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LAWYERS

Lake Malbena
Tourism developments in reserve areas

On 15 September 2021, the Full Court of the Supreme Court of Tasmania handed down the long-awaited decision of *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12 (**Lake Malbena**). The decision has clarified how some proposals for developments in reserve areas, such as the World Heritage area or National Parks, must be assessed by local councils (**Planning Authority**).

The Full Court held that, in order for a Planning Authority to approve a development on reserved land, it must be satisfied that the proposal meets the land use requirements in the reserve management plan (**Management Plans**) applicable to the area. However, it does not authorise a full audit of compliance or conformity with all aspects of a Management Plan.

The Full Court's decision overturned the earlier decisions of Justice Estcourt at first instance and that of the Resource Management and Planning Appeal Tribunal (**Tribunal**). Both decisions held, to some extent, that the existence of a Management Plan was sufficient to satisfy the acceptable solution; its existence meant that the use was subject to the Management Plan.

What is now required by Council planning officers and the proponent's consultants is that the development application must include an assessment of whether the proposal's use of the land is consistent with the Management Plan. While there had been some uncertainty regarding the dual application of planning schemes and Management Plans in reserve areas, it is now clear that both apply, and both must be considered.

With the roll-out of the Tasmanian Planning Scheme (**TPS**), this decision is likely to be of less relevance over time. The form of the discretionary use standard for the Environmental Management Zone under the TPS (which will apply across the State), takes a different form to that considered in Lake Malbena.

Background

Wild Drake Pty Ltd (**Wild Drake**) holds a commercial lease from the State Government over Halls Island at Lake Malbena in the Walls of Jerusalem National Park and the Central Plateau Conservation Area (**site**). This area forms part of the Tasmanian Wilderness World Heritage Area.

Wild Drake applied to the Council for approval to develop a luxury fly-in fly-out tourist retreat. The development included helipads, kitchen and toilet facilities, and visitor accommodation.

The relevant Planning Authority is the Central Highlands Council, so the site is subject to the *Central Highlands Interim Planning Scheme 2015* (**Planning Scheme**). The site is also reserved land within the meaning of the *National Parks and Reserves Management Act*

2002 (**NPRM Act**)[1] and subject to the *Tasmania Wilderness World Heritage Area Management Plan 2016* approved under that Act.

On 26 February 2019, the Council refused to issue a development approval to Wild Drake.

The Central Issue – Interpretation of the Acceptable Solution

The Full Court considered the key issue to be how the phrase "in accordance with", as it appears in clause 29.3.1 A1 (Use Standards for Reserved Land) (**Acceptable Solution**), ought to be interpreted. The Acceptable Solution requires that the use of reserved land "is undertaken *in accordance with* a reserve management plan".

Extract from the Environmental Management zone in the *Central Highlands Interim Planning Scheme 2015*

29.3.1 Use Standards for Reserved Land

Objective:	
To provide for use consistent with any strategies for the protection and management of reserved land.	
Acceptable Solutions	**Performance Criteria**
A1 Use is undertaken in accordance with a reserve management plan.	**P1** Use must satisfy all of the following: (a) be complementary to the use of the reserved land; (b) be consistent with any applicable objectives for management of reserved land provided by the *National Parks and Reserves Management Act 2002*; (c) not have an unreasonable impact upon the amenity of the surrounding area through commercial vehicle movements, noise, lighting or other emissions that are unreasonable in their timing, duration or extent.

This provision is replicated in several Interim Planning Schemes in Tasmania.

How did the Tribunal interpret the Acceptable Solution?

Wild Drake appealed the Council's refusal to the Tribunal. The Wilderness Society, the Tasmanian National Parks Association Inc, Richard Webb, Paul Smith (collectively referred to as **The Wilderness Society**) and the Director of National Parks and Wildlife joined the proceedings as Parties Joined. The Attorney-General was an intervenor to the proceedings.

Wild Drake argued that "in accordance with" equated to "subject to" and that the

[1] Reserved land is defined in the NPRM Act by reference to the *Nature Conservation Act 2002*, which provides:

"reserved land means –
(a) any land declared under this Act to be reserved land; and
(b) any land taken to have been so declared"

Acceptable Solution simply required that a Management Plan apply to the land in question, and that the specifics of the Management Plan need not be complied with for the Acceptable Solution to be satisfied.

In contrast, the Wilderness Society submitted that "in accordance with" meant "consistent with" or "in conformity with". Accordingly, the Wilderness Society argued that compliance with the Acceptable Solution required a separate assessment of compliance of the proposal with the Management Plan.

In adopting the interpretation advocated by Wild Drake, the Tribunal held that the proper interpretation of the Acceptable Solution required that:

a) a Management Plan is in existence; and

b) an assessment of use in accordance with the Management Plan was undertaken and approved up to and including Step 7 of the Reserve Activity Assessment process.[2]

On 21 October 2019, the Tribunal upheld Wild Drake's appeal and ordered that Council issue a permit.

How did the Supreme Court interpret the Acceptable Solution?

The Wilderness Society then appealed the Tribunal's decision to the Supreme Court of Tasmania, arguing that the Tribunal erred in upholding the appeal.

On 6 July 2020, Estcourt J dismissed the appeal on the basis that his Honour did not consider that there was any error in the Tribunal's decision. In particular, his Honour held that all that is required is for the Planning Authority to *"simply satisfy itself, as a matter of fact, that the development was 'subject to' a reserve management plan."* [3]

How did the Full Court interpret the Acceptable Solution?

The Full Court, in the leading judgment of Porter AJ, considered the meanings ascribed to "in accordance with" by a range of Courts.

The Wilderness Society submitted, and Porter AJ agreed, that the reasoning utilised in *VicForests v Friends of Leadbeater's Possum Inc* [2021][4] was not open in this case because:

> *"if all that the provision meant was that a reserve management plan "applied" in the geographic sense, then the acceptable solution would use the same formula as the cl 29.2 use table; that is, "if a reserve management plan applies". Alternatively, cl 29.2 would simply state that no permit is required "if a reserve management plan applies"."*[5]

Ultimately, having considered both interpretations advocated for by Wild Drake and the Wilderness Society, Porter AJ held that, for the Acceptable Solution to be met, the use must comply with, or conform to, the prescriptive requirements of the applicable Management Plan relating to use. It was not sufficient to say, as a matter of fact, that a Management Plan was in effect for the area.

In overturning the decision of Justice Estcourt, the matter was remitted back to the Tribunal to be determined in accordance with the Full Court's decision.

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2 Establishes that an assessment under the Management Plan has been undertaken and that the Proposal has been approved as compliant with the Management Plan by Parks and Wildlife.

3 The Wilderness Society v Wild Drake Pty Ltd [2020] TASSC 34 at [52].

4 FCAFC 66, 389 ALR 552.

5 *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC [128].

Regulation of reserve land

Developments are generally subject to concurrent assessment processes at a local, State and Federal level. However, there had been some uncertainty regarding how, if at all, Planning Schemes applied to reserve areas such as the World Heritage area.

In addition to the interpretation of the Acceptable Solution, the Tribunal also considered the interrelationship between the *Land Use Planning and Approvals Act 1993* (**LUPAA**) and the NPRM Act, an issue that had required judicial clarification for some time. The Tribunal held that neither LUPAA nor the NPRM Act exclude the operation of the other.

When the matter came before the Full Court, Porter AJ also unpacked the issue of jurisdiction and the interaction of the provisions of the LUPAA and the NPRM Act in reserve areas. His Honour considered the stringent requirements for a repeal by implication and affirmed the Tribunal's stance that simultaneous effect could be given to both Acts in reserve areas.

Read our earlier article on this point **here**.

Implications of the decision considering the roll-out of The Tasmanian Planning Scheme

This decision means that a Planning Authority, in assessing applications under clause 29.3.1 of some Planning Schemes, will be required to undertake its own assessment of the proposal against the applicable Management Plan provisions as they relate to use. This will make the requirements relating to the granting and obtaining of approval for a proposal on reserved land more difficult to meet.

As outlined above, the TPS takes a different approach to tourism proposals in reserve areas. As a starting point, most proposals will be permitted where Parks and Wildlife have granted an approval – presumably through the RAA process.[6] In contrast to the use standard considered in Lake Malbena, the use standard in the TPS only applies to discretionary developments:

Extract from the Environmental Management zone in the *Tasmanian Planning Scheme*

23.3.1 Discretionary uses

Objective:	
That uses listed as Discretionary recognise and reflect the relevant values of the reserved land.	
Acceptable Solutions	**Performance Criteria**
A1 No Acceptable Solution.	**P1** A use listed as Discretionary must be consistent with the values of the land, having regard to: (a) the significance of the ecological, scientific, cultural or scenic values;

[6] Specifically, the use table in the Environmental Management Zone provides tourist operation to be permitted where "*an authority under the National Parks and Reserved Land Regulations 2009 is granted by the Managing Authority, or approved by the Director-General of Lands under the Crown Lands Act 1976.*"

	(b)	the protection, conservation, and management of the values;
	(c)	the specific requirements of the use to operate;
	(d)	the location, intensity and scale of the use;
	(e)	the characteristics and type of the use;
	(f)	traffic and parking generation;
	(g)	any emissions and waste produced by the use;
	(h)	the measures to minimise or mitigate impacts;
	(i)	the storage and handling of goods, materials and waste; and
	(j)	the proximity of any sensitive uses.

As one can see, the use standard in the TPS does not provide for an acceptable solution but instead requires the Planning Authority (and therefore the Proponent) to consider the specific factors that are more akin to planning considerations, such as traffic and parking, to meet the performance criteria.

Therefore, the broader implications of this decision may be limited once the TPS is in effect across the State.

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