

CONFLICTS OF INTEREST: THE SMELL TEST

Identifying and managing conflicts of interest in the course of Environmental Practice.

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A. INTRODUCTION

The recognition of the work of environmental practitioners as a distinct profession has been a central theme for the Environment Institute of Australia and New Zealand since its formation . It is for this reason, and for the advancement of the notion of the profession of environmental practitioner, that the EIANZ has instituted its well-regarded and widely recognised program for the certification of environmental practitioners.

Central to the concept of a profession is the notion of an occupation which operates according to a relationship of trust and confidence as between the members of that profession, between the profession and its clients, and in the eyes of the public generally.

In the furtherance of this objective the EIANZ has instituted and adopted a Code of Ethics and Professional Conduct ("the Code") with which all members of the EIANZ and Certified Environmental Practitioners are required to conform in the course of their professional practice.

The Code was adopted by the Annual General meeting of the EIANZ on 24 October 2012 and is available for downloading on the EIANZ website. A copy is attached.

The rationale behind the Code of Ethics is, with respect, succinctly stated by the Foundation President of the EIANZ, Professor Simon Molesworth AO QC as follows:-

"Codes of ethical conduct have been the hallmarks of professional practice since the inception of what we can identify as the founding professions such as the medical profession and the legal profession.

In essence a true professional has regard to a higher order of considerations beyond self-interest such as the pursuit of an occupation merely for remuneration.

With the emergence of the environmental professional, the practitioners' core discipline has the hallmark of environmental management at its focus it was

identified that like other professions there was a need to distinguish between practitioners simply pursuing a job, and practitioners who aspire to a higher order of practice, adhering to standards of competency and working within an ethical framework”.

The Code goes on to analyse and set out the contents of the ethical practices, the values and the expectations underpinning the Code.

The legal basis and compulsion to comply derives from the Rules of the EIANZ which allow the adoption of such a Code and which provide for its binding effect. The Rules also set out the possible consequences of a breach and the means by which the Code is to be enforced.

This paper looks particularly at the issue of conflicts of interest. This is a specific obligation, which operates in conjunction with the other more general requirements of the Code. It provides an example of the overarching ethical obligations to act in an honest and trustworthy manner, and to avoid misrepresentation and obfuscation.

Specifically, the Code provides, under the heading “Demonstrate Integrity” the following direction in this regard:-

“This Code commits Environmental Practitioners to: ...

(d) avoid or manage conflicts of interest, and to make all relevant parties aware when there is such a conflict;”

The Code defines “Environmental Practitioner” for the purpose of the Code to be “a person who is a member of the EIANZ or a Certified Environmental Practitioner.”

This apparently simple statement brings into play a body of law and regulation which is largely derived from the experience and regulation of other professions. The legal profession has a long history of the regulation of conflicts of interest. It is not clear that the rules and principles which are applicable to the legal profession are necessarily equally applicable to environmental practitioners. However, the application of the high standards applicable to legal practitioners would serve the environmental profession well. It is probably the case that a person fulfilling the obligations applicable to a legal practitioner could be confident of compliance with the obligations under the Code.

The imposition of this serious and solemn duty derives from a concern on the part of the EIANZ that those persons whom it has admitted to membership, or whom it has

considered worthy to be given its certification, can be regarded by the public and by their clients with confidence as to their integrity.

B. SCOPE

This paper considers the position of the environmental practitioner in the following contexts:-

1. The duty owed by an environmental practitioner to those persons who have engaged them to provide services and advice as to environmental issues. This is referred to as practitioner-client conflict.
2. The duty that requires environmental practitioners only to act in the interest of their client, and no other party. This is referred to as concurrent conflict.
3. The issue of the ongoing nature of these duties, which may continue to apply even after the termination of the professional relationship between the environmental practitioner and the client.
4. The impacts of a conflict of interest upon the role of environmental practitioner as an independent expert. This may be where an environmental practitioner is called upon to provide an assessment of environmental issues for regulatory purposes, or is appearing as an expert witness providing evidence to a Court.
5. The consequences of a breach of the duty to avoid a conflict of interest are examined.

For the purpose of this paper the term "client" is used to denote that person who has engaged the environmental practitioner and to whom advice is provided. This is an appropriate characterisation of a professional relationship. Engagement by a client of a professional person involves various duties and obligations between the parties which are superimposed upon and which transcend the mere commercial transaction.

C. PRACTITIONER-CLIENT CONFLICT

The basic premise is that, apart from a payment for their work, an environmental practitioner is not entitled to act with the objective of advancing other personal interests. To this end an environmental practitioner is forbidden by the Code to allow their personal interests to conflict with those of their clients.

This obligation compels a high requirement of disclosure of any possible interest to the client.

The relationship between an environmental practitioner and the client must be one of trust and reliance. This is generally referred to in the context of a profession as a *fiduciary relationship*. This term imports an obligation of good faith at the highest level. It entails an obligation to decline to accept work, not only in cases where a conflict can be seen to exist, but also in any circumstance where there is the possibility that a conflict may exist or may subsequently arise.

The concept of personal interest can extend to other parties. A benefit derived by a family member, related entity or close associate may also create a conflict of interest.

The existence of a conflict on the part of an environmental practitioner is not removed or avoided by the transfer of the work to another associated person. Advice given in the context of the professional-client relationship must be independent. It is not appropriate therefore, that such advice be given by another party related in business, whether as an employee, co-director or partner of the environmental practitioner holding the conflict.

The duty of disclosure is specifically spelt out in the Code in the requirements ..."*to make all relevant parties aware when there is such a conflict.*"

The notion of a free and informed decision and consent as to dealings between an environmental practitioner and a client, requires, of its very nature, that the client be provided with complete information upon which to base their decision. Anything less than a full and frank disclosure will be inadequate and is likely to breach the Code.

Any consent to act which has been given despite that disclosure, should be recorded in a document which sets out the full nature of the disclosure. This document should include confirmation of the opportunity for other independent advice and, where appropriate, confirmation that such advice has been obtained.

The preparation of such a document is very much easier at the start of the professional relationship.

An appropriate engagement document can fulfil a great many important functions. It can provide a basis for the work to follow and can avoid many of the severe consequences which might otherwise arise.

Having said this, any such situation must be approached with caution. Even though it may be thought possible to “cleanse” the transaction through sufficient disclosure, the default position should be to avoid the possibility of a conflict even if this means turning away work.

The receipt of any additional benefit over and above the agreed fee for the work undertaken gives rise to a possible conflict. If the possibility of that benefit becomes apparent after the work has started, then it must still be fully disclosed as soon as possible.

The role of the environmental practitioner may often involve the task of referring some of the client's work or business to another party. The client is entitled to expect that any such referral will be based solely upon the consideration of the best interests of the client.

If there is an arrangement whereby some fee or benefit is paid to the environmental practitioner for providing the referral then a potential conflict immediately arises. It is almost impossible to remove that concern, despite clear disclosure. Such situations should be avoided.

D. CONCURRENT CONFLICTS

The general notion of a conflict of interest precludes the possibility of a professional acting on behalf of different parties where their interests are divergent or opposed. There is a temptation to seek to minimise costs and complications for multiple clients by having one expert advisor to advise the whole group. This may be a false economy. It may initially appear that there is no divergence of interests, but this is a very dangerous territory. What may appear to be a relationship without contentions may subsequently turn out to be entirely different. It is vastly to be preferred that those positions of conflict be avoided from the start.

It is important that an environmental practitioner determine from the start whether there is any likelihood of a conflict of interest between multiple parties. This requires a full consideration of the nature and future of the nature of work and all possible circumstances which may arise in the future.

If there is any doubt then the safest course is to decline to act for any additional party, even if that creates a risk that the job may be lost. This is preferable to the scenario where the conflict arises and it becomes impossible to act for any of the parties.

A clear example of the difficulties that can arise can be seen in the case of advice requested jointly by the owner and lessee of land on which some environmental concern exists. An assessment of the problem and its method of rectification may also involve assessments of the responsibility of each of the parties for that situation. This may clearly end up in a dispute as to the legal consequences of their actions.

E. ONGOING DUTIES

Despite the end of a business relationship, the obligation to avoid a conflict of interest may entail ongoing obligations not to act in conflict with the former client's interests in the future. Even though the business relationship may have concluded, professional obligations may well continue. A major concern in this regard relates to obligations of confidentiality. This is the subject of an additional specific obligation identified in the Code.

The fact is that as one proceeds through one's professional career, knowledge and experience are gained and lessons are learned. That knowledge and experience is a commodity which an environmental practitioner is entitled to sell on to other clients in the future. In doing so, however, there is an obligation to avoid the use of commercially sensitive or confidential information gained whilst acting for one client in circumstances that may be harmful to the interest of that former client.

This is not always an easy path to walk but the precautionary principle should be applied and any circumstance of doubt should lead to an environmental practitioner declining to undertake the work.

Once again, the best time to identify and deal with these matters is at the start of the relationship. It is necessary to speak to both the former client and the prospective

client and provide full and frank information to both. It may be that the perceived difficulty does not exist or is not a problem. The former client may not have a concern. If so, this is another situation where it is important to have a written record of the discussion and the outcome.

F. ENVIRONMENTAL PRACTITIONERS AS AN EXPERT ADVISOR OR WITNESS

A substantial and very visible role of the environmental practitioner may be in the area of an expert advisor to a regulatory authority, or in providing evidence as an expert witness to a court or tribunal.

The position of environmental practitioners in giving expert evidence in a court is a separate subject which deserves close examination in the context of the Code. The primary and completely overriding consideration in that circumstance is that a party called by a court to give expert evidence has a duty, first and foremost, to assist the court. It is inconsistent with the level of objectivity required to discharge that duty for a party to give evidence in circumstances where that witness may be seen to have some other interest which may be in conflict with that position.

Thus, a person who has previously been engaged to advise a client as to means by which environmental issues might be managed or controlled should consider that this limits the possibility of providing expert evidence to a court as to that specific circumstance.

An expert witness is entitled to charge a fee to the person who engages that expert. It is vital that the payment has no strings attached. It is not appropriate, for instance, that the fee or reward should be linked in any way to the outcome of the litigation. Such a link would completely destroy the vital and evident independence and objectivity of the witness.

G. CONSEQUENCES OF BREACH OF THE CODE

The Code specifically provides for action which may be taken in circumstances of breach the Code. In the case of membership of the EIANZ, there is a power under its Rules, to expel, suspend or sanction a member for various reasons including a breach of the Code.

It also is within the powers of the Certification Board to withdraw the certification of an Environmental Practitioner in such circumstances.

The process is to be undertaken by both the Council and the Board involve an application of rules of natural justice and fairness. Generally this will require an independent investigation of the alleged misconduct, an open hearing of such complaint, the opportunity for the environmental practitioner to be advised of the substance of the complaint and the investigation, and be afforded a full opportunity to respond to the allegations.

An environmental practitioner who acts in a manner contrary to the Code may also expose themselves to a civil legal action in circumstances where a loss or detriment has been suffered by a client as a result of the breach. Acting in breach of the Code may well constitute a breach of contract. Even if it has not been specifically stated as a term of the contract to provide services, it is likely a court would regard the obligation to comply with the Code as a reasonably implied term of any such contract. That reasonable implication is provided in the plain terms of the Code and would also arise from the likely reliance of the client on the implied competence of an environmental practitioner.

It may also be that a party in those circumstances would also be regarded as having acted in a misleading or deceptive manner in the course of trade of commerce. That would open up the possibility for the various remedies which are available pursuant to provisions of the Australian Consumer Law.

It is also likely that such a breach may be put forward as a reason why the client ought not to be obliged to pay the fee agreed for the work.

CONCLUSION

The requirement to comply with the Code, and to avoid conflicts of interest involve the common sense application of clear and apparent duties and obligations.

In circumstances of any doubt it is important to err on the side of caution.

The duties imposed by the Code, including the avoidance of conflicts of interest, are vital to the integrity of, and public confidence, in the environmental profession. If that profession is to thrive and prosper, such public confidence is absolutely vital.

The consequences of breach are profound and may be very costly.

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DISCLAIMER

The information within this paper represents a preliminary interpretation of some of the obligations under the EIANZ Code of Ethical Conduct by the author. It is for general information only. It is not intended as professional advice – for such advice you should consult a lawyer or other similarly qualified professional. Mellor Olsson expressly disclaims all liability for any loss or damage arising from reliance upon the information in this paper.