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FEATURING

Can s 52 of the Trade Practices Act 1974 (Cth) be invoked against misleading statements by a proponent of a project in an environmental impact statement under Pts IV or V of the Environmental Planning and Assessment Act 1979 (NSW)?

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Environmental impact statements perform multiple roles. They inform decision-makers who decide whether to allow or prohibit a development (or "activity"). The role of EISs also extends further than the procedural requirements of impact assessment law. They are quasi-marketing documents which can be partisan towards the interests of the development proceeding. As such they have the potential to mislead their audiences about the extent and severity of impacts. A key feature of EISs is that they tend to contain highly technical and scientific information, which may be presented in such as way as to be misleading. The prohibition of "misleading or deceptive" conduct pursuant to s 52 of the Trade Practices Act is the subject of this analysis, in particular the test of what is "in trade or commerce" and who is a "consumer". Two other bodies of law are also discussed, namely the High Court's position on "adequacy of information" of EISs and the relevant law concerning expert evidence.

INTRODUCTION

When an Environmental Impact Statement (EIS) under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) fulfils the statutory requirements, but in doing so provides information or makes representations of a misleading nature, can it be open to legal censure under "the most litigated provision of the *Trade Practices Act 1974* (Cth)[the TPA]",[1] s 52(1), which states: "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive."

The following enquiry will be informed by three sources:

- current case law on s 52 of the TPA;
- developments in relation to expert testimony in respect of the TPA and other jurisdictions; and
- judicial opinion on the subject of misleading information submitted to government decision-makers.

MISLEADING AND DECEPTION CAN OCCUR

That there may be economic incentives to understate the environmental impacts of a project is clear – whether the developer is a private or public entity.[2] Can an Environmental Impact Statement (EIS) and other conduct associated with an Environmental Impact Assessment (EIA) be "misleading or deceptive"? To date, there have been no reported cases on this specific question. As a consequence,

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[1] Healey D and Terry A, *Misleading or Deceptive Conduct* (CCH, 1991) p v, Foreword per R Baxt.

[2] Government appreciation of risk, and community consternation can conspire successfully against a prospective development. Recent examples of major developments that did not proceed as a result of State government's response to public outrage about environmental risks include the Kurnell sand mining extension, the M4 East Motorway, the ORICA Geomelt facility at Botany and the proposed Desalination Plant, also at Kurnell.

one must seek to glean applicable rules from within s 52 case law or to draw guidance from cases in other Australian jurisdictions which deal with adequacy of information of EIAs.

The type of impact assessment activities which will be considered will be limited to those in New South Wales, under Pts IV and V of the EP&A Act (NSW).[3] Proponents of "designated developments"[4] must conduct EIA before gaining development consent.[5] According to Pt IV, s 79C(b), a "consent authority" must "take into consideration" the "likely impacts of that development" on the local environment.

Part V is concerned with the granting of licences and approvals to government agencies in respect of prescribed land-based "activities"[6] and creates a duty that the "determining authority" should "examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity"[7] before making decisions.[8] Application of Pt V is limited to corporatised government agencies otherwise they will not satisfy the s 52 wording "corporation shall not".

The purpose of the EIA is to produce an EIS.[9] EIA is a procedural mechanism for public participation which may improve decision-making by exposing decision-makers to additional information they might otherwise not have considered, as enunciated by the High Court in *Scurr v Brisbane City Council* (1973) CLR 242; 28 LGRA 50. Can the EIS or its associated conduct constitute "conduct" within the meaning of s 52?

WHAT KIND OF CONDUCT FALLS WITHIN S 52?

The TPA does not itemise the categories of conduct. Courts have stated repeatedly that each case must be considered according to its specific circumstances.[10] One can conceive of many circumstances where EIS and associated activities are "misleading or deceptive". This does not mean that mens rea to mislead or deceive needs to be proven.[11]

In contrast to this view, the High Court has held that proven inadequacy of information of an EIS is excusable if a government department operating in accordance with an environmental management plan did not act in bad faith – so long as there was not a fundamental non-compliance in the performance of the administrative duties involving the gathering, publication and consideration of information.[12] The application of a good faith requirement imports a need to prove state of mind, where the body of evidence in relation to s 52 says there need be none. At some time in the future, these two concurrent threads of judicial opinion must confront each other.

In practice, an EIA is a carefully crafted combination of assertions and omissions of several types:

- plainly observable facts which are indisputable, and about which there is consensus;

[3] Typically, the first step in impact assessment under Pt 4 is a Statement of Environmental Effects (SEE) and under Pt V a Review of Environmental Factors (REF). These assessments could influence a decision-maker under the *Environmental Planning and Assessment Act 1979* (NSW) to decide that further investigation of environmental impacts is unnecessary.

[4] *Environmental Planning and Assessment Act 1979* (NSW), s 77A "Designated development".

[5] *Environmental Planning and Assessment Act 1979* (NSW), s 78A(8)(a).

[6] See *Environmental Planning and Assessment Act 1979* (NSW), Pt V, s 110 for definition of "activity".

[7] *Environmental Planning and Assessment Act 1979* (NSW), s 111 "Duty to consider environmental impact".

[8] Neither the consent authority under Pt IV, nor the determining authority under Pt V are required to do any more than to "take into account" or "consider" the environmental impacts. They are not actually required to assess the content of EIAs on its merits.

[9] Bates G, *Environmental Law in Australia* (5th ed, LexisNexis, 2004) p 275.

[10] *Rhone Poulenc v UIA Agronomie* (1986) 12 FCR 477 at 489 and *Johnson Tiles v Esso Australia* (2000) 104 FCR 564 at 565; [2000] FCA 1572.

[11] In *Murphy v Farmer* (1988) 165 CLR 19; [1988] HCA 31, the High Court considered whether "false or wilfully misleading" meant no more than wrong in fact or whether it imported intentional untruth on the part of the person delivering, making or producing it. The court held that a misleading representation may be made by reason of circumstances beyond the appreciation of the person furnishing the answer.

[12] *South-West Forest Defence Foundation v Department of Conservation and Land Management; Bridgetown-Greenbushes Friends of the Forest v Department of Conservation & Land Management (No 1)* [1998] HCA 34.

- predictive statements about future environmental impacts based on scientific observation;
- statements of a scientific or engineering nature; and
- statements of corporate intent.

It is well-established that conduct can be, "by act or omission, by communication or by silence".[13] Omission can constitute a breach of s 52 if it is a "deliberate refraining from doing an act",[14] although the Federal Court has tempered this rule with the proviso that:

> where a question involves disclosure of risks associated with the supply of a product or service, it cannot reasonably be expected that the supplier is to inform the public of every possible risk. Where complex issues are involved, the question of whether non-disclosure is misleading is to be assessed in a practical realistic way.[15]

A type of document which has some parallels with EIS is the prospectus. Both are quasi-marketing, highly technical documents whose target audience includes those members of the public who may not have specialist knowledge. In both, the specialist information may be edited in a way which involves simplification or omission. *Fraser v NRMA* (1995) 55 FCR 452; 127 ALR 543, a decision of Gummow J (as he then was) states that if a "material omission" from the prospectus constitutes an inadequacy which would "properly be a matter of interest and concern" to the target audience, then this "apparent discrepancy" is a breach of s 52.

Many arguments have been framed to limit what "conduct" is, including that it be "representational in character". Such a limitation would require the conduct to be explicitly and actively seeking to convey a particular impression. This limitation as to the form of the conduct has been rejected. We now know the appropriate test is "whether ... of its nature [it] constitutes misleading or deceptive conduct".[16]

Next, conduct must be demonstrated to fall within the TPA's power in respect of "trade or commerce". EISs could fairly be described as both "statements made in public debate" and "statements made to government bodies".

Aspiring litigants might believe their chances of characterising an EIS as "in trade or commerce" are slim, after *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193; (1990) ATPR 41-022, now the leading case on this subject. As a result of *Nelson*, the phrase "in trade or commerce" in s 52 means: "conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character".[17] This was a major reversal from previous authorities by the High Court.[18]

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[13] See *Rhone-Poulenc SA v UIM Chemical Services* (1986) 12 FCR 477 at 489; 68 ALR 77 at 84 per Bowen CJ, and *Costa Vraca Pty Ltd v Berrigan Weed and Pest Control Pty Ltd* (1999) 155 ALR 714 at 721-722 per Finkelstein J.

[14] *Johnson Tiles v Esso Australia* (2000) 104 FCR 564 at 566.

[15] *Johnson Tiles v Esso Australia* (2000) 104 FCR 564 at 565.

[16] *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546 at 555; 79 ALR 83, per Lockhart J, Burchett and Foster JJ agreeing. Nevertheless, "there are continued suggestions at first instance that breach of the prohibition is unlikely to be proved unless it is established that the conduct in issue amounts to a misrepresentation" and also by the Full Federal Court. Lockhart C, *The Law of Misleading or Deceptive Conduct* (2nd ed, LexisNexis, 2003) p 36.

[17] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193, headnote of Mason CJ, Deane, Dawson and Gaudron JJ.

[18] The early case law on s 52 regarded "in" as meaning "in connection with" or "in relation to" rather then "within". Lockhart, n 16, p 37. While earlier case law on s 52 had adopted a wide interpretation, "[t]he terms 'trade' and 'commerce' are not terms of art ... and are clearly of the widest import", *Re Ku-ring-gai Co-Op Building Society (No 12) Ltd*; *Re Dee Why Co-operative Building Society (No 29) Ltd* (1978) 36 FLR 134; 22 ALR 621, per Deane J at 649; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193, established High Court authority for a narrow interpretation of "trade or commerce", at odds with the accepted interpretation of the Commonwealth's "trade and commerce" legislative power pursuant to s 51(i) of the *Commonwealth Constitution 1901* and divergent from a lineage of case law established by *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216;18 ALR 639, supporting the "broad reach" of s 52. The distinction derived from the use of "with", rather than "in" and the Constitutional expression "trade and commerce" has been taken to suggest that s 51(i) was intended to be inclusive and catching a wide range of activities.

By this standard, an EIS would not fall within the phrase "in trade or commerce", as it does not form an intrinsic part of the bargain or transaction. It is, however, an essential precondition to the progress of the entire activity or development in relation to which the commerce or reading occurs. That an EIS can have a "commercial" flavour is widely understood:

> [T]he information and analysis contained in the Environmental Impact Statement and supporting documents is ... in some cases misleading...the [EIS] is in reality a "sales" document which fails to provide justification for the construction of the Tunnel.[19]

Statements made to government bodies are an essential part of "trade or commerce", as:

- They have the purpose of informing and influencing decision-makers as to whether the development should be allowed planning approval.
- They may further have the purpose of informing the general public, who enjoy the right of public participation if the decision-maker uses their discretion to allow it.

Prior to *Nelson*, two cases concerning statements made to government bodies, *Brown v Riverstone Meat Co Pty Ltd* (1985) 60 ALR 595 and *Merman Pty Ltd v Cockburn* (1988) 84 ALR 521, held that they could constitute trade or commerce for the purposes of s 52. Both concerned statements made to Commonwealth regulators, but there is no apparent justification for restricting the application to them and not to State regulators if s 52 otherwise applies.

Pre-*Nelson*, "statements made in public debate" (as an EIS may be described) were categorised as in trade or commerce. *Glorie v WA Chip & Pulp Co Pty Ltd* (1981) 55 FLR 310; 39 ALR 67[20] was a suit instituted pursuant to s 52 to obtain declaratory and injunctive relief to prevent forestry industry interests from exhibiting a film about forestry practices to the public. Morling J denied relief to the applicant on the grounds that the film was not misleading or deceptive, but conceded that it did come within the trade and commerce definition.

As it was acknowledged in *Nelson* itself, "the precise boundaries of the territory within which [s 52] operates remain undetermined".[21] Thereby it sows the seeds of future challenge. For over a decade observers have been watching to see whether the courts would extend the operation of this so-called "central conception" test, "thus slowly broadening again the scope of s 52(1)".[22] At least one commentator has criticised *Nelson* in strong terms:

> it is not surprising that the High Court has taken the opportunity to confine the scope of the section. What is surprising, and also disappointing, is the manner in which the majority has achieved this. By restricting the term "in trade or commerce" to its central conception, the majority adopted an approach which is artificial and against the consumer policy objectives of the section.[23]

In his dissenting opinion[24], McHugh J said:

> It seems almost paradoxical to hold that the general prohibition of misleading or deceptive conduct in s 52 requires rejection of the construction that the section is limited to consumers and at the same time to hold that the words "in trade or commerce" which are part of the general prohibition have a restricted meaning.[25]

According to Lockhart's *The Law of Misleading or Deceptive Conduct*:

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[19] Harvey N, "EIA Practice in Australia: Case Studies from Australian States and Territories" in Harvey N (ed), *EIA: Procedures, Practice and Prospects in Australia* (Oxford University Press, 1988) p 97, acknowledging a 1987 report of the Department of Environment and Planning to its Director-General, advising on the Sydney Harbour Tunnel project.

[20] Also known as the *South-west Forests case*. Johnston PW, "Judges of Fact and Scientific Evidence – Problems of Decision-Making in Environmental Cases" (1983) 15 UWALR 122 at 127.

[21] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193 per Mason CJ, Deane, Dawson and Gaudron JJ at 169 CLR 594, 601.

[22] Solomon P, "Commentary: *Concrete Constructions v Nelson*" (1990) 17(4) MULR 759 at 764.

[23] Solomon, n 22.

[24] The decision in *Nelson* was 4:3, and two of the minority judges mounted a vigorous case in favour of a wide interpretation of the trade or commerce power of s 52.

[25] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 64 ALJR 293 at 302.

> [T]he decision in Nelson, with respect, raises as many questions as it answers. In rejecting the relevance of the interpretation of s 51(i) of the *Constitution* to the construction of s 52 and, as a result, seemingly dismissing a good deal of the analysis in the prior case law concerning the prohibition's "in trade or commerce" requirement, the court significantly altered the requirement's role in misleading conduct law.[26]

Some legal commentators suggest a "possible clue" as to how the future interpretation of s 52 may evolve is provided by the minority judgment of McHugh J (above) who indicated a preference for reading down the application of that section to consumers, and not "members of the community in their capacities as government officials, shareholders and environmentalists or electors".[27]

McHugh J's approach highlights the artificiality of limiting the definition of "in trade or commerce" only to maintain what many believe is an overly broad interpretation of s 52's standing requirements. According to this approach

> s 52 is limited to conduct which affects members of the public in their capacity as consumers...the object of s 52, indicated both by its heading, and by parliamentary speeches, is to protect consumers, and not other persons.[28]

The wide interpretation of "consumer" has deep roots in Australian law[29]. In the words of Franki J:

> [t]he public interest involved in Part IV of the TPA 1974 assists in reaching the conclusion that the remedies provided by s 80 of the Act may be applied for by "any other person" and that the legislature did not intend any limitation on those words.[30]

Phelps v Western Mining Corporation (1978) 33 FLR 327; 20 ALR 183, a TPA case where an environmental activist brought s 52 proceedings against the Australian Uranium Producers Forum in respect of advertisements published about uranium mining,[31] echoes this approach. It is a widely cited authority for the view that, "it is not the case that only consumers or prospective consumers can move for an injunction under s 80(1)(c) of the *Trade Practice Act*".[32]

Phelps is "often and rightly quoted to illustrate that by section 80 of the Act, Parliament intended to involve interested members of the public in the enforcement and effective operation of the Act".[33]

Clearly this is a vexed debate which could be the forum for a new direction in judicial approach. Despite powerful authority for the general principle that all "interested members of the public" should have access to ensure the enforcement of Commonwealth Acts, the wording of the TPA explicitly focuses on "consumers" only. As one commentator has said, "surely a court would find it easier to recognise a consumer than it will to determine what is the essence of trade or commerce".[34]

Taking McHugh J's approach, the particular circumstances would determine whether a complainant has standing as an actual consumer. For example, residents of Haberfield or Leichhardt in Sydney, seeking to challenge conduct in relation to the proposed M4 East motorway extension, might

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[26] Lockhart, n 16, p 39.

[27] *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; 92 ALR 193, per McHugh J at 169 CLR 594, 619.

[28] Solomon, n 22 at 761.

[29] *Brebner v Bruce* (1950) 82 CLR 161, per Latham CJ, agreed by Webb and Kitto JJ, (at 164): "the presumption is that any person whosoever may institute a prosecution for any offence against a Commonwealth Act or regulation. In order to exclude the application of this presumption, it is necessary that a contrary intention should appear in the legislation creating the offence".

[30] *Phelps v Western Mining Corporation* (1978) 33 FLR 327; 20 ALR 183 at 189, per Franki J.

[31] The matter was heard on a preliminary point of law, that of standing only. This was granted, but the matter never proceeded to trial per Morling in *Glorie v WA Chip & Pulp Co Pty Ltd* (1981) 39 ALR 67 at 73.

[32] *Phelps v Western Mining Corporation* (1978) 33 FLR 327; 20 ALR 183 (per Deane J, as he then was).

[33] *Re: United States Tobacco Company And: The Minister For Consumer Affairs And The Trade Practices Commission No G158 of 1988 Administrative Law* at [29], available online at http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/unrep3522.html?query=%22phelps+%20v+western+mining%22 (viewed 22 November 2005).

[34] Solomon, n 22 at 763.

not be consumers because they could conceivably not be users of a motorway whose very reason for existence is to bypass their suburbs and deny them entry to it.[35]

EVIDENTIARY ISSUES IN PROVING MISLEADING AND DECEPTIVE

If the "central conception test" can be overcome, and s 52 be found to apply, EISs present evidentiary challenges to an aggrieved party. Attempts to show that EIS evidence is misleading may encounter the reluctance of the courts to question the basis of expert evidence. Arguing that the expert information is not "fact" but "opinion" is another means of defending against claims of misleading conduct. In other words, the evidence cannot be misleading or deceptive as it does not claim to be a fact. According to Morling J in *Glorie*, the impugned film consisted of "mere statement of opinion",[36] and was nothing more than an explanation of aspects of forestry "that were not completely understood by the public".[37]

It is unrealistic to say that environmental risk predictions are "mere" statements of opinion. To the contrary, they are often highly influential statements of expert opinion. Contests between environmental and developer interests typically involve highly contestable inferences about data, not value-neutral objective statements or universally agreed facts. The contestability of predictive statements based on science is an important concern of environmental law. Predictive statements depend on effective methodology and the motivation to minimise error in the forecasted environmental impacts. Statistical design, sampling decisions and attitudes toward risk shape the way that scientific information is ultimately offered to decision-makers for consideration. The inevitability of these subjective factors renders even more critical the need for transparency and reliability of the methodology. Some judges have been reluctant to grapple with scientific evidence, due to "judicial deference to technological evidence presented on behalf of proponents of industrial projects".[38]

The nature of EISs poses interpretive challenges as their target audience is both the government decision-maker and the public.

The rule is clearly stated by Hill J in *Tobacco Institute (Aust) v AFCO* (1992) 38 FCR 1 at 47; 111 ALR 61, a case which concerned whether an advertisement was misleading or deceptive under s 52:

> in such a case the statement in question will be misleading, not because it is objectively true or false, but because it represents that there is an objective truth when that is not so, at least on the present state of knowledge.

Thus the identity of the target audience plays a decisive role in whether the impugned conduct is perceived as a fact or opinion.[39]

Until recently, courts have not been universally inclined to question the methodology and inferences which shape the conclusions drawn by an expert. This now appears to be changing. *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305, is a leading case on the subject. A unanimous decision of the New South Wales Court of Appeal held (per Heydon J at 705 and 736) that, "[t]he prime duty of experts in giving opinion evidence is to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusion". In his landmark judgment, Heydon JA (as he then was) referred (at 736) to *Trade Practices Commission v Arnotts Ltd (No 5)* (1990) 21 FCR 324, per Beaumont J:

> [T]he key to the situation ... is that there may be two distinct subjects of testimony – premises, and inferences or conclusions; and that the latter involves necessarily a consideration of the former.

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[35] Conversely, a class of possibly hundreds of thousands of Sydney residents and business customers *could* conceivably be construed as consumers – albeit via an intermediary – of the waste services provided by the Collex Transfer Station at Clyde, or a desalination plant to supply Sydney with water.

[36] Per Hill J in *Tobacco Institute (Aust) v AFCO* (1992) 38 FCR 1 at 46; 111 ALR 61

[37] *Glorie v WA Chip & Pulp Co Pty Ltd* (1981) 39 ALR 67 at 69 per Morling J.

[38] Johnston, n 20 at 126.

[39] In *Tobacco Institute* a wide, lay audience would have regarded evidence as fact, whereas in *Pyrotek Pty Ltd v Ausco Industrial Pty Ltd* (1992) ATPR (Digest) 46-085 the expert audience was regarded to know the conduct was opinion.

Now that Mr Justice Heydon is a member of the High Court does it herald that, in future, Australian courts will not shy away from making evaluations of the underlying presumptions, if not the actual scientific data or conclusions offered by experts? Of course Heydon J is but one of the respected voices on that Bench.

In *Glorie*, the learned judge did not concern himself with the methodology which lay at the heart of the expert opinions about the impacts of excessive logging, cool-weather burning and other practices said to be misleading and deceptive. This reluctance continued to be observed in cases such as *Tobacco Institute*, where the Full Federal Court disagreed with Morling J when, as judge of first instance, he attempted to attribute weighting or value to the various expert testimonies.[40]

Thanks partly to *Makita*, there is now a burgeoning authority to consider how the expert arrived their conclusions (unless the matters were not at all raised in argument by the parties[41]). Expert evidence appears to be entering a new era of scrutiny, in which courts are demanding to know the underlying facts and methodology used by the expert to form their expert opinion.[42] *Makita*, *Arnott* and cases which have affirmed this view are supported by strong United States authorities (notably *Daubert's case*[43]) in a similar vein. Admittedly, none of these cases concerned environmental expertise. For the most part, advances in the judicial approach to expert testimony are occurring in the context of personal injury and medical evidence.[44] However, there is no identifiable reason why they may not be applied to cases where the subject is environmental in nature.

In *Glorie*, the court found that

> [b]ecause of the ambiguity and inconclusive nature of the specific factual issue, that is, whether there was a possibility of long-term harm to the forest, the statement could not be said to be misleading so long as the public was aware that the film was merely expressing opinions which were supported by some scientific evidence.[45]

This view of science as "merely expressing opinions" is unrealistic. A more realistic appraisal of the dominant conception of science is that

> science alone produces valid knowledge. It seeks laws of cause and effect, generally with the goal of prediction. Knowledge is seen as being objectively-based and cumulative, and the scientific method is seen as applicable to all human problems ... Rationalist planning has stressed prediction and modelling based on abstract concepts.[46]

Yet environmental science is unable to predict environmental impacts by the use of proven scientific laws. The reliance on modelling of future impacts, rather than direct measurement, is prevalent in planning decisions, measuring pollution and EIA.

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[40] The role of Morling J in the evolution of expert evidence is a point of tangental interest. From his decision in *Glorie*, he later went on to sit at the Chamberlain Royal Commission, where his decision overturning expert testimony resulted in the pardon of Lindy Chamberlain. By the time that he heard the *Tobacco Institute case* he was willing to enter into a level of scrutiny very different from that which he employed in *Glorie*

[41] "The rule in *Jones v Dunkel*" see *Jones v Dunkel* (1959) 101 CLR 298.

[42] Practical advice for a hopeful litigant, would be to adduce objective evidence to challenge the allegedly misleading or deceptive conduct, and include it in comprehensive pleadings to ensure it can be cross examined and receive judicial consideration. The ISO 14000 series of voluntary environmental management standards is a means of providing some objectivity about methodology. "Aspects and impacts" studies conducted according to the ISO standards could be considered by the court, provided that they were submitted in evidence. For example, in *Makita*, failure to include precise details of the relevant Australian Standard to support expert evidence impacted badly on that party.

[43] *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579; (1993) 125 L Ed 2d 469, in which case the previous reliance by United States courts upon scientific community acceptance for determining appropriate standards for the admission of scientific knowledge claims was replaced by a series of considerations primarily concerned with assessing the "internal" practices of science. See Odgers, ST and Richardson, JT, "Keeping Bad Science Out of the Courtroom: Changes in Australian Expert Evidence Law" (1995) 18 UNSWLJ 108.

[44] The link between medical and environmental evidence was made in Johnston, n 20.

[45] Johnston, n 20 at 129.

[46] Birkeland-Corro J, "Redefining the Environmental Problem" (1988) 5 EPLJ 109 at 112.

> The use of models is logical in a world with an incomplete air quality monitoring system and positive costs to data collection and analysis ... the result is that it is the model that governs how emissions control measures are evaluated, not their actual results ... As developing the data to design the model is expensive and the test procedures do not represent all driving conditions, models will inevitably inaccurately predict actual emissions.[47]

EIA relies on many subjective inputs:

> If, for example, the matter ... concerns the approval of an application for the establishment of a land-fill site, the evidence must include a detailed hydro geological site assessment. The site specific portion of the assessment will be based upon a plethora of information derived, inter alia, from drilling logs, soil analysis, and contour mapping etc most of which will depend upon the subjective interpretation on the part of the individual presenting the information.[48]

The best that environmental science can achieve in predictive certainty is "to use the best possible monitoring program to detect negative changes in the environment and to apply conventional statistical tests using a 95 per cent confidence level".[49]

In view of this, and given the admission by some scientists that, "using statistics is 'at best more objective than not using them'",[50] some in the scientific community argue that, "the limitations of scientific knowledge in identifying and addressing environmental problems should be clearly emphasized and acknowledged".[51]

ADEQUACY OF INFORMATION

Another future direction could be the integration of "adequacy of information" law in the prosecution of s 52 environmental cases. Although this body of law arises out of judicial review of EIA processes, which is permitted to address only the procedural correctness of the decision-maker and not the merits of the decision, it establishes some fundamental standards which may be used by the courts to inform decision-making. Concepts such as "likelihood" of harm and "significant impact" are central to the vocabulary of the EIA.[52] The risks referred to in an EIS are described essentially in those terms. Those who produce EISs should be fully aware of their duty not to provide misleading information to decision-makers, in some cases having to sign a declaration to that effect.[53]

SOME INTERPRETIVE AIDS

Frustration has been expressed about the way in which minority judgments – such as, presumably, that of McHugh J in *Nelson* – create uncertainty in High Court decisions.[54] How might the High Court regard attempts to set aside or distinguish Nelson? With all but one of the minority judges in *Nelson* having left the High Court and McHugh J himself soon retiring, how might a future High Court regard arguments about what is effectively a major reversal of the current interpretation of s 52? The answer is likely to be along the lines that, "[t]he orthodox approach to legal precedent requires a search for the binding rule in a case, not a selection from a smorgasbord of dicta".[55] In other words, a number of minority High Court judgments do not make a rule.

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[47] Morris, AP, Yandle, B and Dorchek A, "EPA's Regulation of Heavy-Duty Diesel Engines: Part D EPA's Reliance on Modelling" (2004) 56(2) Admin L Rev 403 at 415-416.

[48] Jeffery MI, "The Appropriateness of Dealing with Scientific Evidence in the Adversarial Arena" (1986) 3 EPLJ 313 at 314.

[49] Harding R, "Toxics, Industry and Precaution: What Role for Science?" in Harding R and Fisher E (eds), *Perspectives on the Precautionary Principle* (Federation Press, 1999) p 212.

[50] Jeffery, n 48 at 213.

[51] Jeffery, n 48 at 215.

[52] The status of the law on this subject is well explained in Preston B, "Adequacy of EISs in NSW" (1986) 3 EPLJ 194; Preston B, "The EIS Threshold Test: When is an Activity Likely to Significantly Affect the Environment" (1990) 7 EPLJ 147; Bates, n 9, Ch 12.

[53] Clause 71(f)(iii) of the *Environmental, Planning and Assessment Regulation (2000)* applies to Pt IV applications, and Cl 229(f)(iii) to Pt V.

[54] Gleeson AC, The Hon M, "The High Court of Australia: Challenges for its New Century" (2004) 7(1) *Judicial Review* 1 at 7

[55] Gleeson, n 54 at 6.

However, the Federal Court might be persuaded to disturb *Nelson* if a circumstance presented itself that begged distinguishing that case: "[n]o case will afford a guide to any other case, since it must essentially be a question of fact whether a particular formulation of words expresses merely an opinion or a statement of fact".[56]

In the future, the TPA – both consumer protection and competition policy aspects of it – may become the battleground for increasing number of cases where environmental concerns intersect with consumer issues, although it is pragmatic to observe that "while sustainability concerns have indeed penetrated the economic and political landscape, environment continues to be the junior partner in the environment-economy relationship".[57]

If a breach of s 52 is found, what remedies are available under the TPA? In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management* [2000] HCA 11, "Section 52 is an exercise by the Parliament of its powers to create new norms of conduct and require their observance by specified sections of the community".

In *Tobacco Institute*, the Full Court of the Federal Court analysed the operation of s 52 as follows:

> Section 52 does not purport to create liability, nor does it vest in any party any cause of action in the ordinary sense of that term; rather, s 52 establishes a norm of conduct, and failure, by the corporations and individuals to whom it is addressed in its various operations, to observe that norm has consequences provided for elsewhere in the Act.

In practice, if consent had already been granted by the appropriate consent authority, would the Federal Court impose corrective orders? It is unprecedented. The TPA is more than a statement of inter-party rights, but a regulatory regime whose injunctive power is granted to "restrain conduct which may infringe upon the public interest".[58] Preventive orders would be a stronger likelihood than corrective orders, but necessarily need to be undertaken before the project progresses so far that the interests of commercial certainty are not offended too much.

It is fair to conclude that "[g]iven the wide variety of contexts in which persons deal with public bodies, it is unlikely that any general rule will emerge as to whether conduct of this sort is in trade or commerce".[59]

POISED FOR JUDICIAL CONSIDERATION IN THE FUTURE

We are left to consider how the discrete bodies of law apply to EIS, and to each other. The High Court does not interfere with the adequacy of environmental information for government decision-making unless there is evidence of bad faith, and in the absence of an environmental management plan (*Bridgetown-Greenbushes Friends of the Forest case*[60]). Numerous cases of EISs come to mind which might fail this test, notably a series of motorway EISs in New South Wales and Victoria[61] where there is abundant evidence that the government authorities did not act in good faith (remembering, of course, that the TPA will only apply to corporatised agencies).

However, bad faith would be difficult to prove in respect of most EISs, where the misleading content is not so much a blatant lie but a finely-tuned assessment of risks based on methodologies

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[56] *Tobacco Institute (Aust) v AFC* (1988) 19 FCR 469; 84 ALR 337, per Hill J.

[57] Hollander R and Curran G, "The Greening of the Grey: National Competition Policy and the Environment" (2001) 60(3) AJPA 42 at 53.

[58] *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 268; 110 ALR 47 at 48 per French J.

[59] Lockhart, n 17, p 53.

[60] The High Court might have been less comforted if it had been made clear that an EMP is not the same as an externally audited Environmental Management System with transparency of notification of breaches, which is a very different thing. Nevertheless it was a unanimous decision.

[61] *Mees v Roads Corp* (2003) 128 FCR 418; [2003] FCA 306, where the government authority withheld the true extent of the proposed motorway works; the M2 Motorway EIS (there were several versions) where serious allegations of fabricated evidence were made strongly suggestive that the RTA did not act in good faith and continuing concerns that the RTA is being disingenuous in that it has predetermined to build certain roads no matter what the EIS reveals about environmental risks, verging on misfeasance and a wrongful exercise of power. See Goldberg J, "The F2 Castlereagh Expressway affair" (1993) 11(3) *Urban Policy and Research* 132.

none but the well-versed can hope to challenge. Admittedly, lack of access to information about behind-the-scenes tactical discussions held by proponents is a barrier in proving bad faith.

In this regard, the law of expert evidence is becoming more relevant, as has been suggested above. In every way other than the "in trade or commerce" definition, there are portents of hope that s 52 could apply to EISs. Hopefully these developments in the law will be of assistance to future challenges of the misleading nature of EISs under the TPA. The advantage is that, unlike judicial review of decisions under the EP&A Act (NSW), action under s 52 is not confined to procedural matters, but can materially examine the very substance of claims made in the EIS.

