SEMINAR ON ETHICS IN ENVIRONMENTAL PRACTICE – CONFLICTS, CHALLENGES AND CREDIBILITY on THURSDAY 6 JULY 2006 for the ENVIRONMENT INSTITUTE OF AUSTRALIA AND NEW ZEALAND SOUTH EAST QUEENSLAND DIVISION

RESPONSIBILITIES IN ENVIRONMENTAL ETHICS

by

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INTRODUCTION

1. This paper looks at environmental ethics from two perspectives.
2. The first part examines the Environment Institute of Australia and New Zealand (EIANZ) Code of Ethics and Professional Conduct and related ethics considerations.
3. The second aspect of the paper looks at the role and responsibilities of being an expert witness, especially in the Planning and Environment Court.
4. As an environmental professional you need to be consistent in your opinions. If your opinion changes because of better information or research you should explain that in what you write on the topic.
5. If you are engaged to write a report supporting a project you are best advised to treat your reporting responsibilities as if the report will end up being tested in a Court rather than writing a report that advocates the client's position. You should express your honestly held opinions arrived at independently of your client's wants or desires.

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If the project does end up in a Court you will have already discharged your overriding duty to the Court (discussed under being an expert witness).

6. You are not an advocate for the client.
7. There is a general acceptance of the notion that expert opinions can genuinely and honestly differ and it is the duty of each expert to explain how the opinion was reached and on what facts and assumptions. Qualifications to opinions should also be stated.
8. With increased transparency and accountability and with greater public access to environmental reports you will need to make sure that you explain yourself clearly and express any limitations relating to the scope of your investigations and your reporting. It has been suggested that reports should be *written in a publicly comprehensible form*.[2]
9. To place general considerations of ethics into an environmental practice context, it has been said that:[3]

> *Society needs the diversity of its individuals and groups, and it values or trusts some individuals and groups more than others. We allow them a higher degree of autonomy and rewards that show the extent of their value or our degree of trust (although we don't always speak kindly of them as a collective and we do take delight in identifying deviant individuals so we can ridicule the group). These are the professions – the traditional professions like lawyers, accountants and so on. They're no longer a small, select group with long historical traditions of practice, and now encompass a greater variety of occupations with new perspectives and different challenges.*
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> *A profession is not static, and it should be expected that they develop and evolve and that new professions are established over time. Several different professions may work in a particular field of work. It might be convenient to describe the people in this collective as a profession, such as "environmental professionals" which, on the information I have is quite a diverse profession of scientists, planners, engineers, educators, architects, lawyers, foresters, geologists, nature-based tourism operators, and others. It is easier to see how separately the various occupational groups have the marks of a profession, but more difficult to see those marks in the collective occupational group of "environmental professional". They have an orientation and creative expertise to provide a common good (for example, environmental protection) but the marks of "a self-conscious community", and "institutional status … accorded legal recognition and protection" are perhaps less apparent or not yet present.*
>
> *….*
>
> *For a variety of reasons, industry associations want their members to be competent, ethical and accountable. Association members want to be competent, ethical and accountable.*

[2] Dr Brian Jenkins, Chief Executive, Environment Canterbury (EIANZ Professional Ethics Seminar 18 November 2005)

[3] Keynote Address presented at the EIANZ Professional Indemnity and Certification in Environmental Practice Forum, Melbourne, 21 October 2004 "Regulation, Professional Standards and the Insurance Environment" Bernie Marden, Secretary, Professional Standards Council

Members want the other members to be competent, ethical and accountable. Associations need to use strategies to control the risks that affect the competency, ethical behaviour and accountability of the professions.

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For example, inadequate knowledge and experience are a risk to competency. Associations specify membership requirements such as minimum tertiary qualifications and practice experience, and have continuing professional development programs to help treat that risk. They use codes of ethical conduct, CPD programs, and complaints and discipline systems to manage the risks of an ethical profession. Associations implement compliance audit programs, complaints and discipline systems, whistleblowing procedures, and require members to have adequate professional indemnity insurance as strategies for accountability. And so on. These are risk management strategies.

EIANZ CODE OF ETHICS AND PROFESSIONAL CONDUCT

10. The EIANZ Code of Ethics and Professional Conduct (EIANZ Code) is accessible on the website under "Corporate and Statutory Information."[4]
11. Membership of the EIANZ *is contingent upon the member conforming with the letter and spirit of the Code of Ethics and Professional Conduct*. These ethics apply to EIANZ members who are employed by government or business corporations as well as practitioners who work in consulting firms/companies or who operate as sole practitioners.
12. The EIANZ Code was adopted by the Council of the Institute in April 1989 and ratified by members of the Institute in a general meeting on 10 October 1989. In the time context the Code was adopted after the publication of *Our Common Future* [5] where we were all challenged to consider our ethical responsibilities towards the environment.
13. The EIANZ Code has eight standards or principles as follows:

    (i) *The member shall carry out his or her professional activities, as far as possible, in accordance with emerging principles of sustainable development and the highest standards of environmental protection.*

    (ii) *The member shall at all times place the integrity of the natural environment and the health, safety and welfare of the human community above any commitment to sectional or private interests.*

[4] **www.eianz.org**
[5] Brundtland Report from the United Nations World Commission on Environment and Development (1987).

(iii) *The member shall be personally accountable for the validity of all data collected, analyses performed, or plans developed by the member, and for the scrutiny of all data collected, analyses performed or plans developed under the member's direction.*

(iv) *The member shall actively discourage misrepresentation or misuse of work the member has performed or that which was performed under the member's direction.*

(v) *The member shall conduct professional activities, as far appropriate, in an interdisciplinary manner and recognise the need to collaborate with suitably qualified persons in subject areas where the member is less experienced.*

(vi) *The member shall ensure the incorporation of environmental protection considerations from the earliest stages of project design or policy development.*

(vii) *The member shall not conduct professional activities in a manner involving dishonesty, fraud, deceit, misrepresentation or bias.*

(viii) *The member shall not advertise or present the member's services in a manner that may bring discredit to the profession.*

ECOLOGICALLY SUSTAINABLE DEVELOPMENT

14. The 1st and 2nd principles amount to a duty to the environment acting on the principles of sustainable development.
15. For the purposes of this paper, an overview of ecologically sustainable development has been sourced from the Australian Government Department of Environment and Heritage.
16. In Australia, it is necessary to refer to Ecologically Sustainable Development (ESD). The concept of ecologically sustainability is incorporated into the **Integrated Planning Act 1997**. Internationally, sustainable development is the term used by the United Nations. These comments about ESD are particularly relevant to the first, second, fifth and sixth principles of the EIANZ Code.

WHAT IS ECOLOGICALLY SUSTAINABLE DEVELOPMENT? [6]

17. Over the last three decades, sustainable development has been defined in literally hundreds of different ways. One of the most popular definitions, from the Brundtland Report *Our Common Future* (1987) states:

[6] **http://www.deh.gov.au/esd/index.html** at 4.02pm, Tuesday 27/06/06.

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'

18. Australia's National Strategy for Ecologically Sustainable Development (1992) (NSESD) defines ecologically sustainable development (ESD) as:

using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased

19. There is growing recognition that we have to look beyond economic progress to achieve sustainable societies. Sustainable Development must be ecologically sustainable. Economic and social progress depends on base ecosystem services (for example oxygen production and carbon dioxide absorption by plants) and a healthy environment. Development also implies an improvement in the quality of life through education, justice, community participation, and recreation.
20. Three principles that are necessary to understanding sustainable development are intergenerational equity, the precautionary approach and biodiversity conservation. Together these approaches aim to prevent and reverse adverse impacts of economic and social activities on the ecosystem, while continuing to allow the sustainable, equitable development of societies.
21. It is necessary to consider in an integrated way, the wider economic, social and environmental implications of decisions and actions for Australia, the international community and the biosphere and to take a long term rather than short term view when taking those decisions and actions.

A BRIEF HISTORY OF SUSTAINABLE DEVELOPMENT [7]

22. Sustainable development has been practiced by many cultures, but the industrialised world first became interested in the concept in the 1960s. Many credit Rachel Carson and her book *The Silent Spring* (1962, Penguin Books) as the catalyst for worldwide acknowledgment of environmental problems. In the following years a number of publications including Paul Erlich's *Population Bomb* (1968, Buccaneer Books) and the Club of Rome's *Limits to Growth* (1972, Pan Books) drew attention to global development issues.

[7] **http://www.deh.gov.au/esd/index.html** at 4.02pm, Tuesday 27/06/06.

23. International forums such as the *UN Conference on the Human Environment* 1972, and *Habitat* 1976 further debated the need for a changed approach to development. In 1987 the Bruntland Report *Our Common Future* popularised and defined the term *sustainable development*.
24. In 1992, the United Nations Conference on Environment and Development (commonly referred to as the Earth Summit) in Rio de Janeiro produced Agenda 21, a major publication that sets out a blueprint for sustainable activity across all areas of human endeavour
25. In the same year Australia developed our National Strategy for Ecologically Sustainable Development. Much of the Department of the Environment and Heritage's ESD work to date has focused on implementing the recommendations of these two major strategies.
26. The United Nations World Summit on Sustainable Development was held in Johannesburg in 2002 (Rio + 10).
27. Subject to the enactment of domestic legislation within Australia international declarations, protocols and conventions become relevant when giving advice on domestic environmental issues.
28. In **section 1.3.3** of the **Integrated Planning Act 1997** *ecological sustainability* is defined as follows:

    Ecological Sustainability *is a balance that integrates –*

    (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
    (b) economic development; and
    (c) maintenance of the cultural, economic, physical and social wellbeing of people and communities.

29. There is an explanation of the terms used in definition of ecological sustainability in **section 1.3.6**. Advancing the purposes of the **Integrated Planning Act 1997** is set out in **section 1.2.2** and includes reference to the precautionary principle. When giving advice with respect to projects that involve the **Integrated Planning Act 1997** the purpose of the Act, advancing those purposes and ecological sustainability need to be taken into account.
30. The object of the **Environmental Protection Act 1994** in **section 3** is as follows:

*The object of this Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (**ecologically sustainable development**).*

31. The functions and the powers under this Act are to be performed and exercised *in the way that best achieves the object of this Act* (**section 5**) and community involvement is part of the administration of the Act (**section 6**).

PERSONAL ACCOUNTABILITY AND VALIDATION

32. The 3rd principle in the EIANZ Code is designed to make sure that there are no shortcuts taken. All the principles need to be read together.
33. Even if you delegate work to someone else in the office, or to a consultant in another firm/company, it is your personal responsibility to make sure that the data has been validated. If you are collecting the data, then you should validate it yourself, before passing it to other people in your office, or another consultant as part of the multidisciplinary team.
34. A peer review process is considered advisable especially for major or innovative projects.
35. Report writing should include a description of all methodologies used (even by sub-consultants, where you are writing the principal report) and show how validation has been achieved. You need to demonstrate to everyone who reads your report, how you have complied with this ethical principle in the context of principles one, two, five and six.

CREDIBILITY AND HONESTY

36. Principles four, seven and eight of the EIANZ Code are interrelated. They are to ensure that an honest and objective approach is taken. They also need to be read with each of the other principles in the EIANZ Code.
37. Each of the operative words in the 4th and 7th principles have specific legal meanings.
38. **Dishonesty** is *discreditable; at variance with straightforward or honest dealing. An act is dishonest if it is done in the knowledge that it will produce adverse consequences for others*.[8]

[8] From the Encyclopaedic Australian Legal Dictionary (accessed online via lexis nexis)

39. **Fraud** is *an intentional dishonest act or omission done with the purpose of deceiving*[9] and *in general, fraud is obtaining of a material advantage by unfair or wrongful means; it involves moral obliquity. Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false*.[10]
40. **Deceit** is *making a wilfully false statement by words of conduct with intent that another party shall act upon it, with the result that it is so acted upon and harm results*[11] and k*nowingly or recklessly making a false statement, with the intention that another will rely on it to his or her detriment. Deception includes misleading by deliberate misrepresentation; intentionally inducing in another a state of mind which the offender knows does not accord with fact. Deception includes deception (whether deliberate or reckless) by words or conduct as to fact or law, including deception as to the present intentions of any person*[12]
41. **Misrepresentation** is *a statement or conduct, which conveys a false or wrong impression. A false or fraudulent misrepresentation is one made with knowledge of its falsehood, and intended to deceive. A negligent misrepresentation is one made with no reasonable grounds for believing it to be true. An innocent misrepresentation is one made with reasonable grounds for believing it to be true, as where an honest mistake is made.*[13] A more expansive description of misrepresentation is *a statement or conduct that is false or misleading. Misrepresentations may be fraudulent, negligent, or innocent. A fraudulent misrepresentation is a false statement of fact, made by a person who does not believe the truth of the statement or is recklessly indifferent to whether it is true, to another with the intention that the other person will rely on it. Moral culpability or turpitude is vital in fraudulent misrepresentation; mere carelessness is not enough. A negligent misrepresentation is a statement of fact, advice, or opinion made in a business context which is inaccurate or misleading. People whose business or profession it is to provide information or advice of a kind requiring a degree of skill or knowledge, owe a special duty of care to persons whom they know will rely on that information or advice.*[14]

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[9] Ibid
[10] Osborn's Concise Law Dictionary, Seventh Edition
[11] ibid
[12] Encyclopaedic Australian Legal Dictionary (accessed online via lexis nexis
[13] Osborn's Concise Law Dictionary, Seventh Edition
[14] Encyclopaedic Australian Legal Dictionary (accessed online via lexis nexis)

42. **Bias** is *partiality; a tendency to be less than disinterested in a given situation. At administrative law, a pre-existing favourable or unfavourable attitude to an issue when impartial consideration of the merits of the case is required. In the courts and judicial system, bias is interpreted as prejudice; partiality; a lack of disinterestedness*.[15]
43. Credibility is a very important aspect for every professional. It is often hard to earn and needs to be carefully guarded.
44. Trust is related to credibility. You need to develop trust not only with your own clients but with those who have the job to assess or comment on your report or recommendations.
45. Objectivity is an important element of credibility and trust. It should not matter who employs your services, your opinion on an established set of facts should be the same.
46. You have a duty of care not only to your client but also to others where it is reasonable for them to rely upon your report or recommendations. If you are in breach of that duty of care you are negligent but your reliability and reputation as an expert will be affected by the breach of that duty. In layperson's terms it is important for you to act reasonably, skillfully and to do your best within your field of expertise and not extend out beyond the scope of your special field of knowledge.
47. You should keep in mind what is good science. Professor Ian Spellerberg[16] says it means:

    - *Searching for the truth*
    - *Hypothesis testing*
    - *Clear aims, objectives, methods and analysis*
    - *Repeatable*
    - *Objective*
    - *Quantifiable*
    - *Substantiate/verify/defensible*

[15] Encyclopaedic Australian Legal Dictionary (accessed online via lexis nexis)
[16] Good Science: What does it look like? Professor Ian Spellerberg, Isaac Centre for Nature Conservation, Lincoln University, Christchurch, New Zealand (EIANZ Professional Ethics Seminar 18 November 2005)

48. Ethical standards are developed from a series of basic principles to which is added those considerations relevant to best environmental practice and good environmental outcomes.

CONFLICTS OF INTEREST

49. We are dealing with public interest law. The potential for conflict between the public duty and private interests needs to be monitored.
50. If a conflict arises then there should be full and complete disclosure and the conflict managed in accordance with a code of conduct.
51. Lessons can be learnt from principles developed for the Australian Public Service Commission:[17]

Bowen Report principles

The Report of the Committee of Inquiry: Public Duty and Private Interest (1979), known as the Bowen Report, sets out the principles that underpin public servants' obligations to disclose and manage conflicts. The report recommended a code of conduct, which was later endorsed by the Government. The code is set out below:

1. *An office-holder should perform the duties of his office impartially, uninfluenced by fear or favour.*
2. *An office-holder should be frank and honest in official dealings with colleagues.*
3. *An office-holder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty.*
4. *When an office-holder possesses, directly or indirectly, an interest which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures. Should circumstances change after an initial disclosure has been made, so that new or additional facts become material, the office-holder should disclose the further information.*
5. *When the interests of members of his immediate family are involved, the office-holder should disclose those interests, to the extent that they are known to him.*
6. *When an office-holder (other than a Member of Parliament) possesses an interest which conflicts or might reasonably be thought to conflict with the duties of his office and such interest is not prescribed as a qualification for that office, he should forthwith divest himself of that interest, secure his removal from the duties in question, or obtain the authorisation of his superior or colleagues to continue to discharge the duties.*
7. *An officeholder should not use information obtained in the course of official duties to gain directly or indirectly a pecuniary advantage for himself or for any other person.*
8. *An office-holder should not:*

[17] APS Values and Code of Conduct in practice from section 4 (personal behaviour) in chapter 9 (conflict of interest) www.apsc.gov.au/values/conductguidleines11.htm at 6 pm on 4 July 2006.

a. *solicit or accept from any person any remuneration or benefit for the discharge of the duties of his office over and above the official remuneration;*
b. *solicit or accept any benefit, advantage or promise of future advantage, whether for himself, his immediate family or any business concern or trust with which he is associated from persons who are in, or seek to be in, any contractual or special relationship with government;*
c. *except as may be permitted under the rules applicable to his office, accept any gift, hospitality or concessional travel offered in connection with the discharge of the duties of his office.*

9. *An office-holder should be scrupulous in his use of public property and services, and should not permit their misuse by other persons.*
10. *An office-holder should not allow the pursuit of his private interest to interfere with the proper discharge of his public duties.*

52. Where two or more parties are in dispute over a particular project or issue, you can only be engaged by one party unless there is a joint engagement and joint instructions. If you are engaged by a second and conflicting party, then a conflict of interest arises, if those parties are in dispute and you then cannot act for any of the parties to that dispute. Your screening processes should be carried out carefully so as to retain your original client, and not be compromised by a conflict of interest.
53. You may be engaged before there is any dispute but your approach should be the same. If you give objective and impartial advice you will not only be consistent, but if a dispute arises, you will have explained your research, factual findings and opinions. Other parties who come into dispute with your client may well accept your opinion if they have respect for you and can see how you arrived at your conclusions. They can assess if your opinions are soundly based.
54. Conflicts of interest may arise where you have worked or are working on a related project. In the course of your professional career you will come across confidential information or come to understand how a particular client works. You need to respect the confidentiality. If a competing client comes along you need to be careful not to disclose what you have confidentially learnt from other projects. In some circumstances you may have to decline the work from the competitor. On the other hand, if the work for your 1st client is publicly available (eg on a Council development application file) then the confidentiality no longer applies. In making these comments it is important to say that your expertise will improve with every engagement that you complete and you want to be in a position to be able to refer to past work to improve your reputation and to gain more work. This does not allow you to use confidential information. It remains confidential unless your client has authorised the information to become public.

55. If you have a personal interest in the subject matter of the dispute, you have a conflict of interest, so you should not allow yourself to be engaged to give expert advice with respect to that subject matter. For instance, if you are the part owner of the property proposed to be developed, this is a personal interest which will conflict with your role of giving expert professional advice. The conflict extends to being a shareholder of a company that owns the property. If you are a small shareholder in a large public company, and have nothing to do with the management of that company, apart from your shareholder rights, the conflict arises and you need to disclose the conflict. The parties may agree to your engagement notwithstanding the conflict, if they are satisfied that the personal interest will not affect the objective advice that you will give. If there is any doubt about it, then you should not act. A careful and cautious approach is necessary and it helps build your reputation as a credible, trustworthy and objectively independent environmental professional.
56. Another example of a personal conflict of interest is where a close friend or relative has an involvement in the project and you are concerned that the friendship or the relationship may (not will) have an impact on your impartiality as an expert. If there is a risk that you will put your friendship first, then you should decline to be engaged to give professional advice.
57. The notion of a conflict is where your personal interest is likely to, or is likely to be seen to, affect your actual or perceived impartiality as an expert.
58. If all the parties know of the conflict of interest, they can allow you to be involved as an expert if they are satisfied that you will remain impartial. In that case you will be able to act for party who first approached you. If you have been engaged before a conflict arises, and the party who engages you knows of the personal conflict of interest that could be compromised if, at a later stage, there is a dispute which involves another party who is not satisfied that you will remain impartial. You need to be aware of perceived conflicts of interest.

ACTING AS AN EXPERT WITNESS

59. The Planning and Environment Court's approach to expert evidence has changed since 1985 in two significant steps, as evidenced by the Practice Directions of 2000 and 2006. Before 1985 we did not exchange expert reports before the hearing and some expert evidence was given orally without the assistance of a report. The Local

Government Court (as it was then called) in 1985 introduced the concept of the exchange of expert reports before the hearing commenced. The 2000 and 2006 reforms introduced the concept of experts meeting separately from the lawyers and the parties to see where they can agree and to record their disagreements. In some cases one joint report of the experts in the same field is produced or the written agreement is sufficient to describe what development conditions are recommended to be imposed.

60. Historically, attitudes towards expert witnesses have not always been complementary. In 1873, for instance, the comments of Sir George Jessel MR in the case of **Lord Abinger v Ashton**[18] typified the marked degree of distrust of the quality and, especially, the reliability of expert testimony:

> *In matters of opinion, I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows that he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. … An expert is not like an ordinary witness … he is employed and payed in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biassed in favour of the person employing him…*

61. Sir George Jessel, also identified the well known process of *expert shopping* – selecting an expert according to how the expert's opinion is known to incline.[19] This attitude is expressed in the idea of a *hired gun*, which was inherent in the adversary system particularly up to the mid 1980s.[20] The Planning and Environment Court (and many other Courts) have modified the adversarial system so that experts have a better chance of having their say independently of the parties who engaged them.

62. In the adversarial system, an expert's oral performance in the witness box can be crucial. An expert, when testifying, is putting his or her reputation on the line in a

[18] (1873) 17 L.R.Eq 358, 374 and quoted more fully by I Freckelton at p 128 (n19)
[19] I Freckelton, "The Trial of the Expert: a study of expert evidence and forensic experts" Oxford University Press, 1987, p129.
[20] Judge Alan Wilson SC and Judge M Rackemann, District Court of Queensland "The Planning and Environment Court: It's in the way that you use it", 2004 QELA Conference and "Consultation, Case Management, Accessibility and Dispute Resolution in the Planning and Environment Court", 2005 QELA Conference and Judge Rackemann "The Planning and Environment Court – Judging under the IPA", QELA Conference 2006.

public forum. If an expert can be shown to be self-contradictory and unable to maintain a consistent standpoint, his or her professional reputation is tarnished.[21]

63. Cross Examiners will seek to discredit an expert witness, through methods such as impugning the practicality of the witness's qualifications, pointing out prior inconsistent statements and questioning theoretical rationales and choice of scientific methods. The unprepared expert will appear unprofessional and lacking in credibility.

64. For these reasons, it is important at all times to bear in mind the overriding duty to the Court when preparing expert reports. For even though a matter may not appear potentially litigious, pressure from clients to present a particular opinion and forsaking objectivity, will breach ethical standards of good faith and, in the Court context, breach the overriding duty to the Court.

65. The adversarial system has served the community well. It assists the decision taker to understand the competing points. It is also a valuable exercise in arguing points of law. In all Courts where experts appear there have been sensible modifications to the adversarial model. The Australian Institute of Judicial Administration Incorporated has been conducting research into the use of expert evidence.[22]

66. In a professional negligence context, involving a compulsory acquisition of land, Justice Callinan in **Boland v Yates Property Corporation Pty Limited** [23] made comments relevant to Lawyers and Expert Witnesses that have general application.

> *It is now settled, and for good reason, that a dispossessed landowner should be compensated for the value of his or her land on the basis of its highest and best use. In current times, except in the case of non-controversial uses such as perhaps a single dwelling in a residential zone or a corner shop on a site zoned for that purpose, many uses, and most commercial ones require the prior approval of vigilant planning authorities, compliance with often stringent planning controls and the need to meet and refute objections by objectors, including commercial, competitive objectors in political, administrative and legal forums. These may not be the only hurdles that a developer has to leap. It is now a well established planning principle that a planning authority may take into account the likelihood that a particular development will cause blight to other existing developments [265] and the related consideration that before an approval may be granted an applicant for it demonstrate a need for the proposed development.*

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[21] I Freckelton, "The Trial of the Expert: a study of expert evidence and forensic experts" Oxford University Press, 1987, p136

[22] **Australian Judicial Perspectives on Expert Evidence: An Empirical Study** by Dr Ian Freckelton, Dr Prasuna Reddy and Mr Hugh Selby (Australian Institute of Judicial Administration) (1999).

[23] **[1999] HCA 64 (9 December 1999).**

Many other considerations may be relevant. A developer may also need to show for example that the development can be undertaken without intrusion upon, or nuisance to, or indeed in some cases even inconvenience to adjoining owners and others.

An intending prudent developer of a project such as the respondent here had in mind would inevitably require investigations, studies, plans and information of the kind to which I have referred and which would necessarily involve the services of professionals such as town planners, engineers and others, not only perhaps to obtain, or enhance the chances of obtaining, planning approval but also to place itself in a position to satisfy financiers if it has to borrow to complete the development, and prospective tenants or licensees that a tenancy or a licence in it would be an obligation worth incurring.

I mention these matters simply to show that there was nothing remarkable, or indeed, to use the word which I think has been variously used in these proceedings so far, "special" about what the respondent did before the resumption. What it did it would have had to have done to gain planning and building approvals, and to attract licensees. In short what was done was necessarily done to demonstrate that the highest and best use of the resumed land was its development as a market. If what the respondent did had not been done, then it would be unlikely that any purchaser would pay a price which included a component for the by now demonstrable, realisable, potential of the property for its highest and best use as a market. And a purchaser would have been in as good a position to take advantage of the site in its cleared state as the respondent. None of this is in disparagement of the respondent's efforts. But their site-specific nature meant that Yates would have no interest in withholding their fruits from a purchaser and every reason to provide them to "talk up" the price of the land.

This is in essence how Mr Simos QC and Mr Webster both said they regarded the situation and which Branson J held to be a reasonable view of it. It was also consistent with much of what Mahoney JA said in his dissenting judgment in the Court of Appeal[266]. Branson J was right in this regard and the Full Federal Court therefore fell into error in taking the view that what the respondent had done gave rise to any special value. In short, in my opinion the approach adopted to the case by the lawyers was the appropriate one and such as to offer the best prospects to the respondent. And if I should be wrong about this, the approach on any view was an available one, and such that no lawyer exercising a professional judgment could be regarded as negligent in adopting.

Relationship between the valuers and the lawyers and their respective roles

The approach of the Full Federal Court was coloured by a misapprehension as to the relationship between the experts called in this case and the lawyers. Most professional experts do encounter and have to deal from time to time with matters of law, or mixed facts and law. Engineers and architects may be called upon to construe building codes and building and engineering standards. But apart perhaps from town planners who almost daily will be called upon to construe long and complex planning instruments there would be few non-legal disciplines requiring knowledge and consideration of legal principles to the extent that a valuer must in his or her ordinary practice. As I observed in ***The Commonwealth v Western Australia*** *[267], the Privy Council in* ***Melwood Units Pty Ltd v Commissioner of Main Roads*** *[268] referred to valuation principles and principles of law as if they were interchangeable. Questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice.*

It should also be firmly kept in mind that valuation practice, like legal practice, cannot be an exact science. Both require the exercise of judgments and the forming of opinions, often on matters in respect of which certitude is impossible and uncertainty highly likely.

*In **Kelly v London Transport Executive** [269] Lord Denning MR said that solicitors and counsel must not "settle" the evidence of medical experts as they did in **Whitehouse v Jordan**. In the latter case Lord Wilberforce said [270]:*

"[E]xpert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."

*What the Master of the Rolls categorically said in Kelly, in my opinion, goes too far. But in any event the passage from **Whitehouse v Jordan** quoted does not support as far-reaching a proposition as that propounded by Lord Denning. For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt. I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and which particular method of valuation might be more likely to appeal to a tribunal or court, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions. However it is the valuer who has to give the evidence and who must make the final decision as to the form that his or her valuation will take. It will be the valuer and not the legal advisors who is under oath in the witness box and bound to state his or her opinions honestly and the facts accurately. The lawyers are not a valuer's or indeed any experts' keepers. The Full Federal Court failed to recognise the different roles of the valuers and the appellants in this case and treated the appellants as if they were almost exclusively or exclusively the final arbiters of the way in which the property should be valued. And although the Full Federal Court held that the appellant solicitors were not entitled in this case to shelter behind the barristers and to delegate responsibility to them, it failed to look carefully at the different relationships involved. In a functionally divided profession as in New South Wales, the barristers do not engage the valuers. Nor for that matter do the solicitors necessarily do so. Here the respondent was actively and closely involved in these matters. There were times when the reasons of the Full Court implied, indeed even assumed that the lawyers especially the barristers were personally responsible for the engagement of the valuers and the valuers' opinions. Moreover it is not as if Branson J made any findings that the appellants overbore the valuers and Yates or insisted that the valuers adopt methods of valuation that were impermissible or inferior to some other method.*

For these reasons also the appeals to this Court would have to succeed.

67. The survey of 244 Australian Judges by the Australian Institute of Judicial Administration (AIJA) looked at a wide range of judicial impressions across many jurisdictions. The factors which led Judges to accept expert evidence were:

- Clarity of explanation 28%
- Impartiality 26%
- Experience in the field 23%
- Familiarity with the facts 18%
- Experience as an expert witness 3%
- Qualifications 1.5%
- Appearance 0.5%

These statistics plus those relating to juries are set out and discussed by Justice Chesterman.[24] The AIJA survey was before the commencement of the Planning and Environment Court Practice Direction 1 of 2000 on 28 August 2000. With the **Guidelines for Experts** being followed greater assistance is being provided to the Planning and Environment Court. The **Guidelines for Experts** in 2000 are now included in **Rule 428** of the **Uniform Civil Procedure Rules 1999** and incorporated into Planning and Environment Court Practice Direction 1 of 2006 which commenced on 10 February 2006, and repeals Practice Direction 1 of 2000.

68. A review of the AJIA survey of Magistrates[25] has been carried out by Justice Kirby.[26] The survey suggests improvements in relation to expert evidence and its evaluation to include:

- *Improvements in the skills of advocates, including greater time in preparation for, and improved capacity in the presentation of, the evidence-in-chief of experts and in cross-examining them on their testimony;*
- *Education for the experts themselves, so that they will express their opinions in ways that avoid unintelligible technicalities, jargon or partisan rhetoric;*
- *Use of improved technologies of presentation of data for explaining and illustrating scientific and technological evidence; and*
- *Introduction of improved means of ensuring, so far as possible, the equality of arms in access to expertise that will ensure that the parties and the court will be able to render expert opinions, adduced in a trial, truly accountable to the law so that areas of expertise will be clarified and proffered expert opinion put under real scrutiny, and not simply accepted as gospel.*

69. Justice Chesterman said [27]:

The judge's decision is aided and informed by hearing the best that can be said for each side and the most telling criticism that can be put against each side.

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[24] **The Accountant as Expert Witness** delivered to the Institute of Chartered Accountants, Sydney, 12 March 2000.
[25] I Freckelton, P Reddy and H Selby (eds) **Australian Magistrates' Perspectives on Expert Evidence: A Comparative Study** (Australian Institute of Judicial Administration) (2001) *Magistrates' Report.*
[26] **Expert Evidence: Causation, Proof and Presentation**, 2002. www.hcourt.gov.au/speeches/kirbyj/kirbyj_expert.htm
[27] **The Accountant as Expert Witness** at page 14.

70. The use of experts in the Planning and Environment Court is not uncontrolled. Directions hearings occur in all proceedings. Disputed issues are identified and timetables set for the exchange of expert reports and conferences of witnesses.

71. The hired gun perception discussed by Justice G N Williams [28] is minimised in the Planning and Environment Court because of the Continuing Professional Development Programs of various professional associations and **Practice Direction 1 of 2006 (which repealed the PD 1 of 2000).**

72. The relevant sections of Practice Direction 1 of 2006 are:

Definitions

3. For this Practice Direction and, subject to express provision to the contrary, in any order made by the court the following terms have the following meanings:

(a) *…*
(b) *…*
(c) *a "meeting of experts" is a meeting of expert witnesses where:*
(i) the experts in each area of expertise meet, as directed by the Court, and attempt to reach agreement;
(ii) the parties and their legal representatives do not participate in the meeting ;
(iii) the parties, or their legal representatives, give the experts instructions to meet as directed by the Court, and may assist the experts, prior to the meeting, for example, by identifying the issues in dispute and providing relevant documents and information, but no person gives and no expert accepts instructions to adopt, or reject, any particular opinion;
(iv) the experts produce a joint report, identifying where they are in agreement, and where they disagree. The reasons for any disagreement are to be stated. The report is prepared by the experts at the meeting, or as soon as practicable thereafter, without reference to or instruction from the parties, their legal representatives or others. The joint report contains an acknowledgement from each expert, as required under paragraph 16 of this Practice Direction.
(vi) save for the joint report of the meeting evidence of anything done or said, or an admission made, at the meeting, is not admissible at a trial of the proceeding except with the agreement of all relevant parties

….

Experts

15. A party or the party's legal representatives must, upon first retaining an expert for the proceeding, give that expert written instructions that:
(i) a witness giving evidence (by report, or otherwise) in a proceeding as an expert has a duty to assist the Court and;
(ii) the duty overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses.

16. Each joint report or separate expert report must contain:
(i) an acknowledgement of having been instructed on an expert's duty in accordance with paragraph 15 and having understood and discharged that duty; and;

[28] **Expert Evidence: A Judge's Assessment.**

(ii) a statement verifying that no instructions were given or accepted to adopt, or reject, any particular opinion in preparing the report.

17. Where separate expert reports are prepared, they must include the information set out in r 428 of the Uniform Civil Procedure Rules, to the extent that information is not already contained in an earlier joint report.

73. **Rule 428** of the **UCPR** is as follows:[29]

428 Requirements for report

428(1) An expert's report must be addressed to the court and signed by the expert.

428(2) The report must include the following information—

428(2)(a) the expert's qualifications;

428(2)(b) all material facts, whether written or oral, on which the report is based;

428(2)(c) references to any literature or other material relied on by the expert to prepare the report;

428(2)(d) for any inspection, examination or experiment conducted, initiated, or relied on by the expert to prepare the report—

(i) a description of what was done; and

(ii) whether the inspection, examination or experiment was done by the expert or under the expert's supervision; and

(iii) the name and qualifications of any other person involved; and

(iv) the result;

428(2)(e) if there is a range of opinion on matters dealt with in the report, a summary of the range of opinion, and the reasons why the expert adopted a particular opinion;

428(2)(f) a summary of the conclusions reached by the expert;

428(2)(g) a statement about whether access to any readily ascertainable additional facts would assist the expert in reaching a more reliable conclusion.

428 (3) The expert must confirm, at the end of the report—

428(3)(a) the factual matters stated in the report are, as far as the

[29] **Uniform Civil Procedure Rules 1999** (Reprint 4C)

expert knows, true; and

428(3)(b) the expert has made all enquiries considered appropriate; and

428(3)(c) the opinions stated in the report are genuinely held by the expert; and

428(3)(d) the report contains reference to all matters the expert considers significant; and

428(3)(e) the expert understands the expert's duty to the court and has complied with the duty.

74. The Institution of Engineers, Australia in its Code of Ethics (2000)[30] deals with acting as an expert witness as follows:

An expert witness is in a privileged position in giving evidence in judicial or quasi-legal proceedings. This privileged position may allow the expert in a hearing to be present when other witnesses are giving evidence contrary to the normal exclusion and to advise counsel on examination of other expert witnesses. Additionally to giving evidence as to matters of fact, as a normal witness, an expert may give evidence by way of opinion based on factual or hypothetical circumstances. The role of the expert witness is generally to give a tribunal the benefit of the expert's special training, knowledge and experience to assist or guide the tribunal in respect of matters which the tribunal itself may not have adequate knowledge or experience. The duty of the expert witness is to the tribunal and the process and not to the party engaging the expert to give evidence before a tribunal. The expert witness should not be an advocate in the proceedings and advocacy rather than objective and honest presentation of evidence is likely to inconsistent with obligations under the Code of Ethics.

In compliance with general obligations under the Code of Ethics members acting as experts should:

a. prepare reports and make statements or give evidence before any tribunal in an objective and accurate manner. Any opinion expressed should be on the basis of adequate knowledge and technical competence in the relevant area but may be speculative based on experience and wide relevant knowledge provided such speculation and the basis are clearly disclosed;

b. reveal the existence of any interest, pecuniary or otherwise, that might actually affect or give the appearance of affecting their judgement in any matter about which they are making a statement or giving evidence;

c. ensure that all reports and opinions given to a client prior to the institution or continuance of any legal proceedings include all relevant matters of which they are aware, whether or not the reports and opinions are favourable to the position of their client;

d. ensure that they listen carefully to each question put and that each answer given, before a tribunal, is given objectively, truthfully and as completely as possible, covering all matters relevant to the question;

e. when giving evidence as to past occurrences, unless otherwise directed by the tribunal, have regard to normal practice and the state of knowledge generally at the relevant time.

[30] Approved by the Congress of The Institution of Engineers, Australia in April 2000 and adopted by The Association of Consulting Engineers, Australia in 2003.

CONCLUSIONS

75. Resist pressure to make recommendations and write reports just to agree with the client's wants and desires. Use professional judgment and it the results coincide with the client's wishes then so be it.
76. Being an advocate for your client is inconsistent with your responsibilities in environmental ethics.
77. It is your professional judgment arrived at independently and objectively that will enhance your credibility as an expert.
78. By using professional ethics your career and reputation will be enhanced.
79. The EIANZ Code of Ethics and Professional Conduct is sound. However, it is time for the Institute to review the Code in the light of developments that have occurred since 1989 including the development and implementation of the Certified Environmental Practitioner program.
80. Use the requirements now set by Courts for expert witnesses as they will be beneficial to your environment practice even if you never see inside a Courtroom.
81. You are going to hear more about the Professional Standards Council and actions taken under the **Professional Standards Act 2004** (Qld).
82. Why not be ahead of the rest of your profession by setting a good example now?