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A monthly bulletin reporting on decisions of the Resource Management and Planning Appeal Tribunal

ABBREVIATIONS

EMPCA:	*Environmental Management and Pollution Control Act 1994*
LUPAA:	*Land Use Planning and Approvals Act 1993*
LGA:	*Local Government Act 1993*
LGBMPA:	*Local Government (Building and Miscellaneous Provisions) Act 1993*
RMPAT Act:	*Resource Management and Planning Appeal*

There were four consent decisions reported in July 2013.

PLANNING DECISIONS

Dyke v Glamorgan Spring Bay Council and Murray [2013] TASRMPAT 81

10 July 2013

AF Cunningham, JJ Caulfield & ME Ball

Catchwords: Land – subdivision – two lots – invalid application – insufficient information

Glamorgan Spring Bay Planning Scheme, cl 8.6.2
Project Blue Sky Inc v Australian Broadcasting Authority [1998] 72 ALJR 481

Woolcott Surveys obo Cooroolina Pty Ltd v Glamorgan Spring Bay Council and S Underwood and Others [2007] TASRMPAT 192

The Council approved a proposal to subdivide land at Little Swanport into two lots, one of 97 hectares and the other 60 hectares.

Ms Dyke, who owns land across the river from the site, appealed against the decision. Ms Dyke's primary argument was that one of the lots was less than the minimum lot size of 80 hectares. However, she agreed in closing submissions that Council had discretion to reduce the minimum lot size to 20 hectares.

Clause 8.6.2 of the Scheme provides that:

> A lot less than 80ha but not less than 20ha may be approved subject to compliance with the State Policy on the Protection of Agricultural Land.

The Council must also require under this clause:

> A written statement justifying the proposal and giving reasons why compliance with the development standards of the Rural Zone is unreasonable or unnecessary in the circumstances of the proposal, and/or would tend to hinder the attainment of the above aims and objectives.

Ms Dyke argued that the development application was invalid because the applicant had failed to provide sufficient reasons justifying why compliance with the Rural Zone development standards was unreasonable or unnecessary.

The Council argued that a land capability report provided with the development application contained the requisite justification, despite not specifically referring to the relevant provision of the Scheme.

The Tribunal agreed with the Appellant's planner who stated that:

> the test [for compliance with the State Policy]…is a higher one, and one which will allow concession to lot size or non-agricultural uses only where they seek to protect or enhance the primary purpose of the zone.

The Tribunal held that the development application was deficient in failing to address directly the mandatory requirements of cl 8.6.2.

Referring to High Court and Tribunal decisions, the Tribunal ruled that the failure to comply with cl 8.6.2 lead to the development application being invalid. As a result, the permit issued by Council was also invalid.

The Tribunal set aside the Council's purported decision to issue the permit.

Groves, Jenkins, Kelleher and Wragge v Kingborough Council and MAST [2013] TASRMPAT 83

GP Geason, DR Howlett and R Giblin

12 July 2013

Catchwords: Extension of jetty – community benefit – parking and traffic – navigational hazard

LUPAA, ss. 7(d) and 52(1B)
Local Government Act 1993, s.16
Kingborough Planning Scheme 2000, cl 9.4.1.6 and Schedule 5

Marine and Safety Tasmania (**MAST**) applied for a permit to extend an existing jetty and boat ramp within the Tinderbox Marine Nature Reserve, and to establish a defined navigational channel around the ramp. The extension was intended to allow boats to dock over a longer tidal range than currently possible at the facility. Kingborough Council granted the permit, subject to conditions requiring signage regarding boat speeds and proximity to other users, and delineation of the navigational channel with pylons.

A number of representors, including recreational and commercial users of the marine reserve, appealed on grounds alleging the following:

- The proposed extension and navigational channel did not provide a community benefit or promote recreational values, as the development would restrict use of the area by non-boat users;
- The existing road network and parking area could not support the additional traffic that the development would encourage;
- The navigational channel would create a hazard for recreational divers accessing the marine reserve.

The grounds of appeal initially questioned the sufficiency of consent to the development proposal given by the Crown, however that ground was resolved following an amendment under s.22 of the RMPAT Act (see **[2013] TASRMPAT 69**).

A further issue was raised at the hearing regarding the power to impose conditions requiring installation of pylons beyond low water mark. The Tribunal held that, although the pylons were situated outside the municipal area, it would have power to require their installation if they were related to the use of adjacent land within the municipal area. The Tribunal was satisfied that the navigational pylons were beneficial and integral to the jetty and boat ramp development, therefore it was within its powers under s.7(d) of LUPAA to require that they be installed.

The Tribunal confirmed the need for clear signage outlining rules of use, but considered that, provided rules were complied with, the proposed navigational channel and increased berthing capacity on the jetty (rather than the beach) would improve safety and reduce conflict between boat users and other recreational users (such as divers, kayakers and swimmers). The Tribunal acknowledged concerns that bollards required by the permit conditions may restrict access for kayaks and disabled persons, and ordered that the conditions be amended to address this.

Council acknowledged the current lack of parking, but noted that the issue would be addressed as part of a more strategic review of parking and access issues in the area in future. The Tribunal agreed with the Appellants that existing parking arrangements could not support any proliferation of vehicles, including trailers. The Tribunal did not make specific orders in respect of the issue but noted that it "expects that the Council will take steps to implement appropriate parking restrictions and that these will be monitored in order to ensure that the restrictions have effect", and that Council should attend to these matters "expeditiously".

The Tribunal considered that, subject to appropriate conditions regarding parking, the proposal would reduce conflict between users and improve the current situation. On balance, the Tribunal was satisfied that the proposal would result in a community benefit, although not a significant one, and that any detriment could be managed.

The Tribunal directed the parties to consult and submit revised conditions addressing access issues within 14 days. The final permit conditions agreed by the parties, and endorsed by the Tribunal (see **[2013] TASRMPAT 89**), require bollards to be sufficiently spaced to allow for wheelchair access, and for one bollard to be removable.

Telstra v Northern Midlands Council [2013] TASRMPAT 86

19 July 2013

AF Cunningham and ME Ball

Catchwords: Telecommunications tower and associated equipment – Historic Protection Special Area – Telecommunications Infrastructure Schedule

Northern Midlands Planning Scheme 1995, cll 15.5.1 & 18.2.1

Telstra sought approval to construct a 25-metre high telecommunications tower in Longford on land within the Historic Protection Special Area. Access to the site was via a right-of-way adjacent to a listed culturally significant site, "Old Norley".

Clause 18.2.1 of the Scheme restricts what can occur on areas listed in the Scheme as culturally significant. Permissible activities include "adapt the place", with 'adapt' being defined as "modifying a place to suit proposed compatible uses".

The Council refused the application on the basis that the visual impact of the tower would detract from the heritage values of the area generally, and of Old Norley specifically. The Council also argued that the proposed use went beyond what was permitted on a culturally significant site.

The Tribunal held that the right-of-way near Old Norley was not part of the listed "place", and was therefore not subject to the restriction on uses. Alternatively, the Tribunal held that, if the right-of-way *was* included in the "place", use of the right-of-way could be classified as "adaption". The Tribunal was satisfied that it was not necessary for use of the right-of-way by Telstra vehicles to be an adaption of the whole site to fall within the provision.

After detailed consideration of the evidence in relation to visual impact, the Tribunal agreed with Telstra's evidence that, whilst the tower would be visible from numerous locations in the town, the heritage values of the areas would not be eroded.

The Tribunal conducted a view and subsequently afforded the parties an opportunity to comment on the impact of the tower on the "historic integrity and character" of Old Norley. The Tribunal held that amenity impacts on the current owners were not relevant in the context of the effect on heritage values. The Tribunal concluded that the impact on Old Norley was not significant enough to warrant refusal of the application.

The Tribunal set aside the Council's refusal and directed the parties to submit draft permit conditions for consideration.

FISHERIES DECISIONS

Aprilsea, Tober Freight and Ice, Harris and RLID Pty Ltd v DPIPWE [2013] TASRMPAT 87

26 July 2013

GP Geason

Catchwords: Fishing licence – change in policy

Living Marine Resources Management Act 1995, s.282

The Minister for Primary Industries and Water endorsed Ministerial Guidelines on 8 November 2011 which removed the "privilege" afforded to some fishermen to unload their Tasmanian-caught catch outside Tasmania.

Four appeals were filed in relation to this change, by fishermen whose licence included the following provision:

> *The licence holder is authorised to unload rock lobster* [or giant crab] *at an interstate port of landing from the fishing vessel.*

The change in Ministerial policy would have effectively removed this clause.

The Tribunal considered whether the policy was lawfully made. The Tribunal was satisfied that the

policy was within the Minister's power, consistent with the *Living Marine Resources Management Act* (**the Act**), properly identified relevant considerations and did not include irrelevant considerations. Accordingly, the Tribunal concluded that the policy was lawful and applied to all licensees, subject to consideration of their individual circumstances.

The Appellants argued that the Tribunal was not required to follow the policy. The Tribunal rejected this, finding that it was in the same position as the Minister in being required to apply the policy as appropriate to each particular situation.

Each of the Appellants gave evidence in relation to the negative impacts of the policy on them, including:

- longer periods at sea and related difficulties including retaining crews and maintaining vessels
- cost of airfreight
- reduced value of the quota, as a result of lower selling prices in Tasmania and difficulties marketing the volume of fish caught in Tasmania.

The Manager of Fisheries Compliance and Licensing, Mr Withers, gave evidence that the policy was designed to improve compliance. He noted, and the Tribunal accepted, that the usual inspection process (including inspections on board, at unloading and at the processing facility) could not be ensured outside of Tasmania.

The Tribunal considered an alternative compliance regime proposed by the Appellants, but concluded that the proposal was subject to "insurmountable practical difficulties".

The Tribunal concluded that the weight of evidence supported the management regime proposed by the Department, and noted that to make an exception for the Appellants would 'dilute' the policy unacceptably. In the context of compliance the Tribunal stated:

> *Demonstrable* compliance is important, because unless it can be demonstrated, those responsible for the management of the fishery cannot properly discharge the duty reposed in them by Parliament, to do so.

The Tribunal dismissed each of the appeals.

BUILDING DECISIONS

Lee Quintin Tyers v Director of Building Control [2013] TASRMPAT 82

11 July 2013

GP Geason

Catchwords: Application for review – validity of transitional provisions

Building Act 2000, ss.42, 230 and 237
Acts Interpretation Act 1931, s.47

Mr Tyers lodged an appeal under s 42(1) of the *Building Act 2000* (**the Act**). This decision concerns a preliminary jurisdictional point as to whether the appeal was subject to the Act's transitional provisions, meaning it should be heard by the Building Appeal Board. Relevantly, the *Building Regulations 2004* (Tas) provides:

> If, immediately before the commencement of all the provisions of the *Building Amendment Act 2012* [28 November 2012], a complaint has been lodged with the Director and not determined, that complaint and subsequent appeal is to be determined as if the Act had not commenced.

The Appellant argued that:

- the Regulation was invalid as it is contrary to the regulation making power in the Act
- The Regulation making power (s 230 of the Act) was limited by s 237 of the Act which provides for regulations to be made with respect to transitional arrangements
- The Regulation does not apply to this situation, since the complaint was determined on 3 January 2013, and therefore (at the time of hearing) cannot be considered to be "not determined".

The Tribunal held that, notwithstanding the specific regulation making power in an Act, Parliament has power to legislate for the purpose of making transitional arrangements.

The Appellant argued that s 47 of the *Acts Interpretation Act 1931* (which deals with inconsistency between an act and regulations made under it) had the effect of making invalid the transitional provisions as they relate to appeals. The Tribunal was satisfied that the *Acts Interpretation Act 1931* had "no function to perform here" because

there is an express provision of the *Building Act 2000* to make transitional regulations which was not inconsistent with the general regulation making power.

The Tribunal also rejected the argument that s 230 of the Act was limited by s 237, describing s 237 as "discrete" and "performing a different and unrelated function". The Tribunal held that the correct construction of the Regulation was that a complaint lodged before 28 November 2012, and any subsequent appeal, were to be determined under the old provisions.

Accordingly, the Tribunal was satisfied that the Regulation was valid and, under the transitional arrangements, the appeal should be heard by the Building Appeal Board. The appeal was remitted to that Board for determination.

SUPREME COURT DECISIONS

Krulow v Glamorgan Spring Bay Council [2013] TASSC 33

10 July 2013

Wood J

Catchwords: Motion to review – Civil Enforcement Orders – Prosecution for failure to comply – Defence that orders invalid – Status and consequences of orders – Whether collateral challenge of orders permissible.

LUPAA, ss.23(3), 64 and 65
Purton v Jackson [2012] TASFC 2

This was an appeal from the decision of a Magistrate to record a conviction and order the applicants to pay court costs.

The Appellants (Sarah & Ronald Krulow) operate sandstone works at Buckland, Tasmania. They were charged with breaching orders made by the Tribunal ([2009] TASRMPAT 230)that they install sprinklers on site by 31 May 2010 or cease operations. There was no doubt in the Magistrates' Court proceedings that the order had been breached.

The Appellants argued that the order made by the Tribunal was invalid due to jurisdictional error, as the Tribunal had no power to make an order that required cessation of works undertaken pursuant to existing non-conforming use rights. The Magistrate found she could "consider the orders of the Tribunal as valid". The fact that the Krulows had consented to the Tribunal orders being made, was partly relied on by the Magistrate in forming the view that there was no reason to doubt their validity.

Her Honour began by considering whether the orders of the Tribunal breached s 20(3) of LUPAA – on the assumption that the Applicants could establish existing use rights. Based on the term of the order and subject to the evidence, it was held the Tribunal's order may have been in breach of s 20(3) in preventing the existing use from continuing.

Secondly, Her Honour examined the question of whether the making of the order which affected existing use rights amounted to a jurisdictional error. Justice Wood ruled that jurisdiction was determined by statute and the parties could not confer jurisdiction on the Tribunal simply by consenting to the orders. After discussing the concept of jurisdictional error the court ruled it was not necessary to make a finding on this point in light of the other aspects of the decision.

The Appellant argued that, if the orders of the Tribunal were invalid, there could be no prosecution for a breach of them. Consistent with the decision in *Purton v Jackson*, the Court held that, where there is a jurisdictional error in a decision, "the legal and factual consequences of the decision, if any, will depend on the relevant legislation".

After considering LUPAA and the RMPAT Act, Her Honour concluded that an order under section 64 of LUPAA was binding until set aside by the Supreme Court. This was influenced by the practical impact of a contrary finding, as set out in paragraph 60:

> If orders under s64 of the LUPA Act are not necessarily binding and effective unless set aside by the Supreme Court, it would entirely undermine the regime of enforcement of planning schemes and permits in s64. It would lead to uncertainty as to their status and affect public confidence in those orders. Ultimately it would undermine compliance with the LUPA Act. These ramifications are a stark contrast to the purpose of the legislation and could not have been the intention of Parliament.

The final issue was whether the Magistrate should have ruled on the validity of the Tribunal orders. This would have permitted a collateral challenge to those orders. Collateral challenge in this case would have meant raising the validity of the Tribunal order as a defence to the criminal charge. After

considering in detail relevant authorities, Her Honour held the following statement of principle applied to the case before her:

> Determining whether collateral challenge is available involves the task of construing the relevant legislation. This would include consideration of the legislation governing the deciding body and constraints that it may be subject to, the statutory provision creating the offence, and whether the legislation establishes a scheme for the determination of the specific issues that have been raised.

Her Honour applied this reasoning to LUPAA, noting in particular that there is a process by which orders can be appealed. She held that the fact that appeals cannot be made from consent orders was not relevant. Her Honour was satisfied that LUPAA provides a clear indication that collateral challenge of s 64 orders in the course of a prosecution is not available.

The motion to review was dismissed.

SUPREME COURT – FULL COURT DECISIONS

Howlin v Clarence City Council [2013] TASFC 7

26 July 2013

Blow CJ, Tennent & Porter JJ

Catchwords: Powers of Court – Further evidence - Costs - Creation and extinction of highways – Dedication - Natural justice

Local Government Act 1962 (Tas), s694
Local Government (Highways) Act 1982

This was an appeal from a decision of Evans J (see **[2012] TASSC 26**) in which His Honour held that Marsh Street, Opossum Bay was not a highway under the *Local Government (Highways) Act 1982* and not maintainable by the Council. Without access to a highway, Mr Howlin could not subdivide his adjoining land. His Honour also decided Mr Howlin should pay the Council's costs.

These proceedings are the most recent in number of proceedings involving Mr Howlin in relation to Marsh Street. Tennant J (with whom Blow CJ and Porter J agreed) delivered the judgment. In Her Honour's ruling are listed seven of the previous proceedings in relation to Marsh Street.

Mr Howlin appealed against Justice Evans's ruling on 51 grounds. He was self-represented.

The Full Court judgment is long and comprehensively addresses each ground of appeal. Only a small part of the consideration of the 51 grounds is described below.

The Full Court rejected the Appellant's argument that the land had been dedicated as a highway by Mr Brown in November 1944. This was based on the fact that Mr Brown was not the landowner at the relevant time and did not have the power to make the dedication.

The Full Court was critical of the grounds, noting on several occasions, that the grounds were incomprehensible and failed to identify which of Justice Evans' findings he sought to challenge. The Court also held that Mr Howlin relied on irrelevant evidence (such as comments from Council workers) and misrepresented the evidence in his submissions.

The Court noted that Mr Howlin was revisiting issues previously determined, rather than challenging the decision made, and pointed out that merely disagreeing with the findings did not mean that he had not been afforded natural justice or that Justice Evans had been biased.

The appeal was dismissed.

LAW AND POLICY UPDATES

EPA issues fine for illegal dumping

The EPA recently issued fines totalling $6,500 in relation to dumping of car bodies and other waste at St George's Falls, near Burnie. Four men were fined $1,300 each in relation to the dumping of one of the car bodies. One of the men was also fined an additional $1,300 for dumping household rubbish at a nearby location.

Draft State Coastal Policy Statement released

The Department of Premier and Cabinet recently released a draft *Tasmanian Coastal Policy Statement*. The policy statement sets out proposed guiding principles, goals and policy directions which will form the basis of a Coastal Protection and Planning Framework.

The draft Statement is available at www.dpac.tas.gov.au.

Proposed amendments to the Southern Tasmania Regional Land Use Strategy

The 12 Southern Tasmanian Councils are seeking public comments on proposed amendments to the *Southern Tasmania Regional Land Use Strategy 2010-2035*. Proposed amendments include:

- Alterations to the Urban Growth Boundary;
- Clarification of the policy in relation to biodiversity offsets;
- Removing the objective of protecting sites on the geo-conservation database, given the absence of any State Policy or legislative support for protection of geodiversity values;
- Requiring bushfire hazard clearing around existing dwellings to be limited to the minimum required to protect property, but removing the explicit requirement to consider associated biodiversity impacts;
- Additional references to transport corridors, including maintaining the rail corridor (even after freight ceases) to allow for future mass transit options, such as light rail, and providing for major trip-generating developments to be located near existing public transport corridors;
- Clarifying the application of the Rural Living / Environmental Living Zones; and
- Explicitly supporting expansion of resource uses at Southwood.

Submissions in relation to the proposed amendments can be made until **23 August 2013** and can be sent to the Project Manager at either: GPO Box 503E, Hobart 7001 or planners@stca.tas.gov.au.

The proposed amendments and revised maps are available at www.stca.tas.gov.au/rpp.

Productivity Commission reviews major project assessments

The Productivity Commission has released its draft report into *Major Project Development Assessment Processes*. Key recommendations in the report include:

- strengthening and adopting bilateral assessment and approval agreements between the Commonwealth and States and Territories;
- establishing a coordination office to advise on statutory requirements;
- separating environmental policy from regulatory and enforcement functions;
- setting clear statutory timelines for development assessment and approvals;
- increasing the use of Strategic Assessments; and
- requiring approval authorities to develop risk-based strategies for monitoring and enforcing compliance with approval conditions.

The draft report is available at www.pc.gov.au/projects/study/major-projects/draft. Public comments in relation to the findings and recommendations of the draft report can be made until **13 September 2013** by emailing major.projects@pc.gov.au.

Review of GMO Moratorium announced

The Minister for Primary Industries has announced a review of the moratorium of Tasmania's current policy on genetically modified organisms, to be completed before the expiration of the current GMO moratorium in November 2014. An Issues Paper outlining potential market advantages and disadvantages of allowing the use of gene technology in Tasmanian primary industries is expected to be released for public comment in late August 2013.

More information for the review is available at: www.dpipwe.tas.gov.au

Marine Farming Monitoring Data available

DPIPWE has released a report it commissioned from IMAS reviewing monitoring data collected in the D'Entrecasteaux Channel and Huon Estuary and Port Esperance Marine Farming Development Plan areas between 2009 – 2012. The report, which compares

nutrient emissions from marine farming operations with baseline data and performance measures, concludes that no significant impacts on water quality have been observed, but notes that more data should be collected and it should be analysed more consistently.

The Broadscale Environmental Monitoring Program report is available at www.dpipwe.tas.gov.au/.

Guidelines released for activities under the Water Management Act

DPIPWE has released the following guidelines to assist compliance with conditions of licences and permits issued under the *Water Management Act 1999*:

Guideline for Maintaining Records that Demonstrate the Quantity of Water Taken – to assist licensees to maintain appropriate written records of the volume of water taken under a water licence; and

Guidelines for Developing a Sediment and Erosion Control Plan for Dam Works Sites – provides a general overview of sediment and erosion control measures that are typically required for dam works and ongoing dam operation.

The Guidelines are available at www.dpipwe.tas.gov.au

Gas works exempted from planning permit requirements

The *Gas Infrastructure (Planning Permit Exemption) Regulations 2013*, which took effect on 8 July 2013, provide for a range of infrastructure works associated with gas distribution and connection will not require a planning permit under the *Land Use Planning and Approvals Act 1993.*

Shree Minerals - Tarkine Mine – Federal Court and Subsequent approval

Federal Court

The Tarkine National Coalition (**TNC**) challenged the Federal Environment Minister's (at the time Tony Burke) approval of Shree Minerals' iron ore mine near Nelson River in Tasmania's North-West [*Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694].

Marshall J upheld the challenge and set aside the Minister's decision on the basis that the Minister had failed to have regard to a mandatory consideration under section 139(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), namely the Approved Conservation Advice for *Sarcophilus harrisii* (Tasmanian Devil). His Honour found that, given the significance of the document under the EPBC Act, the Minister was required to "give genuine consideration" to the document. It was not enough that the information in the advice was found in other documents that the Minister did consider. Accordingly the court found a jurisdictional error had occurred and that it was appropriate to declare the decision invalid.

The court also ruled that a condition relating to an insurance population was a valid condition under s 134 of the EPBC Act and was not inconsistent with Australia's obligations under the Biodiversity Convention.

Subsequent Approval

On 5 August 2013, Environment Minister, Mark Butler, granted a new approval for the Shree Minerals' mine. The conditions of approval were essentially the same as those imposed by Tony Burke in the initial approval.

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