



Australian Government

Department of Sustainability, Environment, Water, Population and Communities

Statement of Reasons for a Decision on a Non Controlled Action (Particular Manner)
under the *Environment Protection and Biodiversity Conservation Act 1999*

I, CHARMAYNE MURRAY, Acting Assistant Secretary, Department of Sustainability, Environment, Water, Population and Communities, delegate for the Minister for Sustainability, Environment, Water, Population and Communities, provide the following statement of reasons for my decision of 16 January 2012, under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), that the proposed action by the Tasmanian Department of Primary Industries, Parks, Water and Environment (DPIPWE) to construct and maintain a multi-day walking track, the Three Capes Track, within and near to the Tasman National Park, Tasmania (EPBC 2011/6200), is not a controlled action if undertaken in a particular manner.

Legislation

Section 68 of the EPBC Act relevantly provides:

- (1) A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.
- (2) A person proposing to take an action that the person thinks is not a controlled action may refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.

Section 74 of the EPBC Act relevantly provides:

Inviting other Commonwealth Ministers to provide information

- (1) As soon as practicable after receiving a referral of a proposal to take an action, the Minister (the *Environment Minister*) must:
 - (a) inform any other Minister whom the Environment Minister believes has administrative responsibilities relating to the proposal; and
 - (b) invite each other Minister informed to give the Environment Minister within 10 business days information that relates to the proposed action and is relevant to deciding whether or not the proposed action is a controlled action.

Inviting comments from appropriate State or Territory Minister

- (2) As soon as practicable after receiving, from the person proposing to take an action or from a Commonwealth agency, a referral of a proposal to take an action in a State or self-governing Territory, the Environment Minister must, if he or she thinks the action may have an impact on a matter protected by a provision of Division 1 of Part 3 (about matters of national environmental significance):
- (a) inform the appropriate Minister of the State or Territory; and
 - (b) invite that Minister to give the Environment Minister within 10 business days:
 - (i) comments on whether the proposed action is a controlled action; and
 - (ii) information relevant to deciding which approach would be appropriate to assess the relevant impacts of the action (including if the action could be assessed under a bilateral agreement).

Inviting public comment

- (3) As soon as practicable after receiving a referral of a proposal to take an action, the Environment Minister must cause to be published on the Internet:
- (a) the referral; and
 - (b) an invitation for anyone to give the Minister comments within 10 business days (measured in Canberra) on whether the action is a controlled action.

Section 74A of the EPBC Act relevantly provides:

- (1) If the Minister receives a referral in relation to a proposal to take an action by a person, and the Minister is satisfied the action that is the subject of the referral is a component of a larger action the person proposes to take, the Minister may decide to not accept the referral.

Section 75 of the EPBC Act relevantly provides:

Is the action a controlled action?

- (1) The Minister must decide:
- (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
 - (b) which provisions of Part 3 (if any) are controlling provisions for the action.
- (1AA) To avoid doubt, the Minister is not permitted to make a decision under subsection (1) in relation to an action that was the subject of a referral that was not accepted under subsection 74A(1).

Minister must consider public comment

- (1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:
- (a) in response to the invitation under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and
 - (b) within the period specified in the invitation.

Considerations in decision

- (2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:
- (a) the Minister must consider all adverse impacts (if any) the action:
 - (i) has or will have; or
 - (ii) is likely to have;on the matter protected by each provision of Part 3; and
 - (b) must not consider any beneficial impacts the action:
 - (i) has or will have; or
 - (ii) is likely to have;on the matter protected by each provision of Part 3.

Timing of decision and designation

- (5) The Minister must make the decisions under subsection (1) and, if applicable, the designation under subsection (3), within 20 business days after the Minister receives the referral of the proposal to take the action.

Section 77A relevantly provides:

- (1) If, in deciding whether the action is a controlled action or not, the Minister has made a decision (the **component decision**) that a particular provision of Part 3 is not a controlling provision for the action because the Minister believes it will be taken in a particular manner, the notice, to be provided under section 77, must set out the component decision, identifying the provision and the manner.
- (1A) For the purposes of subsection (1), it does not matter whether or not the Minister believes that the action will be taken in accordance with:
- (a) an accredited management arrangement or an accredited authorisation process for the purposes of a declaration under section 33; or
 - (b) a bioregional plan to which a declaration made under section 37A relates; or

- (c) a bilaterally accredited management arrangement or a bilaterally accredited authorisation process for the purposes of a bilateral agreement.

Section 139 of the EPBC Act relevantly provides:

- (1) In deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with:
 - (a) Australia's obligations under:
 - (i) the Biodiversity Convention; or
 - (ii) the Apia Convention; or
 - (iii) CITES; or
 - (b) a recovery plan or threat abatement plan.
- (2) If:
 - (a) the Minister is considering whether to approve, for the purposes of a subsection of section 18 or section 18A, the taking of an action; and
 - (b) the action has or will have, or is likely to have, a significant impact on a particular listed threatened species or a particular listed threatened ecological community;

the Minister must, in deciding whether to so approve the taking of the action, have regard to any approved conservation advice for the species or community.

Section 391 of the EPBC Act relevantly provides:

Taking account of precautionary principle

- (1) The Minister must take account of the precautionary principle in making a decision listed in the table in subsection (3), to the extent he or she can do so consistently with the other provisions of this Act.

Precautionary principle

- (2) The **precautionary principle** is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

Decisions in which precautionary principle must be considered

(3) The decisions are:

Decisions in which precautionary principle must be considered		
Item	Section decision is made under	Nature of decision
1	75	whether an action is a controlled action

Background

Description of the Action

1. The proposed action is the construction and maintenance of a multi-day walking track, including two jetties and five overnight walking huts, within and near to the Tasman National Park, Tasmania. The proposed action incorporates a boat trip across Port Arthur to connect the western section of the track to the eastern section.
2. The area for the proposed action is Tasman National Park, Fortescue Road, Fortescue, Tasmania, 7182.

Referral

3. The action was referred under section 68 of the EPBC Act by the General Manager, Tasmanian Parks and Wildlife Service, DPIPW, and was received by the Department of Sustainability, Environment, Water, Population and Communities (the department) on 23 November 2011.
4. Pursuant to subsection 74A(1) of the EPBC Act, I considered that the action was not a component of a larger action.
5. Pursuant to subsection 74(1) of the EPBC Act, on 23 November 2011, the department wrote to the following Commonwealth Ministers inviting them to provide comments on the referral within 10 business days:
 - The Hon Anthony Albanese MP, Minister for Infrastructure and Transport; and
 - A delegate of the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs.

No comments were received.

6. Pursuant to subsection 74(2) of the EPBC Act, on 23 November 2011, the relevant State Minister, Mr Brian Wightman MP, Tasmanian Minister for Environment, Parks and Heritage was invited to provide comment on the referral within 10 business days. No comments were received.

7. In accordance with section 74(3) of the EPBC Act, the referral, together with an invitation for public submissions, was published on the department's website for 10 business days from 24 November 2011 to 7 December 2011. Three public submissions were received.
8. The public submissions identified the following issues:
- the proposed action may result in the spread of weeds and disease (e.g. *Phytophthora cinnamomi*) and attract inexperienced bushwalkers;
 - there is currently a lack of understanding of the orchid species *Prasophyllum apoxychilum* and *Prasophyllum castaneum* and the potential impacts from the proposed action and further research and survey work should be undertaken on orchid species prior to commencement of the action;
 - there is a lack of evidence that maintaining a 1 km buffer zone from nests will minimise impacts on Wedge-tailed Eagles (Tasmanian);
 - the huts proposed are unnecessarily large and should be located in more accessible areas;
 - a smaller alternative track has been proposed by the Tasmanian National Parks Association;
 - the proposed jetties may impact on the Australian Convict Sites – Port Arthur Historic Site World Heritage Area as they are within view-shed; and
 - the Minister has publicly announced the intention to include national parks as a matter of national environmental significance and the referral decision should take this into consideration.
9. On 20 December 2011, in accordance with section 76 of the EPBC Act, I requested additional information relevant to making a decision under subsection 75(1) of the EPBC Act. I specifically requested additional information regarding the exact location of the Tunnel Bay overnight node in relation to two eagle nests (identified as #1612 and #1652 in the referral documentation).
10. In particular, I sought additional information regarding:
- the distance between the nests and the edge of the proposed area to be cleared;
 - the distance between the nests and the edge of the proposed hut site; and
 - whether the proposed hut site will be within view-shed of either of these nests.
11. The requested information was received on 12 January 2012 and I considered the additional information in the decision making process.

Not a Controlled Action (Particular Manner decision)

12. On 16 January 2012 I decided in accordance with section 75 and 77A of the EPBC Act that the proposed action is not a controlled action if undertaken in a particular manner.

Evidence or other material on which my findings were based

13. The evidence or other material upon which my findings were based is listed below:

- (a) A brief with attachments prepared by the Environment Assessment Branch of the department dated 16 January 2012, which included the following:
 - the referral for the proposed action and associated figures and maps;
 - additional information received from the DPIPWE on 12 January 2012;
 - the department's Environment Reporting Tool;
 - advice from the Heritage and Wildlife Division and Marine Division of the department;
 - three public comments received relating to the project; and
- (b) Relevant reference material, which included the following:
 - Species Profile and Threats Database (SPRAT);
 - Department of the Environment, Water, Heritage and the Arts (2009). Significant Impact Guidelines 1.1 – Matters of National Environmental Significance;
 - Department of the Environment and Heritage (2006). Australian National Guidelines for Whale and Dolphin Watching 2005;
 - Department of the Environment, Water, Heritage and the Arts (2008). Policy Statement 2.1 – Interaction between offshore seismic exploration and whales;
 - Forest Practices Authority (2009). Fauna Technical Note No. 1: Eagle nest searching, activity checking and nest management. Forest Practices Authority, Hobart;
 - Pfennigwerth S. (2008). Minimising the swift parrot collision threat. Guidelines and recommendations for parrot-safe building design. WWF Australia;
 - Department of the Environment and Heritage (2001) - Threat abatement plan for dieback caused by the root-rot fungus *Phytophthora cinnamomi*; and
 - Tasmanian Department of Primary Industries, Water and Environment (2004) - Tasmanian Washdown Guidelines for Weed and Disease Control: Machinery, Vehicles and Equipment, Edition 1.

Findings on material questions of fact

14. The proposed action is for the establishment and ongoing use of a multi-day bushwalking track on the Tasman Peninsula in south-eastern Tasmania, which incorporates a boat trip across Port Arthur to connect the western section of the track to the eastern section.
15. The proposed action involves the construction of approximately 41 km of new track, five public overnight huts (each accommodating up to 52 people), two jetties, a car park and gateway, and the upgrading of approximately 20 km of existing track. Construction work will require vegetation removal, the use of helicopters to deliver supplies, and machinery to undertake track work and jetty construction. The total footprint of the proposed action is 17.61 ha, and construction work is expected to occur from mid-2012 to late-2015.
16. The referral states that the track is expected to attract up to 10 000 walkers per season (from November to April) and walkers completing the Three Capes Track will require a pass issued by the DPIPWE.
17. The proposed action will also involve the ongoing use of frequent boat traffic across Port Arthur, and helicopter traffic for construction, supply, and maintenance operations. In addition, given the multiple access points, walkers will be able utilise some sections of the Three Capes Track for day walks and the track will also be accessible outside of the walking season. The referral indicates climatic conditions and reduced services (i.e. removal of gas cookers and mattresses from the huts) will likely limit the number of walkers utilising the track outside the walking season.

Listed Threatened and Migratory Species (sections 18 and 20 of the EPBC Act)

18. Based on information in the department's Environment Reporting Tool a total of 51 listed species and communities and 14 migratory species may occur within 5 kilometres of the proposed action.
19. Given the information provided in the referral, the departmental brief and attachments, I found that there was the potential for significant impacts to occur on the following threatened and migratory species:
 - Wedge-tailed Eagle (Tasmanian) (*Aquila audax fleayi*)
 - White-bellied Sea-eagle (*Haliaeetus leucogaster*)
 - Swift Parrot (*Lathamus discolor*)
 - The following listed flora species:
 - Pretty Leek-orchid (*Prasophyllum pulchellum*);
 - Chestnut Leek-orchid (*Prasophyllum castaneum*);
 - Peninsula Eyebright (*Euphrasia semipicta*);
 - Masked Eyebright (*Euphrasia* sp. Bivouac Bay (W.R. Barker 7626 et al.));
 - Tapered Leek-orchid (*Prasophyllum apoxychilum*); and
 - Shiny Cliff Eyebright (*Euphrasia amphisyssepala*).

- Southern Right Whale (*Eubalaena australis*)
- Humpback Whale (*Megaptera novaeangliae*)

Wedge-tailed Eagle (Tasmanian) (*Aquila audax fleayi*) and White-bellied Sea-eagle (*Haliaeetus leucogaster*)

20. Based on information in the referral, the departmental brief and attachments, I considered that surveys conducted on behalf of the proponent within the vicinity of the proposed Three Capes Track recorded the presence of 20 eagle nests. However, only five of these nests are thought to belong to the Wedge-tailed Eagle (Tasmanian) with the remainder presumed to have been built by the migratory-listed White-bellied Sea-eagle. I accepted this conclusion.
21. Given the coastal nature of the area, White-bellied Sea-eagles are likely to be the more prevalent species, with 15 of the nests thought to belong to this species. Therefore, I considered that it is likely that only a small number of Wedge-tailed Eagle (Tasmanian) pairs inhabit the area. However a precautionary approach has been taken by the person proposing to take the action, which assumes all nests to be Wedge-tailed Eagle (Tasmanian) nests. I accepted this assumption.
22. Both the White-bellied Sea-eagle and Wedge-tailed Eagle (Tasmanian) often have multiple nests within their territories however they only use one nest at any one time. I accepted that it is likely that many of the recorded nests are in a degraded state, as they are not currently in use.
23. In addition, I considered that the track route and sighting of overnight nodes had been designed in response to eagle nest surveys, including re-routing track sections to increase distances between the track huts and infrastructure and known nests, to minimise potential for disturbance.
24. I considered that the Fauna Technical Note No. 1: Eagle nest searching, activity checking and nest management produced by the Tasmanian Forest Practices Authority prescribe that no disturbance should occur within 500 m, or 1 km line of sight, of Wedge-tailed Eagle (Tasmanian) nests during the breeding season. I accepted that these strategies are commonly used in Tasmania to minimise impacts on the Wedge-tailed Eagle (Tasmanian). As such, I concluded that the only likely impacts to eagles utilising nests outside a 1 km line of sight from the action are disturbance through helicopter activity associated with either construction or maintenance activities.
25. Based on information in the referral, the departmental brief and attachments, I noted several eagle nests occur within 1 km but outside 500 m of the proposed track or overnight nodes. In these instances the person proposing to take the action committed to not undertaking helicopter flights or construction or disruptive maintenance activities (i.e. use of machinery) within 500 m of an active eagle nest during the breeding season.

26. I also noted that one nest has limited line of sight to Denman's Cove. However the jetty has been located out of sight from this nest and the track (walking) direction, for walkers undertaking the Three Capes Track walk, has been changed to avoid congregation of walkers at or near the jetty. I considered that in these instances the track and overnight nodes are shielded by vegetation or topography and therefore disturbance by walkers is not expected to be significant.
27. Based on information in the referral, departmental brief and attachments, I noted that several nests occur within 500 m of the track and an overnight node. I considered that all but one nest is screened by dense vegetation and topography, thereby limiting the potential for disturbance.
28. I also noted eagle nest #1612 occurs within 500 m of the track and overnight node near Tunnel Bay. I considered that due to topographical constraints the overnight node at Tunnel Bay is proposed to be constructed no closer than 450 m from eagle nest #1612. I considered that nest #1612 is located in a different valley to that of the proposed Tunnel Bay overnight node, and is outside the line of sight of the nest. For this reason, the person proposing to take the action considers that the planned location of this node is not likely to cause disturbance to nesting Wedge-tailed Eagles (Tasmanian). Additional information provided by the person proposing the action supports this, and indicates that nest #1612 is in a state of disrepair, is unlikely to be used again and is likely to have been constructed by a pair of White-bellied Sea-eagles. I accepted this conclusion.
29. Further to this, based on information in the referral, departmental brief and attachments, I considered that nest #1612 has marginal line of sight to a short section of the track. In this instance, I considered that the majority of walkers are expected to be moving away from the nest, reducing the chance that walkers will notice the nest and disturb eagles through focussing attention on it. Helicopter flights will be limited during the breeding season and construction and maintenance activities will be prevented within 500 m or 1 km line of sight during the breeding season.
30. I considered that, as stated in the referral information and the departmental brief and attachments, the person proposing to take the action will implement the following strategies to avoid or mitigate against potential impacts on the Wedge-tailed Eagle (Tasmanian):
- Implement 1 km line of sight exclusion zones around all known nests during the breeding season. No major disturbance (e.g. helicopter and construction activities) will occur unless nests are proven to be inactive by a suitably qualified person;
 - Avoid using helicopters within 1 km line of sight during the Wedge-tailed Eagle (Tasmanian) breeding season for resupply or maintenance activities; and
 - All overnight nodes, apart from the Tunnel Bay overnight node, are to be located in excess of 500 m (450 m for Tunnel Bay) from nests and not within 1 km line of sight of nests.

31. I determined that the measures proposed to reduce the impact on the Wedge-tailed Eagle (Tasmanian) are also likely to be effective for the White-bellied Sea-eagle. I noted that the White-bellied Sea-eagle is listed as migratory and not threatened under the EPBC Act and should the action result in disturbance to this species, when considered against the significant impact criteria for migratory species, the action is unlikely to have a significant impact on the White-bellied Sea-eagle. Therefore, given the nature and location of the action I determined that significant impacts on the White-bellied Sea-eagle were not expected or considered likely.

Swift Parrot (*Lathamus discolor*)

32. Based on information in the referral, departmental brief and attachments, I noted that surveys conducted as part of the flora and fauna assessment found no suitable foraging or nesting habitat for the Swift Parrot within the construction footprint. However, I also noted that due to the presence of eucalypt forest supporting trees with hollows within the vicinity of the track and throughout the national park, there is potential nesting and foraging habitat in the general area, and therefore the possibility exists that the proposed action will interact with the Swift Parrot. However, I noted that the proposal will not require the removal of trees that are likely to provide either nesting or foraging habitat, and therefore I considered that it is unlikely that there will be any adverse impact on this species through vegetation removal.
33. I noted that possible collisions with artificial objects also present a major threat to the Swift Parrot. As such, the presence of huts within potential nesting and foraging habitat represents a potential risk to the species, particularly with regard to windows and other reflective material.
34. I considered that as stated in the referral information, the person proposing to take the action has proposed the following strategy to mitigate against impacts on the Swift Parrot:
- Reduce the collision risk associated with the overnight nodes by incorporating the relevant prescriptions from *Minimising the Swift Parrot Collision Threat* (WWF Australia, 2008) into the hut design. In particular, the huts will not be positioned above the canopy or upslope of known nesting or foraging habitat, and any windows in the hut will be installed in a manner that minimises the potential for collisions.

Southern Right Whale (*Eubalaena australis*) and Humpback Whale (*Megaptera novaeangliae*)

35. I also considered the impact of the proposed action on the listed threatened Southern Right Whale and Humpback Whale.
36. Based on information in the departmental brief and attachments, I considered that the Southern Right Whale and Humpback Whale are found in southern Australian Waters, including those within and adjacent to the proposed action, from June to October. However, I noted that the Humpback Whale may also be present from May to December.

37. I considered that the Southern Right Whale and Humpback Whale are known to be affected by underwater and above-water noise, which can affect their behaviour and may result in injury or death. Injury may also occur as a result of vessel strike. I considered that the proposed action will result in underwater noise through pile-driving and pile-spinning operations associated with jetty construction, and above-water noise through helicopter operations. I also considered that an increase in vessel activity across Port Arthur may result in an increased likelihood of vessel strike.
38. I accepted that the person proposing to take the action has taken the department's guidelines for the interaction between offshore seismic exploration and whales, and national standards for whale watching into consideration in designing the proposed action.
39. Consistent with information provided in the referral and the brief and attachments prepared by the department, I determined that if jetty construction activities and vessel and aircraft operations are undertaken in accordance with the following manners the proposed action is unlikely to have a significant impact on the Southern Right Whale or Humpback Whale:
- A Marine Mammal Observer will be present at all times during jetty construction. The Marine Mammal Observer will conduct pre-construction observation within 3 km of jetty construction, 30 minutes prior to commencement of pile driving, and will remain in radio contact with the person overseeing jetty construction to enable communications regarding any observation of marine mammals;
 - Construction activities will not occur or will cease if any EPBC Act listed cetacean is detected within 1 km of jetty construction. Construction must not commence/recommence until the last observed EPBC Act listed cetacean has either moved outside the 1 km exclusion zone, or has not been sighted for a period of at least 30 minutes;
 - Before commencement of pile-driving, the person taking the action must carry out 'soft start' piling, increasing the intensity of the driving hammer power gradually; and
 - Ensure that vessel masters and aircraft pilots adhere to national standards for whale watching.
40. As such, I found that provided the action is undertaken in the manner described in the referral and decision notice, including the presence of a Marine Mammal Observer during jetty construction activities, the action is unlikely to have a significant impact upon the listed threatened Humpback Whale and Southern Right Whale.

Listed Flora Species

41. I also considered the impact of the action on the listed threatened flora species, Pretty Leek-orchid (*Prasophyllum pulchellum*), Chestnut Leek-orchid (*Prasophyllum castaneum*), Peninsula Eyebright (*Euphrasia semipicta*), Masked Eyebright (*Euphrasia* sp. Bivouac Bay (W.R. Barker 7626 et al.)), Tapered Leek-orchid (*Prasophyllum apoxychilum*) and Shiny Cliff Eyebright (*Euphrasia amphisysepala*).

42. Based on information in the referral, departmental brief and attachments, I considered that in order to minimise impacts on individuals of these species, results of flora surveys have been used in part to determine the route of the proposed track and avoid all known EPBC listed flora species. While some threatened flora do occur near the track, I considered that the high standard of track construction coupled with the terrain and vegetation of the area make it unlikely that threatened flora would be trampled or impacted upon by people straying off the track.
43. In addition, the track will be designed and constructed to a standard which will allow walkers to pass freely whilst on the track and minimise the potential to traverse large muddy areas that may facilitate the spread of *Phytophthora*. For example walkers are expected to travel on a predominately dry track including the use of duck boards to traverse muddy areas.
44. Based on information provided in the referral, departmental brief and attachments, I considered that it is unlikely that significant earthworks would be required for maintenance once construction has been finalised and thus it is unlikely that any future flora populations would be removed. However, I noted that some vegetation may be required to be modified or removed from time to time, for example to provide for bush fire protection around hut sites. I considered that if any listed flora species do grow in such areas they are unlikely to exceed 35 cm in height, and therefore vegetation modification is likely to be able to be conducted in a manner which avoids significantly impacting these species.
45. In accordance with information provided in the referral the person proposing to take the action has committed to undertaking the following measures to minimise the impacts on EPBC listed flora species:
- Prior to construction, high-visibility flagging tape will be used to identify known occurrences of Peninsula Eyebright, Tapered Leek-orchid, Pretty Leek-orchid and Chestnut Leek-orchid, where these occur within 10 m of construction or where known occurrences of Masked Eyebright and Shiny Cliff Eyebright, occur within 5 m of construction;
 - Construction workers will be briefed by a botanist or a works supervisor on protocols to prevent disturbance to these species; and
 - Construction activities will not occur within 2 m of these species for track work, or within 5 m for all other activities.
46. Based on information provided in the departmental brief and attachments, I determined that the proposed action is unlikely to have a significant impact on listed flora species as no listed threatened flora are expected to be removed as a result of the proposed action and the proponent has committed to undertaking measures to reduce the impact of the proposed action.

Root-rot Fungus (Phytophthora cinnamomi)

47. Further to the above listed matters and in accordance with section 139 of the EPBC Act, I considered the impact of dieback caused by the root-rot fungus (*Phytophthora cinnamomi*), listed as a key threatening process under section 183 the EPBC Act.

48. Information provided in the referral, departmental brief and attachments, indicated that Phytophthora is known to occur in some areas of the proposed action. However, I accepted proposed measures made by the proponent in the referral to minimise the potential impact from spread of weeds and Phytophthora, including hygiene measures for construction and ongoing use of the track, will be adopted in accordance with the *Tasmanian Washdown Guidelines for Weed and Disease Control: Machinery, Vehicles and Equipment* and the *Phytophthora Management Plan for the Tasman National Park*. Further to this, I accepted the proponent's proposal to adopt the following mitigation measures:

- Prior to construction, washdown points will be established in mud-free sites immediately outside disease areas, and at the departure points for vehicles or aircraft;
- Construction will be staged in a manner that ensures it progresses from disease free areas to disease areas;
- Any mud or dirt contained on materials, tools, machinery and equipment (including tents, boots and gaiters) associated with the construction and ongoing use of the track will be removed when moving from a disease area to a disease free area;
- All imported track materials, such as gravel and rock, will be sourced from certified "low risk" sites;
- Persons walking the Three Capes Track will be issued a pass that includes the requirement to travel from the western section of the track towards the eastern section and to use the washdown stations provided;
- Boot and equipment washdown stations for bushwalkers will be placed at the following points prior to the commencement of walking operations:
 - White Beach car park;
 - Stormlea Road entrance;
 - Tunnel Bay;
 - Remarkable Cave;
 - Safety Cove;
 - Denmans Cove;
 - Tomado Ridge;
 - Lunchtime Creek; and
 - Fortescue Bay;
- Instructive signage and educational information on Phytophthora hygiene protocols for bushwalkers will be placed at the starting location, each washdown station, hut and toilet along the track; and
- The mitigation measures will be written into any third party contracts related to track construction or associated infrastructure and track maintenance works.

World Heritage property and National Heritage place (sections 12 and 15B of the EPBC Act)

49. There are two World Heritage properties

- Australian Convict Sites – Port Arthur Historic Site; and
- Australian Convict Sites – Port Arthur Historic Site – Buffer Zone

and one National Heritage place

- Port Arthur Historic Site;

within the vicinity of the proposed action.

50. Based on information provided in the departmental brief and attachments, I noted that although the proposed jetty at Denmans Cove is within view of these properties, it will be located 3.5 – 4 km away, and will have a low profile and a negligible visual footprint. Therefore I found that the action was not expected to contribute to the loss, degradation or damage of the sites' heritage values. Similarly, I concluded the walking track itself is unlikely to have a significant impact on the heritage value of these sites as the track has been set back from the coast and will be screened by native vegetation.

51. I considered the location of the action, likely habitat present in the area of the proposed action, the design and nature of the works and the proposed measures to minimise impacts on protected matters when determining that the proposed action is not likely to have a significant impact on a matter protected by Part 3 of the EPBC Act provided it is undertaken in a particular manner.

52. Overall, through the referral, the proponent committed to ensuring that the impacts on EPBC listed flora and fauna, marine and migratory species from the action will be mitigated through the implementation of environmental control protocols which involve principles to:

- Identify and avoid clearing areas where EPBC matters of national environmental significance are found;
- Identify occurrences of Pretty Leek-orchid (*Prasophyllum pulchellum*), Chestnut Leek-orchid (*Prasophyllum castaneum*), Peninsula Eyebright (*Euphrasia semipicta*), Masked Eyebright (*Euphrasia* sp. Bivouac Bay (W.R. Barker 7626 et al.)), Tapered Leek-orchid (*Prasophyllum apoxychilum*) and Shiny Cliff Eyebright (*Euphrasia amphisysepala*) species with high visibility flagging tape and avoid construction activities within 2 m of these species (track) and 5 m (other activities);
- Implement measures to avoid impacts from the spread of *Phytophthora cinnamomi*;
- Implement 1 km line of site exclusion zones and avoid use of helicopters within 1 km of nests to avoid impacts on the Wedge-tailed Eagle (Tasmanian) during the breeding season. Overnight nodes (apart from Tunnel Bay overnight node) will be located in excess of 500 m from nests and not within a 1 km line of sight. These measures are also likely to be effective to manage potential impacts on the White-bellied Sea-eagle;

- Reduce the collision risk to Swift Parrots (*Lathamus discolor*) by incorporating the relevant prescriptions from *Minimising the Swift Parrot Collision Threat* (WWF Australia, 2008) into the hut design;
- A Marine Mammal Observer will be present at all times during jetty construction. The Marine Mammal Observer will conduct pre-construction observation within 3 km of jetty construction, 30 minutes prior to commencement of pile driving, and will remain in radio contact with the person overseeing jetty construction to enable communications regarding any observation of marine mammals;
- Construction activities will not occur or will cease if any EPBC Act listed cetacean is detected within 1 km of jetty construction. Construction must not commence/recommence until the last observed EPBC Act listed cetacean has either moved outside the 1 km exclusion zone, or has not been sighted for a period of at least 30 minutes;
- Before commencement of pile-driving, the person taking the action must carry out 'soft start' piling, increasing the intensity of the driving hammer power gradually; and
- Ensure that vessel masters and aircraft pilots adhere to national standards for whale watching.

Reasons for decision

53. I considered that the mitigation measures proposed by the proponent reduced the likely impact of the action to below a level of significance for listed threatened and migratory species.
54. In making my decision I took into account the precautionary principle as required under section 391 of the EPBC Act and public comments as required under section 75(1A) of the EPBC Act.
55. In light of my findings, I was satisfied that the proposed action is not likely to have a significant impact on any matter protected by Part 3 of the EPBC Act provided it is undertaken in the particular manner specified in the decision instrument. I therefore decided on 16 January 2012 that the action was not a controlled action if undertaken in a particular manner in accordance with section 77A of the EPBC Act.

Signed

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 CHARMAYNE MURRAY
 ACTING ASSISTANT SECRETARY
 5c March 2012