

Submission
No 151

INQUIRY INTO PERFORMANCE OF THE NSW ENVIRONMENT PROTECTION AUTHORITY

Organisation: Charlton Excavations & Demolition Pty Ltd
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Partially Confidential

NSW Legislative Council
General Purpose Standing Committee No. 5

**Inquiry into the Performance of the
NSW Environment Protection Authority**

SUBMISSION

by

CHARLTON EXCAVATIONS & DEMOLITION PTY LTD



August 2014

The General Purpose Standing Committee No 5 is inquiring into the performance of the NSW Environment Protection Authority (EPA), and in particular attempting to measure the EPA's recent performance against its objectives pursuant to section 6 of the *Protection of the Environment Administration Act 1991*.

Since 2013, Charlton Excavations & Demolition Pty Ltd (Charlton) has been dealing with the EPA as it investigates the dumping of building material at a recycling site in Sydney. This dealing has been a source of considerable frustration to Charlton, as the investigation has dragged on for more than 16 months.

The chief contention of this submission, however, is that EPA's conduct has placed the business viability of Charlton at risk, in that it has refused to clarify the scope of its investigation, a decision which has placed the very survival of Charlton at risk.

Background to this matter

Some background to Charlton's dealings with the EPA needs to be set out.

In 2012 Health Infrastructure NSW (HI) contracted Lahey Constructions Pty Ltd (Lahey) to redevelop the Blacktown Hospital site. Charlton Excavations & Demolition Pty Ltd (Charlton) was subcontracted in 2012 to carry out demolition and excavation work on behalf of Lahey at the site.

Charlton, pursuant to this contract, disposed of excavated materials from the site partly through a further subcontract with Jeffco Pty Ltd (Jeffco).

It emerged in early 2013 that Jeffco was disposing of the excavated material at a recycling facility at Chester Hill, in circumstances where it was unclear as to whether the site was appropriately authorised under the *Environment Planning and Assessment Act* to receive the material. The site was clearly authorised to receive excavated earth; it is a matter of dispute as to whether it was authorised to receive excavated earth admixed with building rubble, which was the kind of material being delivered to it from the Blacktown site.

Jeffco concealed the dumping of the material at the Chester Hill site by .
The principal of Jeffco has now apparently left Australia.

In about April 2013 the EPA commenced an investigation into the dumping of the material. That investigation has not been completed.

Lahey has withheld \$2 million from Charlton for the excavated material on the basis that the ongoing EPA investigation into the dumping of spoil at Chester Hill may give rise to some civil liability for Lahey and HI as the head contractors. Charlton and Lahey are now in litigation on this matter.

The failure to pay Charlton this \$2 million for the excavation work has placed the firm under serious financial stress. The firm employs some 40 staff.

Charlton supports the investigation into Jeffco, but believes the inclusion of Charlton in this investigation is ill-conceived, and represents an exercise where the costs of the investigation to all concerned will exceed any possible benefits from a "successful" conclusion. We note in particular that:

- The site had previously received similar spoil lawfully;
- The environmental “damage” from the dumping of material at the Chester Hill site was minimal, if indeed there was any damage at all;
- The spoil that was (allegedly) unlawfully dumped there has since been recycled in full accordance with EPA requirements, and there is no legacy environmental issue;
- The spoil never contained any contamination, e.g. asbestos; and
- Charlton strenuously denies any collusion in Jeffco’s dumping of the spoil at the Chester Hill site,

In all the circumstances, the likelihood of a substantive prosecution of Charlton is remote, and if there is a prosecution, any penalty imposed is likely to be token.

Charlton’s concern with the EPA’s conduct

It is, of course, a matter for the EPA as to whether any prosecution is ultimately proceeded with against Charlton. Though ill-conceived, we accept that EPA is quite entitled to continue to investigate Jeffco and Charlton. However, it is clear that there is no investigation into HI or Lahey in relation to this dumping, and no prospect of a prosecution against either body, but the EPA refuses to confirm this, enabling Lahey to withhold its \$2million payment on the grounds that it “might” be prosecuted and required to pay damages.

There is no active investigation by EPA into either HI or Lahey. Nor has there ever been any suggestion of any involvement by either of them in any dockets. Moreover, Charlton’s legal advice is that, even if a prosecution of Charlton could be mounted, there is no prospect of a prosecution of either Lahey or Health Infrastructure. Senior Counsel’s opinion is emphatic:

In relation to the *EPA Act* there is no possibility of a successful prosecution of Lahey or H & I. Neither of these parties has authorised the Act – the disposal of the waste at the Chester Hill facility – which would constitute the offence under the *EPA Act*.

(Senior Counsel’s advice related to the *Environmental Planning and Assessment Act 1979*, whereas EPA administers and enforces the *Protection of the Environment Operations Act 1997*. We submit that the rationale for his advice is equally applicable under either Act.)

HI has already paid some \$1 million for excavation works completed at the hospital site, on the basis of the satisfactory completion of that work. However, Lahey has declined to pass on the payment to Charlton as required by the contract, on the basis that the ongoing EPA investigation may implicate them.

Charlton submits to the committee that it is bloody-minded of the EPA not to make clear that neither HI nor Lahey are being investigated. Such advice could in no way compromise its ongoing investigation into other parties, but its failure to do so provides Lahey with a disingenuous pretext to withhold a payment for work completed. Charlton is a small to medium-sized family company; the withholding of \$2million is a very heavy financial burden for it to carry, threatening its very survival. The company is fighting to secure other work, to secure cash flow, to tide it over the serious problem posed by a \$2million credit default.

On behalf of Charlton, our advisers wrote to the CEO of EPA asking merely that he confirm that EPA is not contemplating a prosecution of either HI or Lahey in relation to this matter. The CEO responded (12 May) by saying:

The EPA is not a party to any contractual dispute between Health Infrastructure, Lahey Constructions, Charlton or Jefco [sic], is not aware of any contractual arrangements nor does it have a role in resolving any such disputes.

With respect, however, Charlton was not asking the EPA to intervene in the dispute between these parties. It was merely asking that he confirm that certain of these parties were not under investigation, a statement to which effect could have the significant and incidental benefit in resolving the dispute. A possible consequence of failing to provide this statement, on the other hand, is that the dispute would go unresolved and Charlton, deprived of the \$2 million payment, may become insolvent, with the loss of 40 or so jobs.

Charlton invites the committee to seek reasons from the EPA as to its reasons for refusing to make this statement. The statement cannot possibly prejudice its other ongoing investigations (including into Charlton's conduct) but may assist in preventing the insolvency of a viable NSW employer.

Charlton is very happy to appear before the committee, to give live evidence, if this would be considered helpful.

Eli Imad
Manager
Charlton Excavations & Demolition Pty Ltd
August 2014

About Charlton Excavations & Demolition Pty Ltd

Charlton is a small to medium enterprise employed about 40 people in Sydney. It has undertaken many development-related projects in NSW, including on behalf of government instrumentalities.