

**FITZGERALD AND BROWNE**  
**Lawyers**

Ref: RB/mkb 3715

1 September 2011

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

Dear Mr. McKim,

**PULP MILL ADVICE – DAM PERMITS**

I refer to your request for advice as to whether Gunns is able to apply for a new permit (or permits) under the *Water Management Act* in the event that Gunns' permit relating to the pulp mill site have expired.

I refer to my letter to you dated 29 August 2011, which set out my views in relation to the WM series of permits for Dam Works.

In my opinion, Gunns is not able to apply for a new permit under the *Water Management Act* ("the Water Act") in the circumstances so described. More correctly, no person or body established under the Water Act has power to grant any such permit or approval. My reasons for this are as follows, and require a close consideration of the *Pulp Mill Assessment Act 2007* ("the Act").

The Act is extraordinary and highly unusual legislation. The relevant components in terms of the creation of the pulp mill permit are as follows:

1. Relevant persons recommend conditions that should apply to the project (s.6(7))
2. Those conditions can require the proponent to apply for such other permits, licences or other approvals as may be necessary for the project (s.6(6))
3. The Minister is then to prepare the pulp mill permit containing the substance of all conditions (s.6(8))
4. The project is approved if each House of Parliament accepts the permit (s.7(1))

---

PARTNERS  
Tony FitzGerald  
Roland Browne

GPO Box 1951, Hobart 7001  
Level 2, T & G Building,  
115 Collins Street, Hobart 7000  
[www.fitzgeraldandbrowne.com.au](http://www.fitzgeraldandbrowne.com.au)

SENIOR ASSOCIATE  
Cassandra Gregg  
ASSOCIATE  
Doris Melara

DX 246, Hobart

CONVEYANCING CLERKS  
Colleen Burdon  
Shannon Cullen

Tel: (03) 6224 6777  
Fax: (03) 6224 6755  
[thefirm@fablawyers.net.au](mailto:thefirm@fablawyers.net.au)

5. If the project is approved, the pulp mill permit comes into effect (s.8(1)(a))
6. The project may proceed on the conditions specified in the pulp mill permit, and this is expressed to be "notwithstanding any other Act" (s.8(1)(b))

The structure of the Act is that all permits and licences and other approvals for the project are contained within the pulp mill permit as conditions; and the project proceeds – and can only proceed - "on the conditions specified in the pulp mill permit". Any other conditions/licences/approvals required are dealt with as part of the pulp mill permit in accordance with s.6(6) and s.8(2).

The Act is aimed at delivering a codification of permit conditions for the pulp mill through the pulp mill permit, to the point that the Act by s.11 attempts to exclude any legal challenge "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". This is extended – and perhaps clarified – by s.11(2) which has the effect of asserting that any action, decision, process, matter or thing that arises out of any assessment or approval includes any such action, decision, process, matter or thing that arises out of a condition of the permit that requires the permit to apply for such other permits, licences, or other approvals.

Within this framework, s.8(1)(c) provides that any permit or licence or other approval is taken to have been issued under the (particular) Act specified in the permit in relation to each condition, and that that Act applies as if such permit, licence or other approval had been issued on the conditions set out in the pulp mill permit in relation to that Act. Here, it is important to note that any such permit or licence is deemed to have been issued under the specified Act and that that (particular) Act applies as if such permit, licence or other approval had been issued on the conditions set out in that Act.

Critically, the effect of the Act is that any process required for the application for any permit or licence or approval in any Act is superseded by the *Pulp Mill Act*, which has the effect of overriding all other relevant planning, environmental and water management legislation. The only exception to this is s.8(2) which specifies that if a pulp mill permit condition requires the proponent to apply for other permits etc, that person must comply with that requirement.

This is reinforced by the pulp mill permit itself, in the interpretive section on page 1 which provides as follows:

*10: where a condition requires a person responsible to apply for other permits, licences or other approvals as may be necessary for the project, that condition will not be taken to be satisfied until such a licence, permit or other approval is obtained.*

PARTNERS  
Tony FitzGerald  
Roland Browne

GPO Box 1951, Hobart 7001  
Level 2, T & G Building,  
115 Collins Street, Hobart 7000  
[www.fitzgeraldandbrowne.com.au](http://www.fitzgeraldandbrowne.com.au)

SENIOR ASSOCIATE  
Cassandra Gregg  
ASSOCIATE  
Doris Melara

DX 246, Hobart

CONVEYANCING CLERKS  
Colleen Burdon  
Shannon Cullen

Tel: (03) 6224 6777  
Fax: (03) 6224 6755  
[thefirm@fablawyers.net.au](mailto:thefirm@fablawyers.net.au)

I now turn to s.9. Section 9 is as follows.

**9. Provisions of Acts, planning schemes, &c., not to apply to project**

**(1)** *The provisions of any Act, planning scheme, special planning order or interim order –*

**(a)** *requiring the approval, consent or permission of any person in connection with any use or development in relation to the project; or*

**(b)** *empowering any body to grant or refuse its consent to any such use or development; or*

**(c)** *prohibiting any such use or development; or*

**(d)** *permitting any such use or development only upon specified terms or conditions; or*

**(e)** *regulating or permitting the regulation of any such use or development – do not apply to the project.*

Section 9 excludes the operation of any other legislation in relation to the project, where that legislation requires a permit, consent or permission for use or development in relation to the project. The concepts “use” and “development” are well understood terms in planning law.

There is no need to explore the definition of these terms at this point. There could be no doubt that the construction of a dam and the construction of a reservoir would be a use and/or development. Further, it is beyond doubt that such construction would be in relation “to the project”.

Accordingly, the provisions of the *Water Management Act* requiring approval before dam works can be undertaken, do not apply to this project. Section 9(1)(a) has that consequence. This interpretation is buttressed by s.9(1)(d) which has the effect of excluding any power to impose terms or conditions upon any use or development (in connection with the project). In other words, even if s.9(1)(a) could be read down to allow a permit to be granted for dam works, s.9(1)(d) would prevent the imposition of any terms or conditions on the permit to construct the dam or the reservoir. Similarly, s.9(1)(e) has a similar effect. A permit without conditions is meaningless.

PARTNERS  
Tony FitzGerald  
Roland Browne

GPO Box 1951, Hobart 7001  
Level 2, T & G Building,  
115 Collins Street, Hobart 7000  
[www.fitzgeraldandbrowne.com.au](http://www.fitzgeraldandbrowne.com.au)

SENIOR ASSOCIATE  
Cassandra Gregg  
ASSOCIATE  
Doris Melara

DX 246, Hobart

CONVEYANCING CLERKS  
Colleen Burdon  
Shannon Cullen

Tel: (03) 6224 6777  
Fax: (03) 6224 6755  
[thefirm@fablawyers.net.au](mailto:thefirm@fablawyers.net.au)

In my view, this outcome is unsurprising as the Act and the pulp mill permit were designed to be an overarching code for the assessment, approval and regulation of the project. The mechanism by which this was to be delivered was the pulp mill permit to the exclusion of all other regulatory and statutory processes.

Put simply, s. 9(1) has the effect that the dam works approval process (under Division 4 of Part 8 of the *Water Management Act*) does not apply, and cannot apply, to the pulp mill project.

Yours Faithfully,  
FITZGERALD AND BROWNE

Per:



Roland Browne  
E: [rolandb@fablawyers.net.au](mailto:rolandb@fablawyers.net.au)

---

PARTNERS  
Tony FitzGerald  
Roland Browne

GPO Box 1951, Hobart 7001  
Level 2, T & G Building,  
115 Collins Street, Hobart 7000  
[www.fitzgeraldandbrowne.com.au](http://www.fitzgeraldandbrowne.com.au)

SENIOR ASSOCIATE  
Cassandra Gregg  
ASSOCIATE  
Doris Melara

DX 246, Hobart

CONVEYANCING CLERKS  
Colleen Burdon  
Shannon Cullen

Tel: (03) 6224 6777  
Fax: (03) 6224 6755  
[thefirm@fablawyers.net.au](mailto:thefirm@fablawyers.net.au)