



## Serving Notices under s 408 of the Environmental Protection Act (QLD)

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The recent case of *FKP Commercial Developments Pty Ltd* ("FKP") v *Albion Mill FCP Pty Ltd* ("Albion Mill") has highlighted that when disposing of "contaminated land" in Queensland that vendors should be clear and unequivocal when constructing and serving the relevant notice under s 408 of the *Environmental Protection Act 1994* (Qld) ("EPA").

The notice should strictly conform to the requirements of the *EPA*. This includes stating the particulars of the relevant land recorded on either the contaminated or environmental land register, copies of all registered site management plans and stating the particulars of any *EPA* notice or order to which the land is subject to.

Vendors should also be conscious of the manner in which the notice is actually served on the buyer; particularly where the notice is served by electronic communication.

Vendors should also be diligent in serving notices upon the actual correct buyer entity, particularly where subsidiary or related companies are concerned, for example where they are nominated under an option agreement.

The case highlights that when vendors are not clear in constructing and serving these notices, buyers may have grounds to terminate the Contract pursuant to s 408(3) of the *EPA*.

### ***FKP Commercial Developments Pty Ltd v Albion Mill FCP Pty Ltd***

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FKP entered into negotiations to sell 12 lots in Albion to Fridcorp Projects Pty Ltd in May 2015. During this time, the parties agreed to set up an electronic 'drop box' to enable Fridcorp to conduct due diligence to examine land contamination reports for 3 of the lots.

Files regarding the contaminated lots included searches of the environmental management register and the contaminated land register as well as site management plans for the lots. These documents were uploaded by FKP to a folder titled 'Land Contamination'. Mr Roche, Fridcorp's Development Director, was given access to the folder to conduct a due diligence.

In July, 2015, FKP and Albion Mill then entered into a 'Put and Call Option Deed' for the sale of the land.

Fridcorp's lawyers nominated the defendant as the buyer under the Contract. Mr Roche had recently been appointed as the sole director of the buyer. In December 2016, Albion Mill purported to exercise a right to rescind the Contract and claim reimbursement of monies paid to FKP on the grounds that FKP had failed to provide written notice of the contaminated land being sold under the Contract.

FKP rejected this and terminated the Contract for the defendant's repudiation.

At trial, Albion Mill unsuccessfully argued that FKP had failed to provide written notice pursuant to *EPA*.

The defendants were liable to the FKP's loss of bargain and liable to the costs of proceedings.

The case is set to be heard on appeal shortly.

### Lessons

The case illustrates that ambiguities in notices required to be given under s 408 of the *EPA* can give rise to a buyer attempting to rescind the sale Contract. The case highlights that when drafting relevant notices, vendors should carefully consider::

- the method of communication;
- the form of the notice; and
- the identity of who the notice is to be served on.

### Method of Communication

Electronic communication of the notice was of particular issue at trial. The *Electronic Transactions Act 2001 (Qld)* (*ETA*) requires that the recipient of the information must consent to the use of electronic communication.

Mr Roche's nomination of the 'drop-box' as the method of receiving files was held to be sufficient to imply consent to the notice being served electronically by the 'drop-box' rather than a more traditional method of non-electronic or electronic service.

While Courts have implied consent where the method of communication is functionally equivalent to that of a letter or other notice (such as email), vendors who are in doubt as to how to validly serve a notice by electronic communication, should do so either by letter or an already established form of electronic communication between the parties or alternatively by delivery of a letter or facsimile attaching the notice.

### Form of Notice

Vendors should be cautious as to the form in which a written notice is served.

The *EPA* does not specify the form in which a notice must take. While it was held that the 'Land Contamination' folder containing the documents, coupled with Mr Roche's awareness of the documents when entering into the Contract, constituted a 'served' written notice, the Court's conclusions in this instance may be limited to these particular set of facts.

To avoid ambiguity and a future challenge, vendors should specify that notice is being served pursuant to s 408 of the *EPA* and attach to the notice the relevant contaminated land searches and any site management plans. It is recommend that notices should also be signed

by the Buyer before the Buyer signs the Contract as an acknowledgement of receipt.

### Recipient of the Notice

The case also emphasises the importance of serving notices on the correct buyer entity.

The *EPA* requires that notice to be served upon the buyer of the land.

While the Court held that the defendant was given notice in accordance with the *EPA* this was on the basis that Mr Roche was party to negotiations while he was representative of Fridcorp. Mr Roche was aware of the contamination notice during his time as a representative of Fridcorp and his later appointment as sole director of the defendant company (a related company of Fridcorp) presented grounds for the Court to hold that his personal knowledge was then knowledge of the defendant company who was the buyer.

Notice was therefore served on the defendant company in accordance with the *EPA*, despite that entity not being the nominated 'buyer' at the time that the notice was communicated.

Vendors should be diligent in ensuring that a notice is served on the buyer, particularly where related companies and subsidiaries are present.

For queries regarding EPA notices and what it means for vendors, please contact [Paul O'Dea](#) in our [Property & Projects team](#).

#### For more information, please contact:



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