



Citation:	Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 4) [2023] TASCAT 217
Division:	General
Stream:	Resource & Planning
Parties:	Malcolm Ryan (Appellant in P/2023/21) Paul Smith (Appellant in P/2023/23) Birdlife Tasmania (Appellant in P/2023/27) ACEN Robbins Island Pty Ltd (Appellant in P/2023/29) Bob Brown Foundation (Appellant in P/2023/30) Circular Head Coastal Awareness Network Inc (Appellant in P/2023/31) Circular Head Council (First Respondent) ACEN Robbins Island Pty Ltd (Second Respondent except in P/2023/29) Director, Environment Protection Authority (Party Joined)
Hearing Date(s):	11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28 and 29 September 2023
Hearing Location:	Hobart
Date of Orders:	27 November 2023
Date Reasons Issued:	27 November 2023
Panel:	R Grueber, Deputy President K Loveday, Member

M Kitchell, Member

Orders Made:

1. The parties are to file agreed conditions of a permit by 4pm on 7 December 2023.
2. In the absence of agreement in respect to (1) then by 4pm on 13 December 2023 each party is to file and serve submissions in respect to any disputed conditions or advise the Tribunal that they do not want to be heard.
3. Each party is to file and serve any submissions in response to any submission made pursuant to (2) by 4pm on 18 December 2023.
4. In respect to (2) any disputed condition may only be a condition arising from the grounds of appeal or the proposed draft conditions or these reasons for decision and must not be inconsistent with these reasons. The submissions are to include the formulation of any proposed condition.
5. The parties have liberty to apply in respect to this timetable, with any such application to be supported by submissions and to be made before the expiration of the relevant period.

Catchwords:

Environment and Planning – Planning appeal – Wind farm development – Jurisdiction in respect to conditions required by the EPA – Whether piecemeal development – Whether development application is inadequate or incomplete – Whether permit and conditions uncertain – Assessment by the EPA – The precautionary principle – Risks to Orange-bellied Parrots, shorebirds, eagles and Tasmanian Devils – Risks to geoheritage sites – Whether required to locate on rural resource land – Drainage and sewerage disposal – Height, location and visual intrusion – Application of zone purpose statements, local area objectives and desired future character statements – Conditions

Cases Cited:

Sandy Bay Developments v Loring [1991] TASSC 34; *Public Guardian v Guardianship and Administration Board* [2011] TASSC 31; *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40 *Tricare (Bayview) Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 31; *United States v C Dunkel* [1991] USCA7 185; *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 2)* [2023] TASCAT 129; *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 3)* [2023] TASCAT 194 ; *Gull Petroleum (WA) Pty Ltd v Nashville Investments Pty Ltd* [1999] WASCA

12; *S Cai v Launceston City Council and TRC Multi-Property Pty Ltd* [2023] TASCAT 27; *Richard G Bejah Insurance & Financial Services Pty Ltd v Maning & Ors* [2002] TASSC 36; *St Helens Area Landcare & Coast Care Group Inc v Break O'Day Council* [2007] TASSC 15; *Dunland Property Pty Ltd v Brisbane City Council* [2021] QPEC 34; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASFC 14; *Auspine Limited v George Town Council and Forest Enterprises Australia Limited* [2008] TASRMPAT 28; *NP Power Pty Ltd v Central Highlands Council* [2012] TASRMPAT 56; *Tomaszewski v Hobart City Council* [2020] TASSC 48; *Tomaszewski v Hobart City Council (No.2)* [2021] TASSC 15; *Re Carmel Elizabeth McDonald v Director-General of Social Security* [1984] FCA 57; *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33; *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* [1980] HCA 1; *Brisbane City Council v Cunningham & Anor* [2001] QCA 294; *Lewiac Pty Ltd v Gold Coast City Council & Ors, Tanswell v Gold Coast City Council & Anor* [2006] QPEC 112; *Gamble v Kingborough Council* [2020] TASFC 7; *North Sydney Council v Ligon 302 Pty Ltd* [1996] HCA 20; *Brisbane City Council v Cunningham & Anor* [2001] QCA 294; *Fox & Anor v Brisbane CC & Ors; Fox & Anor v Brisbane CC & Anor; Stop Master Butchers Industrial Estate in Hemmant & Tingalpa Action Group & Ors v Brisbane CC & Anor* [2003] QCA 330; *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; *Scott v Wollongong City Council* [1992] NSWCA 227; (1992) 75 LGRA 112; *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 5; *Win v Director-General of National Parks and Wildlife and Ors* [2001] NSWCA 17; *Howie v Clarence City Council* [2001] TASSC 53; *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12; *Jackson v Purton* [2011] TASSC 28; *Meander Valley Council v RMPAT* [2018] TASSC 9; *Planning Commission (WA) v Temwood Holdings Pty Ltd* [2004] HCA 63; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; *Craig Webb Pty Ltd v Launceston City Council* [2023] TASCAT 108; *Mount Wellington Cableway Company Pty Ltd v Hobart City Council & Ors* [2022] TASCAT 128; *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41; *Boland v Clarence City Council* [2021] TASSC 5; *Raff Angus Pty Ltd v Resource Management and Planning Appeal Tribunal* [2018] TASSC 60; *Star Box Architecture v Latrobe Council & Anor* [2020] TASRMPAT 7; *Smith v Hobart City Council* [2010] TASFC 9; *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41; *Attorney-General v University of Tasmania* [2020] TASFC 12; *Tarkine National Coalition Inc v Director, Environment Protection Authority* [2020] TASSC 3; *Action View Tas Pty Ltd & Ors v Clarence City Council & Anor* [2020] TASRMPAT 20; *Telstra Corporation v Meander Valley Council & Ors* [2019] TASRMPAT 11; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; *Alcan (NT) Alumina Pty Ltd v Commissioner*

of Territory Revenue [2009] HCA 41; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; *Southwestern Sydney Local Health District the Gould* [2018] NSWCA 69; *M Cubitt and T Powell v Launceston City Council & Ors* [2022] TASCAT 47; *Capital Airport Group Pty Ltd v Director-General of the NSW Department of Planning (No.2)* [2011] NSWLEC 83; *Mt Wellington Cableway Company Pty Ltd v Hobart City Council & Ors* [2022] TASCAT 128; *Allesch v Maunz* [2000] HCA 40; *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* [2003] FCA 983; *Meander Valley Council v Resource Management and Planning Appeal Tribunal* [2013] TASSC 42 [10]; *Pielage v Launceston City Council* [2019] TASSC 1; *Jezreel Pty Ltd & Anor v Brisbane City Council & Anor* [2023] QPEC 7.

Legislation Cited:

Environmental Management and Pollution Contract Act 1994; *Land Use Planning and Approvals Act 1993*; *Tasmanian Civil and Administrative Tribunal Act 2020*; *State Policies and Projects Act 1993*; *State Coastal Policy Validation Act 2003*; *Energy Coordination and Planning Act 1995*; *Circular Head Interim Planning Scheme 2013*; *State Coastal Policy 1996*

Representation:

Appellant in P/2023/21:	Self-represented
Appellant in P/2023/23:	Self-represented
Appellant in P/2023/27:	E Woehler
Appellant in P/2023/29:	M O'Farrell SC/E Peppler – Ashurst
Appellant in P/2023/30:	D Deller/R Browne – Fitzgerald & Browne
Appellant in P/2023/31:	T Ellicott, V Bleyer – Bleyer Lawyers
First Respondent:	N Street/T Cooper – Simmons Wolfhagen
Second Respondent:	M O'Farrell SC/E Peppler - Ashurst
Party Joined:	T Carr/K Barwick – Environment Protection Authority

File No:

P2023/21, P2023/23, P2023/27, P2023/29, P2023/30, P2023/31

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REASONS FOR DECISION

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Robbins Island

1. Robbins Island is a 9,869 ha island located in Bass Strait at the northwest tip of Tasmania. It is separated from mainland Tasmania by Robbins Passage, which is a tidal passage on the southern side of the island ranging in width from 1.4 km to over 6 km.
2. Access to Robbins Island is limited to 4-wheel drive vehicles crossing Robbins Passage at low tide from Robbins Island Road, which runs from West Montagu Road to the coast.
3. Robbins Island is privately owned. Approximately 2,267 ha, or around 23 per cent of the area of the island, is cleared pasture, and the island is used for grazing cattle for beef production. Existing development on the island includes a quarry, outbuildings, three meteorological masts, two dwellings and accommodation for farm workers.
4. The area of the mainland adjacent to the island is largely rural farmland. The Montagu campground is at Stoney Point on the mainland shore of Robbins Passage. The nearest dwelling is 2.8 km away. The nearest township is Smithton, which is approximately 20 km to the southwest.

The wind farm proposal

5. ACEN Robbins Island Pty Ltd (**ACEN**) proposes the use and development of a wind farm on Robbins Island. The wind farm would contain up to 100 wind turbine generators. The wind turbines would each have three blades. Each blade would have a maximum length of 86 m giving a total rotor diameter of 172 m. The blades would be attached to a tower with a hub height at a maximum of 126 m, resulting in a blade-tip height above ground level of a minimum of 40 m and a maximum of 212 m.

6. The proposal includes a bridge across Robbins Passage from the end of Robbins Island Road. The bridge would have a single 4.4 m wide lane with a span length of 1,290 m and a maximum height of 8.2 m. The overall length of the bridge, with connecting ramps, will be 1,829 m. Robbins Island Road will be upgraded to a width of 5.5 m with a gravel surface except for a 30 m length where it meets West Montagu Road, which will be sealed, with a sealed turning circle at the end with the bridge.
7. The proposal also includes a wharf, which will extend 509 m off Backs Bank Beach on the north shore of Robbins Island. The wharf is for the delivery of components of the wind turbines, particularly the blades, avoiding the need for road transport. A 100 m long concrete ramp will connect the wharf to an internal road network.
8. The road network for the development will consist of 33.8 km of main roads and 59.4 km of spur roads. The site, including the entire island and the supporting infrastructure and roadway portion on the mainland will total 10,590 ha.
9. Four quarries are proposed, to extract material for use during construction.
10. The proposal incorporates ancillary and supporting infrastructure which includes:
 - Five meteorological masts of up to 165 m;
 - A site office and workshop with a footprint of 1 ha, and a co-located maintenance and services facility with a warehouse, office building and staff facilities which will also cover an area of 1 ha.
 - Transmission infrastructure including an underground electrical network and three sub-stations.
 - Three water storage dams.
 - Wastewater treatment facilities.
 - Re-fuelling and vehicle wash-down facilities.
11. The proposal will be developed in two stages. The first stage will include the construction of approximately 56 wind turbines. The second stage will be the construction of the remaining 44 wind turbines. The second stage is dependent on either increased electricity demand within Tasmania or the construction of the Marinus link, a proposed electricity interconnector between Tasmania and Victoria.

The development application

12. ACEN submitted a development application to the Circular Head Council (**the Council**) on 18 March 2020. The development application was amended by orders made on the application of ACEN in *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 2)* [2023] TASCAT 129.
13. The proposal is for a wind energy facility which falls within cl 7(f) of Sch 2 of the *Environmental Management and Pollution Control Act 1994 (EMPCA)*. Accordingly, pursuant to s 25 of EMPCA, the Council referred the development application to the

Board of the Environment Protection Authority (**the EPA**, which for convenience in this decision refers to any of the EPA, the Board of the EPA and the Director of the EPA unless specified). The EPA determined that it would assess the proposal pursuant to s 25(1)(d) of EMPCA.

14. Subsequently the proposal was advertised in accordance with the requirements of the *Land Use Planning and Approvals Act 1993 (LUPAA)*. The Council received 386 representations in respect to the proposal.
15. On 20 January 2018 the EPA issued guidelines (**the DPEMP Guidelines**) to ACEN for the preparation of a development proposal and environmental management plan. Following several iterations a final development proposal and environmental management plan (**the DPEMP**) was completed by ACEN in December 2021.
16. On 6 December 2022 the EPA issued an environmental assessment report. On 8 December 2022 the EPA advised the Council of conditions that it required any permit to contain, pursuant to s 25(5)(a) of the EMPCA.
17. On 16 February 2023 the Council resolved to grant a permit for the development application, subject to conditions which included the EPA conditions.

The appeals

18. Following the grant of the permit six appeals were lodged. One appeal was by ACEN in respect to conditions of the permit. The Council is the respondent to that appeal.
19. The remaining five appeals challenge the grant of the permit. The Council and ACEN are respondents to each of those appeals.
20. The EPA was made a party pursuant to cl 7(2)(a) of Pt 8 of Sch 2 of the *Tasmanian Civil and Administrative Tribunal Act 2020 (the TASCAT Act)* as the appeals, including ACEN's appeal, bring into issue conditions required by the EPA.
21. By direction, the appeals were heard together and the evidence in each appeal was taken as evidence in the other appeals.
22. To avoid confusion, the parties will be referred to by name and any reference to the appellants collectively will be to each of the appellants except ACEN.

Grounds of appeal

Appeals by the appellants

23. There are 52 grounds of appeal by the appellants.
24. The grounds of appeal were consolidated into a single document in the following terms, which maintain the styles of the respective drafters and are not corrected:

- I. The proposed use and development is inconsistent with clauses 29.1.1, 29.1.2 and 29.1.3 of the Local Area Objectives and Desired Future Character Statements

for the Environmental Management Zone in the Circular Head Interim Planning Scheme 2013. The proposed project is inconsistent because:

1.1. The proposed use and development fails to protect, conserve and manage populations of Bartailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot, and will result in the loss of habitats for them, inconsistent with clause 29.1.1.1 of the Planning Scheme.

1.2. The annual and cumulative deaths of Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot will impact on the sustainability and viability of the populations of these species in the area, reduce the avian biodiversity of the area, and threaten the integrity of ecological processes in the area, inconsistent with clause 29.1.2 (a).

1.3. The proposed use and development will reduce the available feeding and roosting habitats for Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot by displacing birds from the area as a result of disturbance during construction and operations, inconsistent with clause 29.1.2 (b).

1.4. The proposed use and development will intrude on the natural behaviours of Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Seaeagle, White-throated Needletail and Orange-bellied Parrot by displacing birds from the area as a result of the turbines presenting as a barrier to their normal flights, including migratory flights for migratory species during construction and operations, inconsistent with clause 29.1.2 (g).

1.5. The proposed use and development increases the risk of extinction to Far Eastern Curlew, Hooded Plover and Orange-bellied Parrot, all Priority Species in the Commonwealth Government's 2022-2032 Threatened Species Action Plan, inconsistent with clause 29.1.3 (a) (i).

1.6. The proposed use and development fails to protect and conserve the internationally- and/or nationally-significant ecological values of the area (Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, [all shorebirds], and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, Whitethroated Needletail and Orange-bellied Parrot), all of which are formally-listed Threatened Species, inconsistent with clause 29.1.3 (a) (iv).

2. The project further fails to meet these objectives because:

2.1. The proposed use and development will cause deaths to Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot, and will result in the loss of habitats for them.

2.2. The field studies of the bird species referred to above that were submitted with the application for development approval are out of date, and do not properly assess the impact of the proposed use and development on these species. In many cases, the field studies are more than 10 years old and cannot be relied upon for the proposed project.

2.3. The radio-tracking studies are old, and cannot be considered representative of the shorebird community in the area based on their very small sample size and subsequent changes in populations over the last decade. At best, the patchy radio-tracking study could only locate a small fraction of the shorebirds flying over Robbins Island based on the locations of directional antennae used, the documented equipment failures and the primary effort to locate feeding birds. The radio-tracking studies were undertaken for the original White Rock Ridge proposal, and not for the expanded current proposal.

2.4. The proposed use is on a site with, and adjacent to lands that have recognised significant ecological values, thus contrary to the acceptable solution A1 of Clause 29.3.2.

3. The proposed use and development is inconsistent with the Local Area Objectives and Desired Future Character Statements for the Environmental Management Zone as in clauses 29.1.1.1, 29.1.2 and 29.1.3 of the Planning Scheme.

3.1. The Local Area Objectives and Desired Future Character Statements at clauses 29.1.2 (a), (b), (c) and (d), and 29.1.3 (a) (iv) and 29.1.3 (b) support the protection and conservation of the land's ecological, scientific, cultural and aesthetic values in accordance with best practice management principles.

3.2. The proposed use and development is inconsistent with the protection and conservation of the land's ecological, scientific, cultural and aesthetic values in accordance with best practice management principles and in particular;

3.2.1. The wind turbine elements of the proposed use and development will have unreasonable impact on the aesthetic values of Robbins Island, having regard to the visual impact of the wind power turbines (up to 122) on the broader landscape given the height of the turbines will be up to 270 m high.

4. The proposed use and development is inconsistent with the Local Area Objectives and Desired Future Character Statements for the EMZ as set out in clauses 29.1.1, 29.1.2 and 29.1.3 of the PS. In particular:

4.1. The proposed use and development is inconsistent with the protection and conservation of the land's ecological, scientific, cultural and/or aesthetic values in accordance with best practice management principles and in particular:

4.1.1. The proposed use and development will cause deaths to Tasmanian Devils, Spotted-tailed Quolls, Green and Gold Frogs and the loss of habitat for those species.

5. The proposed use and development is inconsistent with clause 29.3.2 of the Environmental Management Zone in that:

5.1. The proposed use is a discretionary use for the purposes of the Environmental Management Zone and should have been refused as per 4. above.

5.2. The site has significant ecological cultural or aesthetic values for the reasons set out at 4. above.

5.3. As a discretionary use, the use and development is to protect conserve and manage significant ecological cultural or aesthetic values in accordance with the purposes of the zone at clause 29.1.1.1, 29.1.1.2, 29.1.2 and objective (a) in the table at clause 29.3.2.

5.4. The proposed use is inconsistent with the purposes of the zone at clause 29.1.1.1 and the objectives of clause 29.3.2 – that is the protection and conservation of the land's ecological, scientific, cultural and aesthetic values for the reasons set out at 6(c) and furthermore the proponent has not demonstrated that the proposed use and development is consistent with the protection and conservation of the land's ecological, scientific, cultural and aesthetic values in accordance with best practice management principles.

5.5. The proposed use is on a site that is in an area which has significant ecological, scientific, cultural and aesthetic values, contrary to the acceptable solution A1 (a) and (b) in the table at clause 29.3. 2, and the decision of the Environment Protection Authority to approve the proposed use and development, with conditions, should be overturned for the reasons set out in 8 – 21 below.

5.6. The use is not required to be located in an area of significant ecological, scientific, cultural or aesthetic value for any of the reasons set out in the performance criteria (a) (i) - (v) in the table at clause 29.3.2, and the decision of the Environment Protection Authority to approve the proposed use and development, with conditions, should be overturned for the reasons set out at 8 – 21 below.

6. Flora and fauna studies relied upon by the proponent are outdated and should not be relied upon.

6.1. The once off count data from 2010/2011 provides little use in terms of the threat assessment to Threatened Species. Twice-yearly counts by Birdlife Tasmania demonstrates a decrease in bird numbers since 1996.

6.2. The data used to assess the Wedge Tailed Eagles risk is old and outdated, having been developed more than 30 years ago for the forestry industry in Tasmania, long before the establishment of a wind turbine industry. The threats to eagles from forestry and wind farm operations are so disparate that forestry guidelines are inappropriate and fail to protect eagles. Contemporary assessment tools such as that of Dr Dr Megan Murgatroyd

(a South African researcher who has examined threats to eagles from wind farms), recommends that in the absence of using the model adopted in her studies, that a precautionary buffer of 5.2 km radius around a nest site should be protected from wind farm development.

6.3. The DPEMP failed to list 16 species of birds with elevated conservation status under State and Federal legislations.

7. The impacts of the proposed use and development cannot be properly assessed, and the approval of the proposed use and development in these circumstances would be contrary to the application of the precautionary principle as the unspecified and indeterminate number of turbines to be constructed, the maximum tip heights of turbines to be installed, and the layout of the turbines for the proposed project prevents an appropriate assessment of impacts. Environmental Management and Pollution Control Act 1994 grounds.

8. Pursuant to s.25 Environmental Management and Pollution Control Act 1994, the EPA Board should have directed the Circular Head Council to reject the project as:

9. Bar-tailed Godwit

9.1. Flights of Bar-tailed Godwit between and among foraging and roosting sites around Robbins Island and surrounding areas pass over Robbins Island.

9.2. The Bar-tailed Godwit is listed as Vulnerable under the Environmental Protection and Biodiversity Conservation Act (1999). Recent analyses have indicated the species now meets the criteria for listing as Endangered.

9.3. The project will cause deaths of Bar-tailed Godwits, which impact is unacceptable and unpreventable.

10. Curlew Sandpiper

10.1. Flights of Curlew Sandpiper between and among foraging and roosting sites around Robbins Island and surrounding areas pass over Robbins Island.

10.2. The Curlew Sandpiper is listed as Critically Endangered under the Environmental Protection and Biodiversity Conservation Act (1999) and Threatened under the Tasmanian Threatened Species Protection Act 1995.

10.3. The project will cause deaths of Curlew Sandpipers, which impact is unacceptable and unpreventable.

11. Far Eastern Curlew

11.1. Flights of Far Eastern Curlew between and among foraging and roosting sites around Robbins Island and surrounding areas pass over Robbins Island.

11.2. The Far Eastern Curlew is listed as Critically Endangered under the Environmental Protection and Biodiversity Conservation Act (1999) and Endangered under the Tasmanian Threatened Species Protection Act 1995.

11.3. The project will cause deaths of Far Eastern Curlews, which impact is unacceptable and unpreventable.

12. Great Knot

12.1. Flights of Great Knot between and among foraging and roosting sites around Robbins Island and surrounding areas pass over Robbins Island.

12.2. The Great Knot is listed as Critically Endangered under the Environmental Protection and Biodiversity Conservation Act (1999).

12.3. The project will cause deaths of Great Knots, which impact is unacceptable and unpreventable.

13. Hooded Plover

13.1. Flights of Hooded Plover between and among foraging and roosting sites around Robbins Island and surrounding areas pass over Robbins Island.

13.2. The Hooded Plover is listed as Vulnerable under the Environmental Protection and Biodiversity Conservation Act (1999) and Threatened under the Tasmanian Threatened Species Protection Act 1995.

13.3. The project will cause deaths of Hooded Plovers, which impact is unacceptable and unpreventable.

14. Red Knot

14.1. Flights of Red Knot between and among foraging and roosting sites around Robbins Island and surrounding areas pass over Robbins Island.

14.2. The Red Knot is listed as Endangered under the Environmental Protection and Biodiversity Conservation Act (1999).

14.3. The project will cause deaths of Red Knots, which impact is unacceptable and unpreventable.

15. Grey Goshawk

15.1. Flights of Grey Goshawk pass over the area of the proposed development on Robbins Island and surrounding areas.

15.2. The Grey Goshawk is listed as Endangered under the Tasmanian Threatened Species Protection Act 1995.

15.3. The project will cause deaths of Grey Goshawks, which impact is unacceptable and unpreventable.

16. Tasmanian Masked Owl

16.1. The Tasmanian Masked Owl occurs on and around Robbins Island.

16.2. Flights of Tasmanian Masked Owl pass over the area of the proposed development on Robbins Island and surrounding areas.

16.3. The Tasmanian Masked Owl is listed as Vulnerable under the Environmental Protection and Biodiversity Conservation Act (1999) and Endangered under the Tasmanian Threatened Species Protection Act 1995. Recent analyses have indicated the species now meets the criteria for listing as Endangered under the EPBC Act.

16.4. The project will cause deaths of Tasmanian Masked Owls, which impact is unacceptable and unpreventable.

17. Tasmanian Wedge-tailed Eagle

17.1. The Tasmanian Wedge-tailed Eagle occurs on and around Robbins Island.

17.2. Flights of Tasmanian Wedge-tailed Eagle pass over the area of the proposed development on Robbins Island and surrounding areas.

17.3. The Tasmanian Wedge-tailed Eagle is listed as Endangered under the Environmental Protection and Biodiversity Conservation Act (1999) and Endangered under the Tasmanian Threatened Species Protection Act 1995.

17.4. The project will cause deaths of Tasmanian Wedge-tailed Eagles, which impact is unacceptable and unpreventable.

18. White-bellied Sea-eagle

18.1. The White-bellied Sea-eagle occurs on and around Robbins Island.

18.2. Flights of White-bellied Sea-eagle pass over the area of the proposed development on Robbins Island and surrounding areas.

18.3. The White-bellied Sea-eagle is listed as Vulnerable under the Tasmanian Threatened Species Protection Act 1995.

18.4. The project will cause deaths of White-bellied Sea-eagle, which impact is unacceptable and unpreventable.

19. White-throated Needletail

19.1. Flights of White-throated Needletail pass over the area of the proposed development on Robbins Island and surrounding areas.

19.2. The White-throated Needletail is listed as Vulnerable under the Tasmanian Threatened Species Protection Act 1995.

19.3. The project will cause deaths of White-throated Needletails, which impact is unacceptable and unpreventable.

20. Orange-bellied Parrot

20.1. Migratory flights of Orange-bellied Parrot pass over the area of the proposed development on Robbins Island and surrounding areas.

20.2. The Orange-bellied Parrot is listed as Critically Endangered under the Environmental Protection and Biodiversity Conservation Act (1999) and Endangered under the Tasmanian Threatened Species Protection Act 1995.

20.3. The project will cause deaths of Orange-bellied Parrots, which impact is unacceptable and unpreventable.

21. The conditions required by the EPA Board and placed on the permit by Council cannot mitigate the impacts of the proposed project. In particular:

21.1. The fatal impact on the Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and

Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot from collisions with turbine blades.

21.2. The impact on the Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot from, and with respect to habitat loss.

21.3. The impacts to Bar-tailed Godwit, Curlew Sandpiper, Far Eastern Curlew, Great Knot, Hooded Plover, Red Knot, (all shorebirds), and Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot arising from the impacts of construction explosions, noise and dust, that will result in disturbance to roosting and feeding shorebirds and potentially reducing their migratory capacity, and hence their survival.

21.4. The impacts to Grey Goshawk, Tasmanian Masked Owl, Tasmanian Wedge-tailed Eagle, White-bellied Sea-eagle, White-throated Needletail and Orange-bellied Parrot arising from the impacts of construction explosions, noise and dust, that will result in disturbance to birds, and potentially reducing their migratory capacity, and hence their survival.

22. The EPA failed to acknowledge the national and international significance of the Robbins Passage – Boullanger Bay wetlands.

22.1. The wetlands were recognised in 2008 for the internationally-significant shorebird values present. The installation of turbines on Robbins Island, which supports multiple roosting and feeding locations for those shorebirds, poses immediate risks to the shorebird values.

22.2. The wetlands were recognised in 2009 for the internationally-significant populations of migratory shorebirds as an Important Bird Area (IBA) in 2009.

22.3. The wetlands are listed in the Directory of Important Wetlands in Australia and in the Australian National Directory of Important Migratory Shorebird Habitat.

22.4. The Robbins Passage – Boullanger Bay wetlands currently meets 7 of the 9 criteria for listing as a Ramsar wetland of international significance. A wetland needs to meet just one criterion to be nominated and listed for international recognition. C. Failure to conduct required assessment.

23. The decision made by the EPA Board failed to further objective 1(a) of the EMPC Act under Schedule to promote the maintenance of ecological processes.

23.1. The predicted deaths of woodland birds and migratory and resident shorebirds will adversely affect the ecological processes of Robbins Island and of the adjoining and ecologically-linked Robbins Passage – Boullanger Bay wetlands.

24. The decision made by the EPA Board failed to apply the precautionary approach as specified in Part 2, 3(h) of the EMPC Act objectives.

24.1. The precautionary approach was not incorporated into the conditions for migratory shorebirds, which are known to fly over Robbins Island.

25. The decision to grant the permit should be set aside as:

- (a) condition 5 of the permit is uncertain or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734) in that it delegates to the proponent the power to determine which of two significantly different proposals is to be advanced;
- (b) the permit has not approved a particular development, but has purported to approve two significantly different alternative developments and will result in a permit that is not final (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734).
- (c) the permit is uncertain or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734) as condition 11 of the permit defers the decision to site the WTGs to the General Manager in circumstances where any such decision is fundamental to the permit itself and to the environmental impacts of the development;
- (d) the permit is uncertain or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734) as conditions 12 and 13 of the permit defers the decisions as to lighting to the General Manager in circumstances where any such decision is fundamental to the permit itself and the environmental impacts of the development.

26. That in the exercise of the discretion under clause 26.3.1 of the Circular Head Interim Planning Scheme 2013 ("CHIPS") the application should be refused for the proposed use in the Rural Resource Zone because:

- (a) there is no Acceptable Solution;
- (b) the use must be consistent with local area objectives;
- (c) the use must be consistent with any applicable desired future character statement;
- (d) The proposed use does not comply with the local area objectives (cl 26.1.2) as it: - Is not a primary industry and is not a priority purpose for the land; - Does not involve sustainable agricultural production; - The air, land and water will be permanently lost to a utility use that has no need or reason to locate on the land; - The use will unduly constrict, constrain and interfere with the practice of primary industry on the land;
- (e) The proposed use does not comply with the desired future character statement (cl 26.1.3) as it fails to minimise disturbance to: - Physical terrain - Natural biodiversity and ecological systems - Scenic attributes - Visitor amenity

27. Clause 26.4.1 of the CHIPS requires the site to be suitable. The proposal does not satisfy clause 26.4.1P4 because there is no system for disposal of sewerage or liquid trade waste.

28. Clause 26.4.1 of the CHIPS requires the site to be suitable. The proposal does not satisfy clause 26.4.1P4 because there is no system for disposal of sewerage or liquid trade waste.

29. Clause 26.4.2 of the CHIPS requires the development to comply with location and configuration criteria. The development does not comply with A2 and fails to comply with the performance criteria in clause 26.4.2 P2 because the development:
- is not consistent with the rural landscape; - does not attenuate visual impact.

30. Clause 26.4.2 of the CHIPS applies to buildings other than the wind turbines. The development does not comply with A3.1 and fails to comply with P3.1 because the location, height and visual appearance of the meteorological masts do not have regard to minimising visual impact on the skyline or minimising visual impact on the shoreline.

31. That in the exercise of the discretion under clause 29.2 of the CHIPS the application should be refused for the proposed use in the Environmental Management Zone because:

- (a) there is no Acceptable Solution;
- (b) the use must be consistent with local area objectives;
- (c) the use must be consistent with any applicable desired future character statement;
- (d) The proposed use does not comply with the local area objectives (cl 29.1.2) as the proposed use, including the wharf and bridge, will not advance any objectives in Clause 29.1.2 to protect, conserve and/or manage Environmental Management land;
- (e) the proposed use does not comply with and is not in harmony with the local area objectives (cl 29.1.2);
- (f) Clause 29.3.2 A1 does not apply;
- (g) Clause 29.3.2 P1 is not satisfied as the use:
 - is not required to be located in the environmental management zone;
 - does not provide utility infrastructure of critical importance to the municipal or regional community or for Tasmania;
 - does not provide significant social, economic or environmental benefit to the Region or Tasmania.

32. Clause 26.4.2 P3.2 of the CHIPS is not complied with because the proposed wind turbines have a maximum height of 270 metres. Acceptable solution A3.2 is not complied with. The development fails to comply with P3.2 as the proposal fails to minimise impact on the broader landscape, having regard to visual impact of the development, the characteristics of the vicinity of the site, topography and potential impacts on birds.

33. Clause 29.3.2 P2 of the CHIPS is not complied with as the intended use/development is exposed to bushfire, a natural hazard. The proposed use does not satisfy any of sub-clauses (a) - (b) inclusive and, in particular, the proposed use fails to provide any overriding social, economic or environmental benefit to the Region or to Tasmania.

34. Clause 29.4.3 P3 of the CHIPS is not complied with as the use/development will be visually apparent and dominant and intrusive and provides no overriding community benefit and there are no exceptional circumstances that are applicable to the use/development.

35. Pursuant to s. 25 Environmental Management and Pollution Control Act 1994 the EPA Board should have directed Circular Head Council to reject the project as:

- Robbins Island contains sites of great geoconservation significance;
- These areas are irreplaceable as the creative processes are no longer occurring;
- The project will cause significant disturbance to these sites;
- No adequate protection can be provided;
- The impact is unacceptable. Failure to conduct required assessment

36. Pursuant to s. 25 Environmental Management and Pollution Control Act 1994 the EPA Board should have directed Circular Head Council to reject the project as:

(a) Section 74(9) of the Environmental Management and Pollution Control Act 1994 required the EPA Board, in conducting an environmental impact assessment, to establish the information base for decision-making on: (i) the environmental impacts of the proposed development; (ii) whether the proposed activity should proceed; (iii) any restrictions or conditions under which the proposed activity should proceed; and (iv) the management regime under which the proposed activity should proceed.

(b) the EPA Board failed to establish the information base;

(c) The EPA Board has deferred the establishment of the information base to the proponent as identified in Clauses of the EPA Permit Conditions – Environmental No. 9786: CN1 – Design Report CN2 – Construction Environmental Management Plan FF2 - Eagle Monitoring and Management Plan FF4 – Automated Detection and WTG Curtailment System Plan FF5 – Orange-bellied parrot Monitoring and Management Plan FF7 – Shorebird Monitoring and Management Plan FF9 – Pre-Construction Survey – eastern hooded plover FF10 - Pre-Construction Survey – grey goshawk FF12 - Roadkill Monitoring and Adaptive Management Plan FF13 – Pre-construction survey and management of Tasmanian devil dens FF14 - Pre-Construction Survey – threatened flora species FF15 – Management of threatened flora and vegetation communities FF16 - Pre-construction survey and management – green and gold frog FF17 - Pre-Construction Survey – Marrawah skipper

37. The conditions required by the EPA Board and placed on the permit by Council (the conditions) will not adequately mitigate the impacts of the proposed project on Tasmanian Devils with respect to habitat loss and road kill; Clause 26.1.3

38. Clause 26.1.3 The proposed use and development (proposal):

1. Does not comply with PI(a) in that the proposal is not consistent with the following clause 26.1.2 “Local Area Objectives”: a. clause 26.1.2(a): the proposal (which is not a ‘primary industry’ on the proper interpretation of the Interim Planning Scheme) is not dependent on access to any naturally occurring resource (‘wind’ not being a ‘resource’ on the proper interpretation of the Interim Planning Scheme) b. clause 26.1.2(c)(i): the proposal has no need or reason to locate on land containing a land resource c. clause 26.1.2(c)(ii): the proposal, which will: i. result in the loss of at least 54ha of agricultural land, will exclude or unduly conflict, constrain, or interfere with the practice of primary industry ii. segregate one or more existing large parcels of agricultural land into smaller parcels of agricultural land, will exclude or unduly conflict, constrain, or interfere with the practice of primary industry d. clause 26.1.2(e): the proposal, which will result in the loss of at least 54ha of agricultural land, will result in the loss of agricultural land which is a valuable resource to be protected for sustainable agricultural production.

2. Does not comply with PI(b) in that the proposal is not consistent with the following clause 26.1.3 “Desired Future Character Statements”: a. Clause (d): the proposal involves sites of sizes which: i. are not in accordance with the type, scale and intensity of primary industry; and ii. do not reduce loss and constraint on use of land important for sustainable commercial production based on naturally occurring resources;

3. Does not comply with PI(c) in that the proposal is not required to be located on rural resource land for operational efficiency as listed in (c)(i)-(vii) or (viii).

4. Does not comply with PI(d) in that the proposal, which will result in the loss of at least 54ha of agricultural land, does not minimise likelihood for: a. permanent loss of land for existing and potential primary industry use; b. constraint or interference to existing and potential primary industry use on the site and on adjacent land

39. Clause 26.4.2 The proposal does not comply with P2 because the building height of the towers and the masts is not consistent with the rural landscape

40. Clause 29.3.2 The wharf and bridge and Quarry QZI components of the proposal (which are in the Environmental Management Zone) do not comply with PI(a) in that neither the wharf or bridge or quarry is required to be located in this area of significant ecological, scientific, cultural or aesthetic value (which is significant because it provides habitat for threatened and endangered species) for any of the reasons listed in PI(a)(i)-(v);

41. The wharf and bridge components of the proposal (which are in the Environmental Management Zone):

1. do not comply with P3(a) because they will be visually apparent: a. on and from the shoreline and b. on and from a marine or aquatic water body;

2. do not comply with P3(b) because they are: a. not essential and unavoidable in order to provide an overriding community benefit; b. capable of change.

42. Condition CN1 is, and if affirmed by the Tribunal will be, invalid or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council (1991) 23 NSWLR 734*) insofar as it:

1. defers the proposal for further consideration or determination by the Director, including by reference to “guidelines provided by the Director” (which have not yet been provided by the Director);
2. alternatively, allows the Director to approve use and/or development which is different to the use or development: a. assessed by the Tribunal in these proceedings; b. further or in the alternative, approved by any planning permit which the Tribunal directs or orders must be issued.

43. Condition FF2 is, and if affirmed by the Tribunal will be, invalid or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council (1991) 23 NSWLR 734*) insofar as it:

1. defers the proposal for further consideration or determination by the Director, including by reference to “guidelines provided by the Director” (which have not yet been provided by the Director);
2. alternatively, allows the Director to approve use and/or development which is different to the use or development: a. assessed by the Tribunal in these proceedings; b. further or in the alternative, approved by any planning permit which the Tribunal directs or orders must be issued.

44. Condition FF5 is, and if affirmed by the Tribunal will be, invalid or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council (1991) 23 NSWLR 734*) insofar as it:

1. defers the proposal for further consideration or determination by the Director, including by reference to “guidelines provided by the Director” (which have not yet been provided by the Director);
2. alternatively, allows the Director to approve use and/or development which is different to the use or development: a. assessed by the Tribunal in these proceedings; b. further or in the alternative, approved by any planning permit which the Tribunal directs or orders must be issued.

45. Condition FF6 is, and if affirmed by the Tribunal will be invalid or alternatively will result in a permit that is not final (*Mison v Randwick Municipal Council (1991) 23 NSWLR 734*) insofar as it reserves an unfettered discretion to the EPA Board to “otherwise [approve] in writing” a use which is different to the use:

1. assessed by the Tribunal in these proceedings;
2. further or in the alternative, approved by any planning permit which the Tribunal directs or orders must be issued.

46. Clause 26.4.1 of the CHIPS requires the site to be suitable. The proposal does not satisfy clause 26.4.1 P4 because there is no system for disposal of sewerage or liquid trade waste. CHCAN INC GROUNDS

47. (Paragraph 3) The proposed use and development fails to demonstrate that the use is required to be located on rural resource land for operational efficiency.

Again, the proposed use is a discretionary use for the purposes of the RRZ, and is not an agricultural use, and it will permanently remove 54 hectares of land from use for primary agricultural production. The proponent has not demonstrated that the proposed use and development is required to locate on RRZ land for operational efficiency to:

- (a) Access a specific naturally occurring resource on the site or on adjacent land in the zone;
- (b) Access infrastructure only available on the site or on adjacent land in the zone;
- (c) Provide an essential utility or community service infrastructure for the municipal or regional community that is of significance to Tasmania; and/or
- (d) Provide a significant benefit to the region, pursuant to a cost benefit analysis in economic, environmental and social terms.

This is contrary to the performance criteria PI (c)(i), (ii), (vii) and/or (viii) in the table to clause 26.3.1 of the PS (the performance criteria set out in PI (c)(iii) - (vi) not being relevant for the purposes of the proposed use and development).

48. (Paragraph 8) The application is a piecemeal application, and/or inadequate information has been provided in support of the application:

- (a) The proposed wind farm will require electricity transmission infrastructure to connect to the Tasmanian transmission network. The proponent has not sought planning approval for the electricity transmission infrastructure that is required. The details of the electricity transmission infrastructure that is required have not been provided, and the impacts of all of the electricity transmission infrastructure that is required have not been assessed. Hence the application is piecemeal and should not be approved.
- (b) The application is incomplete and/or not sufficiently precise: i. Condition 5 of the permit abrogates to the proponent the power to determine: A. The final number of wind turbines (74 or 122). B. The height of the wind turbines (180 metres in height or 270 metres in height). ii. The length of the proposed wharf is not known. iii. The foundation design of each Wind Turbine Generator and depth of excavation for each Wind Turbine Generator is not known. iv. The location of the Wind Turbine Generators is not known, and condition 11 of the permit abrogates the decision to approve the final location of all wind turbine generators to the Council's general manager. v. The location of the internal access roads is not known. vi. Flora and fauna studies relied upon by the proponent are outdated and should not be relied upon. vii. The appearance of the proposed bridge is not known.

49. (Paragraph 9) In the circumstances set out at [8(a)] – [8(b)(i) – (vii)], or any one of them, a permit should not issue, because:

- (a) The impacts of the proposed use and development cannot be properly assessed and the approval of the proposed use and development in these circumstances would be contrary to the requirements of the precautionary principle;

(b) The permit conditions 5 and 11 improperly abrogate decisions to the proponent and Council's general manager respectively where such decisions are fundamental to the permit itself and the environmental impacts of the project;

(c) The permit in combination with the permit conditions lack finality and/or certainty; and/or

50. The Environment Protection Authority in imposing the Environment Protection Authority conditions, and the Circular Head Council, in accepting without reviewing the Environment Protection Authority conditions, failed to exercise jurisdiction under the Environmental Management and Pollution Control Act 1994 (Tas) and the Land Use Planning and Approvals Act 1993 (Tas) by deferring significant further issues for further determination, including in relation to the impact of the proposed use and development on the Tasmanian Devil population free of the Devil Facial Tumour Disease, the Orange Bellied Parrot, the Spotted-tailed Quoll, the Green and Gold Frog, the Tasmanian Masked Owl, the Tasmanian Wedge-tailed eagle and the White-bellied Sea Eagle.

51. The development is inconsistent with protecting places of special cultural value or heritage importance in respect to Indigenous and VDL cultural values on Robbins Island as required in clause 29.1.2 (d)

- Thousands of years of Indigenous culture has occurred on Robbins Island with the Parperloihener people traditionally living there.
- Aborigine tribes from along the North West Coast and West Coast would head to Robbins Island in spring when the Blackwoods were flowering, which also signalled the return of the Yula, now named mutton birds. Yula/Mutton bird eggs along with the juvenile birds were important food sources for the Aborigines.
- Robbins Island and Robbins Passage has aboriginal history occupation for over 1000 generations.
- The indigenous values of Robbins Island and the surrounding Islands, channels, wetlands and coastal areas have intangible values. These together with the environmental values, migratory and local species of bird life, wildlife and waters need to be managed as an integrated system rather than a series of sites as this has been the way by aboriginals for thousands of years.
- Robbins Island contains numerous traditional village sites and burial grounds among the dunes away from the villages.
- In 1832, 4 sealers ambushed a village on Robbins Island attempting to kidnap pre-adolescent girls but were overcome and killed by the aborigines.
- Intrinsic values of indigenous culture on Robbins Island will be desecrated by the proposed windfarm development. • VDL acquired rights over Robbins Island shortly after their arrival in 1826.
- VDL established holdings on Robbins Island.

- VDL management had interactions with aborigines on Robbins Island as well they were responsible for incarceration and atrocities depending on which VDL personnel were involved.

52. Pursuant to s.25 Environmental Management and Pollution Control Act 1994, the EPA Board should have directed the Circular Head Council to refuse to grant the permit. Particulars

a. s.74 of EMPCA requires the EPA Board, as the authority responsible for assessing the project, to provide guidance to the proponent about what should be included in the case for assessment.

b. The EPA Board published Project Specific Development Proposal and Environmental Management Plan Guidelines for Robbins Island Renewable Energy Park, Robbins Island, North West Tasmania, on January 2018 (“Guidelines”).

c. Objectives identified within the Guidelines for the DPMP required the proponent to include a demonstration that the proposal is consistent with objectives as required by the relevant statutes and policies including the Tasmanian Resource Management and Planning System (“RMPS”) and the Environmental Management and Pollution Control System (“EMPCS”).

d. The Guidelines further required the proponent to detail and substantiate both positive and negative impacts and to address each of the RMPS and EMPCS objectives which were asserted to be very much centred around the concept of sustainable development which requires consideration of meeting the economic and social needs of people now and in the future while sustaining the environment and avoiding or mitigating adverse effects. The Guidelines asserted the EPA Board will consider each objective and then endeavour to make the decision which best furthers the objectives considered together.

e. The DPMP fails to adequately address the Schedule 1 objectives in so far as they relate to the sustainable development of air, land and water and the sustainable development of natural resources in respect to the project for the following reasons.

- Schedule 1 is concerned with sustainable development;
- ‘sustainable development’ is defined in clause 2 of Part 1 of Schedule 1 as
 - o 2... managing the use, development and protection of natural and physical resources in a way or at a rate, which enables people and communities to provide for their social, economic and cultural well-being...
 - o 2(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.
 - o 2(c) avoiding, remedying or mitigating any adverse effects on the environment.
- This development is not a sustainable development by that definition as:
 - o 2... it fails to enable people and communities to provide for their well-being in the long-term.

- o 2(a) it ignores the ‘reasonably foreseeable needs of future generations’.

- o 2(c) it fails to avoid, remedy or mitigate adverse effects of the proposed development on the environment as many of these will occur over the long-term.

f. The assessment by the EPA Board fails to further the Schedule 1 objectives in so far as they relate to the sustainable development of air, land and water and the sustainable development of natural resources in respect to the project for the following reasons.

- Schedule 1 is concerned with sustainable development;
- ‘sustainable development’ is defined in clause 2 of Part 1 of Schedule 1 as o 2... managing the use, development and protection of natural and physical resources in a way or at a rate, which enables people and communities to provide for their social, economic and cultural well-being...
 - o 2(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations.
 - o 2(c) avoiding, remedying or mitigating any adverse effects on the environment.
- This development is not a sustainable development by that definition as: o 2... it fails to enable people and communities to provide for their well-being in the long-term.
 - o 2(a) it ignores the ‘reasonably foreseeable needs of future generations’.
 - o 2(c) it fails to avoid, remedy or mitigate adverse effects of the proposed development on the environment as many of these will occur over the long-term.

25. The 52 grounds may be grouped into common issues:

- Grounds 1, 2, 3 and 4 assert that the proposed use and development is inconsistent with clauses 29.1.1, 29.1.2 and 29.1.3 of the Circular Head Interim Planning Scheme 2013.
- Grounds 2, 5, 31, 33 and 40 assert that the proposal will not comply with cl 29.3.2 of the planning scheme.
- Ground 6 contends that flora and fauna studies relied on by ACEN are outdated.
- Ground 7, 24 and 49 assert a failure to apply to the proposal, or a result contrary to, the precautionary principle.
- Grounds 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 assert that the EPA should have directed the Council to refuse a permit on the basis that the proposal will cause the deaths of Bar-tailed Godwits, Curlew Sandpipers, Far-eastern Curlews, Great Knots, Hooded Plovers, Red Knots, Grey Goshawks,

Tasmanian Masked Owls, Wedge-tailed Eagles, White-bellied Sea-eagles, White-throated Needletails and Orange-bellied Parrots.

- Ground 21 asserts that the conditions required by the EPA cannot mitigate the impacts of the proposal on the birds named in grounds 8 to 20.
- Ground 22 asserts that the EPA failed to acknowledge the national and international significance of the Robbins Passage – Boullanger Bay Wetlands.
- Ground 23 asserts that the EPA failed to further the objectives of EMPCA.
- Ground 25 asserts that the permit is uncertain or is not final contrary to *Mison v Randwick Municipal Council*.
- Grounds 26, 38 and 47 assert the proposal will not comply with cl 26.3.1 of the planning scheme.
- Grounds 27, 28 and 46 assert that the proposal will not comply with cl 26.4.1 of the planning scheme.
- Grounds 29, 30, 32 and 39 assert that the proposal will not comply with cl 26.4.2 P2 of the planning scheme.
- Grounds 34 and 41 assert that the proposal will not comply with cl 29.4.3 P3 of the planning scheme.
- Ground 35 asserts that the EPA should have directed the Council to reject a permit on the basis of geo-conservation significance.
- Ground 36 asserts that the EPA should have directed the Council to refuse a permit because the EPA failed to establish an information base for an environmental impact assessment pursuant to s 74(9) of the EMPCA.
- Ground 37 asserts that the conditions required by the EPA will not adequately mitigate impacts on Tasmanian Devils.
- Ground 42, 43, 44, 45 and 49 assert that conditions of the permit are invalid or lack finality.
- Grounds 48 asserts that the proposal is a piecemeal development.
- Grounds 48 and 49 assert that inadequate information has been provided in support of the application.
- Ground 50 asserts that the EPA failed to exercise its jurisdiction under the EMPCA and LUPAA by deferring issues for further determination in respect to the impact of the proposed use and development on certain species.
- Ground 51 asserts that the proposal fails to comply with cl 29.1.2(d) of the Scheme in respect to Indigenous and Van Diemen's Land Company Cultural value.
- Ground 52 asserts that the EPA failed to further the economic objectives in Sch I of the EMPCA.

Appeal by ACEN

26. ACEN has appealed conditions 5 and FF6 of the permit.

27. Condition 5 was imposed by the Council and provides:

Wind Turbine Generators

This permit allows for:

- (a) 74 wind turbine generators that have a maximum height of 270 m; or
- (b) 122 wind turbine generators that have a maximum height of 180 m.

The height of a wind turbine generator is measured from natural ground level at the base of each tower of the wind turbine generator to the blade tip at its highest point.

28. Condition FF6 was required to be included in the permit by the EPA in the following terms:

FF6 Orange-bellied Parrot turbine shutdown

Unless otherwise approved in writing by the EPA Board, all WTG must be shut down during the northern OBP migration period (1 March to 31 May inclusive) and the southern OBP migration period (15 September to 15 November inclusive).

The reference to 'WTG' in FF6 is to wind turbine generators.

29. In respect to condition 5, the issue between ACEN and the Council fell away with the amendment to the development application ordered in *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 2)*. Following that amendment the proposal was varied to be for up to 100 wind turbine generators with a maximum height of 212 m. A proposed new condition 5 advanced by the Council and agreed by ACEN addresses the concerns raised by ACEN's ground. Instead of a general range of maximum numbers of wind turbine generators determined by maximum height as provided in the permit, the new condition 5 would provide a ceiling of up to 100 WTGs and a maximum height of 212 m.

Approach to the grounds and powers on determination of the appeals

30. Reference in this decision to the grounds of appeal is to the appellants' grounds rather than ACEN's unless identified as such.
31. The grounds of appeal are extensive and complex. Some contain compounded issues and multiple contentions. As they have been consolidated in the sense of being incorporated in a single document, but maintain their form as filed, some contain common issues.
32. The grounds of a planning appeal do not have the limiting effect of pleadings in inter-partes adversarial proceedings, although they should be narrowed to the real issues in dispute: *Tricare (Bayview) Pty Ltd v Council of the City of Gold Coast* [2022] QPEC 31 [145]-[147]. In determining the correct or preferable decision we are not confined by the grounds, however for reasons of fairness an appellant may be limited to his or her grounds: *Sandy Bay Developments v Loring* [1991] TASSC 34 at [28], [37]-[39] and [86]-[87].
33. The appellants did not directly address all the grounds of appeal in either evidence or submissions, and largely took an approach of homogeneity to the 30 or so grounds which

do not directly raise standards in the planning scheme, which has not made it easy for the Tribunal to make determinations in respect to some grounds. With the exception of Mr Smith, none of the appellants directly referred to specific grounds in their written submissions. In applying the evidence and the submissions of the appellants to the grounds we are put in mind of the comment made by the United States Court of Appeals in *United States v C Dunkel* [1991] USCA7 185 that we should not be “like pigs, hunting for truffles buried in briefs”.

34. Notwithstanding that, we have dealt with the entirety of the grounds, but have focussed on the areas of active dispute. Rather than addressing the grounds in turn we have addressed multiple grounds that raise a particular standard or issue together. Broadly, we will deal with technical or legal issues, then environmental issues and then assessments against the standards in the planning scheme.

Powers on determination

35. The appeal arises under the review jurisdiction of the Tribunal in Div 3 of Pt 7 of the TASCAT Act. Section 78(1) of the TASCAT Act provides:

78. Decision on review

(1) Subject to the provisions of a relevant Act, the Tribunal, on a review by the Tribunal of a reviewable decision, may –

- (a) affirm the decision that is being reviewed; or
- (b) vary the decision that is being reviewed; or
- (c) set aside the decision being reviewed and –

- (i) substitute its own decision; or

- (ii) send the matter back to the decision-maker for reconsideration in accordance with any directions or recommendations that the Tribunal considers appropriate –

and, in any case, may make any order that the Tribunal considers appropriate.

36. Pursuant to s 3 and Sch 1 of the TASCAT Act, LUPAA is a relevant Act for the purposes of s 78(1). Section 62(1)(c) of LUPAA provides:

62. Determination of appeals

(1) After hearing an appeal, the Appeal Tribunal may, in addition to its powers under the Tasmanian Civil and Administrative Tribunal Act 2020 –

- (c) in the case of an appeal against a grant of a permit, a refusal to grant a permit or a grant of a permit subject to conditions or restrictions–

- (i) direct the planning authority to grant the permit; or

- (ii) direct the planning authority to grant the permit and direct the planning authority that the permit must or must not contain any specified conditions; or

- (iii) direct the planning authority not to grant a permit;

37. ACEN and the Council contend that the decision to grant a permit should be affirmed with varied conditions. The EPA’s position is that any permit should include the conditions it required in the permit as issued. The appellants, in substance, variously contend that the decision to grant a permit should be set aside and substituted with a decision to refuse

a permit, or in the alternative that the conditions relating to environmental protection matters should be strengthened.

Planning and other controls

The Circular Head Interim Planning Scheme 2013

38. The site of the proposal falls within the area of the Circular Head Interim Planning Scheme 2013 version 20 (**the Scheme**). The Scheme was superseded by the Tasmanian Planning Scheme – Circular Head on 26 May 2021. However, pursuant to s 51(3) and s 62(3) of LUPAA the appeal is to be determined in accordance with the Scheme.
39. Robbins Island is subject to two zones under the Scheme:
- (a) The Rural Resource Zone applies above the high watermark;
 - (b) The Environmental Management Zone applies below the high watermark.
40. The proposed bridge and wharf will be located within the Environmental Management Zone. The remainder, and majority, of the proposal will be within the Rural Resource Zone.

The use class

41. Clause 8.2.1 of the Scheme requires that a proposed use or development must be categorised into one of the use classes set out in table 8.2 of the Scheme. A single proposal may include more than one use or development: *Gull Petroleum (WA) Pty Ltd v Nashville Investments Pty Ltd* [1999] WASCA 12 at [52]. However, cl 8.2.2 provides that:
- A use or development that is directly associated with and a subservient part of another use on the same site must be categorised into the same use class as that other use.
42. Two planning experts gave evidence at the hearing, Ms Emma Riley for the Council and Mr Neil Shephard for ACEN. Ms Riley and Mr Shephard both considered that the proposal falls within the definition of the utilities use class in table 8.2. The definition includes: “use of land for utilities and infrastructure including ... (b) electricity generation; (c) transmitting or distributing ... power”. We are satisfied that the utilities use class is the correct use class.
43. In *S Cai v Launceston City Council and TRC Multi-Property Pty Ltd* [2023] TASCAT 27 at [34] the Tribunal determined that ‘directly associated with and a subservient part of’ means an ancillary use which is connected with and serves, contributes to or promotes the primary use. The supporting elements of the proposal, including the proposed bridge, wharf, quarries, roads and supporting infrastructure will be directly associated with and subservient to the activity of electricity generation and transmission, and so must also be categorised into the utilities use class.

The State Coastal Policy 1996

44. The State Coastal Policy 1996 (**the coastal policy**) is not raised in any of the grounds of appeal, but its application to the proposal was raised during the hearing by the Tribunal.

45. The coastal policy was made under the *State Policies and Projects Act 1993*, and was validated by the *State Coastal Policy Validation Act 2003* after the decision in *Richard G Bejah Insurance & Financial Services Pty Ltd v Maning & Ors* [2002] TASSC 36 that the coastal policy was ultra vires.
46. The coastal policy sets out a number of outcomes. Outcome 1 is protection of natural and cultural values of the coastal zone. Section 5(1) of the *State Coastal Policy Validation Act* provides that:
- (1) A reference in the State Coastal Policy 1996 to the coastal zone is to be taken as a reference to State waters and to all land to a distance of one kilometre inland from the high-water mark.
47. Part of the site will fall within the coastal zone, including all development within the Environmental Management Zone.
48. Clause 1.4 of the coastal policy establishes outcomes in respect to coastal hazards. Clause 1.4.2 provides:
- Development on actively mobile landforms such as frontal dunes will not be permitted except for works consistent with Outcome 1.4.1.
- Outcome 1.4.1 provides:
- Areas subject to significant risk from natural coastal processes and hazards such as flooding, storms, erosion, landslip, littoral drift, dune mobility and sea-level rise will be identified and managed to minimise the need for engineering or remediation works to protect land, property and human life.
49. Section 13 of the *State Policies and Projects Act* sets out the effect of state policies. It clearly intends that the coastal policy is to inform planning schemes. Section 13(1) provides that a planning scheme which is in force at the time that a state policy comes into operation is void to the extent of any inconsistency with the state policy. Section 13 provides that the Tasmanian Planning Commission (**the Commission**) must amend planning schemes to incorporate relevant parts of a state policy. Section 13C provides that a state policy binds the Crown and councils.
50. The Scheme was established after the coastal policy was issued. Section 30K(3)(e) of LUPAA, which has been repealed but which was in force when the Scheme was established, required the Commission to consider applicable state policies in the process of approving interim planning schemes, such as the Scheme. At cl E10.3 the Scheme adopts the definition of coastal zone in the coastal policy. Clause E10 establishes a Water and Waterways Code that includes in cl E10.6.2 a standard in respect to development in a shoreline area. Clause E6 of the Scheme establishes a Hazard Management Code. Clause E6.6.2 provides a standard for development on land exposed to a natural hazard. These clauses address the matters arising in connection with outcome 1.4.
51. Interim Planning Directive Number 4 (**IPD 4**), which was issued by the Minister for Planning under LUPAA and came into effect on 22 February 2021, made amendments to the Scheme, including introducing a new cl 5.0 in respect to exemptions. Clause 5.0.3 provides:

Development must not be located on actively mobile landforms in the coastal zone, unless for engineering or remediation works to protect land, property and human life in accordance with clause 1.4.1 and 1.4.2 in the State Coastal Policy 1996.

52. That amendment was made after the development application was lodged and so will not apply to it. However, there is a noteworthy and nuanced difference between cl 5.0.3 of the IPD 4 and cl 1.4 of the coastal policy. Clause 5.0.3 prohibits work unless for engineering or remediation works to protect land, property and human life. Clause 1.4 provides that work will only be permitted if it is consistent with the identification of areas subject to risk and the management of those areas to minimise the need for engineering or remediation works to protect land, property and human life. Clause 1.4 apparently permits development which is consistent with management of frontal dunes with dune mobility to minimise the need for engineering or remediation works to protect land, rather than requiring that any development be for the purpose of protecting land, as is the apparent effect of cl 5.0.3.
53. In *St Helens Area Landcare & Coast Care Group Inc v Break O'Day Council* [2007] TASSC 15 the Full Court considered whether the Resource Management and Planning Appeal Tribunal (**RMPAT**) was required to consider the provisions of the coastal policy. At [22]-[38] Crawford J concluded that neither the council nor RMPAT were under any obligation to consider the provisions of the coastal policy in determining whether a permit should issue for a development application. Blow J, as he then was, considered the issue at [58]-[74]. His Honour observed at [70] that s 13C(b) of the *State Policies and Projects Act*, which provides that a state policy binds a Council, thereby imposes an obligation on a council considering a development application to seek to achieve the outcomes set out in the policy. At [71] His Honour observed that s 13C does not mention statutory Tribunals that are independent of the Crown and thus it does not follow that the coastal policy was binding on RMPAT. His Honour observed that *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 590 is authority for the proposition that if an original decision maker has properly paid regard to a government policy in reaching a decision then the existence of that policy will be a relevant factor for a tribunal reviewing that decision to take into account. His Honour concluded that because a council must pay regard to the coastal policy in reaching a decision on a planning application in respect of land in the coastal zone it follows that the coastal policy must be a relevant consideration for RMPAT to take into account on an appeal, but that because the *State Policies and Projects Act* does not expressly make state policies binding on the Tribunal it may make decisions that are inconsistent with the coastal policy, drawing an analogy with the Administrative Appeal Tribunal, which has the duty to determine appeals independently of any instruction, advice or wish of the executive government: [73]. Evans J essentially agreed with the approach of Blow J, expressing a view at [42] that it is axiomatic that if a council is obliged to apply the coastal policy then a tribunal considering an appeal must take the coastal policy into account.
54. The planning scheme considered in *St Helens Area Landcare and Coast Care Group Inc v Break O'Day Council* was apparently made prior to the establishment of the coastal policy, unlike the Scheme, which has clearly been made in cognizance of the coastal policy. The Council contends that we may take the coastal policy into account simply by being satisfied of compliance with the standards in the scheme. That the approach of Ms Riley. She said that she would not normally assess a specific proposal for a specific planning permit application against the coastal policy, that it is not enlivened for the purposes of

assessment of the proposal and that the relevant provisions are the ones in the Scheme. Given the statements in *St Helens Area Landcare & Coast Care Group Inc v Break O’Day Council* we will have regard to the coastal policy, but we are not bound to apply it.

The objectives in EMPCA and LUPAA

55. The EPA’s assessment of the proposal and the resultant imposition of conditions were undertaken pursuant to EMPCA.
56. Part 1 of Sch 1 of EMPCA sets out the objectives of the resource management and planning system of Tasmania. They mirror the objectives set out in Part 1 of Sch 1 of LUPAA:
1. The objectives of the resource management and planning system of Tasmania are –
 - (a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and
 - (b) to provide for the fair, orderly and sustainable use and development of air, land and water; and
 - (c) to encourage public involvement in resource management and planning; and
 - (d) to facilitate economic development in accordance with the objectives set out in paragraphs (a) , (b) and (c) ; and
 - (e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.
 2. In clause 1 (a) , *sustainable development* means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –
 - (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
 - (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
 - (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.
57. Part 2 of Sch 1 of EMPCA sets out the objectives of the Environmental Management and Pollution Control System established by that Act. Clause 3 lists the objectives of that system, expressing that they support the objectives set out in Pt 1 of Sch 1:
3. The objectives of the environmental management and pollution control system established by this Act are, in support of the objectives set out in Part 1 of this Schedule –
 - (a) to protect and enhance the quality of the Tasmanian environment; and
 - (b) to prevent environmental degradation and adverse risks to human and ecosystem health by promoting pollution prevention, clean production technology, reuse and recycling of materials and waste minimization programmes; and
 - (c) to regulate, reduce or eliminate the discharge of pollutants and hazardous substances to air, land or water consistent with maintaining environmental quality; and

(d) to allocate the costs of environmental protection and restoration equitably and in a manner that encourages responsible use of, and reduces harm to, the environment, with polluters bearing the appropriate share of the costs that arise from their activities; and

(e) to require persons engaging in polluting activities to make progressive environmental improvements, including reductions of pollution at source, as such improvements become practicable through technological and economic development; and

(f) to provide for the monitoring and reporting of environmental quality on a regular basis; and

(g) to control the generation, storage, collection, transportation, treatment and disposal of waste with a view to reducing, minimizing and, where practicable, eliminating harm to the environment; and

(h) to adopt a precautionary approach when assessing environmental risk to ensure that all aspects of environmental quality, including ecosystem sustainability and integrity and beneficial uses of the environment, are considered in assessing, and making decisions in relation to, the environment; and

(i) to facilitate the adoption and implementation of standards agreed upon by the State under inter-governmental arrangements for greater uniformity in environmental regulation; and

(j) to promote public education about the protection, restoration and enhancement of the environment; and

(k) to co-ordinate all activities as are necessary to protect, restore or improve the Tasmanian environment.

58. The objectives in Sch I of LUPAA and Sch I of EMPCA may be relevant to the application of standards or the exercise of discretion. For example, the objective of fair development of land was a matter taken into account in respect to the exercise of a discretion in *Smith v Hobart City Council* [2010] TASFC 9 at [13]-[16].
59. However, the objectives are not themselves tests for a development to be assessed against: *Clarence City Council v Resource Management and Planning Appeal Tribunal* [2018] TASSC 41 at [56] and *Attorney-General v University of Tasmania* [2020] TASFC 12 at [117]-[120].
60. In *Clarence City Council v Resource Management and Planning Appeal Tribunal* at [56] Brett J said:

56. I do not agree that a performance-based approach is inconsistent with the statutory requirement in s 51(2) to take into account the objectives in Sch I of LUPA. The objectives are stated in general terms. Their formulation makes it clear that they are intended to operate by providing context and guidance in respect of the evaluative assessment engaged in in respect of various decisions required within the planning system generally, including in respect of the exercise of a specific discretion. Hence, the objectives are relevant to the exercise of discretion, as part of an integrated process of synthesis: *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASFC 14. However, they cannot supplant the specific criteria against which the development is to be tested, nor in themselves constitute a test of a proposed development: *Von Witt v Hobart City Council* (1995) 86 LGERA 134.

61. In *Attorney-General v University of Tasmania* at [117] Geason J said:

The objectives in the LUPA Act are qualitative in nature; they do not give of a right or wrong answer. Their objectives operate at an abstract level. Their character and function becomes obvious when it is recognised that they do not identify any matter upon which an application for an approval or an amendment could be made. Applications proceed by reference to specific standards, regulations and obligations. Applications are granted or refused or amended, by reference to specific standards, regulations and obligations. An application for an amendment will fail for specific reasons, the engagement of which will have the effect, inter alia, of placing the application in conflict with objectives.

62. The statutory objectives in EMPCA are not binding rules that the EPA is obliged to obey and a failure to further any objective will not invalidate an exercise of power by the EPA: *Tarkine National Coalition Inc v Director, Environment Protection Authority* [2023] TASSC 3 at [50].

63. For these reasons the objectives in Sch 1 of EMPCA are not standards against which the proposal is to be assessed, but they inform our assessment, particularly of the conditions required by the EPA. Section 8 of EMPCA expressly provides:

8. Objectives to be furthered

It is the obligation of any person on whom a function is imposed or a power is conferred under this Act to perform the function or to exercise the power in such a manner as to further the objectives set out in Schedule 1

Jurisdiction in respect to conditions required by the EPA

64. Both the appellants and ACEN challenge conditions of the permit imposed by the Council at the direction of the EPA.

65. Section 25 of EMPCA provides that the EPA may undertake an assessment of a level 2 activity. A wind energy facility is a level 2 activity pursuant to cl 7(f) of Sch 2 of EMPCA.

66. Section 25(5)(a) provides that the EPA must notify a council of any condition that the EPA requires to be contained in a permit.

67. Section 25(8)(a) and (b) provide that a council must impose conditions required by the EPA, and cannot impose conditions inconsistent with EPA conditions. A council may only enforce EPA conditions with the agreement of the EPA, pursuant to s 25(8A).

68. EMPCA does not provide a right of appeal in respect to conditions imposed by the EPA under s 25.

69. The question arises as to whether we are required to impose the EPA conditions or whether, unlike the Council, we can vary or remove EPA conditions from the permit.

70. On a planning appeal the Tribunal “stands in the shoes of the original decision-maker”: *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASFC 14 at [140]. Notwithstanding this, RMPAT, the Tribunal’s predecessor as the relevant planning appeal tribunal, determined that its jurisdiction on an appeal extended to conditions imposed on a permit by the EPA under s 25: *Auspine Limited v George Town Council and Forest Enterprises*

Australia Limited [2008] TASRMPAT 28 and *NP Power Pty Ltd v Central Highlands Council* [2012] TASRMPAT 56, which reached the same conclusion as *Auspine Limited v George Town Council and Forest Enterprises Australia Limited* without reference to that decision. We adopt the reasonings in those decisions. The jurisdiction is now expressly contemplated by cl 7(2) of Pt 8 of Sch 2 of the TASCAT Act, which in concert with cl 7(1)(b) provides that the EPA is a party to an appeal against a condition required by the EPA under s 25 of the EMPCA.

71. We are satisfied that we have the power to vary or exclude the conditions required by the EPA to be included in the permit. The EPA did not contend otherwise.

Some comments on the nature of the hearing, evidence and certain witnesses

72. The Tribunal not have an inherent jurisdiction. Our jurisdiction is determined by legislation. Any discretion that we are invested with is to be determined in accordance with the ordinary rules of statutory interpretation: *Public Guardian v Guardianship and Administration Board* [2011] TASSC 31 at [41]-[42], having regard to the relevant matters expressed in the legislation or implied from its subject matter, scope and purpose: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40 at [40].
73. The appeal is by way of a hearing de novo and our obligation is to make the correct or preferable decision on the material before us: *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [140] and *Tomaszewski v Hobart City Council (No.2)* [2021] TASSC 15 at [17]. We are not bound by the rules of evidence. Although the hearing of a planning appeal has many of the familiar characteristics of a court hearing, the Tribunal acts in an administrative capacity: *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASFC 14 at [140]. As such, we are to determine matters by reference to the relevant legislation and considerations of natural justice rather than technical rules of evidence and onus of proof: *Re Carmel Elizabeth McDonald v Director-General of Social Security* [1984] FCA 57.
74. The evidence heard over the course of the three weeks of hearing was extensive. We have considered all of the material relevant to assessment of the grounds, but for reasons of space have not recited or summarised the evidence in its entirety. Key factual matters that either were agreed or were in dispute and have been determined have been referred to in these reasons.
75. Several witnesses were the subject of criticism on the basis that they were biased, either by personal or commercial interest. Correctly, ultimately no party objected to the admissibility of the evidence, but contended that the asserted lack of independence affected the weight of the evidence: *FGT Custodians Pty Ltd (formerly Feingold Partners Pty Ltd) v Fagenblat* [2003] VSCA 33 at [3]-[30].
76. Mr Mark Holdsworth, who was called by the Bob Brown Foundation, and Dr Eric Woehler for Bird Life Tasmania, were cross-examined about financial contributions that they had made to an opponent of the proposal who is associated with the Circular Head Coastal Awareness Network. Dr Barry Baker, who was called by the Bob Brown Foundation, was cross-examined about a representation he had made to the Council opposing the proposal.

77. Mr Holdsworth has dedicated much of his career to the study and preservation of the Orange-bellied Parrot. Dr Woehler and Dr Baker likewise in respect to birds more generally. They were open about their opposition to the proposal, because of their concern about the effect on birds. It is not surprising that experts deeply engaged in the study and preservation of endangered species might value those species highly against competing interests or perceived threats to the species. Passion for a subject does not necessarily undermine the factual evidence given by those experts or the expert scientific opinions expressed by them based on the facts.
78. Mr Holdsworth, Dr Woehler and Dr Baker reached different conclusions to experts called by ACEN, but their expertise was not challenged, and the factual matters underpinning their opinions were largely uncontroversial, with differences arising from uncertain or incomplete data. Their evidence was not tainted by inconsistencies or exaggerations or evasions that would bear on the weight of the evidence. Mr Holdsworth was somewhat vague about his financial donations, but not to an extent that causes us to doubt the credibility of his evidence in respect to the parrots. Our impression is that the differences between the experts reflected their genuinely held expert opinions rather than any prejudice which influenced their evidence. As another expert witness, Mr Nick Mooney, put it he is an advocate for the Wedge-tailed Eagle, not for any party. That sentiment would equally apply to Mr Holdsworth, Dr Woehler and Dr Baker, observing of course that Dr Woehler did in fact represent a party whose interest is expressly the study and conservation of birds.
79. Mr Grant Draper, who gave evidence for ACEN in respect to the energy market and the anticipated economic and commercial consequences of the proposal, was cross-examined at length concerning his engagement in the production of his evidence, as the leader of a team, and whether the development of his evidence was influenced by the outcomes sought by ACEN. Mr Draper was responsive to questions and requests to produce documents. His evidence did not include any apparent inconsistencies or omissions. He was cross-examined at length about his methodology and made reasonable concessions. Clearly Mr Draper relied on input from members of his team in the formulation his extensive report, which included modelling and which exposed its methodology and underlying assumptions and research. Despite the weight of his evidence being criticised on the basis that he had not authored the entirety of the material in the report he was not cross-examined as to what his direct contributions were or whether any of the conclusions reached were not his. He was criticised for the involvement of ACEN's solicitors and ACEN in the iterative development of his evidence. However, he required factual input from ACEN to develop his evidence, and it is not inappropriate for lawyers to be involved in preparation of expert reports: *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 7)* [2003] FCA 983 at [19].

Is the proposal a piecemeal development?

80. Grounds 48 challenges the permit on the basis that the proposal is a piecemeal development.
81. The Circular Head Coastal Awareness Network contends that the proposal should be refused as a piecemeal application because it does not include the transmission line that will be required to connect the proposal to the electricity grid. The Network says that operation of the wind farm will be dependent on the transmission line.

82. The concept of a prohibition on piecemeal applications arises from the decision of Stephen J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* [1980] HCA 1; (1980) 145 CLR 485. The *Pioneer* principle was summarised by Thomas JA, with whom McMurdo P and Helman J agreed, in *Brisbane City Council v Cunningham & Anor* [2001] QCA 294 at [11]:

11. The essential requirement of the decision in *Pioneer Concrete* is that the proposed use “must be stated in appropriate detail in one application and all the land involved in the use must be subject of the application”. There is no rule prohibiting the making of more than 1 application in respect of the one piece of land or part of a parcel of land. The *Pioneer* principle required that each application for a use for a particular purpose be for the whole of the use (including incidental and necessarily associated uses) and for the whole of the land devoted to that use. It did not require that two separate and distinct uses be combined in one application.

83. In *Lewiac Pty Ltd v Gold Coast City Council & Ors; Tanswell v Gold Coast City Council & Anor* [2006] QPEC 112 at [13] Rackemann DC observed that:

13. The “Pioneer principle”...is not a principle of the common law, but an interpretation of a statutory requirement. It relates to that which was required to be included in an application, having regard to the statutory regime which then applied.

84. This was expressly observed by Stephen J in *Pioneer Concrete* at p 500 where he concluded that “no piecemeal series of applications is permissible, at least under the City of Brisbane’s town planning measures”. His Honour was applying the definition of ‘use’ in s 3 of the *City of Brisbane Town Planning Act 1964 – 1975 (Qld)*, which provided:

“Use” – in relation to land, includes the carrying out of excavation work in or under land and the placing on land of any material or thing which is not a building or other structure.

The term includes any use which is incidental to and it necessarily associated with the lawful use of the land in question.

85. That definition of use clearly includes development. The definition of use in s 34 of LUPAA does not include development. Under LUPAA use and development are mutually exclusive: *Gamble v Kingborough Council* [2020] TASFC 7 at [18] and [26].
86. ACEN contends that, on a textual basis, the *Pioneer* principle should be confined to its statutory context, noting that the definition of use in the *City of Brisbane Town Planning Act* expressly includes all incidental uses, while that expression is not included in the definition of use in LUPAA. In *Pioneer* Stephens J treated the development of a quarry and an access road as a single use based on the definition in the *City of Brisbane Town Planning Act*. In a joint decision in *North Sydney Council v Ligon 302 Pty Ltd* [1996] HCA 20 at [15], where use was contained in the definition of development in s 4(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* and did not include incidental and necessarily associated uses, the High Court distinguished *Pioneer* on the basis that a club and the carriageway to access the club were distinct uses.
87. The power of ACEN’s submission is reduced, however, by the requirement in cl 8.2.2 of the Scheme that a use or development that is directly associated with and a subservient part of another use on the same site must be categorised into the same use class.

88. The *Pioneer* principle does not “place an embargo upon staged development”: *Brisbane City Council v Cunningham & Anor* [2001] QCA 294 at [12]. In *Fox & Anor v Brisbane CC & Ors*; *Fox & Anor v Brisbane CC & Anor*; *Stop Master Butchers Industrial Estate in Hemmant & Tingalpa Action Group & Ors v Brisbane CC & Anor* [2003] QCA 330 at [12] de Jersey CJ, who with White J formed the majority on this point, said:

[12] The so-called *Pioneer* principle was development in relation to proposed use of particular land for a single purpose. The goal is that the local authority should be made aware of all that is proposed, prior to its embarking upon a consideration and determination of the application. But where considerations of convenience otherwise warrant separate applications, there is no legislative prohibition, and the *Pioneer* principle should not be erected into an equivalent, where, as here, each application makes the overall scope of the project abundantly clear: No relevant intention was “held back”.

89. This addresses the mischief identified by Stephen J in *Pioneer Concrete* at page 504:

16. Such piecemeal applications are likely to place planning authorities or review tribunals in somewhat of a dilemma. The first application may well require assessment of the entire proposal if it is properly to be disposed of; yet the second application will still remain to be dealt with on its merits as an independent matter. When it comes to be heard there will be strongly felt pressures to avoid what might seem to be conflicting outcomes if, the first application having been granted, the second were to be refused. Any detailed examination in the first application, whether by the tribunal or by objectors, of matters which will have to be dealt with in the second is likely to be met with the objection that they are more proper for consideration when the second application is heard; but when that second application is heard it is likely to be much dominated by the outcome of the first.

90. Stephen J made that comment in the context of the judge at first instance in that case having to consider all aspects of the proposed quarry operation and imposing strict conditions in respect to the transport of quarried materials from the site. His Honour observed that this would make it difficult for the council or a reviewing court to treat any subsequent application for consent for the proposed access route in a different way, such that the outcome of that subsequent application would effectively be pre-judged.
91. The development application identifies the proposed wind farm use in sufficient detail. The transmission line will be geographically discrete from the wind farm. It would likely pass through land in three separate municipalities with three separate planning schemes to join a link with Victoria. Development approval may be sought by ACEN for the transmission line, but it will be operated by TasNetworks, a state owned corporation that owns and operates the Tasmanian electricity transmission and distribution network. It will be a utility and will fall into the same use class as the wind farm but it will be a distinct and separate use of land. Determination of the application for the wind farm use does not require consideration of the transmission line, nor has, or will, it involve conditions that might bear on or influence the assessment by the relevant councils or the Tribunal of a development application for the transmission line. The proposal, and the permit, do not create the mischief identified by Stephen J. Further, as ACEN points out, there are varied routes and forms that the transmission line may take. We do not consider that the proposal is a piecemeal development by reason of it not including the transmission line.

92. Ground 48 is not made out insofar as it contends that the development is a piecemeal development.

Alleged inadequate and incomplete information

93. Ground 48 also contends that the development application is incomplete.
94. Following on from its contentions in respect to piecemeal application, the Circular Head Coastal Awareness Network asserted that other key elements are missing from the proposal that make it incomplete and imprecise. The Network points to an absence of detail of the bridge, the wharf and the construction and emplacement of wind turbine infrastructure.
95. The Network also contended that flora and fauna surveys were inadequate and that there were other omissions, without identifying them. Those submissions were not developed.

The bridge, the wharf, roads and wind turbines

96. The design of the bridge is described in the project components section in part 2.6 of the DEPMP. That part includes a description of the design of the bridge, a schematic diagram, a section diagram, the proposed location of the bridge and a 3D depiction of the bridge.
97. It also contains a description of the design of the wharf with schematic diagrams, detail of the proposed location of the wharf and a 3D depiction.
98. That part also includes details of the design of the wind turbine generators, including the rotors, the towers, the nacelle sitting on top of the towers, the foundations and schematics for the hardstands.
99. The proposal as amended by order of the Tribunal identifies by a plan the approximate sites for each of the wind turbines, and the roads to be developed on the site. Although not identified precisely, there is sufficient information to enable assessment of the proposal.
100. The application is for planning approval, not for building approval. It is not uncommon for the engineering component of a development application to be at a relatively higher level, with detailed engineering drawings to be developed for the purposes of building approval. Indeed, LUPAA does not expressly require plans to be submitted with a development application, although in practice it is almost invariably the manner of describing a proposed development: *Tomaszewski v Hobart City Council* [2020] TASSC 48 at [8]. It is also not uncommon for detailed consideration of aspects of a large project to be undertaken in stages subject to planning approval, to enable appropriate responses to permit conditions and other statutory requirements.
101. The proposal was sufficiently detailed to enable assessment by the Council and the EPA. As will be apparent from the considerations below, the level of detail provided for the development is sufficient to enable consideration of the planning and environmental issues by us.
102. Ground 48 is not made out insofar as it contends that the proposal is incomplete.

Flora and fauna surveys

103. Ground 6 raises the adequacy of flora and fauna studies relied on by ACEN.
104. The DPEMP incorporates a natural values assessment that includes a botanical survey, a Tasmanian Devil survey, a bat utilisation survey, a roadkill survey, a bird impact assessment, an eagle nest survey, an aquatic fauna survey, a marine environment survey, and resident shorebird and migratory shorebird surveys.
105. The Circular Head Coastal Awareness Network submitted that the flora and fauna surveys were inadequate. It did not develop that submission or provide evidence in respect to flora. The ground raises data in respect to Wedge-tailed eagles, but the Foundation did not advance submissions or evidence in respect to the adequacy of surveys of eagles. Its evidence, by Dr Charles Meredith, an expert in ecology, was that sufficient utilisation data on the eagle had been collected from Robbins Island to enable a numerical analysis of the collision risk. The Network did provide evidence to identify the surveys that it contended were inadequate in respect to surveys of Orange-bellied Parrots and seabirds, neither of which are expressly referred to in the ground.
106. Dr Meredith was critical of a gap in surveys of the parrot. Surveys of Orange-bellied Parrots were undertaken in March, April, May, June, September and October 2003, April 2004, March, April and May 2009, March, April and May 2023, with a radio tracking of a small number of captive-bred birds in February to June 2023. Dr Meredith noted surveys of seabirds, but criticised the absence of nocturnal seabird movement surveys, saying that some species are likely to fly across Robbins Island at night.
107. The Bob Brown Foundation criticised the bird utilisation surveys relied on by ACEN, picking up on evidence by Dr Baker, Dr Meredith and Dr Shannon Troy, an expert in Orange-bellied Parrot biology, ecology and management called by the EPA, that the surveys focussed on areas of preferred foraging habitat and did not fully assess other, less preferred, potential foraging habitats. It is difficult to fault a survey bias towards area that the birds would prefer to frequent, given the difficulties in identifying OBPs due to their size and small numbers. The Foundation more relevantly criticised the small number of participants undertaking the surveys, usually two or three persons, for an area of suitable habitat covering 792 ha.
108. These matters will inform the assessment of risk, and the application of the precautionary principle, in respect to other grounds of appeal and the formulation of conditions, but ground 6 does not of itself give rise to a basis to refuse a permit.
109. Ground 6 is not made out.

Alleged uncertainty of the permit and conditions

110. Grounds 25, 42, 43, 44, 45 and 49 assert that conditions 5, 11, 12, 13, CN1, FF2, FF5 and FF6 of the permit are uncertain or result in a lack of finality.

Lack of finality

111. Each of the grounds raising this issue, except ground 49, expressly refer to *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734. No appellant cited *Mison* in their

written submissions. The finality principle was described by Clarke JA in *Mison* at p 740 in the following terms:

Where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect, it is difficult to see how that consent could be regarded as final.

112. In *Scott v Wollongong City Council* [1992] NSWCA 227; (1992) 75 LGRA 112 at p 118 Samuels AP explained the purpose of the finality principle:

The principle of “finality” is intended to protect both the developer and those in the neighbourhood who may be affected by the proposal, against the consent authority's reservation of power to alter the character of the development in some significant respect, thereby changing the expectations settled by the consent already granted. That consent may, of course, be subject to conditions; and those conditions are subject to the principle.

113. The principles in *Mison* were summarised by Basten JA, with whom Handley JA and Hunt AJA agreed, in *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23 at [24]-[28]:

24 In accordance with principles explained by this Court in *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734, there may be no lawful consent to a development application where the consent falls within one of two categories of overlapping circumstances. The first category is where a condition has the effect of “significantly altering the development in respect of which the application is made”: at 737B (Priestley JA). The second category is where a council has purportedly granted consent, but in terms which lack either finality or certainty, so that there is, in substance, no effective consent to the application.

25 These two categories may overlap in circumstances where consent is granted subject to a condition which allows for significant variation of the development proposed.

26 In *Mison*, the condition in question required that the overall height of the dwelling house to be constructed be reduced “to the satisfaction of Council’s Chief Town Planner”. Because the approved height remained to be determined, and might, the Court held, fall at any point within an undefined range, the consent left open the possibility that that which was consented to would be significantly different from the development the subject of the application.

27 Alternatively, it was said that there was a substantial degree of uncertainty in relation to a condition which was “an important aspect of” the development: p 737B (Priestley JA). Meagher JA adopted a similar approach at 741. Clarke JA described the question of height as an aspect of the development “which was beyond question of critical importance”. However, his Honour preferred to rest his decision on the lack of finality, rather than the possibility of there being a consent to a significantly different development: p 740F. Clarke JA also considered that the failure to specify a criterion for determining height was a fatal omission.

28 Although different language is used in relation to the separate categories of invalidity, it would seem that the test of uncertainty or lack of finality, being determined by reference to an important aspect of the development, requires that what is left uncertain must be the possibility that the development as approved may

be significantly different from the development the subject of the application. Thus, the result should not be different depending upon which approach is adopted: a consent will only fail for uncertainty where it leaves open the possibility of a significantly different development. On other hand, a consent may fail, within the first category, where a condition of great precision and certainty of operation results in a significantly different development. Whichever category is preferred in the case of a consent which lacks certainty or finality, it is helpful to bear in mind the relationship between the two tests.

114. *Kindimindi Investments* was applied by Geason J, with whom Estcourt J and Pearce J agreed, in *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 5 at [38]. His Honour went on to say at [39]-[41]:

39. In *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111 at 179:

"Decisions such as *Mison*, *Winn*, *Kindimindi* and *Ulan Coal Mines* go to confirm the observation that, under the general law, the question whether a conditional approval or a condition attached to the approval of some activity is valid, is an exercise in statutory construction. They also confirm that, as a general principle, the approval or a condition will not necessarily be considered invalid because a condition retains in the decision-maker some ongoing flexibility in relation to the implementation of an approved activity or because it delegates some authority in relation to the implementation of the decision to some other person or agency."

40. The principle advanced by the appellant is not a contentious one. The question is whether that principle is offended. The answer to that question requires consideration of whether there is a continuing uncertainty about what has been approved because "what is left uncertain" is the possibility that the development as approved may be *significantly different* from the development the subject of the application.

41. In my view the facts do not support the appellant's argument. I do not foresee a planning outcome which leaves open the possibility of something so different from that which was applied for and approved, that there is the requisite uncertainty of outcome to offend the principle; there is not continuing uncertainty around those matters, but rather "ongoing flexibility in relation to... implementation" achieved by way of a delegated authority in relation to that matter.

115. Geason J focussed on the question of whether a condition might result in a significantly different development. A difference may be substantial without being significant and the consideration is a matter for judgment in the context of the circumstances: *St Helens Area Landcare and Coast Care Group Inc v Break O'Day Council* [2007] TASSC 15 at [19] and *Dunland Property Pty Ltd v Brisbane City Council* [2021] QPEC 34 at [14].

116. A valid permit may be conditional on further approval by the planning authority or an officer of the planning authority: *Win v Director-General of National Parks and Wildlife and Ors* [2001] NSWCA 17 at [17]-[18]. In *Scott v Wollongong City Council* Samuels AP said at p 118, following the passage cited above:

However, it is common to find that development consent is subject to conditions which provide for some aspects of the matter stipulated to be left for later and final decision by

the consent authority or by some delegate or officer to whose satisfaction, for example, specified work is to be performed. Such provisions are inevitable since it cannot be supposed that a development application can contain ultimate detail or that a consent can finally resolve all aspects of the proposal with absolute precision.

117. A valid permit may also be conditional on a subsequent approval or permit by a third party: *Howie v Clarence City Council* [2001] TASSC 53 at [14]-[17] and *Wilderness Society (Tasmania) Inc v Wild Drake Pty Ltd* [2021] TASFC 12 at [175].

The impugned conditions

118. Ground 25 challenge conditions 5, 11, 12 and 13. Ground 49 also challenges conditions 5 and 11.
119. None of the appellants made submissions specifically in respect to condition 5. As with ACEN's appeal concerning condition 5, the issues raised by the grounds of appeal fall away with the amendments to the proposal made in *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 2)* and the Council's proposed new condition.
120. Condition 11 requires a detailed site plan to be approved by the Council's general manager showing the final location of wind turbines, access roads and supporting infrastructure, and requiring that the detailed site plan be in accordance with the development application. The amended development application shows the general proposed siting of wind turbines and roads. None of the appellants made submissions specifically in respect to condition 11. It does not create an uncertainty that might result in the proposal becoming something significantly different to that which has been applied for.
121. Conditions 12 and 13 require approval by the Council's general manager of a lighting plan. No appellant made submissions specifically in respect to these conditions. There is no realistic prospect that the conditions leave open the possibility that the lighting plan might result in the proposal becoming something significantly different to that which has been applied for.
122. Ground 42 challenges condition CNI. No appellant made submissions specifically in respect to the condition. CNI is a condition imposed by the EPA. It requires that, at least three months prior to the commencement of construction, a design report detailing the wind turbine generators, siting of development, environmental constraints and design specifications of the bridge and wharf structures must be submitted by ACEN to the EPA for approval. The condition requires that construction not commence until the report has been approved. This condition deals with the potential consequences of the detailed design. It reflects caution arising from the more general detail contained in an application for development approval compared to an application for building approval. It does not invite change that might result in the proposal becoming something significantly different to that which has been applied for.
123. Ground 43 relates to condition FF2, a condition required by the EPA for the preparation and approval of an eagle monitoring and management plan. No appellant made

submissions specifically in respect to the condition. Once again this condition does not provide a discretion that might result in the proposal becoming something significantly different to that which has been applied for.

124. Grounds 44 and 45 relate to conditions FF5 and FF6 imposed by the EPA concerning the Orange-bellied Parrot. Condition FF6 is also the subject of a ground of appeal by ACEN.
125. Condition FF5 requires the preparation of an Orange-bellied Parrot monitoring and management plan for approval by the EPA. Condition FF6 requires that all wind turbines be shut down during the northern Orange-bellied Parrot migration period from 1 March to 31 May inclusive and the southern Orange-bellied Parrot migration period from 15 September to 15 November inclusive. Once again, there is no real prospect that it might result in the proposal becoming something significantly different to that which has been applied for
126. Submissions were made in respect to condition FF6 concerning a provision in the clause that it is to operate “unless otherwise approved in writing by the EPA Board”. The Bob Brown Foundation and the Circular Head Coastal Awareness Network submitted that that discretion should be removed, on the basis that the condition is invalid as the discretion left open to the EPA is unfettered and is in respect to an important aspect of the proposal which could alter the proposal in a fundamental respect.
127. The condition reflects concern about the effect of the proposal on the critically endangered Orange-bellied Parrot. The discretion in the condition would permit the condition to be modified to reflect the actual experience of the proposal once in operation.
128. Clause FF6 will be considered in more detail below. For the reasons set out below, any issue that the condition is invalid on the basis of finality becomes hypothetical.
129. None of the conditions raised give rise to any further discretions or decisions that would, if those discretions or decisions were exercised, result in a development which would be significantly different from the development set out in the development application. It will remain a wind farm with up to 100 wind turbines of the dimensions identified in the amended development application, situated generally in the locations identified in the amended application, supported by the infrastructure detailed in the application, which is also to be located in the positions detailed in the application. Its operation will remain as for the generation of electricity by wind. The proposed use will not be altered by the exercise of any of the discretions reserved in the conditions.
130. Grounds 25, 42, 43, 44 and 45 asserting invalidity on the grounds of lack of finality are not made out. Ground 49 insofar as it asserts a lack of finality is not made out.

Alleged failures by the EPA

Conditions reserving discretion

131. Ground 50 asserts that the EPA, in imposing conditions, and the Circular Head Council, in accepting the conditions without review, failed to exercise jurisdiction under EMPCA and LUPAA by deferring significant issues in respect to the impact on wildlife for further determination.

132. Insofar as the ground asserts failure by the Council, it is misconceived. Pursuant to s 25 of EMPCA the Council was required to include the EPA conditions in the permit. The Council had no discretion to amend the conditions and is expressly prohibited from imposing conditions contrary to the EPA conditions.
133. Further, the appeal is by way of a hearing de novo, not a rehearing to determine error by the Council or the EPA: see *Allesch v Maunz* [2000] HCA 40 at [22] for the differences between an appeal by way of rehearing and a hearing de novo.
134. No appellant made submissions expressly in support of ground 50, or sought to explain how the EPA had failed to exercise its jurisdiction.
135. It is not apparent to the Tribunal that there was any failure to exercise jurisdiction. If there was an alleged failure to exercise jurisdiction resulting in invalidity of the permit, then that may well have been a matter more appropriately raised in a judicial review application. However, as it has been raised before the Tribunal we must determine it as a jurisdictional issue: *Sandy Bay Developments v Loring* [1991] TASSC 34 at [40]-[41] and *Jackson v Purton* [2011] TASSC 28 at [40]-[48]. If the permit is invalid, that invalidity will not deprive the Tribunal of jurisdiction to determine the appeal, but will restrict the orders available to us: *Meander Valley Council v RMPAT* [2018] TASSC 9 at [45]-[51].
136. We are not satisfied that there was a failure by the EPA to exercise jurisdiction when imposing the conditions. The EPA called its director, Mr Wes Ford. Mr Ford was not cross examined and his evidence was not challenged by conflicting evidence. Mr Ford gave evidence with respect to the conduct of the assessment by the EPA, including the establishment of an information base and the decision to impose conditions, having considered whether to seek further information from ACEN.
137. None of the appellants led evidence to support this ground or pointed to a basis for the asserted failure of the EPA to exercise its jurisdiction, other than Mr Smith on a different basis, and whose ground is dealt with below. The EPA undertook an assessment and imposed conditions. For the reasons discussed earlier in this decision, none of the EPA conditions raised in the appeal is invalid for a lack of finality.

138. Ground 50 is not made out.

Wetlands

139. Ground 22 asserts that the EPA failed to acknowledge the national and international significance of the Robbins Passage and Boullanger Bay wetlands.
140. Dr Woehler, an expert in seabird and shorebird ecology, who appeared for and gave evidence on behalf of Birdlife Tasmania, described the international significance of the wetlands to resident and migratory seabirds. That evidence is relevant to assessment of the proposal in respect to EMPCA and conditions, but for the same reasons as for ground 50 and ground 6 this ground is not a basis to refuse a permit.
141. Ground 22 is not made out.

Failure to apply the objectives of EMPCA

142. Ground 23 asserts that “the decision made by the EPA Board failed to further objective 1(a) of the EMPC Act under Schedule [sic] to promote the maintenance of ecological processes”. Ground 24 asserts that “the decision made by the EPA Board failed to apply the precautionary approach as specified in Part 2, 3(h) of the EMPC Act objectives”.
143. The grounds do not identify the impugned decision by the EPA, but we infer that it is either the decision not to direct the Council to refuse a permit or its formulation of conditions. The formulation of ground 24 in its entirety supports the latter.
144. The analysis set out below in respect to ground 52, concerning the nature of the appeal and the application of the objectives in EMPCA, will apply equally to this ground. We are not concerned with error by the EPA. Even if we were, there is no evidence that the EPA failed to take any relevant objectives into account. The guidelines for the DEMPC produced by the EPA indicate otherwise. Nothing was put to Mr Ford in cross-examination on this issue.
145. In *Tarkine National Coalition Inc v Director, Environment Protection Authority* at [40] Blow CJ directly addressed a contention that “the Director did not have regard to the relevant Schedule 1 objectives, particularly the one relating to a precautionary approach, when making the decision under review; that he thereby erred in law; and that the decision under review is invalid as a result”, a consideration that directly engages ground 24. At [50] His Honour said of the objectives in EMPCA:
- The statutory objectives are not binding rules of law that a decision-maker is obliged to obey. I accept that, as a general rule, any failure to further any single objective does not invalidate the relevant exercise of power. There will certainly be occasions in which some objectives pull in different directions. It was open to the Director to make his own decision as to the balancing of conflicting objectives.
146. Grounds 23 and 24 are not made out.

Information base

147. Ground 36 contends that the EPA should have directed the Council to refuse a permit on the basis that it failed to establish, or deferred establishment of an information base, as required by s 74(9) of EMPCA. Section 74 provides that an environmental impact assessment may be required when an environmentally relevant activity is proposed. The proposal is an environmentally relevant activity as defined in s 3 because it involves a level 2 activity.
148. This ground was not developed in submissions beyond the assertion of incomplete information dealt with in respect to grounds 6 and 48. EMPCA does not define ‘information base’ or prescribe what an information base should contain. It is a matter left to the EPA to determine in the particular circumstances. Mr Ford’s evidence that an information base was established was not challenged.
149. Ground 36 is not made out.

Economic objectives

150. Ground 52 was raised by Mr Paul Smith. It is a complicated ground in a narrative form. Ultimately it contends that the EPA failed to further the objectives set out in Sch 1 of EMPCA insofar as they relate to sustainable development.
151. Mr Smith contends that the determination by the EPA under s 25 not to direct the Council to refuse a permit is tainted by failure to consider an economic theory advanced by him, on the basis that the theory is a matter which the EPA was required to consider. That is more appropriately a matter for judicial review, not the appeal, however, we are seized of the issue.
152. Mr Smith gave evidence based on his expertise in political science and economics. His evidence focussed on asserted failures of the EPA. He contended that the proposal would grow the Tasmanian economy through financial returns and new employment. In his opinion the Tasmanian Government is addicted to growth and at some point the adverse consequences of growth will outweigh their benefits. He did not contend that this wind farm proposal itself would achieve that result. Mr Smith submitted that planning authorities should refuse to grant permits for developments that produce growth in the State's economy expressly because they will produce growth. He relies on scarcity multiplier theory. Multiplier theories are well known in economics, for example the Keynesian multiplier. The scarcity multiplier theory appears to be a theory formulated by Mr Smith and a colleague.
153. Mr Smith opened his case on the basis that his appeal had two purposes: to cure or substantially reduce government failure by means of institutional reform; and to cure societal addiction to growth. His focus was on political and economic reform. His evidence reflected that approach.
154. Mr Smith's case is misconceived. His evidence was expressly framed in terms of alleged error by the EPA. As noted above, the appeals are to be heard de novo, not by way of rehearing to establish error by the EPA. Mr Smith's evidence did not address any standard arising under a planning instrument. He did not address conditions. He purports to establish that the EPA erred by not directing the Council to refuse a permit on economic grounds based on the objectives of EMPCA. The appeal is to determine whether a permit should issue for the proposed wind farm, and if so on what conditions. Although starting from an assessment that the proposal would result in economic growth Mr Smith advances an economic theory relating to the effect of development on the economy as a whole rather than assessing the discrete wind farm proposal. Regardless of the merit of his economic theory, the issue engaging Mr Smith is not a relevant consideration for the Tribunal in determining whether the proposal should be granted a permit or the conditions of a permit.
155. As noted above in respect to the alleged failure by the EPA to exercise its jurisdiction by applying the objectives in EMPCA, we are satisfied that the EPA's assessment of the proposal was not tainted by error.
156. Ground 52 is not made out.

Environmental considerations

157. A large number of environmental considerations were raised on the appeal, both in respect to standards arising in the Scheme, the conditions imposed by the EPA and the

EPA's discretion to direct the Council to refuse a permit. The issues overlap many of the grounds and it will be simpler to set out the evidence and our findings in respect to particular species and issues, and then to relate the relevant grounds back to those findings.

158. The issues arose particularly in respect to Orange-bellied Parrots, eagles, shorebirds, Tasmanian Devils and geosites, under grounds 8-21 inclusive, 35 and 37.

The precautionary principle

159. Before considering the relevant species and geosites it is useful to say something about the precautionary principle. The precautionary principle, or precautionary approach, is a well-established concept in environmental law. It is expressly cited in grounds 7, 24 and 49, and will inform assessment of the evidence more broadly in respect to the environmental grounds.

160. In their submissions, ACEN and the Circular Head Coastal Awareness Network addressed the precautionary principle at some length. The Network contended that it should be applied to assessments in respect to the Orange-bellied Parrot, the Tasmanian Devil, seabirds and Wedge-tailed eagles.

161. Clause 3(h) of Pt 2 of Sch 1 of EMPCA provides that one of the objectives of the environmental management and pollution control system is:

(h) to adopt a precautionary approach when assessing environmental risk to ensure that all aspects of environment quality, including eco-system sustainability and integrity and benefit uses of the environment, are considered in assessing, and making decisions in relation to, the environment.

162. EMPCA uses the term precautionary approach rather than precautionary principle. It does not define that term.

163. The State Coastal Policy requires that the precautionary principle be applied to development that may pose serious or irreversible environmental damage within the coastal zone established in the coastal policy: cl 2.1.5. The coastal policy includes a definition of precautionary principle which picks up the definition that is contained in the Intergovernmental Agreement on the Environment 1992, which was entered into by the Commonwealth, each of the states, the two internal territories and the Australian Local Government Association, which is the principal organisation representing Australian councils. Clause 3.1.5 of that agreement defines the precautionary principle in the following terms:

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

1. Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
2. An assessment of the risk-weighted consequences of various options.

164. Preston CJ undertook a thorough analysis of the precautionary principle in *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133. His Honour was considering legislative instruments that used both the terms precautionary principle and precautionary approach. His Honour did not distinguish between them in terms of effect. At [113] his Honour referred to there being numerous formulations of the precautionary principle, but that the most widely employed formulation adopted in Australia is that defined in s 6(2)(a) of the *Protection of the Environment Act 1991* (NSW), which is in identical terms to the definition in the Intergovernmental Agreement on the Environment.
165. Applying that definition, the precautionary principle arises where firstly there is a threat of serious or irreversible harm to the environment and secondly there is a lack of full scientific certainty.
166. Preston CJ's analysis identified a number of considerations to guide application of the precautionary principle:
- (a) It is the threat of serious or irreversible environmental damage that triggers the principle: [129]
 - (b) Relevant threats include direct and indirect threats, secondary and long-term threats and the incremental or cumulative impacts of multiple or repeated actions or decisions: [130]
 - (c) Assessing the seriousness or irreversibility of environmental damage includes consideration of many factors including the scale of the threat, the magnitude of possible impacts, the perceived value of the threatened environment, the temporal scale of possible impacts, the complexity and connectivity of possible impacts, the manageability of possible impacts, the level and rationality of public concern and the reversibility of possible impacts: [131]
 - (d) The threat of environmental damage must be adequately established by scientific evidence: [134]
 - (e) Lack of full scientific certainty means uncertainty as to the nature and the scope of the threat of environmental damage: [140]
 - (f) Assessing the degree of scientific uncertainty involves analysis of many factors, which might include the sufficiency of the evidence that there might be serious or irreversible environmental harm, the level of uncertainty, the kind of uncertainty and the potential to reduce uncertainty within a reasonable timeframe: [141]
 - (g) Full scientific certainty as to the threat of environmental damage is an unattainable goal: [143]
 - (h) The threshold is reasonable scientific plausibility, which may be established by empirical scientific data, but may also be purely a theoretical risk if it is scientifically credible: [148]
 - (i) If the precautionary principle is triggered a decision maker is to assume that there is, or will be, a serious or irreversible threat of environmental damage and take that

into account, notwithstanding the degree of scientific uncertainty about whether the threat exists: [152].

- (j) The burden of showing that the threat does not in fact exist or is negligible falls on the proponent of a development: [150]
 - (k) If the proponent fails to discharge that burden of proof it does not necessarily mean that the development must be refused, but the assumption of serious or irreversible environmental damage must be taken into account in the decision: [154]
 - (l) The precautionary principle, where triggered, does not necessarily prohibit the carrying out of a development but requires assessment of the risk weighted consequences of the available options and selection of the option that affords the appropriate degree of precaution for the set of risks associated with the option: [179]-[181].
 - (m) The precautionary principle should not be used to try to avoid all risks as some risks are acceptable and others are unacceptable: [157]-[160]
 - (n) The response to the risk will depend on an assessment of the probability of the event occurring and the seriousness of the consequences should it occur: [161]
 - (o) A margin for error may be retained, for example by implementing a step-wise or adaptive management approach: [162] to [165]
 - (p) Precautionary measures should be proportionate, so that measures should not go beyond what is appropriate and necessary in order to respond to the potential threats: [128] and [166]-[167]:
 - (q) The selection of the appropriate precautionary measures involves balancing the consequences of the proposed development with its benefits: [177]
167. These considerations will guide the application of the precautionary approach, including for the purposes of cl 3(h) of Pt 2 of Sch 1 of EMPCA.
168. Ground 24 raises the precautionary principle as a discrete issue, and is dealt with later in these reasons.
169. Grounds 7 and 49 expressly assert that a permit would be contrary to the precautionary principle or that the impacts of the proposal cannot be properly assessed and that the issue of a permit would be contrary to the precautionary principle. These issues go to the assessment and conditions. For the reasons set out elsewhere in this decision concerning the issues to which the precautionary principle will apply ground 7 and that element of ground 49 are not made out.

Orange-bellied Parrots

170. Issues surrounding the Orange-bellied Parrot (**OBP**) were the most significant and contentious on the appeal. The appellants contended that the risk to the OBP from the proposal is such that a permit should be refused, or that the wind farm should be shut down for the entirety of the OBP's migration periods.

171. The OBP has been a closely studied species. It is a small parrot, around 23 cm in length and weighing about 50 g, and is critically endangered, with a wild population of only 77 birds. Much is known about the biology, habitat preferences and migration patterns of OBPs, but much is shrouded in uncertainty. There is a single population of OBPs with all breeding occurring within 6 km of Melaleuca in southwest Tasmania. The uncertainty concerning the OBP largely exists outside that breeding area. The OBP has a non-breeding range extending along the west coast of Tasmania, including the islands at the north-western tip of Tasmania (Robbins Island, Hunter Island and Three Hummock Island), King Island in Bass Strait, the southeast coast of South Australia, the coast of Victoria and the southern coast of New South Wales. The OBP migrates north each year from southwest Tasmania to coastal mainland Australia, primarily in coastal Victoria and south-eastern South Australia between early March and late May following the breeding season, and returns south between mid-September and mid-November. These periods are reflected in condition FF6, although birds may begin the migration north as early as January.
172. It is the uncertainty about what occurs with OBPs in the non-breeding range and during migration that has resulted in eminent experts giving evidence before the Tribunal reaching different conclusions about the potential impact of the proposal on the long-term viability of the species and, hence, whether the proposal should be permitted, and if so, under what conditions.
173. Mr Brett Lane, an ornithologist and ecologist with extensive experience with OBPs and with bird impacts at wind energy projects in Australia called by ACEN concluded that, properly managed, the risk to the OBP population from collisions at the site would be very low. He considered that condition FF6 was out of proportion to the risk to the species from the proposal, but that turbine shutdown at known sensitive locations and times should remain part of any mitigation strategy. Mr Lane summarised his views in the following terms:
- The parrot is critically endangered and is supported in the wild by a large captive-release program;
 - Small numbers utilise coastal habitats between Cape Grim and east of Stanley as a migratory stopover, spending a few days in coastal saltmarsh habitats.
 - At Robbins Island, findings to date (2003 to 2023) have found parrots on the west coast of the island.
 - Most individuals are likely to migrate across the region between Cape Grim and east of Stanley, with the latest radio-tracking work indicating it occurs at night and involves limited time spent at Robbins Island.
 - Small numbers of Orange-bellied Parrots may migrate across Robbins Island but it is highly unlikely to involve the whole population given the spread of records in that region and evidence to date indicates a preference for activity on the west coast of the island;
 - Collision risk from a small number of flights will be low considering the small number of flights involved, experience with the low number of collisions by the much more abundant Blue-winged Parrot (closely related and behaviourally similar) and based on previous modelling of cumulative wind turbine collision risk for the Orange-bellied Parrot;
 - The likely consequences of an occasional loss of an individual are not considered significant and will not contribute to an increased risk of species' extinction based on inferences that

can be drawn from an available population viability assessment (Smales et al. 2005), notwithstanding changes in some population parameters and having regard to positive differences in current population parameters and trajectory as a consequence of a successful captive breeding and release program.

- The mitigation and offset measures proposed and required in the current condition of approval (FF5) will assist in offsetting any extinction risk. It is also recommended that a contribution be made to boosting the number of captive bred birds released into the wild population as a direct way of replacing any lost birds.
- Provided effective mitigation and offset measures are implemented, the Robbins Island Wind Farm will not significantly affect the population or recovery capacity of the Orange-bellied Parrot.

174. ACEN also called Dr Keith Reid, an expert in conservation science and ornithology. Dr Reid undertook a review of the published scientific evidence available in respect to OBPs. Dr Reid observed that the very small population size of the OBP means that the survival of the species is highly sensitive to impacts from a range of natural factors, such as fire or predation at nesting sites, which could result in the species' extinction. As a consequence he considered that the increased frequency and severity of extreme events associated with anthropogenically driven climate change pose a particularly acute risk to the OBP.
175. Dr Reid noted that records of OBPs in the migration corridor in northwest Tasmania and King Island are limited to the northward migration period. He observed that only one in five of the juvenile birds that depart the breeding grounds return in the subsequent breeding season and become part of the wild population. The pattern of occurrence of migratory birds during their northern migration, when a relatively larger number of inexperienced juvenile birds are involved, is characterised by birds occurring in a greater variety of locations along the migration route, which he says suggests that the greatest relative likelihood of a collision is of a juvenile OBP on its first northward migration. He concluded from the published evidence that the likelihood of collisions occurring would be low. In respect to the consequences of collision for the species, he said that the overall risk is difficult to quantify, particularly given the available data with which to assess the likelihood of occurrence of a collision. The current drivers of the unsustainably low survival rate for OBPs are essentially unknown and therefore it is not possible to assess the potential impact of collision risk, relative to those other drivers, in the overall impact on the population. However, he said that it is apparent that there is no empirical evidence that collisions with wind farms are a significant current driver of population dynamics.
176. Mr Holdsworth, who managed the OBP recovery plan, noted that available evidence indicates that the entire population of the OBP migrates through the northwest region of Tasmania, including western Bass Strait islands. OBPs forage within a variety of coastal and agricultural habitats during the autumn migration, preferring coastal habitats. The northern migration is protracted with some birds commuting between foraging sites and roosts on multiple occasions. Robbins Island has extensive saltmarsh and sedgeland habitats which the species will utilise and therefore the presence of wind turbines on or adjacent to those habitats could result in collision. This would increase the risk to the survival of the species. In contrast to the northern migration, the southern migration is more rapid with some OBPs being observed to undertake the passage within two days. Mr Holdsworth was not aware of any observations of OBPs foraging during the southern migration. He said that there are no data available on the altitude OBPs fly at during migration. He said that the proposed meteorological masts will add to the collision risk,

particularly during inclement weather or night-time movements. Mr Holdsworth said that use of the region by OBPs, including Robbins Island, is likely to vary between seasons and years, and it is highly likely that the species will encounter wind turbines over time. He considered that any increase in mortality of the OBP is unacceptable, and that to reduce the risk of collision with the wind turbines to zero, the shutdown period in condition FF6 should operate from February to November, when OBPs could be within the northwest region.

177. Dr Baker is a member of the OBP recovery team. Dr Baker's evidence concerning knowledge of the OBP was consistent with the other experts. He added that the flight behaviour of the OBP has not been specifically examined nor accurately measured, including maximum flight heights and frequency of flights above the proposed minimum rotor height. He said that the OBP has been the focus of a national recovery program for over 35 years, coordinated by the recovery team, which comprises representatives from government, non-government, and community organisations, that has so far prevented the extinction of the species. The wild population has grown because of management that includes release of captive-bred adults at the start of the breeding season to supplement the wild population, increase the number of breeding pairs and produce wild-born young with potential to migrate successfully and contribute to the population in following years, together with release of captive-bred juveniles with potential to migrate successfully and contribute to the population in following years. He said that releasing captive OBPs to increase the population size is a measure to prevent extinction, not to mitigate threats. He considered that no increase in mortality is acceptable for the OBP, and that any mortality would undermine the conservation effort. He was concerned by the impact on the recovery of the OBP from the proposal by collisions, reducing the area of occupancy of the species, adversely affecting habitat and disrupting the breeding cycle through impacts on migration. He considered the death of a single OBP to be of concern and any increase in non-natural mortality to be unacceptable.
178. Dr Troy is employed by the Department of Natural Resources and Environment Tasmania as program and project manager of the OBP Tasmanian Program. Dr Troy said that the OBP's northern migration commences in January, with most birds departing from Melaleuca to commence their northward migration between March and April, with birds returning to Melaleuca from September to April inclusive. She observed that records in the Natural Values Atlas, which is a database of Tasmania's natural values maintained by the Department of Natural Resources and Environment Tasmania, indicate 99 per cent of observations of OBPs on the northern migration have occurred within 5 km of the coastline including offshore islands, and 95 per cent within 3 km of the coastline including offshore islands. Data indicates that the northward migration is variable and can take between weeks and months. Dr Troy said that the general timing of OBP migration and the location of the OBP migration route on the west coast of Tasmania and Bass Strait Islands is well understood, as are the vegetation communities that OBPs utilise for foraging and roosting in the non-breeding range. However when, where, how many and how often OBPs use areas within their Tasmanian migration route is less clear. Outside of their breeding range, OBPs are difficult to detect owing to their low density, mobile nature, and broad geographic distribution. Because Robbins Island forms part of the migration route, and contains known foraging and roosting habitat, she expected that OBPs will use Robbins Island during their migration to overfly, forage, roost and rest. How many and how often OBPs visit Robbins Island during their migration is not known. Dr Troy said that the height at which OBPs fly is not known. She said that anecdotal reports suggest

OBFs fly at a low height less than 2 m within foraging patches and a height above 10 m flying between foraging locations and roost sites. Field surveys in 1999 to assess the likely risk to the OBP from the development of a different wind farm concluded that most parrots were observed flying at heights of less than 100 m, with the acknowledged limitation that it would be difficult to detect a parrot flying higher than 100 m. In respect to collision mortality, Dr Troy said that the current population size is 77 mature adults. She considered that the loss of one bird per year could have a minor impact on the size and trajectory of the wild population. However, the current population size is the result of a recent increase which may not be linear and the smaller the population, the higher the potential effect of the loss of one bird. OBFs travel in small groups or flocks, so there is the potential that more than one bird will be impacted by the proposed wind farm at any time. Dr Troy supported condition FF6.

Condition FF6

179. The EPA imposed condition FF6, to protect OBFs, in the following terms:
- FF6 – Orange-bellied Parrot turbine shutdown
- Unless otherwise approved in writing by the EPA Board, all WTG must be shut down during the northern OBP migration period (1 March to 30 May inclusive) and the southern OBP migration period (15 September to 15 November inclusive).
180. Condition FF6 would prevent the wind farm from operating for five months each year. Mr Draper’s expertise includes the commercial valuation of energy projects. His analysis was that a shutdown of four weeks or more per year would make the proposal commercially unviable. That evidence that was not contradicted.
181. ACEN accepted that the proposal will give rise to a risk of OBFs colliding with wind turbines. ACEN’s position was that while the death of any OBP is undesirable, the operation of the wind farm would have no significant effect on the survival of the species. ACEN’s position is that condition FF6 is disproportionate to the risk the proposal presents to the OBP. The EPA defends the condition. The Council takes no position on this point. The appellants broadly either contend that the condition should be maintained if a permit issues, or that it should be strengthened by extending the shutdown period.

Migration path

182. It was common ground between the experts that Robbins Island is within the known migration path of OBFs, both for the northern migration and southern migration. It is not contended that all OBFs cross Robbins Island on any or all migrations, in either direction. Neither is it known what percentage of the population uses or overflies the island during migration, nor at what height they might be flying when they do. It was accepted by the experts that the northern migration is more likely to see some birds land and forage on Robbins Island. The southern migration is likely to be quicker, with the imperative to return to the breeding grounds, with overflights of the island rather than foraging.

Presence on Robbins Island

183. There are limited records of OBFs on Robbins Island. According Mr Lane, there have been six recorded observations of OBFs on Robbins Island in the last 20 years, three of

which were made by Mr Lane or his colleagues. Mr Holdsworth referred to another sighting made by him in May 2002. A small scale radio migration tracking trial of captive bred juvenile OBPs from February to June 2023 described by Dr Troy recorded two out of seven birds with transmitters attached on or over Robbins Island. The small number of visual recordings have occurred in the saltmarshes on the west coast of the island, which, together with other information, led Mr Lane to conclude that it is likely to be the only area on which OBPs will utilise the island. Dr Troy for the EPA and Dr Baker and Mr Holdsworth challenged that conclusion on the basis that the preponderance of survey effort has been in the areas of saltmarsh, because that is where the OBPs would be expected to be. The inference is that if a similar level of survey effort was applied to other areas of Robbins Island, then the known range of OBPs may well be extended beyond the west coast.

184. The small number of sightings may not be an accurate indication of the number of OBPs that use Robbins Island, as the size of the bird and its cryptic habits make it very difficult to identify, particularly for observers not familiar with the species. How long foraging OBPs would remain on the island is unknown. The longer they stay the more potential there is for exposure to wind turbines, and therefore the greater the risk of collision.

Foraging habitat

185. There was universal agreement amongst the experts that the preferred foraging habitat for the OBPs exists within the island's saltmarshes, with the most important species being Beaded Glasswort (*Sarcocornia quinqueflora*), which flowers and then seeds from March to May. It is the seeds of the Beaded Glasswort that are the preferred food source for OBPs. This habitat is outside the area of the wind turbines.
186. Other food sources, such as pasture or weed species, may be utilised in the event that Glasswort is not in seed. Foraging on pasture or weed species would place the OBPs within closer proximity to wind turbines.

Roosting habitat

187. OBPs will move from feeding to a roost once or twice a day. The roosting habitat is usually in low, dense scrub localised to the foraging area, such as the melaleuca scrub adjacent to the saltmarshes on Robbins Island, or within a kilometre or two of the foraging area. OBPs are also known to roost in taller trees and at further distances from foraging habitats.

Collision records

188. The evidence disclosed only four instances where OBPs are known or believed to have been killed by colliding with manmade objects. One was a collision with the Cape Wickham lighthouse more than 100 years ago. The other three incidents were at Melaleuca. Two birds hit buildings and the other was found at the base of a small domestic wind turbine on an eight metre tower. That turbine provides power for the base for study of OBPs near the feeding site at the breeding ground.
189. Excluding the small wind turbine at Melaleuca, no collisions with wind turbines, either in Tasmania or on the mainland, have been recorded. That may be because OBPs have not collided with wind turbines, or it could be because of a lack of carcass searches or that

the size of dead birds makes the, difficult to observe and collect, or a combination of those factors.

Blue-winged Parrot as an analogue

190. The more abundant Blue-winged Parrot and the OBP are within the same genus, *Neophema*, are about the same size, occupy similar habitats and have similar flight patterns. The Blue-winged Parrot and the OBP are two of only three migratory parrot species in Australia. It is reasonable that Blue-winged Parrots may be used as an analogue for OBPs in considering the response of OBPs to wind turbines and their susceptibility to collision.

Basis for assessment

191. The OBP is one of the most endangered parrot species in the world. It is listed as critically endangered under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the highest level of endangerment listing under that Act, and is listed as endangered under the *Threatened Species Protection Act 1995*. The most current evidence is that there are just 77 wild individuals. The species has been on the verge of extinction, with the wild population dropping to just 17 in 2016. Its extinction has been prevented only by a captive breeding program that, as of August 2023, held a maintenance population of 307 adult OBPs. Dr Troy explained that the program is managed by the Zoo and Aquarium Association which conducts breeding programs for the conservation and recovery of threatened species. OBPs at the facility are paired for breeding, released into the wild, transferred to partner institutions for genetic management, or held for future utility.
192. The OBP is an iconic species which is highly valued by the community, as evidenced by the millions of dollars of government investment and volunteer work that has gone towards its conservation and recovery.
193. Any threat to the OBP represents a threat of serious or irreversible environmental damage. That threat triggers the precautionary approach, requiring an assessment of the level of scientific certainty or uncertainty in respect to the threat posed by the proposal.
194. ACEN encouraged the Tribunal to make its assessment on the basis of an on-balance judgment, balancing the benefits of the wind farm and the costs of not proceeding with it, for example in economic, climate and employment terms, against the seriousness of the threat to the OBP population. Such a judgment would involve reconciling the intrinsic and unmonetised value of an endangered species with the economically quantifiable value of the wind farm project.
195. In terms of economic cost Ms Ellen Witte, an economist called by the Circular Head Coastal Awareness Network, undertook an assessment of the ecosystem values of habitat for migratory birds, habitat for the Tasmanian Devil, the visual values of Robbins Island for nearby residents, and ecosystem services provided by Robbins Island, which are the benefits provided to humans through the transformations of resources. Those ecosystem services are not traded in the marketplace and therefore have no price attached to them. Ms Witte determined values by using the benefit transfer method, which estimates values by transferring existing benefit estimates from other case studies, a method which she noted results in less reliable outcomes than other methods. She based her assessments on United States estimates of the median cost of recovering endangered mammal species and willingness to pay per household, leading to a discounted present value for the loss

of the ecosystem service from extinction of the OBP as a species in a range from \$38 million to \$151 million. With respect to Dr Witte, the cost assumptions underlying her assessment do not appear to have any relevance to the proposal in the context of a bird species in Tasmania or Australia and do not provide any assistance in undertaking an on-balance judgement. Her attempt to monetise the risk to the OBP exemplifies just how difficult it is to undertake an on-balance assessment.

196. The balance might vary depending on the economy, the power needs of the state, the labour market and the circumstances of the environment. The approaches of the expert witnesses further exemplify how difficult and subjective an on-balance judgment would be. For example, Mr Holdsworth would not brook the loss of even one OBP regardless of the economic, employment and climate change benefits that might flow from the proposal.
197. While the analysis of the precautionary principle by Preston CJ includes balancing of benefits, a better approach in this instance is to make an assessment on the degree of risk to the long-term survival of the species taking into account the design of the project, the placement of the wind turbines, any offsets that might apply and conditions that might be imposed. This more appropriately reflects the objectives in cl 1(a), cl 2(c) and cl 3(a) and cl 3(h) of Sch I of EMPCA.

Analysis of risk

198. A risk assessment necessarily involves an analysis of the likelihood of the risk factors occurring and the consequences of such risks. The proposal presents three potential risks to OBPs, being removal or degradation of habitat, disturbance of birds and collision.

Removal or degradation of habitat

199. The science in respect to preferred OBP foraging and roosting habitat is not uncertain. The critical saltmarsh foraging habitat is almost entirely contained within a 500 m coastal exclusion zone where no development will occur. There will be some loss of roosting habitat by virtue of the placement of wind turbines and access roads within areas of Melaleuca scrub. That loss however will represent a very small percentage of that habitat type, with ample remaining for use by OBPs. The proposal will not result in material loss of habitat and no realistic risk to the OBPs on that basis.

Disturbance

200. Birds may be disturbed by construction activity and traffic movements associated with installation of the wind turbines. The only evidence provided for the impact of such activity on OBPs was provided by Mr Lane. He referred to a 1997 study which showed minor disturbance occurring from trucks passing within 100 m of foraging OBPs with no observed reaction at a greater distance. All construction activity planned for Robbins Island will be located at least several hundred metres away from the preferred foraging habitat on the west coast and is unlikely to have any significant impact on OBPs.
201. There was no direct evidence of the potential for wind turbines themselves to cause a disturbance to OBPs. Mr Lane indicated that colleagues of his had observed numbers of Blue-winged Parrots foraging on the ground near wind turbines at a wind farm in Victoria. His conclusion was that that species is not deterred by wind turbines. On the basis that

OBPs are an analogue of Blue-winged Parrots it is likely that they will not be disturbed by the wind turbines.

202. The degree of scientific uncertainty in respect to disturbance by the operation of the wind turbines is not significant in the assessment of risk to the OBPs. The threat of disturbance is not significant.

Collision

203. The risk of OBPs colliding with wind turbines is the most potentially significant of the three risk factors in terms of impact on individual birds and on the species. It is also the area of greatest scientific uncertainty.
204. That likelihood of collision is, as a matter of common sense, a product of the number of OBPs on the island, the time they spend on the island, the likelihood of OBPs moving within or crossing the area populated by wind turbines and the height at which they do so. The likelihood will be informed by any history of collisions. Risk will be a factor of the likelihood of collision and the consequences of collision.
205. The greater the number of OBPs on the island the statistically greater chance of an interaction with a wind turbine. As noted, there is only a handful of records of OBPs on Robbins Island. However, the absence of evidence is not evidence of absence for such a cryptic species. It is almost certain that there have been more birds on Robbins Island over time than those officially recorded. Nonetheless, the recorded evidence of limited use of Robbins Island by OBPs must be taken into account.
206. Another factor influencing the chance of collision is the proximity of wind turbines to OBP habitat and the likelihood of OBPs sharing the areas to be occupied by the turbines. The nearest turbines to the preferred saltmarsh foraging habitat are several hundred metres away, with most turbines being kilometres away. There is, therefore, little or no risk of collision when parrots are foraging within their preferred habitat, or when moving from one preferred patch of foraging habitat to another, unless they chose to cross the island to do so.
207. A greater potential risk occurs with birds moving from their foraging habitat to roosting habitat, or in the less likely circumstance, when they move to alternative pasture or weedy foraging sites. The ecologically obvious roosting sites on the island are within the Melaleuca scrub close by the saltmarsh. The Melaleuca is far lower in height than the swept area of the wind turbines. Mr Holdsworth's evidence was that OBPs fly in a direct path from point to point. They would, therefore, be unlikely to intercept a turbine blade. The same would apply in moving from preferred foraging habitat to pasture or weedy areas.
208. Mr Holdsworth indicated that OBPs have been known to roost in trees that are taller than Melaleuca scrub. The vegetation map contained within the Natural Values Atlas reveals that the only tree type potentially higher than Melaleuca on Robbins Island is *Eucalyptus nitida*, or Smithton peppermint, which occurs in patches in the centre and east of Robbins Island. Roosting in that habitat would put OBPs in danger of turbine collision, but it appears unlikely that birds would fly over large areas of suitable Melaleuca roosting habitat in order to use less suitable eucalypt roosting sites.

209. The period of time spent by OBPs foraging and roosting on Robbins Island during the northern migration is unknown. Mr Lane gave evidence of observing an individual OBP on Robbins Island over a period of three days. Mr Holdsworth's evidence was that the spring southern migration is more rapid than the northern migration and would not involve foraging. Dr Troy inferred that the OBPs would fly faster on the southern migration but noted that the route was unknown.
210. The risk of collision from birds overflying the island is simply unknown. There is no evidence before us to determine at what height they would overfly, and there is no way of knowing how likely it would be that they would pass within the swept area of the wind turbines. Mr Lane's evidence was that OBPs are well understood in terms of what they do when in habitat during the day, but that how they fly when they're migrating, including the height at which they fly and the length of hops in their flights is not understood.
211. The evidence of OBP collisions at existing wind farms is relevant to assessing the likelihood of collision at Robbins Island. The Bluff Point and Studland Bay wind farms are situated within the migration route of the OBP in northwest Tasmania. Ten years of carcass searches on those wind farms during the migration period did not reveal any OBPs, and just one Blue-winged Parrot. This would suggest that the risk of collision with *Neophema* species is very low. There is no record of an OBP colliding with a commercial wind turbine anywhere in Australia. The domestic turbine at Melaleuca that was implicated in the death of an OBP is quite unlike a commercial wind turbine, and in particular, at 8 m is much lower in height than the lowest point of the swept path of the proposed wind turbines, at 40 m.
212. An absence of evidence of collision is not evidence that there have been no collisions, given the difficulty finding a small and mutilated carcass. However, the virtual absence of any evidence of *Neophema* collisions on wind farms anywhere, coupled with the matters referred to above, leads to the conclusion that the likelihood of OBPs colliding with the proposed wind turbines is extremely low.
213. The second element of the risk equation is the consequence of collision. In respect to an individual bird, the consequence would be catastrophic. The greater issue is the consequence for the species. This again leads us into uncertain territory. Mr Lane had regard to a population viability assessment led by Ian Smales in 2005.¹ At first blush it appeared that that assessment would assist in identifying the level of mortality at which survival of the species would be put at risk, or conversely the level of mortality from the wind farm that would provide a small risk to the population. However the parameters and assumptions used in the Smales assessment are substantially different to the circumstances proposed at Robbins Island.
214. All of the 20 wind farms dealt with by the Smales assessment had fewer turbines than the up to 100 proposed to Robbins Island. The four Tasmanian sites considered in the assessment each have between 20 and 45 turbines. The swept area range of the wind farms considered by Smales was between 33 and 123 m in height, compared with 40 to 212m for the Robbins Island proposal. Smales modelled on the basis of an OBP population

¹ Smales, I, S Muir and C Meredith. 2005. Modelled cumulative impacts on the Orange-bellied Parrot of wind farms across the species' range in south-eastern Australia. Report for Department of Environment and Heritage, Canberra

of 150, which is twice the current population. The survival rates used in the Smales model are also different to the evidence of current survival rates tendered to us. Avoidance rates are critical in Smales' population viability assessment, but there are insufficient data to enable a collision risk model to be run for Robbins Island. Dr Meredith was a co-author with Mr Smales. His opinion was that the Smales' population viability assessment could not be relied on to accurately simulate the outcomes from the proposal.

215. The experts provided diametrically opposing views as to the consequence of any mortalities that might be caused by the proposal. They ranged from Mr Holdsworth's view of a single loss being catastrophic to an assessment by Mr Lane that the few losses, if any, that might be caused by the proposal would be insignificant in the context of the mortality suffered each year from causes other than wind farms. Dr Troy's cautious view was that single deaths would not affect the survival of the species, depending on the population from time to time.
216. Data from the Department of Natural Resources and Environment, which administers the OBP Tasmanian Program, on adult returns to Melaleuca at the start of each season tends to support the less catastrophic view. The data indicated that 31 OBPs died in the non-breeding range in 2019/20, 67 in 2020/21, 122 in 2021/22 and 63 in 2022/23. Over the same period total adult returns to Melaleuca increased from 23 to 77. Those numbers indicate that the OBP population, supplemented from captive-bred birds, is capable of surviving considerably higher mortalities than might reasonably be likely to be suffered from collisions at Robbins Island, given the risk based on the existing evidence relating to OBP collisions and their Blue-winged Parrot analogue. Any such mortalities would be additional mortalities, and so undesirable, but would not apparently be significant enough to cause a deviation from the regular or normal state or trajectory of the OBP population.
217. This is contingent on the continuation of the captive breeding program, without which the species would already be extinct. In this respect, ACEN has offered a payment of \$100,000.00 per year over each of the first ten years of operation of the wind farm to support the program. ACEN has also proposed a payment of \$250,000.00 as a contribution to a detailed OBP radio tracking program. Together those offsets have the potential to improve the body of knowledge of OBPs in a way that could lead to more protective measures and consequential reductions in non-breeding area mortalities generally.
218. We also consider that an additional offset should be included as a contribution that mirrors the proposed condition for eagles, which is a \$100,000.00 financial contribution for each detected eagle mortality. OBP mortalities are at least as significant as eagle mortalities and a similar condition should be provided for them.

Conclusion

219. The uncertainty concerning the OBP outside its breeding grounds is a trigger for application of the precautionary principle. The relevant risk is deaths by collision affecting the maintenance and recovery of the OBP population. The response to that risk depends on the probability of collisions and the seriousness of the consequences if collisions occur. The risk to the recovery of the OBP population arising from the proposal is very low. That risk assessment coupled with appropriate offset conditions that have the potential

to further the conservation of the species leads us to the conclusion that the proposal should not be refused on the basis of risk to OBPs.

Condition FF6

220. The evidence of Mr Draper was that a shutdown for more than four weeks would render the proposal uneconomic in terms of investment. Condition FF6 requires that the wind farm shut down for five months per year. The condition has the same effect as a refusal in the sense that the proposal will not proceed if it is required to shut down for five months per year.
221. This raises the question of whether the condition is a valid condition within the parameters identified in *Planning Commission (WA) v Temwood Holdings Pty Ltd* [2004] HCA 63 at [56]-[58] and [93] and in *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737-738. That consideration would flow into the appellants' challenge to the extent of the discretion reserved in condition FF6 to the EPA.
222. However, given our conclusions in respect to the risk to the Orange bellied Parrot, our view is that condition FF6 is not proportionate to the risk and not reasonable or necessary.
223. Accordingly, ACEN's appeal in respect to the condition should succeed.

Eagles

224. Two risks to eagles that occupy and utilise Robbins Island were raised in the appeal:
- Disturbance at nesting sites, especially during construction and particularly at breeding time when birds may abandon nests that contain eggs; and
 - Collision with the turbines.
225. Two raptors were identified in the grounds of appeal: White-bellied Sea Eagles and Wedge-tailed Eagles.
226. White-bellied Sea Eagles barely raised a mention during the course of the hearing. It is likely that this is because, firstly, the four identified nests in the locale would be protected from disturbance by a 1 km exclusion zone and, secondly, the eagles' coastal hunting range will not intersect with any wind turbines, meaning that collision risk would be extremely low. We conclude that the proposed conditions FF1 to FF4 inclusive required by the EPA will be adequate to ensure that White-bellied Sea Eagles are properly protected.
227. Wedge-tailed Eagles are at greater risk from the proposal. Reference to eagles below is to Wedge-tailed Eagles.
228. We heard evidence from two experts, Mr Aaron Organ, an expert in ecology for ACEN and Mr Nick Mooney, and expert in conservation biology for the Bob Brown Foundation.
229. Mr Organ and Mr Mooney agreed that the proposed 1 km exclusion zone for the two eagle nests which are located on Robbins Island would be sufficient to protect against disturbance.

230. The experts diverged on the issue of collision mitigation. Mr Organ considered that the combination of the exclusion zone with a functional automated detection and curtailment system would be sufficient to protect eagles. Mr Mooney questioned the validity of a circular 1 km exclusion zone for collision mitigation and suggested additional protective measures.
231. It was agreed that eagle flight densities on Robbins Island were in the low to moderate range when compared with another Tasmanian wind farm, Cattle Hill wind farm, which is located on the eastern shore of Lake Echo in the southern side of the Central Plateau. Cattle Hill has a significantly higher density of nearby eagle nests. IdentiFlight, the automatic detection system proposed for Robbins Island, is installed at Cattle Hill. Cattle Hill experienced a marked decrease in eagle collisions when the system was first installed, but there have been eight recorded mortalities since 2019. Mr Organ considered that the principal reason for those mortalities is the close proximity of tall vegetation that masked detection of birds by IdentiFlight. Mr Mooney speculated that a nest close to one of the turbines might have accounted for many of the deaths. Both experts agreed that those circumstances would not apply to the proposal on Robbins Island, with its relatively flat topography, low vegetation and 1 km exclusion zones.
232. Mr Organ was quite enthusiastic about the capability of IdentiFlight to significantly reduce the risk of eagle collisions on Robbins Island. The system uses cameras and artificial intelligence to identify eagles and to automatically completely shut down turbines within a period of 30 to 74 seconds from detection. Mr Organ considered that the system could be trained to identify other species, but training the artificial intelligence entails a great deal of work.
233. Mr Mooney acknowledged the potential of IdentiFlight but was more cautious in his endorsement of the technology. He pointed out that the 1 km circular exclusion zone was a concept developed for forestry operations, not wind farms. It was developed to reduce disturbance at nests, not to mitigate collision risk. Mr Mooney referred to recent work in South Africa by Murgatroyd et al² that sought to design eagle exclusion zones for wind farms by the use of flight tracking data of eagles around nests. That assessment would result in exclusion zones that are irregular in shape and are tailored to the actual flight patterns of birds, which would result in a small improvement in protection. Mr Mooney considered that a data driven approach to exclusion zone design should be adopted on Robbins Island.
234. Mr Mooney's fundamental point is valid. The 1 km exclusion zones have no empirical basis for collision mitigation. However, the Murgatroyd collision risk-potential model referred to by Mr Mooney is still in its infancy and deals with a different eagle species, in South Africa. It may be that running that model using radio tracking data, which Mr Mooney says exists for Robbins Island, or data generated from IdentiFlight would identify tailored exclusion zones. It would be reasonable to require that the Murgatroyd model be run for Robbins Island and that the results be considered in designing or modifying exclusion zones.

² Murgatroyd M, Bouten W, Amar A. (2021). A predictive model for improving placement of wind turbines to minimise collision risk potential for a large soaring raptor. *J Appl Ecol.* 2021; 58:857–868.

235. Mr Mooney suggested two additional measures to reduce the risk of collision. One was to apply some form of colouring to the meteorological towers to make them more apparent, and so easier for eagles to avoid. That appears sensible and reasonable and there was no evidence to the contrary. Mr Mooney's second suggestion was to adopt the application of one black blade on each three bladed turbine, a technique that he says has been used in Norway and is reported to have significantly reduced bird collisions. ACEN has agreed to trial the use of one black blade in areas of perceived eagle collision risk.
236. The EPA conditions in the permit propose an indirect research payment offset. Mr Mooney suggested it would be better to provide a direct offset that responds to the major cause of eagle mortality, which is power lines. ACEN agreed to redirect the proposed offset to the TasNetworks threatened bird program which is designed to address that threat.
237. Based on the relatively low numbers of eagles resident on and close to the site, being two nests and three families utilising the island; low to moderate flight density over the island; the high likelihood that IdentiFlight will succeed on Robbins Island given its relatively flat topography and low vegetation; the proposed exclusion zone; and the additional protective measures of coloured wind towers and a black blade on relevant wind turbines, we consider that the threat to eagles from the proposal is low.

Shorebirds

238. The issue arising in connection with shorebirds is the risk of collision with turbines, either when moving between foraging and roosting sites or when ascending in migration.
239. Robbins Passage forms part of the Robbins Passage and Boullanger Bay wetlands complex of intertidal mudflats. This wetlands complex is an important site for migratory shorebirds. Dr Woehler, said that the area supports more migratory shorebirds than the rest of Tasmania combined, and that a significant number of the shorebird species are listed as threatened in both national and Tasmanian threatened species legislation. He said that the area forms one of the southern-most parts of the East-Asian–Australasian flyway, which extends from Tasmania to Siberia.
240. While there is no doubt about the environmental significance of the wetlands complex and the shorebirds that utilise it, there is disagreement between Dr Woehler and Dr Reid, as to the significance of the threats posed by the wind farm. Dr Reid was not cross examined on his evidence in respect to shorebirds.
241. Dr Woehler and Dr Reid also gave evidence in respect to the White-throated Needletail. The White-throated Needletail is a large swift, not a shorebird, but the issue concerning it is the same as with the shorebirds and it is convenient to deal with them together. Dr Woehler's evidence in respect to the White-throated Needletail was brief and Dr Reid was not cross examined on his evidence. They agreed that wind farm collision is cited as the primary risk to the species in Australia. Dr Reid's evidence that the White-throated Needletail occurs infrequently in Tasmania and has no habitat association that increases the likelihood of its occurrence at Robbins Island compared to any other location in Tasmania was not challenged.

242. We were not provided with any empirical evidence to demonstrate that shorebirds routinely cross Robbins Island when moving between and among foraging and roosting sites. Dr Reid's uncontested evidence was that:

There is no evidence to suggest that birds make (or are even likely to make) daily movements from roost to feeding sites that require transit across Robbins Island. The evidence of home range sizes of shorebirds suggests that such commuting flights would be unlikely.

243. It appears highly likely that the majority of movements of shorebirds on Robbins Island between foraging and roost sites will be along the coast of the island where there will be no turbines, with few flights across the island in the vicinity of the proposed turbines.
244. Dr Woehler's evidence was that rates of climb for various shorebirds put them potentially within the range of the swept area of the turbines, and so in danger of collision. Dr Reid questioned the assumptions inherent in Dr Woehler's scenario, including the assumption of linearity in climb rates and the lack of data in the range distance of 0 km to 15 km. The bird impact assessment in the DPMP refers to a paper showing that the migration behaviour of shorebirds involves rapid and steep ascent, and another which indicates a range of ascent from 10 to 30 degrees. At 15 degrees a height of 130 m would be attained after approximately 500 m, such that a take-off from the coastal area of the island would be unlikely to result in collision. The assessment also refers to weather radar showing migration heights of shorebirds between 0.5 and 6 km, well above the height of the proposed wind turbines.
245. We are not able to say with any degree of certainty what level of risk attaches to collision with turbines in migration flights, and there was no evidence as to the consequences of any deaths from collisions. Condition FF7 of the conditions imposed by the EPA requires the preparation and submission of a shorebird monitoring and management plan prior to commencement of construction. The condition requires that the plan include detailed mitigation measures to address shorebird collision with wind turbines, including adaptive management. That appears to us to be a reasonable response for protection of shorebirds in the circumstances.

Other species

246. The grounds of appeal also raised issues with the Grey Goshawk, the Tasmanian Masked Owl, the Green and Gold Frog and the Spotted-tailed Quoll. No evidence of impact on these species was led by the appellants, nor did they cross-examine ACEN's experts or make submissions in respect to the species. We accept the unchallenged evidence of the expert witnesses called by ACEN and can deal with these issues briefly.
247. Mr David Young, an expert in raptor ecology, was called by ACEN in respect to the Grey Goshawk and the Tasmanian Masked Owl. Mr Young's conclusion in respect to the Grey Goshawk was that the proposal will impact the birds and their potential habitat to some extent, however, impacts are likely to be minimal and therefore acceptable. Similarly, in respect to the Masked Owl, he concluded that the proposal will impact the birds and potential nesting and roosting habitat to some extent, however the impacts are likely to be minimal and therefore acceptable considering a relatively large amount of suitable habitat exists in areas surrounding the project site. In respect to both species Mr Young

observed that impacts could be further reduced with strategies and mitigation measures that he identified.

248. In respect to the Green and Gold Frog, Mr Organ expressed confidence that, with permit conditions to implement avoidance and minimisation measures the proposal can proceed with any resident populations of the species and associated habitats remaining viable.
249. In respect to the Spotted Tailed Quoll, ACEN called Dr Grant Daniels, an expert in conservation ecology and development impact assessment, who observed that there is no evidence that the species occurs on Robbins Island. He considered the risk of roadkill to the quoll in respect to Robbins Island Road and reached the same conclusions and recommendations as referred to below in respect to the Tasmanian Devil.
250. The effects of the proposal on these species are not bases to refuse a permit.

Grounds in respect to birds

251. For the above reasons grounds 8 – 21 inclusive are not bases for refusal of a permit.

Tasmanian Devils

252. Ground 37 raises the impact of the proposal on Tasmanian Devils.
253. Robbins Island contains a significant and healthy Tasmanian Devil population. The proposal gives rise to assertions of three risks in respect to devils:
- destruction of lair habitats;
 - roadkill; and
 - earlier access of devil facial tumour disease to the currently unaffected Robbins Island devil population.

Destruction of lair habitats

254. There is potential for construction activity to impact on the devil population by destruction or degradation of lair habitat.
255. Condition FF13, requires that a pre-construction survey of Tasmanian Devil dens be undertaken in accordance with identified guidelines to the satisfaction of the EPA, and that a report be submitted to the EPA. The condition provides for the approval in advance of den decommissioning plans for any Tasmanian Devil den that cannot be conserved, and for mitigation measures to reduce impacts to identified devil dens. No evidence was led that those proposed measures will not be sufficient to protect the devil lair habitat.

Roadkill

256. The most significant immediate threat to devils on Robbins Island by the proposal is from animals being struck by vehicles.
257. Dr Daniels considered that the risk of roadkill can be mitigated by measures including vehicle speed limits on project roads, limiting night-time movement of vehicles, removal

of carrion from roadsides and installation of virtual fencing along the length of Robbins Island Road. Except for virtual fencing each of these matters is expressly required by condition FF12 imposed by the EPA. That condition requires the preparation of a roadkill monitoring and adaptive management plan which must be approved before construction is commenced. Together with virtual fencing these measures should be sufficient to minimise the risk of devil roadkill.

Devil facial tumour disease

258. Dr Daniels and Dr Meredith agreed that the Robbins Island devil population is free of devil facial tumour disease (**DFTD**). Both also agree that there is, and always has been, movement of devils between Robbins Island and the mainland across Robbins Passage, as a consequence of which they conclude that DTFD will inevitably reach Robbins Island with or without the proposed bridge. The only difference between the two experts is the anticipated rate of transmission. Dr Daniels postulates that the disease could arrive on Robbins Island within two years, based on the current rate of spread elsewhere in northwest Tasmania. Dr Meredith thought that it could be as long as 10 years given that the movement of devils across Robbins Passage would be infrequent. Both experts emphasised the uncertainty of their estimates. Given the inevitable movement of DTFD to Robbins Island, the advantage in delaying that movement is if a cure were discovered within the next 10 years. Neither expert indicated that that was likely.
259. Dr Daniels and Dr Meredith also agreed that measures should be taken to slow the introduction of DFTD to Robbins Island by way of features built into the bridge design to prevent devils using it to access the island. Dr Daniels considered that the design features built into the Dunalley Bridge at Dunalley in southern Tasmania have successfully prevented movement of infected devils into the Forestier Peninsula, and that a similar approach could be readily adapted to the Robbins Island Bridge. The Dunalley Bridge has a surface much like a cattle-grid that is not conducive to devils walking across it, and has cameras monitoring the bridge, with real time feedback to regulators, which are triggered by devils and set off deterrent noises and flashing lights to scare them away. Dr Meredith considered that, compared to Dunalley, the Robbins Island Bridge will be a different type of structure in a different environment. He considered that the design parameters for the bridge should be specified in the conditions.
260. Condition CNI, as required by the EPA, requires that a construction design report be submitted to the EPA for approval in advance of construction. The condition includes a requirement to detail design specifications of the bridge structure to minimise environmental impacts, including access by fauna via the bridge. Dr Daniels recommends that the bridge design include barriers to devil use at both the mainland and Robbins Island ends, and that the barriers on the mainland end include one-way flaps for devils to escape the bridge should they manage to breach the barriers and become at risk of being trapped on the bridge. Dr Daniels evidence was that devils will readily use one-way flaps and that this would be an effective escape mechanism back to the mainland. It is not necessary to specify the particular design features in the conditions. It is reasonable to leave final approval of the devil proofing to the EPA.
261. Ground 37 is not a basis to refuse a permit.

Geoheritage

262. Ground 35 contends that the EPA should have directed the Council to reject the proposal on geoconservation grounds. As explained elsewhere in these reasons we are not concerned with error by the EPA, but the issue was advanced in evidence and submissions going to the conditions of a permit to preserve geosites of significance.
263. There are four sites of geo-conservation significance listed on the Tasmanian Geo-conservation Database which are on, or directly proximal to, the project area on Robbins Island: White Rock Ridge, Robbins Passage, Back Banks and Remarkable Banks. Each of these geosites will be impacted to some degree by the development aspects of the proposal.
264. The Tasmanian Geo-conservation Database is a database of geo-diversity features of conservation significance. The database is publicly accessible through the Land Information System Tasmania and the Tasmanian Natural Values Atlas, both of which are administered by the Department of Natural Resources and Environment Tasmania. ACEN sought to subvert the authority of the database on the basis that listing is assessed by a volunteer group, the Tasmanian Geo-conservation Database Reference Group, which is not a statutory authority that operates according to a terms of reference document that it may amend from time to time, and that the database has a non-consultative listing process. Notwithstanding this, the reference group that curates the database is constituted by recognised experts with peer support. The fact that it is housed within the Department of Natural Resources and Environment Tasmania indicates that the database is a trusted source.
265. We heard evidence from three expert witnesses, Dr Ian Goodwin, a geoscientist and climatologist called by ACEN, Dr Melinda McHenry, an expert in physical geography called by the Bob Brown Foundation and Mr Grant Dixon, and expert in geology and geoconservation, also called by the Bob Brown Foundation. It was the work of Dr Goodwin that resulted in the Remarkable Banks being listed on the database. Dr McHenry and Mr Dixon are members of the reference group.
266. There was general agreement between all three experts as to the significance of the geosites, but disagreement as to the impact of works and the preferred measures for the protection of those sites. Of the three experts, only Dr Goodwin has undertaken work on Robbins Island. He has done so on a number of occasions and has published research concerning Remarkable Banks.

White Rock Ridge

267. White Rock Ridge is a relict boulder beach and embayment on the northwest of Robbins Island. An exclusion zone is proposed to protect the geosite, a measure that was deemed appropriate by each of the experts. Dr McHenry was concerned about the possibility of edge effects associated with nearby quarry impacting on the geosite and considered that some buffering was necessary but neither Dr Goodwin nor Mr Dixon indicated any need for additional buffers to the exclusion zone.

Robbins Passage

268. Robbins Passage is a tidal channel system over which the bridge is proposed to be constructed. Mr Dixon considered that this development was unlikely to impact the geosite and Dr Goodwin made no mention of any concerns. Dr McHenry raised a number

of concerns in respect to compounding sediment and tidal events which she described as of unknown consequence due to incomplete modelling of the bridge structure but which she presumed would be of low to moderate consequence. She recommended further investigation but did not recommend that development be excluded from Robbins Passage. Dr McHenry's concerns can be dealt with by an appropriate condition requiring the preparation of a management plan for the Robbins Passage geosite for approval by the EPA prior to construction.

Back Banks

269. Back Banks is a barrier dune system of approximately 9-10 kms backing the exposed beaches of Ransonnet Bay on the northeast coast of Robbins Island. The only part of the entire geosite that will be impacted by works associated with the proposal is a stretch of approximately 50 m to accommodate the wharf. That area represents approximately 0.5 per cent of the entire Back Banks geosite.
270. Dr McHenry believes that the consequence of the wharf emplacement will be catastrophic at the point of excavation. That is clearly the case, as the fore-dune will be destroyed at that point. She concludes that this impact will diminish the value of the dune system as a whole due to its integrity and representative reference values. Mr Dixon considered that the geosite's significance would not be fundamentally compromised as long as appropriate permit conditions are applied. Dr Goodwin made no assessment of the significance of the impact of the wharf on the geosite but indicated that a pre-construction geo-scientific survey should be conducted to sample the geo-heritage and that any data generated should be archived and assessable for future scientific study.
271. Mr Dixon, in response to questions from the Tribunal, said that the site of the proposed wharf would be over a frontal dune and that the dune is a mobile landform. Dr McHenry confirmed that the dune has a mobile component. The wharf would therefore be a development falling within cl 1.4 of the coastal policy. The Scheme was prepared in contemplation of the coastal policy and contains no prohibition on development on actively mobile landforms. The Scheme is the expression of the public interest in the orderly and appropriate management of development in the municipality: *Jezreel Pty Ltd & Anor v Brisbane City Council & Anor* [2023] QPEC 7 at [361] and [370]. The State Coastal Policy acknowledges this in cl 2.1.4, which provides that "Planning schemes...will provide guidance for resource allocation and development in accordance with this Policy".
272. The balance of the expert advice is that the destruction of the tiny portion of the Back Banks geosite will not materially impact its geo-heritage significance and the risk may be dealt with by an appropriate conditions requiring the preparation of a management plan for approval by the EPA prior to commencement of works.

Remarkable Banks

273. Remarkable Banks is a Pleistocene beach ridge complex consisting of around 140 low-level sand ridges that range in length from 2.8 km to 7 km and occupy an area of approximately 1,490 ha. The Tasmanian Geo-conservation Database identifies them as being the most extensive and best preserved of their type in Tasmania, containing an almost continuous record of sea level change over the last interglacial period, which occurred between 130,000 and 115,000 years BP. Dr Goodwin considers it to be a unique

index record of the last interglacial period. The database gives the geosite a rating of global significance.

274. ACEN proposes to locate 33 turbines within the Remarkable Banks area. ACEN has calculated the area of disturbance associated with those turbines at 75.2ha, most of which is the footprints of turbines and roads. The area of disturbance represents approximately 5 per cent of the remarkable banks geosite.
275. Both Dr McHenry and Mr Dixon vigorously oppose any development within the Remarkable Banks geosite. Mr Dixon contends that the geosite is too important a site to be further degraded in any way. He did not consider that a proposed exclusion zone across the Remarkable Banks is a satisfactory proposal for protecting the values of the site. Dr McHenry was more robust in her opposition. She considered Remarkable Banks as the geosite most likely to suffer broad-scale catastrophic impacts to its integrity and interpretative potential due to the development. She considered that the proposal would destroy the global significance of the site. Mr Dixon did not agree with this. He said that it would retain its global significance unless it was completely destroyed. He said that condition and significance are not the same thing. The proposal might retain its global significance, but that does not mean that it will remain as good a site.
276. The measures proposed to conserve those values are a 100 m wide exclusion zone extending the full length of the geosite, a LiDAR scan of the land-form topography, sedimentological analysis, ground penetrating radar transects and sand sample dating at all sites of disturbance across Remarkable Banks.
277. Dr Goodwin's evidence was that the 100 m exclusion zone would be sufficient to preserve a representative sample of the landform in the presence of the proposal, and that this, in turn, will allow future scientific study of the geomorphological record contained within Remarkable Banks. His view is that the geosite's value as an index or reference site would be maintained. Dr Goodwin was engaged with ACEN's project architect and engineer, GHD, in the planning stage, and initially recommended a 200 m wide exclusion zone. In cross-examination he said that he considered 200 m preferable, but not necessary. The Bob Brown Foundation submitted that Dr Goodwin's evidence was compromised by his negotiations with GHD. It was apparent from Dr Goodwin's evidence that ideally his preference would be that there be no development on Remarkable Banks. His opinion was constrained by the fact that a permit had been issued and that the development would proceed. He was essentially confronted with having to make the best of the situation and to provide advice as to how the significant values of the geosite could be conserved as a natural archive in co-existence with the wind farm.
278. The science in respect to this issue is not uncertain, and accordingly the precautionary principle is not engaged. Remarkable Banks will be impacted by the development. However, its basic function for scientific study can be retained by the exclusion zone and the ascribed values will not be irreparably compromised. It may also be observed that the 95 per cent of the geosite not impacted by the development will remain available for study.
279. Ground 35 is not made out as a basis to refuse a permit.

Standards in the Scheme

280. The grounds of appeal assert that the proposal will fail to comply with certain standards in the Rural Resource Zone and in the Environmental Management Zone of the Scheme.
281. The relevant standards in the Rural Resource Zone are in clauses 26.3.1, 26.4.1 and 26.4.2.
282. The standards in the Environmental Management Zone are in clauses 29.3.2 and 29.4.1.
283. We heard expert planning evidence from Mr Shephard and Ms Riley. No other planning expert was called.

Are local area objectives and desired future character statements standards?

284. A number of grounds raised compliance with the local area objectives and the desired future character statements in the Rural Resource Zone and the Environmental Management Zone. It should be noted that local area objectives and desired future character statements, like zone purpose statements, are not in themselves standards against which a proposal is to be assessed, unless a use standard or a development standard requires compliance with them: *Craig Webb Pty Ltd v Launceston City Council* [2023] TASCAT 108 [58]-[72], *Mount Wellington Cableway Company Pty Ltd v Hobart City Council & Ors* [2022] TASCAT 128 at [41]-[42]; *Clarence City Council v Resource Management and Planning Appeal Tribunal* at [50]-[56] and *Boland v Clarence City Council* [2021] TASSC 5 [9].
285. The proper approach to assessment and the contextual use of objectives was explained by Brett J in *Clarence City Council v Resource Management and Planning Appeal Tribunal* at [53]-[61] and in *Boland v Clarence City Council* [2021] TASFC 5 at [9]-[11].
286. If local area objectives and desired future character statements are not directly brought into consideration by a use standard or a development standard they may still provide context for the construction of acceptable solutions and performance criteria in standards: *Raff Angus Pty Ltd v Resource Management and Planning Appeal Tribunal* [2018] TASSC 60 at [22]. They may also ground a legitimate planning purpose on which to base conditions of a permit as described in *Planning Commission (WA) v Temwood Holdings Pty Ltd*.

A general discretion to refuse a permit?

287. The Circular Head Coastal Awareness Network submitted that cl 8.8.1 of the Scheme conferred a discretion on the Tribunal to refuse an application even if it satisfies the applicable standards. A well-developed argument that an identical clause in the Launceston Interim Planning Scheme 2015 gave rise to a discrete discretion in addition to the standards established by acceptable solutions and performance criteria was considered and rejected by the Tribunal in *Craig Webb Pty Ltd v Launceston City Council* for the reasons set out in that decision at [48]-[56] and [58]-[73]. We respectfully adopt that reasoning.

Clause 26.3.1 - Requirement to locate on rural resource land in the Rural Resource Zone

288. The proposal falls for assessment under the use standard in cl 26.3.1. Grounds 26, 38 and 47 assert that the proposal will not comply with the standard.

289. Clause 26.3.1 provides:

26.3.1 Requirement for discretionary non-residential use to locate on rural resource land

Objective:	
Acceptable Solutions	Performance Criteria
AI	PI
There is no acceptable solution	<p>PI Other than for residential use, discretionary permit use must –</p> <p>(a) be consistent with the local area objectives;</p> <p>(b) be consistent with any applicable desired future character statement;</p> <p>(c) be required to locate on rural resource land for operational efficiency –</p> <p>(i) to access a specific naturally occurring resource on the site or on adjacent land in the zone;</p> <p>(ii) to access infrastructure only available on the site or on adjacent land in the zone;</p> <p>(iii) to access a product of primary industry from a use on the site or on adjacent land in the zone;</p> <p>(iv) to service or support a primary industry or other permitted use on the site or on adjacent land in the zone;</p> <p>(v) if required –</p> <p>a. to acquire access to a mandatory site area not otherwise available in a zone intended for that purpose;</p> <p>b. for security;</p> <p>c. for public health or safety if all measures to minimise impact could create an unacceptable level of risk to human health, life or property if</p>

	<p>located on land in a zone intended for that purpose;</p> <p>(vi) to provide opportunity for diversification, innovation, and value adding to secure existing or potential primary industry use of the site or of adjacent land;</p> <p>(vii) to provide an essential utility or community service infrastructure for the municipal or regional community or that is of significance for Tasmania; or</p> <p>(viii) if a cost-benefit analysis in economic, environmental, and social terms indicates significant benefits to the region; and</p> <p>(d) minimise likelihood for –</p> <p>(i) permanent loss of land for existing and potential primary industry use;</p> <p>(ii) constraint or interference to existing and potential primary industry use on the site and on adjacent land; and</p> <p>(iii) loss of land within a proclaimed irrigation district under Part 9 Water Management Act 1999 or land that may benefit from the application of broad-scale irrigation development</p>
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290. Clause 26.3.1 has no acceptable solution. The proposal must satisfy the performance criteria PI. PI(a) to (d) are cumulative, and the proposal must meet each requirement. The eight elements of PI(c) are framed in the alternative. The three elements of PI(d) are cumulative.
291. The grounds raising cl 26.3.1 assert that the proposal will not comply with the standard because:
- (a) It is not consistent with the local area objectives in cl 26.1.2 as required by PI(a);
 - (b) It is not consistent with the desired future character statement in cl 26.1.3 pursuant to PI(b);
 - (c) It is not required to locate on rural resource land for operational efficiency having regard to PI(c)(i), (iv), (vi) and (vii).

- (d) It will not minimise the likelihood for permanent loss of land for existing and potential primary industry use and will constrain or interfere with existing and potential primary industry use on the site pursuant to PI(d)(i) and (ii).

Local area objectives

292. PI(a) requires consistency with the local area objectives. The local area objectives are set out in cl 26.1.2 and provide:

26.1.2 Local Area Objectives

- (a) The priority purpose for rural land is primary industry dependent upon access to a naturally occurring resource;
- (b) Air, land and water resources are of importance for current and potential primary industry and other permitted use;
- (c) Air, land and water resources are protected against –
- (i) permanent loss to a use or development that has no need or reason to locate on land containing such a resource; and
 - (ii) use or development that has potential to exclude or unduly conflict, constraint, or interfere with the practice of primary industry or any other use dependent on access to a naturally occurring resource;
- (d) Primary industry is diverse, dynamic, and innovative; and may occur on a range of lot sizes and at different levels of intensity;
- (e) All agricultural land is a valuable resource to be protected for sustainable agricultural production;
- (f) Rural land may be used and developed for economic, community, and utility activity that cannot reasonably be accommodated on land within a settlement or nature conservation area;
- (g) Rural land may be used and developed for tourism and recreation use dependent upon a rural location or undertaken in association with primary industry
- (h) Residential use and development on rural land is appropriate only if –
- (i) required by a primary industry or a resource based activity; or
 - (ii) without permanent loss of land significant for primary industry use and without constraint or interference to existing and potential use of land for primary industry purposes
293. The requirement to be consistent with local area objectives and desired future character statements was considered by RMPAT *Star Box Architecture v Latrobe Council & Anor* [2020] TASRMPAT 7 at [16]:

16. The ordinary meaning of ‘consistent’ in this context means ‘compatible’, ‘congruous’, or ‘in agreement with’. However, the legal meaning of an adjective will not necessarily correspond with the dictionary meaning. The Tribunal considered the meaning of a use being “consistent with” local area objectives in a rural resource zone in *R Brown and T Shaw v Launceston City Council and Bullock Consulting* [2014] TASRMPAT 15 and approved the approach of Bignold J in the New South Wales Land and Environment Court in *Dem Gillespies v Warringah Council* [2002] NSWLEC 224. His Honour considered the meaning of the phrase in the context of a provision that required consideration of whether a development was consistent with a

statement of desired future character in a planning instrument. He concluded that consistent had its ordinary and natural meaning, and that it was not necessary to show that a development was antipathetic to the relevant characteristics to establish that it was not consistent: at [12]. In respect to the practical task of undertaking an assessment of consistency, his Honour, referring to a decision of *Stein J in Bodyline Spa & Sauna (Sydney) Pty Ltd v South Sydney City Council (1992) 77 LGRA 432* said:

“Whereas it is the case that his Honour expressly rejected the submission that “a positive finding of compatibility was required” his Honour nonetheless held that what was required was a finding that the development is “not incompatible or inconsistent with” the residential development. That remains a **positive** finding though expressed via a double negative and with great respect I do not for myself see much difference between a requirement that there be a finding that a proposed development is “consistent with” a zone objective and a requirement that there be a finding that a proposed development is “not inconsistent with” a zone objective.” [His Honour’s emphasis]

It follows that if the proposed development is not inconsistent with the local area objectives it will satisfy P1(a).

294. Both Mr Shephard and Ms Riley considered that the proposal would be consistent with each of the eight local area objectives in cl 26.1.2.
295. Objective (a) is that the priority purpose for rural land is primary industry dependent upon access to a naturally occurring resource. Primary industry is not defined in the Scheme or LUPAA. Accordingly, pursuant to cl 4.1.1 of the Scheme it will have its ordinary meaning. The Macquarie Dictionary definition of primary industry is “any industry such as dairy farming, forestry, mining, etc, which is involved in the growing, producing, extracting, etc of natural resources”. Although Mr Riley, consistently with Mr Shephard, assessed the proposal as falling into the utilities use class, she observed that a wind farm harnesses wind as a natural resource and seeks to convert it into electricity, and in this respect it has similarities to other primary industry activities.
296. Robbins Island is currently used for a relatively low intensity agricultural use of cattle grazing. Ms Riley’s evidence was that the proposal will cover 305.2 ha out of the total area of 9,869 ha, or 3.1 per cent of the total area of the island. It will result in some land being no longer available for primary industry, but most of the island will continue to be available for use for primary industry purposes.
297. Objective (b) is that air, land and water resources are of importance for current and potential primary industry and other permitted use. The site has air and land resources. The proposal is being pursued because of the quality of the air, or more particularly the quality of the wind resource available on the site. The use of the wind resource and the land area to be used will not alter the importance of those resources for current or potential primary industry use, or any other permitted use in the use table 26.2 for the Rural Resource Zone. There was no evidence that the existing cattle farming activity would be obstructed or restricted by the loss of air, land or water resources to the proposal.
298. Objective (c) has two parts. The first part is that air, land and water resources are protected against permanent loss to a use or development that has no need or reason to

locate on land containing such a resource. The second part is that air, land and water resources are protected against use or development that has the potential to exclude or unduly conflict, constrain or interfere with the practice of primary industry or any other use dependent on access to a naturally recurring resource.

299. No air or water resource will be lost. There will be a very small loss to primary industry of 3.1 per cent of the island area on the island. Ms Riley calculated this as 0.1 per cent of the total area of the Rural Resource Zone. That loss will exist while the wind farm is operational. Condition DCI directed by the EPA requires that the land be rehabilitated once the wind farm is decommissioned, which would return the land resource.
300. Mr Trenton Gilbert, an expert in wind resource and energy production, gave evidence for ACEN. His opinion was that the Robbins Island wind resource can be considered comparatively strong having regard to the mean wind speed across the proposed turbine locations. There is a need to locate the wind farm on the site to access the wind resource, such that the proposal has a reason to locate on the site.
301. ACEN called Dr Lee Peterson, an expert in agriculture, who observed that Robbins Island has approximately 2,267 ha currently developed as pasture area, which is about 23 per cent of the island. He considered that the site was not suitable for intensive cropping. He observed that the proposal will result in the loss of 34 ha of the currently developed agricultural land, however he considered that the proposal will not exclude or unduly conflict, constrain or interfere with the current primary production practice of grazing.
302. Objective (d) is that primary industry is diverse, dynamic and innovative, and may occur on a range of lot sizes and at different levels of intensity. This objective identifies the wide range of possible primary industry uses and impacts in the zone. The proposal is not inconsistent with this.
303. Objective (e) is that all agricultural land is a valuable resource to be protected for sustainable agricultural production. The existing grazing resource will only be marginally affected, as we have outlined.
304. Objective (f) is that rural land may be used and developed for economic, community and utility activity that cannot reasonably be accommodated on land within a settlement or nature conservation area. This objective recognises that rural land may be developed for purposes other than primary production, and specifically contemplates development for utilities. Clearly wind farms would not be welcome or feasible within settlements or nature conservation areas, for obvious reasons. The zone clearly contemplates the establishment of wind farms by making utilities a discretionary use and providing specific standards for wind power turbines in cl 26.4.2 A3.1 and P3.1 and A3.2 and P3.2.
305. Objective (g), which is that rural land may be used and developed for tourism and recreation use dependent upon a rural location or undertaken in association with primary industry is not relevant to the proposal.
306. Objective (h) provides that residential use and development on rural land is appropriate only in certain circumstances. The proposal is not for a residential use. It does include temporary workers accommodation to support construction of the proposal, which will be ancillary to the utilities use and will be located on land that will be used for the permanent maintenance and services facility.

307. The proposal is consistent with each of the relevant local area objectives.

Desired future character statement

308. PI(b) requires consistency with any applicable desired future character statement. The desired future character statements are set out in cl 26.1.3:

26.1.3 Desired Future Character Statements Use or development on rural land –

(a) may create a dynamic, extensively cultivated, highly modified, and relatively sparsely settled working landscape featuring –

- (i) expansive areas for agriculture and forestry;
- (ii) mining and extraction sites;
- (iii) utility and transport sites and extended corridors; and
- (iv) service and support buildings and work areas of substantial size, utilitarian character, and visual prominence that are sited and managed with priority for operational efficiency

(b) may be interspersed with –

- (i) small-scale residential settlement nodes;
- (ii) places of ecological, scientific, cultural, or aesthetic value; and
- (iii) pockets of remnant native vegetation

(c) will seek to minimise disturbance to –

- (i) physical terrain;
- (ii) natural biodiversity and ecological systems;
- (iii) scenic attributes; and
- (iv) rural residential and visitor amenity;

(d) may involve sites of varying size –

- (i) in accordance with the type, scale and intensity of primary industry; and
- (ii) to reduce loss and constraint on use of land important for sustainable commercial production based on naturally occurring resources;

(e) is significantly influenced in temporal nature, character, scale, frequency, and intensity by external factors, including changes in technology, production techniques, and in economic, management, and marketing systems

309. Statement (a) provides that use or development on rural land may create a dynamic, extensively cultivated, highly modified and relatively sparsely settled working landscape featuring utility sites and service and support buildings and work areas of substantial size, utilitarian character and visual prominence that are sited and managed with priority for operational efficiency. This statement acknowledges that rural landscapes may be eclectic working landscapes. Ms Riley's evidence was that the rural areas of Circular Head demonstrate a dynamic, modified and sparsely settled working landscape. She considered that the site and surrounding landscape feature a patchwork of improved and unimproved grazing paddocks, remnant native vegetation, isolated dwellings and clusters of agricultural buildings and utility structures, including existing wind farms that are visually prominent

and are utilitarian in character. The proposal will maintain the landscape pattern identified by Ms Riley, which is consistent with statement (a).

310. Statement (b) provides that use or development on rural land maybe interspersed with small scale residential settlement nodes, places of ecological, scientific, cultural, or aesthetic value, and pockets of remnant native vegetation. This statement acknowledges that development may be interspersed with other elements. Insofar as those elements are identified on Robbins Island, it does not contain a residential settlement node, although there are a small number of residential dwellings existing on the island. In terms of ecological and scientific value, Robbins Island includes sites of geoheritage significance, Aboriginal heritage significance, native vegetation and fauna of ecological significance. The siting of the proposal will not significantly alter that existing pattern, which reflects the mixed and varied nature of rural resource land and how it may have multiple values in planning terms.
311. Statement (c) is that use or development on rural land will seek to minimise disturbance to physical terrain, natural biodiversity and ecological systems, scenic attributes and rural residential and visitor amenity. The statement implicitly acknowledges that use and development may result in disturbance to those characteristics. In a similar context Porter AJ in *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* [2017] TASFC 14 at [81] said:
- Minimisation does not mean reduced to nothing or to something negligible, nor in this context is it to be examined in the abstract. The concept is relative to the situation. Assessments need to be made about the environs; and whether proposed measures for minimisation are appropriate given the situation. The Tribunal quite clearly failed to give any consideration to the likely residual risk, or effects or harm, and the consequences in terms of the grant or refusal of the permit. Its focus was only on minimisation as such, and not on the likely impact of the end result of that minimisation process.
312. The proposal will result in localised impacts to a small proportion of the terrain of Robbins Island, through excavation, cutting and filling associated with building, roadworks and quarrying. The degree of disturbance will be minimal.
313. The proposal will result in disturbance to biodiversity and ecological systems and geoheritage values which are discussed above and which may be addressed with conditions to satisfy the standard.
314. Ms Riley's view was that the site did not demonstrate any moderate or high quality scenic characteristics. The island is similar in landscape characteristics to the surrounding mainland areas, comprising low lying pastoral land with some undulations in topography and areas of remnant native vegetation that is dense and scrubby.
315. In respect to rural residential and visitor amenity the proposal will not have any direct impacts such as noise, odours and other emissions, or affect privacy or access to sunlight. The proposal is distant from rural residential areas. The nearest residence to Robbins Island is 2.8 km away. In respect to visitor amenity, Ms Riley's evidence was that Robbins Island and the surrounding area is not a key focus of visitation for the Circular Head area.

316. The only amenity impact would be in terms of view. Evidence of visual amenity was led by ACEN from Mr Steve Shutt, an expert on landscape and visual impact. For the purposes of statement (c) the visual montages created by Mr Shutt indicate that there would be minimal disturbance to residential and visitor amenity from the appearance of the wind farm.
317. Statement (d) is that use or development on rural land involves sites of varying size in accordance with the type, scale and intensity of primary industry and to reduce loss and constraint on use of land important for sustainable commercial production based on naturally occurring resources. The proposal does not raise any issues in respect to this statement.
318. Statement (e) provides that use or development on rural land is significantly influenced in temporal nature, character, scale, frequency and intensity by external factors, including changes in technology, production techniques, and in economic, management and marketing system. The proposal involves a site which is influenced in character and scale by changes in technology and economic systems given the development of wind generated energy systems and their commercial viability, reflecting how rural landscape is affected by changes and external factors over time.
319. The proposal is consistent with the applicable desired future character statement.

Location on rural resource land for operational efficiency

320. PI(c) provides that the use must be required to locate on rural resource land for operational efficiency on the basis of certain listed circumstances. The circumstances are framed in the alternative, such that the proposal need only meet one of the eight circumstances.
321. Brett J considered an identical standard in a different planning scheme in *Raff Angus Pty Ltd v Resource Management and Planning Appeal Tribunal* [2018] TASSC 60. At [24] his Honour described the purpose of cl 26.3.1:

24. In my view, the objectives stated in cl 26.3.1 provide an important aspect of the context within which the meaning of the text used in the performance criteria must be considered. It is clear that the overall purpose of the provision is to limit the location of discretionary non-residential use on Rural Resource land in order to minimise the loss of agricultural land or unreasonable conflict or interference with land used for that purpose. Accordingly, the performance criterion sets the parameters of limitation of uses so as to ensure that those uses and developments are both consistent with the agricultural use of Rural Resource land and reasonably located in that zone. Hence, subpar (c) provides eight separate circumstances, read disjunctively, within which the use or development must fall before it will comply with the performance criterion. The intended operation, in my view, is not to set an ironclad restriction on what can be located in the zone, but rather to limit acceptable uses to those which can demonstrate a reasonable basis for location within the zone, having regard to the categories specified in subpar (c).

322. His Honour considered the effect of the words ‘for operational efficiency’ at [29] to [31]:

30. There is no doubt that those words, taken alone, are incongruous with the balance of the provision. They impart a standard which must be subjective to the

particular use, and incapable of any form of precise quantification or definition. "Operational efficiency" can only be measured against the subjective standards of the particular development. The phrase has no real meaning within a planning context, and certainly not in respect of a performance criterion purporting to constrain development.

31. The words do, however, derive some sensible meaning if the relevant provisions are interpreted as linking the purpose or pre-condition prescribed by the particular criterion to the location of the proposal on Rural Resource land. If that is the case, then the use of those words suggests that it must be demonstrated that there is some efficiency or advantage to be gained in respect of the relevant purpose or condition, from the location of the development within the zone. Hence, using subpar (c)(i) as an example, an evaluative assessment would be required as to whether there is "operational efficiency" in locating the development in the Rural Resource Zone for the purpose of accessing a specifically naturally occurring resource on the site or adjacent land in the zone. Such an assessment might reveal that a development which purports to locate itself in the zone for that purpose cannot achieve satisfactory operational efficiency in giving effect to that purpose, and hence would not satisfy the performance criterion. This approach to the construction of the words in question is consistent with the context provided by the fact that the words are intended to describe evaluative standards applied as performance criteria to proposed uses. The words are intended to inform an evaluative judgment made for the purpose of the exercise of a discretion, and not prescriptive standards capable of precise definition.

323. Ms Riley observed that a fundamental and intrinsic element of the operational efficiency of a wind farm is the suitability and quality of the wind resource. In respect to why the operational efficiency of a wind farm is best achieved on rural land she said that:
- the majority of land in the municipality, nearly 59 per cent in total land area, is within the Rural Resource Zone;
 - land within the largest lots in private ownership are within the zone;
 - wind farms are compatible with ongoing pastoral activities and do not sterilise land in the zone;
 - most of the flatter land is in the zone;
 - wind farms have noise emissions that require them to be sited away from populated areas; and
 - once operational, wind farms have low intensity operational needs that do not require locations close to major transport routes or other reticulated services.
324. Ms Riley noted that existing wind farms in Tasmania are all located on rural land. PI(c)(i) requires location on rural resource land for operational efficiency to access a specific naturally occurring resource on the site or on adjacent land in the zone. Mr Gilbert's evidence established that Robbins Island has a high quality wind resource that is suitable for a wind farm. Wind is a naturally occurring resource on the site. As observed in *Raff Angus* it is not necessary that the wind resource is exclusive to the site, nor that there are other sites which might have a similar wind resource.
325. PI(c)(ii) and (iii) are not relevant to the appeal.

326. PI(c)(iv) provides that the proposal be required to locate on rural resource land for operational efficiency to service or support a primary industry or other permitted use on the site or on adjacent land in the zone. Aspects of the proposal, such as the bridge and road network may provide an incidental benefit to the grazing use on the land. However, that is not the purpose of the wind farm use.
327. PI(c)(v) was not raised on the appeal.
328. PI(c)(vi), to provide opportunity for diversification, innovation, and value adding to secure existing or potential primary industry use of the site or of adjacent land, invites the same analysis as PI(c)(iv).
329. PI(c)(vii) provides that the proposal be required to locate on rural resource land for operational efficiency to provide an essential utility or community service infrastructure for the municipal or regional community or that is of significance for Tasmania. Electricity is an essential requirement of modern life, particularly where it is generated in a sustainable renewable manner. ACEN led evidence on this point from Mr Draper. Mr Draper was criticised by the Bob Brown Foundation in respect to credit relating to the independence of his evidence, and by the Circular Head Coastal Awareness Network on the basis of his methodology in terms of assessing the economic benefit of the proposal, although his methodology in respect to assessment of demand was not challenged.
330. Mr Draper undertook an assessment of the national energy market and the operational scenarios for the proposal in that market up to 2050. He also assessed the anticipated contribution of the proposal to the state meeting the Tasmanian Renewable Energy Target established by s 3C(2) of the *Energy Coordination and Planning Act 1995*. Mr Draper set out his method and the assumptions on which it was based. He concluded that, consistent with other regions, Tasmania will experience a demand for increased electricity consumption that will require new energy supply sources. He described the current demand and supply conditions in Tasmania as tight, requiring gas fired power generation to meet peak demand. He considered that the proposal would make a substantial contribution to meeting the Tasmanian Renewable Energy Target.
331. The Bob Brown Foundation led evidence from Prof Bruce Mountain, an expert in energy economics. Prof Mountain provided detailed historical data in respect to electricity generation and demand which led him to conclude that the Tasmanian electricity market is well supplied. He noted that the maximum production from the proposal could double electricity generation by wind in Tasmania. He considered that it would be likely to reduce the demand for electricity from Victoria in summer and increase the export of electricity from Tasmania in winter. He did not consider that the proposal is required in order to establish electricity security in Tasmania. He considered that it would be no more essential than any other electricity generation already operating in Tasmania. Prof Mountain did not, however, model future supply needs or consider the contribution of the proposal to the state meeting the Tasmanian Renewable Energy Target. We accept Mr Draper's evidence as establishing that the proposal will have relevant significance for Tasmania.
332. PI(c)(vii) requires the provision of an essential utility. It does not require that the particular proposal be essential. In modern society, the generation of electricity is clearly an essential utility.

333. The next element of the criterion is that it be for the municipal or regional community or be of significance for Tasmania. Insofar as the proposal provides electricity for Tasmanian consumption, the municipal or regional community, however that might be defined, will share in the use of the generated power insofar as it feeds into the Tasmanian grid. More clearly, on the basis of Mr Draper's evidence, the proposal will be of significance for Tasmania in terms of contribution to meeting the Tasmanian Renewable Energy Target.
334. PI(c)(viii) is not relevant to the proposal, as there was no evidence of a cost benefit analysis.
335. The proposal is only required to satisfy one of the elements of PI(c). It satisfies PI(c)(i) and (vii).
336. PI(d)(i) and (ii) require that the proposal minimise likelihood of permanent loss of land for existing and potential primary industry use and minimise constraint or interference to existing and potential primary industry use on the site and adjacent land. PI(d)(iii) is not relevant to the proposal.
337. The elements of PI(d)(i) and (ii) are considered above in respect to the assessment of the local area objectives arising under PI(a). The difference between the standards is that PI(a) requires consistency, while PI(d) requires minimisation.
338. The final footprint of the proposal will amount to 3.1 per cent of Robbins Island. The majority of the wind turbine generators will be located away from existing pasture. Once the proposal is constructed grazing will be able to recommence around the wind turbines in the existing pasture areas. Ms Riley said that this was evident from other existing wind farms across Tasmania. She observed that wind farms are known for their compatibility with grazing activities and that it is common across Australia for wind farms to be located on pastoral land because, other than the physical footprint, there are no impacts that limit or prevent grazing activities. She considered that the benefits from improved access and transport resulting from the proposal would assist in minimising constraint and interference with the agricultural use. She extended her assessment to a possible impact on aquaculture activities and observed that the proposal will not impact the southeast coastline of Robbins Island which would be the most suitable area for onshore activities associated with aquaculture. She considered that there are no inherent characteristics of the proposal that would make it incompatible with aquaculture.
339. Dr Peterson's opinion coincided with Ms Riley's. He concluded that, with the additional bridge and road infrastructure, productivity will be improved on the site post-construction as it will open up further areas for conversion to pasture, which would offset the loss of pasture to the proposal. Mr Shephard relied on Dr Peterson's opinion to determine that the proposal will comply with PI. Mr Shephard observed that, because the site is an island, there will be no potential for constraint or interference on adjacent land in other ownership.
340. We are satisfied that the proposal will meet each of the performance criteria in cl 26.3.1 PI.
341. Grounds 26, 38 and 47 are not made out.

Clause 26.4.1 - Drainage and disposal of sewerage in the Rural Resource Zone

342. Grounds 27, 28 and 46 raise compliance of the proposal with cl 26.4.1 P4.

343. No appellant led evidence or made submissions in respect to this ground.

344. Clause 26.4.1 A4 and P4 provide:

26.4.1 Suitability of a site or lot on a plan of subdivision for use or development

Objective:	
<p>The minimum properties of a site and of each lot on a plan of subdivision are to –</p> <p>(a) provide a suitable development area for the intended use;</p> <p>(b) provide access from a road; and</p> <p>(c) make adequate provision for a water supply and for the drainage and disposal of sewage and stormwater</p>	
Acceptable Solutions	Performance Criteria
A4	P4
<p>Unless for agricultural use other than controlled environment agriculture which permanently precludes the land for an agricultural use dependent on the soil as a growth medium, a site or each lot on a plan of subdivision must be capable of draining and disposing of sewage and liquid trade waste –</p> <p>(a) to a sewerage system provided in accordance with the Water and Sewerage Industry Act 2008; or (b) by on-site disposal if –</p> <p>(i) sewage or liquid trade waste cannot be drained to a reticulated sewer system; and</p> <p>(ii) the development - a. is for a single dwelling; or b. provides for an equivalent population of not more than 10 people per day; or</p>	<p>(a) A site or each lot on a plan of subdivision must drain and dispose of sewage and liquid trade waste –</p> <p>(i) in accordance with any prescribed emission limits for discharge of waste water;</p> <p>(ii) in accordance with any limit advised by the Tasmanian Environmental Protection Agency;</p> <p>(iii) without likely adverse impact for the health or amenity of the land and adjacent land;</p> <p>(iv) without compromise to water quality objectives for surface or ground water established under the State Policy on Water Quality Management 1997; and</p> <p>(v) with appropriate safeguards to minimise contamination if the use or development has potential to –</p> <p>a. indirectly cause the</p>

<p>(iii) the site has capacity for on-site disposal of domestic waste water in accordance with AS/NZS1547:2012 On-site domestic-wastewater management clear of any defined building area or access strip</p>	<p>contamination of surface or ground water; or b. involve an activity or process which requires the use, production, conveyance or storage of significant quantities of sewage or liquid trade waste that may cause harm to surface or ground water if released through accident, malfunction, or spillage; or</p> <p>(b) It must be unnecessary to require the drainage and disposal of sewage or liquid trade waste</p>
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345. The proposal will not meet the requirements of A4, and so must comply with the performance criteria P4. P4 is framed in the alternative, and the proposal may therefore satisfy either (a) or (b). It will not satisfy (b). In order to comply with P4 (a) the proposal must comply with each of the five elements, which are framed as cumulative requirements.
346. Ms Riley's evidence was that the majority of sewerage generation by the proposal will be during the construction stage when there will be a higher number of workers on the site. As a consequence, a temporary tertiary treatment system will be required. During the operational phase of the proposal sewerage will be treated by an on-site wastewater system and utilised as irrigation for adjacent pasture.
347. The EPA assessed sewerage and liquid waste generation by the proposal and required conditions in the permit³. Based on the EPA assessment and conditions Ms Riley considered that the proposal would satisfy P4 (a)(i), (ii) and (iii). In the absence of any submissions or evidence to the contrary we accept her opinion.
348. Ms Riley also observed that P4(a)(iv) and (v) were assessed by the EPA and were addressed in conditions required by the EPA⁴. Those conditions require a construction environmental management plan, an erosion and sediment control plan, a sewerage treatment management plan, and wastewater and ground water and stormwater management. The State Policy on Water Quality Management 1997, referred to in P4(a)(iv) was applied across the EPA's assessment. Accordingly, both Ms Riley and Mr Shephard considered that P4(a)(iv) and (v) will be satisfied by the proposal.
349. The proposal will meet the requirements of cl 26.4.1.
350. Grounds 27, 28 and 46 are not made out.

Clause 26.4.2 - Location and configuration of development in the Rural Resource Zone

³ Conditions CN2 and CN9.

⁴ Conditions CN2, CN4, CN5, E1, E2, SW1, SW2, SW3, GW1 and GW2.

351. Grounds 29, 30, 32 and 39 raise compliance of the proposal with cl 26.4.2 P2, P3.1 and P3.2. The proposal will not satisfy the acceptable solutions A2, A3.1 or A3.2.

352. Those standards are:

26.4.2 Location and configuration of development

Objective:	
The location and configuration of development is to provide a reasonable consistency between sites for setback from a boundary, height of buildings, and location within the landscape	
Acceptable Solutions	Performance Criteria
<p>A2</p> <p>Building height must be not be more than 8.5m</p>	<p>P2</p> <p>Building height must -</p> <p>(a) minimise likelihood for overshadowing of a habitable room or a required minimum area of private open space in any adjacent dwelling;</p> <p>(b) minimise apparent scale, bulk, massing and proportion in relation to any adjacent building;</p> <p>(c) be consistent with the streetscape and rural landscape;</p> <p>(d) respond to the effect of the slope and orientation of the site; and</p> <p>(e) take into account the effect and durability of screening other than vegetation to attenuate impact</p>
<p>A3.1</p> <p>A building or utility structure, other than a crop protection structure for an agricultural use or wind power turbines or wind power pumps, must –</p> <p>(a) not project above an elevation 15m below the closest ridgeline;</p>	<p>P3.1</p> <p>The location, height and visual appearance of a building or structure except for wind power turbines or wind power pumps must have regard to –</p> <p>(a) minimising the visual impact on the skyline;</p>

<p>(b) be not less than 30m from any shoreline to a marine or aquatic water body, water course, or wetland;</p> <p>(c) be below the canopy level of any adjacent forest or woodland vegetation; and</p> <p>(d) clad and roofed with materials with a light reflectance value of less than 40%.</p> <p>A3.2</p> <p>Wind power turbines and wind power pumps must not exceed 20m in height.</p>	<p>(b) minimising height above the adjacent vegetation canopy;</p> <p>(c) minimising visual impact on the shoreline or a marine or aquatic water body, water course, or wetland where possible; and</p> <p>(d) minimising reflection of light from an external surface.</p> <p>P3.2</p> <p>Wind power turbines or wind power pumps must minimise their impacts on the broader landscape having regard to –</p> <p>(a) the visual impacts of the development;</p> <p>(b) the characteristics of the vicinity of the site;</p> <p>(c) the characteristics of the wind resource;</p> <p>(d) the topography of the site and how that location affords access to wind; and</p> <p>(e) potential impacts on birds.</p>
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353. Once again, the only planning evidence was provided by Ms Riley and Mr Shepard. Three photographs taken by a photographer, Mr Garth Smith, were tendered by the Circular Head Coastal Awareness Network. Mr Steve Schutt, a landscape architect called by ACEN, provided photomontages and opinion on visual assessment.

354. Each of the performance criteria contain elements requiring minimisation of certain effects. The observation by Porter AJ in a similar context in *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd* noted above will be applicable.

Building height

355. P2 provides standards for building height. in is defined in Clause 4.1.3 of the Scheme defines building as having the meaning as defined in LUPAA. The definition of building in LUPAA includes a structure, and would include each of the buildings and structures proposed, including the wind turbines and meteorological towers.

356. P2(a) and (b) are not relevant in respect to the proposal.

357. P2(c) requires that building height must be consistent with the streetscape and rural landscape. Streetscape is defined in cl 4.1.3 of the Scheme in the following terms:

Means the visual quality of a street depicted by road width, street planting, characteristics and features, public utilities constructed within the road reserve, the setback of buildings and structures from lot boundaries, the quality, scale, bulk and design of buildings and structures fronting the road reserve.

For the purposes of determining streetscape with respect to a particular site, the above factors are relevant only if within 100m of the site.

358. Mr Shephard considered that there was no established streetscape in respect to the proposal. He described the rural landscape on Robbins Island as comprising a mixture of pasture and vegetated areas. He said that in the broader area there are existing wind turbine generators at Woolnorth and other forms of rural infrastructure such as transmission towers, power lines, fencing, large sheds, silos, communication towers and irrigation infrastructure which are evident in the montages prepared by Mr Schutt. He relied on Mr Schutt's visual assessment.
359. Ms Riley observed that the site includes the Robbins Island road corridor and so had regard to the existing streetscape along Robbins Island Road. She noted that it has a character typical of rural roads with vegetation framing the road corridor, with grass verges opening across a pastoral landscape and with buildings not being a noticeable feature along the road corridor. She considered that the bridge, while a new built element, will be consistent with the streetscape by simply extending the road pavement which is already a key feature. She did not consider that the upgrade of the road surface from gravel to seal, with some widening, will significantly alter the characteristics of the streetscape environment.
360. In respect to the wind turbine generators, Ms Riley noted that they will be visible from Robbins Island Road but will not be adjacent to a streetscape. The nearest wind turbine will be nearly 3 km from the end of Robbins Island Road. She concluded that consistency with streetscape is not a relevant factor in their assessment.
361. In respect to consistency with the rural landscape Ms Riley said that that landscape is primarily a pastoral landscape with an existing presence of a wind farm in the area, at Woolnorth. Buildings and structures in the area have a utilitarian character. She considered that while the heights of key built elements of the proposal are much higher than any other existing built element in the landscape, in most views the proposal will be visible in the background and the pastoral landscape will remain the dominant visual element. Even from closer viewpoints she considered that the rural landscape character will be retained. She noted that the greatest visual impact will be in the coastline adjacent to Robbins Island and in Robbins Passage, but in those locations the tallest elements of the proposal will read as an element above the landscape which will retain its underlying characteristics. She considered that the meteorological masts will be visually imperceptible in the landscape due to their wire frame form.
362. P2 (d) has no relevance to the proposal.
363. P2 (e) requires that building height take into account the effect and durability of screening other than vegetation to attenuate impact. Mr Shephard observed that because of the

height of the wind turbines there is no effective screening mechanism to attenuate visual impacts where they are not already screened from distant viewpoints due to natural features. He relied on Mr Schutt' assessment.

364. Mr Schutt considered that, on the basis of 15 representative view locations, the overall impact within the zone of theoretical visibility would be no worse than moderate in most locations, and in specific locations where the magnitude of visibility would be high high, such as the Montagu camp ground, the overall assessment is of a lower order due to either landscape value or receptor sensitivity.
365. Ms Riley undertook her own visual assessment. It was suggested by the Circular Head Coastal Awareness Network that her discipline did not qualify her to do so, but evaluating visual impact is a regular part of assessment of projects against standards by professional planners.
366. Ms Riley observed that the wind turbines and meteorological mast components will be tall elements in a landscape that is of comparatively low profile in landform and vegetation. She said that this low profile is part of the characteristics which make the location suitable for a wind farm and that the height of wind turbines is determined by operational requirements. She observed that, while the photo montages prepared by Mr Schutt show locations where the wind turbines will be screened from view due to the topography of the land, it is not reasonably possible to screen the development entirely using topographic or built elements. She correctly observed that attenuating visual impact does not equate to making something invisible. She said that a key mitigating factor to attenuate visual impact is distance, which will have an effective screening impact. She noted that the site is away from key settlements and tourist locations which will maximise the effect of distance. She considered that the overall visual impact of the wind turbines will be acceptable. She observed that the maintenance and service facility will be located in a location that will be screened from view from off the island, although that screening would be by remnant vegetation.
367. The analysis by Ms Riley, Mr Shephard and Mr Schutt was not countered by any contrary expert evidence. We accept their analysis. The proposal will satisfy cl 26.4.1 P4.

Location, height and visual appearance

368. Clause 26.4.1 P3.1 and P3.2 each raise criteria relating to the visual impact. In *Mt Wellington Cableway Company Pty Ltd v Hobart City Council & Ors* [2022] TASCAT 128 at [294] the Tribunal considered a standard raising visual impact and said:

294. It was common ground between the experts that visibility does not equate to, or presume, visual impact. Mr Moir described visual impact as the visible impacts of a proposal through the combination of its scale, contrast and magnitude upon the existing landscape character of a view. The extent of visual impact, whether negative or positive, is determined by how much the proposal impacts upon the defining character elements of a view, and to what extent the proposal may influence the existing landscape character of the view to change. Changes can be described in various ways including whether they are positive, neutral or negative.

369. P3.1 sets out four matters that the Tribunal must have regard to. It is well settled that the requirement to have regard to elements does not elevate each element to a

mandatory requirement that the proposal must satisfy, rather the Tribunal need only consider the elements in ascertaining whether the proposal complies with the performance criteria: *M Cubitt and T Powell v Launceston City Council & Ors* [2022] TASCAT 47 at [56] and *Capital Airport Group Pty Ltd v Director-General of the NSW Department of Planning (No.2)* [2011] NSWLEC 83 at [98].

370. P3.1 regulates the location, height and visual appearance of a building or structure, but expressly excludes wind power turbines. The standard will apply to the maintenance and services facility, temporary worker accommodation and meteorological masts. It will also apply to the ramps to the bridge and the ramp to the wharf, which are within the Rural Resource Zone. The scale and siting of the meteorological masts and the bridge mean that the proposal will not meet the acceptable solution A3.1.
371. The maintenance and services facility will be constructed adjacent to the upgraded access road near the Robbins Island end of the proposed bridge. It will be utilitarian in character with dimensions of 40 m x 15.4 m. Ms Riley said that the broader compound area would be cleared and quarried prior to installation of the facilities and a buffer of vegetation will be retained between the buildings and the coastline, which Ms Riley considers will be sufficient to screen the facility from view such that it will have negligible visual impact.
372. Mr Shephard relied on Mr Schutt's assessment in respect to the meteorological masts. Mr Schutt considered that any visual impact resulting from the meteorological masts will be minimal due to their slender, lightweight and lattice form. Mr Shephard observed that the bridge and wharf will be visible from the adjacent shoreline and waterbodies, but will be low in height, close to natural ground level and will not, in any pragmatic sense, breach the skyline. He observed that standard concrete construction is normally of low reflectivity. Mr Shephard concluded that the proposal would meet the requirements of P3.1.
373. Ms Riley undertook her assessment on the premise that the functional purpose of a relevant building or structure is a matter to take into account, on the basis that it would be unreasonable to require something to be minimised to the point at which it no longer achieved its intended purpose. That approach is consistent with Porter AJ's commentary on minimisation in *Sultan Holdings Pty Ltd v John Fuglsang Developments Pty Ltd*.
374. Ms Riley observed that 'skyline' is not defined in the Scheme. She noted that in table 3.1 of the Tasmanian Planning Scheme skyline is defined as "a line along the top of a hill or mountain that forms an outline against the sky". That meaning is apposite in this case. Given the facts of this case, it is not necessary to consider whether skyline as used in the Scheme has a broader meaning, for example including the outline of buildings in an urban area against the sky.
375. Ms Riley considered that the meteorological masts will be imperceptible on the skyline due to their wire-frame form, based on the existing masts on the island. She concluded that they would have no visual impact on the shoreline or on a marine or aquatic waterbody. It should be noted that conditioning to protect Wedge-tailed Eagles will make the meteorological masts more visually apparent, but given their form and the distance to viewpoints, it is unlikely to result in them moving from an acceptable to an unacceptable visual impact.

376. Mr Schutt did not consider the effects of aviation lighting, navigational lighting or operational lighting from the proposal in terms of visual impact. The DPEMP provides that aviation lighting will be activated through a radar-based system that detects nearby aircraft and therefore will only be used intermittently. Any issue with aviation lighting would arise under P3.2 in respect to the wind turbines, but it is convenient to deal with this issue as it arises under both criteria. Neither Ms Riley nor Mr Shephard considered lighting in terms of visual intrusion. The Circular Head Coastal Awareness Network submitted that this meant that the proposal has not demonstrated compliance with the standard. This issue was not directly raised by a ground of appeal, nor by evidence filed by the Network or any other party. Lighting was only raised in ground 25 in respect to the allegations of uncertainty with respect to conditions of the permit, not visual impact.
377. Quite apart from the fact that a party may be confined to its grounds, as previously noted on the authority of *Sandy Bay Developments v Loring*, this issue was not put to Mr Shephard or Ms Riley, nor was Mr Schutt asked for his opinion whether the lighting proposed would be visually intrusive, he simply agreed to the proposition that lighting can cause visual impact. We do not consider that the evidence establishes that light emissions from the proposal will be visually intrusive.
378. We heard no expert evidence to contradict the analysis of Mr Shephard and Ms Riley and we agree with their assessments that the proposal will satisfy P3.1.

Impact of the wind turbines on the broader landscape

379. P3.2 establishes a standard that wind power turbines must minimise their impacts on the broader landscape. That requirement is to be assessed having regard to five listed elements.
380. In respect to the first two elements, visual impacts of the development and the characteristics of the vicinity of the site, Mr Shephard again relied on Mr Schutt's evidence. Mr Schutt applied a Western Australian manual for the assessment of visual landscape and planning to assess the proposal. That assessment took into account landscape value, magnitude of visibility of the proposal and the nature, number, frequency and duration of visual receptors. The assessment describes landscape value and landscape typologies, including natural and rural typologies. Landscape may be assessed as having high, moderate or low value. The assessment characterises magnitude and visibility in a range from nil to very high.
381. In terms of receptors, Mr Schutt applied a British guideline for assessment of landscape visual impact.
382. Mr Schutt had regard to the broad range of natural, rural and built landscape in the area. He assessed viewpoints from 15 locations: at Smithton, the Montagu campground, three sites in Montagu, three sites at West Montagu, Woolnorth, the Woolnorth wind farm, three sites at Stanley, Anthony Beach and Robbins Island. Mr Schutt's assessment of the proposal's impact on 13 sites was moderate and at two sites was nil. He concluded that the overall impact of the proposal will be no worse than moderate in any location. Mr Shephard's conclusion on the basis of Mr Schutt's evidence is that the standard will be satisfied having regard to visual impacts and the characteristics of the vicinity of the site.

383. In respect to the characteristics of the wind source and the topography of the site and how the location affords access to wind, Mr Shephard relied on the assessment by Mr Gilbert. In a general sense, Mr Shephard noted that the site is located within a prevailing westerly air stream which is not impacted by any significant topographic elements.
384. Mr Gilbert considered that the Robbins Island wind resource is at the upper range of those encountered in wind projects in Australia. He assessed the capacity of the wind farm at the upper end of the range compared to other operating projects in Australia. Mr Gilbert considered that the proposal will reduce the seasonal variation of electricity generation in Tasmania and Victoria. Mr Shephard considered that the elements in respect to characteristics of the wind resource and topography would be met.
385. Ms Riley observed that wind turbines are functionally required to be tall elements, so that the entire blade rotation occurs at an elevation that has a high quality, consistent wind resource. She said that the height range of the proposed wind turbines reflects wind monitoring data, and noted that the amended proposal is lower than the original proposal. She accepted that the wind turbines will be visible in the landscape, primarily because of their function, but considered that they will have a low visual impact from most viewing locations. She reached this conclusion on the basis of an analysis combining visual effects and visual sensitivity. She considered that visual effects arise from a combination of visual contrast and integration, established character and desired character. How visible a development is, its prominence and how much of the view field it occupies is relevant. Distance is a key mitigating factor in limiting visual effect. She said that visual sensitivity relates to the scenic qualities of the landscape as well as how many people are likely to view the development from any location, and the likely duration of view.
386. Ms Riley concluded that from most viewing points the proposal will have a low visual impact primarily because of distance and because the movement of the turbines and shadow flicker from the blades are unlikely to be perceived at distance. She noted that the visual impact will be greater from nearby coastal locations, including the Montagu campground where viewers will be in closer proximity and the proposal will occupy more of the field of view. However, she noted that natural landscape features in the foreground will be the key visual feature. She observed that the bridge component of the proposal will be a prominent foreground feature, although only part will fall within the rural resource zone.
387. Neither Mr Shephard nor Ms Riley had regard to P3.2(e), the potential impacts on birds. Ms Riley observed that that was outside her expertise and Mr Shephard expressly left that issue to the EPA and other experts. We have had regard to the assessment elsewhere in these reasons in respect to the impact of the wind turbines on birds.
388. Once again, none of the appellants led evidence from planning experts. The Bob Brown Foundation provided video and still images and a computer generated visual model with a flythrough of the site, but did not provide any expert analysis.
389. We are satisfied that the proposal will satisfy P3.2.
390. Each of the relevant performance criteria in cl 26.4.1 will be met by the proposal.
391. Grounds 29, 30, 32 and 39 are not made out.

Clauses 29.1.1, 29.1.2 and 29.1.3 - Zone purpose statements, local area objectives and desired future character statements in the Environmental Management Zone

392. Grounds 1, 2, 3, 4 and 51 raise compliance with clauses 29.1.1, 29.1.2 and 29.1.3 of the Scheme. Those clauses respectively establish the zone purpose statements, local area objectives and desired future character statements in the Environmental Management Zone.
393. As observed above, those clauses do not in themselves establish standards against which a proposal is to be assessed. Unlike the Rural Resource Zone, no acceptable solution or performance criterion in the Environmental Management Zone requires compliance with the zone purpose statements, the local area objectives or the desired future character statements. Accordingly, while they will provide context and aid in interpretation of the standards, the proposal is not required to comply with them as if they were standards.
394. Grounds 1, 2 insofar as it asserts a failure to comply with local area objectives, 3 and 4 are not made out.
395. Ground 2 also asserts that the proposal will not comply with cl 29.3.2 A1. That is correct. It does not assert that the proposal will not comply with the associated performance criterion in cl 29.3.2 P1. We have found that it will so comply.

396. Ground 2 is not made out.

Aboriginal heritage

397. By ground 51 Mr Ryan challenged the proposal on the basis that it would not meet the cl 29.1.2(d) local area objective that environmental management land is protected, conserved and managed to protect places of special cultural value or heritage importance. He provided evidence himself and led evidence from an expert in Aboriginal heritage and an indigenous member of the local community who was described the Aboriginal history of Robbins Island and its cultural importance. The evidence concerned the extensive history of indigenous use of Robbins Island and the surrounding area and the heritage values it holds. It also detailed the disastrous effects of white settlement on Aboriginal people following the acquisition of the area by Van Diemen's Land Company early in the 19th century. That evidence was not challenged. It establishes that Robbins Island is an area of cultural value, which is relevant to the application of cl 29.3.2 P1. However cl 29.1.2(d) does not itself establish a standard against which the proposal is to be assessed.
398. Ground 51 is not made out.
399. Notwithstanding that assessment of Aboriginal cultural heritage is not brought directly into consideration by standards in the Scheme, ACEN will, of course, be subject to obligations under the *Aboriginal Heritage Act 1975* in respect to preservation of Aboriginal sites and relics. The DPMP includes an Aboriginal heritage assessment. Aboriginal heritage sites and Aboriginal artefacts have been identified within the site. The DPMP acknowledges that further discoveries are likely.
400. In addition to these tangible heritage values, intangible values were raised by the Tribunal in the course of the evidence. In closing submissions ACEN advised that if we consider it desirable that a more detailed study of the Aboriginal history of Robbins Island be

undertaken then ACEN would be prepared to provide funding for a study to be by a renowned historian who has published relevant works on the history of the Aboriginal tribes of northwest Tasmania. Such a study may not be for a proper planning purpose so as to ground a condition: *Planning Commission (WA) v Temwood Holdings Pty Ltd* [2004] HCA 63, but it was apparent from the evidence led by Mr Ryan that Robbins Island has a rich and stirring indigenous history and we certainly consider such a study desirable and would encourage ACEN to honour its proposal.

Clause 29.3.2 – Location and natural hazards in the Environmental Management Zone

401. Grounds 5, 31, 33 and 40 raise compliance of the proposal with the performance criteria P1 and P2 of cl 29.3.2.
402. The elements of the proposal that will be located in the Environmental Management Zone are the bridge and the wharf.
403. Clause 29.3.2 provides:

29.3.2 Discretionary permit use

Objective:	
Use of land that is a discretionary use in this zone, other than residential use, is to –	
(a) protect, conserve and manage significant ecological, scientific, cultural or aesthetic value; or	
(b) minimise likelihood of significant risk from exposure to a natural hazard	
Acceptable Solutions	Performance Criteria
<p>AI</p> <p>Discretionary permit use, other than residential use, must be –</p> <p>(a) on a site that is not located in an area of significant ecological, scientific, cultural or aesthetic value; or</p> <p>(b) consistent with any advice or decision of the relevant entity for a statutory outcome applying for protection, conservation and management of a significant ecological, scientific, cultural, or</p>	<p>P1</p> <p>Discretionary permit use, other than residential use, must –</p> <p>(a) be required to locate in an area of significant ecological, scientific, cultural or aesthetic value –</p> <p>(i) to provide immediately access to a specific naturally occurring resource;</p> <p>(ii) to facilitate conservation, protection or management of a significant ecological, scientific, cultural or aesthetic value;</p>

<p>aesthetic value of the land or adjacent land</p>	<p>(iii) to provide opportunity for diversification, innovation, and value adding to secure a conservation outcome;</p> <p>(iv) to provide utility infrastructure of critical importance for the municipal or regional community or for Tasmania; or</p> <p>(v) to provide significant social, economic or environmental benefit to the Region or Tasmania; and</p> <p>(b) have regard to any advice or decision of the relevant entity for a statutory outcome applying for protection, conservation and management of a significant ecological, scientific, cultural, or aesthetic value of the land or adjacent land</p>
<p>A2</p> <p>There is no acceptable solution</p>	<p>P2</p> <p>Use on land with a high level of risk from exposure to a natural hazard must be required to provide an overriding social, economic or environmental benefit to the Region or Tasmania; and</p> <p>(a) no suitable alternate site is available; and</p> <p>(b) a hazard risk assessment in accordance with Code E2 - Bushfire Prone Areas and Code E6 - Hazard Management indicates –</p> <p>(i) there is an insufficient increase in the level of risk to warrant any specific hazard reduction or protection measures; or</p> <p>(ii) a hazard management plan demonstrates a tolerable level of risk can be achieved and maintained for the type, scale and intensity of the use</p>

404. The acceptable solution A1 will not apply as the site is an area of significant ecological, scientific and cultural value having regard to the geoheritage and wildlife values outlined above and evidence of significant Aboriginal heritage arising from use and experiences of indigenous Tasmanians both before and after white settlement. Mr Schutt also agreed

with the proposition that that land within the Environmental Management Zone has significant aesthetic value. The proposal will therefore be required to comply with P1.

405. There is no acceptable solution associated with P2.

Location

406. P1(a) and (b) are cumulative requirements, however no issue was raised in the appeal in respect to (b).
407. P1(a) requires that a use be required to locate in an area of significant ecological, scientific, cultural or aesthetic value for one of five purposes, which are set out in the alternative.
408. P1(a)(i) is to access a specific naturally occurring resource on the site or on adjacent land in the zone. The project is located on the site in order to access the relevant wind resource. The elements of the proposal in the Environmental Management Zone, being the bridge and the wharf, do not themselves use the naturally occurring resource of wind, but they are, as Ms Riley put it, “integral components of the proposal and are required to be located in the zone in order to achieve their functional purpose related to the overall project”.
409. The purpose of the bridge is to facilitate access to the wind farm for its operational use.
410. The purpose of the wharf is to facilitate the transport of very large prefabricated elements of the wind turbines to the site, particularly the blades. ACEN provided swept path diagrams that were described by us in *Ryan v Circular Head Council and Smith v Circular Head Council and Birdlife Tasmania v Circular Head Council and ACEN Robbins Island Pty Ltd v Circular Head Council and Bob Brown Foundation v Circular Head Council and Circular Head Coastal Awareness Network Inc v Circular Head Council (No 3)* [2023] TASCAT 194 at [20]-[21] in the following terms:

20. The evidence tendered by ACEN consisted of eight swept-path diagrams of intersections and junctions, and two key plans showing the location of the swept-paths. One location is at the port of Burnie and the other seven locations are in the town of Smithton. The diagrams illustrate that transport of the blades could not be achieved within the relevant road reservations.

21. The plans include the dimensions of the relevant design vehicle for the purposes of the swept-path diagrams. The design vehicle includes a load envelope with a length of 65.08m contemplating wind turbine generator blades of 65m in length. The proposal before the Tribunal incorporates blades up to 86m in length. ACEN advised that the transport route analysis undertaken based on the 65m blades showed social, legal and financial problems with road transport that would necessarily intensify with the longer blades. Due to the results of the preliminary analysis the feasibility of transporting the longer blades to the site was not analysed by ACEN. The evidence was advanced by ACEN to support the need for the blades to be transported to the site by ship, and the consequent need for a wharf which is proposed as a component of the development.

411. As the Council submitted, an effective refusal of the wharf would result in the need to transport large components of the wind turbines by road from the port of Burnie, which would cause significant social and environmental impact and disturbance, would require

changes to the permit and would likely involve the Department of State Growth in its capacity as a road authority.

412. We are satisfied that the proposal will meet the requirements of PI(a)(i).
413. PI(a)(ii) and (iii) were not raised as relevant in the appeal.
414. PI(a)(iv) is to provide 'utility infrastructure of critical importance' for the municipal or regional community or for Tasmania. As observed above, in respect to cl 26.3.1 (c)(vii), the proposal will provide an 'essential utility'. The difference between the language used in cl 29.3.2 PI(a)(iv) and in cl 26.3.1 PI (c)(vii), which appears to set a higher bar under the former, no doubt reflects the purpose of the Environmental Management Zone, as set out in cl 29.1.1.1, which is to provide for the protection, conservation and management of areas of significance.
415. PI(a)(iv) relates not merely to the provision of the utility, but to provision of utility infrastructure, and requires that it be infrastructure of critical importance. It focuses not on the nature of the utility in a general sense but specifically on the infrastructure provided by the proposal. While we are satisfied that the proposal will provide an essential utility of significance for Tasmania it is not clear that the infrastructure is of critical important for the municipal or regional community or for Tasmania. It will no doubt provide benefits, but the use of 'critical importance' suggests some significant adverse outcome or consequence if the infrastructure is not provided. The absence of the bridge and wharf infrastructure might well result in the wind farm not proceeding which would have implications for the State in terms of power production and meeting the Tasmanian Renewable Energy target. However, the evidence did not disclose that Tasmania would experience energy shortages or not meet the renewable energy target if the proposal does not go ahead. That is, the facilitation of the wind farm by the existence of the proposed infrastructure in the Environmental Management Zone is not of critical importance to Tasmania.
416. PI(a)(v) is to provide significant social, economic or environmental benefit to regional Tasmania. This element appears to somewhat undermine the higher bar set by PI(a)(iv). For the reasons advanced in respect to cl 26.3.1(c)(vii) concerning the significance of the provision of an essential utility, the proposal will provide significant economic or environmental benefit to Tasmania. The clause involves assessment of benefit without any associated assessment of disbenefit, or comparison of benefits and disbenefits: *Telstra Corporation Limited v Meander Council and Ors* [2019] TASRMPAT 11 at [72]. It may be that when read together, the effect of PI(a)(iv) and PI(a)(v) is that, while cl 29.3.2 is a use standard, (iv) directs attention to the physical components of a development associated with the use.
417. In the circumstances, it is not necessary to resolve any issues between (iv) and (v) as we are satisfied that PI(a)(i) and (v) will be satisfied by the proposal.

Natural Hazard

418. P2 is triggered where the proposed use is to be sited on land with a higher level of risk from exposure to a natural hazard. If so, the use must be required in order to provide an overriding social, economic or environmental benefit to the region or Tasmania. In addition it must satisfy each of P2(a) and (b).

419. Natural hazard is defined in cl E6.3 of the Hazard Management Code in the Scheme in the following terms:

Means a condition inherent in air, land or water, the occurrence of which has a potential to permanently or occasionally present likelihood of risk to the health and safety of people, property, infrastructure assets, or the environment, and includes but is not limited to bushfire, coastal erosion and inundation, flooding, and landslide.

420. Risk is a central component of a natural hazard. Notably, the trigger in P2 is not merely exposure to a natural hazard, but use on land with a high level of risk from exposure to a natural hazard. The Scheme does not provide any criteria for what might constitute a high level of risk.
421. The only natural hazard raised in the grounds of appeal is bushfire in ground 33. No evidence was led by the appellants in support of this ground. The issue was addressed in the evidence of Ms Riley and Mr Shephard. P2 refers to the Bushfire Prone Areas code. The standard refers to it as Code E2, but it is found in cl E1 of the Scheme.
422. Mr Shephard's opinion was that the portion of the site located within the Environmental Management Zone is not subject to a high level of risk from exposure to natural hazards and that, as a consequence, P2 does not apply to the proposal. He did note the overall bushfire risk on Robbins Island and observed that a hazard risk assessment formed part of the DPEMP. That assessment was reviewed by the Tasmania Fire Service and demonstrated a tolerable level of risk. Mr Shephard also noted that by virtue of their functions, locating the bridge and the wharf within the zone is unavoidable.
423. Ms Riley noted that the bushfire hazard management report did not expressly address specific risk relating to the bridge and wharf. She observed that the bridge will fall within a bushfire prone area because it will be within 100 m of bushfire prone vegetation on the shore. She considered that the proposal would be capable of demonstrating that there is a tolerable level of risk. Like Mr Shephard, Ms Riley considered that the bridge and wharf are required to be located in the zone in order to achieve their functional purpose. She noted that the only mapped hazard applicable was landslide and that the relevant parts of the site are not subject to landslide risk as described in the overlay maps.
424. None of the appellants led evidence that contended that the land was at a higher level of risk from exposure to fire, or any other natural hazard. The bushfire hazard management report in the DPEMP was formulated on the basis that the entire site is within a bushfire prone area because it contains bushfire-prone vegetation of greater than 1 ha in area, which is consistent with the definition in cl E1.3 of the Scheme, but does not differentiate between the Rural Resource Zone and the Environmental Management Zone. It includes a possible bushfire scenario/risk assessment which describes a risk of bushfire occurring from all directions under conditions of 'high' and above fire danger ratings, creating the potential for ash embers and smoke to carry across the island. That comment relates to fire danger ratings as opposed to level of risk associated with the land, and is a reflection of conditions as opposed to any intrinsic character of the land creating risk. It does, however, suggest potential significant consequences of a bushfire on Robbins Island.
425. The response to that risk is assessed in the bushfire hazard management report. The report recommends building to BAL-12.5 level in the Australian Standard AS3959-2018, Construction of Buildings in Bushfire Prone Areas. BAL-12.5 is a predicted bushfire attack

and exposure level defined as “ember attack, radiant heat below 12.5kW/m²”. It is the second lowest in a range of six bushfire attack levels. The next lowest level is “insufficient risk to warrant specific construction requirements”. The report concludes:

Robbins Island is covered in bushfire prone vegetation. Adjacent to the Hazardous Use sites, this is a mix of grassland, scrub, and forest. There is sufficient area at each site to provide setbacks compliant with BAL 12.5 standards. Any buildings that require bushfire measures in each location must be constructed to BAL 12.5 standards. Proposed access across the site will provide adequate roadways for emergency services and also provide adequate evacuation routes. A static water supply must be installed that is compliant with Table E5 of the Code at each site. With these construction standards, a tolerable level of risk can be achieved for this development.

426. The report does not identify the site as having a high level of risk from exposure to bushfire. The recommendation in the report that buildings be built to the second lowest level for bushfire attack would reflect a level of risk less than a high level, such that cl 29.3.2 P2 is not triggered.
427. If cl 29.3.2 P2 is, however, an applicable standard then we are satisfied for reasons set out below in respect to cl 29.4.3 P3(b)(i) that the proposal will provide a relevant overriding economic or environmental benefit to Tasmania; no suitable alternative site is available in respect to the wharf and bridge; and the bushfire hazard management plan demonstrates that a tolerable level of risk can be achieved and maintained. Accordingly, the proposal will satisfy the standard in cl 29.3.2 P2.
428. Grounds 5, 31, 33 and 40 are not made out.

Clause 29.4.3 – Visual appearance in the Environmental Management Zone

429. Grounds 34 and 41 raise compliance with cl 29.4.3 P3. Clause 29.4.3 deals with the location and configuration of development in the Environmental Management Zone. P3 deals with visual impact. It provides:

29.4.3 Location and configuration of development

Objective:	
The location and configuration of development does not dominate or otherwise detract from the performance, appearance, and character of an area of significant ecological, scientific, cultural or aesthetic value or unreasonably intrude onto the occupation of adjacent land.	
Acceptable Solutions	Performance Criteria
A3 A building or a utility structure must be –	P3 (a) a building or structure must – (i) not be visually apparent on a skyline;

<p>(a) not less than 15m below the level of any adjoining ridgeline;</p> <p>(b) not less than 30m from any shoreline to a marine or aquatic water body, water course, or wetland;</p> <p>(c) below the canopy level of any adjacent forest or woodland vegetation; and</p> <p>(d) clad and roofed with materials with a light reflectance value of less than 40%.</p>	<p>(ii) not be visually apparent above the adjacent vegetation canopy;</p> <p>(iii) not be visually apparent on the shoreline or a marine or aquatic water body, water course, or wetland where possible; and</p> <p>(iv) not be visually apparent as a result of the reflection of light from an external surface; or</p> <p>(b) the location of a visually apparent building or structure must –</p> <p>(i) be essential and unavoidable in order to provide an overriding community benefit; or</p> <p>(ii) incapable of change due to an exceptional circumstance</p>
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430. The proposal will not satisfy the acceptable solution A3 because both the bridge and wharf will be less than 30 m from the shoreline. The proposal must satisfy P3.
431. P3(a) and (b) are framed in the alternative.
432. P3(a) sets out four requirements for a building or structure. Those requirements are cumulative. The proposal will not satisfy P3(a) as both the bridge and the wharf will be visually apparent on the shoreline. Curiously, A3 (b) uses the phrase “shoreline to a marine aquatic waterbody” while P3(a)(iii) uses “shoreline or a marine aquatic waterbody”, however it makes no practical difference in respect to compliance of the proposal with P3 (a).
433. The proposal must therefore satisfy the requirements of P3(b). P3(b) contains two elements that are framed in the alternative. The bridge and wharf must be essential and unavoidable in order to provide an overriding community benefit, or they must be incapable of change due to an exceptional circumstance.
434. The first element is that the structures be essential and unavoidable in order to provide an overriding community benefit. The Council cited the Macquarie Dictionary to submit that an overriding benefit is one which prevails over all other benefits. The term cannot be read literally. To do so would require a proposal to provide a community benefit which is greater than any other benefit that the relevant community might experience from any circumstance, which would require a potentially impossible assessment to compare the benefit from the development against every other benefit experienced by a community.
435. A planning scheme is to be construed in accordance with the ordinary rules of statutory interpretation: *Saltwater Lagoon Pty Ltd v Glamorgan Spring Bay Council* [2022] TASFC 5 at [18]-[21]. The meaning of a provision is to be determined according to the plain and ordinary meaning of the text read in the context of the surrounding provisions and the

legislative scheme as a whole: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [4] and *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [69]. An adjective will not necessarily correspond with its dictionary meaning: *Southwestern Sydney Local Health District the Gould* [2018] NSWCA 69 at [78]-[81]. Grammatical meaning will usually establish legal meaning, but context, the purpose of the legislative instrument and a purposive approach to construction may require that a provision be read in a different way: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14].

436. The objective of cl 29.4.2 is that development does not dominate or detract from the appearance and character of an area of significance. P3(b) relates to visual appearance which might dominate or detract from the appearance or character of an area of significance. In context, the reference to overriding community benefit would be to a community benefit which overrides the domination or detraction from the appearance or character of the area of significance. That is, a community benefit which is so significant as to justify domination or detraction.
437. In construing the term ‘significant community benefit’ in *Telstra Corporation v Meander Valley Council & Ors* [2019] TASRMPAT 11 at [71] RMPAT considered that a community is a group of people living in one place, but what constitutes a community should not be interpreted narrowly. Clause 29.3.2 PI(iv) refers to the municipal or regional community, which contemplates community as extending beyond those living in the immediate area. It would appear that the extent of community must be read in the context of the particular circumstances. In the circumstance of the proposal, providing energy state-wide with a state significance for the renewable energy target, the relevant community extends to the entire state. We have identified the benefit to the state in economic and environmental terms. That benefit would be sufficiently significant to override the domination or detraction of the appearance and character of those areas that will be affected by the bridge and by the wharf.
438. Ms Riley’s evidence was that the locations of the bridge and the wharf are unavoidable in order to achieve their functions. They are integral to the proposal. Their precise location might be varied with the engineering detail required for building approval, but it would make no difference to the visual intrusion.
439. In respect to P3(b)(ii), RMPAT considered ‘exceptional’ in the context of exceptional circumstances in *Action View Tas Pty Ltd & Ors v Clarence City Council & Anor* [2020] TASRMPAT 20 at [22]:

In *Baker v The Queen* [2004] HCA 45 at [173] Callinan J adopted a statement by Lord Bingham of Cornhill C] in *R v Kelly (Edward)* [2000] QV 198 at 208 in respect to the meaning of exceptional in the context of exceptional circumstances:

‘We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.’

What might amount to exceptional circumstances will require consideration of all the circumstances. A combination of factors which are not individually exceptional might together amount to exceptional circumstances: *Griffiths v The Queen* [1989] HCA 39 per Brennan and Dawson JJ at [10].

- 440. The fact that the site is on an island creates a circumstance which is special or uncommon, such that the requirement for the bridge and wharf can be seen to be incapable of change due to that exceptional circumstance.
- 441. We are satisfied that the proposal will comply with cl 29.4.2 P3.
- 442. Grounds 34 and 41 are not made out.

Preliminary determination and conditions

The outcomes of the appeals

- 443. The appellants' appeals should be dismissed.
- 444. In respect to ACEN's appeal, the challenge to condition FF6 should be upheld and condition 5 should be varied to reflect the amended development application.

Formulation of conditions

- 445. The Council's decision to grant a permit should be varied in respect to the conditions of the permit. The decision to grant a permit and the conditions to be imposed on such a grant are not separate considerations and are components of a single process: *Meander Valley Council v Resource Management and Planning Appeal Tribunal* [2013] TASSC 42 [10] and *Pielage v Launceston City Council* [2019] TASSC 1 [8] and [14].
- 446. Therefore, before we proceed to a final determination of the appeal we must determine the conditions to be applied to the permit.
- 447. With its closing submissions ACEN provided proposed amended conditions. The EPA and the Bob Brown Foundation asked that they be given the opportunity to make submissions in respect to the proposed conditions if we determine that a permit should issue. Other appellants and the Council may also want to do so. The parties should also have the opportunity to formulate the additional conditions proposed in these reasons.
- 448. The parties should also be given the opportunity to agree conditions or make submissions in respect to the proposed conditions and any additional conditions or amendments arising from, and in the light of, these reasons. That should not be taken, however, as an opportunity to reargue the matters we have determined or to propose conditions which are inconsistent with these reasons. We do not propose to consider conditions which do not arise from these reasons, the grounds of appeal or the proposed draft conditions unless agreed to by all parties.
- 449. We note the proximity of the Christmas-new year break, and so will impose a relatively tight timetable, but will provide liberty to apply.

Directions

450. Accordingly we make the following directions:

1. The parties are to file agreed conditions of a permit by 4pm on 7 December 2023.
2. In the absence of agreement in respect to (1) then by 4pm on 13 December 2023 each party is to file and serve submissions in respect to any disputed conditions or advise the Tribunal that they do not want to be heard.
3. Each party is to file and serve any submissions in response to any submission made pursuant to direction (2) by 4pm on 18 December 2023.
4. In respect to direction (2) any disputed condition may only be a condition arising from the grounds of appeal or the proposed draft conditions or these reasons for decision and must not be inconsistent with these reasons. The submissions are to include the formulation of any proposed condition.
5. The parties have liberty to apply in respect to this timetable, with any such application to be supported by submissions and to be made before the expiration of the relevant period.