

STAND UP AND DELIVER EXPERT EVIDENCE

IPENZ Transportation Group Conference 2012

**Amanda Douglas
Partner**

WYNNWILLIAMS
LAWYERS

Given evidence?



WYNNWILLIAMS
LAWYERS

Stand Up & Deliver Expert Evidence



WYNNWILLIAMS
LAWYERS

Council Reports and Hearings

- Section 42A Resource Management Act 1991
- Assessment of Environmental Effect
- Evidence or prepare a report for a submitter



WYNNWILLIAMS
LAWYERS

Council Reports and Hearings continued

- Consider possibility of appeal
- Make sure your evidence will “stand up”



WYNNWILLIAMS
LAWYERS

Environment Court

- Prepare evidence in writing
- Environment Court Practice Note
- Code of Conduct for Expert Witnesses



WYNNWILLIAMS
LAWYERS

Environment Court: Evidence Preparation

Every expert witness must:-

- Be provided with a copy of a Practice Note/Code of Conduct;
- Comply with the Code of Conduct; and
- Acknowledge read and compliance with Code of Conduct

Over-riding duty to assist the Court impartially

Not an Advocate



WYNNWILLIAMS
LAWYERS

Expert Witness Conferences

- Expert witness confer
- Attempt to reach agreement on issues
- Identify the issues on which they cannot agree
- Agree the reasons for that disagreement



WYNNWILLIAMS
LAWYERS

Expert Witness Conferences continued

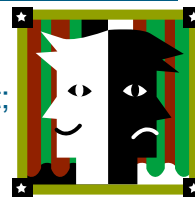
- Genuine dialogue
- “Without prejudice”
- Exercise independent and professional judgment
- Ensure your opinions and reasons in written evidence will stand up to your peers



WYNNWILLIAMS
LAWYERS

Definition of “Effect”

- Any positive or adverse effect;
- Any temporary or permanent effect;
- Any past, present or future effect;
- Any cumulative effect which arises over time or in combination with other effects –
regardless of the scale, intensity, duration or frequency of the effect,



WYNNWILLIAMS
LAWYERS

Definition of "Effect" continued

and also includes –

- Any potential effect of high probability
- Any potential effect of low probability which has a high potential impact

WYNNWILLIAMS
LAWYERS

Definition of "Effect" continued

© Gregory Kogan. All rights reserved. GagCartoons.com



"What do those Wall Street gurus say about the probability of us ever going out to dinner again?"

WYNNWILLIAMS
LAWYERS

De Minimis Principle

- Usually de minimis effects are disregarded
- Shorthand for “*de minimis non curat lex*” – “the law is not concerned with trifles”
- Not the same as “minor”, or “less than minor”
- An effect so small and trifling that the law should not be concerned with it



WYNNWILLIAMS
LAWYERS

De Minimis Principle continued

- To disregard de minimis, effect: close to non-existent
- De minimis not in RMA - use the wording from the Act

No effect | **de minimis** | less than minor | minor | more than minor

WYNNWILLIAMS
LAWYERS

Less than Minor, Minor or More than Minor Effects

Use of these terms:

- **PUBLIC NOTIFICATION:** a consent authority must publicly notify an application if it decides that the activity will have or is likely to have adverse effects on the environment that are more than minor

MINOR → MORE THAN MINOR

WYNNWILLIAMS
LAWYERS

Less than Minor, Minor or More than Minor Effects continued

- “ADVERSELY AFFECTED PERSONS” - LIMITED NOTIFICATION:

A consent authority must decide that a person is an affected person if the adverse effects on an activity on that person are minor or more than minor, but not less than minor

LESS THAN MINOR MINOR MORE THAN MINOR

WYNNWILLIAMS
LAWYERS

Less than Minor, Minor or More than Minor Effects continued

- Passing a “gateway” or “threshold” test for a **NON-COMPLYING ACTIVITY**: a consent authority may grant a resource consent for a non-complying activity if the adverse effects of the activity on the environment will be minor

MINOR

MORE THAN MINOR

WYNNWILLIAMS
LAWYERS

Less than Minor, Minor or More than Minor Effects continued

So, how do you translate that to traffic / transport
engineering / safety / management
evidence??



WYNNWILLIAMS
LAWYERS

Less than Minor, Minor or More than Minor Effects continued

NO SIMPLE ANSWER



EXPERTISE & EXPERIENCE!



WYNNWILLIAMS
LAWYERS

Less than Minor, Minor or More than Minor Effects continued

- Question of fact and degree and will vary from application to application
- The decision-maker will consider the overall combined effects of the proposal
- When considering public notification, the Council must disregard owners and occupiers of application site and adjacent land
- More than localised effects to be publicly notified

WYNNWILLIAMS
LAWYERS

Cumulative Effects

- Effects from the application, in combination with effects of other existing activities



WYNNWILLIAMS
LAWYERS

Cumulative Effects continued

- Is it “fair” for the later developer to bear the full cost of upgrade works?
- Tailor development to the environment as it exists at the time that consent for the development is sought.



WYNNWILLIAMS
LAWYERS

Cumulative Effects continued

- If cumulative effects of existing activities are more than minor, further considerations include:
 - The small scale of a proposed new activity
 - Different operation times of new activity, for example, during low demand periods
 - Conditions to mitigate or avoid adverse effects

WYNNWILLIAMS
LAWYERS

Tips for Preparing Evidence

- Obtain all of the relevant material
- Know the weaknesses of the client's case
- Concede points where appropriate
- Experience and expertise
- Include all relevant evidence in statement of evidence



WYNNWILLIAMS
LAWYERS

Tips for Preparing Evidence



WYNNWILLIAMS
LAWYERS

Tips for Preparing Evidence *continued*

- Express yourself with authority, but succinctly
- Have a real understanding of the proposal
- Be true to yourself
- Ensure that it is your own evidence
- Express opinions objectively



WYNNWILLIAMS
LAWYERS

Tips for Preparing Evidence continued

- Understand all data and workings
- Address all of the matters that the decision maker will need to consider
- Be clear about the objective
- Assist the decision maker



WYNNWILLIAMS
LAWYERS

Tips for Preparing Evidence continued



WYNNWILLIAMS
LAWYERS

Being Cross-Examined

Basic points for giving evidence in Court

- Carefully read through the evidence before hearing
- Read the evidence of other witnesses
- Dress professionally
- Tell the truth
- Only answer the question asked



WYNNWILLIAMS
LAWYERS

Being Cross-Examined continued

- “I don’t know” or “That falls outside my area of expertise”
- Think for a few seconds
- Speak loudly and slowly
- Look at the person who asked the questions
- If the lawyer instructing you interrupts when you are being questioned, stop talking



WYNNWILLIAMS
LAWYERS

Being Cross-Examined continued

- Do not let the other lawyer put words into your mouth
- Do not tell jokes, and do not argue with the lawyer
- Do not volunteer extra information
- Ask to see any document needed to answer a question



WYNNWILLIAMS
LAWYERS

Being Cross-Examined continued

- Take a sip of water if you are feeling flustered
- Give a straight answer
- Correct errors as soon as possible



WYNNWILLIAMS
LAWYERS

Being Cross-Examined continued

- Re-examination = clarification



WYNNWILLIAMS
LAWYERS

Stand Up and Deliver Expert Evidence



WYNNWILLIAMS
LAWYERS

Stand Up and Deliver Expert Evidence



<http://www.linkedin.com/pub/amanda-douglas/25/208/b25>

WYNNWILLIAMS
LAWYERS

WYNNWILLIAMS
LAWYERS