Legal Issues arising from the Pulp Mill Permit issued under the *Pulp Mill Assessment Act 2007* (Tasmania)

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I INTRODUCTION

This article examines legal issues arising from the pulp mill permit for the Gunns Pulp Mill issued under the *Pulp Mill Assessment Act 2007* (Tas) ('*PMAA*'). Firstly, the article gives a short account of the origins of the *PMAA* and the events leading to its enactment. The article then considers the basic scheme of the Act and the legal nature of the permit which it authorises, before examining the system for regulating the pulp mill established under the *PMAA*. That system depends upon imposing conditions on the construction and operation of the mill in a permit known as the Pulp Mill Permit and imposing a duty on nominated agencies to enforce those conditions. The system of regulation contemplated by the Act is surprisingly stringent, allowing for zero tolerance of breaches, in that if the mill breaches a condition, the permit is suspended, all its operations become illegal and the agency nominated as responsible for enforcing the condition has no option but to enforce the condition.

The article considers the relationship between the provisions for enforcing permit conditions and other possible regulatory systems, such as those which regulate and control pollution. It also examines the ways in which permit conditions may be altered, considering whether an Act of Parliament may be needed to amend the permit.

Probably because the government saw a zero tolerance enforcement regime as being too rigid and too strict, an attempt was made in the conditions to water it down. Permit conditions 8 and 9 sought to give agencies nominated to enforce conditions some discretion not to enforce, by defining a breach of condition as only arising if the nominated agency was reasonably satisfied that there was not substantial performance of that condition and had notified Gunns accordingly. The article examines the validity of these conditions. In my opinion, these conditions are invalid as a backdoor attempt to amend the legislation. However, the article concludes that they may be severed from the rest of the Permit, so

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that the Permit remains valid but must be enforced strictly as required by the Act.

II EVENTS LEADING TO THE ENACTMENT OF THE *PMAA*

The *PMAA*[1] was enacted to save Gunns' Pulp Mill Project after Gunns had withdrawn from the original assessment, an integrated assessment by the then Resource Planning and Development Commission ('RPDC'), now the Tasmanian Planning Commission, under the *State Policies and Projects Act 1993* (Tas) ('*SPPA*').

Gunns announced its plans to build a pulp mill in northern Tasmania in October 2004.[2] By this time, the Commonwealth and States had agreed on standards and processes for assessing new pulp mills in order to avoid the conflict which had arisen over earlier proposals. The standards were set out in the *National Environmental Guidelines for New Bleached Eucalypt Kraft Pulpmills.* Tasmania had modified these guidelines and in October 2004, the then Premier, Paul Lennon, announced to Parliament that the government had approved the new guidelines and was in a position to facilitate a pulp mill in Tasmania.[3] He committed the government to assessing any proposed mill as a project of State significance under the SPPA, a rigorous process requiring an assessment of the environmental and other impacts of the proposal to be exhibited publicly and subjected to scrutiny at open hearings into public representations.[4] In November 2004, the Governor made and Parliament approved an order under the SPPA s 18 declaring the mill to be a project of state significance and instructing the RPDC to carry out an integrated assessment of the project.[5] In December 2005, the RPDC published the *Final Scope Guidelines for the Integrated Impact Statement (IIS): proposed bleached Kraft pulp mill in Northern Tasmania by Gunns Limited* which were to provide Gunns with the issues to be addressed in its impact statement and which were to set the parameters of the assessment of the Mill. Gunns spent much of 2006 preparing its

[1] More detailed accounts of the history of Gunns' proposed pulp mill and the events leading to the enactment of the *PMAA* may be found in Macintosh and Stokes, 'Tasmania and the Gunns Pulp Mill', in Bonyhady and Macintosh (eds), *Mills, Mines and Other Controversies* (Federation Press, 2010) and Stokes, 'Environmental Assessment in Tasmania: The Resource Management and Planning System' in Gale (ed), *Pulp Friction in Tasmania* (Pencil Pine Press, 2011).

[2] Clark, 'Gunns Ready for Pulp Mill – Study Shows Project is Viable', *The Mercury* (Hobart), 29 October 2004.

[3] Tasmania, *Parliamentary Debates*, House of Assembly, 26 October 2004, 29-97 (Paul Lennon).

[4] The process is laid down in sections 20-24 of the SPPA.

[5] State Policies and Projects (Project of State Significance) Order 2004 (S.R. 2004, No. 111).

environmental impact statement. Early on, it made it clear that its preferred site was at Longreach, near Bell Bay in the Tamar Valley.

From the start, some environmental organisations and Tamar Valley residents groups opposed the mill because of concerns that it would be reliant on logging old growth native forests and would add to water pollution in Bass Strait and air pollution in the Tamar Valley, which already suffers from serious air quality problems. At the same time, the government was spruiking up the Mill, especially through its Pulp Mill Task Force, a unit set up within the Department of Economic Development to provide information about the Mill. From the beginning, the Mill's opponents regarded the Task Force as a propaganda unit compromising the impartial assessment of the Mill.

In late 2006, the integrated assessment ran into a series of problems. Firstly, as a result of Task Force activity, two members of the assessment panel, the Chair, Julian Green and expert member, Warwick Raverty, resigned. They were replaced by retired Supreme Court judge, Christopher Wright as Chair and Andre Hamman as an expert member. Secondly, the panel informed Gunns at a directions hearing on 26 October 2006 that parts of its draft integrated impact statement were not adequate and directed Gunns to provide substantial additional information.[6] Gunns did not provide the required information until 16 February 2007. After the RPDC assessed it, it decided that Gunns' integrated impact statement remained critically non-compliant. Gunns' failure to satisfy the RPDC of the adequacy of its impact statement was causing substantial delays because the additional information had to be put on public display and members of the public be given the opportunity to comment before public hearings could begin.

In late February 2007, Gunns started to complain that the integrated assessment was too slow and costly. After a meeting between Lennon and Wright failed to agree on ways to speed up the process because the only way to do so was to abandon public hearings, Gunns withdrew from the integrated assessment.[7] On the following day, 15 March 2007, Lennon announced that he would recall Parliament to enact a special one off assessment process for the Mill. The legislation, the *PMAA*, was supported by the Government and the Opposition and passed Parliament on 17 April 2007.

[6] The matters on which Gunns were directed to provide additional information are listed in Stokes, 'The Resource Management and Planning System', above n 1, 115-6.

[7] The major protagonists at this meeting have offered very different accounts of what happened at it; See Stokes 'The Resource Management and Planning System', above n 1 117, and Macintosh and Stokes, 'Tasmania and the Gunns Pulp Mill', above n 1, 43-4.

III THE *PMAA* AND ITS INTERPRETATION

A *An Outline of the Provisions of the PMAA*

The basic purpose of the *PMAA* was to provide for a consultant to assess the mill by reference to emissions guidelines embodied in the Act, and for government agencies to determine the Mill's operating conditions after considering the consultant's report, and assessing aspects of the mill other than emissions. The Act envisages one over-arching permit for the mill, called the Pulp Mill Permit ('PMP'). The PMP is to contain all the approvals and permits and conditions recommended by the government agencies who took part in the assessment. To ensure that there was only the one overarching permit and that the Mill was not subject to other laws regulating development, the *PMAA* exempted the Mill from all regulatory powers over use or development and only restored those which relate to the enforcement of the permit conditions.[8]

To achieve these aims, the Act repealed the *State Policies and Projects (Project of State Significance) Order 2004* (Tas) which, as noted above, had declared the Mill to be a project of State significance.[9] Taken alone, the effect of that repeal was to subject the Mill to normal planning processes.[10] To avoid that result, the *PMAA* s 9 exempted the Mill from all provisions of other acts requiring consent for or regulating development, including those in the *Environmental Management and Pollution Control Act 1994* (Tas) ('*EMPCA*') and in the *Land Use Planning and Approvals Act 1993* (Tas) ('*LUPAA*'). Under s 6(7) of the *PMAA*, regulatory agencies involved in the assessment of the Mill were given the power to recommend permit conditions. If an agency recommended a condition, it had to specify the Act under which a condition of that type would normally be applied and the regulatory agency normally responsible for enforcing conditions of that type. The Minister had the power under s 6(8) to incorporate the recommended condition including the names of the specified Act and agency in the PMP. Under s 8(1)(c), a condition incorporated in the PMP takes effect as if it had been issued under the specified Act and may be enforced by means of the enforcement powers in that Act. Hence, if a condition takes effect as if it were imposed under LUPAA, the enforcement powers available under LUPAA may be used to enforce it.

These provisions appear to entail that the *PMAA* only authorises permits and conditions which could have been imposed under other legislation

[8] *Pulp Mill Assessment Act 2007* (Tas) ss 9 and 8(1).
[9] Ibid s 13.
[10] Under the *SPPA* section 19, an order declaring a project to be one of state significance exempts that project from laws regulating development until the order is revoked.

and that conditions which could not have been imposed under any other legislation are invalid. It is also arguable that the permits and conditions are subject to general limits on the operation of permits and conditions imposed by the legislation under which they are taken to have been issued. These limits are discussed below in Part III.

B *General Principles of Interpretation – Intention, Meaning and Extrinsic Materials.*

Section 8A of the *Acts Interpretation Act 1931* (Tas) requires courts to consider the intention of legislation and to prefer an interpretation that promotes the purpose or object of the legislation over an interpretation that does not promote the purpose or object. The High Court recently commented with respect to s 15AA of the *Acts Interpretation Act 1901* (Cth), which is similar in its terms, that it contemplates a limited choice between 2 constructions, one of which furthers the purposes of the legislation and the other which does not.[11]

The High Court has adopted the view that provisions such as s 8A are not intended to change the court's duty in interpreting a statute in a radical way. In *Project Blue Sky Inc v Australian Broadcasting Authority* the Court described the process of interpretation as 'giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have.'[12] The Court added that usually, but not always, that meaning will be the grammatical meaning. However, the consequences of the grammatical meaning, the overall purposes of the statute and the canons of construction may require that a provision be given a meaning which differs from its grammatical meaning.[13]

These principles make it clear that the purpose of an enactment is not something which exists outside of the enactment but is to be found in its text and structure as understood in the light of the common law and the rules of statutory construction.[14] Sections such as s 8A do not require significant changes to the process of statutory interpretation. In particular, they do not require the courts to embark on a search for the collective intention or mental state of the legislators who enacted the law in question. The High Court has suggested that to equate the intention of the legislature with a collective mental state of the legislators is a misleading use of metaphor.[15] Instead, the Court held that:

> [J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect

[11] *Lacey v A-G (Qld)* (2011) 242 CLR 573.
[12] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.
[13] Ibid.
[14] *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, [44].
[15] *Zheng v Cai* (2009) 239 CLR 446, 455-456.

> to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[16]

In the recent case of *Lacey v Attorney-General of Queensland*,[17] the High Court singled out one rule of interpretation, the principle of legality, for special mention.[18] It defined that principle as 'the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities'[19] and used it to adopt a limited interpretation of the power of the Queensland Court of Appeal to reconsider an appeal by the Attorney-General against the adequacy of a sentence. In *Lacey,* the Court held that the Queensland equivalent of s 8A was not intended to displace the common law rules of interpretation, such as the principle of legality, but that the alternatives from which it required the court to choose must be consistent with those rules.[20]

In interpreting a statute, the courts may now take into account extrinsic materials such as the Second Reading Speech and the Explanatory Memorandum accompanying the bill when it was presented to Parliament in order to resolve ambiguity. This can be used to provide an interpretation which is not manifestly unreasonable or absurd where the natural meaning is absurd or unreasonable or to confirm the interpretation conveyed by the natural meaning of the provision.[21] It is important to note that extrinsic materials can only be used to displace the unambiguous natural meaning of the words where that meaning is absurd or unreasonable, and not in other situations.

Extrinsic materials provide little assistance in the interpretation of the enforcement provisions of the *PMAA*. Section 8, which deals with the effects of the approval of the permit, and defines the enforcement powers of the government agencies charged with enforcing the permit, was not mentioned in the Second Reading Speech nor discussed in committee in either house of Parliament.[22] However, the Second Reading Speech did

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[16] Ibid. Quoted in *Lacey v A-G (Qld)* (2011) 242 CLR 573, [43].
[17] Ibid.
[18] Ibid 43.
[19] Ibid. Quoting the definition from *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.
[20] Ibid 45.
[21] *Acts Interpretation Act 1931* (Tas) s 8B.
[22] The Second Reading Speech in the House of Assembly may be found at: Tasmania, *Parliamentary Debates*, House of Assembly, 22 March 2007, 27-87. The Committee proceedings may be found at: Tasmania, *Parliamentary Debates*, 22 March 2007, 88-185, with the Second Reading Speech in the Legislative Council accessible at: Tasmania,

state that the *PMAA* '…provides the proponent with the certainty it requires for an end date for the assessment, without compromising Tasmania's rigorous environmental standards.'[23] The Fact Sheet and Clause Notes which accompanied the Bill when it was presented to Parliament are similarly uninformative, except that the Notes to Clause 3 state that if the permit is suspended for a breach of condition under s 8(3), the project will not be able to proceed until the provision is complied with.[24] Given the lack of information about the intention behind the enforcement provisions, there is no alternative but to rely on the grammatical meaning of the Act and common law principles of statutory interpretation when interpreting them.

C *General Problems of Interpretation*

The regulatory regime gives rise to two general questions of interpretation. Firstly, whether the regulatory powers conferred under it must be exercised in accordance with the objectives of the Resource Management and Planning System of Tasmania ('RMPS'), and secondly whether the EPA's powers over pollution under EMPCA apply.

1 *The Duty to Further the Objectives of the Resource Management and Planning System of Tasmania*

LUPAA and EMPCA impose a duty on planning authorities and on the EPA to exercise their powers in a manner that furthers the objectives of the Resource Management and Planning System of Tasmania as set out in Schedule 1 of the two Acts.[25] It is not clear whether agencies charged with enforcing the permits which make up the PMP have a similar duty. The *PMAA* is silent on the point but the duty may be imported as part of the general regulatory scheme. As noted above, the PMP permits and permit conditions take effect under s 8(1)(c) of the *PMAA* as if they were issued under LUPAA or EMPCA or other relevant Acts. Not only is a permit or condition taken to be imposed under a specified Act, but the Act under which a condition is imposed applies to the permit or condition. As the Act applies, any duties it imposes on enforcement agencies may apply. Hence, if a condition is imposed under LUPAA or EMPCA, LUPAA or EMPCA applies to the condition, arguably importing the duty to exercise powers so as to further the objectives of the Resource Management and Planning System of Tasmania.

Parliamentary Debates, Legislative Council, 28 March 2007, 1-59, and Committee proceedings accessible at: Tasmania, *Parliamentary Debates*, Legislative Council, 29 March 2007, 48-116.

[23] Tasmania, *Parliamentary Debates*, House of Assembly, 22 March 2007, 27-87; Tasmania, *Parliamentary Debates*, Legislative Council, 28 March 2007, 1-59.

[24] Pulp Mill Assessment Bill 2007 Clause Notes, copies obtainable from the Library of the Parliament of Tasmania.

[25] *Land Use Planning and Approvals Act 1993* (Tas) s 5; *Environmental Management and Pollution Control Act 1994* (Tas) s 8.

However, the duty to exercise powers so as to implement the objectives of the RMPS may not be consistent with s 8(1)(d) of the *PMAA*. The *PMAA* s 8(1)(d) imposes a duty on enforcement agencies to enforce each condition to the extent of their powers. This may leave the enforcement agencies with no discretion but to exercise their powers whenever there is a breach of condition. If this interpretation of s 8(1)(d) is accepted, that section may be inconsistent with any general duty to exercise powers so as to advance the objectives of the Resource Management and Planning System of Tasmania. The latter duty requires the exercise of discretion and judgment in the exercise of enforcement powers so as to ensure that they are applied in a way which advances the stated objectives. Section 8(1)(d) may rule out any exercise of judgment for the reasons given above.

On the other hand, it is arguable that the general duty to exercise powers so as to advance the objectives of the Resource Management and Planning System of Tasmania is an integral aspect of the powers which s 8(1)(d) requires enforcement agencies to exercise. On this interpretation s 8(1)(d) requires the enforcement agencies to enforce conditions to the full extent of powers which must only be exercised so as to advance the objectives of the System, thus importing those objectives into the Act. In my opinion, this is the better interpretation as the powers cannot be sensibly separated from the objectives which govern their exercise. It also integrates the *PMAA* into the Resource Management and Planning System of Tasmania.

2 *The Effect of the PMAA on the Control of Pollution and Environmental Nuisances under EMPCA*

The *PMAA* does not, in my opinion, affect the powers over pollution given to regulators under EMPCA, which therefore apply to the Pulp Mill. The *PMAA* s 9(1) exempts the Mill and any use or development associated with the Mill from the need to gain an approval under planning and other legislation including LUPAA and EMPCA. It also gives the Mill an exemption from acts regulating development.

The exemption from legislation regulating development does not give an exemption from those provisions in EMPCA which regulate environmental impacts or control the emission of pollutants or the causing of environmental harm. The EMPCA sections, including ss 37-42A dealing with environmental improvement programs and ss 50, 51 and 53, which create the offences of causing serious or material environmental harm or an environmental nuisance, do not regulate development. Although they often apply to the development and use of land, they apply not because they are regulating development, but because development may cause the environmental damage which they are intended to regulate or penalise. The sections also apply to many

actions which do not involve development or the use of land but which pollute or cause environmental harm. For example, to dump a pollutant out of a plane or at sea could cause a nuisance or serious environmental harm, but is not properly described as development and does not involve the use of land. Besides, ss 50-53, which create offences, are not regulatory but penal as they do not regulate lawful acts, but penalise unlawful acts. Legislation regulating the use of land and legislation dealing with pollution or the creation of a nuisance are generally considered as distinct so that, for example, permission to develop land in a particular way does not authorise any pollution arising from the development.[26] For these reasons, in my opinion, the provisions in EMPCA regulating and penalising pollution and environmental harm do not fall within s 9 and apply to the Pulp Mill.

There are good policy reasons why the permits in the PMP should be subject to EMPCA controls on pollution and environmental nuisance in the same way that other permits are. Exempting them from that regulation so that they are subject only to the provisions for enforcing permits may lead to holes in the regulatory framework.

Besides, the *PMAA* s 9 exempting the pulp mill from laws regulating development are identical to s 19(1) of the SPPA exempting projects of State Significance from such laws and are likely to be given the same interpretation. The intention of the SPPA is to provide for more stringent assessment of major projects, presumably with the view of ensuring that they are regulated in a comprehensive manner. Hence it is unlikely that s 19 was intended to exempt such projects from EMPCA controls over nuisance and pollution.

There are similar reasons for assuming that even though the assessment regime for the pulp mill was compromised, there was no intention to compromise the enforcement regime. For example, both Acts impose a duty on agencies charged with the enforcement of permits to enforce the permits 'to the extent of their powers',[27] a duty which is stronger than any imposed under EMPCA. Imposing such a strong duty to enforce the conditions is not consistent with an exemption from the EMPCA controls on nuisance and pollution.

[26] *Gard v Gibsons Ltd* [2004] TASSC 108.
[27] *State Policies and Projects Act 1993* (Tas) s 27(1)(c); *Pulp Mill Assessment Act 2007* (Tas) s 8(1)(d).

IV ENFORCEMENT OF CONDITIONS IN THE PERMIT

A *General Approach of the PMAA to Enforcement*

On its face, the *PMAA* provided for a zero tolerance approach to the enforcement of the permits and conditions to which the pulp mill was subject. As noted above, the PMP contains a number of separate permits which take effect as if issued under other legislation, especially LUPAA and EMPCA. As a result, the permit conditions may be enforced as if issued under LUPAA or EMPCA as the case may be. Section 6(7) of the *PMAA* requires each condition of every permit to name the agency responsible for its enforcement. Under s 8(1)(d) the regulatory agency named as responsible for the enforcement of a condition has a duty to enforce the condition to the extent of its powers, leaving it with no discretion to waive a breach of condition unless such a discretion is conferred in the enforcement powers which it is granted. Where a permit is taken to be issued under LUPAA, the relevant local council, in this case the George Town Council, has a duty to enforce conditions other than those imposed by the EPA.[28] If the council fails to take all reasonable steps to enforce the conditions, it may be prosecuted in the Magistrates Court for that failure.[29] EMPCA does not define the duty of the EPA to enforce conditions which it has required in a permit in such specific terms, imposing on the EPA the function of enforcing the provisions of the Act.[30] In particular, it is required to use its best endeavours to ensure the prevention and control of behaviour causing or capable of causing pollution.[31] EMPCA appears to give it a greater discretion than LUPAA gives local councils, the injunction to use its best endeavours requiring it to exercise judgment about the best regulatory approach open to it.

The duty imposed on regulatory agencies to enforce conditions to the extent of their powers should be interpreted strictly because it is an important guarantee for people whose interests may be affected by the Pulp Mill, as it not only gives regulators the power to enforce the permit conditions, but requires that they do so. The regulators are in breach of the law if they fail to do so, and a person with an interest greater than an

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[28] *Land Use Planning and Approvals Act 1993* (Tas) s 48. Where the EPA has required that the permit contain environmental conditions, the local council is not entitled to enforce those conditions unless the Director has agreed in writing to allow the council to do so; *Environmental Management and Pollution Control Act 1994* (Tas) s 25(8A).

[29] *Land Use Planning and Approvals Act 1993* (Tas) s 63A. For the interpretation of this provision, see *Ellis (DPP) v Hobart City Council* (Unreported, Magistrates Court of Tasmania, 22 December 2004), reversed on appeal *Hobart City Council v Ellis* [2005] TASSC 71. For a critique of the Magistrates Court decision see Stokes, 'Prosecution of a Council for Failure to Enforce its Statutory Planning Scheme in Tasmania' (2005) 22 *Environmental and Planning Law Journal* 469.

[30] *Environmental Management and Pollution Control Act 1994* (Tas) 14(1).

[31] Ibid s 14(1)(c).

ordinary member of the public, including a person who suffers loss or damage as the result of a breach of condition, may be able to enforce the duty in the courts.[32]

B *Legal Effect of a Breach of a Permit Condition*

If the Mill is in breach of a condition, s 8(3) of the *PMAA* operates to suspend the whole of the PMP, taking away the Mill's licence to operate lawfully. Taken at face value, the provision requires that the Mill close until it is able to meet the condition or operate unlawfully, with all the risks that that entails.[33] For example, if it continued to operate unlawfully, it could face civil enforcement action to close it down under either LUPAA s 64 or EMPCA s 48. Under those sections, the Resource Management and Planning Appeal Tribunal (RMPAT) has a discretion to make an order enforcing the Act in question or requiring the project to shut down if it is operating in contravention of its permit.[34] If the breach of condition were not serious, it is unlikely that RMPAT would order the Mill to shut down. Even where a breach is serious and long-standing, RMPAT tends to make orders requiring remediation of the breaches within a specified time rather than to order the whole development to cease operating immediately.[35]

Also, if the permit were suspended and the Mill continued to operate unlawfully, Gunns would lose the protection of the permit in any prosecution under EMPCA for polluting or nuisance. It is a defence to a prosecution for pollution or nuisance under EMPCA s 55A that the defendant's development permit authorised the pollution or the nuisance and that the defendant had complied with the permit.

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[32] Discussion of this issue, and especially the impact of s 11 is beyond the scope of this article.

[33] This literal interpretation is supported by the Clause Notes to clause 8, above n 25, which indicate that the project will not be able to proceed while the permit is suspended for breach of a condition

[34] *Land Use Planning and Approvals Act 1993* (Tas) s 64(3); *Environmental Management and Pollution Control Act 1994* (Tas) s 48(5).

[35] See for example *Quoiba Progress Association v North West Rendering Pty Ltd* [2000] TASRMPAT 168, where the Resource Management and Planning Appeal Tribunal (RMPAT) gave the defendant corporation 18 months in which to remedy a long standing odour problem or to cease operations, rather than ordering it to cease operations immediately despite the corporation's history of non-compliance with environment protection notices requiring it to fix the problem.

V ENFORCEMENT OF THE ENVIRONMENTAL CONDITIONS

A *Agencies Responsible for Enforcement – General Considerations*

The agency 'responsible for the enforcement of each condition' under s 6(7) of the *PMAA* is the agency which normally has responsibility for enforcing conditions of that type under the Act under which the condition is deemed to be imposed. It is not always obvious which agency has that responsibility. Hence naming an agency may remove doubts as to which agency has the duty to enforce under s 8(1)(d) to enforce. However, the power to name an agency as responsible does not permit an agency which clearly has no responsibility for the enforcement of the relevant Act to be named as the agency responsible. It must be an agency which arguably is given enforcement responsibilities by the Act under which the permit condition is taken to have been imposed.

An agency's being named as the responsible agency under the *PMAA* ss 6(7)(c) and 8(1) does not, in my opinion, give it sole responsibility for enforcing the conditions. The conditions take effect as if made under the nominated Act,[36] and therefore may be enforced as if made under that Act by any person to whom the Act gives enforcement powers. There is nothing in an agency's being nominated under the *PMAA* as having the responsibility to enforce a condition which takes away the power of other persons or bodies to enforce. Given its natural meaning, the *PMAA*, by nominating an agency responsible for enforcement and imposing on it a duty to enforce, supplements rather than displaces the enforcement powers given by the acts under which the conditions are taken to have been imposed.

Under both LUPAA and EMPCA, the power to enforce conditions is not vested solely in one agency but in certain circumstances may be exercised by other agencies and by members of the public.[37] Under LUPAA, although local councils are not the only persons or bodies with a power to enforce, they can be said to be responsible for enforcement because they are under a legal duty to enforce their planning schemes and the permit conditions which they impose under those schemes.[38] EMPCA does not impose a similar duty on the EPA, but such a duty may be implied because the EPA is, by implication the body with the prime responsibility for enforcing conditions imposed under that Act. Therefore, it was reasonable to name the local councils and the EPA as the responsible agencies.

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[36] *Pulp Mill Assessment Act 2007* (Tas) s 8(1)(c)
[37] See the discussion below.
[38] *Land Use Planning and Approvals Act 1993* (Tas) ss 48, 63A.

B *Legislation Under Which the Conditions Take Effect*

Section 8(1)(c) of the *PMAA* requires the PMP to be divided into permits, each of which is to take effect as if issued under other legislation named in the permit. The division of permits LU1, LU3 and LU4 which regulate the construction and operation of the Mill into two parts[39] reflects the fact that if it had not been assessed under special legislation, the Pulp Mill would have been subject to two classes of conditions, planning conditions imposed by the local council under LUPAA and environmental conditions imposed by the EPA after an environmental impact assessment under EMPCA. A pulp mill is a level 2 activity under EMPCA. Level 2 activities are defined in EMPCA as activities which are listed in Schedule 2 of the Act. Schedule 2 lists all major industries, including pulp and paper manufacturing.[40]

LUPAA s 51 requires a developer who needs a development permit under a planning scheme to apply for the permit to the council responsible for the implementation of that scheme. When a council receives a development application for a level 2 activity, it must refer the activity to the EPA Board for environmental impact assessment under EMPCA s 25. After completing the assessment, the Board has the power to instruct the council to refuse the development or to impose specified conditions on any approval.[41] If the Board permits the council to approve the development subject to conditions, the council has the power to refuse or permit the development[42] and to impose additional conditions on any approval.[43] But if it approves the development, the council must incorporate the conditions which the Board requires in the permit it issues under LUPAA and any additional conditions which it imposes must not be inconsistent with those conditions.[44]

Hence, where a level 2 activity or development requires a permit under LUPAA, any conditions imposed on that activity or development as a result of an environmental assessment under EMPCA are incorporated into the permit issued under LUPAA. As a result the enforcement powers in LUPAA rather than the enforcement powers in EMPCA are available for the enforcement of these conditions. Since permits LU1, LU3 and LU4 regulating the construction and operation of the Mill take effect as if

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[39] The permits may be viewed at: Department of Justice, *Pulp Mill Permit*, <http://www.justice.tas.gov.au/justice/pulpmillassessment/pulp_mill_permit>.
[40] *Environmental Management and Pollution Control Act 1994* (Tas) sch 2 cl 3(a).
[41] Ibid s 25(5).
[42] *Environmental Management and Pollution Control Act 1994* (Tas) s 25(1) and *Land Use Planning and Approvals Act 1993* (Tas) s 57 give a council the power to refuse or permit any development which requires assessment under EMPCA.
[43] *Environmental Management and Pollution Control Act 1994* (Tas) 51 gives the council the power to impose conditions on any development approval.
[44] *Environmental Management and Pollution Control Act 1994* (Tas) s 25.

issued under EMPCA and LUPAA, the LUPAA enforcement powers but not the EMPCA ones may be used to enforce them.[45]

VI ENFORCEMENT OF PERMIT CONDITIONS REGULATING CONSTRUCTION AND OPERATION

A *Enforcement of Conditions Under LUPAA*

LUPAA confers two major powers with respect to the enforcement of conditions; a power to prosecute for obstruction of a planning scheme[46] and a power to seek a civil enforcement order to restrain a breach of part 4 of LUPAA.[47] The power to prosecute for obstruction of a planning scheme extends to a power to prosecute for breach of a condition or restriction imposed on a development approval by a planning authority.[48] As permits LU1, LU2 and LU3 are taken to have been issued under LUPAA, failure to comply with the conditions in those permits may be prosecuted under s 63 as if it were a breach of a condition in a permit imposed by a planning authority in the implementation of its planning scheme.

LUPAA s 63 is silent as to who may bring prosecutions for breaches of permit conditions. Normally, the council has the power and the responsibility to prosecute as councils have an enforceable statutory duty to enforce development controls in their municipality[49] and they commit an offence if they fail to do so.[50] However, EMPCA section 25(8A) takes away the power of a council to enforce conditions required by the EPA in a planning permit unless the Director and the council have agreed otherwise. Unless there is such an agreement, it is clearly not the responsibility of the council to bring such prosecutions. Therefore, the responsibility probably falls to the EPA by default. If the EPA did not have that responsibility, there would be no agency with the responsibility to enforce conditions which the EPA has required to be included in a development permit under sections 24-27K of EMPCA.

The other enforcement power in LUPAA is the power in section 64 to seek a civil enforcement order in the RMPAT to restrain a breach of Part 4 of the Act. A breach of Part 4 of the Act may take a number of forms, including developing in breach of a planning scheme and a breach of a development permit or of a permit condition. It is not clear which

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[45] EMPCA powers may be available to control any pollution or environmental nuisance created by the Mill, but not to enforce the conditions.
[46] *Environmental Management and Pollution Control Act 1994* (Tas) s 63.
[47] Ibid s 64.
[48] Ibid s 63(1)(c).
[49] *Land Use Planning and Approvals Act 1993* (Tas) s 48.
[50] Ibid s 63A.

government agency has the responsibility of seeking civil enforcement orders. Section 64 gives the right to seek an enforcement order to the Tasmanian Planning Commission (TPC), the local authority which is responsible for the administration of the relevant planning scheme and permits issued under it, and any person, including members of the public who have a proper interest in the subject matter of the case.[51] Normally, the responsibility of enforcing permit conditions falls to the local council. Section 64 gives councils standing to do so and they have a general responsibility for enforcing permit conditions under ss 48 and 63A of LUPAA. However, as pointed out above, EMPCA s 25(8A) takes away that right with respect to permit conditions which the EPA has required unless the EPA agrees to the council's exercising it.

The TPC, although it has the power to do so, rarely involves itself in the enforcement of permit conditions, even where the project is one of state significance under the SPPA. Although under s 25(8A) of EMPCA, councils do not ordinarily have the power to enforce permit conditions imposed by the EPA, the EPA itself has not been given standing to seek an enforcement order under s 64 of LUPAA. If it decides it is necessary to enforce the conditions it has imposed in a LUPAA permit, it must seek standing as a member of the public with a proper interest in the subject matter. Given that the RMPAT has interpreted 'proper interest in the subject matter' broadly, it is unlikely that the EPA would ever be denied standing to enforce conditions which it had required in a permit. Therefore, it is probable that the EPA will have standing to enforce the environmental conditions in the pulp mill permits although they take effect as if issued under LUPAA. However, it is not clear if legally it would be the agency responsible for the enforcement of those conditions under section 64 if it had not been named as the responsible agency under section 8(1) of the *PMAA*.

Although the EPA has been named under s 8(1) as having a responsibility to enforce the conditions it has imposed in permits LU1, LU3 and LU4, it is not the only person with the power to do so. Section 64 give members of the public with a proper interest the power to seek enforcement orders to restrain breaches of conditions in a permit issued under LUPAA. The RMPAT has interpreted 'a proper interest' broadly, to include interests other than property and economic interests, and accordingly has increased the number of people who are able to enforce conditions on development permits.[52] As permits LU1, LU3 and LU4 take effect as if issued under

[51] Ibid s 64(1).

[52] The Tribunal has held that a 'proper interest' for the purposes of section 64 is a broader concept than 'special interest' in *ACF v Commonwealth* (1980) 146 CLR 493; *Brown v Tasman Council* [1996] TASRMPAT 167. See also *Thompson v Strahan Motor Inn* [1994] TASRMPAT 95; *Ross* v *Lighton* [1997] TASRMPAT 45; *Holloway v Despard Holdings Pty Ltd* [1999] TASRMPAT 135.

LUPAA, it is arguable that a member of the public with a proper interest has the power to enforce the permit conditions under section 64. Section 11 of the *PMAA* may prevent such action as it prevents any appeal to a tribunal in respect of any action, decision, process, matter or thing relating to any approval under the Act.[53]

B *Enforcement of Permit EM1*

Permit EM1, which regulates the waste water pipeline offshore, was not issued under LUPAA but solely under EMPCA. Because that pipeline, being at sea, does not fall within the boundaries of any planning scheme, it does not require any permit under LUPAA s 51. If a level 2 activity does not require a permit under LUPAA, EMPCA s 27 requires the person undertaking it to refer it to the EPA for assessment. After assessing it, the EPA may impose conditions on it by means of an environment protection notice. Environment protection notices are normally issued under s 44 of EMPCA to deal with environmental harm or nuisances, but they can be used under s 27 to impose conditions on a development which would otherwise not be subjected to conditions. The pipeline almost certainly is a level 2 development, because it is a part of a wastewater treatment works as it involves the 'discharge of treated or untreated … industrial or commercial wastewater to land or water',[54] and hence would normally fall under s 27.

Even if it is not a level 2 activity, there is power to require it to be assessed under EMPCA s 27. Under s 27(2) the Director of the EPA has the power to refer an activity for which a permit is not required under LUPAA and which is not a level 2 activity to the EPA Board for assessment if s/he believes that it is in the public interest to do so. Given the very large volumes of wastewater to be emitted from the pipelines, it would not be unreasonable for the Director to conclude that it was in the public interest to refer the pipeline for assessment. Therefore, whether or not it was a level 2 activity, the pipeline was an activity which would normally fall for assessment under s 27, so its permit is taken to have been issued under that Act alone. Hence the environmental conditions imposed on the pipeline take effect under s 27 of EMPCA and may be enforced by means of the enforcement powers in EMPCA rather than those in LUPAA. As the conditions to which the pipeline is subject are taken to have been issued under EMPCA alone, permit EM1 names the Director of the EPA as responsible for their enforcement.

Enforcement powers under EMPCA have parallels to those under LUPAA. As noted, the conditions in permit EM1 take effect as if

[53] I do not intend in this paper to consider the interpretation of section 11.
[54] *Environmental Management and Pollution Control Act 1994* (Tas) sch 2 cl 3(a).

imposed under an environment protection notice. It is an offence under EMPCA s 45(3) to contravene a requirement of an environment protection notice. Although the Act is silent as to who may prosecute, it is clear that the EPA has the power, and under s 8(1) of the *PMAA*, the duty to do so. It may be that the local council also would have a power to do so, as councils are not precluded from enforcing conditions imposed under EMPCA s 27 by s 25(8A), which only precludes them from enforcing conditions which the EPA has required to be included in a permit issued under LUPAA s 51. However, as the pipeline extends outside the boundaries of any municipality, it is arguable that no local council has the necessary jurisdiction because councils may have no jurisdiction to prosecute acts which occur outside the municipal boundaries.[55] If a breach of a condition endangered the coastline, the council within whose municipal boundaries that coastline fell would probably have the necessary jurisdiction.

The other major remedy for breach of conditions imposed under EMPCA is a civil enforcement order. EMPCA s 48 empowers RMPAT to issue orders requiring a person to refrain from breaching the Act, and where appropriate, to make good the contravention. The orders are available as a remedy for any breach of the penal provisions of the Act, including the commission of one of the environmental offences, but are also available to enforce compliance with regulatory provisions such as environment protection notices, including notices imposing conditions on a level 2 or other development under s 27.

Standing to bring an action for an order under EMPCA s 48 differs from standing to seek an order under s 64 of LUPAA, in that the Director of the EPA rather than the TPC is given automatic standing.[56] Section 48 also gives the local council standing, and unlike conditions in a LUPAA permit, there is nothing in ss 25 or 27 of EMPCA which prevents the council from exercising this power to enforce permit conditions imposed by the EPA. Like s 64 of LUPAA, s 48 gives any member of the public with a proper interest standing to seek an order.

Section 48 provides RMPAT with a greater range of remedies than does s 64 of LUPAA. Under s 64, RMPAT may only order the person in breach to refrain from breaching planning controls or permit conditions and/or to make good the contravention. Section 48 empowers the Tribunal to grant any of these remedies but also authorises it to award damages to a person who has been injured or suffered property damage as a result of the

[55] Council functions include 'to provide for the peace, order and good government of the municipal area'; *Local Government Act 1993* (Tas), s 20(1)(c). Their jurisdiction may extend beyond their municipal boundaries where there is a relevant connection to the peace, order and good government of the municipality.

[56] *Environmental Management and Pollution Control Act 1994* (Tas) s 48(1).

breach and to require exemplary damages to be paid, not to the person who was injured or suffered damage, but into the Environment Protection Fund. RMPAT may also order the person in breach to pay reasonable costs incurred by the EPA or another public authority in preventing or mitigating environmental harm caused by the breach and the costs of investigating the breach and making the application.

To sum up, section 8(1)(d) imposes a duty on the agencies responsible for enforcing the permits in the Pulp Mill Permit to the extent of their powers. Paradoxically, a greater range of remedies is available to enforce permit EM1 than is available to enforce permits LU1, LU3 and LU4. The major responsibility for enforcing the permit conditions, especially those relating to emissions, lies with the EPA but the relevant local council also has some enforcement powers and individuals who have a proper interest may also have the right to enforce conditions and in some cases seek damages in RMPAT.

VII AMENDING THE PULP MILL PERMIT

As the PMP was approved by a special process and the *PMAA* does not provide a procedure for amending it, it is possible that it may only be amended by another Act of Parliament. However, as noted above, the PMP consists of a number of permits which take effect as if they were ordinary development permits issued under LUPAA and EMPCA. Under s 44 of EMPCA, the Director of the EPA may vary the conditions of a development permit by means of an EPN. It is not clear whether the Director can use this power to alter the terms of the PMP.

Whether EMPCA s 44 applies to the permits and conditions in the PMP depends upon the relationship between ss 8 and 9 of the *PMAA*. Taken alone, the words of s 8(1)(c) suggest that the permits in the PMP are similar in every respect to permits issued under LUPAA and EMPCA because they are 'taken to have been issued under' those Acts and those Acts apply 'as if such a permit licence or other approval had been issued . . . in relation to that Act'. If this is accepted, there is no reason why s 44 may not be used to alter the permits in the PMP.

However, s 9(1) of the *PMAA* exempts the Pulp Mill from the provisions of any Act 'regulating or permitting the regulation of any . . . use or development'. Section 44 of the EMPCA regulates or permits the regulation of development, so it is arguable that it does not apply to the Pulp Mill by virtue of s 9.

Sections 9(1) and 8(1)(c) of the *PMAA* are similar in all relevant respects to the SPPA's ss 19(1) and 27(1) respectively. Hence, the SPPA provides some assistance in the interpretation of the two provisions. Both Acts provide special procedures for assessing and permitting development.

Accordingly, in ss 9(1) and 19(1) they exempt the development to which they apply from other legislation requiring assessment or permission for development. In what may have been an abundance of caution, ss 9(1) and 19(1) also exempt the development to which they apply from acts regulating development as well as legislation requiring assessment or permits. As legislation such as LUPAA and EMPCA provide for the enforcement of assessment requirements, permits and permit conditions as well as for assessments and permits, by exempting the development to which they apply from all the regulatory provisions of these Acts, the SPPA and *PMAA* exempt that development from the enforcement provisions. Rather than provide a new enforcement regime, both the SPPA and the *PMAA* reinstated the enforcement regimes in the Acts from which the development was exempted by deeming any permits issued to have been issued under those Acts.[57] It is not clear whether the provisions reinstating the enforcement regimes reinstate just those provisions necessary to enforce the permits and permit conditions or whether they reinstate all provisions regulating permits as well as those providing for their enforcement.

As noted above, the words of s 8(1) of the *PMAA* and, for that matter of s 27(1) of the SPPA, are broad enough to support the conclusion that permits and conditions issued under those Acts are to be treated as if they were issued under the enforcing Acts for all purposes and hence are subject to all regulation imposed under those Acts. An argument for not adopting this broad interpretation is that not all the provisions that would be imported seem appropriate to the regulation of projects of State significance and the Pulp Mill. If LUPAA s 53(5) had been imported, s 53(5A), giving the local council power to extend the permit, would also have applied. It does not seem appropriate to have the future of major developments that gained their approval from Parliament under the SPPA and *PMAA* determined by the local council that had a very minor role in the approval process.[58]

Some provisions of the SPPA also support the narrower interpretation. Section 26B of the SPPA provides a specific procedure for amending the permit of a project of State significance, which is substantially different from the procedure for amending permits by means of EPNs set up by section 44 of EMPCA. It is arguable that the provision of a special procedure for amending the permits of projects of State significance indicates that the ordinary procedure for amending permits which s 44 of EMPCA provides does not apply to such projects. However, this argument is not conclusive. It may simply be that the Parliament decided

[57] *State Policies and Projects Act 1993* (Tas) s 27(1); *Pulp Mill Assessment Act 2007* (Tas) s 8(1).

[58] Parliament intervened to rule out this possibility by amending s 9(4) to extend the life of the permit to four years and to remove the local council's power to extend it.

to provide another method of amending the permits of projects of State significance, leaving the executive and relevant agencies to decide which to use. Or it may be that s 44 of the EMPCA was deemed unsuitable for amending the permits of projects of State significance so that a special amendment procedure was inserted in the Act.

The reasons for applying EMPCA s 44 to the specific permits issued under the *PMAA* are strong. Unlike the SPPA, the *PMAA* does not contain any specific procedure for amending these permits. If the permits cannot be amended under EMPCA s 44, they are unamendable except by legislation amending the *PMAA* itself. That would be an unfortunate result as it is likely to lead to a situation in that conditions that are found to be inadequate are not amended because it is considered too difficult to do so.

VIII PERMIT CONDITIONS 8 AND 9 AND THE DUTY TO ENFORCE

A *The Effect of Conditions 8 and 9*

As noted above, the *PMAA* adopts a zero tolerance approach to breaches of conditions. Under s 8(1)(c) of the *PMAA* the person, body or State Service Agency nominated as responsible for the enforcement of a condition must enforce the condition to the extent of its powers, while under s 8(3), the PMP is suspended and the Mill cannot operate lawfully while it is in breach of a condition.

Conditions 8 and 9 of the Permit appear designed to weaken the zero tolerance policy and the duty to enforce. There are doubts about their validity as they appear to be inconsistent with the *PMAA*. On their face, conditions 8 and 9 purport to define what amounts to a breach of a condition but go much further than that, weakening the duty to enforce contained in s 8(1) of the *PMAA*, and changing what has to be proved to establish a breach of condition. Condition 8 reads:

> Every requirement in a condition of the Pulp Mill Permit is to be read as requiring that the action to which it refers is to be substantially performed to the reasonable satisfaction of the regulatory authority responsible for the enforcement of that condition in such a manner as to promote the objective of the requirement as identified by that authority,

while condition 9 reads:

> A requirement in a condition of the Pulp Mill Permit is taken to have been substantially performed to the reasonable satisfaction of the regulatory authority responsible for the enforcement of that condition, unless the regulatory authority provides the person responsible with notice in writing that the condition is not being substantially performed to its reasonable satisfaction in such a manner as to promote the objective of the requirement as identified by that authority.

The first limb of condition 8 waters down the regulatory standards which *PMAA* requires the Mill to meet by requiring substantial compliance rather than strict compliance with the substantive conditions in the Permit. Every substantive condition in the Permit must be read in the light of that provision, which may be seen as modifying each condition so as only to require substantial performance of the standard it imposes. The fact that 'substantial performance' is not a clear cut standard, introducing an element of vagueness into what would otherwise be clear-cut standards, adds to the extent to which it weakens the enforcement provisions of the Act. However, it is not invalid because when incorporated into each condition, it simply lowers the standard which each condition requires. That is not inconsistent with the Act because the Act does not itself set any standards but leaves the PMP to do that.

The second requirement of condition 8, that the substantial performance is to be to the reasonable satisfaction of the nominated regulatory agency, is more problematic as it leaves that agency to be the judge of whether there has been substantial compliance. The fact that there is a breach only if the agency is not reasonably satisfied that there has been substantial performance does not give the agency carte blanche to turn a blind eye to breaches. If it makes an error of law or acts unreasonably in deciding that there has been substantial performance, its decision may be challenged in the courts.[59] The real objection to this requirement, especially when coupled with the requirement in condition 9 that a condition is taken to have been substantially performed unless the responsible agency provides Gunns with notice in writing that the condition is not being substantially performed to its reasonable satisfaction, is that it attempts to change the legal nature of compliance with the permit by means of a condition.

Normally, conditions impose standards with which a development must comply. Compliance with the standards is a question of fact about the operation of the development to be determined on the available evidence. There is nothing in the *PMAA* to suggest that that Act adopts a different understanding of compliance with a condition. Yet conditions 8 and 9 purport to adopt a different understanding, one in which the question of compliance depends not upon facts about the operation of the development but on the state of mind and actions of the regulator; there is substantial compliance unless the regulator is not reasonably satisfied that there has been substantial compliance and has given notice to that effect. By doing so it not only weakens the agency's duty to enforce the condition but takes the issue of whether there has been a breach out of the hands of the courts in any action to enforce a condition.

[59] Leaving aside the question of whether s 11 would effectively bar any action, there is no reason why an agency's decision with respect to substantial compliance should not be subject to judicial review.

IX THE VALIDITY OF CONDITIONS 8 AND 9

A *The Legal Nature of Conditions 8 and 9*

Development permit conditions are usually administrative in nature because they are a means of imposing general standards contained in environmental and planning laws to particular developments.[60] Where a planning authority has a discretion to permit or refuse a development, conditions may go beyond implementing standards to imposing controls which are reasonably necessary for the regulation of the development.[61]

However, conditions 8 and 9 are not normal development conditions in that they govern the implementation of all other conditions in the PMP rather than implement development standards and controls. Hence it is difficult to assess their validity by the normal test for conditions which is the test of reasonable necessity. In my opinion, they are legislative rather than administrative in nature so that their validity lies to be determined by the law governing the validity of subordinate legislation rather than the law governing development conditions. They may be legislative because they purport to formulate new rules of law governing the application of all the other conditions in the PMP rather than applying existing rules to particular cases.[62] The Administrative Review Council has suggested that legislation has three basic features:

> Three characteristics might be used to distinguish legislative action from executive action - determination of the content of the law; the binding quality of the rules; and the generality of their application. The first is likely to be conclusive. The presence of the second and third in combination is also a very strong indicator that an instrument is legislative in nature.[63]

Conditions 8 and 9 clearly possess the first two characteristics. They determine the content of the law in that they govern the application of the permit conditions to the pulp mill and they are binding in that, if the interpretation adopted above is correct, they bind the courts and other agencies to the responsible agency's decision as to whether there has been a breach of a condition.

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[60] A common feature of administrative decisions is that they apply general standards to particular cases.

[61] *Cardwell Shire Council v King Ranch Aust Pty Ltd* (1984) 53 ALR 632; *Doma v. Hobart City Council* [1983] Tas SR 132.

[62] *Minister for Industry and Commerce v Tooheys* (1982) 42 ALR 260, 265; *Commonwealth v Grunseit* (1943) 67 CLR 58 (Latham CJ).

[63] Administrative Review Council, 'Rule Making by Commonwealth' Agencies (Report No 35, 1992), 17 [3.4].

Although conditions 8 and 9 do not lay down general standards applying to the community at large, but only apply to the pulp mill, that in itself should not be a ground for seeing them as something other than legislation. If it were, much of the *PMAA* itself could not be regarded as legislation because it lays down special rules to deal with one case rather than general rules applying to the community as a whole. The Administrative Review Council was of the view that the fact that rules applied generally to the community was a good indicator that the rules were legislative, but was not decisive, so that rules which were not of general application could still be legislation.

On the other hand, Pearce & Argument argue that legislation is the laying down of general rules to govern future cases while administration is applying rules to single cases. Hence they argue that even acts of Parliament which are limited in scope to a particular fact situation or to a named individual are administrative in character rather than legislative.[64] In my opinion, that view is incorrect if the Act creates new standards rather than applies existing ones. Pearce and Argument rely on early cases such as *Commonwealth v Grunseit*[65] which stress that legislation lays down general rules applying to the public at large while administrative decisions deal with decisions in particular cases. More recent cases tend to emphasise that legislation is the laying down of new rules which change the law, even if the rules only apply to one case, while administration does not change the law but applies existing rules to particular cases.[66]

The view of the Administrative Review Council that decisions laying down binding rules governing future cases are legislative, even if the rules are not of general application is preferable to the view of Pearce and Argument. The key difference between legislation and administration is that legislation lays down new rules whereas administration is the application of existing rules to particular cases. If this is correct, conditions 8 and 9 should be regarded as legislation because they lay down binding rules to govern the future application of the permit conditions to the Pulp Mill. The fact that they are limited in scope to the one development and are not of general application does not entail that they are administrative rather than legislative in character.

B *The Validity of Clauses 8 and 9 as Subordinate Legislation*

Subordinate legislation is invalid if it is inconsistent or repugnant to the Act under which it is made, another Act or the common law.[67] There are

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[64] Pearce and Argument, *Delegated Legislation in Australia* (Butterworths, 2nd ed, 1999) 1-2.
[65] (1943) 67 CLR 58.
[66] *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 634-5.
[67] Ibid 198.

two ways in which the regulations may be seen as inconsistent with the *PMAA*. Firstly, they are repugnant in that they run counter to the effect of the Act in their impact upon the duty of responsible agencies to enforce the Pulp Mill conditions. The scheme of the Act is to require responsible agencies to enforce conditions in the PMP to the full extent of their powers.[68] Conditions 8 and 9 make the question of whether there has been a breach dependent upon the agency's decision to that effect rather than on facts about the operation of the Mill. Until they make the decision that there has been a breach of condition, their duties to enforce are not enlivened.

Although under the *PMAA* agencies must decide whether there has been a breach of condition before they can exercise their enforcement powers, no legal consequences flow from that decision. In particular, that decision is not a jurisdictional decision which the agency must make before its enforcement powers vest. Yet conditions 8 and 9 effectively give that decision the status of a jurisdictional decision in that until the agency decides there is a breach, there is no breach and the agency has no right to use its enforcement powers. To this extent, conditions 8 and 9 run counter to the effect of their enabling Act, the *PMAA*, and are invalid.[69]

Secondly, the conditions purport to take from the courts and RMPAT one of the issues which the *PMAA* entrusts to them in any enforcement proceedings, the issue of whether there is in fact a breach of condition. The conditions attempt to do this by making the question of a breach dependent on the EPA's decision rather than on the evidence. Regulations which purport to take from the courts one of the issues entrusted to them by the enabling Act are invalid.[70]

The two breaches have serious consequences in that they impose limitations on the enforcement powers of other agencies and on the rights of citizens to seek enforcement orders. Other agencies and citizens can only take action after the agency responsible for enforcing the decision has decided that there has been a breach and has notified Gunns to that effect. The conditions also limit the power of the court and of RMPAT to decide for themselves whether there has been a breach of a permit condition. To that extent they are invalid.

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[68] *Pulp Mill Assessment Act 2007* (Tas) s 8(1)(d).
[69] *Morton v Steamship Co of New Zealand* (1951) 83 CLR 402; *R v Commissioner of Patents; Ex parte Martin* (1953) 89 CLR 381.
[70] *Australasian Jam Co v FCT* (1953) 88 CLR 23.

C *Can Conditions 8 and 9 be Read Down so as to be Consistent with the PMAA?*

If conditions 8 and 9 are wholly or partly invalid, two further questions arise:

1. Is it possible to read them down so as to make them consistent with the *PMAA*?

2. If not, is it possible to sever them wholly or in part from the permit?

If the answer to questions 1 and 2 is no, not only are conditions 8 and 9 invalid, but the whole PMP is invalid.

D *Conditions 8 and 9 and the validity of the Pulp Mill Permit*

In my opinion, it is not possible to read down the conditions so as to make them consistent with the *PMAA* Act. The most obvious way to attempt this is to interpret them as establishing a rebuttable presumption that there is compliance if the responsible agency is satisfied that there is compliance. On this interpretation, the view of the responsible agency would decide the matter in the absence of contrary evidence. However, if the evidence showed that contrary to the agency's opinion, there was a breach, the presumption of compliance would be displaced.

There are a number of reasons for rejecting this interpretation. Firstly, it is not supported by the words of conditions 8 and 9, which make it clear that they determine when there is a breach of a condition rather than establish an evidentiary presumption. Secondly, the first part of condition 8, stating that substantial performance is sufficient, cannot be reduced to an evidentiary presumption, because it alters the meaning of every condition in the Permit, making it clear that substantial rather than strict compliance with the standards in those conditions is all that is required. A condition setting the level of compliance required for each condition goes to the substance of those conditions and cannot be regarded as merely establishing a presumption. However, this point is not decisive, because, as I pointed out earlier, taken by itself, the requirement that substantial performance is sufficient may be legally unobjectionable. As there may be no legal reason why the Permit should not contain such a provision, it may be possible to interpret it differently from the rest of condition 8 and condition 9.

Interpreted in this way, the combined effect of conditions 8 and 9 would be:

1. Every requirement in a condition is to be read as requiring that the action to which it refers (adherence to the condition) is to be substantially performed;

2. Unless there is evidence to the contrary, a requirement in a condition is presumed to have been substantially performed if it is performed to the reasonable satisfaction of the responsible agency; and

3. Unless there is evidence to the contrary, a requirement in a condition is presumed to have been substantially performed to the reasonable satisfaction of the responsible agency unless the agency has notified the developer that the condition is not being performed to its reasonable satisfaction.

If this interpretation were adopted, conditions 8 and 9 would be valid because they do not purport to change the normal understanding of compliance with and breach of a condition which is in the *PMAA*. However, the problem with this interpretation is that it empties the two conditions of all practical significance. In any case where an action is brought to enforce development conditions, the person or agency seeking to enforce the conditions has the onus of proving on evidence about the operation of the development that the condition has been breached. The above presumptions, although appearing significant, add nothing to that. The evidence needed to rebut them is evidence about the operation of the development which shows that there has been a breach of the condition, which is nothing more nor less than the evidence which would be required to prove a breach of condition if the presumptions did not exist.

It may seem that the presumptions could have one practical consequence; that of reversing the onus of proof in a case in which the responsible agency had notified Gunns that it was not satisfied that Gunns was in substantial compliance with the condition. Normally, in an action to enforce a condition, the onus of proving breach lies on the person bringing the action. If conditions 8 and 9 create a presumption that a condition is being breached if the responsible agency gives notice that it is not satisfied that the condition is being complied with, it would reverse the onus of proof, requiring the developer to show that there was no breach of condition.

It is possible that a presumption may be seen as creating by implication a reverse presumption of the sort outlined above. If it did, that in itself may be a reason for invalidating the condition, because there is old authority for the proposition that subordinate legislation reversing the onus of proof in a criminal matter is invalid for inconsistency with the common law.[71] Although the case is old, there is no reason to doubt its correctness because in principle subordinate legislation should not be able to reverse the onus of proof. However, that is not the only alternative. It may be that

[71] *Willoughby Municipal Council v Homer* (1926) 8 LGR 3.

the presumption has no consequences for the case in which the agency has given notice that it is not satisfied that the condition is being complied with, leaving the onus of proving breach on the person seeking to enforce the condition. If this interpretation were adopted, it does, as argued above, mean that the presumption of compliance adds nothing.

Besides, it is unlikely that the intention of the government was to place the onus of proof of compliance on the operators of the Mill in any circumstances. That is inconsistent with their general policy, which has been to remove obstacles to the Mill and to ease regulatory controls over it. The wording of the conditions suggest that they were designed to make compliance easier and to ensure that the duty to enforce did not lead to a situation in which the responsible agency was bound to take enforcement measures against relatively trivial breaches.

Hence, if conditions 8 and 9 are read as embodying presumptions rather than as attempting to change the definition of a breach of condition for the purposes of the Act, they have no practical consequences. That is a good reason for rejecting that interpretation. However, it does have one great advantage. It is easy to reconcile an interpretation of a condition which limits its practical consequences to almost zero with the Act authorizing that condition, thus minimizing the possibility that the conditions may be invalid and may invalidate the permit. However, at the end of the day, it is unlikely that the conditions will be interpreted as embodying rebuttable presumptions because that interpretation is based on a strained interpretation of the words and reduces what were clearly intended to be important provisions to ones which have no practical import.

For reasons given above, the better interpretation of conditions 8 and 9 is according to their natural meaning as intended to change the meaning of the concepts of compliance and of breach for the purposes of the *PMAA*. Interpreted in this way, they are an attempt to change the meaning of the *PMAA* by means of conditions and are invalid for inconsistency. They have the potential to invalidate the PMP unless they can be severed.

E *Severance of Conditions 8 and 9*

The leading authority on severance of an invalid clause in a development approval is the English case of *Kingsway Investments v Kent County Council*,[72] which laid down principles for determining whether an invalid condition invalidates the whole permit or whether it can be severed, leaving the rest of the permit standing. These principles have been applied in many cases on invalid conditions in Australia.[73] It is not easy

[72] [1970] 1 All ER 70.

[73] See especially *Paramatta City Council v Kriticos* (1971) 21 LGRA 404, 408-9 (Aspray JA, with whom Holmes and Moffitt JJA agreed). The High Court refused special leave to

to apply the *Kingsway* principles to this case, because *Kingsway*, and most of the other cases dealing with invalid conditions arose from situations in which the developer sought to challenge a condition which s/he considered to be too onerous, whereas these conditions were designed to reduce the burden on the developer. Besides, the principles do not provide a clear cut answer but make it clear that the answer depends upon the circumstances of the particular case.

The Law Lords in *Kingsway* were influenced by considerations which are not directly relevant in this case. Firstly, Lord Reid implied that the essence of development control legislation is to control development by requiring developers to gain development consent, allowing the consent authority to assess the development. Consequently, severance is not appropriate where the invalid condition imposes a major restriction on the use of land, so that if it were severed, the developer would gain permission to carry out a development in a form to which the authority issuing the permit had not actually consented, contrary to basic aim of the statute. In such a case, the proper approach is to invalidate the whole permit, requiring the authority to reconsider the matter.[74] Similarly, Lord Upjohn suggested that where the authority was likely to have considered a condition essential, so that it would not have granted the consent if it could not have imposed the condition, the condition should not be severed. However, he also pointed out that it is not appropriate to consider the matter solely from the authority's point of view, because it may be unfair to strike down a whole permit because it contains an invalid condition where an innocent developer has relied on it as valid.[75]

All of these considerations except the last one are not directly relevant to the Pulp Mill case, because in this case, the conditions which may be invalid tend to ease rather than add to the restrictions on the developer. However, they suggest a general approach to severance which is relevant to the case. In severance cases, it is necessary to balance the interests of the developer, who is usually an innocent party in that it is through no fault of theirs that the council imposed an invalid condition, with the interests of the general public in proper development control. In *Kingsway*, the court gave greater weight to the interests of the public, not permitting severance where to do so would have the effect of permitting a development in a form which the relevant authority had not permitted. However, severance was possible where the condition dealt with

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appeal the decision in this case. See also *Coulson v Shoalhaven Shire Council* (1974) 29 LGRA 166, 173-4 (Helsham J); *Spurling v Development Underwriting* (1972) 30 LGRA 19, 25-26; *Randwick Municipal Council v Pacific-Seven Pty Ltd* (1989) 69 LGRA 13, 16-20.

[74] Above n 39, 90.

[75] Ibid 114.

preparatory or peripheral matters, not going to the substance or character of the development.

The Law Lords used different terms to describe the distinction, but agreed that severance was not possible if it changed the basic character of the permit. Lord Reid suggested that conditions could not be severed if to do so would change the character of the permission, permitting something which the council had not permitted.[76] Lord Morris, with whom Lord Donovan agreed, drew a distinction between conditions which were unimportant or incidental, superimposed on the permit, which could be severed, and conditions which were fundamental, going to the basic structure of the permit, which could not be severed. Unlike Lord Reid, who suggested distinguishing the fundamental from the incidental by looking at the effect of severing the condition on what was permitted, Lord Morris suggested that evidence about the attitude of the development authority was decisive. If the evidence suggested that the authority would have insisted on the condition or a similar one drafted so as to avoid invalidity, then the condition could not be severed, but would invalidate the permit.[77] Lord Upjohn adopted a similar approach, although he gave more weight to the interests of the developer, pointing out that considering the position solely from the point of view of the development authority was unfair to developers who stood to lose their permits.[78] Lord Guest gave the least weight to the interests of the developer, holding that planning permits were entire, so that an invalid condition was not severable but invalidated the permit.[79]

It is not clear how these principles should be applied to the Pulp Mill Permit because in this case severance would lead to stronger regulation, while the question considered in *Kingsway* was one where severance would lead to weaker regulation. A majority of the judges in *Kingsway* drew a distinction between fundamental and incidental conditions, those going to the character of the permit rather than to peripheral matters. If that distinction is applied to conditions 8 and 9, it is easy to argue that the two conditions go to the character of the Pulp Mill Permit as they define compliance with every other condition, thus determining the way in which the other conditions operate and are to be enforced. The whole Permit would be different if the conditions were severed. Deleting the conditions makes such a difference to the operation of the Permit that it is not possible to determine whether Parliament was likely to have adopted the permit without those conditions.

[76] Ibid 90-91.
[77] Ibid 102-3.
[78] Ibid 113-4.
[79] Ibid 107.

However, the case differs from *Kingsway* in that Parliament may not have agreed to the Permit with conditions 8 and 9 deleted because Parliament may have wanted a weaker permit rather than a stronger one. In this situation, the case for not invalidating the whole permit in the interests of fairness to the developer is stronger than in the type of case considered in *Kingsway*. In the *Kingsway* type case, where deletion of the invalid conditions leads to a weakening of regulation and even to granting an effective consent to development which the council elected not to permit in that form, the public interest arguments run strongly in favour of invalidating the permit to allow the authority to reconsider the development. The court, in determining the validity of a permit or of permit conditions, cannot consider the merits of the development, only the legality of the permit. The development approval authority is the only body which can consider the merits of permitting the development without subjecting it to the invalid conditions. Therefore, to ensure that the merits are considered, the court must refer the case back to the approval authority.

But if deletion of conditions strengthens rather than weakens the permit, the public interest arguments do not run so strongly in favour of invalidating the permit even in cases where deleting the conditions changes the substance of the permit. In deciding whether to sever conditions which weaken the regulation of a development, the Court can only consider the legality of the conditions, not the merits of stronger regulation. Only the approval authority is in the position to consider the merits of stronger regulation. That is of course, a reason for invalidating such a permit and requiring the authority to reconsider its decision rather than to sever the invalid conditions.

The arguments in favour of requiring the approval authority to reconsider the application are not so strong in the case where severance of the condition strengthens the regulation of the development. If the approval authority decides that the permit without the deleted conditions imposes too stringent a system of regulation, it may seek to weaken the regulation in other ways. But it is unlikely to reject the development on the grounds that the proposed regulation is too stringent. The public of course has an interest in not over-regulating development because over-regulation can lead to a loss of development and of the benefits which development brings. But that interest is not so great as the interest in ensuring that development which the relevant authorities were only prepared to permit subject to stringent conditions does not gain permission without any reconsideration of its merits by the back door route of the severance of important conditions. Because the public interest is not so strong, fairness to the developer becomes of greater importance. The developer is usually the innocent party in these cases as they have no control over the content of the conditions. If it is in the interests of the developer to accept more

stringent permit conditions than to have the permit invalidated and reconsidered, there are few good reasons for not allowing this to happen, as it will not result in development which was not approved on its merits.

The Pulp Mill case illustrates these points. Although conditions 8 and 9 are fundamental in that their severance makes a major difference to the way the PMP operates, their severance would not make any fundamental change to the nature of the development which the Permit authorizes. In particular, it would not effectively permit a development in a form which the authority had not authorized without considering the merits of so doing. Instead, it would simply increase the level of regulation of the development which the PMP authorizes rather than change its nature. If Gunns were prepared to accept that higher level of regulation, it is unfair to invalidate the whole permit and force them to seek permission afresh. Therefore, severance of conditions 8 and 9, not invalidity of the whole permit, is appropriate in this case.

If conditions 8 and 9 are severed, the zero tolerance policy of the *PMAA* is retained so that the permit is suspended if Gunns is in breach of a condition, even if the breach is not serious, and the operation of the Mill becomes unlawful. At the same time, the agency nominated as responsible for the condition which is breached must perform its duty and enforce the condition which has been breached to the extent of its powers.

X CONCLUSION

The regulatory regime established by the *PMAA* is complex because it incorporates regulatory regimes established by other legislation, especially LUPAA and EMPCA and imposes on top of them a duty on named agencies to enforce the PMP conditions to the extent of their powers. That is to the extent of the powers conferred on them by the incorporated regulatory regimes.[80] LUPAA and EMPCA do not give any particular agency a monopoly of enforcement powers, envisaging that a number of agencies and interested private individuals may exercise some enforcement powers. The paper has argued that giving a nominated agency a duty to enforce does not give that agency the sole right to enforce. As the conditions in the PMP take effect as if imposed under other legislation, especially LUPAA and EMPCA, the power to enforce which those Acts give to other agencies and individuals remain in place.

The structure of the *PMAA* makes it unclear whether powers other than enforcement powers contained in LUPAA and EMPCA apply to the Mill. I have argued that the pollution and environmental offences created under EMPCA do apply. The *PMAA* exempts the Mill from legislation which

[80] *PMAA* s 8(1)(d).

regulates the use and development of land.[81] However, that does not exempt the Mill from the environmental offences because they are not regulatory but prohibitive and do not apply to the use and development of land but to pollution and environmental harm.

It is not so clear whether environment protection notices may be used to modify conditions which take effect under EMPCA. If the EMPCA conditions may not be amended by environment protection notices, there is no other method provided for their amendment. That would be unfortunate because it means that the conditions could only be amended by Act of Parliament, a cumbersome method of amendment which is unlikely to be used.

The *PMAA* requires the nominated enforcement agency to enforce each condition to the extent of its powers.[82] Perhaps because that was considered to be too stringent a duty, conditions 8 and 9 of the PMP purported to offer a definition of breach of a condition under which a condition is not breached unless and until the agency charged with the enforcement of the condition has informed the operators of the Mill that the condition is not being performed to its reasonable satisfaction. The paper argues that the second half of condition 8 and the whole of condition 9 are invalid. The first half of condition 8, which lays down that permit conditions are to be substantially performed to the satisfaction of the enforcing agency, may be valid. It amends every condition in the PMP, requiring that substantial compliance rather than strict compliance is all that is required. Although it weakens the PMP, it is consistent with the *PMAA*. If, as argued, the second half of condition 8 and the first half of condition 9 are invalid, that does not invalidate the permit because their being invalid does not weaken the permit in ways which may have made it unacceptable to the approval authority. Hence, the permit could take effect despite their invalidity.

[81] Ibid s 9(1)(e).
[82] Ibid s 8(1)(d).