

No One Takes Responsibility for the EIS and its Integrity

The EIS and its supporting documents are plastered with disclaimers that assert the authors do not guarantee the accuracy of the work. This is not consistent with the requirements of the Environmental Planning and Assessment Regulation 2000, nor with the clear intent of the SEARs, nor with equity in relation to parties potentially affected by the development.

Consequently the Department is unable to rely on anything in the EIS and therefore unable to make any recommendations based on the EIS. The EIS must be rejected until its authors are prepared to wholly warrant its accuracy and make themselves liable for any material inaccuracy in the set of documents.

Normal Practice

The NSW Self Insurance Corporation has produced a document “Managing Contracting Risk: A Guide for NSW Government Agencies” which contains the entirely reasonable statement:

“As a general rule, the contract party with the greatest ability to manage a risk should take responsibility for that risk. Arrange indemnities, disclaimers, insurances and guarantees to reflect this concept.” (p. 22)

Clearly in this context the party with the greatest ability to manage the risk of errors in the EIS, where decisions based on those errors would lead to harm to residents or the environment, is the party preparing the EIS. Residents and the environment have no ability to manage those risks and, unless the Government is willing to compensate residents for harm caused by its decisions based on the EIS, then the Government has no ability to manage those risks. The only party that does so is the proponent and/or their agents through, first, being assiduous in the care they take to ensure the EIS is wholly accurate, comprehensive, and in no way misleading; and, second, not seeking to avoid liability for compensation should an erroneous EIS lead to harm to other parties.

This principle is reflected in a short form consultancy agreement template published by the NSW Government’s ProcurePont for government agencies¹. It includes the following:

6.1 (Indemnity) You indemnify Us (and Our personnel) against any liability or loss that We suffer in connection with:

(a) any fraud, **negligence** (emphasis added) or unlawful act or omission by You or Your personnel;

and

5.1 To the extent permitted by law, Your liability under this agreement is limited to the Liability Cap, except to the extent that Your liability:

(b) arises as a result of Your (or Your personnel’s) fraud, **negligence** (emphasis added) or unlawful acts or omissions;

¹<https://www.procurepoint.nsw.gov.au/documents/short-form-consultancy-agreement-template-non-prequal.docx>

It is quite clear that the NSW Government expects anyone providing consulting services to it shall be liable for any harm caused by fraudulent or negligent action or advice, and that it does not allow for disclaimers that would absolve such service providers from liability.

The Regulation's Requirement

According to the Environmental Planning and Assessment Regulation 2000 Schedule 2, Part 3, s. 6 an environmental impact statement must contain

- (f) a declaration by the person by whom the statement is prepared to the effect that:
 - (i) the statement has been prepared in accordance with this Schedule, and
 - (ii) the statement contains all available information that is relevant to the environmental assessment of the development, activity or infrastructure to which the statement relates, and
 - (iii) that the information contained in the statement is neither false nor misleading.

The requirement to declare that the EIS contains **all** available information relevant to the environmental assessment and to declare that the statement is **in no way either false or misleading** seems clear and explicit.

The Fudges and Disclaimers

So what do we find in the EIS documents? Well the main EIS document contains the convoluted statement:

CERTIFICATION	We certify that we have prepared the contents of this EIS to the best of our knowledge. The EIS draws on the work undertaken by a number of technical specialists engaged as part of the Project Team with the information contained in the EIS neither false nor misleading.
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They “certify” that they have “prepared the contents of this EIS to the best of our knowledge”. Nothing in s 6(f) of the regulations makes any reference to “the best of our knowledge”. It seems as though “best of our knowledge” is provided as some sort of hedge despite the regulations allowing for no such provision. The words “neither false nor misleading” occur only after a reference to what other “technical specialists” have done and without presence of the words “certify” or “declare”.

In addition, this “certification” occurs after a first page disclaimer:

This disclaimer, together with any limitations specified in the report, apply to use of this report. This report was prepared in accordance with the contracted scope of services for the specific purpose stated and subject to the applicable cost, time and other constraints. In preparing this report, ERM relied on: (a) client/third party information which was not verified by ERM except to the extent required by the scope of services, and ERM does not accept responsibility for omissions or inaccuracies in the client/third party information; and (b) information taken at or under the particular times and conditions specified, and ERM does not accept responsibility for any subsequent changes. This report has been prepared solely for use by, and is confidential to the client and ERM accepts no responsibility for

its use by other persons. This report is subject to copyright protection and the copyright owner reserves its rights. This report does not constitute legal advice.

Note, according to this disclaimer, the report is provided

- subject to the applicable cost, time and other constraints (so those cost, time and other constraints may have caused errors / misinformation for which ERM won't be held responsible)
- ERM does not accept responsibility for omissions or inaccuracies in the client/third party information; and
- This report has been prepared solely for use by, and is confidential to the client and ERM accepts no responsibility for its use by other persons.

So even though ERM submitted the EIS, the report is "solely for use by . . . the client" and "ERM accepts no responsibility for its use by other persons". That would seem to rule out any responsibility for use of the report by the Department of Planning and Environment.

Notice there is one other thing the submitter is meant to declare that somehow got overlooked, i.e. s. 6(f)(ii) "the statement contains all available information that is relevant to the environmental assessment".

Well, if ERM is not responsible, maybe someone else is, such as subcontractors like DNV GL, who produced the assessments on noise, EMI & EMF, shadow flicker and blade glint, and blade throw. Well DNV GL certainly has their own disclaimers:

This document is intended for the sole use of the Client as detailed on the front page of this document to whom the document is addressed and who has entered into a written agreement with Garrad Hassan Pacific Pty Ltd issuing this document ("DNV GL"). To the extent permitted by law, neither DNV GL nor any group company (the "Group") assumes any responsibility whether in contract, tort including without limitation negligence, or otherwise howsoever, to third parties (being persons other than the Client), and no company in the Group other than DNV GL shall be liable for any loss or damage whatsoever suffered by virtue of any act, omission or default (whether arising by negligence or otherwise) by DNV GL, the Group or any of its or their servants, subcontractors or agents. This document must be read in its entirety and is subject to any assumptions and qualifications expressed therein as well as in any other relevant communications in connection with it. This document may contain detailed technical data which is intended for use only by persons possessing requisite expertise in its subject matter.

They also tell us that:

A Document Classification permitting the Client to redistribute this document shall not thereby imply that DNV GL has any liability to any recipient other than the Client.

So DNV GL, who is responsible for the important noise section of the EIS tells us the document is only for the client and they accept no liability for the consequences of its use by anyone else. And by the way, the client as they define it is ERM, not Newtricity, and certainly not the Department of Planning.

But their disclaimers don't stop there. They also say:

DNV GL will not be responsible in any way in connection with erroneous information or data provided to it by the Client or any third party, or for the effects of any such erroneous information or data

Why does that statement matter? Well they tell us (p. 10) that ERM supplied DNV GL with the background noise measurement data and wind speed information, Newtricity provided them a list of the potentially affected residences (p. 7), and sound characteristics of indicative turbines were provided by Newtricity and some manufacturers (p. 15). So all of the critical parameter information has been provided by someone else and DNV GL accepts no responsibility for any consequences of errors in that data.

So, in a form of "pass the parcel", we have ERM saying they accept no responsibility for the product of third parties such as DNV GL, while ERM provides data to DNV GL and the latter then takes no responsibility if there are errors in that data which affect the noise assessment it produces – so neither party is responsible.

Presumably these disclaimers are not provided as some sort of ornamentation to the documents. They are there because their authors expect to avoid potential liability by including them.

What Should Be Done?

It really is pretty simple.

- the Department should permit no disclaimers on any documentation submitted to it, or at least not by the submitter of the EIS who must be responsible for the integrity of the whole; and
- the declaration about the EIS should follow the wording of s. 6 (f), i.e.
 - the EIS contains all available information that is relevant to the environmental assessment of the development; and
 - the information contained in the statement is neither false nor misleading.

without any nonsense about "best of their knowledge" or any other statement that blunts the clarity of the declarations required by s. 6(f).

Given that ERM has failed to provide the necessary clear declarations in relation to s. 6(f) and has further attempted to avoid responsibility with its disclaimers, the EIS needs to be rejected and not reconsidered until presented in terms that fully comply with s. 6 (f).

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