Where is the line?
Ego, ethics and expectations

ROSS FOX
SENIOR ASSOCIATE - PLANNING AND ENVIRONMENT
FISHBURN WATSON O’BRIEN | COFFS HARBOUR | SYDNEY
Overview

- Why are ethics important?
- What are the key guidelines?
- What is your potential civil and criminal liability?
- Case studies
  - Prosecution of Orogen Pty Ltd and its director
  - Acquittal of Gordon Wood - A cautionary tale for environmental professionals
- How can you manage client expectations and liability issues?
Why are ethics important?

- Credibility and corporate reputation, membership of EIANZ
- Civil liability (negligence, void professional indemnity insurance)
- Criminal liability
  - For example, offence of providing misleading information about waste (s144AA Protection of the Environment Operations Act)
    - $1,000,000 maximum penalty for a corporation
    - $240,000 maximum penalty or 18 months jail
Warning: criminal liability extends to consultants

- Liability for “causing or permitting” environmental offences
  - Waste transport offences
  - Pollution offences
  - Compliance with clean-up notices
- Liability for aid, abet or procuring commission of offence
  - Knowledge of circumstances of offence
  - Participate in an element of offence
- Director and manager liability under environmental legislation
  - Bigger risk for smaller consultants!
What does it mean to be a professional?

Credibility is the key

2. Accreditation – Guidelines for NSW Site Auditor Scheme
3. EIANZ Code of Ethics, Certified Environmental Practitioner Scheme
4. Community and professional expectations
What does it mean to be an expert?

- Opinion not admissible unless exception under the Evidence Act (NSW)
- Expert opinion: “specialised knowledge based on training, study or experience”
- Expert Witness Code sets out important information on:
  - Duty to the Court - not an advocate for a party
  - Structure of report
  - Importance of making assumptions and qualifications clear
  - Duty to notify court if opinion changes
Stages of practice

1. Engagement
2. Preparation of reports
3. Project management
Ego and expert evidence don’t mix...

- Gordon Wood convicted of the murder of Caroline Byrne in 2008
- Conviction overturned 2013
- Location of body critical - did she jump?
- Critical evidence for prosecution: A/Professor Rod Cross, expert in Plasma Physics
- Location of body critical - did she jump?
Temptation to solve problem – how far is too far?

- Court of Criminal Appeal criticised expert:
  - “Poisoned by police investigation”
    - A risk for long projects – know your role/limits
  - Outside accepted specialised knowledge – not expert evidence
  - Expert was “actively making evidence” using “not sophisticated experiments”
    - Have assumptions been sufficiently identified qualified?
  - Published a book about the trial “Evidence for Murder: How Physics convicted a murderer”
    - Described how he “solved the problem” to secure conviction
Case study – Orogen Pty Ltd and its director

- Development site for a Nathan Tinkler development company
- 10ha site – 4ha of Koala habitat
- Consultant engaged:
  - Project life of several years
  - Controversial development
  - Demanding client
  - Several disciplines required to complete project
  - Time pressures
What happened?

- The then DECCW investigated illegal clearing:
  - Both Orogen Pty Ltd and one of its director prosecuted in the Land and Environment Court
  - Convicted and fined for causing damage to habitat of a threatened species
  - Company and director fined total of $160,000 but ordered to carry out environmental project.
  - Project not carried out so the director prosecuted and fined again $16,000
- No other parties prosecuted
- Why? What is relevance to other environmental consultants?
What went wrong?

1. Engagement
   - Scope included: “Responsibility for legislative compliance”

2. Report preparation
   - Prepared “Site improvement plan”
   - Staff did not have experience
   - What vegetation can be cleared?
   - What requires legal or expert advice

3. Project Management
   - Delegated responsibility
   - Attended site briefings and instruct contractor
   - Not present to supervise work
In conclusion

- Credibility is critical
- Importance of the three stages:
  1. Engagement
     - be clear about what you are doing and not doing
  2. Giving advice
     - Get expert or legal advice on issues that are controversial or critical
     - Don’t let ego get in the way
  3. Project management
     - Are you assuming liability for the job gone wrong?