

# Handout on professional duties for ENVM3103 & ENVM7123 lecture 12, 2020

By Dr Chris McGrath (25 May 2020)

## Professional duties

This handout summarises some of the major professional duties you work under as a planner, environmental manager, or engineer in Queensland. In the workplace, as in all parts of life, you have a generic duty to comply with the law (e.g. if you steal something at work you can be charged with theft; etc) but the duties summarised here are chosen because of your professional role either in private practice or working for government.

### 1. Duty to comply with contract terms

Private consultancies normally enter into written contracts to provide services for a specified fee. Such contracts are normally written by lawyers and may be quite long and technical.<sup>1</sup> As a consultant, your basic duty is to comply with your obligations under the contract such as by supplying the services agreed to. You and your firm may be liable for damages<sup>2</sup> incurred by a client if you breach your obligations under a contract. However, your firm may also use the contract to protect itself from liability or to limit its liability for the services it provides. This is done by including liability limitation clauses in the contract.<sup>3</sup>

### 2. Duty to take reasonable care (i.e. avoiding professional negligence)

As a consultant you have a duty to exercise reasonable care in the provision of all services you provide to clients, including professional advice that you give (e.g. advice as a town planner on what development approvals are required to conduct a use of land). You and your firm may be liable for damages incurred by a client who relied on your advice if you fail to take reasonable care (i.e. you are “negligent”). What is “reasonable” is a matter of fact and degree in the circumstances of each case. Typical indicators of situations calling for greater care include: increasing risk or potential financial loss for a client; complex problems that require expertise to understand.<sup>4</sup> Making basic errors such as failing to read the definitions in a planning scheme when advising a client on requirements for development approvals under the planning scheme are very likely to be regarded as negligent.

Liability for negligence underwent major reforms with the passage of the *Civil Liability Act 2003* (Qld) and similar legislation in other states.<sup>5</sup> Section 22(1) of that Act provides in relation to professionals:

#### 22 Standard of care for professionals

(1) A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice. ...

Governments, including local governments, and public authorities can also be liable for negligent decisions and actions of their employees, however, this liability was often difficult to establish under the common law<sup>6</sup> and has been significantly restricted under the *Civil Liability Act*. For example, in deciding whether a public authority has breached a duty the functions required to be exercised by the authority are limited by

---

<sup>1</sup> Entry into a consultancy contract is a matter that requires specific legal advice upon and a solicitor should be engaged to provide this advice for contract negotiations (at least to create a template for the standard terms of your consultancy contract).

<sup>2</sup> “Damages” is a legal remedy involving payment of an amount of money equal to the loss incurred by the person to who damages are awarded.

<sup>3</sup> See, e.g. *Caltex Australia Petroleum Pty Ltd v Charben Haulage Pty Ltd* [2005] FCAFC 271 for examples of limiting liability under contracts in the context of a sale of a petrol station site affected by contamination.

<sup>4</sup> See *Civil Liability Act 2003* (Qld), s 9.

<sup>5</sup> See generally, Douglas RJ, Mullins GR and Grant SR, *The Annotated Civil Liability Act 2003 (Qld)* (4<sup>th</sup> ed, LexisNexis, 2016).

<sup>6</sup> See, e.g. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 where a local government was held not liable for negligence concerning harvesting of oysters contaminated by septic tanks causing Hepatitis A infection involving a failure by the authority to exercise statutory powers to control water pollution.

the financial and other resources that are reasonably available to the authority for the purpose of exercising its functions decided by reference to the broad range of its activities.<sup>7</sup>

Most consultants and consultancy firms obtain professional indemnity insurance to guard against large losses from professional negligence claims. This can be costly but is a necessary part of professional practice and in some cases is a requirement of contracts and membership of professional associations.

### **3. Duty not to engage in misleading or deceptive conduct (or to provide false or misleading information)**

In 1974 Australia passed reforming laws to allow consumers to seek damages for misleading or deceptive conduct in s 52 of the *Trade Practices Act 1974* (Cth). That can now be found in s 18 of the Australian Consumer Law (contained in schedule 2 of the *Competition and Consumer Act 2010* (Cth)),<sup>8</sup> which provides:

#### **18 Misleading or deceptive conduct**

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. ...

The reference to “trade or commerce” captures most commercial activity, including work done as a consultant for a fee. “Misleading or deceptive” are largely tautologies and share a common meaning of “to lead to error”.<sup>9</sup> It is unnecessary to prove that there was an intention to mislead or deceive or that the conduct in question actually deceived or mislead anyone. The conduct must be viewed as a whole and in context but representation may amount to misleading conduct even if it is literally true.<sup>10</sup> A statement that is half-true may be misleading<sup>11</sup> and a false statement that is featured prominently in a written advertisement may be misleading, even if it is qualified elsewhere in the text.<sup>12</sup> A statement which is false (i.e. untrue) is necessarily misleading but the converse does not follow. Where a breach of s 18 is established a range of remedies are available including damages and contractual avoidance or variation.

There are also many similar criminal offences for providing “false or misleading” information to environmental regulators.<sup>13</sup>

### **4. Duty to disclose and avoid conflicts of interest**

A conflict of interest is generally of most relevance for elected representatives and government employees who are required to make decisions on matters that they may have a personal interest in. A conflict of interest involves a conflict between a person’s personal interests and their duty as an elected representative, employee, or office bearer or their duty to a client. The conflict may arise from a range of factors including personal relationships (e.g. where an applicant is a brother of the person assessing an application), other employment or clients, membership of special interest groups, or ownership of property involved in an application. Having a conflict of interest is not unusual and it is not a wrongdoing in itself. However failing to disclose and manage the conflict appropriately is likely to be a wrongdoing.<sup>14</sup>

The basic duty of elected representatives and government employees is to disclose any conflict of interest and, typically, not to participate in decision-making concerning matters in which they have a conflict of

<sup>7</sup> See *Civil Liability Act 2003* (Qld), ss 35-36; and Douglas, Mullins and Grant, n 5.

<sup>8</sup> See generally, Miller RV, *Miller’s Australian Competition and Consumer Law Annotated* (42<sup>nd</sup> ed, Thomson Reuters, 2020); and Paterson JM, *Corones’ Australian Consumer Law* (4<sup>th</sup> ed, Lawbook Co, 2019).

<sup>9</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-199 (Gibbs CJ).

<sup>10</sup> *Hornsby Building Information Centre PL v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 227.

<sup>11</sup> *Union Carbide Australia Ltd v Duracell Australia Pty Ltd* (1986) 7 IPR 481.

<sup>12</sup> *Henderson v Pioneer Homes Pty Ltd (no 2)* (1980) 43 FLR 276.

<sup>13</sup> See, e.g., *Environmental Protection Act 1994* (Qld), s 480; and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 489-491.

<sup>14</sup> This paragraph draws on the *Queensland Public Service Ethics Code* available at <http://www.ethics.qld.gov.au>

interest. In private practice a conflict of interest should typically be disclosed to your employer or client for them to resolve as they wish (e.g. where you are a neighbour to a proposed development).

## 5. Duty of confidentiality

In addition to requirements for confidentiality imposed as contractual terms, the common law imposes a duty of loyalty and fidelity upon all employees.<sup>15</sup> This duty arises from the contract of employment,<sup>16</sup> but may also arise where the employee is in a special position of trust and confidence.<sup>17</sup> In the context of confidential information, the duty of fidelity requires that an employee must not use information obtained in the course of his or her employment to the detriment of the employer.<sup>18</sup>

The basic rule is that you should not disclose documents or information obtained through the course of your employment that are not publicly available unless authorised by your client or employer (e.g. by providing commercial-in-confidence information to a local government as part of a development application).

Government employees have similar duties not to disclose information that is not publicly available obtained through the course of their employment.<sup>19</sup> However, at least in theory the *Public Interest Disclosure Act* 2010 (Qld) protects public interest disclosures by Queensland public servants, including matters involving the commission of an offence involving a substantial and specific danger to the environment.<sup>20</sup>

## 6. Duty not to engage in official corruption & bribery

A number of laws create criminal offences for official corruption and bribery of public officials. In Queensland<sup>21</sup> s 87 of the *Criminal Code* provides:

### 87 Official corruption

(1) Any person who—

- (a) being employed in the public service, or being the holder of any public office, and being charged with the performance of any duty by virtue of such employment or office ... corruptly asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by the person in the discharge of the duties of the person's office; or
- (b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for, any person employed in the public service, or being the holder of any public office, or to, upon, or for, any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed or holding such office;

is guilty of a crime, and is liable to imprisonment for 7 years, and to be fined at the discretion of the court. ...

As a public servant, including as a local government employee, it is a crime for you to corruptly ask for or receive any money, property or other benefit for the performance of your public duties.

As a consultant it is a crime for you to corruptly offer or give money, property or other benefit to a elected official or public servant, or to be a party to such an act (e.g. by aiding another to do it).

The Queensland Crime and Corruption Commission (CCC) receives and investigates complaints of official misconduct under the *Crime and Corruption Act* 2001 (Qld).<sup>22</sup>

<sup>15</sup> This discussion draws on the Australian Law Reform Commission report, *Secrecy Laws and Open Government in Australia* (ALRC Report 112, 2010), Ch 3, available at <http://www.alrc.gov.au/publications/report-112>.

<sup>16</sup> *Robb v Green* [1895] 2 QB 315.

<sup>17</sup> Macken J, O'Grady P, Sappideen C and Warburton G, *Law of Employment* (4th ed, 2002), 139–141.

<sup>18</sup> *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617, 625–628.

<sup>19</sup> See ALRC, n 15, Ch 3; and the *Queensland Public Service Ethics Code* available at <https://www.forgov.qld.gov.au/conduct-and-performance>.

<sup>20</sup> This Act replaced the *Whistleblowers Protection Act* 1994 (Qld).

<sup>21</sup> There are similar laws for official corruption involving Commonwealth officials.

<sup>22</sup> See <https://www.ccc.qld.gov.au/>

## 7. Duty to avoid discrimination (and your right not to be discriminated against)

There is a broad duty to avoid discrimination on the basis of attributes such as a person's race, ethnicity, religion, or sex. The areas of activity where discrimination is prohibited include employment in the work area.<sup>23</sup> There are exceptions where discrimination is lawful, such as acts done to promote equal opportunity by discriminating *in favour* of a disadvantaged group.<sup>24</sup>

## 8. Duty to maintain a safe workplace (including avoiding workplace harassment & bullying)

Both employers and employees have a duty to ensure that a workplace is safe under the *Work Health and Safety Act 2011* (Qld) (WH&S Act). A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of their workers while at work in the business or undertaking.<sup>25</sup> This includes: the provision and maintenance of safe systems of work; the safe use, handling, storage and transport of plant, structures and substances; and the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking. Workers must also take reasonable care for their own health and safety, the health and safety of others in the workplace, and comply with health and safety instructions, policies and procedures.

Harassment or bullying in the workplace is an activity that may cause workplace injuries and is therefore regulated under the WH&S Act. If workplace behaviour is repeated, unwelcomed and unsolicited, and offends, intimidates, humiliates or threatens a person, then workplace harassment exists and action must be taken to stop the behaviour.<sup>26</sup> Workplace harassment may take many forms. More common types of harassing behaviours include: abusing a person loudly, usually when others are present; constant ridicule and being put down; maliciously excluding and isolating a person from workplace activities; persistent and unjustified criticisms, often about petty, irrelevant or insignificant matters; humiliating a person through gestures, sarcasm, criticism and insults, often in front of customers, management or other workers.

## 9. Duty to avoid sexual harassment (and your right not to be subject to sexual harassment)

Sexual harassment is prohibited by s 118 of the *Anti-Discrimination Act 1991* (Qld) and, if it occurs in the workplace it is also regulated under the WH&S Act. Sexual harassment is an unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature which makes a person feel offended, humiliated or intimidated, and where that reaction is reasonable in the circumstances.<sup>27</sup> Some sexual harassment, such as sexual assault, indecent exposure and stalking is also a criminal offence. Examples of acts that may constitute sexual harassment are:

- physical contact such as patting, pinching or touching in a sexual way;
- unnecessary familiarity such as deliberately brushing against a person;
- sexual propositions;
- unwelcome and uncalled for remarks or insinuations about a person's sex or private life; or
- suggestive comments about a person's appearance or body.

Sexual harassment can be very difficult and embarrassing to deal with but you and your fellow workers are entitled to a workplace free of it.<sup>28</sup> Don't accept unacceptable behaviour whether it is directed at you or a colleague at work.

<sup>23</sup> See Part 4 of the *Anti-Discrimination Act 1991* (Qld), especially s 15.

<sup>24</sup> See Part 5 of the *Anti-Discrimination Act 1991* (Qld).

<sup>25</sup> *Work Health and Safety Act 2011* (Qld), s 19.

<sup>26</sup> See the *Prevention of Workplace Harassment Code of Practice 2004*, a code under the WH&S Act.

<sup>27</sup> See *Anti-Discrimination Act 1991* (Qld), s 119.

<sup>28</sup> For more information on responding to sexual harassment, see the Anti-Discrimination Commission Queensland website, <http://www.adcq.qld.gov.au/complaints/making-a-complaint>