



Environmental Defenders Office

18 December 2021

Ms Kazan Brown

By email only: kazanbrown@gmail.com

Dear Ms Brown,

Environmental Impact Statement for Warragamba Dam Raising SSI 8441

1. We refer to your request for advice on aspects of the Environmental Impact Statement for the proposal to raise the Warragamba Dam (**Project**), specifically whether:
 - a. there is a requirement that an Environmental Impact Statement (**EIS**) not contain false or misleading information in a material particular;
 - b. there is a requirement that an EIS must provide accurate information; and
 - c. the proponent has a legal obligation to set out in the EIS any alternatives to the Project (or any alternative locations or designs for the Project) that would have less of an environmental impact.

A. Summary of advice

2. It is an offence under s 10.6 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) for a person to provide information in connection with a planning matter that the person knows, or ought reasonably to know, is false or misleading in a material particular. The EIS for the Project, being information provided by WaterNSW or a person engaged by WaterNSW in connection with its application for approval for the Project, is information in connection with a planning matter. Accordingly, the EIS must not contain false or misleading information in a material particular.
3. The purpose of an EIS is to inform decision-makers and the public of the effect of the activity in question. The *Environmental Planning and Assessment Regulation 2000* (**EP&A Regulation**) provides that an EIS must comply with the Secretary's Environmental Assessment Requirements (**SEARs**). Within the framework governing State Significant Infrastructure (**SSI**), there is significant scope for the Planning Secretary to address any inaccuracies in an EIS by

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requiring correction to information, re-examination of a particular matter, or even the submission of another EIS.¹

4. The EIS for the Project is required to provide an analysis of alternatives to the Project. Clause 7(1) of Part 3, Schedule 2 of the EP&A Regulation sets out the requirement for the EIS and relevantly includes:

an analysis of any feasible alternatives to the carrying out of the development, activity or infrastructure, having regard to its objectives, including the consequences of not carrying out the development, activity or infrastructure.

5. Further, as noted above, the EP&A Regulation provides that an EIS must comply with the SEARs, and the SEARs for the Project require the EIS to include:

- a. an analysis of any feasible alternatives to the Project;
- b. a description of feasible options within the Project;
- c. a description of how alternatives to and options within the Project were analysed to inform the selection of the preferred alternative / option; and
- d. the SEARs further specify that “[t]he Proponent must consider potential alternatives for managing flood waters and justify the selection having regard to the relative environmental impacts.”

B. Background

6. In December 2016, WaterNSW made an application to the Planning Secretary for the approval of the Project – a proposal to raise the Warragamba Dam, ostensibly for the purposes of flood mitigation in the Hawkesbury/Nepean- under s 5.15 of the EP&A Act.
7. On 30 June 2017, the Planning Secretary issued, under s 5.16 of the EP&A Act, the SEARs for the Project. The SEARs were subsequently modified and re-issued on 13 March 2018.
8. The SEARs required that an EIS be prepared for the Project, and that in the EIS the Proponent must (relevantly, for example):

identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of:

(a) Aboriginal places and objects, as defined under the *National Parks and Wildlife Act 1974* and in accordance with the principles and methods of assessment identified in the current guidelines;

(b) Aboriginal places of heritage significance, as defined in the Standard Instrument – Principal Local Environmental Plan;

...

¹ EP&A Act, s 5.17(2).

9. On 29 September 2021, the EIS for the Project was placed on public exhibition, originally for 45 days, which was subsequently extended to allow for submissions to be made on the EIS up to 19 December 2021.
10. You have instructed us that the EIS has not adequately assessed the Aboriginal cultural heritage impacts of the Project, and that it contains false or misleading information with respect to the assessment of Aboriginal cultural heritage and the impacts of the Project.

C. False and misleading information

11. It is an offence under s 10.6 of the EP&A Act for a person to provide information in connection with a planning matter that the person knows, or ought reasonably to know, is false or misleading in a material particular.
12. In order for the offence to be made out, the following elements must be satisfied:
 - a. a person provides information in connection with a planning matter;
 - b. the information was false or misleading;
 - c. the person knew that the information was false or misleading; and
 - d. the information was false or misleading in a material respect.

Information in connection with a planning matter

13. A person is considered to have provided information in connection with a planning matter where (relevantly):
 - a. the person is an applicant for approval under the EP&A Act, and the information is provided by the applicant in or in connection with the application; or
 - b. the person is engaged by any such applicant and the information is provided by that person for the purposes of the application.²
14. The EIS for the Project, being information provided by WaterNSW or a person engaged by WaterNSW in connection with its application for approval for the Project, is information in connection with a planning matter.

False or misleading

15. There is no definition of what constitutes “false or misleading information” for the purposes of the EP&A Act, nor, as far as we are aware, any case law under s 10.6 or its predecessor, s 148B to provide guidance.
16. Generally, in the absence of a statutory definition, words and phrases in legislation should be accorded their ordinary meaning, taking into account their context in the legislation and the purpose or object underlying the legislation. However, in circumstances where the provision in

² EP&A Act, s 10.6(3).

question is ambiguous or where using the ordinary meaning would lead to a result that is manifestly absurd or unreasonable, regard may be had to a range of other material to ascertain the relevant definition.³

17. The case of *Mees v Roads Corporation* [2003] FCA 306 is a matter in which the term “false or misleading” in a similar statutory context, (an offence provision in a statute with ecologically sustainable development as one of its objects, albeit with a different, lower, mental element of negligence rather than constructive knowledge) was examined.
18. In that matter, the Court applied an objective test, of “would a reasonable person be misled by the information in such circumstances?”. The Court held that whether such information is otherwise in the knowledge of the decision-maker is not relevant to whether the information is considered misleading.
19. Extrapolating to these circumstances, information provided in the EIS in relation to Aboriginal cultural heritage is likely to be considered false or misleading if a reasonable person in the circumstances would be misled by the information.

In a material particular

20. In order for the threshold of an offence under s 10.6 to be met, the information provided must be false or misleading in a material particular.
21. Materiality is determined in relation to the purpose for which the information was given. The information is material if it is relevant to the making of the decision,⁴ which is an objective criterion for the Court to determine having regards to the circumstances.⁵

Knows or ought reasonably to have known

22. Whether a person “knows or ought reasonably to have known” relates only to whether the information was false or misleading, not to its materiality.
23. The words “ought reasonably to have known” indicate an objective standard, which means that proving the actual state of mind of the defendant is not required. The test is whether a reasonable person would have known that the information was false or misleading.

D. Addressing inaccuracies in an EIS

24. The purpose of an EIS is to inform decision-makers and the public of the effect of the activity in question. An EIS must be “sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of carrying out or not carrying out the activity”.⁶ In order to fulfil this purpose, taking into account the prohibition on the provision of information that is false or misleading in a material respect, an EIS should not

³ *Interpretation Act 1987* (NSW), s 34.

⁴ *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 110 ALR 367 at 371.

⁵ *R v Maslen* (1995) 79 A Crim R 199; and *R v Clogher* [1999] NSWCCA 397.

⁶ *Prineas v Forestry Commission* (1983) 49 LGRA 402.

contain inaccuracies or information liable to mislead the decision-maker or a reasonable member of the public.

25. Further, the EP&A Regulation, at cl 193C, provides that an EIS must comply with the SEARs. As set out above, the SEARs required that an EIS be prepared for the Project, and that in the EIS the Proponent (relevantly):

identify and assess any direct and/or indirect impacts (including cumulative impacts) to the heritage significance of:

(a) Aboriginal places and objects, as defined under the National Parks and Wildlife Act 1974 and in accordance with the principles and methods of assessment identified in the current guidelines;

(b) Aboriginal places of heritage significance, as defined in the Standard Instrument – Principal Local Environmental Plan;

...

26. You have instructed us that the EIS contains a number of inaccuracies, omissions, and other failures to address the SEARs.
27. The Planning Secretary has, within the framework governing SSIs, a significant amount of power to require revision and amendment of an EIS to address any inaccuracies or deficiencies at a number of stages in the process. For instance:
- a. the Planning Secretary may require the proponent to submit a revised EIS to address the SEARs.⁷
 - b. Following the notification period, the Planning Secretary may require the proponent to submit:
 - i. a response to issues raised in the submissions; and
 - ii. a preferred infrastructure report (outlining any proposed changes to the SSI to minimise its environmental impact or to deal with any other issue raised during the assessment).⁸
28. The Planning Secretary may also undertake an environmental assessment into any matter the Planning Secretary considers relevant, for inclusion in the Planning Secretary's report to the Minister on the SSI.⁹

E. Assessment of alternatives

29. The EIS for the Project is required to provide an analysis of alternatives to the Project.

⁷ EP&A Act, s 5.17(2).

⁸ EP&A Act, s 5.17(6).

⁹ EP&A Act, s 5.18(2)(d).

30. Clause 7(1)(c) of Part 3, Schedule 2 of the EP&A Regulation requires the EIS to include:

an analysis of any feasible alternatives to the carrying out of the development, activity or infrastructure, having regard to its objectives, including the consequences of not carrying out the development, activity or infrastructure.

31. Similarly, cl 193C of the EP&A Regulation provides that an EIS must comply with SEARs, and the SEARs for the Project require the EIS to include:

- a. an analysis of any feasible alternatives to the project, noting that “[a]lternatives to a project are different projects which would achieve the same project objective(s) including the consequences of not carrying out the project. For example, alternatives to a road project may be a rail project in the same area and alternate routes for the road”;
- b. a description of feasible options within the project, noting that “[o]ptions within the project are variations of the same project. For example, options within a road project could be design of an intersection; the location or design of a bridge; locations for a vent stack.”;
- c. a description of how alternatives to and options within the project were analysed to inform the selection of the preferred alternative / option. The description must contain sufficient detail to enable an understanding of why the preferred alternative to and options(s) within the project were selected; and
- d. the SEARs further specify that “[t]he Proponent must consider potential alternatives for managing flood waters and justify the selection having regard to the relative environmental impacts.”

If you wish to discuss this advice, please contact us on (02) 9262 6989.

Yours sincerely,

Environmental Defenders Office



Rachael Chick

Solicitor

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