

AUSTRALIA and NEW ZEALAND

# PROPERTY

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## Public attitudes towards wind farms: a Trans-Tasman comparison

Retirement village valuations:  
complications with DCF  
application

Navigating without signposts: an  
expanded approach to valuation

Known unknowns: some  
good news for valuers in times of  
uncertainty



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# API NATIONAL PRESIDENT'S REPORT



**Nick McDonald Crowley**

API National President

Many members of the Institute are considering the cause of the global financial crisis with evidence mounting that there was no single factor but myriad economic circumstances that contributed to the market collapse. It is prudent to consider whether Australia's strong standing through the crisis was good management or good luck. One thing we know is that members of the Institute need to remind themselves of their professional integrity and of the Institute's Valuation and Property Standards, even if under pressure from industry, the corporate sector and media rhetoric to behave otherwise.

The response to the crisis does not warrant an about-face on the Institute's policy and reform agenda and it highlights the need to be diligent in practice and purpose. Furthermore, the economic environment has confirmed the need to constantly monitor market activity to further entrench our association as the peak professional body providing members with competencies to help them manage adverse situations and conditions as they arise. The best way for practitioners to do this is to engage with the market and seek out and understand the most contemporary market evidence.

The Institute's National Council is to be commended for the reform programs currently being introduced – the largest single investment in the Institute's history that will, over the next two years, provide a nation-wide platform for operations, additional member services helping to promote the professional standing of members. As the Institute integrates the new Contact Management System and revises the data management platform that will host the new API website we should remind ourselves of the efforts made to date. API staff around the country have been working tirelessly to entrench the new system, and our association is indebted to them for their efforts.

The Institute is also working for its members by putting the final structures in place for the Capped Liability Scheme. In essence, the Scheme will cap the occupational liability of participating APIV Limited Members to an amount between \$2 Million and \$10 Million, depending on the Upper End Value of the property being valued, and to the extent that liability can be limited under the respective State or Territory legislation. Members will be able to register their interest in the Scheme from 1 December 2010 and can obtain further information at [www.api.org.au](http://www.api.org.au).

I continue to be in awe of the effort put in by NSW Divisional President, Robert Hecek who, in conjunction with the National Director Grant Warner, has been a prime contributor to the establishment and implementation of the Capped Liability Scheme. All Life Fellows, Fellows and Associates who hold the certification of Certified Practising Valuer, and Provisional Members with the designation of Residential Property Valuer, will be able to enjoy the benefits of the Limitation of Liability Scheme. You will need to reside in Australia and undertake the valuation of real property, to join the Scheme. The minimal/nominal cost of participating in the Scheme for each member is currently being assessed, and members will be advised as soon as a figure has been determined.

Another area where the Institute is showing forward thinking is our new 'Future Professionals Programme' (FPP). The long-term future of the Institute rests with a succession of professional property practitioners and their respective capabilities to manage through adversity such as the GFC; disasters like the Christchurch earthquake and the impact of change in areas like the Murray-Darling Basin. These circumstances place further pressure on the next generation of property professionals. In 2011, the Institute will respond to demands stemming from market change, natural disasters and industry pressures with the introduction of the FPP as a pathway for Graduates of academic excellence to better meet property professional competency. The net result will close the gap between 'student' and 'professional competency' delivering a much higher standard of property professional in a much shorter time frame. The entire industry will benefit from the FPP rollout and once

again the Institute will be recognised for implementing a high quality professional competency program for emerging property professionals.

The *Australia and New Zealand Valuation and Property Standards* and the Institute's professional standing is in demand internationally. Meetings have been held with kindred organisations in South-East Asia who are keen to work with the API to promote valuation, technology and professional standards. The Institute recently signed a Memorandum of Understanding with the Institute of Surveyors in Malaysia. API already has a Memorandum of Understanding with the China Appraisal Society (CAS), reciprocity agreements with the Hong Kong Institute of Surveyors, the Singapore Institute of Surveyors and Valuers and Royal Institute of Chartered Surveyors. A Strategic Alliance also exists with the Property Institute of New Zealand. The Institute's International Committee is currently working to establish closer relationships with Indonesia and Vietnam. In the November eNews, a notice was provided giving members and interested parties an opportunity to be part of a delegation to Vietnam in the latter half of 2011, similar to the successful delegation to China in 2008. For more information about the proposed working mission to Vietnam, contact [national@api.org.au](mailto:national@api.org.au) for information.

As this is the last issue of the Journal in 2010, I would like to thank the authors and contributors, both here and across the Tasman, who have provided articles to what I rate as a first class technical journal. Above all, to the many members who serve on API boards and committees around the country, I extend my deepest appreciation. The Institute relies on the members of the 'Association' and with their efforts we become a stronger and more resilient organisation. The tireless efforts of members who give so much of their time and expertise in guiding the Institute into the future cannot be understated.

In closing, I wish you all a safe festive season and prosperous new year.

**Nick McDonald Crowley**  
President  
Australian Property Institute

# PINZ PRESIDENT'S REPORT



**Ian Campbell**  
PINZ President

I wish to offer a warm welcome to all Property Institute members and readers of the *Australia and New Zealand Property Journal*. You will always find a variety of relevant property topics specific for the property profession in this journal and I would further encourage our New Zealand members to provide New Zealand topics to the editorial committee for inclusion in this journal. As we near the end of the current year, I would like to take this opportunity in wishing all members and readers a festive and safe holiday period.

Since our last publication, we have seen and experienced the devastating blow caused by the recent Canterbury earthquake and the impact this has had upon Cantabrians. Given the unrest and uncertainty for speculation to occur, our Canterbury/Westland branch issued a warning to property owners not to take too much notice of the speculation and comment on what may happen to the Christchurch real estate market at this time. Indeed as the rebuilding of damaged buildings and repairs now commences, the takeout is that people react in different ways in periods of uncertainty when their homes and family are affected. We know through harsh experience that earthquakes can strike at any time and place within New Zealand. History tells us that rebuilding of damaged cities eventually leads to a return to normality but memories such as the 2010 Canterbury Earthquake will be indelible for a number of New Zealanders. The establishment by EQC of their project management office and current procurement of suppliers and contractors including some of our own members has been a good start to the rebuilding programme.

I have been pleased to see that Institute-run activities have been well supported by our members during the year specifically our

regional branch events, the joint international conference in Perth, the Valuers Super Summit and celebrating more than 100 years of valuation in New Zealand. Face to face and online seminar events and sponsored social networking events have all provided good choice for our members to engage with their peers and associates across all property disciplines in a professionally consistent manner.

As I recently spoke to our Branch Chairs at their Wellington planning day, one of the benefits of our unique Property Institute was that it was always seen as a way of catering for the needs of the growing property professional, who had grown beyond his or her trained area of specialisation. Our adopted community structure which has now been in place for two years provides members the ability to learn new skills through qualified training, that is industry supported and tested. I believe that our current direction towards release of community module training in 2011 will further heighten our industry reputation, Institute integrity and members' competency. I am pleased to add that further projects and some exciting events are installed for 2011 which include revamping the marketing of our pedestrian count, release of core learning modules as mentioned earlier, and our Wellington Property Conference in May 2011 as well as cultivating initiatives with the Construction Industry Council, Property Council, NZ Institute of Primary Industry Managers, NZ Institute of Forestry, Local Authority Property Association and Energy Management Association of New Zealand.

## So what of the economic projections for 2011?

Through our own survey of members in November 2010, approximately 60% of respondents considered that market conditions within their specific sector (residential, commercial or rural) would remain unchanged for next six months. Around 58% believe that the national economy will remain unchanged with only 24% predicting the economy to improve. None of our members was asked if there was any specific impact from events like filming

of *The Hobbit*, winning the 2011 Rugby World Cup, or if there could be an early general election!

Approximately 60% of respondents expect that interest rates will remain unchanged (the OCR is currently 3.0%) and the same number expect that property demand will remain unaltered at current levels. Around 58% expect that leasing demand will remain unchanged over the next six months and around 64% expect property investor demand to remain unchanged as well. Around 56% of those surveyed believe that the supply of property for sale or lease will increase, and this ties in with a downwards trend in property values as reported by other commentators.

Our own industry employment opportunities are also an important measure. It is clear that job advertising through the Institute's *Job Mail* had seen more listed vacancies in the past. So when our members were surveyed about their own employment and retention of staff, 75% of respondents expected to see little change in their current staffing levels over the next six months with 17% of firms having already experienced an increase in staffing during 2010.

Accordingly, the feedback we gauge from our members survey indicates that the property market will not change dramatically into 2011, excepting an expected increase in supply of properties for sale or lease.

On a final note and throughout the current year and into 2011, we have made sure that the Property Institute continues to engage with its members, sponsors, the public, central government and reporting media.

One of our primary goals has been to reinforce our position as New Zealand's leading institute for property professionals which I believe we all contribute in our own way.

I appreciate your continued support and I look forward to your continued support in the New Year. Best wishes to you all.

**Ian Campbell**  
President  
Property Institute  
of New Zealand



# Resident-funded retirement village valuations: complications with the application of the DCF

*This article has been peer reviewed*

## Abstract

Retirement village assets are different from traditional residential assets due to their operation in accordance with statutory legislation. Designed for independent living, retirement villages provide either detached or semi-detached residential dwellings with car parking and small private yards with community facilities providing a shared congregational area for village activities and socialising.

In essence, the village operator provides the land and buildings to the residents who pay an amount on entry for the right of occupation. On departure from the units an agreed proportion of either the original purchase price or the sale price is paid to the outgoing resident. As ongoing levies are typically offset by ongoing operational expenses, the market value of the operator's interest in the retirement village is therefore predominantly based upon the estimated future income from deferred management fees and capital gain upon roll-over receivable by the operator in accordance with the respective residency agreements. Given the lumpiness of these payments, there is general acceptance that the most appropriate approach to valuation is through discounted cash flow (DCF) analysis.

There is however inconsistency between valuers across Australia in how they undertake their DCF analysis, leading to differences in reported values and subsequent confusion among users of valuation services. To give guidance to valuers and enhance confidence from

users of valuation services this paper investigates the five major elements of DCF methodology, namely cash flows, escalation factors, holding period, terminal value and discount rate.

## Introduction

Valuers can be called upon to provide valuations for a range of purposes and under various circumstances with respect to retirement villages. This paper outlines the methodology in the valuation of the operator's interest of resident-funded retirement villages in Australia. Typically there are three component parts to a resident-funded retirement village, namely:

- (1) The operator's interest in the existing independent living units (ILUs) and serviced apartments (SAs) which are occupied by residents under contractual arrangements, affording the operator the right to receive income from deferred management fees (DMFs) and subsequent resales/roll-overs;
- (2) The resident's interest in their respective ILU or SA subject to contractual arrangements; and
- (3) The operator's interest in any undeveloped land, which may be subsequently developed with either ILUs or SAs.

The role of the valuer and subsequent valuation methodologies which may be applied depends on the nature of the component part and typically involves a sum of the parts (1) and (3) above, such that the total value of the property may involve the separate parts being individually assessed through their

## Brett McAuliffe, FAPI

Brett McAuliffe is a lecturer in Property Economics at the Queensland University of Technology and a member of the Valuers Registration Board of Queensland. With more than 15 years' experience as a registered valuer in Queensland, Brett has been involved in the valuation of retirement villages for both private and not-for-profit entities. Contact: [b.mcauliffe@qut.edu.au](mailto:b.mcauliffe@qut.edu.au)



respective most appropriate method and then summed together.

This paper is based on the views and opinions expressed by a range of valuers through semi-structured interviews, each being appropriately qualified/registered and Certified Practising Valuer members of the Australian Property Institute, and working in or with a sound knowledge of the valuation of retirement villages. Research through informal semi-structured interviews allowed the interviewees to talk freely about the issues, actual experiences and practices regarding the valuation of resident-funded retirement villages. The interviewer was thus able to pursue particular lines of discussion regarding past and current experiences and outlooks for the future in a more exploratory manner (Saunders 2000).

The range and scope of experience of the seven interviewed valuers was diverse and provided a cross section of opinions and reflected perspectives from senior and junior practitioners within the valuation profession. More particularly, four of the interviewed valuers held senior positions (Manager/Director) within major valuation practices and each had more than 10 years of practical experience. One of the interviewees had between five and 10 years' experience and while being a qualified valuer had a role with an operator/developer as an Analyst. The sixth interviewee held a more junior role with a major valuation firm with less than five years' experience.

## Valuation Methods

Having regard to current theoretical literature and current valuation practice, the value of the operator's interests in existing ILUs and SAs (1) are typically assessed through a discounted cash flow (DCF) approach while the value of

any surplus land (3) is typically assessed through the hypothetical development feasibility or residual approach. The residual approach involves the assessment of the gross realisation of the hypothetical development, from which we then deduct all costs incurred and also an allowance for profit and risk to determine the residual land value (Whipple 2006; Reed 2007).

**... there is general acceptance that the most appropriate approach to valuation is through discounted cash flow (DCF) analysis.**

This paper is particularly focused on the DCF methodology (Keating & Brace 1994; Whipple 2006; Reed 2007), which is utilised for the existing occupied and unoccupied ILUs and SAs (1) within a mature village. The future income source for such an asset is contingent upon the future roll-over of residents and the disbursement of deferred management fees (DMF) and shares in capital gains upon resale. Given the lumpiness of these uncertain roll-overs, a cash flow methodology is considered most appropriate, which may then be checked through direct comparison on a rate per unit basis (Willison, Rich & Gaffney 2007).

The direct comparison approach, which is the primary approach for traditional residential assets such as houses and units (Whipple 2006; Reed 2007), is considered as only a secondary approach in the valuation of retirement villages due to the variation in resident occupancy

agreements within individual villages, let alone between different villages, and across different state borders. Ownership structures within retirement villages can be quite varied (Dirkis 1991), and may include:

- Freehold strata/community title
- Leasehold
- License
- Company title
- Unit trust
- Manufactured home.

Consequently the differences in ownership structure, entry contributions, calculation of entry fees, shares in capital gains, expected time until resident departure and expected re-sale prices (Dirkis 1991), let alone differences in location, village size and quality of improvements and community facilities renders the direct comparison approach a secondary approach for this class of assets.

According to the valuers that were interviewed, they may be called upon to determine the value of an individual unit or apartment (2) within a village. In these instances a valuer may rely on the direct comparison approach having regard to comparisons in terms of the village and the resident's agreements. It is essential that in assessing the value for an individual unit, the valuer takes into account the terms and conditions of the occupancy agreements for the units utilised as sales evidence in comparison to the subject unit and makes allowances for differences, most notably in the structure of the deferred management fees and sharing of capital gains. These differentials may be shown in a matrix format. It may be possible to have regard to sales within the same village on similar terms, however where outside evidence is sought, the valuer must have regard to





the characteristics and peculiarities of the villages and the terms and conditions of the individual agreements.

While determining the value of an individual unit or apartment is important to the parties (village operator and resident) involved and this determination is often required to meet re-sale timeframes under the legislation, the interviewed valuers stated that their more substantial work involves the determination of market value of the operator's interest of the entire village, having regard to the income flows from the deferred management fees and exit fees receivable under the resident agreements to occupy. Given the intricacies involved and detailed within this paper, the valuation of retirement villages in Australia is considered a specialist field and requires the valuer to have an intimate knowledge of the workings of the retirement village industry, the relevant retirement village legislation within each state/territory and the mechanics of individual occupancy agreements (Elliot, Earl & Reed 2002).

Retirement village assets differ from traditional residential assets due to their operation in accordance with statutory legislation. In Australia, each state and territory has its own Retirement Village Act and Regulations, as in Table 1.

The objectives of these Acts and regulations are to promote greater consumer protection by providing a framework for the operation of retirement villages in accordance with approved schemes. In Queensland a retirement village is defined as premises where older members of the community or retired persons reside, or are to

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***Retirement village assets differ from traditional residential assets due to their operation in accordance with statutory legislation.***

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reside, in independent living units or serviced units, under a retirement village scheme. A retirement village scheme is subsequently broadly defined as a scheme under which a person enters into a residence contract; and in consideration for paying an ingoing contribution, acquires a right to reside in a retirement village, and on payment of the relevant charge, acquires a right to receive at least one service in relation to the retirement village (Retirement Villages Act 1999).

Residents typically "purchase" their unit from the village operator, generally at a discount to the cost of similar accommodation in the open residential market. In return for this discount, the residents agree to pay to the retirement village operator a deferred management fee (DMF) when they leave the village. The DMF or exit fee may be calculated as a percentage of entry contribution that was paid or the achieved resale price and may include a sharing of any capital gain and other fees and charges (Dirkis 1991; Elliot, Earl & Reed 2002; McMullen & Day 2007).

For most purposes the assessment of value of the operator's interest will be based on the definition of market value subject to existing resident contracts/agreements. Market value is defined by the International Valuation Standards Committee and endorsed in Australia by the Australian Property Institute (2008) as "the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion".

The DMF typically ranges from 20 to 45% over 5 to 10 years (McMullen & Day 2007; Gelbert & Harris 2008). It

may be calculated on the residents' original purchase price or the amount that the resident sells their unit for upon exit. Residents may also share in capital gains proceeds from the sale of their unit. Departure fees typically comprise one of three possible structures which may be summarised as follows:

- 1 The fee is a percentage of the entry price, which accrues over time at a specified rate; together with an entitlement to all of the capital gain that may have accrued.
- 2 The fee is a percentage of the entry price, which accrues over time at a specified rate; together with a previously agreed proportionate share in the capital gain that may have accrued.
- 3 The fee is a percentage of the re-sale price when the unit is sold, leased or licensed to a subsequent new resident (which by its nature includes both a share in the entry price and a share in any capital gain).

On a day-to-day basis, residents pay for the costs of providing services to the village, namely security patrols, rates and insurance, as part of their general services charge (GSC). In Queensland, residents also contribute to a maintenance

reserve fund (MRF), which covers the maintenance, but not the replacement of village assets (Retirement Villages Act 1999). Between the GSF and the MRF, residents pay a rate that is heavily discounted to the true cost of providing village infrastructure such as a pool and community centre. The DMF therefore compensates the operator for providing these services over the years to the residents (Elliot, Earl & Reed 2002; McMullen & Day 2007).

In short, the market value of the operator's interest in the ILUs and SAs within a village is based upon the estimated future income from deferred management fees and capital gain upon roll-over. Given the lumpiness of these payments, the most appropriate approach to valuation is considered to be through DCF analysis, and noting that there are inconsistencies between valuers across Australia in how they prepare their cash flows, the balance of this paper will focus on the elements of the DCF (Willison, Rich & Gaffney 2007).

## Discounted Cash Flow Methodology

The DCF valuation methodology converts current and future cash flows to a present day equivalent or present

value over the holding period of an investment at an appropriate discount rate. Consequently there are five (5) major elements to a DCF (Whipple 2006; Reed 2007), being:

- Cash flows (both positive and negative)
- Escalation factors
- The holding period
- A terminal value, and
- The discount rate.

These elements are expanded upon as follows:

### Cash Flows

DCF estimates current and future cash flows (positive and negative) and discounts them back to a present value. This requires projections of future incomes and costs, which are influenced by many factors. The accuracy of these future projections is one of the major difficulties facing the DCF approach.

Deferred management fees (DMF), also known as exit or departure fees, comprise the payment made to an operator upon a resident terminating occupancy and vacating their unit. There is a strong correlation between the strength of the residential market and

Table 1

Australian Capital Territory	<i>Fair Trading Act 1992 (Retirement Villages Industry Code of Practice)</i>
New South Wales	<i>Retirement Villages Act 1999 and the Retirement Villages Regulation 2009</i>
Northern Territory	<i>Retirement Villages Act 1995 and the Retirement Villages Regulations</i>
Queensland	<i>Retirement Villages Act 1999 and the Retirement Villages Regulation 2000</i>
South Australia	<i>Retirement Villages Act 1987 and the Retirement Villages Regulations 2006</i>
Tasmania	<i>Retirement Villages Act 2004 and the Retirement Villages Regulations 2005</i>
Victoria	<i>Retirement Villages Act 1986 and the Retirement Villages (Contractual Arrangements) Regulations 2006 and Retirement Villages (Records and Notices) Regulations 2005</i>
Western Australia	<i>Retirement Villages Act 1992 and the Retirement Villages Regulations 1992</i>

demand for independent living units, while serviced apartments are generally an influenced purchase due to an individual's declining health. Simply put, residents of a village will fund the purchase of their unit through the sale of their former residence. Residents will typically seek to purchase their unit and retain some funds from the sale of their previous residence for themselves. Therefore, there is a slight lag in house-price movements and village price movements. The amount payable is affected by the terms and conditions of the DMF agreement entered into upon entry by the resident into the village. There are lots of different DMF contracts in the market, with variations from village to village and from state to state. In short as there are inconsistencies across the market, direct comparison between villages is difficult, thus supporting the use of a DCF framework. Typically the DMF is related to the duration of occupation by the resident (McMullen & Day 2007; Willison, Rich & Gaffney 2007).

A typical residency agreement may include 25% of the ingoing contribution accruing over the first 2 to 7 years of occupation together with 50% of the capital gains. The structure of the DMF has typically reflected the vagaries of the broader residential market, such that as the first part of this century saw strong growth in the residential property market, much in line with general economic prosperity, this translated into higher entry prices being paid for village units together with operators demanding (and receiving) more in terms of higher percentages regarding the ingoing contribution and share of capital gain (McMullen & Day 2007).

Within the cash flow calculation the valuer must have regard to the peculiarities of each unit on a line by line basis taking into account the current

resident's characteristics and subsequent assumptions about the timing of initial roll-over together with escalations in pricing of the units to calculate the respective DMF and share in capital gain.

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***Residents will typically seek to purchase their unit and retain some funds from the sale of their previous residence for themselves.***

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To determine the timing of the first roll-over, the valuer must have regard to the age and gender of the existing resident in each unit, and then have regard to the Life Tables. These tables are a statistical model prepared by the Australian Bureau of Statistics and presented separately for males and females. Life Tables are available from the Australian Bureau of Statistics and due to their size and format, have not been incorporated within the text of this document.

In undertaking a valuation, the latest tables should be utilised by the valuer. To calculate when existing residents are expected to roll over:

- The valuer must determine the current age of the existing resident;
- Then referring to the Life Tables, and having regard to the resident's gender and current age, the valuer calculates the expected number of years to that particular resident's death;
- And then adjust the number of years to death by an x factor:

Why decrease by an x factor? Not everyone leaves a retirement village because of death. They may leave the village for a variety of other reasons, including relocating to a higher care facility, or just vacating for personal reasons (Keating & Brace 1994). The x factor is typically 2 to 3 years.

This calculates the expected date for the first cash flow event or roll-over. Subsequent roll-overs are then assumed on a rolling basis in accordance with



adopted averages and escalations, typically between 8 and 12 years. Estimating roll-overs is subjective with the actual number of roll-overs varying from year to year and from village to village. Obviously the assessed value can vary dramatically due to make up and take in of residents.

Business valuers typically vary from property valuers by using a stochastic model, which randomises the subsequent roll-overs (Keating & Brace 1994).

Therefore, for each village unit's contract, within the cash flow, the valuer needs to make two calculations, namely the percentage of DMF receivable by the operator contingent on the terms of agreement, percentage recoverable and estimated length of stay, together with the capital gain between the entry price and the expected sale price at the time of roll-over. Within the cash flow the valuer must therefore be aware of the particulars of each and every resident contract to determine the correct amounts. The pricing of each individual unit should be checked against each

other and with units within other villages to maintain parity and relativity with the broader residential property market.

Along with the forecast cash inflows upon roll-overs, there are expenses or costs that are incurred over the holding period, including:

- Capital replacement fund (non-recoverable from resident in Queensland)
- Costs of sale
  - Typically 1.5 to 3%
  - May be recoverable, dependent on state and contract
- Overheads
  - Head office management costs are not recoverable from residents
- Refurbishment of unit
  - Typically recoverable dependent on state and contract
  - Eg. New paint, new carpet
  - Every 15 years need to refurbish village.

Regarding refurbishment costs, there are two approaches. The first is to incorporate the refurbishment costs and therefore step change the "price" of the ILU or SA to reflect the refurbishment or alternatively the valuer does not include the refurbishment cost and therefore does not incorporate the step change in the ILU or SA prices.

### Escalation Factors

The escalation rates are the rates at which individual cash flow elements will grow over time due to the influence of the time value of money (Whipple 2006; Reed 2007).

Within the cash flow, the "price" of each individual ILU and SA is escalated from the date of valuation so that the capital gain can be calculated on future roll-overs. Similarly the costs incurred in the refurbishment, marketing and ongoing running of the village are escalated.

Traditional cash flows for commercial and retail properties often escalate incomes at a relatively low growth rate based on



the Consumer Price Index (CPI) plus a premium. Consequently price growth for ILUs is usually in the order of 4 to 5% while price growth for SAs is slightly less in the order of 3 to 5%. The market for SAs is more limited than that for ILUs due to their narrower appeal to residents with increasing/higher care needs and typically for a shorter duration of stay.

Alternatively, there are views that residential property markets outperform CPI and as such a higher escalation rate on prices of up to 6.5% should be adopted. However, much of this escalation may be from two factors: improvement in quality of product and therefore not a true capital gain on like-for-like, and greater access to financing that may have given a one-off boost to property prices. As a result, future price increases may be more in line with CPI.

Costs are typically escalated throughout the cash flow in line with escalations in the Consumer Price Index (CPI).

There is a direct relationship between the escalation rates and overall discount rate adopted within the cash flow (Whipple 2006; Reed 2007), and as such the major problem for valuers is the identification of the:

- Growth rate drivers
- Discount rate drivers.

Typically more expensive units are more sensitive to growth rates due to the compounding effect, whilst other units remain sensitive to the discount rate.

## The Holding Period

The holding period is the length of time that the study period will cover. While the holding period for traditional investment property assets, such as office buildings and retail shopping centres, is typically in the order of 10 or 5 years, the holding period for retirement village

valuation cash flows is typically much longer to take into account the lumpy and irregular nature of the cash flows (Whipple 2006; Reed 2007).

There appears to be two distinct approaches regarding holding periods in the cash flow calculations for retirement villages. These range from a holding period in the order of 20 to 30 years with a terminal value against a holding period in the order of 50 years with no terminal value.

***The shorter the holding period the more contingent the current market value will be on the terminal value calculation.***

The shorter the holding period the more contingent the current market value will be on the terminal value calculation. Consequently given time value of money discounting over the respective holding periods, the current value outcomes under a 26-year model with terminal value is typically very similar or marginally above that for a 50-year model without terminal value.

The shorter (20 to 30 year) cash flow is typically around 26 years, which allows for 2.5 roll-overs for each unit within the cash flow assuming an average occupancy of 8 to 12 years. A further variation adopted by some valuation firms is to run a 20-year model with terminal value based on a further 20-year period. In essence this is a hybrid of the previous methods, capturing a 40-year investment horizon and a suitable number of roll-overs. If the holding period is too short then an insufficient number of roll-overs

are captured and therefore may not present an accurate portrayal of the asset's value.

## A Terminal Value

The terminal value is the cash amount in the final period representing the net proceeds of the hypothetical sale of the property asset at the end of the study period as a proxy for future income beyond the holding period (Whipple 2006; Reed 2007).

For a 26-year cash flow model, the terminal value may be based on the average roll-overs for the previous 9 years where the roll-overs are adopted on a 9-yearly basis. Valuers have opted for more conservative numbers for the roll-overs if a range of options is provided. Roll-over numbers may be affected by an industry trend that shows that average age of current residents attracts new residents of similar age.

## The Discount Rate

The discount rate is the targeted rate of return for the asset based on a pre-tax weighted average cost of capital. International Accounting Standard 36, at paragraphs 55 states that "in measuring value in use, the discount rate used should be the pre-tax rate that reflects current market assessments of the time value of money and the risks specific to the asset" and at paragraph 56 states further that "the discount rate should not reflect risks for which future cash flows have been adjusted and should equal the rate of return that investors would require if they were to choose an investment that would generate cash flows equivalent to those expected from the asset."

In accordance with International Valuation Standards, discount rates should be selected from comparable properties

or businesses in the market. In order for these properties to be comparable, the revenue, expenses, risk, inflation, real rates of return, and income projections for the properties must be similar to those of the subject property. There are business risks peculiar to the operation of retirement villages, including the uncertainty of timing of roll-overs in the cash flow, which are different to those for the holding of traditional commercial office and retail or industrial properties, and as such a softer discount rate is adopted.

In recent years, discount rates have typically ranged from 13 to 15% for an individual village, with firmer discount rates from 10 to 12% adopted in revaluations as part of a portfolio. These rates have softened out in recent times, reflecting softening economic conditions following the Global Financial Crisis of 2008, to now range from 12.5% to 13.5%.

## Conclusions

In considering the aforementioned aspects regarding each element of the DCF, it becomes apparent that retirement villages have maturity periods which impact significantly on their rate of return. Immaturity produces low returns and conversely, maturity is rewarded with higher returns. The maturity of a village can change significantly over time as residents come and go. Maturity may be assessed in terms of a series of inter-related measures including:

- The expected average length of stay of each resident;
- The rate of resident exits;
- Average age of residents as at the assessed date; and
- Average age of residents as at the date of individual entry.

Along with maturity, other important determinants on value include:

- The marketability of the units, both demographically and geographically;
- The quality of the location of the village;
- The quality of the improvements, including level of functional and economic obsolescence;
- The reputation of the village;
- The overall state of the residential market;
- Taxation issues;
- The number and type of resident contracts;
- The ability of resident contracts to provide for the recovery of operating costs and produce a return; and
- The village's maturity as reflected in its resident profiles.

Overall, the most appropriate valuation methodology to utilise in the valuation of the operator's interest in resident-funded retirement villages is considered to be the discounted cash flow approach based on either a 26-year holding period with terminal value or a 50-year holding period without terminal value. These lengths of holding period will allow a sufficient minimum number of roll-overs and balance out the lumpy and irregular nature of the cash flows to appropriately calculate market value.

While there is often reported resident dissatisfaction with the financial structuring of the DMF in residency agreements, as long as there are future financial returns receivable by the village operator, then DCF will continue to be the most appropriate valuation methodology. ■

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# Public attitudes towards proposed wind farms: a Trans-Tasman comparison

**By Professor Sandy Bond and Charmaine Watts.**

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## Abstract

The renewable energy sectors in Australian (AU) and New Zealand (NZ) have grown rapidly in recent years through government support to reduce greenhouse gases resulting from the use of non-renewable energy sources: coal, oil and gas. With this, there has been increased interest and investment in wind energy. However, a number of wind farm proposals have failed due to opposition from lobby groups. This paper outlines the results of two parallel research studies – one carried out in south-west Auckland, NZ and the other in south-west Western Australia – to investigate community attitudes towards the proposal of a wind farm development in each case study area. The results from the selected community within each country were similar, with the Australian respondents being somewhat more averse to a proposal than NZ respondents. More than two-thirds of the residents (70% NZ, 74% AU) supported a wind farm being built in their area, with 17% NZ (6% AU) neutral and 13% NZ (21% AU) against the respective wind farm. Visual unsightliness (24% NZ, 33% AU) and noise pollution (21% NZ, 31% AU) were listed as main perceived disadvantages.

## Background

The Kyoto Protocol is an international environmental treaty intended to reduce greenhouse gas concentrations in the atmosphere. National limitations range from 0% reductions for New Zealand, to 8% for the European Union and permitted increases of 8% for Australia and 10% for Iceland. As of November 2009, 187 parties had ratified the protocol, which entered into force on 16 February 2005.

## Renewable Energy in New Zealand and Australia

In NZ, the government has developed the New Zealand Energy Strategy (NZES) to respond to the challenges of climate change and provide strategic directions for energy use in New Zealand for the decades to come. The draft NZES has a vision for renewable energy: "To maximise the proportion of energy that comes from our abundant renewable energy resources."<sup>1</sup>

In September 2007, former Prime Minister Helen Clark announced a national target of 90% renewable electricity by 2025, with wind energy making up much of that increase.<sup>2</sup> By contrast, in Australia on August 20, 2009, the Federal Parliament passed legislation, the *Renewable Energy (Electricity) Amendment Bill 2009*, that set a Renewable Energy Target (RET) of 20% of Australia's electricity generation to come from renewable energy sources by 2020.

These government policies have generated a surge of interest in wind power. As of February 2010, New Zealand had an installed wind generation capacity of 497MW (4% of NZ's energy generation) on nine wind farms. In 2009, non-renewables made up 25% (coal, oil and gas) of the total energy produced in NZ and renewables accounted for 68.5%: hydro 56.7%, geothermal 6.6%, wind 5.2% and cogeneration 6.6%.<sup>3</sup>

In Australia, the total operating wind capacity at the end of 2009 was 1877MW (1.3% of AU's energy



generation).<sup>4</sup> According to the Australian Wind Energy Association, 563 wind turbines have been built Australia-wide on 42 wind farms.<sup>5</sup> In 2007-8, non-renewables made up 95% (coal 37%, oil 36% and gas 22%) of the total energy produced in AU and renewables accounted for only 5%.<sup>6</sup>

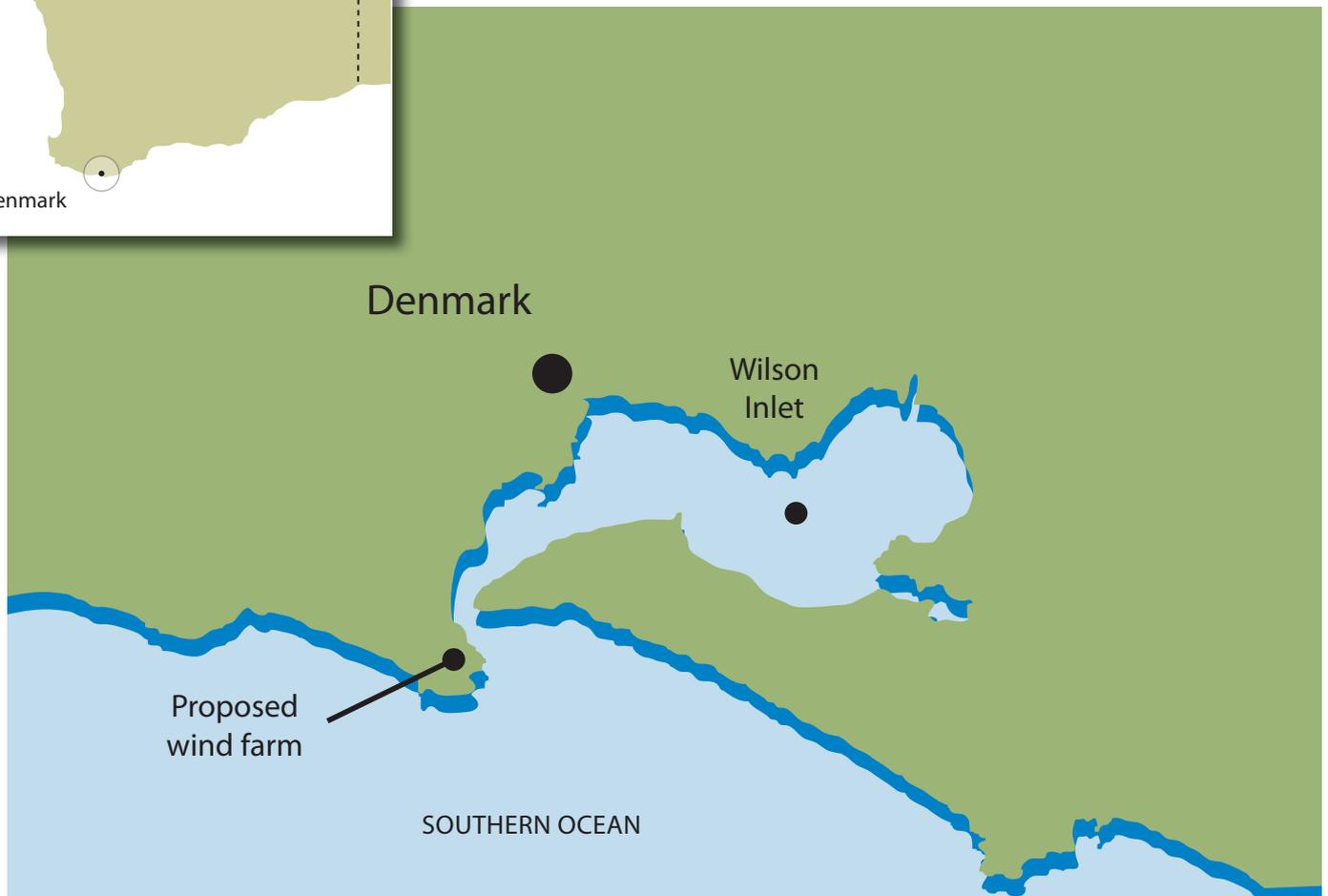
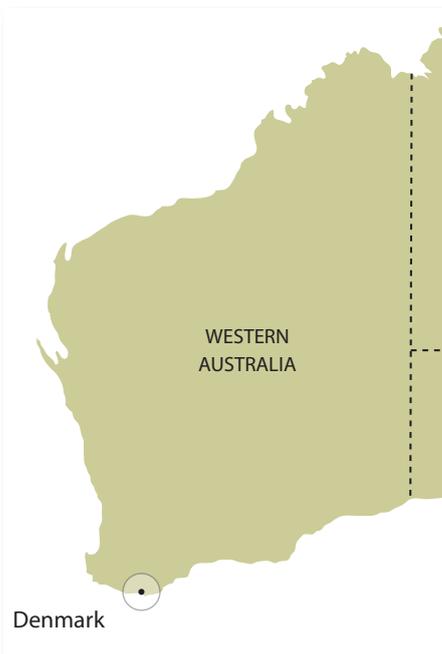
To meet renewable energy targets many more wind farms will need to be

developed. However, there is concern that a number of wind farm proposals have been refused because of objections by local community groups due to a "not in my back yard" kind of mentality.<sup>7</sup> Among the common reasons for objecting are claims that wind farms are not efficient, that they cause changes in neighbourhood aesthetics, noise, light flicker; loss of bird life, and reductions in property values.

Mendonca et al. (2009) propose a combination of solutions to meet renewable energy targets. "Long-term, stable support schemes which allow a multiplicity of actors to invest in the sector will provide a secure basis for development of the industry in a decentralised way. This can be supported by ownership restrictions which direct investment opportunities to the

communities closest to the installations themselves". Further, they suggest that a successful program will take "an innovative democracy approach". Such an approach "provides a formal process for bringing all relevant stakeholders together, to solve problems and accelerate project development", p.394.

This paper outlines the results of two separate research studies carried out in New Zealand in 2005 by Watts et al. (2005), and Western Australia in 2008 by Bond (2010), to investigate community attitudes towards a wind farm proposal. The towns investigated include Awhitu, south-west Auckland, NZ and Denmark on the south coast of WA. The results of each research study are compared to determine if the wind farm development process, particularly relating to public consultation, and community reactions



to this, are similar within each country, or if one country can learn from the experience of the other.

## Previous Research

There has been very little authoritative research on public opinion to the proposed development of wind farms in NZ and AU.

### New Zealand Studies:

Two studies have explored the public opinion of New Zealanders to wind energy and the existing Tararua wind farm (Berg 2003; Energy Efficiency Conservation Association 2004). The Omnibus Wind Survey conducted in 2004 found that wind power is the public's preferred generation option to

meet NZ's future electricity needs, with 60% of respondents expressing some level of support for building a wind farm in their local area (Energy Efficiency Conservation Association 2004). The main reason cited for favouring the development of a local wind farm was the perceived benefit for the environment. Conversely, the main reason cited for opposing such development was the perceived visual and auditory impact. Common arguments used to oppose the Tararua Wind Farm included anticipated adverse effects such as a noise, electromagnetic interference (EMI), visual intrusion and land devaluation (Berg 2003).

At a local level, Phipps (2007) studied the visual and noise effects experienced by

residents living within a notional 3km ring of wind farms in the Tararua and Ruahine ranges in NZ. Of the 1100 survey forms delivered, 614 were returned, providing a response rate of 56%. The distances of homes to the closest turbines were reported as 2-2.5km (16%); 2.5km (40%) and 3km (29%). A majority (84%) of the households reported they could see turbines from their home. Of these, 80% considered the turbines intrusive and 73% thought of them as unattractive. More than half (52%) of households located at distances of 2-2.5km and 5-9.5km could hear the turbines. A quarter of the respondents located 10km away could still hear the turbines. Wind turbine noise disturbed the sleep of 42% of respondents. Nearly a third

### Aerial Photomontages of Proposed Denmark Wind Farm



Source: Denmark Community Windfarm ( DCW )

(32%) of households felt that noise from the turbines reduced the quality of their life. Overall, the survey results show that wind farms have significant visual and noise effects upon a larger population than evidenced in the 2003 and 2004 studies reported above, and than envisaged under current visual assessment techniques and the NZ noise standards (NZS6808:1998), and at a much greater distance.

The NZ Parliamentary Commissioner for the Environment (2006) has identified noise as one of the most frequently raised concerns, both in NZ and overseas, about wind farms. Recent research suggests that this noise may be impacting negatively on human health and safety. MD Nina Pierpont (2006, 2008) has been investigating a cluster of stress-related physiological effects of *low frequency* turbine noise that she terms "wind turbine syndrome". Symptoms suffered include: sleep disturbance, headache, tinnitus, ear pressure, dizziness, nausea, visual blurring, irritability, etc. Pierpont claims that disturbing symptoms of wind turbine syndrome occur up to 1.9km from the closest turbine and in more mountainous terrain they can occur up to 3km away. She recommends a 2km buffer between turbines and homes, but a greater buffer for larger turbines and in more varied topography.

The issue of turbine noise commonly centres on low frequency and infrasound noise that are poorly measured or not included in noise standards relating to wind turbine noise. Noise levels are usually quoted in decibels (dB) and these numbers are frequency weighted. Most noise standards are weighted to the dB (A) scale. However, this frequency weighting discriminates against low frequency sounds and therefore is not an accurate indicator of the disturbing

effects of such noise. The problem is that wind turbines generate far more low frequency noise than high frequency noise where dBA is most sensitive. Importantly, humans perceive low frequency noise as louder, and more annoying, than higher frequency noises with equal pressure levels (Goldstein, 1994).

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***The problem is that wind turbines generate far more low frequency noise than high frequency noise where dBA is most sensitive. Importantly, humans perceive low frequency noise as louder, and more annoying, than higher frequency noises with equal pressure levels.***

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According to the World Health Organization (2004) sound levels during night time and late evening hours should be less than 30dBA during sleeping periods to protect children's health. For sounds that contain a strong low frequency component, typical of wind turbines, WHO says that the limits may need to be even lower than 30dBA to not put people at risk.

### **Australian Studies**

In Australia, a study by Bond (2008) that investigated the attitudes of residents in Albany, WA towards the development of

a wind farm, found that the majority of the respondents thought of a wind farm in positive terms. More than two-thirds (68%) of the respondents were either moderately or strongly in favour of the development, 8% were not concerned, and 19% did not live in Albany prior to the wind farm being built. Only 5% were either moderately or strongly opposed to the proposal. The proximity to the wind farm is an important aspect that could determine attitudes with many respondents reporting that they would not want to live "near" a wind farm (usually stated as between 1-5km). More than a third (38%) of the respondents would pay 1%-9% less for their property due to the presence of a wind farm nearby.

Other less authoritative evidence exists of public opposition to wind farms. For example, the energy company AGL withdrew an application to build 48 wind turbines at Dollar in South Gippsland, apparently on economic grounds. According to the Nationals member for Gippsland South, Peter Ryan, it was a great result for residents opposed to the project and for the council who did not support it (ABC News 2007).

### **Overseas Studies**

There have been a number of studies in the UK of public attitudes towards the construction of proposed wind farms (see for example, Impact Assessment Unit Oxford Brookes University 2003). The results of these studies generally suggest a high level of support for this technology, although the results are mixed. For example, the most frequently mentioned benefits of the Lambrigg wind farm were that it was both good for the environment and non-polluting (RBA Research 2002). Yet concern was raised about the noise and in particular the visual impact since wind turbines tended

to be located in highly valued landscapes (Braunholtz 2003; RBA Research 2002).

A United States study of a yet to be developed wind farm in the Appalachian Mountains found that western North Carolinians were favourably disposed towards the development of a wind energy industry. For those who opposed wind energy development, the overwhelming problem noted was aesthetics (O'Grady, 2002).

The Center for Community Studies at Jefferson Community College (2008) conducted a survey of the attitudes and opinions of residents living in Lewis County, New York, about issues of significance to the region. As a 320MW wind farm had been built in Lewis County in 2005, some of the questions related to opinions about the wind farm. The Maple Ridge Wind Farm is the largest wind farm in the state of New York, with 195 wind turbines. The 390 respondents to the survey were broken down to three subgroups: those that live within a mile (1.6km) of the facility (n=22); those that can

see and/or hear the turbines (n=146); and those that own land with turbines on them (n=36). Based on telephone interviews, 71% of the respondents (50% <1 mile, 77% hear/see, 76% own) felt positive about the impact of the wind farm, 19% (40% <mile, 14% hear/see, 12% own) reported it had no impact, 6% (7% <mile, 5% hear/see, 9% own) said the impact was negative, and 4% were unsure.

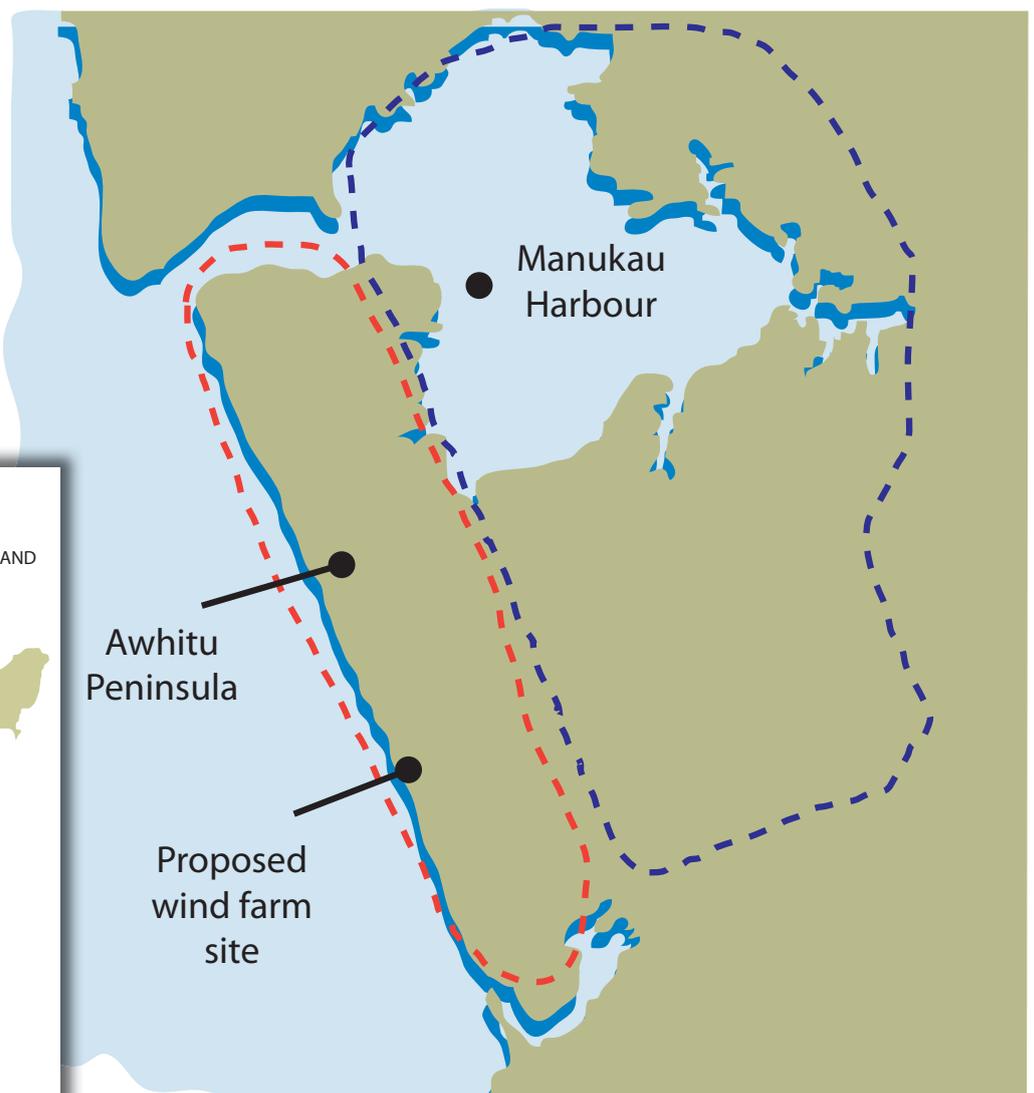
### Summary

The above brief literature review indicates mixed reactions from the community towards the siting of wind

farms. It is likely that opinions will always vary as to what constitutes a Locally Undesirable Land Use (LULU) and there is likely to be corresponding variability in the Not in My Backyard (NIMBY) response to these.

### Methodology

While the research in each country was carried out in different years (2005 and 2008) by separate researchers, they both had similar goals and objectives, and adopted the same research methodology. A case study approach was adopted in both countries to examine public opinion about the proposal for





the development of a wind farm. This involved selecting a study area within each country, administration of a postal survey to a sample of residents living in the case study areas to determine their attitudes towards the proposed wind farm, individually coding the responses and entering them into a computerised database, and analysis. The respective case studies were selected based on recent controversial wind farm proposals that were located within convenient travelling distance to the researchers for cost/time saving reasons.

### Study design

A cross-sectional survey of 500 sampled residents was undertaken in Franklin, NZ and Denmark, WA. Residents were selected using a randomised systematic approach taken from either the local telephone directory (NZ) or a list of ratepayers (AU). A covering letter describing the survey, the questionnaire, and a self-addressed prepaid envelope

were mailed to the 500 selected residents in Franklin in 2005, and Denmark in 2008. In NZ, a \$50 dollar lottery incentive was included for the return of a completed questionnaire. As the questionnaires could be returned anonymously, no formal reminder strategy was able to be used to target individual non-responders.

### NZ Survey instrument

The questionnaire contained seven groups of questions relating to wind farm attitudes and perceptions, in addition to gender and age range, over two pages. Participants were asked if they had visited a wind farm with more than one turbine and how they felt about a wind farm being built in the area. They were asked from a range of options what the perceived main advantages and disadvantages of the wind farm were. Participants were asked to comment on their feelings about if they could see and/or hear the wind turbines. Lastly, respondents were asked from a list of

options what factors had most influenced their views about the proposed Awhitu wind farm.

### WA Survey instrument

The WA questionnaire was longer than the NZ survey as it was written at a later date when property value impacts of wind turbines had become a reported concern to residents. Further, for comparison purposes, it followed the same layout as a survey adopted for a previous WA wind farm study (see Bond 2008). Questions were included about how respondents felt the proximity of the proposed wind farm would affect the price they were prepared to pay for their property. The survey contained 10 questions about respondents' attitudes towards renewable energy and more specifically to wind farms and the proposed development. Four demographic questions were included at the end.



## Statistical analyses

Frequencies and percentages were reported for all categorical variables. To accommodate small expected cell count sizes, comparisons of categorical variables between groups was made using Fisher's exact test. A significance level of P-value  $\leq 0.05$  was used to define statistical significance.

## Study Areas:

### New Zealand

The Awhitu Peninsula situated within the Franklin district, West Coast Auckland, NZ, has been identified as having significant wind energy generation potential (Energy Efficiency Conservation Association EECA 2001). Being part of the greater Auckland area, it is also considered ideally located, being proximal to New Zealand's largest city and heaviest electricity-using centre (Figure 1). A site within this area was identified

by State Owned Enterprise (SOE) Genesis Energy for the development of a wind farm (known as the Awhitu wind farm). Its proposed location was on a privately owned farm, approximately 6km west of the township of Waiuku. The proposed 19 wind turbine structures had a maximum overall height (including the rotor) of 90m from the base of the structure and a maximum hub height (excluding the rotor) of 62m from the base of the structure. The turbines were to have a nominal capacity of between 600 and 1500 kilowatts each, while the total installed capacity for the new development was expected to be within the range of 15 to 25MW.

An assessment of environmental effects from the Awhitu wind farm was submitted by Genesis Energy at the resource and subsequent environment court hearings (Genesis Energy Ltd 2004). The assessment was wide-ranging and examined the natural character; traffic, noise, archaeological aspects, radio

service, property values, birds, turbine safety, public health, and effects on animals (Genesis Energy Ltd 2004).

Individuals and groups opposing the wind farm also made submissions on these and other environmental effects which included cultural effects (tangata whenua Ngati Te Ata), bird kill, erosion, shadow flicker, traffic, radio services, decommissioning, health, noise, and emissions (Genesis Energy Ltd and Franklin District Council 2004). One key element of the opposing submissions was the claim that a significant majority of the local population opposed the construction of the wind farm (Waiuku Wind Farm Information Group 2004b). The independent commission appointed by the Franklin District Council that was hearing the case refused consent in 2004 due to unacceptable effects on the landscape and natural character values, among other things. Genesis subsequently appealed the decision.<sup>8</sup>

Interestingly, in NZ, the Resource Management Act (RMA) has been amended as part of Parliament's climate change measures (Resource Management (Energy and Climate Change) Amendment Act 2004) to aid the planning process. The Genesis Energy Awhitu wind farm was the first wind farm to secure resource consent from the Environment Court (Genesis Power Limited v Franklin District Council [2005] NZRMA 54) under the new measures.

The RMA amended s.7 to require decision makers to have particular regard to efficient use of energy, the effects of climate change, and the benefits associated with use and development of renewable sources of energy. According to Majurey (2005), this amendment together with various climate-change policies were significant in the judicial approval of the Awhitu wind farm. The Court determined that the wind farm would have significant adverse effect on the natural landscape of the coastal environment but that it was important to balance this with the national benefits. The Court concluded: "We find that the benefits of the wind farm proposal, when seen in the national context, outweigh the site-specific effects, and the effects on the local surrounding area. To grant consent would reflect the purpose of the Act as set out in Section 5." [Awhitu, paragraph 230]

While Environment Court cases are not strict legal precedents, the Awhitu case shows how the Environment Court is likely to act, having due regard to the amended RMA, in future wind farm cases.

### Western Australia

The area selected for the case study was Denmark, a southern coastal regional centre located 421 km south of Perth, the capital of Western Australia (see map in

Appendix I). Denmark was selected as it had a newly proposed wind farm that was highly controversial, as reported in the media (ABC News – Stateline WA, 2005). Denmark has a population of around 5,000 in the Denmark Urban Area. The median age is 45 years of age (compared to 36 years for the whole of WA).<sup>9</sup>

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***The Court determined that the wind farm would have significant adverse effect on the natural landscape of the coastal environment but that it was important to balance this with the national benefits.***

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The proposed Denmark wind farm would be the first of its kind in Australia, a community-scaled embedded generation project owned and operated by the Denmark community through an incorporated association, the Denmark Community Windfarm Inc. (DCW). Two 800kW wind-turbine generators would be erected at Wilson Head, south of an existing lime sand quarry, on an area within A-class Reserve 24913. Wilson Head is 10km south of the Denmark town site, and reportedly more than 3km from the nearest permanent residence

(see map in Appendix I and photos in Appendix II). The site was chosen due to its high winds and two years of data were collected from a monitoring mast to confirm the wind resource.

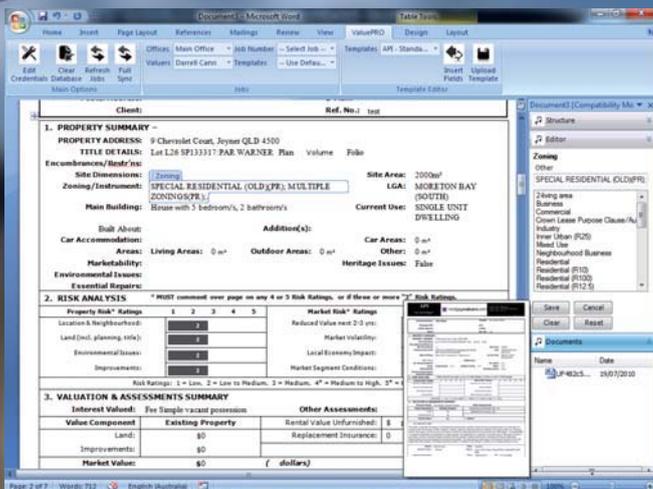
The WA state government approved rezoning of the land to public use in November 2005, despite the council's decision not to amend the town planning scheme. The project has since gained environmental approval from the WA Environmental Protection Authority and the Federal Department of Environment and Heritage (DEH). Planning, connection approvals and investment are being sought. However, in April 2009 the council voted 5-7 against the excision of the 53ha of A-class reserve land on Wilson Head. The motion was "in order to preserve the amenity and landscape values of Wilson Head". While the council, and the community (according to a 2008 Community Needs and Customer Satisfaction Survey), supported a wind farm, debate focused on the level of public support for the Wilson Head site.<sup>10</sup> The South Coast Landscape Guardians, a group established to protect the Denmark landscape, have been particularly vocal on the issue, claiming that siting the wind turbines at Wilson Head would blight pristine land.<sup>11</sup>

### Summary of Case Study Findings

Of the 500 questionnaires mailed to homeowners and tenants in the study areas, 46% (NZ) and 45% (AU) were completed and returned. This is considered to be a very high response rate for a survey of this nature, showing the strong level of interest in the topic. As some of the questions in each country's survey differed, responses to questions that were the same will be focused on and reported here for comparison

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purposes. The full set of responses to each country's survey has been reported elsewhere.

Evaluation of the responses to the questionnaire's background questions revealed that 49% (NZ) and 51% (AU) of the respondents were female. Age categories differed between the surveys. In NZ, 38% were between 40-55 years, 30% were 55-70 years, and 14% were over 70 years of age. In AU, more than half of the respondents (58%) were 60 years of age or older; 16% were between 50 and 59 years, and 18% were between 40 and 49 years. Half of the respondents were retired; 20% worked full-time and 20% worked part-time.

In NZ, only 24% had ever visited a wind farm with more than one turbine in the past compared to the majority (88%) of the AU respondents. This question was posed as it has been found that residents are often more accepting of wind farms if they have visited one previously (Wolsink, 1994; Krohn and Damborg, 1999).

Respondents were asked about their feelings about the proposal for the development of a wind farm in their area: Waiuku (NZ) and Denmark (AU). Overall, 70% of NZ and 75% of AU respondents supported a wind farm being built with nearly two-thirds (56% NZ and 64% AU) declaring strong

support. A further 17% in NZ (5.5% in AU) were neutral ("does not bother me"), and 13% in NZ (20% in AU) were either moderately or strongly opposed to the proposal. Table 1 outlines these results.

There was no statistically significance difference in the distribution of attitude between responders across gender or age groups in NZ and only for age in the AU study with more over 60 year olds being strongly in favour of the proposed wind farm than neutral or against it.

While not statistically significant, for the NZ study 78% of those who had visited a wind farm with more than one turbine in the past were in favour of the proposed farm compared to 68% of those who had never visited such a farm. The results from the AU study differed, in that 72.5% of those who had visited a wind farm were in favour of the proposed farm compared to 85% of those who had never visited such a farm, with this result being statistically significant. This outcome is at odds with previous studies that show that residents who experience wind farms generally become more positive towards them (Wolsink, 1994; Krohn and Damborg, 1999; Boffa Miskell 2003; Bond, 2008).

The reasons for their favouring the proposal were that they saw the

benefits in producing "clean", sustainable, renewable energy that was cost effective and that allowed the town to be more independent of the power grid electricity supply (reporting occasional power cuts to support this view). However, this was perception only as the power generated by the wind farms would be going into the national grid in each country.

Specific to the AU study, some respondents, while agreeing with the concept of a wind farm, had grave concerns over the proposed location: that it would destroy the A-class reserve, the pristine coastal scenery and the enjoyment of the beach, and would create an "eyesore".

Further, there were many concerns voiced in the AU study about the management of the proposed wind farm. One respondent commented that the management of the Denmark Community Wind Farm Inc. (DCW)<sup>12</sup> was contemptuous of the organisation's membership and that the organisation was run by developers and not community representatives, as the title suggests. Other respondents felt the location was chosen solely for the benefit of the developer, who apparently obtained the land for free, to the detriment of the rest of the community, and were concerned other locations with less impact had not been investigated. One respondent summarised these feelings by saying that the process did not appear to be either transparent or consultative and that it has deeply divided the community.

### NZ question

NZ respondents were asked about their feelings towards the wind farm depending on how visible and audible it is. Leventhall's 2004 report on low frequency noise from wind turbines

**Table 1 Feelings about proposal for the development of a wind farm**

Feelings	Frequency % NZ	Frequency % AU
Strongly opposed	10	15
Moderately/weakly opposed	4	6
Does not bother me	17	6
Moderately/weakly in favour	14	11
Strongly in favour	56	64

asserted that the anticipated noise from the proposed Awhitu wind farm would be negligible (Genesis Energy Ltd 2004). Thus, a specific question about noise being heard from residents' properties was not included in the scenarios determining attitudes to seeing and hearing wind turbines. However, nearly a quarter of respondents considered noise pollution to be a problem.

The majority, 62%, of Franklin residents declared that they supported a wind farm in the Waiuku area, even as an obvious feature from their property, with many, 45%, declaring strong support. A further 18% of Franklin residents were neutral (neither for nor against) about a wind farm as an obvious feature and 20% of respondents were against it.

Of those who had ever visited a wind farm with more than one turbine in the past, 88% responded in favour of the scenario of having a wind farm built that cannot be heard or seen from their property, 74% responded in favour of the scenario of having a wind farm built that cannot be heard but can be seen in the distance from their property, and 76% responded in favour of the scenario of having a wind farm built that cannot be heard but seen as an obvious feature

from their property. This compared with 68%, and 57%, respectively, of respondents who had never visited such a farm in the past; a difference that was statistically significant for the first and third scenario. Table 2, shows the overall results:

**Specific to the AU study, some respondents, while agreeing with the concept of a wind farm, had grave concerns over the proposed location...**

#### AU question

While specific questions relating to visibility and audibility were not included in the AU study, questions were asked relating to proximity (a proxy for how easily a wind farm might be seen and heard) to the proposed wind farm and how this might impact on the price they were willing to pay for their property.

Despite concerns being raised earlier by some respondents about the proposed

site, for the majority of them (80%) the proximity of the proposed wind farm was not a concern to them. The main reason put forward for this was because the wind farm is not close to where they live (2-5km away) and they cannot see it. As noted by one resident "the 2km buffer area seems adequate". There was no statistically significant difference in the distribution of attitude between responders across gender; but there was for age. More people over 60 years of age responded that the proximity of the proposed wind farm was not a concern to them, than did respondents from other age categories.

Table 3, below, summarises the ways in which the presence of a wind farm nearby would affect respondents' purchase/rental decisions. The question was asked twice based on two distance criteria: if the wind farm was within 3km of their home, and if it was between 3km to 5km of their home, to determine if distance to the wind farm influenced their decision.

For more than two-thirds (66%) of respondents, the presence of a wind farm within 3km of their home would not influence the price they would be prepared to pay, while 28% reported

**Table 2 Attitudes to a wind farm being built under different auditory and visual scenarios**

Feelings	Cannot see or hear turbines from your property (as %)	Cannot hear but can see turbines in the distance from your property (as %)	Cannot hear but can see as an obvious feature turbines from your property (as %)
Strongly opposed	8	10	12
Weakly opposed	3	3	7
Neutral	17	17	18
Weakly in favour	10	13	17
Strongly in favour	62	56	45

they would be prepared to pay less. When asked to specify this effect as a percentage of total property price, 37% said they would pay 1%-9% less for their property, 25% would be prepared to pay 10%-19% less, 12% would pay 20% or greater less. However, 17% would be prepared to pay 1%-9% more for their property if a wind farm was nearby. These results are almost identical to those reported in Bond (2008) that surveyed residents in Albany, WA towards a built wind farm with 12 turbines.

For 89% of the respondents their answer would not be any different if the wind farm was between 3km and 5km from their home (compared to being within 3km). Of the 11% of respondents who said their response would be different if the wind farm was between 3-5km

from their home, nearly two-thirds (65%) said it would not influence the price they would be prepared to pay. Generally, it appears that being further away from a wind farm would have a positive influence on the price/rent. There was no statistically significance difference in the distribution of attitude between responders across gender or age groups.

#### Advantages and concerns associated with wind farms

Respondents were asked about their feelings on a number of advantages commonly associated with wind-farms, and their turbines. The majority agreed with most of the items listed: environmental friendliness (76% in NZ and 84% in AU agreed); low cost energy source (65% in NZ and 61% in AU agreed, 20% in NZ and 25% in AU were

unsure); renewable resource (82% in NZ and 92% in AU agreed). There was only some uncertainty about employment opportunities with 39% in NZ and 31% in AU agreeing with this advantage and 27% in NZ and 43% in AU unsure. Table 4 outlines these results.

For the NZ survey, there was no statistically significance difference in the distribution of attitudes between responders across gender or age groups. In the AU survey there was a statistically significance difference in the distribution of attitude between responders across gender for the low-cost and employment opportunity advantages. More women than men agree with the low-cost advantage, but more women than men are unsure about the employment opportunities. In both countries, there was no statistically significant difference in the distribution of response between those who had visited a wind farm in the past and those who had not.

Australian respondents had the opportunity to comment further. One respondent noted that with the wind farm the town would be less likely to have power cuts, claiming the last power failure lasted for 36 hours and was indignant when Western Power maintained it was only 11 hours and 55 minutes.

Next, respondents were asked about their feelings towards a number of disadvantages (in the NZ study) or concerns (in the AU study) commonly associated with wind farms, and their turbines. Three of the concerns were the same in the NZ and AU surveys. The NZ survey also included "Requires too much space" and "Bad location" and the AU survey included "Effect on the property's value", "Radio interference" and "Sun/light flicker". The response options also varied between the two country's studies with the NZ survey providing "Yes," "No",

**Table 3** Affect on property price/rent

Price affects	Wind Farm<3km Frequency %	Wind Farm:3-5km Frequency %
Substantially more for this property	0.5	
A little more for this property	5.7	
A little less for this property	16.3	
Substantially less for this property	11.5	
It would not influence the price	66 (n=138)	65 (n=15)
<i>As % of price/rental:</i>	(n = 75)	(n = 6)
20% higher or more	1.3	17
10% to 19% more	6.7	0
1% to 9% more	17.3	17
1% to 9% less	37.3	50
10% to 19% less	25.3	17
20% or a greater reduction	12	0

Table 4 Advantages of a wind farm

Advantage:	Agree NZ (AU) %	Unsure NZ (AU) %	Disagree NZ (AU) %	No Response NZ (AU) %
Environmental friendliness	76 (84)	8 (7)	9 (6)	8 (3)
Low-cost energy source	65 (61)	20 (25)	8 (11)	7 (3)
Renewable resource	82 (92)	7 (5)	3 (1)	8 (3)
Employment opportunities	39 (31)	27 (43)	20 (22)	13 (3)

"Not Sure" options and the AU survey providing "Don't worry very much", "Worry somewhat", "Worry a lot" options and so are reported separately in Table 5, below.

The items respondents were most concerned about or felt were a disadvantage were the same in each country although the ranking between

these varied: the potential harmful impact on wildlife (in NZ 33% said yes or unsure; in AU 47% were worried somewhat to a lot), visual intrusion, and the noise intrusion. It appears that the AU respondents were far more concerned about the potential harmful impact on wildlife than NZ respondents with this ranked as their highest main concern. In

both countries there was no statistically significant difference in the distribution of response across gender, age group, or between those who had visited a wind farm in the past and those who had not, for the concerns outlined in Table 5.

Lastly, AU respondents were asked if they would favour the construction of a wind farm nearby based on different distances:



**Table 5 Concerns about Wind Farms**

Concern	Aesthetics	Noise	Impact on wildlife
<b>Australian Responses – frequency %</b>			
<i>Don't worry very much</i>	67	69	53
<i>Worry somewhat</i>	15	26	36
<b>Worry a lot</b>	<b>18</b>	<b>5</b>	<b>11</b>
<b>New Zealand Responses – frequency %</b>			
<i>No</i>	51	43	56
<i>Unsure</i>	15	26	18
<b>Yes</b>	<b>24</b>	<b>21</b>	<b>15</b>
<i>No response</i>	10	10	11

within 1km (48% in favour); between 1-3km (61%); more than 3km (86%); or a self nominated distance from their home (34% would favour if > 1km; 25% would favour if >3km; 13% would favour if >5km). Only 8% would not favour a wind farm nearby under any circumstances. The results to this question are shown in Table 6 below.

The reasons given for the responses include visual and noise pollution, and that it would depend on the size of the wind turbines, the access routes to them, topography, etc. From a positive

perspective some respondents felt that the environmental concerns outweighed any other concerns residents might have about the wind farm proposal.

### Summary

From the above results it appears that the majority (70% in NZ, 75% in AU) of respondents in both countries are generally supportive of wind farms and think of it in positive terms: provision of an environmentally friendly, low-cost renewable energy source. These results are similar to those in Bond (2008) who

**Table 6 - Would favour the construction of a wind farm nearby**

Response	Frequency %
I would not favour it	8
I would favour if: within 1km	48
I would favour if: Between 1-3km away	61
I would favour if: More than 3km away	86
I would favour if: more than (self nominated distance in km) away	<b>1km (34%); 2km (9%); 3km (25%); 5km (13%); 10km (9%); 50km (2.5%)</b>

surveyed residents' attitudes towards the Albany, WA wind farm where 12 turbines had been constructed.

More of the Australian respondents (21%) were opposed to the development of a wind farm than their NZ counterparts (14%), possibly due to the way the wind farm proponents had communicated with the community over the proposal, and the lack of transparency about the process, particularly as related to the site selection. This result seems to confirm statements by Wolsink (2000) that local opposition is often based on distrust, negative reactions to the actors (developers, authorities and energy companies) trying to build the turbines, the way the projects are planned and managed, and not to the wind turbines themselves. Fortunately, similar inadequacies in public engagement have been acknowledged by developers and federal and state authorities in Australia, with the latter bodies establishing national guidelines for developer engagement with local communities.

Sub-group analysis revealed no statistically significant or important differences in the pattern of support for the wind farm across sex or age groups in the NZ study and only for age in the AU study with more over 60 year olds being strongly in favour of the proposed wind farm, than neutral or against it. The sub-group analyses are important in determining whether the wind farm support is general or sex/age specific.

In the NZ study, more than half (62%) of the Franklin residents reported that they supported a wind farm in the Waiuku area even if it was an obvious feature from their properties. While a specific question about noise being heard from residents' properties was not included in the scenarios determining attitudes to seeing and hearing wind turbines, nearly

a quarter of respondents considered noise pollution to be a perceived problem. As mentioned earlier, it is the low frequency noise of wind turbines that is poorly measured and the dBA scale of noise measurement may not be a good indicator of the annoying affects of such noise. Fortunately, on the basis of responses to this survey, Genesis Energy subsequently proposed a number of mitigation measures. These include screening measures, such as the planting of trees, and moving of turbines to less visible and topologically sensitive (rather than linear or grid-like) positions. Genesis Energy's application was subsequently declined by the commission in September 2004. However, in October 2005 Genesis Energy was granted approval to develop an 18MW Wind Farm through the recourse of the Environment Court. Currently, Genesis Energy considers the project is uneconomic, and has placed this project on hold until market conditions improve.

This study is of the attitudes of residents to the proposal for the development of a wind farm in Awhitu, NZ in 2005 and Denmark, WA in 2008, respectively. However, it must be acknowledged that the latter wind farm had only two turbines proposed and it is likely that the proposal for a much larger wind farm would attract a stronger reaction. This is evidenced in part by the new social movement groups in Australia calling themselves "landscape (or coastal) guardians" that have arisen to contest the siting of wind farms.

It must be recognised that attitudes may vary over time and can depend on the level of experience residents have of wind farms. Studies show that those residents who experience wind farms generally become more positive towards them (Wolsink, 1994; Krohn and



Damborg, 1999; Bond, 2008). This finding was echoed in the NZ study, with those respondents who had visited a wind farm with more than one turbine in the past being more receptive to the construction of the Awhitu wind farm than their counterparts who had never visited such a farm.

To determine if the results are consistent across time and space and for different sized wind farms, many similar studies of varying sized wind farms in different geographic locations would need to be conducted over time. This has been one of the advantages in comparing the NZ results to those from AU (and within AU, Bond, 2008). Despite each case study being carried out in a different country in different years, the results are generally consistent.

## Conclusions

Briefly stated, the results from each study indicate that the majority of the respondents are supportive of the proposal to develop a wind farm. However, it appears that proximity to the wind farm is an important aspect that could determine attitudes. Future research in both countries will examine the proximity aspects in more detail, particularly in regard to concerns residents have about noise. Further, it will be interesting to examine the changes in attitudes of residents should the proposed wind farms be constructed. Bond (2008) found that in Albany, a town which is only 53km from Denmark, public attitudes towards the Albany wind farm improved after it was built compared to when the project was first announced.

One particular concern highlighted in the AU study was, despite a high level of acceptance generally for a wind farm, there was a lack of acceptance of the proposed wind farm due to

concerns about the selected site for the development and the way in which the developers had managed the project. Eltham et al. (2008) have documented, through the study of public opinions of a local population living near a wind farm, how suspicion of the developers' motives by the public, distrust of the developers and disbelief in the planning system may

***It must be recognised that attitudes may vary over time and can depend on the level of experience residents have of wind farms. Studies show that those residents who experience wind farms generally become more positive towards them ...***

impede the success of wind farm projects. The results of the AU study have shown a similar outcome and serve to highlight the importance of providing clear and honest information about the project to help create trust between the developers, local authority and the community. As summarised by Boffa Miskell (2003), public acceptance of wind energy increases with the level of information provided and with public involvement and consultation. ■

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Note: <sup>1</sup> Auswind is now The Clean Energy Council: an amalgamation of Auswind and the Australian Business Council for Sustainable Energy (BCSE).

# Ethics and the valuer's fiduciary duty to adequately inform the client

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## Introduction

Registered valuers are governed by the Valuation Act 1948. The valuers' profession, represented by the Property Institute of New Zealand ("PINZ"), incorporating the New Zealand Institute of Valuers ("NZIV"), and other bodies, has existed for more than 100 years. One of the Institute's objectives is to encourage ethical conduct. The statutory Valuers Registration Board ("VRB") also has jurisdiction over improper, unethical or incompetent conduct, as defined in the NZIV Code of Ethics and "best practice".

Changes in valuation practice in recent years has raised a number of ethical questions. They include the relationship between valuer and client, the duty to adequately inform the client, and compliance with practice standards. In the course of this article I hope to address some of these, using hypothetical examples which I was asked to respond to, with an emphasis on the vexed question of the duty to adequately inform the client.

## The valuers' profession

The 1979 British Royal Commission on legal services thought that there were five main features of a profession:

- (1) A governing body (or bodies) [that] represents a profession and has powers of control and discipline over its members;
- (2) [Mastery of] a specialised field of knowledge. This requires not only the period of education and training ... but also practical experience and continuing study of developments in theory and practice;
- (3) Admission ... is dependent upon a period of theoretical and practical training in the course of which it is necessary to pass examinations and tests of competence;
- (4) [A] measure of self regulation so that it may require its members to observe higher standards than could be successfully imposed from without;
- (5) A professional person's first and particular responsibility is to the client. The client's case should receive from the adviser the same level of care and attention as the client would himself exert if he had the knowledge and the means.<sup>1</sup>

Sociological studies of professions have traditionally focused on listing those activities which are accepted as professions in an attempt to differentiate a profession from non-profession. An alternative approach holds that the ability to obtain and retain professional status is closely related to concrete occupational strategies and to wider social forces and arrangements of power. Such an approach leads to a consideration of the social meaning of occupational tasks (perhaps an easier task with the lawyer or doctor than the architect), the resources behind the emergence and the continuation of professionalism, and the social consequences of professionalism.<sup>2</sup>

Sociologists sought to demonstrate that governing bodies were unrepresentative and ineffective regulators; professions lacked the expertise they claimed; admission criteria



had little relevance to the actual work of the professions; ethical rules were motivated by economic self-interest and failed to ensure competence; and professionals repeatedly betrayed clients.<sup>3</sup> Producers of a service who succeed in constructing a marketable commodity only become an occupation. To become a profession they must seek social exclusivity. The consumer must acknowledge the value of the producers' services, and must be convinced that they cannot produce the services themselves.<sup>4</sup>

Structural functionalists argue that this is not a conscious, self-interested strategy, but is simply the means by which society ensures that consumers receive quality services. Quality is maintained through controls on entry.<sup>5</sup> To promote competition the free-market advocates would reduce the controls on entry into professions, ignoring the fact that this is a means of maintaining standards in the public interest. If it were indeed true that professional status is for the benefit of the professional, then one would require strong evidence of some countervailing public benefit to justify any monopoly.<sup>6</sup>

The valuers' profession, as a profession, must adhere to high ethical and quality standards. In part this is based on its nature as a profession, and the legal and ethical requirements which this imposes.

## The role of ethics

The valuers' profession is not, of course, unique. The Lawyers and Conveyancers Act 2006 (NZ) introduced a new regulatory and disciplinary system. Part 7 of the Act (ss.120-272) comprises a significant proportion of the new, very lengthy and complex, statutory provisions for the legal profession. The New Zealand Law Society is now the sole compulsory membership association of lawyers (excepting the very small class of

conveyancers), and is required to establish a complaints service.

The new arrangements are based on centralised self-regulation, but moderated by the requirement for lay participation. They are unusual in that they effectively have the one agency which has investigative, prosecutorial and disciplinary functions. The Lawyers Standards Committees investigate complaints, attempt to resolve disputes, and prosecute offenders. They also have limited powers to punish, and their

***To promote competition the free-market advocates would reduce the controls on entry into professions, ignoring the fact that this is a means of maintaining standards in the public interest.***

decisions are subject to appeal to the Legal Complaints Review Officer, a non-lawyer. The New Zealand Lawyers and Conveyancers Disciplinary Tribunal deals only with the more serious offences.

Although these Committees are part of the New Zealand Law Society's complaints service – the old District Disciplinary Tribunals have been abolished – it is anticipated that the new committees will be based in the districts. Whereas there was a distinction between the investigative and prosecutorial role of the District Law Society's officers and the disciplinary role of the District Disciplinary Tribunals, in the new system these roles have effectively been combined. This is a departure from the approach adopted in most other jurisdictions reviewed, and its likely effectiveness is unknown. Because the district law societies – apart

from Auckland – have disappeared, local committees are associated with branches of the New Zealand Law Society.

The Real Estate Agents Act 2008 introduced a new complaints system, which provides transparent and fair processes for all parties involved in a complaint. All agents must have procedures for handling complaints. Using those procedures may be the quickest way to resolve your concerns. If you are unable to sort things out this way you can complain to the Real Estate Agents Authority under the Real Estate Agents Act 2008. Other existing consumer protections, such as those provided by the Fair Trading Act 1986 and the Consumer Guarantees Act 1993, also continue to be available to consumers.

A profession will tend to be concerned with personal confidence of the client in the technical competence of practitioners, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole.<sup>7</sup>

Because standards cover conduct and competence, both technically and ethically, control must be exercised over both entry into the profession and conduct within it. It follows that by membership practitioners may be subject to sanctions for acts or omissions which do not violate the criminal or civil law.<sup>8</sup> Only statutory regulation can ensure that the disciplinary sanctions are effective.

Controls over the conduct of members of the valuers' profession include personal remedies in tort, contract or equity; the criminal law; an educational standard for entry; procedural and substantive requirements for admission. Some of these controls belong to the wider law, but some are specific and reflect the fact that members of the profession voluntarily submit to higher standards of

conduct than those required by ordinary citizens, and thereby render themselves liable for professional misconduct in addition to any penalty which the common or statute law may impose.<sup>9</sup>

## Fiduciary duty

Registered valuers are accountable to the VRB, PINZ and NZIV. Valuers, because of their professional role, owe a fiduciary duty to their clients.<sup>10</sup> While the precise implications of this may be unclear, the general law imposes certain obligations,

and the codes of ethics and practice standards of the profession provide others.<sup>11</sup>

## Duty to inform clients

Perhaps central to the duty of valuers is the duty of inform clients. Related to this is the question of who precisely is the client, and what are the obligations with respect to the content of the valuation report. I will use a series of examples to illustrate some of the points of tension, and then attempt to draw these together.

## Example 2

Where a valuation company provides rating value advice to a Local Authority do they have a conflict of interest if they accept instructions from a rating value objector to undertake a valuation report for the purposes of a rating value objection?

### Response:

The PINZ Rules of Conduct, rule 5.0, states that a valuer "shall not accept instructions where there may be, or may reasonably be considered to be a conflict of interest". Receiving instructions in such a situation would create a conflict of interest because they would be potentially utilising information gathered for one client for the advantage of another.

## Example 3

A valuation company is approached by a longstanding client to undertake a market valuation of a commercial property for mortgage purposes. The client agrees to pay the fee. Instructions are initially given by that 'client'. A bank then sends 'instructions' (purported instructions) for the valuer to provide the market value report directly to the bank and not provide the report to the paying client who initially instructed the valuer.

### Response:

It is not ethical for the valuer to fail to send the report to the client. This is interference in the contractual arrangement between client and valuer, unless it could be argued that there is an implied or express condition of the contract that the report is to go to the bank only – which is unlikely. The client is not the bank, and the latter has no right to issue instructions to the valuers. Equally, the valuers ought not follow such instructions unless it is clear that this is what the client wishes.

## Example 1

A valuation company employed a senior valuer who was understood to have a good reputation. The valuation company director became aware that some work completed by the valuer was apparently not up to standard. The valuer was immediately dismissed and went without dispute.

The valuation company then advised their professional indemnity insurer that there would be potential claims. The valuation company, which has a good reputation and longstanding clients, wished to mitigate any damage or loss to the clients by immediately withdrawing the relevant valuation reports to prevent reliance on the reports (proposing a full refund). It is possible that reliance on the documentation had not yet occurred and the valuation company wished to immediately advise the clients to prevent loss to the client and third party who would reasonably be expected to rely on the report, such as a specified financier.

The insurance company's lawyers advised the valuation company not to advise or contact the clients under any circumstances. This prevented mitigation of any loss or damage arising from the reports or reliance on them. The situation was clearly explained by the valuation company to the insurer and their solicitors. There was grave concern at the valuation company, despite the full appreciation of preserving the reputation of the company by not disclosing any defects. It was perceived that the ethical and appropriate thing to do would be to advise the client immediately to prevent any loss.

### Response:

A negligent valuer such as this (and vicariously the valuation company) is exposed to legal liability, including negligence.<sup>12</sup> Foreseeable reliance by people in close legal proximity, including banks, creates potential liability for negligent misstatement. Whether or not an action or inaction is negligent is determined by the courts (though, since s.10 of the Valuers Act 1948 requires the profession itself to promote ethical standards, the code of ethics could be influential in guiding a court). The solicitor for the insurance company has a conflict of interest, in that they are the insurance company's advisers, and cannot be seen to be neutral.

## Example 4

There appears to be significant confusion in the valuation profession about who the client is. Members of the public phone, email or otherwise contact the valuation offices with a view to obtaining valuation and property consulting advice. These people pay the fee. The reports are then extended to various organisations usually in the form of a letter and/or valuation report with the letter headed to the organisation to which the report, advice and liability are extended with an additional statement (usually below 'Re') stating the client name.

### Response:

The client is the client who engages the valuer. Any third party who might foreseeably rely on the valuation report is covered by the law of negligent misstatement. A letter of engagement could easily clarify that the person who initially instructs the valuer – and pays them – is the client.

## Example 5

Multi-disciplinary practices exist in the professional world. There are many known examples of these, particularly with accounting and law firms. Recently and for that matter traditionally, there have been valuation companies that provide both "independent" valuation advice but also are involved in the sale of real estate.

### Response:

The sale of real estate and the provision of valuation reports are two distinct functions which can easily be in conflict. It might in some situations be theoretically possible to adopt "Chinese walls", where there is a clear and complete separation between the operational units responsible for the two functions. In practice, however, it would probably be necessary to disclose the actual or potential conflict of interest, and possibly withdraw from one or other activity.

## Example 6

A valuer provides a standard "market value" report for mortgage security purposes to Mr Joe Bloggs who instructs the valuer and pays the fee. Further to his instructions, the valuer extends the report to a bank. A year later, the bank forecloses on the property and proceeds with a mortgagee sale. The bank contacts the valuer and requests an updated valuation for the purposes of market value assessment and estimated sale price at mortgagee sale.

### Response:

In this case, the private person who engaged the valuer was clearly the client, and the bank a third party. Bloggs may legitimately ask for an updated report which is not to go to the bank; however, if the bank itself asks for an update, this is actually a new contractual arrangement, and not an "update". To use the information collected for the original client would be a breach of the valuer's duty to that client.

## Example 7

Rating valuations are provided for statutory purposes in accordance with legislation, regulations and the rating rules issued by the Valuer General. Rating valuations are not provided for mortgage security purposes. Do local authorities (or their subcontractors who undertake valuation assessments) bear any liability where banks or the public rely on such rating valuations? Do banks who arrange a mortgage security based on rating valuation have a duty to their clients (the mortgagor) to clarify whether rating valuations are an appropriate method of assessing market value for mortgage security purposes? If subcontractors who provide rating value assessments to local authorities guarantee or extend these values to mortgagees (or the mortgagors for that matter) do they undertake a liability for the reliability of such information for such a purpose? Do they breach their obligations to the local authority in doing so?

### Response:

The use of valuation reports for purposes other than that for which they were created could be unethical, and expose parties to liability for negligent misstatement, or for negligence. Local authorities who produce valuation reports may be liable in tort to any other parties where there is foreseeable reliance upon them. This could include banks, though it could be countered that banks ought to know that reliance on rating valuations is not a sufficient safeguard. Banks relying on such valuations could potentially be themselves liable to their clients, if such reliance is held by a court to be in breach of a duty of care.

## Example 8

Practice Standards require certain things in a valuation report. However, there is an exception rule which provides that a valuer may not fulfill all the aspects of the report, as set out by the Practice Standards and Guidance Notes, where the valuer discloses that the report does not fulfill those requirements and an explanation is given as to why.

The reasons for this can be that the bank approaches a valuer to value a property for mortgagee sale, but no access is available to the valuer and the bank's instructions are to assess the value of the property with or without access. The valuer then proceeds with a "street side valuation" to give the best information to the bank based on the limited access available to that valuer:

### Response:

In New Zealand, the client is normally a layperson. Partial reports, which do not meet the requirements of the Practice Standards and Guidance Notes, present a particular risk for them. Whether it is unethical for a valuer to provide a valuation of this sort will depend on several factors, perhaps the most important of which is the extent of the disclosure to the client. The valuer who does not fully inform the client of the limitations of the valuation report could be liable for negligent misstatement, or for a breach of the Consumer Guarantees Act. A bank would not be liable for the accuracy etc of a report which they paid for on behalf of a client. It is inappropriate for a bank to advise a vulnerable client to use a substandard report, rendering them potentially liable in negligence.

## Example 9

The valuer provides a market value for mortgage security purposes to a married couple and accepts the instructions on the basis that the client is 'Mr & Mrs Brown' and the payment is received from Mr & Mrs Brown. Two years later Mrs Brown contacts the valuation company to provide an update valuation for matrimonial/relationship settlement purposes.

### Response:

In this case the original client is Mr and Mrs Brown jointly. As partners in the legal sense they have joint and several liability, and are jointly and severally parties to the original contract. Mrs Brown is a new client, and the pre-existing duty to the original clients remains, creating a conflict of interest.

## Example 10

In Australia, banks pay valuers. Valuers vie for the few major clients. In New Zealand the members of the public pay valuers. Valuers compete for a diverse market of clients and arguably retain greater autonomy. If banks in New Zealand paid valuers to value property and the bank's client (a prospective purchaser) did not receive funding from that bank due to the prospective purchaser's income, could the valuer accept instructions from the prospective purchaser to value the property, or would the valuer have a conflict of interest due to the remaining duty to the bank? Does the bank have the right to stop or not consent to the valuer working on that property for another bank (to prevent losing market share)?

### Response:

The valuer would receive instructions from the bank, as this would be the client. They could receive instructions from the prospective property purchaser (cf from the bank now), but it is likely that this would not be accepted; the purchaser does not have the standing of the bank. Once the valuer has accepted the bank as his or her client a duty is owed to that client. Working for another client on that property would create a conflict of interest.

## Example 11

An unregistered graduate valuer drives all over a region valuing real property. The graduate emails the reports to a NZ registered valuer in another city, or perhaps even overseas. The registered valuer never inspects the properties, or the sales. Please address the ethics and legality involved with regard to the duty to the client.

### Response:

A registered valuer is responsible both ethically and legally (for instance under the Consumer Guarantees Act) to complete the valuation report him or herself. Completion of the research by an unregistered valuer, under supervision, may be acceptable, but not a report wholly made by an unregistered valuer.

## Example 12

Practice standards require that a mortgage recommendation is provided for mortgage security

reports (where valuers provide valuation reports extended to a bank which is advice relied on related to the process of lending funds and taking security over property). Some financiers are “instructing” valuers not to provide mortgage recommendations.

Traditionally, the valuers would provide a mortgage recommendation of no more than 50% for vacant sites and two-thirds of the market value (excluding fixed chattels) for improved properties. With adjustments, as appropriate, for each specific property (eg: high land value in relation to very low improvement value).

Is it unethical for a Registered Valuer to ignore the Practice Standard requirements at the request of the mortgagee without adequately explaining these issues to the valuer’s client, the mortgagor?

### Response:

The valuer should only omit the mortgage recommendation, subject to the client’s prior consent, rather than acting on the instructions directly from the bank. This is because the norm would be to include the mortgage recommendation.

Banks instructing valuers to not provide mortgage recommendations are interfering with the duty of the valuer to the client. Subject to the client’s prior consent, the valuer, in such a case, should indicate in the report that they have not provided a mortgage recommendation at the request of a third party (the bank), and that the report was not in compliance with the PINZ Practice Standards. While the bank knows the risks involved in this practice, the client may not. It would be unethical, and in breach of their duty to the client, to fail to adequately inform them.

## Example 13

Considering The Valuers Act 1948 s.9(1) are Rules 149 and 150 of the NZIV Rules ultra vires? Ultra vires is the doctrine in the law of corporations that holds that if a corporation enters into a contract that is beyond the scope of its corporate powers, the contract is illegal. Could they be used, or are they of no effect?

### Response:

Section 9 of the Valuers Act establishes the NZIV. The Rules of the NZIV are passed by members and approved by the Minister under the Act, and have statutory authority. However, Rules 149 and 150 concern the possibility of the winding up of the NZIV. Since one of the purposes of the Act (as stated in the long title), is the establishment of the New Zealand Institute of Valuers, it might be assumed that the NZIV remains in existence unless and until abolished by further statutory reform. The NZIV is not an incorporated society, and the provisions of Rules 149 and 150 indeed would appear to be ultra vires. The Rules of the Institute (s.16) are meant to cover matters concerned with carrying out the objects of the Institute, and this appears to not include winding it up.

## Notes

<sup>1</sup> (1979) vol 1 at para 28, 30.

<sup>2</sup> Klegon, “The Sociology of the Professions: an emerging perspective” (1978) 5 *Sociology of Work and Occupation* 259.

<sup>3</sup> Abel, *The Legal Profession in England and Wales* (1988) 7.

<sup>4</sup> *Ibid.*, 10.

<sup>5</sup> *Ibid.*, 12.

<sup>6</sup> McKay, “Professions at risk” [1993] NZLJ 104.

<sup>7</sup> *Royal Commission of Inquiry into Civil Rights* (1968-71) (McRuer Report) Ontario No 1 Vol 3 at para 1161.

<sup>8</sup> Flaus, “Discipline within the New Zealand Legal Profession” (1973) 6 VUWLR 337 at 338.

## Conclusion

There are a number of serious ethical issues facing the valuer’s profession. It behoves the professional bodies, and individual valuers to tackle these head on. The major ones are the identity of the “client”, and the contractual, tortious and ethical obligations to them. The second – related – issue, is the role of the bank as “instructor”. Thirdly, is the vexed question of the use of valuation reports which are not compliant with the valuers’ code of ethics and practice standards.

Non-compliant reports aren’t inherently unethical in themselves, but failure to sufficiently highlight the degree of non-compliance, and any other limitations in the reports, would be. It would also render the valuer potentially liable in contract or tort, and under consumer legislation. All or almost all of these difficulties can be avoided or minimised by use of full disclosure and clear letters of engagement.

Since there is no such creature as a registered report, all reports by registered valuers ought to comply with the relevant requirements. Failure to do so must be signalled clearly to the client, and anyone who might reasonably be expected to rely on the report. ■

<sup>9</sup> Abeysuriya, “The Legal Profession” in “Selected extracts from papers given at the [LAWASIA 1993 Colombo] conference” [1993] NZLJ 414.

<sup>10</sup> See M. Conaglen, “The Nature and Function of Fiduciary Loyalty” (2005) 121 *Law Quarterly Review* 452-80; E.J. Weirib, “The Fiduciary Obligation” (1975) 25(1) *University of Toronto Law Journal* 1-22.

<sup>11</sup> See also James Edelman, “When do fiduciary duties arise?” (2010) 126 *Law Quarterly Review* 302-327; *Woolfson v Gibbons* [2002] All ER(D) 69.

<sup>12</sup> A duty ultimately derived from *Hedley Byrne v Heller & Partners* [1964] AC 465. See also *Yianni v Edwin Evans & Sons* [1982] 2QB 438 [1981]; 3 All ER 592 (noted 1982) 1 BCB 31; (see also report in N.Z.V. Vol 25, No. 2, June 1982, p100).

# ANZVG II – Valuation of self storage facilities

## I Introduction

### I.1 Purpose

The purpose of this Guidance Note is to set out matters to be addressed in the valuation of operating self storage facilities. The items addressed in these notes are in addition to those required by ANZVGN2 Valuations for Mortgage and Loan Security Purposes and IVGN12 Valuation of Specialised Trading Properties.

### I.2 Status of Guidance Notes

Guidance Notes are intended to embody recognised 'good practice' and therefore may (although this should not be assumed) provide some professional support if properly applied. While they are not mandatory, it is likely that they will serve as a comparative measure of the level of performance of a Member. They are an integral part of the Valuation and Property Standards Manual.

### I.3 Scope of this Guidance Note

This Guidance Note applies to Members involved in the preparation of valuations relating to self storage facilities. It should be used in conjunction with other guidance notes and practice standards which are either over-arching or directly applicable to the issues involved.

### I.4 International Valuation Standards

This Guidance Note recognises the International Valuation Standards prepared by the International Valuation Standards Council. This Guidance Note is also intended to be consistent with the concepts and definitions contained in those Standards, however, there may be departures from IVSC Standards to reflect Australian and New Zealand law and practice.

## 2 General Explanation of Self Storage Operations

Self storage operations involve the licensing of storage areas to private and business users for the storage of goods. Storage users may select from a range of storage unit sizes provided within the property.

Self Storage Operators typically apply a standard storage licence agreement and apply a monthly storage fee. Storage fees vary depending on the size and location of the storage unit occupied. Because the licence agreement typically operates on a month to month basis the operator may review the storage licence fee at any time. The frequency and amount of storage fee increases will depend on the management strategy of the operator; the level of competition and storage fees applied in competing facilities.

It is a fundamental element of operation of a self storage facility that the operator does not take care, custody or control of the goods stored. In a limited number of cases operators receive and hold goods on behalf of customers. This requires a specific, modified storage agreement.

It should be noted that the storage industry generally compares pricing levels for individual units on a dollars per month basis.

In addition to direct storage fees, self storage facilities may also derive revenue from late payment charges, cleaning charges when storage units are vacated, sale of storage related merchandise, and sale of insurance for customer goods in storage.



### 3 Instructions and Basis of Valuation

#### 3.1 The Role of the Valuer

The Valuer needs to demonstrate in a report an understanding of the operation of the subject property, the operator's management arrangements, the self storage market place, surrounding competition and any specialised features of the facility.

It is important that the Valuer obtains sufficient detail in relation to the current storage unit configuration, storage unit occupancy, current revenues, operating expenses and arrears status of occupied storage units. It is incumbent upon the party instructing the Valuer to ensure that the Valuer has access to records and information from which the above detail may be extracted.

#### 3.2 Going Concern

The valuation should clearly state that it has been undertaken as a 'going concern' self storage facility on a 'walk in walk out' basis inclusive of all plant, equipment, furniture, fittings and merchandise stock as appropriate.

Going concern valuations are based on the net income associated with the operation of the whole of the self storage activities on the property.

#### 3.3 Facilities Subject to Lease to an Operator

Some self storage facilities are subject to leasehold interests. Valuation of a self storage facility subject to a long term leasehold interest of land and buildings is not a going concern valuation. Valuation of self storage facilities subject to leasehold interests should reflect the net cash flow associated with the lease and the specific terms of the lease.

#### 3.4 Accepting an Instruction

Prior to accepting an instruction, a valuer must be confident of having the necessary expertise and sufficient information to undertake the valuation. For example, if the valuer does not have complete or appropriate access to comparable sales and trading data for the subject self storage facility, then the valuation instruction should be declined, or undertaken in conjunction with a valuer who has the expertise and access to such information.

It is important that the valuer should, as a term of their retainer, ensure the client has an obligation to provide access to records and information concerning the site (as set out in Clause 3.1). It is important that the client and the valuer agree that the valuation cannot be completed until such information is provided.

### 4 Operational Detail

Operational arrangement may vary from facility to facility and there are variations in management and operation arrangements in various regions. Accordingly the valuation should identify and describe the operation arrangements applied in the facility being valued. This would include a description of the following items

- The form of storage agreement utilised,
- Storage unit fee payment arrangements,
- Late payment fee policies,
- Insurance of customers' stored goods,
- Arrangement for the display and sale of merchandise,



- Office operating hours and
- Access hours for existing customers.

## 5 Building Improvements

### 5.1 Building Construction and Services

The valuer should consider the design characteristics and form of construction of the property, including specialised features that may impact upon the ability to attract self storage customers, viability of operation, and marketability.

The construction, design and general condition of improvements need to be considered in the context of their specialised use, with the following being examples of relevant factors:

- The form of construction and materials used including consideration of the buildings' ability to provide adequate ventilation, insulation against temperature extremes and protection against water penetration;
- The size and mix of storage units, accessibility of storage units including vehicular access, corridor layout and

width and lift or hoist systems where multi-level storage is utilised,

- Signage,
- Size, location and appearance of reception and merchandise display areas,
- Onsite caretakers or managers accommodation,
- Customer parking and docking arrangements,
- Access systems including gate access controls and arrangement for after hours access and
- General site security and unit security including perimeter access control, unit alarms and video monitoring.

### 5.2 Repair and Condition

The valuation should comment on the state of repair of the improvements of the property, including any outstanding works to be completed and any modification or maintenance work required. Any item that may affect the continuing efficient operation of the self storage facility should be identified.

An annual repair and maintenance expense allowance is a normal item of operating expense and the valuation should include a provision for repair and maintenance as part of normal operating expenses. However it may also be necessary to apply an initial capital expense amount in valuation calculations where building defects present an immediate impediment to continued efficient and competitive operation of a self storage facility.

## 6 Valuation Calculation

### 6.1 Valuation Methodology

Capitalisation of net operating income is the most commonly applied method in valuation of self storage facilities. Discounted Cash Flow (DCF) analysis is

also a very effective and complementary methodology, particularly for substantial self storage facilities. The net operating income should be calculated before depreciation, amortisation, interest, tax and capital expenditure deductions. Such calculations being on a GST exclusive basis.

Experience suggests that the market initially places greater weight on capitalisation (yield) calculations in negotiation of transaction prices. However, informed purchasers and vendors are clearly aware of the variations in net income levels that occur with variations in occupancy. This and other variables are often best displayed in DCF analysis.

The results of both methodologies should be applied in the valuation of larger self storage facilities particularly where occupancy levels may not have reached a full, mature level. Because of the static nature of capitalisation calculations this methodology develops complexities and anomalies when applied to facilities operating at a less than mature occupancy level.

Calculations should demonstrate a transparent connection between actual calculations and current performance levels of the facility. If calculations apply revenue or expense details that vary from actual current amounts there should be a clear explanation and rationale provided for the variations.

An extensive range of operating expenses typically applies in the good management of operating self storage facilities. It is necessary to ensure that complete and realistic expenses are applied in the valuation calculations.

Calculations should display all critical assumptions and inputs, including the capitalisation rate applied. In DCF analysis



there is a need to provide a disclosure of other valuation elements including escalation rates, discount rate applied to future revenues and value calculations applied at the end of the assumed investment period.

## 6.2 Revenue and Trading Performance

The Valuer should clearly establish the current, actual revenue of the facility at the date of valuation. This should be supported by disclosure of elements supporting the actual revenue. This will involve:

- Identification and description of the total net rentable storage area available.
- A clear disclosure of the units and unit areas that are occupied and accruing storage fees.
- Detail of the current actual storage fee rates achieved and accrued (excluding incentives or other distorting factors) for occupied storage areas.
- Details of other income amounts including such items as late fees, sale of goods in custody insurance, merchandise sales or other areas of incidental revenue.
- Analyse and make provision for customer delinquency and delinquency write-offs.
- A month by month history of occupancy level and associated accrued storage fees over time. A 12 month history is generally sufficient to identify any correlation between occupancy and revenue trends.
- Where available, up to a 3 year trading history is generally sufficient to assist in identifying any correlation between occupancy and revenue trends. If there is less than a 3 year trading

history, then a complete trading history will be required.

- The Valuer should also examine the unit configuration, characteristics and features of the occupied space compared with unoccupied space and where significant variations exist make reasonable adjustment in projected revenues and occupancy to account for the differences.

***Prior to accepting an instruction, a valuer must be confident of having the necessary expertise and sufficient information to undertake the valuation.***

Accrued and potential storage fee revenue is typically equated to a rate per square metre of occupied space per annum (rate per square metre per month X 12) for analysis and comparison purposes. Analysis of variations in the achieved storage fee rate per square metre will illustrate pricing performance over time. It should also be noted that storage fee revenue rates may be influenced by additions or modifications to the number of storage units or the mix of storage unit sizes.

Where a valuation applies a revenue or occupancy level that differs from the current level being achieved, this should be clearly stated. In these circumstances the Valuer should also state the basis upon which variation in revenue or occupancy will occur including the period over which the Valuer considers these variations will occur.

## 6.3 Operating Expenses / Outgoings

The valuation should establish the operating expenses applied in the calculations.

Detail of full year operating expenses associated with the normal operation of the facility should be included in the valuation. This should be provided on an itemised basis and include, but not be limited to, advertising costs, site management wages, insurance costs, rates and taxes, bank charges, power costs, telephone charges, merchandise purchases and maintenance costs.

An amount for head management fees should be included in valuation calculations. This amount is in addition to the direct site operating expenses. While this amount is not always incurred as a direct site expense, a management fee would be incurred if the facility were to be purchased and operated on a true investment basis.

The Valuer should critically review operating costs provided, and where it is evident that costs are out of line with industry standard management practices or where significant items have been omitted, the Valuer should make appropriate adjustments to bring costs in-line with industry standards. These adjustments should be clearly disclosed and explained in the valuation report.

## 6.4 Existing Licence and Management Agreements

It is not uncommon for facilities to operate under management or general branding agreement. The valuation should provide detail of these agreements where applicable including detail of fees and charges applicable under such arrangements. The valuation should



clearly state if the assessment is subject to continuation of the Licence or Management Agreement.

## 6.5 Facility Operator and Customer Agreement

The Valuer should also review the standard terms of the agreement between the facility operator and customer to satisfy themselves that the terms of such agreement are consistent with industry standards and in particular whether the agreement contains clauses which provide that the operator has the appropriate rights to deal with goods left by the customer and that the agreement does not expose the operator to risks that may impact upon running the business.

## 6.6 Surplus Land / Additional Capacity

It is often the case that self storage facilities have not fully utilised the whole of the site or the whole of the building within which they operate. It is not unreasonable to attribute a value to undeveloped areas within a self storage facility which are not currently income producing or at full income potential. However the value attributed to these areas should be realistically assessed and clearly described in the valuation. Application of revenues based on hypothetical potential does not typically provide a reliable assessment of the current market value. Values based on immediately achievable use are more reliable.

## 7 Competition

The performance of a self storage facility is impacted by the level of competition from other self storage facilities. The Valuer should be conscious of current and proposed competition within the customer catchment area of the self storage facility being valued and where

possible discuss the performance of the competing self storage facilities.

Customer catchment areas may vary and are influenced by the position and number of other self storage facilities in the area, transport corridors, natural barriers such as waterways and the demographics and population density of immediately surrounding suburbs.

## 8 Sales Evidence

### 8.1 Sales Analysis

It is not always possible to obtain sufficient information to fully analyse every sale. However, the Valuer still needs an appropriate level of sales that have been adequately analysed in order to arrive at an opinion of value.

It is not uncommon for self storage facilities to be combined with other uses such as more traditional industrial premises or vacant land. Sales analysis and examination of property yields should identify these varying property uses and make specific adjustments to reflect the component elements.

The sale of 'going concern' self storage facilities typically involves the concurrent and interdependent sale of real property and a sale of a business. Accordingly reliance upon a reported property transfer amount that may be shown in general property data base material can be misleading as it is often only the property component of the transfer that is recorded. In analysis of sale of going concern transactions, it is essential for the Valuer to determine the total consideration paid including both property and business transfer amounts.

### 8.2 Initial Yield vs. Equivalent Yield

The simplest yield analysis is the calculation of the passing net income (gross revenue less operating expenses)

as a percentage of the Purchase Price. This is referred to as the Initial or Passing Yield.

It is however, quite common for self storage facilities to be purchased at occupancy levels that are below a mature occupancy level. This will result in the initial yield being at a relatively low level. In practice, purchasers may pay amounts reflecting the expectation that occupancy levels will increase and there will be a corresponding increase in storage fee revenues and net income. The yield calculated on the basis of expected increased occupancies and associated net income is referred to as an Equivalent Yield(I). In effect, this is the rate that the Valuer should compare to the adopted capitalisation rate.

## 9 General Issues

### 9.1 Leasehold Tenure

In cases of self storage facilities held upon leasehold title, the impact of the ground rent on returns/incomes should be fully considered and reflected in the valuation calculations.

### 9.2 GST Caution

The Valuer should consider the manner in which similar properties are bought and sold from a GST perspective and adopt the most appropriate treatment of GST accordingly. Properties transacted on a 'going concern' basis may be exempt from GST.

### 9.3 Disclaimer

The Valuer should consider whether the valuation report should contain a qualification concerning the storage of hazardous or illegal goods on the premises and any implications upon value.

## 10 Effective Date

This Guidance Note is effective from 1 January 2011. ■

## Navigating without signposts: an expanded approach to valuation

Articles published in the Real Time section aim to generate debate within the property professions. The views expressed are those of the author. Additional contributions to the debate (articles, Letters to the Editor etc) are welcome.

*Traditional property investment approaches to valuation have not passed the tests set by changing markets and the profession needs to adapt the way it approaches the investment valuation equation, Peter Power argues.*

I have written this paper in response to my observations of real estate valuation professional practice in a market that has changed course over the past three-year period. The paper reflects on my opportunity to review many real estate valuation reports prepared for investment properties and how the change in market course over the past three years has presented specific challenges to valuers. In many cases, the profession has responded to these challenges with good measure, prudence and reason accompanied by growing sophistication in the modelling of cash flows. But, in many instances, valuers have found difficulty supporting valuations since one by-product of changing market conditions has been the dearth of sales evidence, in particular for CBD commercial and high-value retail shopping centres.

Market exuberance, behaviours and consequent outcomes drive change and are revealed by tangible indicators reflecting the change. Often though, it is only gut feel or sentiment that tells us the course has already changed before the empirical evidence arrives.

It therefore becomes problematic when sentiment is strong but the tangible evidence we are used to observing, the transaction, isn't there.

This has represented the real estate valuer's dilemma in recent years and highlighted a technical shortcoming in some valuation advice over the past three years.

The transaction allows the valuer to anchor an analytical process or precedent that in turn reflects the market's sentiment.

### **Peter Power**

Peter Power AAPI is Corporate Value Advisory – Director at PricewaterhouseCoopers. He has more than 25 years' experience in property and tangible asset, investment and business valuation, lease administration, consulting and project management with a focus on retail, commercial, industrial, manufacturing, hospitality, residential, retirement and leisure property.

How well equipped is the profession to respond to the change of course that manifests itself in the absence of its traditional signposts?

Valuers have found it difficult to articulate a clear position on investment value in the absence of transactions. Traditionally, most real estate valuers are not equipped to analyse beyond simple investment notions that allow the extraction of a multiple, capitalisation rate or discount rate from a transaction.<sup>1</sup>

Traditionally, the valuer's preferred approach is a capitalisation or multiples based approach, often easily referenced to a transaction and widely understood.



In the absence of transactions in many markets and the growing emergence and sophistication of cash flow models, the discounted cash flow (DCF) approach has, by necessity, grown in preference.

Unfortunately, a trend to poorly or loosely constructed arguments in support of discount rates applied by valuers highlights a professional knowledge gap, often the valuer relies to a large degree on sentiment without objective and reliable measurement proxies to fill the gap left by few sales. Given discount rates can be deconstructed and the component parts understood, a valuer would find firmer ground on which to construct the valuation argument if the discount rate could be constructed from first principles.

Such an approach is applicable as a primary method to discount rate formulation or as a means to cross check or test a valuation outcome.

The more nebulous notion of a margin above a risk-free rate, often based on experience and judgment, is now compared to construction of a cost of capital by component parts and from first principles.

This approach is not a new methodology, it is frequently applied to enterprise valuations, but is not part of mainstream property valuation practice. This paper does not purport to replace traditional methodologies with a cost of capital approach but it does seek to promote development of complementary methodologies, reliably applicable when others cannot or in support of a traditional approach, e.g. capitalisation.

## Constructing the discount rate

This paper touches advanced corporate finance and valuation theory lightly,

but there are many texts on real estate investment analyses and general corporate finance theory.<sup>2</sup>

A discount rate applied to real estate investment cash flows, simply put, is a required rate of return representing the margin above a risk-free rate of return.

**Unfortunately, a trend to poorly or loosely constructed arguments in support of discount rates applied by valuers highlights a professional knowledge gap, often the valuer relies to a large degree on sentiment without objective and reliable measurement proxies ...**

This notion, often described in valuation reports, tells a reader something but it doesn't tell the full story and the frustration to a reader is understandable if this is the total explanation of a discount rate provided. The valuer has two sources for this measure, firstly the analysed internal rates of return extracted from transactions and secondly the compilation of a discount rate from first principles.

From my observations, most real estate valuers practising in investment valuation are not able to construct either a discount rate or an argument for a discount rate from first principles, often the approach is little more than notions of sentiment based upon movement from the last known point of reference, the last sale.

Ogier et al describe capital as:

*"the financial resources or funds that businesses, individual, or governments need in order to pursue a business enterprise or implement an investment project."*<sup>3</sup>

There are typically two forms of capital, debt and equity, and it is the cost of these weighted to the optimal contribution of each, that helps determine the weighted average cost of capital (WACC). This is a simplified analysis, but already, the cost of capital or discount rate has been deconstructed into two parts, each capable of further measure or reference.

This approach is based upon longstanding principles applied for other asset classes (tangible and intangible), for single and portfolios of assets, developed and studied for much of the 20th century.<sup>4</sup>

Information sources such as Bloomberg and Capital IQ provide real time and historical analysis of equity market performance and individual listed stock performance including market capitalisation, debt structure and beta observations.

Although not explicitly stated by valuers, WACC implicitly forms the basis of the discount rate a real estate valuer uses. The formula is represented as follows.

$$WACC = \frac{[K_e * E / (D + E)] + [K_d * (1 - T_c) * D / (D + E)]}{1}$$

The key inputs are defined as follows:

- $K_e$  = the cost of equity
- $E$  = the market value of equity
- $K_d$  = the cost of debt
- $T_c$  = the marginal effective tax rate
- $D$  = the market value of debt
- $E$  = the market value of equity.

## Debt

Facilities available to market participants wishing to raise debt provide ready



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proxies for the cost of debt. Debt markets have become sophisticated, but in its simplest form, a normalised borrowing rate referenced to the risk grading of a likely buyer and reflective of normal flows and availability of capital can be used as a proxy for the cost of debt.

Banks, as the typical sources of debt providing scale and volume across markets, are able to competitively price debt which is also relative to its cost of raising capital, e.g. deposit base. Other proxies for debt include rated corporate bonds.

## Equity

Equity is typically more expensive than debt. Equity returns are paid after debt; hence equity holders are rewarded for the higher risk.

The Capital Asset Pricing Model (CAPM), first published by Sharpe in the early 1960s<sup>5</sup> was developed to price the return for an asset to be included as part of an already diversified portfolio. While CAPM might not strictly be compatible with a single asset requirement, many single assets are part of larger portfolios or alternatively possess attributes that are compatible with asset portfolios. Further, larger assets are often considered only by existing or aspiring portfolio owners.

The CAPM model states that:

$$K_e = R_f + \beta_e * (EMRP)$$

where:

$K_e$  = expected (or required) return on equity for investment

$R_f$  = risk free rate

$\beta_e$  = equity beta for investment

$EMRP$  = the equity market risk premium which is the expected return on a broad portfolio of stocks in the market less the risk free rate

The return to equity is framed by a risk free rate, typically a government bond, and an equity market risk premium (EMRP) reflecting the average long-term premium achieved from investing in the equities market as a whole.

The relativity adjustment to the EMRP is the beta factor reflecting specific risk of the investment relative to an overall market wide risk or average of all market returns.

## ***Banks, as the typical sources of debt providing scale and volume across markets, are able to competitively price debt ...***

Beta itself is a variance measure for a series of price observations for a listed stock relative to observation of the market as a whole. It is a daily measure of the volatility, or systematic risk, of a security or a portfolio in comparison to the market as a whole or its aggregated returns and is obtained from sources including Bloomberg, AGSM and Capital IQ.

Again, this is a simplified demonstration, but if the risk free rate is identifiable and the overall equity market return is identifiable, then beta is the only remaining component for measurement.

## Capital Structure

The weighting or proportions of debt and equity (gearing) determines the final cost of capital. The adopted weighting reflects market observations. Importantly, this weighting provides a number of insights into the discount rate itself and is particularly illustrative when considering real estate investment returns and volatility.

For example, as debt is typically cheaper than, and repaid before equity, optimal gearing ensures appropriate returns are available to service the higher cost of equity.

Longer term debt facilities capable of refinancing within reasonable parameters, again at the correct gearing, coupled with secure cash flows also support the notion often argued by owners that real estate investments can have lower volatility, albeit volatility is not entirely reflected in discount rate.

### **What are some of the issues in formulating a WACC for a single investment property?**

*EMRP is a market-wide premium for liquid tradable securities; however a single property by its nature is illiquid. In a similar vein, Beta is drawn from listed markets and the specific risk characteristics of a standalone property may not be suitably reflected.*

Reasonably, the merit of EMRP might be debated as a proxy for a property risk premium for CAPM given the inherent illiquidity of property.

Prior to the current market change of course, listed markets accounted for about 70% of the core property investment market (excluding unlisted, debt and related instruments) or more than \$137 billion.<sup>6</sup> In turn this accounted for about 10% of the value of the ASX.

Listed markets include specialist holders, e.g. office and retail, and diversified either in class or development lifecycle, e.g. greenfield, construction, ownership, management. Consequently, any listed market analysis can be segmented to reflect the nature of the asset class and its composition of property and consequent risk and return profile.

Beta reflects a portfolio rather than a single property – apart from one example, Carindale Property Trust. Listed trusts comprise diversified portfolios and often diversification is represented not only across a range of industries but properties at various stages of development maturity. All valuers face judgment in preparing a valuation, but rather than judgment applied to the entire premium to the risk-free rate, judgment is applied in conjunction with empirical measurement at the component levels.

In addition, risks specific to a property should reflect in the cash flows for that property. It is only risks that are not reflected in cash flows and systematic of the market that reflect in the discount rate. One element often debated as part of discount rate is tenant quality. An alternate approach is an allowance reflecting the probability of default and the cost to remedy might be included as part of the cash flow rather than reflected in notional discount rate adjustment.

**WACC is a post-tax measure, property valuations are conducted using pre-tax cash flows.**

The observations of beta are made from a market that reflects both the impost and the benefit provided by tax. Similarly, the cost of debt is impacted by the tax shield afforded. Tax is paid after deducting depreciating charges and depreciation is

added back to calculate free cash flow. Depreciation is not considered as part of the traditional pre-tax property valuation model, however its impact on after tax cash flows is in a real estate investment is material and measurable. Property managers have detailed depreciation schedule reporting building and building plant lives and allowances that can be well utilised by valuers. A more substantive approach, therefore, might be to consider use of post tax cash flows.

### **... risks specific to a property should reflect in the cash flows for that property.**

A valuation, completed using a post-tax WACC and post-tax cash flows (including terminal value), can be substituted into a pre-tax cash flow model and back-solved to calculate the pre-tax discount rate. This provides a further “sense test” to the calculation showing the pre tax rate of return usually observed by the valuer:

#### **How do I calculate the terminal yield, also given the absence of transactions?**

Many property valuation models include the default notion that the terminal yield adopted as part of the DCF model is higher than the capitalisation rate that might be applied as part of the capitalisation approach, often 25 or 50 basis points higher. This is sometimes rationalised on the basis that the building will be older or less appealing.

Given the capital expenditure profile adopted as part of the cash flow should support the property’s capacity to continue to attract the rent that is

forecast, it seems internally inconsistent that rental growth is predicted, capital expenditure is programmed but the terminal yield is higher than what would be applied if a capitalisation approach was adopted.

Further, there seems less rigor applied to the construct of capital expenditure profiles, but equally the capacity to map capital expenditure over a 10-year horizon is problematic. One solution is using a 5 or 7 year DCF model, depending on lease expiry profile and capital expenditure planning.

The notion of long-term growth for investment property is affected by prevailing lease provisions, supply and demand. On the basis that a terminal yield must capture long-term growth, then simple application of the Gordon Growth formula<sup>7</sup> to capture a fixed long-term growth assumption is appropriate.

The Gordon Growth formula for terminal value calculation is represented as:

$$tv = i/(k-g)$$

Where

tv = terminal value

i = income

k = required rate of return  
or discount rate

g = long term growth

Income is post-tax income for the year following the last cash flow, k is the post tax discount rate and g is inflation. The argument is that in perpetuity rates of growth are represented by the long-term inflation forecast or target band represented by government or monetary authorities, e.g. RBA. This allows analytical focus on capital expenditure profile and provides internal consistency between cash flow, discount rate and terminal yield.

## Historical perspective of WACC movement

This paper describes a point in time approach to calculation of a discount rate (WACC) where transaction evidence is not available to deduce either a capitalisation rate or discount rate. Market conditions have been problematic over the past three years and typified by reduced market rentals in some instances and higher levels of lease incentives combining to provide a weight of opinion that yields or capitalisation rates have increased.

Applying the cost of capital approach over the period 2007 to 2009 provides some perspective for the likely pattern of discount rates. To facilitate this analysis, the following assumptions are made:

- Risk free rate – quarterly observations of 10-year government bond rate; bond rate adjusted to reflect inflation anomaly – see Figure 1.
- Equity market risk premium – empirical studies reflecting historical equity market returns – 6% constant
- Asset beta - based on quarterly observations of equity beta from three

listed office funds – Commonwealth Office Property Fund, ING Office Fund, Macquarie Office Trust (pre Charter Hall), de-levered using the fund's existing capital structure (debt to equity) to create individual asset beta observations. In this case the median asset beta is adopted and re-levered to provide the equity beta using an optimum capital structure for application to the WACC calculation. The adoption of an asset beta might be the median or a specific fund's observation, this is the domain for the Valuer to apply judgment based upon

Table I - Asset Beta Observations

Beta analysis												
Asset beta (unlevered) (3)												
Comparable listed company name	31-Dec 2009	30-Sep 2009	30-Jun 2009	31-Mar 2009	31-Dec 2008	30-Sep 2008	30-Jun 2008	31-Mar 2008	31-Dec 2007	30-Sep 2007	30-Jun 2007	31-Mar 2007
<i>Broad set of comparable listed companies</i>												
Commonwealth Property Office Fund	0.42	0.40	0.37	0.39	0.40	0.38	0.47	0.44	0.37	0.40	0.37	0.34
ING Office Fund	0.84	0.83	0.82	0.80	0.54	0.47	0.61	0.56	0.41	0.38	0.37	0.39
Macquarie Office Trust Ltd.	1.16	1.16	1.11	1.04	0.92	0.77	0.76	0.67	0.49	0.44	0.41	0.39
Mean	0.63	0.61	0.60	0.60	0.47	0.42	0.54	0.50	0.39	0.39	0.37	0.37
Median	0.84	0.83	0.82	0.80	0.54	0.47	0.61	0.56	0.41	0.40	0.37	0.39
Low	0.42	0.40	0.37	0.39	0.40	0.38	0.47	0.44	0.37	0.38	0.37	0.34
High	1.16	1.16	1.11	1.04	0.92	0.77	0.76	0.67	0.49	0.44	0.41	0.39

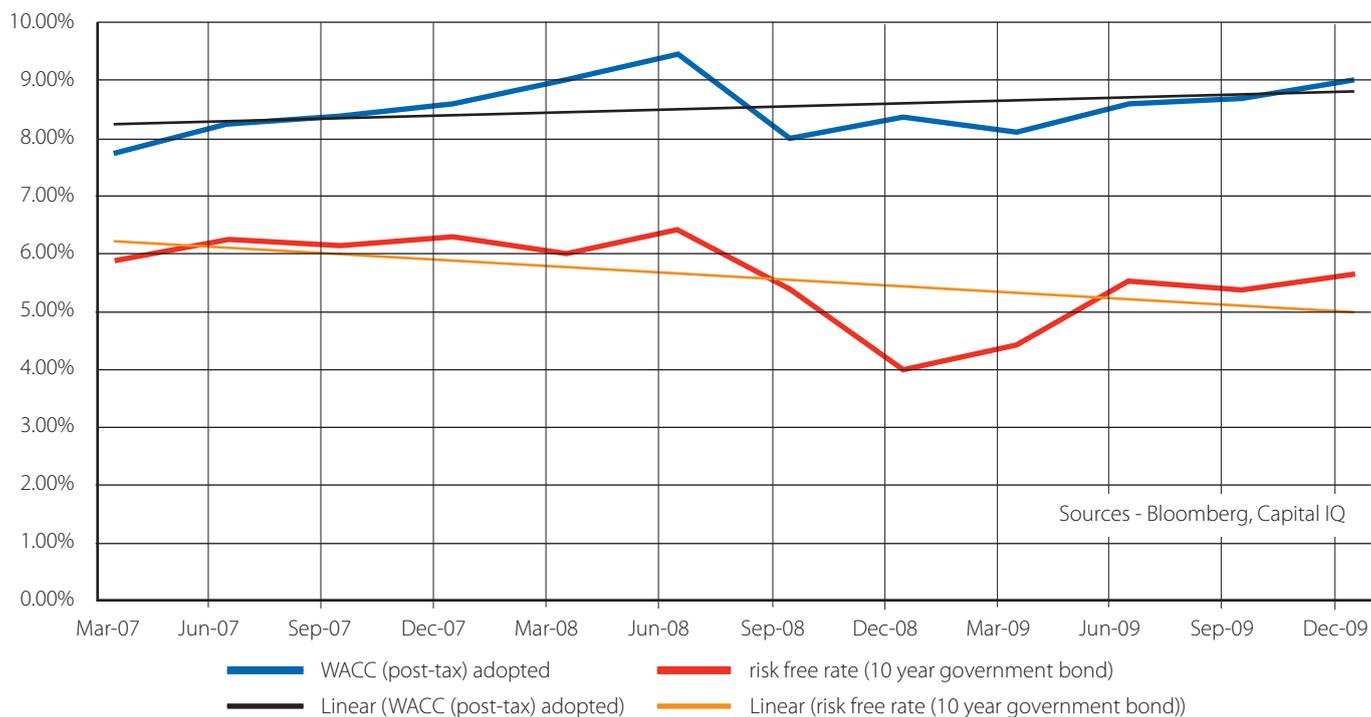
### Notes:

(1) As obtained from Bloomberg. Based on five year monthly regression and includes a Bayesian Adjustment (to account for statistical error). In instances where less than 50 observed datapoints, we have relied on a three year weekly regression.

(2) Calculated based on information obtained from Bloomberg and CapitalIQ.

(3) Calculated using Harris Pringle Formula, assuming a debt beta of Nil.

Figure 1 - Quarterly WACC and Bond Rate Observations



asset type or fund composition – see Table 1.

- Optimum capital structure – assumed capital structure of 30% debt to value held constant
- Cost of debt – risk free rate plus average periodic spread of BBB Corporate bonds.

The following table shows quarterly pre-tax WACC movement over this period.

Observations like the above based upon listed markets and other market observations of debt and gearing need to be considered in the context of the following occurrences.

Debt markets – The period during late 2008 and early 2009 was characterised by a global shortage or rationing of capital reflecting difficulty for borrowers securing funds for acquisition or if refinancing was due.

Discount to NTA – During this period listed prices traded at substantial discount to net assets. In part due to the lag in book values (represented by independent

valuations) compared to the daily traded price of equities, the discount might also be explained by short-term perspectives taken by investors reflecting difficulties of the market at that time, e.g. debt availability and gearing. The market prices equities daily and was pricing impact of valuation movement ahead of balance sheet asset reporting, perhaps extending beyond the real level of change. It may also explain the lift in WACC above the trend line and a fall below after June and September 2008. This highlights the paradigm between a listed equity traded daily for assets less liquid as a whole and typically held for the long term.

### Bond rates and inflation

Between June and December 2008, the bond rate fell from 6.5% to 4.3% (see above) as did interest rates through proactive central monetary policy. Simplistically, using the WACC formula and all other inputs equal, this suggests a lower WACC, although counteracting this decline, to some extent, is higher cost

of debt represented by increased credit spreads. The decline is also complicated in the assessment of terminal value (Gordon Growth model) as long-term inflation assumptions deducted from a discount rate using a lower risk-free rate would give rise to lower terminal yield and higher terminal value.

While risk-free rates fell, the inflation component within the nominal bond rate was at the very low end of, and below, the RBA's target range of 2-3%. Combined with cash-flow forecasts of inflation or better, an inconsistency between the risk-free rate used in estimating discount rate and the way perpetuity cash flows are defined in the terminal value calculation arose.

Two approaches can be applied to overcome this anomaly:

- decreasing the long-term growth assumption in the cash flows; or
- adding a "company specific adjustment" to the estimate of discount rate to adjust for the inconsistency.

Table 2 - WACC Calculation

WACC Variable	Assumption	Explanation
<b>30/06/2009</b>	<b>Mid</b>	
Risk Free Rate (Rf)	5.02%	10 year bond rate - average of nominated observation period%
Asset Beta (Ba)	0.49	Asset Beta selected based on analysis of comparable data
Debt/Equity Ratio (D/E)	42.9%	
Target Gearing (D/(D+E))	30.0%	D/(D+E)
Equity Beta (Be)	0.70	Be = Ba x (1 + D/E)
Equity Market Risk Premium (EMRP)	6.00%	Based on various studies and internal PwC research.
Cost of Equity (Ke)	9.22%	Cost of Equity from the CAPM formula = Ke = Rf + (Be x EMRP)
Alpha Factor	0.0%	
Cost of Equity (Ke) with Small Stock Premium (STP)	9.22%	Cost of Equity from the CAPM formula = Ke = Rf + (Be x EMRP) + STP
Debt Margin	3.35%	Assessed
Pre Tax Cost of Debt	8.37%	
Tax Shield	30.0%	
Post Tax Cost of Debt (Kd)	5.86%	Cost of Debt = Kd = (Rf + Debt Margin) x (1 - Tax Shield)
Post Tax WACC	<b>8.21%</b>	WACC Formulae = Ke x (1 - gearing) + (Kd x gearing)

Given cash flow application is largely determined by lease adjustments which are known and, over the long term, might be considered consistent with inflation, adding a company specific premium ensures the discount rate remains internally consistent with growth forecasts.

The results above show an increased WACC when bond rates have decreased. For December 2008 and March 2009 quarters, a specific inflation adjustment is made to return the bond rate closer to a band implying inflation in the upper end of the 2-3% band. The increase in WACC is not uniform and still decreases in late 2008 and early 2009, which is counter-intuitive to the then prevailing market sentiment but as noted above, consistent with the market's ability to price daily companies reporting asset values at up to 12-month intervals. The long-term trend increase evident prior to this period and

with bond rates now returning to normal levels, is confirmed in the period after late 2008 up until December 2009.

### Methodology Application

With reference to Table 2 and Table 3: for valuation illustration, the point in time methodology application for a WACC is shown as follows.

The objective is to test for reasonableness, the valuation of a CBD commercial office building prepared by independent valuer at June 2009. The valuer's cash flows are applied following review of lease inputs, outgoings, capital expenditure and re-leasing assumptions. Additional assumptions applied include depreciation allowances and tax at the corporate rate.

Note - Valuer advises in the report an absence of transactions to support valuation position.

Valuer's valuation - **\$440 million** as at 30 June 2009

Valuer's key assumptions 9.0% (pre tax WACC), 7.0% (terminal yield)

Test valuation outcome using post tax WACC of 8.21% - **\$421 million**

In turn, the test valuation shows:

Pre-tax WACC (back solve) – 9.85%

Pre-tax passing yield – 6.26%

Pre-tax terminal yield – 6.85%

### Observations and conclusions

- Higher adopted WACC but lower terminal yield and difference in valuation cross check of -4.1% to original valuation.
- Test valuation included depreciation allowances from owner's tax schedules but no additional capital expenditure as this considered reasonable.
- Passing yield of 6.26% not unreasonable in context of CBD market.

**Table 3 - Post tax and Pre tax cash flow and valuations**

		01-Jul-09	30-Jun-10	30-Jun-11	30-Jun-12	30-Jun-13	30-Jun-14	30-Jun-15	30-Jun-16	30-Jun-17	30-Jun-18	30-Jun-19
Cashflow		0	0.5	1.5	2.5	3.5	4.5	5.5	6.5	7.5	8.5	9.5 10
<b>Post Tax Cashflow</b>		\$'000's										
Net Rental (after capex/vacancy)	1	30,509	26,426	30,885	32,297	33,558	34,213	35,809	31,372	38,655	39,460	38,345
Depreciation	2		(8,511)	(8,511)	(8,507)	(8,505)	(8,430)	(8,340)	(8,043)	(7,744)	(7,702)	(7,645)
EBIT	3		17,915	22,374	23,790	25,053	25,783	27,469	23,329	30,911	31,758	30,700
Tax	4		(5,375)	(6,712)	(7,137)	(7,516)	(7,735)	(8,241)	(6,999)	(9,273)	(9,528)	(9,210)
Depreciation	6		8,511	8,511	8,507	8,505	8,430	8,340	8,043	7,744	7,702	7,645
Free cashflow	7		21,052	24,173	25,160	26,042	26,478	27,568	24,374	29,382	29,933	29,135
Terminal Value	8											589,575
Total Cashflow (post tax)	9	(446,258)	21,052	24,173	25,160	26,042	26,478	27,568	24,374	29,382	29,933	618,709
Discount Factor	10		0.961	0.888	0.821	0.759	0.701	0.648	0.599	0.553	0.511	0.472 0.454
	11	446,258	20,237	21,474	20,655	19,757	18,563	17,861	14,593	16,256	15,304	281,557
Acquisition Costs		24,265										
Value		421,993										
<b>Substitute value and terminal value into pre tax cashflows to deduce pre tax WACC</b>												
Net Rental (after capex/vacancy)	13		26,426	30,885	32,297	33,558	34,213	35,809	31,372	38,655	39,460	38,345
Net rental Income	15		26,426	30,885	32,297	33,558	34,213	35,809	31,372	38,655	39,460	38,345
Terminal Value	16											591,632
Cashflow (pre-tax)	17	(446,258)	26,426	30,885	32,297	33,558	34,213	35,809	31,372	38,655	39,460	629,977
Discount Factor	18		0.954	0.869	0.791	0.720	0.655	0.596	0.543	0.494	0.450	0.410 0.391
		446,258	25,213	26,824	25,535	24,152	22,415	21,356	17,032	19,104	17,753	246,874
Acquisition Costs		24,265										
Value		421,993										
IRR/WACC (Backsolve)	18	9.85% pre tax										
Passing Yield	19	6.26% (13/17)										

<b>Assumptions</b>		<b>Outputs</b>		<b>Comparison</b>	
Office Investment Property		Post tax WACC	8.21%	IRR - pre tax	9.85%
Contract Rental Growth		Post tax Initial yield	4.99%	Valuer Value	440,000
Market Rental Growth	3.00%	Post tax terminal yield	5.21%	Test Value	421,993
Long term growth	3.00%	Pre tax WACC	9.85%	Variation	4.09%
WACC post tax	8.21%	Pre tax Initial yield	6.26%		
pre tax (backsolve)	9.85%	Pre tax terminal yield	6.85%		
Terminal Yield post tax		Value	421,993		
WACC minus Long term Growth	5.21%				
Acquisition Costs	5.75%				
Disposal Costs	0.25%				



## Conclusion

The investment property valuer has experienced no more difficult a period than the past three years as the market has changed course. In the absence of transactions in particular segments, particular CBD commercial and high-value retail, the valuer was forced to subjective judgments that reflected experience and knowledge and good sense based on “gut feel” but without objective measures to support, thus increasing the margin for error.

A cost of capital or WACC approach incorporating CAPM is a methodology that provides an objective set of measures, a safety net to the valuation methodology, a complementary approach and more value to the valuation opinion. ■

## Notes

<sup>1</sup> In this paper, the terms discount rate, internal rate of return, and weighted average cost of capital are all considered interchangeable for the purpose of discussion. Similarly capitalisation rates and multiples are also interchanged, (a multiple is the inverse of a capitalisation rate).

<sup>2</sup> *Property Investment and Analysis* (Robinson), *Principles of Corporate Finance* (Brierly and Myers), *The Real Cost of Capital* (Ogier; Rugman and Spicer).

<sup>3</sup> *The Real Cost of Capital* - Ogier; Rugman and Spicer, page 5.

<sup>4</sup> Brealey, Modigliani, Miles, Ezzell, et al.

<sup>5</sup> Sharpe, William F. (1964). Capital asset prices: A theory of market equilibrium under conditions of risk, *Journal of Finance*, 19 (3), 425-442.

<sup>6</sup> D.M. Higgins, Placing commercial property in the Australian capital market, RICS Research paper series, Volume 7 Number 12, September 2007

<sup>7</sup> Myron J Gordon 1959.

# Legal Notebook

## Recent cases, headline issues and new legislation

Lindsay Joyce is a Partner at DLA Phillips Fox.

### Known unknowns: some good news for valuers in times of uncertainty

#### *Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd*

##### Summary of Case

In this case, a lender claimed damages against the valuers under s.82 of the *Trade Practices Act 1974* (TPA) for misleading and deceptive conduct and under the *Fair Trading Act (Vic)* (FTA) and for negligence, (in effect alleging a negligent overvaluation). The lender claimed that it would not have made the loan had the over-valuation not occurred. It was held on appeal that the lender was not entitled to damages against the valuers, even though the valuers were found negligent and in breach of TPA, because the chain of causation was broken by criminal damage to the property that occurred before the lender took possession.

#### FACTS

##### The decision before the Victorian County Court

The Victorian Court of Appeal decided an appeal from a County Court judgment on 22 September 2010. In the County Court, the lender was awarded damages for loss said to have been caused by a negligent over-valuation of properties by the defendant valuers. The case was brought at common law and for misleading conduct proscribed by the TPA and the FTA, but was dealt with primarily pursuant to the TPA.

The valuers had valued properties at \$800,000 and said that the properties were suitable security "up to a loan ratio of 65%" (that is, \$520,000). On that basis, the lender lent \$520,000 to borrowers secured by mortgages over the properties. After the borrowers defaulted, but before the lender took possession of the properties, the properties were deliberately and criminally damaged by an unknown third party. The properties were then sold for \$380,000 plus GST, resulting in a loss to the lender.

For the purpose of the proceeding it was agreed by the parties that:

- 1 the properties were, in fact, only worth \$575,000 at the time of the valuation (in other words the valuers admitted their liability);

- 2 if the properties had not been valued at \$800,000, the lender would not have made the loan;
- 3 the diminution in value of the properties caused by the property damage was \$215,000 and the loss on sale totalled about \$170,000.

One question the trial judge was asked to resolve was whether the valuers were liable for the entire loss suffered by the lender or whether the diminution in value of the subject properties caused by the deliberate damage was not recoverable. The valuers were held liable for the entire loss at first instance before the County Court.

##### The decision on appeal

On appeal, the valuer was successful and the lender was not entitled to damages under the TPA for the loss in value of the properties resulting from the criminal acts of third parties.

In the view of the Court of Appeal, the loss on resale was not an indivisible loss caused by the misleading representations by the valuers. There were two separate and distinct causes of loss:

- 4 One of which was the valuer's misleading representations about value;
- 5 The other of which was attributable to the fact that the properties were damaged by third parties.

The Court of Appeal gave several reasons in favour of the valuers' arguments:

First, although the lender would not have made the loan but for the valuers' misrepresentations, the satisfaction of the "but for" test is not sufficient to establish that the loss was caused by the conduct of the valuers. The criminal damage could have occurred regardless of the valuers' negligent misstatement.

Secondly, the legal context in which the right to recover damages arises, must be taken into account in resolving causation issues. The Court considered that the purpose and policy of the TPA does not require a negligent valuer to be held liable for loss caused by the criminal acts of third parties, except in circumstances where the original breach increased the risk that those acts would occur. The damage suffered was not within the scope of the protection conferred by the TPA.

The policy considerations which underpin the TPA do not require a finding that a valuer who misrepresents the value of property is to be held liable for all losses which happen to occur after the making of a misrepresentation. The Court said that the case law did not require valuers to be treated as "insurers" of the loan; to be burdened with liability for every loss which occurs after making a negligent misstatement of the value of the property. The Court added that the reference to the 65% loan-to-value ratio in the valuation was not an undertaking that the properties would continue to be adequate security for the loan, even if they were subsequently damaged by third parties, as this would mean that a valuer who makes a misleading representation as to the value of the property would be liable for any occurrence, no matter how unusual, which later reduced its value. The Court considered that such an approach would go well beyond the objects of the TPA.

Finally, the Court noted that in the context of common law negligence, where a Defendant's negligence is flowed by subjected criminal acts, Courts have been reluctant to hold that the Defendant is liable for harm caused by those acts. The Court held that in some cases a Defendant has been held liable for the subsequent acts of a third party because his or her negligence created the risk that the latter act may occur. The Court found that that principle did not exist or apply in this case. In other words overvaluation did not increase the risk that a third party would damage the properties.

Finally, the Court considered the case was an example of an abnormal event intervening between the breach and the damage which broke the chain of causation between the misleading representation and the loss suffered as the result of the subsequent criminal acts.

## The 'Good News' about this decision for Valuers

This decision provides for the future argument in cases where the value of a mortgage security property has been affected by an unforeseen market fall subsequent to the valuation.

This case provides good authority for drawing a distinction between losses brought about entirely by a valuer's negligence, and losses where a supervening event is either the real cause of a loss or the substantial cause of a loss. In this case the criminal acts of a third party in damaging the property were considered such a supervening causative act giving rise to the loss.

In the case of *Kenny and Good Pty Ltd v MGICA (1992) Ltd (1999) 199 CLR 413*, the High Court of Australia specifically found in that case that the subsequent drop in the market, following a negligent valuation was not a sufficient supervening event for there to be any reduction in the damages claim made upon the Valuer. That case was – in the author's opinion – probably the wrong case on its facts to argue such a point primarily because the valuer in

that case had represented the property as suitable mortgage security for the period of three years after the valuation. Kenny had overruled a House of Lords decision, of *Banque Bruxelles [1997] 2 AC 191*, where the House of Lords had determined that notwithstanding a negligent valuation, the valuer ought not to have been held liable for a subsequent drop in the market.

In the Hay case, it is probably correct to say that the Victorian Court of Appeal did not go far enough in its reasoning to put "the market drop" causation point in question. However it is submitted that there now appears to be an arguable basis for a reconsideration of the Kenny principle, based upon the reasoning and authorities relied upon by the Court of Appeal in Hay, such that in a clearly proven instance of an unforeseen market drop having an effect on the loss of a lender or mortgage insurer, such supervening event post valuation might now be considered more favourably in respect to the damages claimed against a valuer.

If most, if not all of the governments of the world could not have predicted adverse affects on, for example, property values as a result of the Global Financial Crisis, it seems that such an argument exists in favour of a valuer that might be sufficient to lead to the reconsideration of Kenny. Clearly the facts of every case will be different and evidence from valuers retained in cases such as this will be needed to support an argument as suggested.

There is a further dimension to the issues arising from this case in respect of valuations undertaken pursuant to the *Australia and New Zealand Valuation and Property Standards* where valuations are done pursuant to the Property Pro Residential Valuation and Security Assessment Pro-Forma and together with the Supporting Memorandum.

Valuations done pursuant to Property Pro require valuers to provide a risk rating in relation to certain potential property risks including in particular Market Risk Ratings about a potential "reduced value next 2-3 years".

The Supporting Memoranda states, under that section:

" *This risk rating is an indication of a level of risk of this property reducing in value over the next 2-3 years. It is a forward-looking summary rating taking into account aspects affecting, or likely to affect, the value of the property. The assessment is made on the bases of information, that is common knowledge and/or readily ascertainable in the market and having regard to reasonably foreseeable events as at the date of assessment. The rating cannot be expected to reflect information that was not common knowledge, or conditions, or events or circumstances that occur subsequently or unexpectedly.* "

Additionally under the heading "Market Volatility", Property Pro states as follows:

" *This aspect reflects the risk of significant adverse impact on the value of the property of the market changing direction rapidly. Whilst this will reflect historical performance, reasonably foreseeable events should also be taken into account.* "

It is not the intention of this case note to consider and analyse what issues valuers need to have regard to in undertaking Property Pro valuations and as such considering the rating analysis/risk ratings for each of those headings noted above.

However it is reasonable to now consider that any assessment of a valuer's consideration of those particular risk ratings be considered in the light of the Hay case, but more particularly having regard to the reasoning of the Victorian Court of Appeal and its analysis of the various authorities in the Hay case, in determining what in fact might be "common knowledge", "information readily accessible in the market" and having regard "to reasonably foreseeable events as at the date of the assessment".

Valuers need to consider what issues might affect their judgment in relation to those risk ratings. Nonetheless, valuers should not be held responsible for subsequent events that affect value and that are not common knowledge and/or reasonably foreseeable events at the times of assessment or are the result of conditions, events or circumstances that occur subsequently or unexpectedly.

# API life fellowships

API recently awarded life fellowships to Greg Preston and Ned Walsh. The *Australia and New Zealand Property Journal* congratulates both Greg and Ned for being awarded the honour.

## Gregory John Preston

*After gaining his Associate Diploma in Real Estate Valuation, Greg became registered as a valuer under the NSW Valuer's Registration Act on January 17, 1984, and he was admitted as an Associate of the Australian Institute of Valuers and Land Administrators in November of that year. He gained valuer's registration in Queensland in 1989.*

Greg also joined the Society of Land Economists in 1986 and when the two institutes amalgamated in 1991, he became a member of both the valuation and land economy streams of the former Australian Institute of Valuers and Land Economists. He became a Fellow of the Australian Property Institute in 1995.

Greg's academic study also included gaining Certificates in Real Estate, Auctioneering, and Stock and Station Agency. He has since completed a Bachelor of Commerce (Land Economy) at the University of Western Sydney and is currently undertaking a Masters of Applied Finance at Macquarie University.

His working career included training as a property manager and valuer at Hardie and Gorman which later became Knight Frank Hooker. He was then employed at Colliers International Property Consultants as a valuer also undertaking auctions and investment agency. Following Colliers, Greg worked at Richard Stanton undertaking significant valuation and consultancy assignments.

He left Richard Stanton in late 1988 to establish his own firm of real estate valuers and consultants based in the Sydney CBD. About four years later, his firm merged with others in Melbourne, Brisbane and the Gold Coast to form

Preston Rowe Paterson. Today the firm operates throughout Australia and has an association with the British-based firm King Sturge.

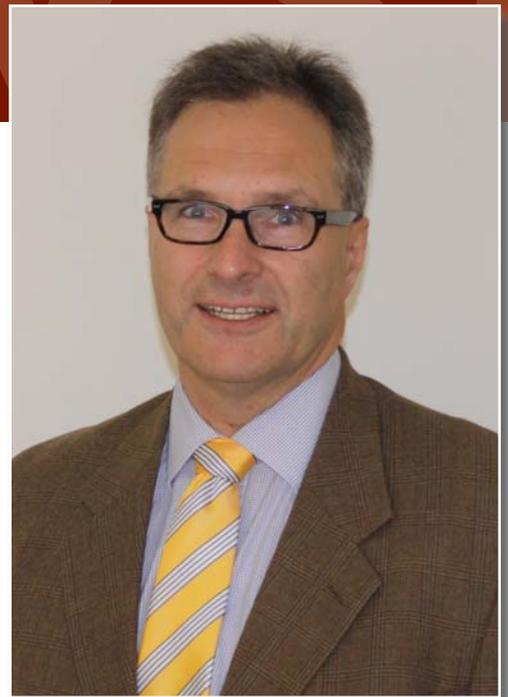
Over many years, Greg has generously contributed to assisting young people entering the property profession. Since 1992, he has given guest lectures on various valuation topics to the students undertaking the University of Western Sydney property degree.

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Greg has generously  
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Greg joined API's NSW Divisional Council in 2000 and became the NSW President in 2004. The following year he was elected to National Council and in 2007 he became the API National President. Greg retired from National



Council in May this year but continues to serve on the Divisional Council.

During his term as National President, the Memorandum of Understanding between the API and the China Appraisal Society was signed and this agreement has cemented the strong relationship between the two bodies.

During his time on both Divisional and National Councils, Greg has contributed to numerous portfolios including the NSW President's Appointment Committee, the NSW Valuation Professional Board, the National Professional Board, the National Finance Board, the Structural Review Committee, the CPV Taskforce and the International Committee.

Along with Lindsay Joyce and Andrew Sharpe of DLA Phillips Fox, Greg was instrumental in establishing the API's Valuation Risk Management Module which commenced in 2003 and which has been updated and presented in 2006 and 2009. He is also the author of the chapter on professional office practice procedures.

Greg's strong support and commitment to gaining continued API recognition of the diploma course in valuation offered by NSW TAFE was widely recognised by the membership around Australia. The culmination of his and other Councillors' ongoing liaison on this issue led to the introduction of the Provisional Member class in 2008 and the recognition of the diploma for entry to this class.

Greg generously donated his National President's honorarium as a scholarship for TAFE graduates who continue in their studies to gain an API endorsed graduate diploma.

He was instrumental in the establishment of the Australian Valuation and Property Standards Board and the harmonisation of the Australian standards and those of the International Valuation Standards Committee. His work on valuation and property practice standards for the Institute has been prodigious.

Greg has represented the API in discussions with ASIC and APRA for the past five years and his liaison with those bodies has led to significant results. In 2007, the API's suggestions were incorporated into ASIC's Regulatory Guide 69 on Debentures – improving

disclosure for retail investors and Regulatory Guide 156 Debenture Advertising. The areas that Greg continues to work on with ASIC include improving disclosure for retail investors for mortgage schemes, unlisted property schemes and infrastructure entities.

Life Fellowship was presented to Greg Preston at the 46th Kiparra Day on 6 August 2010 at the Sydney Hilton by API NSW President, Robert Hecek FAPI and API National President, Nick McDonald Crowley FAPI. ■

## **E.A. "Ned" Walsh**

*Ned began his professional career as a teacher with the Victorian Education Department in 1954 and following experience as a farmer and agricultural instructor between 1961 and 1964, he started his career as a valuer. From 1965 to 1970 he was a rural valuation officer with the Commonwealth Bank and from 1972 to 1977 he held valuation positions with LJ Hooker, Richard Ellis Sallman & Seward and Dillon Inkster Real Estate.*

In 1977 Ned started his own practice and in 1979 resumed his career as an employee where he has held senior valuation positions with WJ Harper, Richard Ellis, Baillieu Knight Frank and Gross Waddell, where he has practiced since 2005.

Ned holds a Bachelor of Commerce Degree from Melbourne University where he majored in Economics and Commercial Law. He also holds a Diploma of Agricultural Science from Dookie Agricultural College and the Real Estate Management and Valuation Certificate from RMIT, the forerunner to the current undergraduate degree in property and valuations.

Ned first joined the Australian Property Institute in March 1968 when he was

admitted as a Provisional Associate. He became an Associate in 1970 and was elevated to Fellow status in 1985.

Ned has been an active member of the Institute and has been a member of the Panel of Examiners for more than 31 years. He has mentored many young valuers since the mid 1970s. In 2006, the Institute launched a trial Mentor Program for graduates and Ned was the first to volunteer.

Well known for his expertise in Crown Land and Industrial valuations, Ned is a highly regarded member of the valuation profession and community. He is a modest, true professional man who has sought no recognition for his support of many others in his chosen vocation. ■



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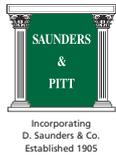
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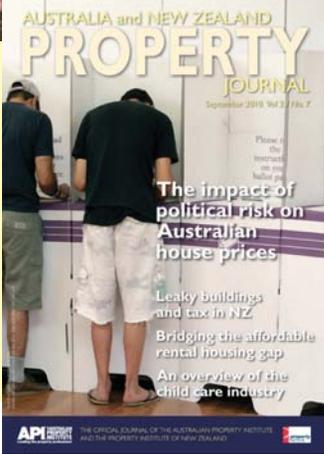
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