

Environmental and Planning Law Association (NSW) Inc.

15 October 2015



ETHICS, EVIDENCE AND EXPERTS

Andrew Pickles SC



Expert Witness Code of Conduct Sch 7 UCPR

General duty to the Court (clause 2)

- Overriding duty to assist the court impartially on matters relevant to expertise.
- Duty to the court not to any party.
- Not an advocate for a party.



Expert Witness Code of Conduct Sch 7 UCPR

Duty to work co-operatively with other experts (Clause 4)

- Exercise independent, professional judgment.
- Endeavour to reach agreement with other experts.
- Must not act on an instruction or request to withhold agreement.



Impartiality

- Expert's immunity from suit – c.f. *Jones v Kaney* [2011] UKSC 13
- Independent professional judgment (EWCC clause 4, LEC Conference of Experts Policy at [23]).
- Joint conferences and joint reports.
- Concurrent evidence.
- Refusal to admit partial evidence – *Willoughby CC v TIDC*
- Disclosure of pre-existing relationships – e.g Practice Note Class 1 Appeals at [51]



Duty to the court not to a party

- Advice to clients that view may change.
- Independent, professional judgment (EWCC clause 4).
- Avoid partisan opinions – *Willoughby CC v TIDC*
- No substantive amendments to written opinions on instruction of party or lawyers – *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd (No. 8)* [2014] VSC 567.
- Full disclosure of opinion during oral evidence – *Hudspeth (No. 8)*.



Not an advocate

- Avoid partisan opinions as to the appropriate outcome - e.g. Practice Note at [49] - It is not the role of any expert to opine whether a development appeal should be upheld or dismissed, c.f. *Willoughby CC v TIDC*.
- Identify the real issues in dispute and eliminate issues not genuinely in dispute Joint Expert Report Policy (JERP) at [5].
- Where matters are not agreed, but capable of being resolved by modification, identify what changes could be made – JERP at [11].



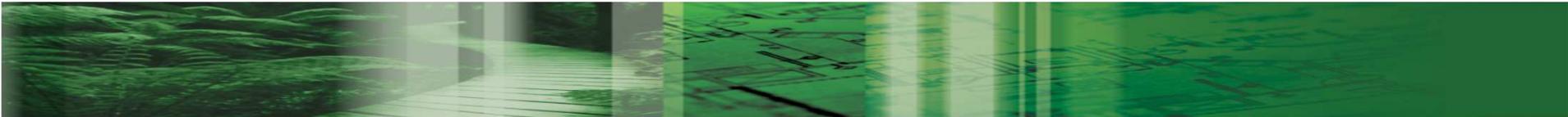
Independent, professional judgment

- The linchpin.
- Do not just copy and paste from an individual report or Council report – JERP at [6].
- Use photos, diagrams or maps to explain differences in opinion – JERP at [6].
- Do not blindly follow the format of the Statement of Facts and Contentions – JERP at [7].
- Avoid uninformative and unreasoned opinions – JERP at [8].



Endeavour to reach agreement

- Experts are to ensure that their joint conference is a genuine dialogue between experts in a common effort to reach agreement with the other expert witness about the relevant facts and issues. Any joint report is to be a product of this genuine dialogue – Practice Note at [54], Conference of Expert Witnesses Policy (CEWP) at [25].
- Joint conference should be a personal meeting – CEWP at [17].
- Experts should bring all notes, background material, surveys, studies, montages and photographs – CEWP at [14].



Instructions to Experts

- Lawyers or parties should not instruct experts not to consider or review possible amendments, sketches or other details that might resolve issues:
 - Experts should bring all notes and background material, including sketches that might resolve matters to conference: CEWP at [14] and
 - A joint report may identify matters that might be capable of being agreed with further information or with a modification: JERP at [4].
- Instructions to experts must be careful to address a legally relevant question: *Protect Penrith Action Gp Inc v Penrith City Council* [2015] NSWLEC 159



Other matters relevant to the expert's obligations

- Joint reports should contain a succinct statement of reasons for disagreement – JERP at [11].
- Expert reports should provide plans, photographs, montages or any other visual aids that assist understanding of opinions – JERP at [12]. Remember – ‘a picture can tell a thousand words’.
- Address contentions in relevant groups – JERP at [7].
- Get reports done ON TIME, in accordance with the Court's directions: EWCC clause 3