Queensland Law Society Property Law Conference

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Refresher on the Planning and Environment Court

FY Kingham DCJ

Thank you for the kind introduction and warm welcome. I will start with the traditional disclaimer. I am here in my capacity as a judge of the Planning And Environment Court but I do not come as its emissary. I will be making observations and raising questions or comments for your consideration during this address. In doing so I am not purporting to represent the court or the other judges who hold commissions in it. I am merely expressing one person's view but one which, I hope, is properly informed by my limited experience in this interesting jurisdiction.

I should also expose some assumptions I have made in preparing this presentation.

Firstly, I have assumed that you will not be devastated if I do not use power point. For those of you who are aurally challenged and need visual prompts, my apologies. I will circulate the paper I am talking to in due course.

Secondly I have assumed you are not expecting a lecture on recent decisions of the Planning and Environment Court or of the Court of Appeal in this jurisdiction. I made this assumption because of the quick and easy access you have to full text judgments on the Supreme Court library's wonderful website. You also have concise informative case notes available through services such as the Qld Environmental Practice Reporter – an initiative of the Queensland Environmental Law Association.

Thirdly I have assumed you are more interested in learning about changes which have occurred within the court's practice and procedure and what you might expect in the future. I will not stray into legislative reform. That is well beyond my brief. Those of you involved in consultations will be far more informed than I am, in any case. Rather I would like to talk to you about procedural innovations in the court.

Those of you with at least a 4 in front of your age will remember life without the Planning and Environment Court. Its predecessor, the Local Government Court, was a newcomer on the judicial block when the major reform to planning and environmental law in the 1990's got underway. I well remember how limited was the scope for review of the decisions of local authorities when I commenced practice. It is in my lifetime as a practitioner that our current system of broadly accessible merit based review has developed. While the Planning and Environment Court may appear middle aged and comfortable, it is an infant in the justice system.

The introduction of merit review and opportunities for citizens to be involved in decision making characterised the first stage of the court's development. Along the way the revolution in development approval processes and local authority planning wrought by the Integrated Planning Act has taken up much of our time and attention as practitioners and as judges. Given the expansive and ambitious agenda that is encompassed within the objectives of IPA, there is another round of reform ever waiting in the wings. It is, I believe, to the court's credit that ongoing legislative reform has not prevented it from scrutinising its own practice and procedure with an eye to providing an accessible and efficient forum for resolving planning and environment disputes. Under the leadership of my wise and creative brethren, in particular their honours Judge Wilson and Judge Rackemann, I believe the court has embarked upon the next important stage in its development as a modern court. That is evident in processes developing in two areas: mediated or facilitated resolution or ADR and engagement with experts.

One of the defining characteristics of the planning & environment jurisdiction is the highly skilled and experienced professionals, legal and non-legal, who regularly appear in the court. Those judges fortunate enough to have a Planning and Environment Court commission enjoy, largely, well-prepared, thoroughly documented and intelligently presented cases. Given the degree of skill exhibited by our practitioners, it is hardly surprising they also have a history of productive direct negotiation between parties.

Nevertheless, the planning and environment jurisdiction has always had a hearty case load and negotiations are often not fruitful until considerable time, energy and money

has been expended. I am reliably informed by some of my colleagues that, until fairly recently, it was not unusual for appeal hearings to take in the order of 2 to 3 weeks. We are all aware of more complex, sometimes notorious appeals, which took much longer. The cost to all parties of engaging well-remunerated professionals for such lengthy hearings inevitably led to calls to reform the jurisdiction. Various structural reforms to the court were floated over the years. As it transpired none has been implemented. Happily, the debate which attended various proposals did inspire mature consideration of the court's processes.

Alternate Dispute Resolution, in particular, mediation, to resolve civil disputes is well-established in Queensland. The Qld Law Society pioneered its introduction through its enthusiastic support for settlement week all those years ago. For some decades parties to civil disputes have been cajoled, encouraged and eventually required to seriously explore settlement options. Those efforts have been so successful that the civil lists in Queensland are a shadow of their forbears. Many barristers supplement grim court appearance fees with mediation engagements. Most law firms offering civil litigation services boast lawyers skilled in representing parties at mediations and many of them practice as mediators. Given the affection, generally, for mediation in the civil jurisdiction, it is somewhat surprising it has been slower off the mark in this jurisdiction. This may be due to the very active case management which has been an early and enduring feature of the court. The court has been well served by judges eager to ensure matters are progressed as efficiently and effectively as possible.

Certainly, some of the larger or more innovative councils, advised well by their lawyers, have experimented with internal ADR processes in an effort to resolve as many appeals as possible. Brisbane City Council and Logan Shire Council are two councils which spring to mind.

In recent years, the court itself has promoted ADR to the profession and the parties. Practice Directions in 2000 and 2006 encouraged parties to agree on steps to resolve issues, failing which the court indicated that it would make directions, including, where appropriate, requiring the parties to mediate. The later Practice Direction built upon the first and unambiguously championed early resolution by calling on parties to

develop a dispute resolution plan. The clear expectation is that all reasonable efforts will be taken to resolve matters without the need for determination by the court.

Recently, the Court was successful in securing funding to support parties to achieve what it demands of them. In May 2007, Ms Peta Stilgoe was appointed Registrar Planning & Environment ADR. Already I see Ms Stilgoe's appointment as a noteworthy milestone in this court's development. Her appointment has reinforced a more concerted court directed focus on ADR. Ms Stilgoe will be familiar to many of you, whether or not you have availed yourself of the services she offers in her court role. She has a extensive history as a well respected litigation lawyer with particular expertise in planning and environment work. The Court was fortunate to be able to secure her appointment and the success of the new court annexed mediation service is in lion's share due to her high level of skill and the extent to which she has positively engaged court users.

Ms Stilgoe provides a mediation service to parties to planning and environment appeals. It is free to parties in that the court charges no fee and provides the venue and some administrative support. This feature makes it accessible to self represented parties and community groups. It also avoids shifting the cost burden of mediation to development proponents and local authorities.

I am indebted to Registrar Stilgoe and John Hayden of counsel for the work both have recently done in compiling, at this early stage, some data about the impact of the process. Both Peta and John have presented at international conferences about the process in this court. The preliminary analysis is very encouraging. An assessment of the success of mediation needs to take into account both quantitative and qualitative measures.

The following quantitative measures give a snapshot of positive indications of success. In March 2008, the number of matters which proceeded to trial was reduced from 30% of those listed for trial at the directions hearings to 13%. In that month, three "spare" judge weeks were returned to the court for allocation to other jurisdictions.

In the year 07/08, 103 mediations were conducted over 141 sessions. Fifty one appeals (49%) resolved completely at mediation. Two appeals were subsequently withdrawn. The number of issues in dispute was reduced as a result of mediation in twelve appeals. In a further eleven appeals the proceedings were adjourned to allow further steps to be taken in anticipation of further resolution of issues.

I would characterise each of those results as successful outcomes. Whilst only 51 settled completely at mediation, 2 settled shortly afterwards and, for a further 25 matters, the issues were reduced or further work was identified which may well lead to settlement before adjudication.

Sitting in Southport I have seen a number of appeals come through court annexed mediation resulting in complete resolution or partial resolution with an agreed program of further steps towards resolution. My planning and environment sittings in October all but collapsed as a result of Registrar Stilgoe's effort and I was able to devote that time to the sentencing of miscreants– a relentless stream of whom makes its way to the District Court.

Of course you will be most interested in achieving a workable agreement for your clients. Clearly the process is producing acceptable outcomes there. For court administrators, no doubt the saving in judge time is most exciting. Working on an estimate of three hearing days for every one appeal, the outcome of mediation in 07/08 saved almost one year of the court time of a Planning and Environment judge. I understand the cost to the court of a mediation session is considerably less than the cost of a judge sitting in court. So it must follow that the savings go well beyond the reduction in the number of sitting days in this jurisdiction.

As to qualitative measures, let me tell you what those who have been involved in the process have said about it.

From submitters

"I have found the mediation an extremely constructive and informative process. Usually community groups simply cannot afford to become involved in any legal

actions and are therefore excluded, mediation gives us the opportunity to at least be heard. In many cases I think informed community groups do have valid points."

"…A relaxed atmosphere which is important for us non-legal people, we really do get a fair hearing and yet the discussion is kept disciplined and on the topic. Not always easy."

"We are coping with procedures better and getting our points across with better understanding than with a formal hearing."

From lawyers

"The parties would like to acknowledge the assistance of the ADR Registrar who was instrumental in achieving an agreement in relation to this complex matter."

"The parties participated in a mediation meeting before this Court's Registrar of ADR. While the matter was not resolved, areas of concern…were better identified and articulated in a 14-point document, executed by the parties. That was helpful in providing focus."

From experts

"Peta, it is an unenviable task trying to organise us as we are all flat strapped with work and I just wanted to thank you for all your efforts to date."

"Given the nature of this matter it is clearly imperative that Peta be in attendance along with all of the actual experts involved in the ecological issues relevant to this matter."

"Thank you Peta – at least sanity will prevail at last! Your involvement in this matter is very much appreciated by…As we normally have to deal with this behaviour from…on our own and forever have to deal with his twisted interpretations and convolutions that only seem to pervert the process and preclude any possibility of a solution prior to a court hearing. Thanks once again for your help in this matter. I

just wish we had this process and someone like you every time we have to deal with…"

"…Your assistance in the meeting process is really valuable and…felt that the planners would not really have talked about the issues in the appeal and would have "fluffed about" if you were not there to keep them on track."

"Thank you for your input once again Peta – refreshing to have you assist us get the issues clarified for the court."

A number of points emerge from those testimonials which are worth summarising:

- Acknowledgement of the skill possessed by our Registrar ADR.
- A feeling that less formal processes allow discussion of the issues by non-legally qualified people whether they are representatives of community groups or are experts engaged in the process.
- Acceptance that a "third party" can help to resolve complex issues and can identify and confine what can't be resolved.
- Assistance in focusing experts on meaningful dialogue.
- Assistance in getting past the behaviour of individuals so fruitful discussion can take place.

Of course many parties have accessed external mediators in the past and have experienced those benefits. What is exciting for the Court is being able to offer a further option to parties, court annexed mediation, and one of such high quality.

As well as that, Ms Stilgoe's position as the Court's Registrar provides an opportunity to employ ADR techniques in already established pre-hearing processes, particularly as it relates to engagement with experts. This is something not available through a private mediator.

This brings me to the next topic I wish to address, developments in engagement with experts in planning and environment matters, in particular:

(a) Concurrent evidence in appeal hearings;
(b) The role of experts in mediation; and
(c) Facilitated meetings of experts.

Concurrent evidence in Planning and Environment Court hearings.

Some of you may have attended the Queensland Environmental Law Association seminar held in late October dealing with concurrent expert evidence in this jurisdiction. His Honour Judge Brabazon QC spoke, as did Danny Gore QC and the traffic expert, Colin Beard. You may have heard this process of concurrent evidence described in other forums as "hot tubbing". I eschew the use of this dreadful name which conjures up most inappropriate images and says little that is meaningful about the process. In essence, concurrent evidence involves a number of experts on a particular topic giving their evidence in a single session, rather than in the ordinary course of a party's case. Rather than each expert being subject to question and answer by counsel in turn, each has the opportunity to express their opinion and to comment on the opinions of other experts.

Judge Brabazon has used this process in two Planning and Environment hearings this year. I think it is fair to say that the jury is still out on this experiment and I have heard many concerns expressed about how it might be best to proceed with it.

The process Judge Brabazon adopted was based on draft guidelines prepared by the Administrative Appeals Tribunal which can be summarised as follows:

- The experts each take an oath or affirmation.
- The judge outlines the concurrent evidence procedure.
- The judge identifies any significant factual matters that have arisen in the evidence already given in the hearing and may clarify the issues in relation to which the experts should direct their evidence. The parties or their representatives are invited to comment on, add to or seek to clarify any matters raised by the Judge. The hearing may be adjourned for a short time to allow the experts to confer in light of that discussion;

- Each expert is given the opportunity to express his or her views on the issues and to engage in a dialogue with other experts. This may involve asking questions of the others. The judge will facilitate the process and may ask questions of the witnesses as well. In general, this stage of the procedure occurs without the intervention of the parties or their representatives;
- The parties or their representatives are then invited to ask questions of the expert witnesses;
- Each expert witness is invited to give a brief final summary of their views on any of the issues before the Court;
- At any stage of the process the Judge may intervene and ask questions.

Proponents of this procedure contend this will save court time and reduce the cost of experts. They also argue that it will expose partiality and increase the accountability of experts.

An interesting cautionary note was sounded by Mr Beard in his presentation to QELA which I commend to you for your consideration. If you are confronted by a request for expert evidence to be offered concurrently you will need to thoughtfully address this question in the best interests of your client. Mr Beard queried whether concurrent evidence sessions might hinder a legal team in their presentation of their client's case – that is- the case theory or story they want to roll out for the adjudicator to best advantage their client. He argues counsel will need to modify their presentation techniques to ensure that concurrent evidence does not undermine the client's case. I would add to his useful observation a further query. How might it change the way in which you, as solicitors, engage expert witnesses and prepare your client's case?

Mr Beard agreed concurrent evidence sessions provided a forum for useful debate among experts before the Court and could avoid the imbalance which is sometimes present in a dialogue between an adversarial barrister and an impartial expert. The traditional cross-examination of experts presents plenty of challenges to the expert, not least the lack of control they have about defining what question should be addressed. Concurrent evidence will present different challenges to experts and I will watch with interest the discussion of this amongst our community of expert witnesses.

Speaking personally, I have not yet employed this procedure. When I heard matters in the Land and Resources Tribunal, from time to time I requested the evidence of experts on a particular topic was given sequentially to enhance my appreciation of that evidence. I certainly found that process helpful. What it lacked, however, was the opportunity for experts themselves to present their views in summary form and to engage with each other. I recall that on some occasions, when I heard a particular specific answer from a later witness I regretted that I had not had the benefit of hearing what an earlier witness would have said about that. Whilst every effort is made to capture, comprehensively, the expert's opinion in report form, it is almost inevitable that some addition or refinement will arise during cross-examination. That is its purpose after all. It seems to me that concurrent evidence provides an opportunity for that to be addressed by all the experts on a particular topic.
I would be interested to hear from any of you who have had experience with the process or who have a particular view on it.

Role of experts in mediation

This is a reflection of the style of mediation that Ms Stilgoe has so effectively introduced to the Planning & Environment Court. This is not to say that private mediators do not also encourage this. However, it is worthy of note that, because of her specialist background, Registrar Stilgoe is very much alive to the benefit of involving experts in mediation sessions, particularly where a party is not legally represented. For example, in one power station appeal she mediated last year, the developer's experts attended mediation and were probed by community representatives opposed to the development. In addition to the money saved by the residents because they did not engage their own experts, there were two benefits to this use of experts. One was that the experts were able to educate all those involved in the technical issues surrounding the development. The other was the unrepresented co-respondents to the appeal were able to test the settlement options being discussed with the assistance of experts who helped to formulate them.

A further potential benefit of using experts in this way is that, when issues which require further investigation are identified during mediation, the experts are already well briefed to investigate and report back to later sessions.

Creative use of experts in mediations can unlock potential solutions and move the process from an adversarial competition to a problem solving dynamic. When that is achieved, prospects of resolution are not only maximised but also solutions can be identified which go beyond compromises your client can live with and which enhance the outcomes for all parties.

Facilitated meetings of experts

An innovation which has aroused concerns and suspicions is the direction that expert witnesses meet without the lawyers who have engaged them. The purpose of these meetings is for the experts to discuss their opinions with a view to resolving their differences and, where disputes cannot be resolved, to identify the areas of disagreement and the basis for their disagreements. This can be a very effective tool for reducing the scope of judicial determination on matters of non-legal expertise.

Lawyers and their clients are understandably nervous about what happens behind closed doors. There is a high level of "letting go" involved and it introduces a pre-hearing forum in which, unusually, the lawyers have no control over the way in which their client's position is advocated.

The conclave process is not always successful and sometimes the joint statement seems to contain far more about disagreement than agreement. Recently, at the request of a party and some Judges, the court have encouraged parties to avail themselves of Registrar Stilgoe's availability to facilitate these meetings. This is a creditable example of what I spoke of earlier, the ability to extend ADR techniques into existing pre-hearing processes because we have a skilled Registrar imbedded in the process.

I have been interested to hear some responses to facilitated expert meetings. The involvement of an independent third party, skilled in facilitation, can only improve it.

Some of the comments that I recounted earlier from experts related to facilitated expert meetings rather than mediations. They identify the value the Registrar can bring to that process. It seemed to me their feedback demonstrated there is greater accountability, they receive assistance to move beyond professional conflicts or personality clashes to better dialogue and they enjoy the benefit of having a person tasked with keeping them on track and working productively. This must maximise the value of expert conferencing. I predict we will see and hear a lot more about the evolution of expert conferencing over the next few years. It is my understanding that this procedure is unique to the Planning and Environment Court in Queensland and other jurisdictions are watching with interest.

Another aspect of this process which interests me is how a facilitated experts meeting might affect if and how concurrent evidence is used in the court. Reflecting back on the AAT guidelines for concurrent evidence, some steps in the process seem to be directed towards achieving what is or can be the outcome of expert conclaves. More effective expert conferencing facilitated by the Registrar may enhance the utility of concurrent evidence or it may render it otiose. That is, it may so clearly identify the true foundation for the dispute that there will be little to be gained from concurrent evidence. Time will tell. And it may be that the outcome differs from one case to the next.

I also see the potential for more constructive use of experts to advise on their remaining disagreements. For example, we may well see, as an outcome from a facilitated expert meeting, some joint recommendations from the experts about how their evidence may be received or their dispute resolved by the Court. What a revolution it would be for experts to be advising lawyers on process issues. Yet when the dispute to be resolved is a matter of particular expertise, how it might be resolved is something they are likely to have an opinion about that's worth hearing. This is something they do within their own professional circles, why should the courts not learn from this?

I am eager to hear from practitioners, their clients, and their consultants about their experiences with the services Registrar Stilgoe provides and with expert evidence during hearings. Your constructive criticism, particularly suggestions to modify or

improve our processes would be welcome. I urge you to take advantage of any opportunities, formal or informal, to provide the court with your feedback. Perhaps instead of asking me questions in a moment, you can seize this opportunity to give me the benefit of your experiences of or views about the matters I have discussed in this paper. Thank you for giving me your attention and, once again, my thanks to the organising committee of this conference for giving me this opportunity to talk to you.