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Queensland Environmental Law Association Conference
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THE PLANNING AND ENVIRONMENT COURT OF QUEENSLAND – THE YEAR IN REVIEW AND IN PROSPECT

Since the 2007 QELA Conference, the Planning and Environment Court of Queensland has experienced a typically busy year "both on and off the field", to use a sporting analogy. On the field, the court continues its quest to manage and dispose of its caseload with reasonable efficiency and expedition. The court continues to offer reasonably prompt trial dates and parties can also get their matters before the court quickly for interlocutory applications or reviews and for urgent final relief. This is made possible by the continuing support and consideration which the Chief Judge affords the Planning and Environment Court in the allocation of judicial resources across jurisdictions.

Accurate statistical information on the court's success in disposing of its case load is not currently available, but that will be rectified in the near term. Under-recording of those proceedings which have been finalised in any given period, has led to past understatement of the court's performance, as measured by the clearance rate. A file audit is presently underway to facilitate preparation of more accurate statistics.

Off the field, work has continued on prospective changes to the legislation, rules and practice direction, pursuant to which the court undertakes its work. There have also been retirements and new appointments and the court is now facing the imminent retirement of two of its experienced judges.

The 26th of September 2008 will mark the retirement of the Planning and Environment Court's senior member and longest serving judge, His Honour Acting Justice Skoien. His Honour has served the Planning and Environment Court (including its predecessor, the Local Government Court) for more than a quarter of a century. His retirement is particularly significant and will represent a loss which will be sharply felt by the Planning and Environment Court, those who appear before it and other stakeholders alike. It is a loss which will be shared with the civil and criminal jurisdictions of the District Court, which His Honour has served for the same

length of time, and also the Supreme Court of Queensland, which he has served as an Acting Justice from time to time, including for the majority of this year.

In reflecting upon his Honour's contribution to the Planning and Environment Court, it is relevant to look back to the then Local Government Court at the time of his Honour's appointment. His Honour was appointed on 29 October 1982, just two and a half years after the appointment of Judge Row and a year prior to the appointment of Judge Quirk. Judge Ambrose (later Justice Ambrose of the Supreme Court of Queensland) then undertook the work of the Court in north Queensland, but these three relatively new judges were soon undertaking the bulk of the court's work otherwise and shaping its jurisprudence at that time. Reference to the 1985 volume of the QPLRs, for example, shows that those three judges were collectively responsible for approximately 90% of the reported decisions in that year, with Judge Skoien delivering about a quarter of the reported decisions. His Honour has gone on to publish more than 220 reported decisions in the planning and environment jurisdiction. Each of those three judges made great contributions to the Court, but Acting Justice Skoien went on to become the longest serving of them and will become the last of those 'musketeers' (His Honour loves all things French) to retire.

The Planning and Environment Court has, of course, evolved in the decades since His Honour's appointment. Its workload has increased in volume and broadened in subject matter. The judges who constitute the court have changed in number, identity and distribution. The court's name has changed from the Local Government Court to the Planning and Environment Court. There have been changes to the legislation pursuant to which it is constituted, to its rules and its practices. Throughout all of this, his Honour has been a guiding force.

I first met His Honour 23 years ago, when I was an associate. Later I had the pleasure of appearing before His Honour on many occasions as a barrister. Over the last four and a half years, I have had the privilege of serving on the same court. His Honour's many fine qualities are well known. He was, and remains, a popular judge in all jurisdictions. As a barrister, I was always pleased to learn that His Honour would preside on my next case. A hearing before His Honour was invariably conducted efficiently and effectively, but also fairly and with calmness, good grace and good

humour. Just as importantly, His Honour's finely-tuned sense of balance gave confidence that the decision would be as fair as the hearing. I am sure that all wish him well in retirement.

The court is also facing the imminent retirement of His Honour Judge White. His Honour was appointed on 28 August 1992 and retires this Friday. An experienced, respected and robust judge, His Honour has made a significant contribution to the Planning and Environment Court. In particular he has been responsible for the management and conduct of the list in Cairns over many years. He will be missed by his fellow Judges and also by practitioners and others, particularly those in far north Queensland. His Honour will be replaced in Cairns by the newly appointed Judge Everson, who will be well known to you.

The establishment of the position of ADR Registrar has been a recent and welcome development. The court's first ADR registrar is Ms Peta Stilgoe, who was previously a solicitor specialising in the planning and environment jurisdiction. While the position was initially funded on a temporary basis, the news that funding has been confirmed on a permanent basis is most welcome.

The court has, in recent years, placed an ever increasing emphasis on dispute resolution. The appointment of an ADR Registrar has been significant in this context. For the first time, it has enabled the court to offer its own mediation services. The ADR Registrar has also, pursuant to judicial direction, undertaken other forms of dispute resolution, including chairing without prejudice conferences, case management conferences, and meetings of experts.

These services of the ADR Registrar are provided free of cost to the parties. This has not only increased the parties' enthusiasm for dispute resolution, but has, importantly, promoted "access to justice". The court deals with issues of concern to the community and it is not uncommon for self-represented community members or community groups to participate, or wish to participate, in the process. That there is now a court-provided ADR process which is both free and independent of the parties is a boon, particularly for those with limited means and/or who lack confidence in dealing with more sophisticated and well resourced legally represented parties. The

'feedback' which the court has received about the services provided by the ADR Registrar has generally been very positive. Attached to this paper is a copy of an open letter which was recently tendered by self-represented co-respondents in an appeal which came before me.

The success and popularity of the mediation services as offered by the ADR Registrar should also serve to encourage parties to give greater consideration to the use of private mediation services, particularly where they have the capacity to meet the cost of those services. I have already noticed an increase in the number of draft orders, prepared by the parties, which provide for a private mediator.

The court is conscious that its current rules are, in some respects, out of date. Substantial work has been undertaken with a view to adopting new rules of court. The first draft was formulated in 2007. Representatives of the barristers and solicitors branches of the legal profession (as nominated by the Bar Association of Queensland and the Law Society of Queensland respectively) were consulted and their views incorporated. All judges of the Planning and Environment Court were also consulted before the proposed changes were sent to the Department for consideration. The Department, which has been supportive, has issued drafting instructions to the Office of Queensland Parliamentary Counsel, which has been working on the rules. My previous expectation, that new rules would be in force in time for this presentation, has not been realised, but the process is now relatively advanced.

The matters which the new rules may be expected to address include the following:

(i) abolition of the "entry for hearing", which serves no useful purpose;

(ii) abolition of the "optional early settlement procedure", which was rarely if ever used;

(iii) permitting a co-respondent by election to withdraw from a proceeding by filing and serving documents, rather than having to appear in court;

(iv) simplification of the venue provisions;

(v) amendment of the provisions for orders and directions to incorporate parts of the Practice Direction concerning the time within which an application for directions should be made and also concerning the provision of draft orders.

The non-exhaustive list of directions and orders which may be sought will also be updated to better reflect current practice;

(vi) amendment of the provisions relating to expert evidence, to reflect the court's practice regarding expert meetings and joint reports including:

- a requirement for parties to ensure that their experts are ready to participate fully, properly and promptly in the meeting of experts
- a process to permit experts to revert to the parties, by way of a joint enquiry, even though the expert meeting has not concluded or the joint report has not been prepared
- confirmation that the expert meeting and joint report process relates to the opinion evidence of the experts. That evidence will often lead to a narrowing or resolution of issues by consensual agreement between the parties, but it is not the role of the experts to, in terms, settle the case;

(vii) acknowledgement of the role of the ADR Registrar.

The above is not an exhaustive list. The changes are more evolutionary than revolutionary and are designed to make sure that the court's rules keep pace with the evolution of the court's practices and facilitate future evolutionary change, where appropriate. The court's Practice Direction will also require consequential amendment.

There are also impending changes to the Integrated Planning Act, including to those provisions which relate to the court. The proposed changes, as stated in the "more accessible dispute resolution" section of "Planning for a Prosperous Queensland – a Reform Agenda for Planning and Development in the Smart State" (August 2007) include:

60. Expand the jurisdiction of the Tribunal as follows:
    - Stage 1 – the identification and inclusion of less complex technical matters into the Tribunal's jurisdiction, including infrastructure planning and charging disputes.
    - Stage 2 – the identification and inclusion of complex technical matters within the jurisdiction of the Tribunal.

61. Amend the fee structure of the court to align with other Court jurisdictions.
62. Establish a full-time Registrar to the Court.
63. Expand the discretionary powers for the Court in determining sufficient grounds for departing from a planning instrument.
64. Expand the discretionary powers for the Court to determine whether a matter of procedural non-compliance can be excused.
65. Expand the discretionary powers for the Court to determine if proceedings have been motivated by commercial competitiveness.

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68. Publish successful mediations on the departmental IPA website.
69. Develop and implement a comprehensive education and training package for all stake holders to improve awareness of existing ADR processes.

The Department has been consulting the court, through the Chief Judge, about these and other matters. While the content of that consultation is confidential, the following observations can be made:

- The expansion of the jurisdiction of the tribunal is a matter of policy for the government.
- The amendment of the fee structure of the court will hopefully result in simplification.
- The ADR Registrar's position has already been established, but will need to be considered in amendments to the IPA and in the new rules.
- The expansion of the discretionary powers of the court is expected to be directed to the difficulties of which I have spoken previously, including in the paper which I delivered at the 2006 QELA conference. It has long been recognised that decision makers in this jurisdiction need sufficient discretionary powers to permit them, where appropriate, to prevent technicality from distracting from substance. It is worth again recalling the following passage from *Pacific Seven v City of Sandringham* [1982] VR 159 at 163:

> "Planning is a difficult exercise with flexibility an essential ingredient. Those entrusted with its implementation should bear in mind that neither individual or community interest is served by recourse to exotic

> legalism. Whetting the saliva of lawyers with one hand on the guillotine can only frustrate rather than meet the needs of justice, and the expressed intention of the legislature in the field of planning. Whatever be the consequence of legal points which fall to be decided, every endeavour should be made to deal with the substance of an application for permission to use or develop land in a certain way with maximum expedition and fairness."

- There are other matters which should be attended to in the IPA amendments. These include, for example, amendment to the contempt provisions, which currently make reference to a sub-section of the *District Court of Queensland Act* 1967 which no longer appears in that Act.

In addition to reviewing its own processes from a local perspective, the Court will continue to engage with other like jurisdictions. The QELA has provided one avenue for that, by inviting speakers from different jurisdictions to address its annual conferences. The National Environmental Law Association conference, at which I spoke earlier this year (in the panel session), provides another such forum. What might be less well known is that the various courts and tribunals dealing with planning and environment law across Australasia come together every two years, so that Judges and tribunal members can share their experience, discuss trends and learn from each other. The last such conference was hosted by Queensland at the Kingfisher Bay resort at Fraser Island in 2006.

Moreover, while the last 12 months has been a busy period in the Court, the next 12 months promises to see even more significant change, with impending judicial retirements and changes to the legislation, Rules and Practice Direction pursuant to which the court undertakes its work. We can all look forward to seeing how those changes unfold between now and the 2009 QELA conference.

Rackemann DCJ