

CORRS IN BRIEF

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RISKS ASSOCIATED WITH FALSE OR MISLEADING ENVIRONMENTAL REPORTS

Developers and regulatory authorities rely upon environmental reports of all kinds to support development applications and major project applications. What happens if the consultant, negligently or otherwise, makes a false or misleading statement which is relied upon by a regulator or consent authority in their decision-making process?

BREACH OF STATUTE

Under both the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), it is an offence to provide false or misleading information in an environmental report (s 122E EP&A Act and s 489 EPBC Act).

Under the EPBC Act (s 491), knowingly providing false information to a Minister or authorised officer of the department - whether in an environmental report or otherwise - is punishable by imprisonment or fine or both.

Section 78 of the EPBC Act allows the Federal Minister to revoke a decision and substitute it with another if there is "substantial new information" about the impact the proposal has, or is likely to have. This criteria can include information that environmental reports previously supplied were false or misleading.

The provision of false or misleading information in a variety of reports required under the *Contaminated Land Management Act 1997* (**CLM Act**), is prohibited. Section 46 makes it an offence for a person to provide a false or misleading statement in a report required under Part 3 of the Act (investigation and remediation of contaminated land), and s 55 currently prohibits false statements in connection with site audit reports. Further,

s 103 of the CLM Act currently makes it an offence to provide false information in evidence, or as a response to an order.

On 26 June 2008, the *Contaminated Land Management Amendment Bill 2008* (**Bill**) was introduced to the NSW parliament. As explained in the explanatory memorandum to the Bill, one of the objects of the Bill is to "create a general offence of providing false or misleading information that replaces a more specific offence along those lines". To this end, s 55 of the CLM Act is to be omitted altogether, and s 103 is to be omitted and replaced with a broader prohibition of providing false and misleading information. The penalty if found guilty under s 103 has increased substantially (from 50 penalty units to 1,250 penalty units in the case of a corporation and 600 penalty units in the case of an individual). Also, the current Part 3 of the CLM Act is to be omitted and replaced. The new s 17(6)(b)(iii) allows the EPA to serve a management order (defined under the new s 14(1)) on an appropriate person or public authority if a voluntary management proposal was approved on the basis of false or misleading information.

A FEW CLOSE CALLS

McGovern v Ku-Ring-Gai Council and Anor [2007] NSWLEC 22

McGovern argued the Council's 2005 development consent for additions to a property in Pymble was invalid due to (among other things): 1) a false statement concerning existence of proper survey and 2) false statement concerning certification of statement of environmental effects. The argument failed as the misrepresentation was not "fundamental" to the Council's decision to approve the development application.

Charben Haulage Pty Ltd v Environmental & Earth Sciences Pty Ltd [2004] FCA 403

Charben Haulage purchased the two sites in Killara from Caltex. The sites had been used as a service station and were contaminated. Caltex gave Charben reports prepared

by Environmental & Earth Sciences Pty Ltd (EES). The reports misrepresented the extent of contamination. The Court found that: *“nothing was said or done by Caltex that might reasonably have conveyed the impression that it was adopting the contents of either report”* [at 151]. There was no evidence that Caltex officers knew that the EES reports were misleading. A claim against Caltex under s75B of the *Trade Practices Act* failed.

The Court found that, despite the fact that the report was used by Caltex to discharge its legal obligations and had been passed on by Caltex in circumstances where it was aware that it would be relied on by a purchaser, it did not amount to a representation by Caltex. The Court found that the report was obviously a technical report passed on by an apparently appropriate independent consultant and hence there was no reason to conclude that Caltex adopted the contents of the report, or passed them on as representations of Caltex itself.

Mees v Roads Corporation [2003] FCA 306

Under the EPBC Act, a proposal to build a freeway in Victoria was referred to the Federal Environment Minister. The issue was whether information provided to the Minister was misleading, as there was a failure to refer to a potential freeway link that would result in a complete ring road. The Court held that the failure to inform the Minister of the strong chance of construction of a future road link was misleading.

CONCLUSION

Everyone associated with preparation of reports and applications under the EPBC Act must be cautious about the accuracy of information provided to the Department and the Minister.

Misleading or false reports can result in prosecution, reversal of Ministerial approvals or legal challenges to approvals.

The purpose for which environmental reports will be used and the importance of accuracy and completeness of reports should be expressly stated in retainer agreements with environmental consultants.

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