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LAWYERS

Our Ref: JEH:MYC:547046

7 April 2015

Private & Confidential
The General Manager
Narrabri Shire Council
PO Box 261
NARRABRI NSW 2390

Legal professional privilege applies

Attention: Hamish McTaggart

Email: hamishm@narrabri.nsw.gov.au

Dear Sir

Westport Quarry - proposed expansion
Property: Lot 21 DP 757083, Jacks Creek State Forest

We refer to Mr McTaggart's emails sent on 10 and 11 March 2015.

Council has requested us to advise regarding whether its proposed expansion (**the Expansion**) of Westport Quarry (**the Quarry**) at the above property (**Site**), as detailed in Development Application No. 41/2015 (**the DA**), is permissible under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

For the following reasons, we consider that the Expansion is **not** permissible under the EP&A Act. That is, we consider it highly likely that the Expansion is **prohibited** development for the purposes of that Act.

Questions for advice

In considering Council's request for advice, we have contemplated the following questions which will form the basis for this advice:

- Is the Expansion permissible development without consent, for the purposes of s 76 of the EP&A Act, as a use "authorised under the *Forestry Act 2012*" for the purpose of the Land Use Table for Zone RU3 Forestry under *Narrabri Local Environmental Plan 2012* (**the LEP**)?

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- Is the Expansion permissible with consent, for the purposes of s 76A of the EP&A Act, under clause 7(3)(a) of *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**the Mining SEPP**), or some other state environmental planning policy?

- If the answer to both of the above questions is "No", could the Expansion have the benefit of existing or continuing use rights under Division 10 of Part 4 of the EP&A Act?

We have considered each question in turn later in this advice. In each of the three cases we consider the correct answer to be "**No**". Before proceeding to advise in detail on those questions we consider it useful to summarise the relevant background facts, legislative framework and position taken by the Forestry Corporation of NSW.

Background facts

1. Council is assessing the DA. The Site is owned by the Forestry Corporation of NSW and is located within the Jacks Creek State Forest. The DA has been lodged as designated development and an Environmental Impact Statement (**EIS**) was prepared by SMK Consultants for Council, which is the applicant. The EIS describes the proposal in detail and notes that approval for the existing quarry and its expansion is sought. The development involves the winning of material (gravel) which is stockpiled on site. The material is then crushed by a portable crushing plant which is brought to the Site. The crushed material is then removed from the Site. The expanded operations would involve the removal of some existing vegetation and expansion of quarrying to the south and east by a further 4.74 hectares.

2. Further, the EIS states as follows with respect to the proposed quarrying activities involved in the Expansion:

> *Allowing for a maximum quarry depth of 4m, the extended area would provide a maximum of up to 189,600 cubic metres of raw gravel material. This would potential* [sic] *offer the applicant up to 40 years of extraction from this site at a maximum rate of 5,000 cubic metres per annum.*
>
> *The proposed operation would not be continuous. Operations generally involve Council employing a contractor to clear and win sufficient gravel material for their specific contract needs. Once this raw material is stockpiled, a portable crusher is brought to the site to crush the required amount of gravel for the specific project. The dozer and crusher are then removed from the site. When the project site is ready, Council deploy a front end loader to the site which loads their trucks and hauls the gravel to the project. The trucks would include a water truck to limit dust emissions from the vehicle movements. The number of trucks used to haul the gravel would vary according to the project size and location in relation to haul distances and work schedules.*

Legislative framework

3. The Site is zoned RU3 Forestry under the LEP, which provides:

> ***1 Objectives of zone***
>
> - *To enable development for forestry purposes.*

- *To enable other development that is compatible with forestry land uses.*

2 ***Permitted without consent***

Roads; Uses authorised under the Forestry Act 2012

3 ***Permitted with consent***

Nil

4 ***Prohibited***

Any development not specified in item 2 or 3

4. The word "forestry" is then defined in the Dictionary to the LEP as follows:

forestry *has the same meaning as* **forestry operations** *has for the purposes of Part 5A of the* Forestry Act 2012.

Note. *The term is defined as follows:*

forestry operations *means:*

(a) *logging operations, namely, the cutting and removal of timber from land for the purpose of timber production, or*

(b) *the harvesting of forest products, or*

(c) *on-going forest management operations, namely, activities relating to the management of land for timber production such as thinning and other silvicultural activities such as bee-keeping, grazing and bush fire hazard reduction, or*

(d) *ancillary road construction, namely, the provision of roads and fire trails, and the maintenance of existing railways, to enable or assist in the above operations.*

5. The relevant provisions of the *Forestry Act 2012* (**Forestry Act**) are extracted at **Annexure A** to this advice.

6. Clause 7(3)(a) of the Mining SEPP provides as follows:

(3) ***Extractive industry***

Development for any of the following purposes may be carried out with development consent:

(a) *extractive industry on land on which development for the purposes of agriculture or industry may be carried out (with or without development consent),*

...

7. The term "agriculture" is not specifically defined in the Mining SEPP, however clause 3(1) of that instrument defers to the Dictionary to the *Standard Instrument (Local Environmental Plans) Order 2006.* That dictionary defines "agriculture" as follows:

> **agriculture** *means any of the following:*
>
> *(a) aquaculture,*
>
> *(b) extensive agriculture,*
>
> *(c) intensive livestock agriculture,*
>
> *(d) intensive plant agriculture.*

8. The word "industry" is specifically defined within the Mining SEPP as follows:

> **industry** *means the manufacturing, production, assembling, altering, formulating, repairing, renovating, ornamenting, finishing, cleaning, washing, dismantling, transforming, processing or adapting, or the research and development of, any goods, chemical substances, food, agricultural or beverage products, or articles for commercial purposes, but does not include a mine, petroleum production facility or extractive industry.*

Forestry Corporation position

9. Council has been provided with a letter dated 9 March 2015 from the Forestry Corporation of NSW (**the Forestry Corporation letter**) asserting that "forestry" will fall within the definition of "industry" for the purposes of clause 7(3)(a) of the Mining SEPP. Relevantly, in that letter authorised by Conan Rossler, District Manager the Forestry Corporation has asserted as follows:

> *... I have obtained advice from FCNSW's legal advisors and we are firmly of the opinion that Narrabri Shire Council (Council) is the consent authority for the proposed expansion of the Quarry.*
>
> *I have been advised that "Forestry" (a use authorised under the Forestry Act 2012 and permitted without consent in Council's LEP), will fall within the definition of "Industry" in State Environmental Planning Policy (Mining Petroleum and Extractive Industries) 2007 (the Mining SEPP) and that the Mining SEPP will therefore apply to the land on which the Quarry is situated, it being land on which development for the purpose of agriculture or industry may be carried out (with or without development consent) with development consent (cl 7(3)(a)).*
>
> *As you would be aware, to the extent that the Mining SEPP is inconsistent with the provisions of Council's LEP that prohibit extractive industry in the RU3 Forestry Zone, the Mining SEPP will prevail.*
>
> *In our opinion there is no doubt that, based on the provisions of the Mining SEPP, Council is the consent authority for the proposed development. In addition, it is not possible for FCNSW to authorise extractive industry development through the issuing of a Forest Permit. This is because permits*

pursuant to the Forestry Act 2012 *are only for forestry purposes and are not intended to be issued for other purposes.*

The case of Nerasko Pty Liimited [sic] v Coffs Harbour City Council & Ors *[1990] NSWLEC 57 involved a virtually identical issue and is authority for the position that, uses or purposes authorised by the* Forestry Act *are limited to "forestry" uses or purposes.*

...

Is the Expansion permissible without consent?

10. In order to be permissible without consent, it would have to be demonstrated that the Expansion is "development for the purposes of" (see clause 2.3(3)(a) of the LEP) a use or uses authorised under the Forestry Act. This is because the Expansion is clearly not development for the purposes of a road or roads, and all other development except for uses authorised under the Forestry Act is prohibited within Zone RU3 Forestry under the LEP.

11. The content of the Forestry Corporation letter is principally directed to asserting that "forestry" will fall within the definition of "industry" for the purposes of clause 7(3)(a) of the Mining SEPP. However, the final two paragraphs extracted above which consider the earlier Land and Environment Court decision of *Nerasko* are important for the purposes of this first question.

12. Some closer examination of *Nerasko* is warranted for the purposes of determining whether the Expansion is permissible without consent as a use authorised under the Forestry Act for the purposes of the LEP. This is because the zoning table is different in the *Nerasko* case to the LEP zoning table we are considering in this advice.

13. In *Nerasko*, clause 7 of *Coffs Harbour Local Environmental Plan 1988* (**Coffs LEP**) provided as follows in relation to the 1(f) Rural Zone in the Coffs LEP:

> *1. Aims of zone*
>
> *The aim is to identify land which is reserved under the Forestry Act 1916.*
>
> *2. Objectives of zone*
>
> *The objectives are as follows:*
>
> *(a) to enable the development of land within this zone for forestry purposes;*
>
> *(b) to enable the development of land for other purposes where it can be demonstrated by the applicant that suitable land or buildings for the proposed purpose are not available elsewhere and that such a use will not detrimentally affect forestry operations on nearby lands.*
>
> *3. Without development consent*

Any purpose authorised under the Forestry Act 1916 and any purpose ancillary or incidental to such a purpose.

4. Only with development consent

Any purpose that will not adversely affect the usefulness of the land for the purposes of forestry.

5. Prohibited

Except as otherwise provided in this table, all development unless the council is satisfied that the carrying out of the development is generally consistent with one or more of the objectives of this zone.

14. It is noteworthy that the objectives set out above are markedly similar to the objectives in the Land Use Table for the RU3 Forestry Zone under the LEP. That is, the primary objective in both cases is to the effect of enabling development of the affected land for forestry purposes. The common secondary objective then appears to enable other non-forestry development that is compatible with forestry land uses.

15. In the case of the Coffs LEP, the primary objective appears to have been achieved by specifying only forestry-related development as being able to be carried out without consent. The secondary objective appears to have been achieved by permitting non-forestry development only if it would not adversely compromise achievement of the primary objective. The language used in the "only with development consent" and "prohibited" categories under that instrument clearly allowed for some discretion on the part of the council in determining whether a particular non-forestry development would be permissible with consent.

16. Whilst the objectives of the RU3 zone are markedly similar, the way those objectives are achieved under the LEP works quite differently to the regime under the Coffs LEP. In the case of the LEP, the only forms of development that are permissible **in any way** are roads and uses authorised under the Forestry Act. Both forms of development address the primary objective of the RU3 zone, as they clearly enable development for forestry purposes.

17. Given the existence of the secondary objective of the RU3 zone in the LEP, that objective must be given some work to do. In this respect, the definition of "forestry" in the Dictionary to the LEP is noteworthy.

18. The term "forestry" for the purposes of the LEP, and therefore "forestry purposes" for the purposes of the primary objective in the Land Use Table for the RU3 Forestry Zone, has a narrower meaning than the phrase "uses authorised under the Forestry Act" that is used in the LEP. That is, the Forestry Act regulates much more than just forestry operations. Such operations only involve logging, harvesting the resulting products, on-going management and ancillary road works.

19. In our view, the secondary objective of the RU3 Forestry Zone under the LEP, that is to *enable other development that is compatible with forestry land uses*, is achieved by construing "uses authorised under the Forestry Act" to include not only "forestry operations" (which address the primary objective), but also **some** other non-forestry uses that are otherwise authorised under the Forestry Act.

20. In reaching that view, we have carefully considered *Nerasko* and particularly the passages from the judgment that are extracted as **Annexure B** to this advice.

21. Careful analysis of the above judgment is required for the purposes of this advice given the differences between the relevant zoning tables discussed above. That is, the Court's dismissal of the applicant's argument in *Nerasko* that the proposed quarry could be carried out without development consent does not automatically mean that a similar argument as to the permissibility of the Expansion should be dismissed in this case. The question turns on the particular language of the Land Use Table for the RU3 zone.

22. In this respect we note the Forestry Corporation's views referred to earlier in this advice. We do not consider the Forestry Corporation's view on its powers and the applicability of *Nerasko* to be entirely correct. This is because *Nerasko* is not "virtually identical" as claimed by the Forestry Corporation, but rather is partly distinguishable from the current factual circumstances. However, for the following reasons it remains highly relevant:

    (a) In this case the EIS describes the proposed quarrying activities involved in the Expansion in some detail. In this case the DA, similarly to *Nerasko*, proposes not only the "taking" of extractive material but more so the extraction, processing, storage and removal of that material. Whilst the amount of material and environmental impacts of the Expansion are much lesser here than in the case of *Nerasko*, the DA is for designated development requiring the lodgement of an EIS. The fact that designated development is intended by the EP&A Act to require a high level of environmental scrutiny indicates that quarrying **may** not have been intended by the drafter of the LEP as a use that could be carried out without consent due to it being "authorised under the Forestry Act".

    (b) The Coffs LEP considered in *Nerasko* contained a definition of "forestry" that is quite similar to that contained in the LEP. It is "forestry" to which the **primary** objective in both instruments is directed. The Coffs LEP however achieved the secondary objective by allowing some other activities with consent, whereas the LEP achieves the secondary objective of the RU3 zone within the "permitted without consent" category itself. That is, *Nerasko* was decided in a situation where the relevant planning instrument contained express provision for development for non-forestry purposes to be carried out **with consent**. There is no such provision in the case of the RU3 zone under the LEP - that is, the "permitted without consent" category appears to allow for some scope of non-forestry development purposes, given the secondary objective of the zone requires this.

The meaning of "Uses authorised under the Forestry Act 2012"

    (c) The considerations in (a) and (b) above need to be reconciled for the purposes of this case. That is, to what extent are non-forestry activities contemplated within the "permitted without consent category" for the RU3 zone? That is, what does "Uses authorised under the *Forestry Act 2012*" mean?

    (d) Quarrying is clearly an activity that is **contemplated** by the Forestry Act. A person must not, on any State forest, **quarry**, dig for, extract, obtain, remove, destroy or damage "any forest materials". To do so is an offence under s 38(1)(b) of the Forestry Act. The phrase "forest materials" is defined in s 4 of

that Act as meaning "rock, stone, clay, shells, earth, sand, gravel or any like material".

(e) Such activities do not give rise to an offence under s 38(1)(b) if they are, among other things:

(i) authorised by a timber licence, forest products licence, **forest materials licence** or clearing licence (s 38(3)(a)(i) of the Forestry Act);

(ii) authorised by a "small quantity authorisation" issued under s 45 of the Forestry Act;

(iii) authorised under a number of listed Acts which include the *Mining Act 1992*; or

(iv) authorised by the land manager of the forestry area in accordance with Part 5 of the Forestry Act (s 38(3)(b) of that Act).

(f) While we have some reservations about directly applying *Nerasko* to the facts of this case, we consider that the tenor of the Forestry Corporation's claim based on *Nerasko* is correct. That is, the Court's finding that a forest materials licence under the former s 27C of the *Forestry Act 1916* can authorise the "taking" but not the **mining or processing** of extractive materials is directly applicable to forest materials licences under s 42 of the Forestry Act. This is because whilst timber, forest products and clearing licences all permit certain activities **on** Crown-timber land (see sections 40, 41 and 43 of the Forestry Act), forest materials licences only permit the **taking** of forest materials **from** a State forest. That is, s 42 appears to assume that the relevant extractive or other forest material has already been "won", and is yet to be processed.

(g) Small quantity authorisations only apply to the taking of timber, forest products or forest materials having up to a certain monetary value. Extractive materials are not timber or forest products, and for the reasons above could be "taken" under a small quantity authorisation but not quarried or processed. Therefore s 45 of the Forestry Act does not assist in this case.

(h) The fact that an offence of quarrying for extractive materials can be avoided under the Forestry Act by the person having authorisation under another Act does not, in our view, render such an activity capable of being a use "authorised under the Forestry Act" for the purposes of the LEP. In our view for some "authorisation" to exist for the purposes of the LEP it would have to be via the direct authorisation of an instrument granted under the Forestry Act itself.

(i) Whilst the Forestry Corporation itself cannot issue forest permits for non-forestry purposes, section 60 of the Forestry Act specifies that the "land manager of a forestry area" can do so in certain circumstances. However, that land manager cannot exercise functions in a manner that is "inconsistent with the use of State forests for the purposes of carrying out forestry operations" (s 59(2)(a)(i) of that Act). We consider that issuing a forest permit in this case for quarrying would be directly inconsistent with the relevant parts of the Site being used for the purposes of carrying out forestry operations, given it would render those areas incapable of being used for forestry for a significant period of time.

On that basis the land manager's powers under the Forestry Act are of little assistance here.

(j) For the above reasons, whilst quarrying is contemplated by the Forestry Act it is not capable of being a "use authorised under" that Act for the purposes of the LEP. Whilst the taking of the extractive material from the Site would be capable of being permitted, the mining of that material would not be, nor would its processing.

23. As a consequence of the above analysis, whilst *Nerasko* is not directly applicable in this case we have carefully reviewed the relevant law and respectfully agree with the Forestry Corporation that the Expansion is **not** capable of being carried out **without** development consent.

Is the Expansion permissible with consent?

24. In requesting our advice, Mr McTaggart has referred to clause 7(3)(a) of the Mining SEPP and noted Council's view "*that neither development for the purpose of forestry or roads fell into the definition of 'agriculture' or 'industry*". For the reasons that follow, we agree with that view.

25. Clause 7(3)(a) of the Mining SEPP provides that extractive industry may be carried out with development consent "on land on which development for the purposes of agriculture or industry may be carried out (with or without development consent)".

26. When the four types of "agriculture" included in the definition of that word for the purposes of the Mining SEPP are examined, it is apparent that roads and uses authorised under the Forestry Act cannot have been contemplated by the drafter of the Mining SEPP as being included within that definition.

27. We hold a similar view in respect of the definition of industry under the Mining SEPP. Development for the purposes of "roads" under the LEP is clearly not development for the purposes of "industry" as defined above. Development for the purposes of "uses authorised under the *Forestry Act 2012*" is a broad and relatively imprecise phrase. However, for the reasons above it does not include a mine, petroleum production facility or extractive industry. The question is whether it falls within any of the phrases that are **included** in the definition of "industry".

28. The similar definition of "industry" within the *Environmental Planning and Assessment Model Provisions 1980* was held by the NSW Court of Appeal in *Egan v Hawkesbury City Council* (1993) 79 LGERA 321 to be "a wide and comprehensive definition" that should "not be given a restricted construction". However, uses "authorised under the Forestry Act" do not include the on-site crushing activities considered by the Court in *Egan*, for reasons discussed in answering the first question. That is, it needs to be demonstrated that forestry operations on, or the **taking** of forest materials from, the Site would comprise an "industry" as defined.

29. We consider that the mere taking of forestry materials (eg extractive materials) from the site is **not** an industry. It does not involve physically changing any such materials. Rather, activities that are not directly authorised under the Forestry Act such as crushing the materials would involve such "industry", as found in *Egan*. That is, the

mere taking of the material (*Adi Ltd v Hawkesbury City Council* (2000) 110 LGERA 406):

> *... does not add any component to the product; nor does it of itself require any making, altering, preparing or adapting of the product.*

30. Uses "authorised by the Forestry Act" for the purposes of the LEP can therefore only amount to "industry" if "forestry operations" for the purposes of that Act amount to "industry". The phrase "forestry operations" is extracted in full at paragraph 4 above.

31. In our view, none of the four limbs of the definition of "forestry operations" involve "industry". This is because the definition of "industry" in the Mining SEPP essentially replicates the definition of "industrial activity" in the LEP. The definition of "industrial activity" is then incorporated into the definitions of "hazardous industry", "heavy industry", "high technology industry", "light industry" and "offensive industry" in the LEP.

32. Within the Land Use Table to the LEP, "forestry" and "industries" appear separately on a number of occasions - see for example the business and industrial zonings. Therefore the LEP seems to contemplate forestry operations **not** being industrial in nature. Even if that were not the case, we consider that the activities listed as "forestry operations" are **not** essentially industrial in nature. Whilst the harvesting of forest products involves some element of industrial activity, the primary focus of the definition is on timber being produced elsewhere. If forestry were an industry, it could have been described as one in the Dictionary to the LEP.

33. We have considered the potential applicability of other state environmental planning policies, but do not consider that any of them are of particular relevance to this case. Namely, the rate of extraction from the Quarry that will result from the Expansion will not reach the threshold for State significant development under *State Environmental Planning Policy (State and Regional Development) 2011*, nor is clause 18 of *State Environmental Planning Policy (Infrastructure) 2007* of any assistance given the Site is both subject to a standard local environmental plan and within a State forest.

Expansion highly unlikely to have benefit of existing or continuing use rights

34. This final question only arises if, consistent with our views set out above, the earlier two questions are both answered in the negative.

35. We are instructed that the Quarry does not have the benefit of any historical consent or approval of Council. Therefore s 109B of the EP&A Act does not apply in this case.

36. Similarly, for the reasons that follow we consider that the Expansion does not have the benefit of existing or continuing use rights under s 107 or s 109 of the EP&A Act respectively.

37. We do not at this stage have sufficient information to form an opinion as to whether or not the Quarry (as opposed to the Expansion) has the benefit of existing or continuing use rights. For example, we do not know whether the Quarry use commenced lawfully, or was abandoned at any time after the date on which planning controls first applied to the Site. However, even if such rights applied to the Quarry the incorporated provisions of the *Environmental Planning and Assessment Regulation 2000* do not allow land uses

to expand onto land that the use was not being carried out on before the date that such controls first applied.

38. That is, Clause 42(2)(b) of the Regulation requires "land" to mean the area for which the existing use was granted and upon which it is carried out and any other part of the subject property held in reserve for that use. Whether some other part of the Site is held in reserve for such use depends upon an examination of the question whether there was some area of land including the area of the Quarry actually quarried but extending beyond it that could fairly be regarded as a whole area used for the relevant purpose at the relevant time (*Lemworth Pty Ltd v Liverpool City Council* (2001) 53 NSWLR 371). However, we doubt that the part of the Site that is proposed for the Expansion has been held in reserve for quarrying given that the Site is part of a State forest not owned by Council, and which (according to the EIS) has been logged on several occasions by the Forestry Corporation of New South Wales.

39. On the basis that it is highly unlikely that the part of the Site proposed for the Expansion has been held in reserve for quarrying, we consider that even if the Site had the benefit of existing or continuing use rights, such rights would not benefit the Expansion. As such, unless the Expansion is permitted without consent under the LEP or with consent under the Mining SEPP (neither of which we consider to be the case), the Expansion is development that is prohibited under s 76B of the EP&A Act.

Please let us know whether or not you require any further advice. If you have any questions in the meantime, please do not hesitate to contact us.

Yours faithfully

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ANNEXURE A - RELEVANT PROVISIONS OF FORESTRY ACT

38 Unlawful taking of timber etc

(1) A person must not:

...

(b) on any State forest or flora reserve—quarry, dig for, extract, obtain, remove, destroy or damage any forest materials or cause or allow any of those things to be done.

Maximum penalty: 50 penalty units or imprisonment for 6 months, or both, and $10 for each tree destroyed or damaged in the commission of the offence.

...

(3) A person does not commit an offence under subsection (1):

(a) if the act in question is authorised by or under any of the following:

(i) a licence or small quantity authorisation,

(ii) the Native Vegetation Act 2003 *(including any instrument made under that Act),*

(iii) the Mining Act 1992 *or any mineral claim or mining lease under that Act,*

(iv) the Petroleum (Onshore) Act 1991 *or any petroleum title under that Act,*

(v) a forestry right or any restriction on use or covenant imposed under Division 4 of Part 6 of the Conveyancing Act 1919 *in connection with the forestry right,*

(vi) Schedule 6 to the Crown Lands (Continued Tenures) Act 1989,

(vii) section 18D (1) (b) of the Western Lands Act 1901, *or*

(b) if the act in question is done or authorised by the land manager of the forestry area in accordance with this Act, or

...

40 Timber licences

(1) A timber licence authorises the holder to take timber, or such class or description of timber as is specified in the licence, on Crown-timber land.

(2) *The term of a timber licence is the term specified in the licence, but the term:*

(a) *must not exceed 5 years without the prior written approval of the Minister, and*

(b) *must not, in any event, exceed 20 years.*

41 Forest products licences

(1) *A forest products licence authorises the holder to take forest products, or such class or description of forest products as is specified in the licence, on Crown-timber land.*

(2) *The term of a forest products licence is such term, not exceeding 5 years, as is specified in the licence.*

42 Forest materials licences

(1) *A forest materials licence authorises the holder to take forest materials, or such class or description of forest materials as is specified in the licence, from a State forest.*

(2) *The term of a forest materials licence is the term specified in the licence, but the term:*

(a) *must not exceed 5 years without the prior written approval of the Minister, and*

(b) *must not, in any event, exceed 20 years.*

43 Clearing licences

(1) *A clearing licence authorises:*

(a) *the holder, and*

(b) *a successor in title to the land in respect of which the clearing licence is issued,*

to ringbark or otherwise kill or destroy trees, or such class or description of trees as is specified in the licence, on such Crown-timber land as is specified in the licence.

(2) *Subsection (1) has effect despite any other Act or any terms or conditions subject to which any tenure of the Crown-timber land is held.*

(3) *The term of a clearing licence is the term specified in the licence.*

...

45 Small quantity authorisations

(1) *The Corporation may, otherwise than by the issue of a timber licence, forest products licence or forest materials licence, authorise a person:*

(a) *to take timber, forest products or forest materials having a value of not more than $1,000 (or such other amount as may be prescribed by the regulations) on or from land within a State forest, other than land set apart as a flora reserve, or*

(b) to take timber or forest products having a value of not more than $1,000 (or such other amount as may be prescribed by the regulations) on or from Crown land.

(2) A small quantity authorisation is subject to such conditions as may be imposed by the Corporation or by the regulations.

(3) The authority conferred by a small quantity authorisation is subject to the regulations.

(4) A small quantity authorisation may not be issued in respect of:

(a) land held under a conditional purchase lease, closer settlement lease, group purchase lease, settlement purchase lease or returned soldiers' special holding unless the lessee of that land consents to the issue of the authorisation, or

(b) land in respect of which trustees have been appointed for a public purpose unless those trustees consent to the issue of the authorisation.

ANNEXURE B - RELEVANT PASSAGES FROM *NERASKO*

Mr Tamberlin submits that no development consent is required because the intended purpose is one which is authorised under the Forestry Act *1916 (NSW). Reliance is placed on s 27C of the* Forestry Act *which provides:*

> *"(1) A forest materials licence authorises the holder, subject to the regulations and subject to the conditions and limitations of the licence, to take forest materials, or such class or description of forest materials as is specified in the licence, from a State forest.*
>
> *(2) The term of a forest materials licence shall be such term, not exceeding 5 years, as is specified in the licence.*
>
> *(3) Forest materials licences shall be issued by the commission."*

"Forest materials" are defined in s 4 of the Forestry Act *as meaning "rock, stone, clay, shells, earth, sand, gravel or any like material".*

According to an affidavit of the applicant's solicitor, Mr Fishburn, the purpose of the proposed quarry is the extraction, processing, storage and removal of rock, stone and gravel.

...

On behalf of the Council Mr Naughton QC, makes the following submissions:

...

3. The objectives of the 1(f) forest zone are to enable development for "forestry" purposes. "Forestry" is defined by the LEP and includes the removal of "forest products" but not "forest materials". Products are defined in s 4 of the Forestry Act, *but do not include "forest materials" which is separately defined ... The "purposes" authorised by the* Forestry Act *are forestry and certain other specified purposes but do not include "extractive industry". Development for other purposes, if consistent with the objectives of the zone, is permissible subject to Council's planning discretion.*

Alternatively, 4. The zoning table requires that the purpose be a purpose which has in fact been authorised by a permit or licence already granted *by the Forestry Commission under s 27C and no such permit has been granted to the applicant.*

On behalf of the second respondent Boral, Mr McEwen of counsel adopts Mr Naughton's submissions. Additionally, he submits that the intent of the primary zone objective in the LEP is limited to "forestry purposes" which do not include extractive industry such as described in the EIS. The application involves much more than just "taking". It extends to the winning and processing of extractive materials. The regulation making power in the Forestry Act *does not extend to the processing of forest materials but only to their "obtaining" or "removing" (s 41(1)(e)). No provision exists in the* Forestry Act *or the* Forestry Regulations *1983 (NSW) which permits the processing of forest materials although by contrast the Act makes provision for the*

processing of timber products (s 25F(4)). He notes that the EIS clearly contemplates a crushing plant for primary, secondary and tertiary crushing.

...

... The question is whether one should construe "purpose" in the clause as any purpose at all to be found in the Forestry Act, *including non-forestry purposes, or whether it should be confined to "forestry purposes", and thereby exclude the removal of extractive or forest materials? It is a nice point. But if Mr Tamberlin's argument is correct the situation will verge on the absurd. A substantial hard rock quarry, which in any other circumstances is patently designated development under Pt IV of the EPA Act, is transformed into an "activity" under Pt V to be determined by the Forestry Commission because s 27C of the* Forestry Act *requires the Commission to consider the issue of a licence for up to five years (not twenty-five to thirty years) to "take forest materials". The commission is, one assumes, to assess the application under s 111 of the EPA Act and also determine whether the activity is likely to have a significant effect on the environment under s 112 and whether an EIS is required. It then has to exhibit the EIS, assuming it decides that is required. Other procedures are inherent in ss 113 and 114 of the Act which may include a Commission of Inquiry. All of these Pt V procedures highlight the unreasonableness of the applicant's construction. The Forestry Commission, while an expert in assessing forestry purposes and operations, does not profess to have the expertise to properly assess all of the environmental impacts of a hard rock quarry of this magnitude.*

...

In arriving at the conclusion that development consent is required under Pt IV of the EPA Act I also accept that there is a clear distinction to be made between "taking" forest materials under s 27C of the Forestry Act *and the winning of extractive materials. While the EIS makes it plain that the application embraces the latter, it obviously also includes the former. But s 27C does not in my opinion authorise the winning of the scale of extractive materials referred to in the EIS, 2.3 to 3.4 million tonnes. It is my belief that the concept of s 27C is to provide for the taking of relatively small quantities of extractive materials, often for internal roading purposes and the like: see s 30I* Forestry Act *and cl 45 of the* Forestry Regulations.

I also accept Mr McEwen's submission that neither s 27C, nor any other provision of the Forestry Act or regulations, extends to the processing of forest materials removed from a State forest. To this extent the application must be dealt with under Pt IV of the EPA Act, even if the removal of the rock itself does not require development consent.

It follows from my above conclusions that I do not need to consider Mr Naughton's alternative argument that a permit under s 27C needs to be granted before par 3 of the LEP operates. It is not however an argument to which I am attracted.

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11/05/2015

The General Manager
Narrabri Shire Council
PO Box 261n
Narrabri NSW 2390

By email to hamishm@narrabri.nsw.gov.au

Dear Mr McTaggart

Development Application for the proposed expansion of Westport Quarry

We refer to the ongoing correspondence between Forestry Corporation NSW (FCNSW) and Narrabri Shire Council (Council) concerning the permissibility of the proposed expansion (the expansion) of Westport Quarry (the Quarry) under the *Environmental Planning and Assessment Act* 1979 (the EP&A Act), and to the legal advice provided to Council by HWL Ebsworth Lawyers on 7 April 2015, which has been provided to us.

FCNSW and Council are both keen for the proposed expansion of the Quarry (the DA) to proceed, and the purpose of this letter is to assist Council with not only identifying the correct legal position but the most efficient means of dealing with the DA.

We note from the outset that both FCNSW and Council (following the legal advice it has received) agree that the DA is not something that can be dealt with by way of approval/permit/licence etc under the *Forestry Act* 2012 (and although we disagree with a number of assertions made in this part of Council's legal advice we do not propose to discuss those here). This letter will therefore only address the issue of permissibility of the DA.

FCNSW has previously advised Council that we are of the view that the DA is permissible *with development consent* within the RU3 Forestry Zone as described in Council's Local Environmental Plan (the LEP). We note that the legal advice provided to Council suggests that the DA is not permissible and may in fact be prohibited development.

For the reasons set out in this letter, we remain firmly of the view that the correct position is that proposed expansion of the Quarry *is* permissible with development consent under the EP&A Act, and that Council is the consent authority for the proposed expansion.

Permissibility of the DA

The DA is for extractive industry. Within the RU3 Forestry Zone in the LEP, roads and "uses authorised under the *Forestry Act* 2012" are permitted without consent.

There are no types of development permitted with consent, and so this would suggest that the DA is prohibited in the RU3 Forestry Zone.

However, *State Environmental Planning Policy (Mining Petroleum and Extractive Industries) 2007* (the SEPP) applies to the land with Jacks Creek State Forest where the expansion of the Quarry is proposed and as will be explained below, will operate so as to make the DA permissible with development consent. This is where we say that the legal advice provided to Council is misdirected.

The SEPP

Pursuant to cl 4 of the SEPP, it applies to the whole of NSW and therefore to the entire area of Jacks Creek State Forest including the area where the Quarry is located. To the extent that the SEPP is inconsistent with the LEP, the SEPP will prevail (cl 5(3)). The legal advice provided to Council does not seem to address this fundamental point.

cl 7(3)(a) of the SEPP provides that extractive industries on land on which development for the purpose of agriculture or industry may be carried out (with or without development consent) may be carried out with development consent. "Industry "is defined in the SEPP as:

> *The manufacturing, **production**, assembling, altering, formulating, repairing, renovating, ornamenting, finishing, cleaning, washing, dismantling, transforming, **processing**, or adapting, or the research and development of, any **goods**, chemical substances, food, agricultural or beverage products, or **articles for commercial purposes**, but does not include a mine, petroleum production facility or extractive industry* (my emphasis)

In order to correctly determine whether "industry" may be carried out in Jacks Creek State Forest, it must be considered whether "uses authorised under the *Forestry Act 2012*"(ie, those activities permitted without consent in the RU3 Forestry Zone) fall within the above definition. In our opinion it is beyond question that they do.

Whether "uses authorised under the Forestry Act" fall within the definition of "industry"

Paragraph 30 of the legal advice provided to Council states that "Uses "authorised by the Forestry Act" for the purposes of the LEP" can therefore only amount to "industry" if "forestry operations" for the purposes of that Act amount to "industry".

"Forestry operations" is defined in the *Forestry Act* 2012 as:

> *(a) logging operations, namely, the cutting and removal of timber from land for the purpose of timber production, or*
>
> *(b) the harvesting of forest products, or*

(c) on-going forest management operations, namely, activities relating to the management of land for timber production such as thinning and other silvicultural activities and bush fire hazard reduction, or

(d) ancillary road construction, namely, the provision of roads and fire trails, and the maintenance of existing railways, to enable or assist in the above operations.

It is useful to point out here that the definition of "forestry operations" was inserted into the Act not as an exhaustive description of the harvesting process but to deal with those matters that are part of the Integrated Forestry Operations Approval (IFOA) process. In determining whether "uses authorised under the Forestry Act" are "industry" a broader range of activities can be considered other than those things referred to the definition of "forestry operations" but we are happy to use that definition as a general guide.

We can only assume that Council's legal advisors did not have a clear understanding of the logging activities that occur on State forests before giving their advice in this matter.

The harvesting process typically involves the felling of a standing tree and the servicing (cutting up) of the felled tree into various timber products within the forest. For example parts of the felled tree may have sawlogs cut out of it (to be later further converted in sawn timber products) or veneer logs (to be later further converted into veneer) or salvage logs (to be later further converted into reconstituted wood products such as paper or converted within the forest into charcoal) or firewood. A single tree will produce more than one type of log product. As these different log products are created within the forest they are segregated and stockpiled and may be sold to and taken by different entities. Each of these log products is indisputably "goods" and there are markets for these goods without further conversion – for example sawlogs from NSW State forests are exported to China. In our view the taking of the standing tree and cutting up within the forests into sawlogs and other goods is unquestionably the production of "goods", or "articles for commercial purposes" within the definition of "industry". Further FCNSW has the statutory power to control and regulate every aspect of the logging process so that there can be no question that the creation of these goods are authorised under the Forestry Act. Indeed as these goods have differing commercial values it is a necessary function for FCNSW to authorise, regulate and control the process that creates them and brings them into account.

The *Macquarie Dictionary* defines "production" as *"the act of producing;creation;manufacture".* Further, "goods" are defined as *"articles of trade;wares;merchandise, especially that which is transported by land"*

Although not of any weight because "industry" is specifically defined in the SEPP, the *Macquarie Dictionary* definition of "industry" may be generally helpful to illustrate the context in which forestry operations are carried out, namely, *"a particular branch of trade or manufacture; any large scale business activity".* FCNSW is generally regarded as a participant in the forest industry.

It is our opinion that the processes involved in forestry operations (ie, changing the product from a tree into a value added product) clearly result in the production of goods for commercial purposes.

Further, Council's legal advice states in paragraph 31 that "...none of the four limbs of the definition of "forestry operations" involve "industry". We have assumed that Council's legal advisors are not aware of the nature of forestry operations in reaching this conclusion. Similarly, we do not think that the definition of "industrial activity" in the LEP is a relevant consideration, as to the extent that the definition of "industry" in the SEPP captures forestry operations and that in the LEP does not, the SEPP will prevail.

We have advised on a similar matter concerning the operation of a quarry in the Port Macquarie – Hastings area. In that matter, Council obtained independent legal advice that supports our position. A copy of that advice is attached to the email containing this letter, for your consideration.

Council's suggested amendments to the LEP

We have read Mr McTaggart's email of 23 April 2015 to Mr Dashwood of FCNSW's Dubbo office. In that email it is suggested that the LEP be amended in one of three possible ways to permit the expansion of the Quarry in Jack's Creek State Forest. We will not provide specific comments in this letter about the three suggested amendments to the LEP, as those amendments were put to FCNSW on the basis of the advice to Council that the DA could not be assessed under the EP&A Act.

With respect, we do not think that any amendment to the LEP is necessary, and that in any event amending the LEP would involve Council in a lengthy process, with no certainty that the amendment would be approved, further delaying the approval of the DA (which is not in the interests of either Council or FCNSW).

We note that the Department of Planning & Environment (the Department of Planning) have been consulted about the DA, and have indicated that they would not have any objection to amending the LEP and have suggested the three possible amendments. We do not know the extent to which the Department of Planning have been consulted about this matter, but would respectfully suggest that if they were briefed according to our advice, their advice may be different.

Approving the DA

In our opinion the most appropriate method for dealing with the DA is for Council to proceed with an assessment under the EP&A Act (as the DA is permissible in the Zone). Amending the LEP would, in our opinion, create an unnecessary delay for Council and there is the real possibility that any application to the Department of Planning would not be approved.

We note Council may be concerned about the possibility of an objector appeal being brought under s98 EP&A Act against any development consent that is granted for the DA, but with respect do not think that the risk of this occurring outweighs the fact that the development is permissible and should be assessed under the EP&A Act by Council as the consent authority.

Summary

In our opinion,

1. The DA is permissible with development consent within the RU3 Forestry Zone

2. Council is the consent authority and should assess the DA under the EP&A Act

3. There is no need to amend the LEP

We understand that the only reason Council does not accept that position is the advice it received from HWL Ebsworth Lawyers. We would urge Council to ask that firm to reconsider its advice in the light of the explanation of the harvesting process given in this letter or alternatively that Council seek a second opinion.

We would be happy to discuss this matter further with you if necessary, and look forward to progressing the expansion of the Quarry.

Yours faithfully,

Jennifer Coburn
Assistant Legal Officer

lindsaytaylorlawyers

Confidential

2 December 2014

Our ref: HAS14028
Your ref:

The General Manager
Port Macquarie-Hastings Council
PO Box 84
PORT MACQUARIE NSW 2444

Attention: Matt Rogers

Email

Dear Sir,

Advice re Permissibility of Extractive Industries in RU3 Forestry Zone PMH LEP 2011

Introduction

1 I refer to Matt Rogers' emails requesting advice dated 26 and 27 November 2014.

2 Council has been in discussions with the proponent of a hard rock quarry and Forestry Corp NSW (**FCNSW**) about the permissibility of a proposed quarry (**Development**) to be located in the Broken Bago State Forest.

3 Initially, the discussions focused on whether an extractive industry was a 'Use authorised under the *Forestry Act 2012*' and thereby permitted without consent in the RU3 Forestry Zone under *Port Macquarie Hastings Local Environmental Plan 2011* (**LEP**).

4 On the basis of the decision in *Nerasko Pty Ltd v Coffs Harbour City Council* [1990] NSWLEC 57, Council is of the view that it is not permissible under that instrument.

5 However, a further question has arisen as to whether an extractive industry may be permissible with consent under *State Environmental Planning Policy (Mining Petroleum and Extractive Industries) 2007* (**SEPP**).

Advice required

6 I am asked to advise whether an extractive industry is a purpose of development that is permissible only with development consent in the RU3 Forestry Zone within the meaning of the LEP either under that LEP and/or under the provisions of the SEPP?

Summary

7 In my view an extractive industry is permissible with consent in the RU3 zone.

Advice

8 Clause 5(3) of the SEPP provides that if the SEPP is inconsistent with any other environmental planning instrument[1], whether made before or after the SEPP, the SEPP prevails to the extent of the inconsistency.

9 It follows that even if an extractive industry is prohibited in the RU3 zone under the LEP, it would still be permissible if the SEPP so provides.

10 Clause 4 in Part 1 of the SEPP provides that the instrument applies to the State.

11 Clause 6 in Part 2 specifies certain kinds of development that are permissible without consent.

12 Clause 7 goes on to specify a number of kinds of development that are permissible with consent.

13 Paragraph (3) is relevant.

> ***7 Development permissible with consent***
>
> ...
>
> *(3) Extractive industry*
>
> *Development for any of the following purposes may be carried out with development consent:*
>
> *(a) extractive industry on land on which development for the purposes of agriculture or industry may be carried out (with or without development consent),*
>
> *(b) ...*

14 For the purposes of the SEPP, cl3(2) defines an '*industry*' as follows:

> ***industry*** *means the manufacturing, production, assembling, altering, formulating, repairing, renovating, ornamenting, finishing, cleaning, washing, dismantling, transforming, processing or adapting, or the research and development of, any goods, chemical substances, food, agricultural or beverage products, or articles for commercial purposes, but does not include a mine, petroleum production facility or extractive industry.*

15 I can see no reason not to apply the definition in the context of clause 7(3)(a).

16 Therefore, the permissibility of an extractive industry depends on whether any kind of '*industry*' may be carried out with or without development consent in the RU3 zone under the LEP.

17 I think that it can.

---

[1] Subject to provisions of certain other State policies mentioned in subclause (4) which do not appear to be relevant.

18 The Land Use Table for the RU3 zone in the LEP provides as follows:

Zone RU3 Forestry

1 Objectives of zone

- *To enable development for forestry purposes.*
- *To enable other development that is compatible with forestry land uses.*

2 Permitted without consent

Uses authorised under the Forestry Act 2012

3 Permitted with consent

Roads

4 Prohibited

Any development not specified in item 2 or 3

19 There is no question that roads are not a form of industry.

20 The only question is whether '*Uses Authorised under the Forestry Act 2012*' include any '*industry*' as defined in the SEPP.

21 Use which may be authorised under the *Forestry Act 2012* include a range of matters, but of particular relevance:

21.1 the taking of timber (which includes trees of any age or description, whether growing or dead) under a timber licence on Crown-timber land (s40);

21.2 the taking of forest products (being the products of trees and other vegetation (other than timber) that are of economic value), under a forest products licence on Crown-timber land (s42); and

21.3 the taking of forest materials (defined as rock, stone, clay, shells, earth, sand, gravel or any like material) from a State forest under a forest materials licence (s41).

22 I have assumed that the relevant land so zoned RU3 under the LEP is Crown-timber land and State forest land as defined in the *Forestry Act 2012*. Please let me know if this is not the case as it would change my advice.

23 In *Nerasko Pty Limited v Coffs Harbour City Council & Ors* [1990] NSWLEC 57, the Court considered a virtually identical issue relating to a proposed quarry in the 1(f) zone under *Coffs Harbour Local Environmental Plan 1988*.

24 Paragraph 3 of the zoning table for the 1(f) zone under the Coffs Harbour LEP permitted with consent, development for *'any purpose authorised under the Forestry Act 1916 and any purpose ancillary to or incidental to such a purpose'*.

25 Stein J held that the purposes so referred to excluded an extractive industry and were limited to '*forestry*' where:

25.1 '*forestry*' excluded any purpose authorised under the *Forestry Act 1916* in respect of the taking of '*forest materials*'; and

25.2 '*forest materials*' were, in turn, defined in the same way as in the *Forestry Act 2012*, to which I have already referred at paragraph 21.3 above.

26 Stein J summarised the position as follows:

> *Bearing in mind the objectives of the zone as expressed in the LEP, indeed the whole of the relevant zoning table, the definition of "forestry" in the plan, the context and wording of s.27C of the Forestry Act, the construction*

pressed by the Council, and supported by Boral and the Forestry Commission, is open and to be preferred. The reference to "purpose" in paragraph 3 is logically to forestry purposes and the extraction of forest materials is not a forestry purpose under the Forestry Act but a purpose other than a forestry one. This is a construction which I believe is reasonably open and preferable to the simplistic, and perhaps superficially attractive interpretation, urged by the applicant. A purposive construction is necessary to conform to the intent of the LEP and the legislative intent and policy of the EPA Act, see Kingston v. Keprose ((1987) 11 NSWLR 404 at 421). Conversely the applicant's interpretation leads to manifest inconvenience.

27 Although the *Forestry Act 1916* has been replaced by the *Forestry Act 2012*, and the relevant LEP, the Land Use Table for the RU3 zone and the legislative scheme of the *Forestry Act 2012* more generally seems to be relevantly identical.

28 As *Nerasko* has not been overturned, there is also a good chance that it would be followed by another judge of the Court on the basis of comity because it is not plainly wrong.

29 Assuming that is the case, the things that are permissible in the RU3 zone under the LEP is '*forestry*' purposes.

30 '*Forestry*' is defined in the LEP to have the same meaning as *forestry operations* has for the purposes of Part 5A of the *Forestry Act 2012*, namely:

(a) *logging operations, namely, the cutting and removal of timber from land for the purpose of timber production, or*

(b) *the harvesting of forest products, or*

(c) *on-going forest management operations, namely, activities relating to the management of land for timber production such as thinning and other silvicultural activities such as bee-keeping, grazing and bush fire hazard reduction, or*

(d) *ancillary road construction, namely, the provision of roads and fire trails, and the maintenance of existing railways, to enable or assist in the above operations.*

31 In particular, I note that '*forestry operations*' does not include any kind of activity relating to the taking or winning of '*forest materials*'.

32 The scheme under the *Forestry Act 2012* therefore maintains a distinction between forest materials activities on the one hand and forestry (governed by timber licences and forest products licences) on the other.

33 In summary, therefore:

33.1 the activities that are permissible in the RU3 zone under the LEP without consent are '*forestry operations*' as defined in the *Forestry Act 2012*; and

33.2 extractive industries are prohibited in that zone under the LEP.

34 The next question is whether '*forestry operations*' include any '*industry*'.

35 In my view, logging operations as referred to in paragraph (a) of the definition of '*forestry operations*' falls within either or both of '*production of any goods*' or '*articles for commercial purposes*' in the definition of '*industry*'.

36 The cutting and removal of timber seems to me to be the production of '*goods*'.

37 '*Goods*' are relevantly defined in the *Macquarie Dictionary* 5th Edition as, '*articles of trade; wares, merchandise, especially that which is transported by land*'.

38 In *The Noordam* [1920] AC 904 at 908 to 909, the English Court of Appeal held that the meaning of the word '*goods*' derives its meaning from its context. In that sense, it seems to me unexceptional to regard the product of logging operations (namely lumber), as the production of goods in the relevant sense.

39 So too, the harvesting of 'forest products' in paragraph (b) of the definition would also be the production of goods.

40 However, I think that it is even clearer that lumber and forest products are articles produced for commercial purposes.

41 If so there is a kind of industry permissible without consent in the RU3 zone and it that is the case, cl7(3)(a) of the SEPP has the effect that extractive industries are permissible with consent in the RU3 zone.

42 I trust that this advice is of assistance.

Yours Sincerely,

Dr Lindsay Taylor
Senior Partner

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