

Re Pulp Mill Pipeline

1. Schedule LU4 of the Pulp Mill Permit comprises effectively a Land Use and Development Permit in relation to a water pipeline for the pulp mill. It requires that the pipeline be confined for the most part to easements which it identifies.
2. However, it does not grant any easements or otherwise change title to land. Instead, at least as far as private land is concerned, it imposes on Gunns the necessity to negotiate the required easements; Condition 2.6.
3. Unless the permit creates an easement or other right to construct and operate a pipeline over council land, Gunns must negotiate the right to do so with the council as the relevant land owner. The fact that the permit does not state this requirement specifically does not rule it out. The normal law requires that a private developer such as Gunns who needs to develop on the land of another must negotiate with the other for that land.
4. Griffiths' opinion suggests that LU4 creates a statutory licence over council land, including public land, such that no easement is needed. However, that is unlikely because LU4 indicates that the pipeline is to follow a corridor defined in terms of stipulated easements; see the definition of 'construction corridor'. However the possibility that LU4 creates statutory licences over council land cannot be ruled out on that ground alone.
5. LU4 can only confer a licence or other right to build the pipe line on council land if the Pulp Mill Assessment Act (PMAA) authorises the permit to grant such a right.
6. Development permits are usually granted under the Land Use Planning and Approvals Act (LUPAA). Section 52(1B) of that Act requires that an application to develop on council land must be signed by the general manager of the council. One of the consequences of the Pulp Mill Assessment Act is to waive that requirement because it, in section 9, exempts the mill from the provisions of LUPAA.
7. However, this does not mean that the PMAA authorises Gunns to carry out works on council lands without the permission of the council. The council is, in my opinion, not giving a developer an easement, licence or other right to carry out development on council land subject only to planning permission when the general manager signs the development application. The signature of the general manager is a precondition to the council's considering the application but does not confer any rights over council land. If the application is not signed by the general manager, it cannot be considered, that is all.
8. The reason why the general manager's signature does not confer any rights over the land is that, if it did, it would enable local governments to avoid the restrictions which the Local Government Act places on their dealings with land.
9. Section 178 of the Local Government Act places limits on the power of a local government to deal with public land, which is defined in s 177A of the Act. Resolutions to sell or otherwise dispose of public land must be passed by an absolute majority of council. The council must advertise its intention to dispose of public land and must consider any objections by members of the public. An objector may appeal the council's decision under s 178A of the Act.

10. If the general manager's signature on a development application under s 52(1B) of LUPAA transferred rights in the land to the developer, a council would be able to use that procedure to transfer public land to a developer without going through the procedures laid down under s 178 of the Local Government Act. The developer, as in this case, might be a private developer. Members of the public would only find out and have a right to object if the development was discretionary rather than permitted and thus could lose their rights to challenge the alienation of public land. In my opinion, that was not the intention of s 52(1B) of LUPAA.
11. AS the general manager's signature under s 52(1B) of LUPAA does not confer any rights over council land to a developer, the PMAA's waiving of the requirement for that signature does not confer any rights, whether easements or licences, to develop over council land to Gunns.
12. Section 9 of the PMAA does not confer any such right. It exempts the mill from the provisions of any Act, planning scheme, planning order or interim order requiring the approval, consent or permission of any person in connection with the use or development. Although it could be said that the council's rights as land owner arise under Acts such as the Local Government Act and the Land Titles Act, and that as a land owner its permission is normally required for development to take place on its land, in my opinion there is nothing in section 9 which exempts Gunns from the need to gain the council's permission as landowner to develop on their land.
13. If Gunns were given this exemption, it would apply equally to privately owned land as well as publicly owned land. It was not the intention of the PMAA to vest rights over private land in Gunns where necessary for their development. Such an interpretation is untenable because it entails that the parliament intended to deprive private land owners of property rights and vest them in a private developer without any compensation.
14. It is clear that s 9 of the PMAA only exempts the mill from permissions required from public authorities under public law regulatory statutes, like development permission under LUPAA. It does not exempt Gunns from any need to gain private law rights over other people's land which it needs for the development to take place. Planning approval normally does not give such rights but gives a permission for development to take place if the developer has or is able to obtain ownership and other necessary property interests in the land the subject of the development approval.
15. Therefore, neither the PMAA or LU4 gives Gunns any right or licence to go onto council land to carry out the pipeline development. Instead they must gain that right from the council.
16. If the easements contemplated by LU4 are on land which is public land for the purposes of the Local Government Act, it is arguable that a grant of those easements is a disposal of some part of the land for the purposes of 178 of the Local Government Act and therefore can only be done by absolute majority after appropriate advertising.
17. Whether that is the case or not, the pipeline cannot commence or be built on council land without the council's permission.

18. It would be an abuse of power if council refused that permission on general planning grounds because Council was deprived of its planning powers over the mill by the PMAA and it cannot deal itself back in by misusing its position as land owner. If it did that, its decision would be open to challenge in the courts.
19. However, it can, like any land owner, sell the required easements. It may also have the power to refuse the easements if they are inconsistent with the use to which the public land is dedicated. The mill is a private development and in some circumstances it may be improper for a council to make public land available for a private development. But that is left to the discretion of the council subject to the right of appeal in s 178A of the Local Government Act. In reaching its decision, the council would be expected to take into account that parliament was the approval authority and to give its opinion due weight. But other considerations could conceivably outweigh that fact, justifying a decision to refuse Gunns permission.
20. The council decision not to sign the pipeline easement agreement, for whatever reason, means that the pipeline cannot be constructed across council land. This is the case even if the council did not sign the agreement under the mistaken assumption that its consent was not needed. The council's deciding that it has no jurisdiction to give or refuse access to their land does not give Gunns the right it needs to enter their land to build the pipeline. Only a decision to grant Gunns the necessary right could do that. A decision that they have no jurisdiction does not confer any licence or other property rights. Silence is not an approval, whether it is deliberate or based on a misunderstanding of their legal powers. However, Gunns are not permanently barred from council land, as the council could agree to the easement at some future time.

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