

**FITZGERALD <sup>AND</sup> BROWNE**  
**Lawyers**

Ref: RB/mkb 3556

29 August 2011

The Hon. Nick McKim,  
Leader of the Tasmanian Greens,  
Parliament House,  
Hobart.

Dear Mr McKim,

**ADVICE – GUNNS PROPOSED PULP MILL**

I refer to your request for advice about this project and for answers to the following questions:

1. If, hypothetically, no further work on the Gunns Ltd pulp mill project is undertaken, would the project's current status be considered "substantial commencement" as required under section 8 of the *Pulp Mill Assessment Act 2007*?
2. How is the question of "substantial commencement" determined, either under the Act or any other relevant instrument?
3. What options are available to state authorities and/or statutory officers to undertake in order to determine whether "substantial commencement" has occurred?; and
4. Under the current Act can a third party seek to take legal action in order to test whether "substantial commencement" has occurred?
5. What is the current status of the Water (Dam) Permits taken to be issued under section 8 of the Act, when do they expire, and how is this determined? Further, should the Water permits expire, what bearing would that have for the 'substantial commencement' requirement of the Pulp Mill Permit?

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## Summary

The issue is not whether there has been commencement; there has been. The issue is whether it is "substantial". As of now, I regard it as an open question as to whether the steps taken by the proponent to commence the project could be regarded as "substantial". It is not possible at this time to conclude the commencement is "substantial". Equally, it could not be concluded it is not "substantial".

Either way, the issue will need to be determined by the Supreme Court of Tasmania or, perhaps, the Resource Management and Planning Appeal Tribunal. There is no role or statutory function under the *Pulp Mill Assessment Act* (or any Act) for an administrative body such as the EPA, or the Council or other state officer or instrumentality to determine this issue.

## Background

The *Pulp Mill Assessment Act 2007* ("the Act") made provision for a process of assessment of the pulp mill project by the two Houses of the Tasmanian Parliament, in turn relying upon an assessment by other relevant persons.

In its original form, s.8 of the Act provided that upon the Parliament approving the permit (under s.7) the permit came into effect and the project was able to proceed. There was no time constraint imposed by the Act as to commencement of the construction of the project.

In 2009, however, doubts arose as to whether subsidiary permits granted under the *Land Use, Planning and Approvals Act* ("the LUPA Act") would expire as a consequence of the operation of s.53(5) of the LUPA Act, which is in the following terms:

- (5) If the use or development in respect of which a permit was granted is not substantially commenced, the permit lapses –
- (a) at the end of a period of 2 years from –
- (i) the date on which the permit was granted; or
- (ii) if an appeal has been instituted against the planning authority's decision to grant the permit, the date of the determination or abandonment of the appeal; or

(b) if the planning authority has granted an extension under subsection (5A), at the end of a further period of 2 years from the end of the relevant period referred to in paragraph (a).

As a consequence, Parliament passed the *Pulp Mill Assessment Amendment (Clarification) Act 2009*. That Act inserted subsections (4) - (6) inclusive into the Act.

Section 8(4) - (6) now provide as follows.

(4) The Pulp Mill Permit lapses if the project is not substantially commenced before the end of the period of 4 years commencing on the date on which the Pulp Mill Permit comes into force.

(5) A permit that is to be taken, in accordance with section 8(1)(c), to be issued –

(a) under the *Land Use Planning and Approvals Act 1993* only lapses under section 53(5) of that Act when the Pulp Mill Permit lapses, if at all, under subsection (4); or

(b) under the *Water Management Act 1999* lapses under section 159(8) of that Act at the end of the period of 4 years commencing on the date on which the Pulp Mill Permit comes into force if the dam works within the meaning of that Act are not substantially completed within that 4-year period.

(6) A permit that –

(a) is to be taken, in accordance with section 8(1)(c), to be issued under the *Land Use Planning and Approvals Act 1993* or the *Water Management Act 1999*; and

(b) would have, but for this subsection, lapsed under that Act on and from a day (the "relevant day") before this subsection commences –

is to be taken, on and from the relevant day, to have not so lapsed on and from the relevant day.

The Second Reading Speech<sup>1</sup> of the Minister given when moving the *Pulp Mill Assessment Amendment (Clarification) Bill* is instructive. The Minister, the Hon. David Llewellyn, said this:

*The amendment of the Pulp Mill Assessment Act means that regulators can be certain that, should Gunns not have substantially commenced the project by 30 August 2011, the pulp mill permit lapses and Gunns'*

<sup>1</sup> Hansard, 5 November 2009

*authority to build and operate the pulp mill is extinguished. Four years is considered a reasonable period of time given the size and considerable complexity of the project and lapsing provisions in other legislation.*

Returning to s. 8(4) of the Act, it is important to note that it is the "project" that is required to be substantially commenced before the end of the period of 4 years commencing on the date on which the pulp mill permit comes into force, rather than the pulp mill itself. The permit came into force when it was approved by each House of Parliament on 30 August 2007. The period of 4 years expires at midnight on 30 August 2011.

The role of s.8(6) is to eliminate any doubt about the validity of specific permits taken to be issued under the LUPA Act and the *Water Management Act, 1999* ("the Water Act") that were deemed to have been issued by the Pulp Mill Permit.

Section 8(5) of the Act is significant. It requires not "substantial commencement" of dam works, but "substantial completion" of those dam works. The phrase "substantial completion" mirrors the terminology of the Water Act<sup>2</sup>. The reference to "those dam works" is also important, and is expressed to be a reference to such works as defined by the Water Act. That definition, and the definition of "dam" are found in s. 3 of the Water Act as follows:

"**dam works**" means any works for the construction, erection, enlargement, modification, repair or removal of a dam, or for the conversion of land to a dam, to which Part 8 or Part 8A applies or any work on any such dam which may significantly increase the dam's safety risk.

"**dam**" means a permanent or temporary barrier or structure that stores, holds back or impedes the flow of water and includes –

- (a) any spillway or similar works for passing water around or over the barrier or structure; and
  - (b) a pipe or other works for passing water through or over the barrier or structure; and
  - (c) water stored or held back by the barrier or structure and the area covered by that water; and
  - (d) an artificial depression or hole excavated in a watercourse that holds water or impedes the flow of water; and
  - (e) an artificial levee or bank that holds back or diverts water in a watercourse –
- but does not include –
- (f) associated works and canals used in, or in relation to, the generation of electricity; or

<sup>2</sup> s. 159

- (g) a tank or reservoir unless –
- (i) the storage of water involves flooding natural ground; or
- (ii) the tank or reservoir is on a watercourse; or
- (h) roads, buildings and other ancillary works that are not part of the dam;

Returning to the Act, and the “project” that is required to be substantially commenced, the “Project” is defined in s.3 of the Act. It is in the following terms.

**“project”** means the project declared by the Administrator to be a project of State significance on 22 November 2004 in Statutory Rules 2004, No. 111, being the proposal by Gunns Limited (ACN 009 478 148), as amended, for the development and operation of a bleached kraft pulp mill in northern Tasmania including any use or development which is necessary or convenient for the implementation of the project, including but not limited to the development and operation of any facility or infrastructure for –

- (a) the supply or distribution of energy to or from the mill; and
- (b) the collection, treatment or supply of water; and
- (c) the treatment, disposal or storage of waste or effluent; and
- (d) access to or from the mill; and
- (e) transport to or from the mill; and
- (f) the storage of pulp at, or transport of pulp from, a sea port in the northern region or the north-western region; and
- (g) the production of materials for use in association with the operation of the mill;

The “project” in s.3 also refers to “the project” declared to be a project of State significance in Statutory Rule 111 of 2004 (“the 2004 Order”). The 2004 Order was amended by the *State Policies and Projects Amendment Act 2005*, and accords with the wording of s. 3 of the Act. It adds nothing to the definition on s. 3.

### The Legal Issues

A number of legal issues arise when considering “substantial commencement”. The first is the meaning of the phrase itself, and what it is that has to be substantially commenced. The second question is obscured by the first, and requires a determination of what works or expenditure or activities can be taken into account when determining whether there has been “substantial commencement”.

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The interpretation of the requirement for substantial commencement - in accordance with established principles of statutory construction - requires a consideration of the whole Act, and of its objects and purposes<sup>3</sup>. Section 8(5) is relevant here, in that it requires substantial completion of dam works prior to 30 August 2011. There is no question that dam works - as defined in the Water Act - are encompassed by the definition of "project"<sup>4</sup>. Consequently, this has the result of requiring substantial commencement of the pulp mill project by 30 August 2011, where a significant component of the project is required to be substantially completed by 30 August 2011.

If Parliament only intended investigation, planning, regulatory approval and the entering into contracts etc., together with minor earthworks, to constitute substantial commencement, it is hard to understand why Parliament required the dam works to be substantially completed within 4 years. When one considers the requirement (of substantial completion) applying to the dam works, it is more likely Parliament was contemplating that broad scale commencement of the project was underway for the purposes of "substantial commencement". This approach is consistent with the Speech of the Minister referred to above.

As to the meaning of the phrase "substantial commencement", two decisions of the High Court are relevant to the interpretation and understanding of the expression "substantial commencement". They are Drummoyne Municipal Council v. Leberman (1974) 131 CLR 350 and Day v. Pinglen Pty Ltd (1981) CLR 289.

To some extent, I believe that both of these decisions need to be approached with caution. While they are both concerned with the use of the expression "substantially commenced" within s.315 of the *Local Government Act 1919 (NSW)*, that provision is specifically concerned with the substantial commencement of "building work". It provides that a building approval will be void "if the building work to which it refers is not substantially commenced within 12 months after the date of approval". Hence, the New South Wales decisions concerning substantial commencement do so within the framework of whether work on the site - being building work - has been substantially commenced (as opposed to the "project"). Further, interpretation of the phrase in the Act must be in accordance with its context within the Act, and the purpose of the Act.

In the case of the proposed pulp mill, we are concerned with "substantial commencement" of the "project", which is defined in terms so as to mean (from s.3

<sup>3</sup> See s. 8A *Acts Interpretation Act 1931*

<sup>4</sup> Which would be infrastructure for the supply of water within the terms of the definition of project in s. 3.

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of the Act) “the proposal by Gunns ... for the development and operation of a bleached kraft pulp mill in northern Tasmania”.

Hence, “development” of the pulp mill project is just one component that is required to be assessed as part of the factual matrix in determining whether there has been substantial commencement.

What then ought be understood to be part of the “development” of the project? The definition of project in s.3 of the Act uses the expression “development and operation”. The word “operation” could only refer to the running of the proposed pulp mill and all associated infrastructure once its construction (and development) had been completed. The project could not be in “operation” unless its development had been completed. Accordingly, development must contemplate, at the least, construction of the component parts of the project (including the waste pipeline to Bass Strait, the pulp mill, water pipeline, wharf etc), up to but not including the operation of the pulp mill. However, the “operation” of the project cannot be overlooked as part of the concept that is required to be substantially commenced.

The word “development” is usually a noun, but in the sense that it is used in the Act I believe it is a transitive verb. The word “develop” as a transitive verb is defined in the Concise Oxford Dictionary to mean “construct buildings etc on (land), convert (land) to new use, so as to realise its potentialities”.

What has to be substantially commenced is the project, comprising the development and operation of a pulp mill (and associated infrastructure). The “development” must comprise the construction of the component parts of the project. The question is, does “development” of the project contemplate project planning and design work, and seeking regulatory approval?

In relation to the Act, it is the “development and operation of the pulp mill” that must be commenced. That cannot be commenced until there has been an approval granted by the State (under the Act), and an approval granted by the Commonwealth. Given the comments of the Minister set out above as to the reasons for the amendments to the Act, it would defeat the purpose of the 2009 amendments to the Act – ie to give clarity and certainty – if the proponent could demonstrate commencement to the requisite degree based largely upon work carried out to obtain permits, and then not progress the project at all.

In my opinion, work carried out to obtain regulatory approval would not be considered as part of the commencement. There is also one NSW case holding that work carried out for the purpose of obtaining an approval would similarly be excluded from consideration<sup>5</sup>.

<sup>5</sup> *Lawrence Waterhouse Pty Ltd v. Port Stephens Council* [2007] NSWLEC 605 at [25].

If the NSW and Queensland Court cases are a guide<sup>6</sup>, work done on the project prior to the entering into contracts for construction will not be considered relevant. It is what is described as “preparatory work”, and is regarded as outside the field of relevant works.

Accordingly, an answer to the question of whether there has been substantial commencement of the project will require a close examination of work that has been carried out, and a consideration of the purpose of the work. There will be no bright dividing line, in that some work will be attributable to permits, but may also be relevant to design and operation.

### Applicable Legal Principles

The following are some of the applicable legal principles.

- The question whether the work or development has been substantially commenced is an objective one depending on what in fact has been done, rather than on the intention with which it is done: United Dominions Corporation v. Woollahra Municipal Council [1973] 1 NSWLR 616 at 618, Drummoyne Municipal Council v. Leberman at 360.
- Substantial commencement does not suggest that what has been done forms a large proportion of the whole work. Something can be substantially commenced although it has not been substantially completed: Drummoyne Municipal Council v. Leberman at 361.
- The commencement must be real, as opposed to a notional or sham commencement and in some circumstances the absence of any intention to complete, if proved, might establish that a purported commencement was a sham: United Dominions v. Woollahra Municipal Council at 622G.
- The facts must be such as to lead naturally to the conclusion that the commencement is not merely evident, but is substantial, that is, of considerable amount. The statutory purpose must be borne in mind. A substantial commencement involves a commitment of resources of such proportions relative to the approved project as to carry the assurance that the work has really commenced: Day v. Pinglen at page 299.
- Substantial commencement requires that that which is commenced and commenced substantially shall be that which has been approved: Hastings MCV v. Mineral Deposits Ltd (1981) 1 NSWLR 310.

<sup>6</sup> See eg *Ex parte Dackfield* (1982) 49 LGRA 363; *Hunter Developments Brokerage Pty Ltd v. Cessnock City Council* [2004] NSWLEC 454.

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- It may well be that planning, design work and the like are to be considered as part of "development". In *Liverpool City Council v Home Units Australia Pty Ltd* [1973] 2 NSWLR 61 Hutley JA, after referring to an earlier decision of Hardie J in *North Sydney Municipal Council v Middle Harbour Investments Pty Ltd* [1964] NSWLR 934, made a number of observations at p. 69 in relation to preparatory work and design work as being relevant to the question of commencement under the *Local Government Act 1919*:

"It was suggested that that passage [that is, the passage from the judgment of Hardie J] means that in determining whether work has been substantially commenced, work off site was to be disregarded, such work being preparatory work. Though the passage lays it down that there has to be work done on the site for there to be substantial commencement, it does not mean that work done off the site which is referable to a particular building or structure is to be disregarded. Such work though preparatory work in one sense can be part of the unequivocal step indicating that the building has been commenced.

The law is not compelled to disregard the transformation in building practice brought about by prefabrication on a large scale in the development of the means of erecting buildings in situ by the assembly of prefabricated sections ...

It would be ridiculous to disregard prefabricated work or firm contracts for the prefabricated work in determining whether the building is substantially commenced as in such work the great bulk of the expenditure on the building work may be made ... A small amount of work on site may well be preceded by a great amount of work.

The distinction between preparatory work and other work is that work leading up to the making of the building contract is preparatory work, work which is part of the contract to erect is not preparatory work. Design work for incorporation in the contract is preparatory work, design work in consequence of the contract is not. Preparatory work is not work off site.

The erection of a structure has not substantially commenced if all that has happened is that planning has started to enable a contract to be let or the work of erection to be started but, provided some contract work has been done on site, all the work which is part of the contract can be looked at to answer the question."

### Factual materials

I have taken account of the following information:

- Volume 2b of Gunns' Draft Integrated Impact Statement for the pulp mill, Ch 11, Description of the Landfill (Solid Waste Disposal Facility) Quarry and Water Reservoir;

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- The Pulp Mill Permit approved by both Houses of Parliament pursuant to the Act.
- a document entitled "8. Major Construction Phase Activities". This is an extract from Volume 1 of the Draft Integrated Impact Statement for the pulp mill. It derives from Gunns' website and provides details of the construction activities.
- a document entitled "Construction Environmental Management Plan". This document is likely to have been prepared and lodged with the Director of Environmental Management pursuant to Schedule LU1, condition 2CN.2.1 of the Pulp Mill Permit. This document is dated August 2009 and identifies, in considerable detail, the work that is involved in the construction of the mill, the wharf, the associated infrastructure, the water supply pipeline and the like.
- a copy of a document entitled "Bell Bay Alliance, Bell Bay Pulp Mill Project Construction Monitoring Plan". This document has been reproduced from the [www.gunnspulpmill.com.au/permits/pma.htm](http://www.gunnspulpmill.com.au/permits/pma.htm) website. It sets out a likely timetable and scheduling for the various construction activities.
- A document from [www.businessday.com.au](http://www.businessday.com.au)<sup>7</sup> that refers to the planned commencement of earthworks this month and \$230m already spent as potentially satisfying obligations of substantial commencement.
- The video of the site found on the Gunns pulp mill website<sup>8</sup>.
- An email from Lucy Landon Lane, a resident of the Tamar Valley, dated 27 August 2011 stating that there is no sign of any dam works at the locations identified in the Pulp Mill Permit WM2 and WM3, relating to the construction of a water reservoir and a landfill pond.
- Gunns Ltd's Preliminary Final Report released to the ASX on 25 August 2011, which contains the following statement<sup>9</sup>:

### 17. Pulp Mill Project

*Capital works in progress include \$217.5m (June 2010; \$205m) relating to the proposed Bell Bay Mill. The project is the construction of a bleached Kraft pulp mill in Tasmania. The costs capitalised are those costs incurred after establishing the commercial viability of the project and which are directly attributable to the development of the project. They include preliminary*

<sup>7</sup> At <http://www.businessday.com.au/business/gunns-clears-decks-for-mill-handover-20110714-1hg2x.html>

<sup>8</sup> <http://www.gunnspulpmill.com.au/aerial.php>

<sup>9</sup> At page 14

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*environmental monitoring and engineering work, costs associated with the planning approval process for the mill and equipment purchases. ...*

*Final Federal operational Permits for the pulp mill project were issued in March 2011. The issue of these permits provides all required permits for construction and operation of the mill. It is a requirement of the State permit that substantial commencement of the project occur before August 30 2011. The company has undertaken substantial investment and works on the project to meet this requirement. Expenditure to date of over \$200m has been incurred to finalise approvals, complete site roading and vegetation clearing, prepare construction, operation and monitoring plans and procure equipment. The completion of bulk earth works will see a further investment of approximately \$20m.*

- The announcement by Gunns on Friday 26 August 2011<sup>10</sup> of the appointment of contractors for bulk earthworks at the site (Hazell Bros and John Holland).

From the above materials, it can be deduced that Gunns has not commenced construction of any component part of the project, other than some clearing of the site, basic earthworks and some road works. None of the energy supply, water supply, waste disposal, access, storage, loading, wharf, power production, or effluent disposal has begun construction (or been developed). Significantly, no dam works within the meaning of that expression in the Water Act have been constructed, let alone substantially completed.

It is necessary to direct attention to Gunns' ASX announcement. Curiously, there is a discrepancy between Gunns' ASX announcement of having spent \$217.5 million towards the pulp mill, while Gunns has been reported in July 2011 in [www.businessday.com.au](http://www.businessday.com.au) as having spent \$230m. This is a significant discrepancy.

What is clear from the ASX report is that Gunns has unquestionably included its outlays towards State and Federal permits as part of what it claims as expenditure on substantial commencement of the project. What we do not know is how much of the expenditure is referable solely to permits/approvals and what would be called preparatory works.

As to the contract for bulk earthworks, this is certainly one factor to be taken into account in determining if there has been substantial commencement. However, the contract would need to be scrutinised carefully as to whether, for example, it is contingent upon the validity of the pulp mill permit, or upon finance being obtained by the proponent. Further, no start date for the works has been identified. Again, the terms of this contract will be part of the factual matrix that will need to be

<sup>10</sup> <http://www.examiner.com.au/news/local/news/business/pulp-mill-contract-announced/2271753.aspx>

considered, and this is especially so given its announcement some 4 days prior to the expiry of the 4 year period.

## ANSWERS

1. If, hypothetically, no further work on the Gunns Ltd pulp mill project is undertaken, would the project's current status be considered "substantial commencement" as required under section 8 of the Pulp Mill Assessment Act 2007?

I am presently unable to answer this question, because the precise extent of any work that could be regarded as development of the project by Gunns is largely unknown (apart from some clearing of the site and minor road works), or is unable to be verified. Any construction works that may be commenced on the site (or off the site) in the next few days could have no impact on the answer to the question.

Any consideration of substantial commencement needs to take account of:

- the scale of the project (put at \$2.5 billion) and the construction of the component parts;
- the reference in the Construction Environmental Management Plan, page 5, to the duration of the bulk earthworks as 12 months;
- the extent of the earthworks that could be anticipated to be carried out in the month of August 2011, but prior to 30 August 2011;
- the extent of site works already carried out;
- the extent of work on "development" of the project;
- any contracts that the proponent has entered into such as to advance the project, such as the bulk earthworks contract;
- the requirement of the Act for substantial completion of dam works;
- the failure to substantially complete any dam works.

In terms of the uses and developments which are contemplated by s. 3 as being a part of the project, being:

- (a) the supply or distribution of energy to or from the mill;
- (b) the collection, treatment or supply of water;
- (c) the treatment, disposal or storage of waste or effluent;
- (d) access to or from the mill;
- (e) transport to or from the mill;

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(f) the storage of pulp at, or transport of pulp from, a sea port in the northern region or the north-western region;

(g) the production of materials for use in association with the operation of the mill;

none of these has been advanced at all.

Gunns clearly relies upon its expenditure towards permits and approvals, and if this is to be disregarded as contributing to the commencement of the project, then it significantly lessens the prospect of commencement being substantial. The work on the site – given the scale of the project – is relatively insignificant and alone could not be considered a substantial commencement of the project.

It is impossible to say with confidence that the project has or has not substantially commenced at this point in time.

The only way the status of the project could be clearly determined is by proceedings in the Supreme Court or the Resource Management and Planning Appeal Tribunal, where Gunns would be required to produce evidence to demonstrate substantial commencement of the project. Work done (or contracts entered into) after 30 August 2011 would be irrelevant.

2. How is the question of “substantial commencement” determined, either under the Act or any other relevant instrument?

There is no procedure available for the making of such a determination. There is no statutory requirement for the EPA – or any body such as a Council or statutory authority or Minister – to decide this issue. Those bodies can really only just form a view. That view does not bind Gunns. Ultimately, these factual issues will need to be determined by the Supreme Court or the Resource Management and Planning Appeal Tribunal (as to which, see below). It will involve a consideration of all the evidence of steps taken by the proponent to advance the project, as of 30 August 2011. However, absent a determination by the Supreme Court or RMPAT, the point will never be decided. This makes regulation of the project problematic. While Gunns may confidently assert the project has been substantially commenced, the EPA and other regulators need to be able to proceed without any doubt as to this.

3. What options are available to state authorities and/or statutory officers to undertake in order to determine whether “substantial commencement” has occurred?

The issue can be determined in one of two ways. It can be authoritatively determined by the Supreme Court, on the application of a party seeking a declaration that the permit has or has not lapsed. This in turn will require the Court to determine the factual issue of whether the commencement is substantial. Any

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relevant State authority (such as the EPA), statutory officer or Georgetown Council could be an applicant before the Supreme Court.

The second way the issue can be determined is by application to the Resource Management and Planning Appeal Tribunal for orders restraining the proponent from carrying out works without a permit<sup>11</sup> (which permit would be required under the Planning Scheme if the Pulp Mill permit has lapsed). That would involve a determination by the Tribunal as to whether Gunns' permit had lapsed, as only if it had lapsed would the Tribunal have jurisdiction to deal with the application for restraining orders.

4. Under the current Act can a third party seek to take legal action in order to test whether "substantial commencement" has occurred?

The answer to this question is "yes", and raises 4 issues:

- (1) Does the third party have standing to bring the proceedings? A third party can take action in the Supreme Court to seek a declaration as referred to in the answer to question 3, providing that person or organization has standing. A Tamar valley resident who is potentially impacted by the noise or smell or visual impact of the proposed project would likely have standing. An organization set up to oppose the proposed project, or which has relevant objects relating to environmental protection, would also likely have standing<sup>12</sup>. Georgetown Council would undoubtedly also have standing to apply.

Standing could also arise where the Attorney-General grants his or her *fiat* (or imprimatur) to a member of the public to bring proceedings, in circumstances where that person would not have standing. The grant of the *fiat* gives the person standing to sue in the Supreme Court.

- (2) Further to (1) above, Georgetown Council, the Tasmanian Planning Commission or a person with a proper interest in the case<sup>13</sup> could apply to the Resource Management and Planning Appeal Tribunal, as referred to above.

- (3) I have considered whether s. 11 of the Act is an impediment to seeking a declaration in the Supreme Court as referred to in the answer to question 3, or an order from the Resource Management and Planning Appeal Tribunal. In my view it is not an impediment, for 2 reasons.

<sup>11</sup> Under s. 64 of the *Land Use Planning and Approvals Act, 1993*

<sup>12</sup> However, more is required to be demonstrated by such an organization to be held to have standing: North Coast Environmental Council Inc. v. Minister for Resources (1994) 55 FCR 492 at 512

<sup>13</sup> Under s. 64(1) of the *Land Use Planning and Approvals Act, 1993*

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Section 11 is as follows:

**11. Limitation of rights of appeal**

*(1) Subject to subsection (3) and notwithstanding the provisions of any other Act –*

*(a) a person is not entitled to appeal to a body or other person, court or tribunal; or*

*(b) no order or review may be made under the Judicial Review Act 2000; or*

*(c) no declaratory judgment may be given; or*

*(d) no other action or proceeding may be brought –*

*in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act.*

*(2) For the purposes of subsection (1), "any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act" includes any action, decision, process, matter or thing arising out of or relating to a condition of the Pulp Mill Permit requiring that the person proposing the project apply for such other permits, licences or other approvals as may be necessary for the project.*

Firstly, s. 11 prevents an action "in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act". Neither the action for a declaration referred to in the answer to question 3, nor the application to the Resource Management and Planning Appeal Tribunal, arise out of or relate to any assessment or approval, and neither are they "in respect of any action, decision, process, matter or thing".

Secondly, there are reasonable prospects of an argument succeeding that s. 11 is constitutionally invalid. In early 2010 the High Court in Kirk v. Industrial Court (NSW) (2010) 239 CLR 531 decided that a provision in the NSW Industrial Relations Act 1996 that purported to prevent any appeal, review or challenge to a decision of the NSW Industrial Court (for jurisdictional error) from being brought in the NSW Supreme Court was invalid by virtue of Chapter III of the Commonwealth Constitution. This was because the power to supervise and enforce the limits of the Executive government that is reposed to the Supreme Court could not be taken away from the Supreme Court. In my view, the principle applied in that decision would apply to s. 11, as s. 11 purports to remove from the Tasmanian Supreme Court the power to

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supervise and enforce the limits of the exercise of power of the Tasmanian Government.

- (4) A "third party" who would not have to demonstrate standing to bring the proceeding in the Supreme Court (or RMPAT) is the Tasmanian Attorney-General. The Attorney-General has a right to bring proceedings in the civil courts to seek an injunction or declaration when public rights are affected<sup>14</sup>. The right of the Attorney-General has been expressed as the ability to take proceedings to prevent the commission of a public wrong<sup>15</sup>, or as the right to enforce obedience to the law<sup>16</sup>. If a public right is involved, there is no doubt the Attorney-General has the right to proceed in a Court to enforce the right, whether it constitutes a breach of the criminal law or not. The Attorney-General also has a right to bring proceedings in the civil courts to seek an injunction to restrain a breach of the criminal law.

If the Pulp Mill Permit has lapsed by operation of s. 8(4) of the Act, then any work carried out by the proponent on the land or as part of the project would be a "use or development" within the terms of the LUPA Act, and by s. 63(2) of that Act, it is a criminal offence to undertake development contrary to a planning scheme. In this case, the Georgetown Planning Scheme 1991, by clause 2.5.1(c), provides that a use or development without a planning permit is prohibited. Thus, the Attorney-General would have standing to bring proceedings. An example is Attorney-General v. Chaudry [1971] 3 All ER 938, where an injunction was granted to the Attorney-General to restrain the use of a building as an hotel without a licence. Such use was also a criminal offence.

5. What is the current status of the Water (Dam) Permits taken to be issued under section 8 of the Act, when do they expire, and how is this determined? Further, should the Water permits expire, what bearing would that have for the 'substantial commencement' requirement of the Pulp Mill Permit?

If it is the case that the dam works have not been commenced - and that appears so - then by the operation of s. 8(5) of the Act and s. 159(8) of the Water Act the Water Management Permits being Schedule WM2 (Water Reservoir) and Schedule WM3 (Landfill Pond) to Appendix 2 of the Pulp Mill Permit will lapse at midnight on 30 August 2011. There is a procedure under the Water Act for the Assessment Committee for Dam Construction to grant an extension of the 4 year period, provided an application is made no later than one month prior to the permit lapsing<sup>17</sup>. I do not know if an application has been made to the Committee.

<sup>14</sup> See for example Gouriet v. Union of Post Office Workers [1977] 3 All ER 70

<sup>15</sup> Gouriet at 93, 100

<sup>16</sup> Attorney-General v. Publishing & Broadcasting Ltd (1962) 2 NSWLR 813 at 815

<sup>17</sup> Water Act, s. 159(1).

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Similarly to the substantial commencement issue, there is no statutory procedure to determine if the dam works have been substantially completed. However, given that the dam works have not commenced it will be indisputable that the permit lapses (absent an extension of time).

I cannot see the expiry of the permits will impact upon whether there has been substantial commencement of the project, as the permit can be extended, and, provided the application has been made by July 30, the threshold for extension is far from onerous.

If there is any aspect of this advice that requires clarification, please do not hesitate to contact me.

Yours faithfully,  
FITZGERALD AND BROWNE

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