to propose increased protections.

Accordingly, EDO opposes any retreat from the rigour attached to making or amending statutory reserve management plans. If there are to be any changes to the process for management planning, then they should incorporate the principle of non-regression, whereby amendments to the plans must not reduce environmental protections, community engagement or transparency.

**Recommendation 24:** A high level of public scrutiny and scientific rigour should be applied in any management planning process. If there are to be any changes to the process for management planning, then they should incorporate the principle of non-regression, whereby amendments to the plans must not reduce environmental protections, community engagement or transparency.

### 4.2 'Minor' amendments

The Information Sheet sets out the proposal to amend the NPRM Act to allow the Director to approve 'minor' amendments to both management plans and (proposed) management statements. The scope of what is considered a minor amendment is to be defined in the NPRM Act. Minor amendments would not require the full process set out in the Act for the development and approval of management plans.

The current process for amending management plans is the same as for making them. [16] The proposal to truncate the amendment process appears to intend to formalise a pathway for changes to management plans similar to that which was attempted to facilitate the luxury helicopter-accessed tourism proposal at Halls Island, Lake Malbena when the draft TWWHA management plan was being prepared.[17]

This proposal is deeply concerning. Relevantly to the TWWHA, it is also likely to be inconsistent with the World Heritage Convention and the Australian World Heritage Management Principles as set out in the EPBC Act, which requires there to be adequate provision for public consultation on proposed elements of a management plan.[18] If there was any inconsistency with these principles,

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[16] The process is summarised as follows. There is a public notification of the draft management plan by the Director National Parks and Wildlife. The public can make representations on the draft plan and National Parks and Wildlife Advisory Council (NPWAC) can provide comments on the draft plan directly to the Minister. The Director prepares a report of public representations, the Director's opinion on the representations, any changes to the draft management plan and any other relevant information to the TPC. The TPC then considers the Director's report and the representations and has 21 days to decide whether to hold a hearing to assist its review of the Director's report and the representations. If the TPC decides not to hold a hearing, it provides notice of that decision to the representors, the Director and Minister. Following any hearing or decision to not hold a hearing, the TPC then provides notice of the public exhibition of the Director's report and report and representations (the purpose of this review is not clearly stated in the legislation). The Commission provides its review to the Minister. The Minister then considers the Director's report, the TPC's review and comments received from NPWAC. The Minister can then decide to submit the management plan to the Governor in its original form or altered form as the Minister thinks appropriate having regard to certain matters. The Governor then approves the plan.

[17] See Emily Baker, "Halls Island rezoned after tourism proposal received" in the Mercury on 20 February 2019, accessible at https://www.themercury.com.au/news/tasmania/halls-island-rezoned-after-tourism-proposal-received/news-story/070c4046ced0081382b636f5453bcf60; and Dixon, Grant. (2020). Wilderness Tourism: A Cautionary Tale from the Tasmanian Highlands. International Journal of Wilderness 26. 102-117. accessed at: https://ijw.org/wilderness-tourism-tasmanian-highlands/

[18] The World Heritage Management Principles are provided for under EPBC Act, s 323(1), and Schedule 5 to the EPBC Regulations. Where a National Heritage place is not in a Commonwealth area, the Australian Government must use its best endeavours to ensure that a management plan is prepared and implemented

or for National Heritage-listed places, the National Heritage Management Principles, it would mean that a management plan for the area could not be accredited under a bilateral agreement or Ministerial declarations under the EPBC Act.[19]

EDO acknowledges that the EPBC Act is currently under review. However, EDO does not support the changes currently mooted in the Information Sheet as they appear likely to result in a reduction in transparency and accountability (and democratic principles) such that appropriate public involvement in management plan changes may be bypassed to smooth the way for new development.

Without a clear definition of what would constitute a 'minor amendment', there is potential for significant changes to be passed off as minor and obtain approval solely at the discretion of the Director.

It is concerning that the Information Sheet identifies the implementation of reserve management recommendations arising from completed RAA as an example of a minor amendment. While there might be some merit in designing a system that would enable a management plan to be amended in response to an outcome of an RAA, such amendments should not be characterised as 'minor' unless they otherwise fall within the other criteria for minor amendments.

Before progressing any proposal for amending the Act to enable minor amendments (including those that might have been identified during an RAA process), PWS should:

- demonstrate specific instances where the terms of a management plan capable of being changed under the proposed minor amendment pathway have hindered or prevented PWS from achieving optimum park management in accordance with the objectives for the park; and
- nominate specific provisions of s 27 of the NPRM Act that it considers could (or could in specific circumstances) amount to a 'minor' change, and those that would never be caught by a minor amendment process.

For example, changes to correct typographical errors should be acceptable. Non-substantive amendments might be amenable to a truncated amendment process if, for example, they fell within section 27(1)(j) of the NPRM Act if the changes related to minor specifications about how management objectives for the reserve are to be achieved. On the other hand, for example, changes to management objectives (under section 27(1)(e)) could never be considered a minor amendment.

In relation to the appropriate decision-maker for changes to management plans, plans are statutory instruments and accordingly should only be altered as they are made – by the Governor.

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in co-operation with the relevant state or territory government – EPBC Act, s 321. National Heritage Management Principles are provided for under the EPBC Act, s 324Y and Schedule 5B to the EPBC Regulations.

[19] EPBC Act, ss 33, 34B, 34BA, 46(1).

**Recommendation 25:** The Tasmanian Government should further consider and consult on the potential for minor amendments to management plans, and set out the proposed parameters for a minor amendment. A minor amendment should not be substantive and may follow a truncated process that nevertheless includes public notice and an opportunity to make submissions.

**Recommendation 26**: Amendments to management plans should be made by the Governor, not the Director.

### 4.3 Significant amendments

The Information Sheet proposes that 'significant' amendments (i.e., those that would continue to follow the full requirements for management planning processes under s 25 of the NPRM Act) could be approved by the Minister if no other agencies' statutory powers were affected by the changes, rather than the Governor, as is currently the case.

EDO opposes such a change. Management plans have effect as statutory instruments and for the sake of accountability, any changes to them should therefore continue to be approved by the Governor.

### 4.4 Combined project proposal/management plan amendment

The Information Sheet (at p7) proposes that a proponent of an activity or development in a reserve (including PWS) should be able to submit a proposal for amendment (either minor or significant) to a management plan as part of the RAA process. It appears that the intention is that the proposed process for combined project proposal/management plan amendment would involve the proposed TPC-appointed RAA Panel making decisions about changes to the existing management plan. It is further proposed that the Minister may approve a management plan amendment on the recommendation of the Panel (Information Sheet, p 5).

The proposed combined project proposal/management plan amendment process may be potentially more transparent than what has occurred in the past - for example, in relation to the Lake Malbena proposal, where boundaries of a management zone were altered to allow development of the island *after* public comment on the draft management plan had closed. However, as demonstrated by that case ad hoc changes to management plans, particularly those proposed by proponents of commercial ventures to accommodate developments, risk the overarching objectives, vision and holistic nature of reserve management planning and are unlikely to be in keeping with the broader purpose of management of parks and reserves. Such changes also may not be consistent with national and international obligations for World Heritage properties (some of which are outlined above in relation to the proposal for 'minor' amendments of plans).

The Information Sheet states (at p 6):

> This process must provide an appropriate level of scrutiny and assessment relative to the scale of the project and still provide for public involvement including public hearings. If assessed as suitable, the Panel may recommend to the Minister for Parks an amendment to the management plan. The Panel would give consideration to both the management plan amendment and the proposal through the same process.'

It is unclear what level of public comment and scrutiny of the proposed management plan amendment would be allowed for under the proposed combined project proposal/management plan amendment process, particularly given that it is currently proposed that the Panel will have discretion as to whether or not to hold hearings.

It is also unclear why the Minister should be the entity approving a change to the management plan, where it otherwise appears to have been accepted with the other proposed amendments to the NPRM Act to provide for the statutory RAA process that the Minister should not have a role in the assessment of proposals.

**In EDO's view, the proposal to amend the NPRM Act to allow combined project proposals and management plan amendments risks putting lutruwita/Tasmania's treasured parks and reserves to death by a thousand cuts.**

| **Recommendation 27**: No amendments to the NPRM Act should be made to provide for a combined project proposal/management plan amendment process. |
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### 4.5 Management statements

The Information Sheet proposes that the NPRM Act should be amended to allow the Director to develop statutory documents referred to in the information sheet as 'reserve specific management statements'. The Information Sheet notes that there are already four such 'management statements' in place for reserves, albeit they are not of statutory effect.

EDO is concerned about the risks flowing from this new category of documents to guide decision-making about and management of activities in reserves. In particular, we are concerned that management statements will follow a less open and rigorous public consultation process than statutory management plans, and that they are proposed to give effect to or implement other documents, such as policies, that may not have been subject to any public input (for example, the PWS Standing Camp Policy was used with the PWS RAA process to justify the approval of Wild Drake's proposed luxury huts at Halls Island, Lake Malbena).

The Information Sheet notes (at p 2) that many parks and reserves across lutruwita/Tasmania are either without a statutory management plan or are subject to an outdated management plan. EDO understands that under the current process, management plans take many resources and a long time to develop. We also understand there is a need to ensure that areas without management plans have some form of plan in place for their management. However, EDO remains unconvinced that the solution to this problem is to bring in a new category of documents in the form of management statements (indeed, the Coningham Nature Recreation Area Management Statement

2009 is 80 pages long). For example, we find it difficult to accept that the problem is one of resourcing the creation of statutory management plans, given how many resources the Government has already invested in the EOI process, and now proposes to invest in terms of making allowance for amendments of statutory management plans through a combined project proposal and management plan amendment process.

In EDO's view, the Tasmanian Government has not made the case in environmental, economic and practical terms, for why it requires statutory management statements instead of, or to complement, management plans. However, if it does make that case, then in developing such statements, EDO supports the Director consulting the public and responding to submissions made on draft management statements. Statements must also be consistent with and complement management plans and statutory objectives for management, and not attempt to supplant the role or content of management plans.

**Recommendation 28**: The Tasmanian Government should consult further in relation to the types of matters proposed to be dealt with by management statements. Management statements must be consistent with and complementary to, management plans.

*Thank you for the opportunity to make this submission.*
*Please do not hesitate to contact our office should you have further enquiries.*