Extract from Paper Presented to District Court Judges of Queensland at their Annual Conference on 18th August 2005

Thank you for the invitation to speak at your conference where you are addressing ethical issues. I propose to make some observations based upon my short time in office as the Queensland Integrity Commissioner. I have held that office now for just over one year.

The role is a statutory one created by the *Public Sector Ethics Act 1994*. Although the Act was passed in 1994 it was not until 1999 that amendments were made to introduce the office. I am the second Integrity Commissioner, the first being the Honourable Alan Demack AO.

I found the Parliamentary Debate surrounding the amendments that created the Office of Integrity Commissioner to be very interesting. Both sides of politics freely acknowledged that public esteem of politicians was at a very low ebb. The major reason advanced for creating the new office was that it would create a confidential source of advice in relation to conflicts of interest with a view to addressing such conflicts before actions were taken that would further diminish the standing of politicians in the eyes of the community.

In my role as Integrity Commissioner I have statutory constraints as to secrecy. People can come to me to seek advice and I am not able to publish the fact that they have come, or the advice that I have given. A person seeking the advice is able to publish it as widely as he or she chooses.

My statutory role to give advice is limited to a category of individuals known as "designated persons". Essentially this includes the Premier, Ministers and Government (not Opposition) politicians and senior public servants as well as persons appointed to an office by a Minister or the Governor in Council. It does not include judicial officers.

No doubt you all appreciate that the field of ethics is not the same as the field of law. Legal rights and entitlements cannot necessarily cover the same field as ethical behaviour.

I have found the most apt guideline for persons holding public office is to liken it to the position of a trustee. The holder of an office is vested with trust by the public to act in accordance with the public good. Once this is appreciated and adopted as a way of life, a pattern for ethical behaviour can be established.

A most important factor in ethical behaviour is to recognise the fundamental role of public perception. Indeed it might well be said that in this field perception is reality. One of the most important things to realise in relation to making a decision in the field of conflict of interest is that it is not the proper test to focus upon what you, with your undoubted integrity, think is the solution to the problem. The true test is what a reasonable member of the public properly informed would think of your actions. There is world of difference between the two approaches and I have found on many occasions that persons are prepared to become involved in decision-making or other activity in fields ripe for conflict of interest. They are prepared to justify their action on the basis that

they, with their own firmly held belief of their integrity, will be able to manage the situation. A moment's thought would give rise to the acknowledgement that other people, perhaps of not the same integrity as the decision-maker, would not be acting correctly if they participated.

Here lies one of the fundamental problems. You regard as fundamental the proposition that a person should not be a judge in his or her own cause. Yet this is often precisely what occurs when people are faced with a situation of potential conflict of interest. It is vital in such a situation that you take backward steps to enable you to bring an objective approach, assessing it from the point of view of a reasonable member of the public properly informed. Often the test of what would you do if your actions were reported in the media is adopted. In my view this can be inappropriate because all too often the media sensationalises matters rather than looks at them objectively. Often their view point does not meet the test of a reasonable member of the public properly informed.

The law is a very traditional profession and changes seem to come slowly. I would however, suggest to you that in the field of ethical behaviour there has been a great change in perception as to what is appropriate conduct.

Let me give an example from my own experience going back not much more than a decade or so. In those days it was not uncommon for judges to appoint their children or other relatives as associates or, alternatively, to make an appointment as a favour to a friend. There are now protocols in existence that recognise that such behaviour is not appropriate.

There have been similar shifts in attitudes and practices in the area of receipt of gifts and on receipt of hospitality, or the holding of business interests.

In all these areas, public perception would seem to be the catalyst encouraging the change.

Minds can differ as to where the line should be drawn in relation to conduct in the area of conflict of interest or bias. In the comparatively recent decision of Hot Holdings Pty Ltd, a Western Australian case, the issue was decided by the primary judge on the basis that there was no reasonable perception of bias. A unanimous Court of Appeal of three judges held that there was such a perception. When the matter went to the High Court a majority of 5-1 held that there was no such perception. (Hot Holdings Pty Ltd v Creasy - 2002 HCA 51)

Very briefly the facts were, that the applicant company was seeking the Minister's approval to be granted a valuable mining license. The system was that public servants in the Minister's department assessed the suitability of various applicants and made a recommendation to the Minister. In the course of this process one public servant was a scribe who noted discussions and draft recommendations by two more senior people, who in turn made their recommendations to the head of the department, who ultimately forwarded them to the Minister. The complaint by a disappointed applicant was that the scribe was a shareholder in a company which had options to purchase shares in the successful applicant and that one of the more senior people had an adult son who was a

shareholder in the applicant company. Ultimately the High Court held that such interests as were held were not sufficiently proximate. In particular the persons holding them were not sufficiently integral to the decision-making process as to cause the process to fail.

One cannot be too careful in giving careful consideration to what should be the next step if there is any suggestion of a conflict of interest or possible bias. Disappointed parties are prepared to draw the long bow in calling in question a decision that was not to their liking. For example, in a recent case a judge had reserved a decision in a bankruptcy matter. One of the primary creditors was a bank. Ultimately the judge found against the bankrupt but whilst he reserved his decision for some months, his mother died leaving him a small parcel of shares in the bank. After he made a decision adverse to the bankrupt, the bankrupt appealed seeking to set the decision aside because of bias arising from these circumstances. Whilst the Court of Appeal unanimously dismissed the contention, the litigation is evidence of the sensitivity in this field.

In this day and age there are many challenges to the creation of an ethical regime. Leadership is all important and that means leadership by example. If and when there is some lapse in ethical behaviour by a person in a leadership position in the community, the overall cause to establish an ethical regime can suffer a very severe detriment.

The question of adopting as a touchstone the attitude of a reasonable member of the public properly informed has its difficulties. Very recently following the death of the former Premier Sir Joh Bjelke-Petersen there was comprehensive public discussion. One

view propounded was that whatever might have been the failings of the late Premier in the ethical field, he left a legacy to be admired because of public works that he carried out. To me this is a very disappointing attitude because it suggests that unethical behaviour can be dissolved by making a decision to carry out public works. Apart from anything else, this completely ignores the fundamental fact that a person in a leadership position is the trustee of public money, and has an obligation to use it for the public good. It is far from being an act of personal munificence. If such an approach is widespread among the community, the benchmark for assessing ethical behaviour is drastically lowered.

Another challenge is to encourage the media to be more ethical and responsible. The media plays a vital role in keeping the public informed of the activities of persons in public office. Whilst politicians still fall very much towards the bottom of the scale of public respect as evidenced by public opinion polls, the media is even lower in esteem. This, too, creates a significant challenge in the battle to establish ethical behaviour.

Whilst minds may differ and there is a spectrum of views as to what is acceptable in given circumstances, holders of public office ought to be studious to avoid activities which will result in questioning of their activity. This really means a Caesar's wife approach reflecting the concept of public trust reposed in the individual. Guidelines, Codes or consensus in relation to holders of public office should be clear cut and not susceptible of a wide range of interpretation. This particularly applies to entitlements,

where my view is that these should be very carefully and exactly spelt out and not left with uncertainty or ambiguity.

Finally, let me leave you with a concept which I think can prove very helpful in areas where a decision as to proper ethical behaviour has to be made. I note as part of your conference you will be addressing and discussing hypothetical examples of difficult ethical problems. The concept that I want to leave with you is expressed as the capital of the organisation, in this case it is the capital of the Court. I think it is particularly helpful in matters where, for example, a judge retires and very shortly thereafter enters the legal profession. It can also apply in matters where you become aware of inappropriate behaviour by a judicial colleague and are left in a dilemma as to whether you should do something about reporting it. There are, of course, a very wide range of other examples.

Essentially the capital of the court is the public respect in which it is held, and must be held, properly to fulfil its function. This is built up by the contributions of its members in their day to day carrying of their duties and the examples which they set. This capital sits comfortably with the notion of public trust previously mentioned. The members of the court are the repositories of the public trust, the public ceding to them the great responsibility of making decisions that could have significant effects on the lives of those who appear before them.

This capital is not owned by any individual and is the product of exercising public duty and responding to the public trust in an ethical way. Because it is the capital of the Court it is not to be used for personal or selfish purposes and is not available to be traded or

trafficked to further one's personal interest. There is a duty not to do anything that might detract from this capital, as well as to act positively to preserve it, if you feel it is under threat to be diminished.

In short, it is priceless and is the property of the court and not yours to deal with, diminish or use for your personal motives.