File No:244/02 P **J 54/2003**

Forestry - Organic Farming – Pollution

RESOURCE MANAGEMENT AND PLANNING APPEAL TRIBUNAL

BETWEEN

Gunns Ltd Appellant

AND

Kingborough Council Respondent

This was the hearing on an appeal against a conditional permit for forestry, and an alleged failure to grant a permit applied for, namely for road construction, harvesting and plantation establishment, on land known as P1212 at Risby Road, Middleton.

The appeal was heard at Hobart on the 17, 18, 19 and 20 February 2003.

S.McElwaine of Counsel appeared on behalf of the appellant.

G Kench of Counsel appeared on behalf of Kingborough Council, and was granted leave to withdraw. Council was then represented by A Goodsell.

C Klok , S Young and J Turner appeared in person as joined parties.

Amended pursuant to Section 23 of the Resource Management and Planning Appeal Tribunal Act 1993

Condition 13 – page 22
New Clause 48 replaces 48 & 49 re costs – page 23

The ……day ……..2003

KAM Pitt QC
Chairman

DECISION

1. Application was made for a permit for "road construction, harvesting and plantation establishment" on a property known as P1212 at Risby Road, Middleton. Council granted a permit upon a number of conditions for the "forestry". The permit document was silent, either by reference to a refusal or otherwise, as to the aspects of the application relating to "road construction, harvesting". The permit document set out a number of conditions.

2. The appellant contended that as the permit was only for forestry, and there had been a failure by Council to determine the permit application insofar as it related to road construction and harvesting, Council was deemed to have granted a permit, pursuant to section 59 of the Land Use Planning and Approvals Act 1993. It was also contended for the appellant that the permit was ultra vires, in that it purported, in part, to be for land over which Council had no jurisdiction. The appeal was also against a number of conditions in the permit.

3. With respect to the contention that Council had failed to grant a permit in respect of a number of the aspects of the proposed use and development sought, it was answered for Council that the road construction and harvesting were already complete by the date of the application for the permit, and that for Council to have granted a permit in respect of those matters, would have been to grant a retrospective permit; which would it was contended have been outside the power of Council. It was common ground, and the Tribunal finds, that at least two-thirds of the stated activities of road construction and harvesting were already complete by the date of application for the permit. It was contended for Council that all of those activities were complete by that date; that is assumed in council's favour, for the purposes of the present argument. It does not however follow that the application was one for a retrospective permit.

4. The following sections of the Land Use Planning and Approvals Act 1993 are relevant:

> 51
>
> (1) A person must not commence any use or development which, under the provisions of a planning scheme or special planning order, requires a permit unless the planning authority which administers the scheme or order has granted a permit in respect of that use or development and the permit is in effect.
>
> (1A) A person may apply to a planning authority which administers a planning scheme or special planning order for the granting of a permit for a use or development which under that scheme or order requires a permit to be granted in respect of that use or development.
>
> (1B) If an undertaking is in respect of –
>
> (a) a combination of uses; or
>
> (b) a combination of developments; or

(c) a combination of one or more uses and one or more developments –

and under a planning scheme or special planning order any of those uses or developments requires a permit to be granted in respect of them, a person, in one application, may apply to the planning authority for a permit with respect to that undertaking.

(2) In determining an application for a permit, a planning authority –

(a) must seek to further the objectives set out in Schedule 1; and

(b) must take into consideration such of the prescribed matters as are relevant to the use or development the subject of the application; and

(c) must take into consideration the matters set out in representations relating to the application that were made during the period referred to in section 57(5).

(3) The decision of a planning authority on an application referred to in subsection (1A) or (1B) is to be made by reference –

(a) to the provisions of the planning scheme or special planning order as in force at the date of that decision; or

(b) if the planning authority has been required under section 28(1)(a) to modify a draft planning scheme and that draft planning scheme has not been approved by the Commission at the date of that decision, to the provisions of the draft planning scheme modified as required; or

(c) if the planning authority has been required under section 41(a) to modify, or alter to a substantial degree, a draft amendment to a planning scheme and that draft amendment has not become operative at the date of that decision, to the provisions of the planning scheme as they would be if the draft amendment modified, or altered to a substantial degree, as required had become operative.

(3A) A permit to which section 57 applies may be subject to such conditions or restrictions as the planning authority may impose.

(4) A permit to which section 58 applies may be granted subject to such conditions or restrictions as the planning authority may impose with respect to any matter specified in the relevant planning scheme or special planning order.

58.

(1) This section applies to an application for a permit in respect of a use or development for which, under the provisions of a planning scheme or special planning order, a planning authority is bound to grant a permit either unconditionally or subject to conditions or restrictions.

(2) If an application for a permit to which this section applies meets the requirements of the planning scheme to which the application relates, a planning authority must grant the application either unconditionally or subject to conditions or restrictions not later than the expiration of the period of 42 days from the day on which the authority received the application or such further period as is agreed to, in writing, by the authority and the applicant before the expiration of that 42 day period.

(2A) A further period agreed to by a planning authority and an applicant under subsection (2) may be extended or further extended by agreement, in writing, between the planning authority and applicant at any time before the expiration of the period to be extended and, when so extended, is taken to be the further period referred to in subsection (2).

(3) Where a planning authority grants a permit to which this section applies either unconditionally or subject to conditions or restrictions, it must, within 7 days of granting the permit, serve notice of its decision on the applicant.

59.

(1) The failure of a planning authority to determine an application for a permit to which section 57 or 58 applies before the expiration of the period, or, where applicable, the further period, referred to in section 57(6)(b) or 58(2) is deemed to constitute a decision to grant a permit on conditions to be determined by the Appeal Tribunal.

(2) Where the failure of a planning authority to determine an application for a permit to which section 57 or 58 applies is deemed to constitute a decision to grant a permit on conditions to be determined by the Appeal Tribunal, the authority must, within 7 days of the expiration of the period, or, where applicable, the further period, referred to in section 57(6)(b) or 58(2), serve notice –

(a) on the applicant; and

(b) on any person who made representations under section 57(5) –

that the permit has been deemed to have been granted on conditions to be determined by the Appeal Tribunal.

(3) If a planning authority fails to determine an application before the expiration of the relevant period referred to in section 57(6)(b) or 58(2), the applicant may apply to the Appeal Tribunal for an order determining the conditions on which the permit is granted.

(4) After hearing an application under subsection (3), the Appeal Tribunal may, in addition to its powers under the Resource Management and Planning Appeal Tribunal Act 1993 –

(a) grant the permit unconditionally; or

(b) grant the permit and direct that the permit must contain specified conditions; or

(c) in the case of an application for a permit to which section 57 applies, direct that a permit must not be granted.

(5) After hearing an application under subsection (3), the Appeal Tribunal must direct the planning authority to pay –

(a) to the Appeal Tribunal an amount determined by the Appeal Tribunal as being the costs of the appeal; and

(b) to each other party to the appeal an amount determined by the Appeal Tribunal as being the appeal costs of that party.

(6) For the purposes of the Resource Management and Planning Appeal Tribunal Act 1993, an application under this section is deemed to be an appeal.

(7) Notwithstanding the provisions of this Division, a planning authority may make a decision on an application for a permit to which section 57 or 58 applies at any time before the lodging of an application under subsection (3).

(8) Where a planning authority makes a decision under subsection (7) it must, within 7 days of making the decision, serve notice of its decision on the applicant and, where representations have been made in relation to the application under section 57(5), on all persons who made representations.

(9) . . . . . .

(10) Any sum to which a planning authority is entitled under subsection (9) may be recovered as a debt due to the planning authority in any court of competent jurisdiction.

64.

(1) Where a person contravenes or fails to comply with a provision of this Part, the Commission, a planning authority or a person who has, in the opinion of the Appeal Tribunal, a proper interest in the subject matter may apply to the Appeal Tribunal for an order under this section.

(2) The application may be made ex parte and, if the Appeal Tribunal is satisfied that there are sufficient grounds, it must issue a summons requiring the respondent to appear before the Appeal Tribunal to show cause why an order should not be made under this section.

(2A) If an application under this section is made by a person other than the planning authority in whose municipal area is situated the land to which the application relates, the planning authority is taken to be a party to the application.

(2B) At any time after receiving an application made under this section by a person other than the planning authority in whose municipal area is situated the land to which the application relates, the Appeal Tribunal may direct that the planning authority be made an applicant in the application.

(2C) At any time after receiving an application made under this section by a person other than the Commission, the Appeal Tribunal on the request of the Commission may direct that the Commission be made an applicant in the application.

(3) If –

(a) after hearing –

(i) the applicant and the respondent; and

(ii) any other person who has, in the opinion of the Appeal Tribunal, a proper interest in the subject matter of the proceedings and desires to be heard in the proceedings –

the Appeal Tribunal is satisfied, on the balance of probabilities, that the respondent to the application has contravened or failed to comply with a provision of this Part; or

(b) the respondent fails to appear in response to the summons or, having appeared, does not avail himself or herself of an opportunity to be heard –

the Appeal Tribunal may, by order –

(c) require the respondent to refrain, either temporarily or permanently, from the act, or course of action, that constitutes the contravention of, or failure to comply with, this Part; and

(d) preclude, for a period specified by the Appeal Tribunal, the respondent from carrying out any use or development in relation to the land in respect of which the failure to comply or contravention relates; and

(e) require the respondent to make good the contravention or default in a manner, and within a period, specified by the Appeal Tribunal.

(4) Any person with a legal or equitable interest in land to which an application under this section relates is entitled to appear and be heard in proceedings based on the application before a final order is made.

(5) If, in proceedings under this section, the Appeal Tribunal is satisfied that, in order to preserve the rights or interests of parties to the proceedings or for any other reason, it is desirable to make a temporary order under this section, the Appeal Tribunal may at any time during those proceedings make such an order.

(6) A temporary order –

(a) may be made on an ex parte application before a summons has been issued under subsection (2); and

(b) may be made subject to such conditions as the Appeal Tribunal thinks fit; and

(c) is not to operate after the proceedings in which it is made are finally determined.

(7) A person who contravenes, or fails to comply with, an order or a temporary order under this section is guilty of an offence.

Penalty:

Fine not exceeding 500 penalty units.

(8) Where the Appeal Tribunal makes an order under subsection (3)(e) and the respondent fails to comply with the order within the period specified by the Appeal Tribunal, the Commission or a planning authority may, by leave of the Appeal Tribunal, cause any work contemplated by the order to be carried out, and may recover the costs of that work, as a debt, from the respondent.

(9) The Appeal Tribunal may, if it thinks fit, adjourn proceedings under this section in order to permit the respondent to make an application for a permit that should have been but was not made, or to remedy any other default.

(10) The Appeal Tribunal may, on an application under this section, exercise the powers conferred on it by section 62(1) in relation to any use or development of land as if the application were a hearing of an appeal.

(11) For the purposes of the Resource Management and Planning Appeal Tribunal Act 1993, an application under this section is deemed to be an appeal.

(12) The Appeal Tribunal must make such orders in relation to the costs of proceedings under this section as it thinks fit and in making such orders must take into account –

(a) the result of the proceedings; and

(b) whether a party has raised frivolous or vexatious issues at the hearing; and

(c) whether any party has unnecessarily or unreasonably prolonged the hearing or increased the costs of it; and

(d) the capacity of the parties to meet an order for costs.

(13) If the Appeal Tribunal is of the opinion that an application under this section is frivolous or vexatious, the Appeal Tribunal must dismiss the application and order the applicant to pay an amount determined by the Appeal Tribunal as being the costs of the proceedings in relation to the application and the costs of any person referred to in subsection (3)(a)(ii).

(14) An order under subsection (12) or (13) may be registered in a court having jurisdiction for the recovery of debts up to the amount ordered to be paid by or under the order.

(15) Proceedings for the enforcement of an order under subsection (13) may be taken as if the order were a judgment of the court in which the order is registered.

(16) Proceedings under this section may be commenced at any time within 12 months after the date of the alleged contravention of, or failure to comply with, a provision of this Part.

5. It was also common ground that the proposed uses are "permitted" under the provisions of the Kingborough Planning Scheme 1988, and that section 58 applies to them.

6. While section 51(1) prohibits the commencement of a use or development without a permit, and is clearly intended to have operation in respect of proposed, rather than completed, uses and developments, subsections (1A) and (1B) are neutral in respect of whether the "undertaking" referred to has been commenced or is entirely prospective. Further, section 64(9) must contemplate the circumstance where a use or development has been commenced prior to the proceedings before the Tribunal, and therefore the issue of a permit notwithstanding that fact. Even if the permit so issued were not properly called a retrospective permit, it would at least have the effect that as from the date of issue of the permit, uses and developments complying with the permit would be lawful. There is nothing in the relevant provisions as to retrospective operation of any such permit. The issue of whether there can be retrospective operation of such a permit, may be relevant in other proceedings in other jurisdictions.

7. It was therefore open to Council to have granted the permit in respect of each of the categories of use and development which it ignored, and Council's failure to do so therefore brings section 59 into operation. That is because Council's failure to address the relevant categories of use and development in the application, the application being not severable, constituted a failure to determine the whole application. Council is therefore deemed, pursuant to section 59, to have granted a permit for the uses and developments applied for, upon conditions to be imposed by the Tribunal.

8. The permit document, including conditions, granted by Council is therefore a nullity, and it is not strictly necessary to address the specific conditions which Council purported to impose. At the same time however, it was the position of Council and Mr. and Mrs. Klok that conditions to the effect of those purportedly imposed, were necessary and appropriate in order to safeguard those aspects of the neighbouring properties likely to be affected by pollution or the reduction of water arising from forestry activity on the coup. Mr. Young contended that because of the vulnerability of his organic farming operation, more stringent conditions should be imposed. The forestry operation is permitted, the issues in the appeal were therefore only as to the appropriate conditions.

9. The second ground of the appeal was that Council had purported to grant a permit over land which was not within its jurisdiction. Had the Tribunal not found that Council had failed to grant a permit, the following reasoning would have been applicable. It was common ground, and the Tribunal finds, that the application related in part to land within a Forest Practices Plan, and in part to land within the Huon Municipality. Of that land, part was subject to the provisions of a Private Timber Reserve. The permit granted identified the land by reference to a map which set out all of the land in the Forest Practices Plan, without excluding either the land in the other municipality or that the subject of the Private Timber Reserve. It is however

possible to read the permit down so as to relate only to those parts of the land within Council power. The Tribunal considers that for the purposes of the present appeal, given that it has already been determined that section 59 applies, such a construction should be adopted. It follows that in those respects were the permit was within power and not ultra vires.

10. It was contended on behalf of the party joined, S Young, that the application for a permit was invalid because it had not been signed by each of the owners of the land involved. It was put on behalf of the appellant that the one owner who had signed, had done so on behalf of each of the other owners; the point was not thereafter pursued. Given that there was no protest by the other owners apparent from the evidence, in those circumstances the Tribunal makes no finding of irregularity in this respect.

11. The application is therefore treated as being for the south-eastern portion of the land which lies within the jurisdiction of the Kingborough Council and is not subject to a Private Timber Reserve. For present purposes, it can be called "the application land". The remainder of the 259 hectares the subject of the Forest Practices Plan, together with those two blocks, lies at the end of Garden Island Creek Road, which enters the area from the west. That road enters the two blocks from the north, towards its western edge; it then traces an irregular course towards the south, dividing the application land so that approximately two-thirds lies on the eastern side of the road and one third on the western side of the road. Grosse Creek has one of its headwaters commencing in the south-west corner of the land and exiting through its southern boundary; that Creek within passes through the other land and thence onto the land owned by S Young, which extends to the south and East from the south-east corner of the land in question. McKay rivulet commences in the southern half of the land, and travels to the East, through a parcel of land owned by the parties joined C and G Klok. The Klok western boundary is with the subject land, and the Klok southern boundary is with the Young land.

12. The property owned by S Young lies at the south-east corner of the proposed coup, abutting approximately the southernmost 130 m of the eastern coup boundary. Including that 130 m, the western boundary of the Young land is approximately 560 m in length; and it extends to the east for approximately 650 m. Mr. Young's evidence was that he had applied in the latter half of 2002 for the certification of the property as an organic farm. That process involved pre-certification for 12 months, and then a two-year period of conversion to organic status. As at the date of the hearing Mr. Young's evidence was that he had the following livestock on the land: 50 chickens, of which 14 or 15 were organically certified; 30 to 40 organically certified ducks; six goats and two sheep, also organically certified; and various other animals which were not organically certified. He intended to increase his organically certified stock by breeding, rather than purchasing. He intended to attain a level of approximately 1000 hens, producing organically certified eggs. He projected an income without organic certification, of approximately $45,000 per annum from the one thousand birds ; or an income of approximately $22,500 per annum from 500 birds. If organically certified the income from 500 birds would rise to $29,250 per annum, and pro rata for more such birds. His evidence was that he had spent over $60,000 to date on setting up his enterprise. He noted that there was presently approximately a 30 percent premium on the value of organic produce as opposed to non organic produce.

13. Mr. Young's evidence was that either actual or reasonably suspected contamination of organically certified stock would result in the de-certification from, or a period of at least a year's suspension from, the organic status of his farm. His evidence was that the loss of income which that would entail would cripple his enterprise. Similarly, if the certification process were delayed by contamination or the risk of contamination from the forestry operation, there would be a commensurate loss of income. It is obvious that the extent of loss would depend upon the extent of investment in the organic enterprise which was then delayed or spoiled, but subject to that, the Tribunal finds according to the above facts and the tenor of Mr. Young's evidence.

14. Mr. Young's evidence, supported by that of Mr. Whitten, a person experienced with respect to organic farming , was that "contamination" of an organic farm or organically certified product, was deemed to have occurred when :

- levels of any chemical contained within the property's soil, air, water, livestock, crops and /or product are above 10 percent of the accepted Maximum Residue Limit (MRL) for that chemical as pre-determined by the National registration authority.
- Chemical organic products have contact with non-certified organic products, or products of a lower level of certification.
- Products of any level of organic certification have contact with prohibited inputs such as 1080, pesticides and chemical fertilizers.

15. An example of a level of residue which had been predetermined by a National registration authority, was to be found in the National Drinking Water Guidelines(1996), setting limits of residue for commonly used herbicides, pesticides and other chemicals, at levels deemed to be safe for human consumption. Under the organic certification rules, contamination would occur when only 10 percent of that level had been reached. That evidence was challenged, but was not made to appear incorrect, and the Tribunal accepts it and finds accordingly.

16. Mr. Young was also concerned at the possibility of the diminution of the amount of water reaching his property, by reason of increased consumption by the rapidly growing plantation and revegetation forests on the coup. The headwaters of Grosse Creek commence about 100 meters into the southern portion of the coup, and then travel across other land before reaching the south-western corner of the Young property, exiting that property about halfway along its length to the east. There is also surface drainage off the south-eastern portion of the coup, onto the Young property, together with other waters supplying a large dam at the north-eastern end of the Young property.

17. The Klok property, called Kibbenjelok, runs eastward from the proposed coup. The Klok property is 56 hectares in area. It receives water from the headwaters of the McKay rivulet, which originate within the coup. A stream supplies a 20ML dam in the north-east corner of the property, and there is also a 2-3ML dam, both within 100 meters of the common boundary with the coup. There are also a number of springs, and substantial surface runoff, from the coup area onto the Klok property. There is a water license to take water from the McKay rivulet for the dams, not to exceed 13.50ML annually, intake to be only between the 1st of May and the 31st of October in each year. Annual rainfall on the property averages approximately 1250 mm. The garden and irrigation water comes from the dams; the domestic water supply is from

rainwater collected on roofs on the property. An ornamental garden of approximately 4 hectares has been developed into an attraction of international repute. Mr. and Mrs. Klok, and their visitors, derive great pleasure from the garden. Native birds and animals are welcome visitors to the garden.

18. The evidence of Mr. and Mrs. Klok was further that in 2001 there had been a period when large numbers of native animals died in their garden, causing them considerable distress. They attributed this to poisoning, suspecting some activity on the coup. There was however no evidence to bear out this suspicion; there had not, on the evidence, been any planting on the coup at about that time, which would have called for the use of poisoning to prevent grazing by native wildlife.

19. In the spring of 2002 a considerable amount of sedimentation and turbidity, including material appearing to be road construction material, had found its way into the Klok's upper dam. That occurred at about the time road works and land clearing had been occurring on the coup. They inferred, although the other evidence was insufficient to verify, that the source of the turbidity was the road works and clearing. The evidence does not enable the Tribunal to make a definitive finding on this issue.

20. Mr. and Mrs. Klok have created a Blackwood plantation of 4000 trees, now about 16 years old, on the northern side of their property approximately 100 meters from the coup boundary.

21. The principal areas of concern for Mr. and Mrs. Klok were potential reduction in water runoff from the coup to their property; contamination of their drinking water supply from aerial chemical application; contamination of their surface water supply from fertilizers pesticides and 1080; the risk of herbicides affecting their garden and plantation; and the distress and danger arising from animals poisoned by 1080 finding their way onto their property.

22. A principal issue in the appeal, is the level of protection to which the neighbours are entitled. The starting point in consideration of that issue is the provisions of the planning scheme.

23. It is apparent from the provisions of the planning scheme setting out the intent of the rural zones, that the retention of land for agricultural, forestry and landscape protection purposes, is the predominant intent. It is a matter of common knowledge that agriculture and forestry normally each involve the use of herbicides, pesticides, and chemical fertilizers. Guidelines have been developed for the purpose of providing reasonable protection to other rural properties, from those agents. Examples are guidelines with respect to aerial spraying, the use of chemicals, and drinking water standards. The concept of what is reasonable protection, involves assessing what is reasonable from the points of view of both the person carrying out the operation and the neighbour. The concept of what is reasonable is one which takes into account ordinary, rather than special, sensitivities and susceptibilities. It is paralleled by the general legal concept of nuisance affording protection to ordinary, common rather than special or heightened, sensitivity. In the context of the planning scheme Rural provisions, the concepts of forestry and agriculture are broadly treated rather than being subdivided into specific kinds of agricultural forestry activity. In the present context, the susceptibility of an organically certified operation, for example to levels of chemical at only 1/10 of the level deemed suitable for drinking water, is a special rather than a common or normal susceptibility. Guaranteed protection at that level for the organically certified property would carry with it commensurate restrictions upon the agricultural and forestry activities carried on the adjoining properties. The concept of what is reasonable does not extend to such

guaranteed protection. At the same time, what is reasonable must take account of the existence of the organically certified operation; it is a matter of balance. Similarly, the strong emotional attachment which Mr. and Mrs. Klok and many of their visitors have to the wonderful gardens on their property, and the enjoyment derived from those gardens and the presence of the native wildlife coming onto the property, are relevant factors, but relate to matters which have a greater sensibility or vulnerability than would arise from the conduct of ordinary agricultural or forestry operations on their Rural zoned property.

24. By the end of the hearing the appellant was prepared to accept limitation on its activities on the land, as set out on the plan annexed to this decision and marked "J". That plan set out the water sample points, roads, plantation area, reserve and unharvested areas, and regeneration areas. Reference will be made to that plan in the course of this decision.

25. The portion of the coupe to which the Kingborough Planning Scheme 1988 applies, is the south-east portion adjoining and extending north from the properties owned by the parties joined Young and Klok, the southern most rectangle of land within Council's jurisdiction. Block 3 on Plan G lodged with the Tribunal, is zoned Rural C. Blocks 2 and 1 extending north from Block 3 are zoned Rural A. Block 4, to the north of Block 1, is in the area subject to the Kingborough Planning Scheme, but is the subject of a private timber reserve, and therefore excluded from consideration in the present appeal. The portions of the coupe lying to the west of the above blocks all lie within the Huon Valley Municipality. The land subject to the Kingborough Planning Scheme, as calculated by Mr Goodsell, Council's Planner totals 92.2 hectares. The land owned by the parties joined Young and Klok is also within the Rural zones.

26. Clause 8.10.1 of the Planning Scheme provides the intent and requirements for the Rural zones:

> "(a) The intent of the Rural zones is to retain land for rural purposes such as farming and grazing, forestry, mining, aquaculture, rural industries, waste disposal areas, landscape protection, recreation and the like.
>
> (b) The intent of the Rural A zone is to retain land for predominantly agricultural purposes together with other associated land uses.
>
> (c) The intent of the Rural B zone is to retain land for predominantly agricultural and landscape protection purposes.
>
> (d) The intent of the Rural C zone is to retain land for predominantly forestry and landscape protection purposes.
>
> (e) In the Rural zones development shall be controlled such that rural activities are given first priority and other developments shall be restricted so as to not jeopardise the principal intentions of the zone."

27. Clause 3.4.1 of the Planning Scheme provides in respect of permitted developments:

> "3.1 A development for a use of land in a zone which is depicted in the table of uses by the letter 'P' shall not be undertaken without the application for and issue of a planning approval, which Council shall grant with or without conditions, provided that development complies with all relevant development standards without invoking the provisions of Clause 3.5.1(b)."

28. Clause 3.9.2 relevantly provides

> "3.9.2. Before granting with or without conditions or refusing a planning approval for a development, the Council shall take into consideration:
>
> (a) -(e) [a wide range of planning criteria.]
>
> (f) Whether the proposed development would adversely affect the existing and possible future use or uses of adjacent land, and vice versa; and …."

29. Part 5 of the Scheme sets out its objectives, relevantly:

> "5.2 Objectives.
>
> (a) To guide and control development and subdivision within the municipality to encourage an orderly and efficient use of land and to promote a desirable standard of amenity.
>
> (b) To make provision for zones which are to be used to give priority to specified classes of uses and to separate incompatible uses, and to protect the rural resource of the municipality.
>
> …"

30. Under Clause 5.3 a number of objectives are set out. Clause 5.3.3 relates to amenity, setting out a number of prescriptions as to criteria such as respect for natural and built surroundings, respect for the character and amenity of the area in which they are located and the intent of the zone, siting design and landscaping to provide reasonable sunshine and the like; enhancing pedestrian amenity; and development and integration of open space areas.

31. Clause 5.3.4 relating to environment relevantly provides,:

> "5.3.4.
>
> (a) Development and subdivision shall provide for the adequate treatment and disposal of waste and

runoff, together with the adequate control of any form of pollution emanating from the site.

(b) Protection measures to reduce the potential risks associated with fire, flood or landslip should be incorporated into the development or subdivision of land.

(c) Development shall be set back such distance from the shoreline or a water course to avoid:

(i) Shoreline or streamside erosion.

(ii) Undesirable removal of vegetation.

(iii) Shoreline or bank instability.

…"

32. It was contended for the appellant that there was no power to impose any condition upon the permit, by reason of the proper construction of Section 51 of the Land Use Planning and Approvals Act 1993 ("the Act") relevantly that section provides:

"51. ...

(3A) A permit to which section 57 applies may be subject to such conditions or restrictions as the planning authority may impose.

(4) A permit to which section 58 applies may be granted subject to such conditions or restrictions as the planning authority may impose with respect to any matter specified in the relevant planning scheme or special planning order."

58.

(1) This section applies to an application for a permit in respect of a use or development for which, under the provisions of a planning scheme or special planning order, a planning authority is bound to grant a permit either unconditionally or subject to conditions or restrictions.

(2) If an application for a permit to which this section applies meets the requirements of the planning scheme to which the application relates, a planning authority must grant the application either unconditionally or subject to conditions or restrictions not later than the expiration of the period of 42 days from the day on which the authority received the application or such further period as is agreed to, in writing, by the authority and the applicant before the expiration of that 42 day period.

(2A) A further period agreed to by a planning authority and an applicant under subsection (2) may be extended or further extended by agreement, in writing, between the planning authority and applicant at any time before the expiration of the period to be extended and, when so extended, is taken to be the further period referred to in subsection (2).

(3) Where a planning authority grants a permit to which this section applies either unconditionally or subject to conditions or restrictions, it must, within 7 days of granting the permit, serve notice of its decision on the applicant."

33. It was contended for the appellant that Section 51(4), in its reference to the imposition of conditions "with respect to any matter specified in the relevant planning scheme …", meant specified with respect to the imposition of conditions. Reliance was placed upon the decision of Zeeman J in *James Douglas v. Hobart City Council*, unreported (TAS) Serial No. A27/1996 at page 5, as to the meaning of "specified". In that case the relevant provision of the Act, Section 57, in its then form was "applies to an application for a permit in respect of the use or development of a kind specified in a planning scheme …" as being a use or development which a planning authority has a discretion to refuse or permit. The question of whether the use or development was of a kind which was so specified, required definition of the word 'specified', and Zeeman J adopted from another authority the following:

> " 'specified' and its derivatives are capable of referring to a wide range of degrees of specificity; the article in the *Oxford English Dictionary* well illustrates this, as many different degrees of specificity can be indicated by mentioning, speaking of, naming something definitely or explicitly, or setting down or stating something categorically or particularly; one can be definite without being explicit, and particular without being categorical. . . . . the word should be given a reasonable construction consistent with effective operation to achieve the stated purpose of providing machinery for enabling development to be carried out in accordance with a planning instrument or consent."

34. In *Douglas*, the relevant provision of the planning scheme did not specify a use or development in the way required. It was contended for the appellant here that there was a similar deficiency in the presently relevant scheme. It is therefore necessary to consider Section 51(4). The provision itself does not limit what is specified by reference to its being only for the purposes of the imposition of conditions. In that respect it is unlike the relevant passage in Section 57, which says what it is that must be specified. It is also relevant to consider that, almost universally, planning schemes when they refer to a power to impose conditions, do not themselves specify exactly what matters may be the subject of the conditions. That is normally left to the general law, which means that the conditions must be both necessary and reasonable. Consistently with that, the words in Section 51(4) "with respect to any matter specified in the relevant planning scheme" can be comprehended in the wider meaning of "specified", that is specified in the sense of being referred to in the planning scheme, (for example stated as a relevant matter for consideration in the planning scheme), rather than specified as a matter in respect of which conditions may be imposed. An example of a wider use of the word "specified" is the passage

on page 2 of *Douglas*" the principles and the desired future character of the relevant precinct referred to in Clause 2.6.1 are specified in the Scheme. Relevantly, the principles include the following: …". In the present instance, the criteria which may properly be taken into account for the purposes of imposing conditions, include the matters set out in Clause 5.2(b), 5.3.1(a), 5.3.4. Also relevant are the intent and requirements of the rural zones set out in Clause 8.10.1(e): "In the rural zones development shall be controlled such that rural activities are given first priority and other development shall be restricted so as not to jeopardise the principal intents of the zone." The Tribunal is accordingly satisfied that it has the power to impose conditions with respect to the matters specified in the above planning scheme provisions.

35. It was further contended for the appellant that under Clause 5.3.4, if that were the sole source of the power, there would be no power to impose conditions with respect to matters such as hydrological assessment, fencing, 1080, aerial spraying, and sedimentation control. With the exception of the hydrological assessment, which was for the purposes of verifying that there was adequate water runoff available to the downstream properties, the other matters enumerated are all relevant to the issue of pollution, and the Tribunal considers that even under 5.3.4 alone there is power to impose conditions with respect to them.

36. The issue of hydrological assessment can be treated separately, as it may not prove relevant.

37. Council had purported to impose conditions relating to the use of 1080 poison, and other methods of animal browsing control. The evidence on behalf of the appellant was that the use of 1080 was essential if the coupe was to be financially viable. That evidence was not successfully challenged, and the Tribunal finds according to it. It was common ground that, if 1080 were to be used, it should be applied only in accordance with requirements set out in the permits to be issued by National Parks and Wildlife Service and the Code of Practice for the Use of 1080, that 1080 be applied only once within the life of the plantation, that there should be daily collection of dead animals poisoned by 1080 in accordance with the National Parks and Wildlife Service requirements, and of the uneaten 1080 baits within 24 hours of the time baits were laid. It was also common ground that shooting and trapping were appropriate. In conjunction with these provisions with respect to 1080 Council had purported to impose conditions as to fencing, by continuous fencing to prevent access on to the Young and Klok properties by wallabies or other "ground-based animal life". The length of this fence was approximately twice the length of the common boundary between the coupe and the Young and Klok properties. Evidence was given that construction of a fence which would be adequate to prevent poisoned animals from leaving the coupe and going on to the Young and Klok properties, would be of the order of $40,000. That estimate was disputed, particularly on the basis of estimates given by Mr J Turner, a person experienced in fencing matters. It was however common ground that unless the fence extended for some kilometre or more in either direction past the Young and Klok boundaries, and unless it was electrified or some other appropriate method of preventing possum access across it, and unless it was inspected to ensure that no breach had occurred, animals having consumed 1080, could go over, around or through it and die on the Young or Klok land. Part of the cost of the fence would come from clearing either side of it. It was also common ground that it was not appropriate to run the fence through the streamside reserves for the various water courses, because that could not be done so as to provide effective fencing without significant interference with those water courses. The evidence given in the above respect was from Mr R Dixon, Mr M Statham, as well as Mr Turner. The Tribunal finds that to be as effective as it could

be made, the fence would need to be of the order of costs set by Mr Dixon, that is approximately $40,000 for the more than 2 kilometres which would be involved. Both Mr Young and Mr and Mrs Klok supported the concept of a fence. For Mr Young the fence was necessary not only to preclude the poisoned wildlife coming into contact with his livestock, but also because of the special sensitivity of dogs to 1080; he had planned to use stock guarding dogs, and noted the special susceptibility of dogs to 1080. Having regard to all of these matters the Tribunal considers that the proper balance is not to require that a fence be built along the common boundary, but rather to impose conditions with respect to the proximity of 1080 poisoning, so as to ensure that all baits are laid in an area to the west of the road running from north to south down the coupe, provisions as to the collection of bait and dead animals, and as to shooting and trapping. In addition it is reasonable, having regard particularly to the relatively low level of stock which Mr Young stated he has and will have for the immediate future, to provide for contribution to the cost of creating an enclosure for those stock and his dogs, to be paid by the appellant to him. The contribution is not intended as a replacement for or substitute for any obligation which may arise under the Boundary Fences Act, but is a measure designed to ameliorate to a reasonable extent, the potential impact of the use of 1080 on the coupe. The same measures, with the exception of the fencing contribution, will in the opinion of the Tribunal provide reasonable protection for the Klok property with respect to 1080. Those provisions are set out under the heading "1080 Use and Animal Browsing Control" at the end of this decision.

38. The proposed use of pesticide, herbicides and fertilisers was the subject of particular concern to Mr Young, and to a lesser extent to Mr and Mrs Klok. The concerns of Mr and Mrs Klok were with respect to damage to their garden from overspray, and pollution of their ground water supply and of their roof catchment drinking water supply. Mr C Barnes, an agricultural scientist, specialist in weed science, and the north-east plantation estate manager for the appellant, gave evidence. His evidence was that the Forest Practices Code contained practicable provisions with respect to the use of chemicals. His evidence was the fertiliser would need to be applied to the plantation at various periods. The Forest Practices Code (Section E2 – Use of Chemicals) specified that "fertiliser application will be planned and carried out so as to minimise the chance of fertiliser being dropped or drifted onto any surface waters – streams, lakes, storage, swamps or wetlands". In his opinion water course protection was adequately provided for under the Code. Similarly with respect to herbicides and pesticides, his evidence was that these were necessary for weed and insect management on the plantation. In his opinion a spraying plan of the kind normally utilised by the appellant provided a more appropriate approach, than specific conditions which had been suggested by Council. He pointed to the history of the appellant's use of such chemicals on forestry, and gave evidence that of all of the water sampling carried out by the appellant of its forestry operations, none of the relevant chemicals had been found at the boundaries of the forestry land at concentrations exceeding limits set by the relevant guidelines. That evidence was not effectively challenged and the Tribunal finds according to it. In his opinion the relevant codes of practice associated with the use of chemicals, combined with the appellant' s work practices, including the use of a spray plan and checklist, and notification of neighbours, taken in conjunction with the limitation of the application of pesticides and herbicides in accordance with Plan J attached to this decision, would be the most achievable safeguard for the neighbouring properties. Taking all of the competing considerations into account, the Tribunal considers that the propositions by Mr Barnes constitute the most reasonable solution.

39. Associated with the issue of contamination control was that of water monitoring. The evidence on behalf of the appellant, from Mr Barnes, was that water samples were

typically taken prior to application of the relevant chemical, immediately after its application, and after the first significant rainfall (in excess of 5 mm) event. His opinion was that having regard to the history of the appellant's operations, it was possible to comply with the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (2000), and the Australian Drinking Water Guidelines (1996) with respect to water quality at the boundaries of the coupe. His was the most detailed and informed evidence in this respect, and the Tribunal finds according to it. The Tribunal considers that the conditions at the end of this decision, with respect to herbicide and pesticide use, constitute the most appropriate controls. As an integral part of that, the location of the monitoring points was at the junction of each water course with the property boundary, shown by red dots on the annexed plan marked "J".

40. The Council's proposed conditions were, and the neighbours sought conditions, relating to monitoring for fertiliser, and the application of fertiliser, commensurate with those applicable to pesticide. The evidence was that the fertiliser was not capable of being applied in liquid form, and accordingly aerial application conditions were inappropriate. The Tribunal considers on all the evidence that the significance of fertiliser use is in the potential for excessive nutrient concentration. There was no evidence suggesting that fertilisers were likely to otherwise affect either the Young or Klok operations. The Tribunal accordingly considers that it is appropriate to have only water quality monitoring, of the kind applicable to herbicides and pesticides, in respect of fertiliser. The Tribunal's conditions will include provision in this respect.

41. With respect to soil and water management, Council had proposed a condition based upon the Hobart Regional Soil and Water Management Code of Practice. The evidence was however was that that code of practice was principally with respect to development and subdivision, and that the Forest Practices Code was a much more appropriate mode of soil and water management. The previous instance of sedimentation and turbidity from the coupe area onto the Klok property may have been due to the failure of forest practices procedures, and shows that irrespective of the terms of the condition, it is only as effective as its enforcement. The same limitation of course applies to the condition suggested by Council. The Tribunal considers the Forest Practices Code a more appropriate basis for soil and water management, and conditions to that effect have been provided.

42. Council had suggested conditions with respect to water modelling, requiring the appellant to undertake a hydrological assessment of the impact of the proposal upon the eastern flowing water courses. The purpose of this was to protect the water catchment of, particularly, the Young and Klok properties, as well as those further downstream. The Tribunal considers the best evidence was that of Mr E O'Laughlin, a hydrological expert. He and Mr P O'Shaughnessy were in substantial agreement as to most matters. Mr O'Laughlin's conclusion was that water use by the plantation would increase over the first 13 years of its life. As an average, there would be a mean reduction of 16 per cent in the annual water flow from the coupe to the Klok property. In drier years the reduction would approach 30 per cent. It would be more variable from month to month, in drier periods. That was the most detailed and appeared to the Tribunal to be the most carefully assessed evidence with respect to the effect upon the water flow on to the Klok property, and the Tribunal finds according to it. The evidence as to the extent of the effect of water flow onto the Young property was not so detailed. The Tribunal however accepts the general tenor of the evidence that, given that the Young property shares only a relatively small common boundary with the coupe, the effect upon water flowing from the coupe to that property will be considerably less than with respect to the Klok property.

43. The Council, and the neighbours, sought the imposition of conditions requiring the hydrological survey to establish what the effect of the proposal would be. The evidence was that the cost of such a hydrological assessment, under conditions regarded as appropriate by Council, would be of the order of $200,000 to $250,000. That assessment was given by Mr O'Shaughnessy, an expert in hydrological matters, and was not effectively countered; the Tribunal finds according to it. Given the relatively specific evidence with respect to the impact of the plantation upon the most susceptible property, that is the Klok property, the Tribunal does not consider that a hydrological assessment is warranted.

44. It was contended for Mr and Mrs Klok that the kind of tree planted would affect the extent of diminution in water flow. The expert evidence with respect to this was however all to the same effect, that there would be little difference whether the species planted were the proposed Eucalyptus nitens or some other eucalypt species. The Tribunal finds accordingly.

45. There is no other condition, which the Tribunal considers or which was suggested by the parties to be appropriate, which could safeguard the extent of water being made available to the Klok property. The seriousness of the interruption to water flow needs however to be assessed by reference to the extent of the entitlement under the Klok property water licence. That is limited to no more than 13.5 megalitres per annum, and only to be taken between 1 May and 31 October in each year, which are not the drier months when the effect of the plantation would be more pronounced. Given that, and the lack of any other apparent condition which could protect the Klok's water supply, other than refusal of the proposal which would not be lawful, the Tribunal does not see it as appropriate to impose any conditions in this respect.

46. The Tribunal accordingly determines that the following permit and conditions are appropriate. The decision of the Tribunal is that a permit be granted in the following terms:

> "Application No. DA-2002-265 dated 28 August 2002 submitted by Gunns Limited.
>
> This permit is granted, subject to the conditions set out below, for the development and/or use of Forestry (harvesting, road construction, plantation establishment and future harvesting) on the land comprised in Certificates of Title Volume 131262 Folio 1, Volume 131055 Folio 1, and Volume 664444 Folio 1 (the Land).
>
> **CONDITIONS**
>
> **GENERAL**
>
> 1. The development and use is to be carried out substantially in accordance with the development application DA-2002-265 lodged on 28 August 2002 (the Application) and subject to the conditions which follow. Where a condition of the permit is inconsistent with the application it prevails to the extent of the inconsistency.
>
> 2. Reserves, regeneration areas and plantation areas must be established in each of the areas marked on the plan attached.
>
> **1080 USE AND ANIMAL BROWSING CONTROL**

3. 1080 to be applied only in accordance with the requirements set out in the permit/s to be issued by the National Parks and Wildlife Service and the Code of Practice for the Use of 1080.

4. 1080 to be applied only once within the life of the plantation.

5. Daily collection of dead animals poisoned by 1080 with disposal in accordance with National Parks and Wildlife Service requirements.

6. 1080 must not be laid within the area hatched and marked "A" on the plan annexed and marked "J".

7. Prior to laying of 1080 baits on the land of Certificate of Title 131055/1 and 66444/1, free feeding of non-baited carrots must occur on at least six occasions within the area hatched and marked "A" on the plan annexed and marked "J".

8. Apart from the use of 1080 as authorised in this permit vermin control within the area hatched and marked "A" on the plan annexed and marked "J" must be by shooting and trapping.

9. 1080 baits which remain on the land within the area marked "B" on the plan annexed and marked "J" must be collected within 24 hours of the time that the baits are laid.

PESTICIDE AND HERBICIDE USE

10. No pesticides or herbicides or fertilizers are to be applied on the subject land unless all neighbouring residents within 100 metres of the boundary of the title affected and Council's Senior Environmental Health Officer have been notified in writing at least 7 days in advance.

11. A pesticide or herbicide or fertilizer application plan being prepared 14 days before the application, detailing:

    - Height at which helicopter will be flown
    - Limitations on weather conditions deemed suitable for application.
    - Application rates and locations (grid references or similar).
    - Pesticides or herbicides to be used.
    - Methods to ensure spraying occurs within target area.
    - Identifying all mixing and loading sites where handling will occur, specifying the exact location, distance from environmentally sensitive areas such as water courses, and the method and design of bunding to ensure no spillages occur.

12. No herbicide use is to occur on land identified on the annexed map marked "J", shown as hatched and marked "A" along with land within 40M of any Class 4 waterway draining towards the east – mainly McKay Rivulet headwaters, McDowell Rivulet headwaters and Grosse Creek anabranch headwaters other than hand applied Roundup. Insecticide use must not occur in this area.

13. All aerial application of pesticides and herbicides is to be undertaken using a 600 micron minimum nozzle head (VMD) at a height no greater than 10M above ground level, or obstacle level whichever is greater using a helicopter.

14. An emergency response plan to address accidental spillage is to be prepared to the satisfaction of Council's Senior Environmental Health Officer, within 3 months of the date of issue of this permit.

CONTAMINATION CONTROL

15. Water quality monitoring of stream flows is to be conducted at the locations identified with red dots on the annexed map marked "J", shown as marked with the letter "A" in accordance with the following:

- Immediately prior to the application of fertilisers, herbicides or pesticides on the site;
- Immediately after the application of fertilisers, herbicides or pesticides on the site; and
- Once after rainfall on the land of 5mm or more after the application of fertilisers, herbicides or pesticides.

16. Analysis of samples is to be undertaken at a NATA accredited laboratory for the following parameter, that is the active ingredients of each of the pesticides or herbicides being used, and the nutrients in the fertiliser.

17. Monitoring is to be undertaken to the satisfaction of Council's Senior Environmental Health Officer.

18. Monitoring results must be provided to Council and made available to the adjoining land owners within 7 days of their receipt.

19. In the event of contamination of natural waters being identified through water monitoring the following steps must be taken:

(a) Immediate notification of the affected landowner and the Senior Environmental Health Officer of the Council.

(b) Immediately cease chemical application on the land.

(c) Continue water monitoring until the levels prescribed by the Australian Drinking Water Guidelines are complied with.

In this clause "contamination" means exceedance of the Health Value set out in the Australian Drinking Water Guidelines.

21. The applicant is to pay to S Young, within 1 month after this decision, the sum of $4000 as a contribution to the cost of a poisoned-wildlife-proof enclosure for the organically certified animals on his farm.

SOIL AND WATER MANAGEMENT

22. An erosion and sedimentation control plan compiled in accordance with the Forest Practices Code and any directions or requirements determined by the Chief Forest Practices Officer pursuant to the Forest Practices Act 1985 with particular reference to potential sediment entry into the McKay Rivulet system, and the Klok property must be submitted to the Council within 6 weeks of the issue of this permit.

BUSHFIRE PROTECTION

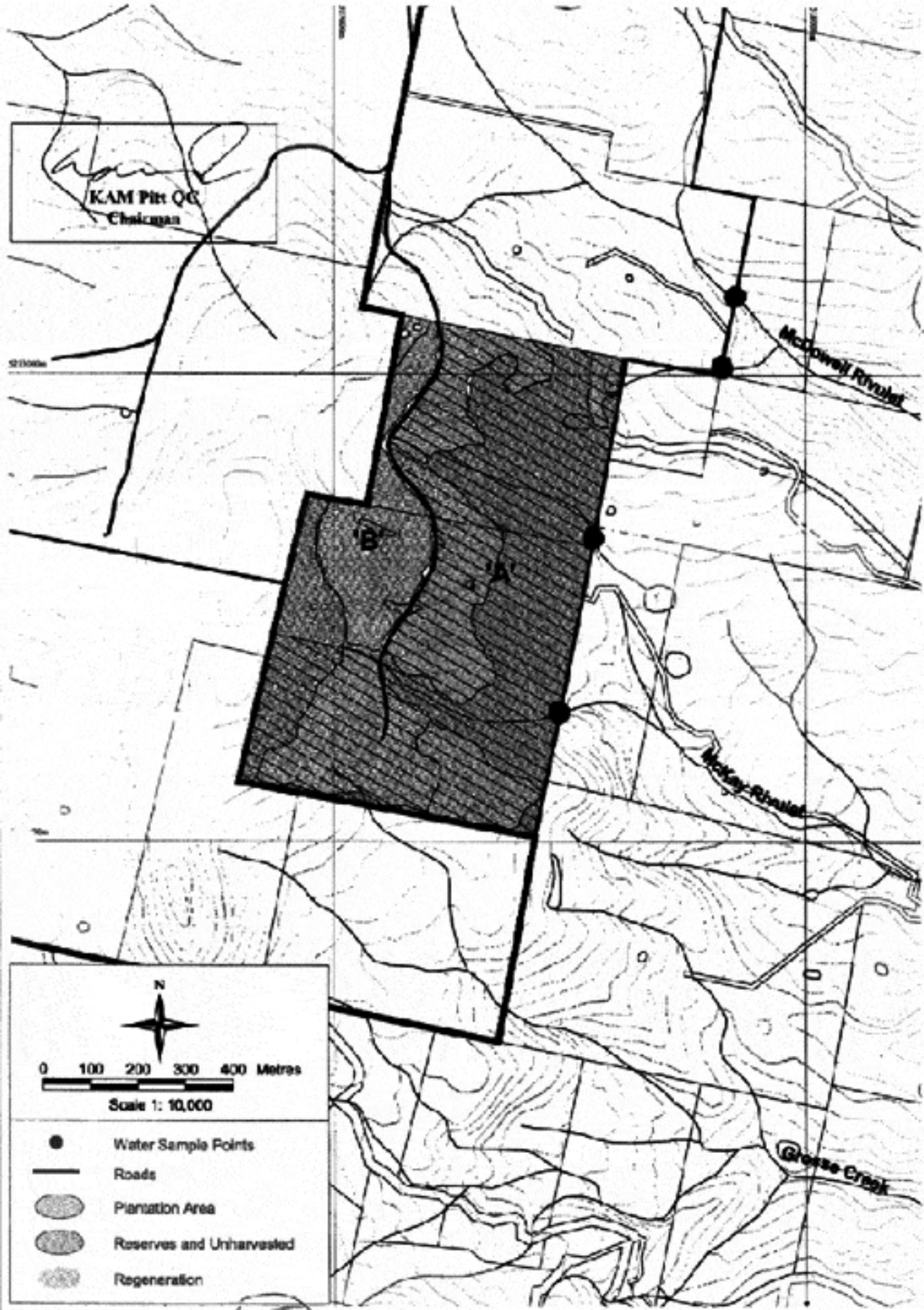
23. A fire management plan is to be provided to the satisfaction of the Manager Development Services and Tasmania Fire Service within 6 months of the grant of this permit."

47. Council is directed to issue a permit in the above terms.

48. Pursuant to section 59 of the Land Use Planning and Approvals Act 1993 the Tribunal directs that the Kingborough Council pay to the Tribunal the sum of $600 being the Tribunal's costs of the appeal. It is further directed that the Kingborough Council pay the costs of the appeal, of each other party to the appeal, such costs to be in a sum agreed or in default of agreement taxed by the Registrar of the Tribunal as nearly as may be in accordance with the higher scale of costs in the Supreme Court Rules 2000.

Dated this 17th day of March 2003

B McNeill	**KAM Pitt QC**	**IA Sansom**
Member	**Chairman**	**Member**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Water Sample Points
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