THE PLANNING AND ENVIRONMENT COURT –

ARE WE THERE YET?

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Introduction

The conference theme "Are we there yet?" asks whether the legislative reform process, which has been ongoing for more than a decade, has yet achieved its objective. This paper does not address the broader reform of the *Integrated Planning Act* 1997. Rather, it focuses upon the Planning and Environment Court's management, resolution and disposition of planning and environment disputes.

The question is timely, in its application to the Court. The ink is barely dry on the Court's new rules, the *Planning and Environment Court Rules* 2008 (2008 PECRs), which took effect on 12 December 2008 and the new Practice Direction (PD 2 of 2008), which superseded Practice Direction 1 of 2006 (PD 1 of 2006) and which complements the 2008 PECRs. The Court's forms have also been updated. The Court's in house ADR service, provided by the ADR Registrar, is now well entrenched. This is, in some ways, the culmination of the Court's most recent period of reform of its own practice and procedure. This process initially bore fruit, in a documentary sense, with the publication of PD 1 of 2006. To what extent then have we achieved our objectives? What are those objectives? Do we have "mission accomplished"? Are we there yet?

The question "Are we there yet?" sometimes indicates a degree of weariness and impatience. It assumes at least the following:

- there is a destination;
- we are bound for that destination;
- the destination has or will be reached, and
- the person answering the question will know whether and when we have arrived.

Those assumptions are not necessarily applicable to the evolution of the Court's practice and procedure. The Court's primary responsibility, to do justice according to law, remains constant. The way in which that is best achieved however, evolves over time in response to the ever-changing context within which the Court undertakes its work.

Contemporary courts recognise that continuing vigilance is required to ensure that, so far as is practical, rules, procedures and practices remain relevant and appropriate. There is no final destination which, when reached, permits complacency. For that reason we should never presume to be "there yet".

This paper provides a brief, and necessarily incomplete, overview of the evolution which has occurred in some of the key aspects of the Court's practice and procedure.

The purpose in doing so is to aid an appreciation of the journey so far and the factors which will likely guide the Court's trajectory into the future.

List Supervision and Case Management

Active list supervision and individual case management lie at the heart of the practice and procedure of the Planning and Environment Court, as they have for decades.

In earlier times, courts traditionally left it to the parties to prepare their matter for trial, by following published rules and filing a request for trial, when they were ready. Similarly, the exploration of opportunities for settlement was traditionally left to them. In more contemporary times, courts of every description have recognised the need to exercise active management of their lists. The Planning and Environment Court is no exception. That is particularly appropriate, given the public interest nature of the matters which come before it.

Not all courts or tribunals actively supervise their lists and manage their cases in the same way. For example, in some jurisdictions, active management is conducted by "streaming" cases down a limited number of "tracks" with standard directions. The Planning and Environment Court however, has maintained a system of individual case management, where each case is the subject of orders or directions, made by a judge, upon a review of the individual matter.

This approach maximises flexibility in two ways. Firstly, it permits case management to be applied flexibly from case to case. While most of the Court's directions will have some common elements, the details of those directions can be tailored to best suit each case. Secondly, the management of pre-trial procedure by way of orders or directions (rather than just by the rules of Court), combined with broad powers as to the types of orders or directions which may be made, permit the judges to adjust case management more generally over time, without necessarily having to change the rules of the Court. In this way case management can be continually fine tuned.

While active case supervision and individual case management may now be taken for granted, it is pertinent to recall that, in Queensland, the Court, under its former title of the "Local Government Court" adopted such an approach from early times. The bringing of an application for directions was first provided for in rule 36 of the *Local Government Court Rules* 1966. In 1984 the then *Local Government Court Rules* 1966 were amended to insert rule 18(4A), which provided for individual case management via compulsory directions hearings triggered once an appeal was entered for hearing. For more than two decades, case preparation in the Planning and Environment Court of Queensland has occurred in accordance with directions set by a judge in each individual case. A usual feature of those directions, from earliest times, has been the early identification of the date (or at least the sittings) in which a matter will be heard.

While the general structure of the Court's approach has remained in tact, the manner of its application has evolved. In the 1980s, individual case management was, in many cases, limited to a single directions hearing. The matter would then only come back before a judge, in advance of trial, if one of the parties arranged for it to be re-listed. These days even a relatively straightforward case will now also be reviewed by a

judge, to check its progress, prior to the callover for the sittings in which it is set for hearing. Further, to prevent matters from languishing:

(i) the 2008 PECRs require matters to be promptly brought to the Court, for directions[1];
(ii) any adjournment of a directions hearings or review is ordinarily to a specific date for further review, rather than to a date to be fixed, and
(iii) the judges, with the assistance of the ADR Registrar, actively monitor the lists and list matters for review, where they appear to have become inactive or where it otherwise appears desirable to conduct a further review.

The Court has, particularly in recent years, sought to identify and give greater case management to longer or more complex cases, or to other cases where appropriate. It is not, however, always easy to find sufficient time to devote this in the course of the usual directions hearings/reviews/callover reviews which are held in Brisbane each Wednesday, Thursday and Friday morning. With that in mind, the Court in Brisbane is now setting aside some additional time for matters which may need or benefit from greater case management. The Court is also setting aside more time for the pre-callover review of longer cases. The extended pre-callover reviews of longer matters, which I conducted this month, proved beneficial. Some time has now been set aside in June for further reviews of that kind.

The ADR Registrar has provided a valuable resource for the Court, including in relation to its active list supervision and individual case management. By virtue of rule 38 of the 2008 PECRs, the ADR Registrar may, if directed by the Court, or if asked by all active parties, convene and chair a Case Management Conference, which each active party must attend. The purpose of these conferences is for all active parties to confer about the way to conduct the proceeding to ensure the resolution of the issues in dispute is just, expeditious and conducted at a minimum of expense. The Court has already directed such conferences in a number of cases particularly where, for one reason or another, it appears that a decision on the best way forward would benefit from further assisted discussion between the parties. Further, by reason of rule 39 of the 2008 PECRs, the ADR Registrar may, at any time, upon the ADR Registrar's own initiative, list a proceeding for review or further review by a judge.

ADR

Another hallmark of contemporary courts is a commitment to dispute resolution other than just by determination upon a hearing. This is an area which has received significant emphasis in the Planning and Environment Court in recent years.

In earlier times, directions for dispute resolution typically required a single "without prejudice" meeting between the parties, shortly prior to the hearing. The publication of PD 1 of 2006 signalled a change of emphasis. In particular, PD 1 of 2006 provided that a draft directions order should ordinarily include a Dispute Resolution Plan

[1] Rule 18(3) requires the party with the onus in the proceeding to apply to the Court for orders or directions as soon as practicable, but with 3 months after the originating process is filed. This was previously provided in clause 4 of PD 1 of 2006.

(DRP)[2]. The Court has progressively required more substantive DRPs. It is now common for DRPs to be multi-pronged plans, utilising a number of ADR mechanisms progressively throughout a single case.

The appointment of the ADR Registrar has given the Court much greater capacity to promote ADR. That is all the more so because the ADR Registrar (Peta Stilgoe) is a trained mediator, and also an experienced legal practitioner in the planning and environment field.

Under the 2008 PECRs the ADR Registrar may not only convene a Case Management Conference[3], but may also, at the direction of the Court or at the request of the active parties, convene and chair a "without prejudice" conference[4]. Section 4.1.48 of the *Integrated Planning Act* 1997 also permits her to be appointed to mediate a matter. The Department's funding of the ADR Registrar means that the Court has been able to offer these services free of charge. They have proved popular and successful.

The ADR Registrar does not have the capacity to mediate every case. If the growth of ADR in the Court is to continue, then more capacity will have to be found. The 2008 PECRs permit a function or power of the ADR Registrar to be delegated to another registrar or deputy registrar of the Court[5]. Capacity might come from outside the Court, in the form of expanded use of private ADR services, which are used more extensively in other jurisdictions. The Court meanwhile continues to monitor domestic and international developments in ADR.

The Planning and Environment Court is not unique in placing increased emphasis on ADR or in offering ADR services. Where the Court differs from some like courts and tribunals, is in the way that it otherwise carries out case management, so that the ADR process is better informed, and a problem solving approach is fostered.

In recent years the Court has focussed more heavily on protecting the objectivity of expert witnesses and on case management which promotes a professional discourse among them. That objective is also now sought in other jurisdictions. For example, such considerations underlie the concurrent evidence (hotub)[6] model of adducing expert evidence at trial. This has been used occasionally in the Planning and Environment Court and in the Land Court in Queensland, but more frequently in New South Wales.

The Planning and Environment Court in Queensland however, has not been content to await the hearing, before the parties get the benefit of the expert professional discourse. Instead, case management is used to ensure that the benefit of that discourse is obtained at an earlier time, through a system of early notification of lists of experts followed by joint[7] meetings, in the absence of the parties or their legal or

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2 Clause 9(a)(v) of PD 1 of 2006, now clause 8(a)(iii).

3 Rule 38.

4 Rule 40.

5 Rule 42.

6 The concurrent evidence model results in all experts in the same field being sworn in, and giving their evidence at the same time. They can ask questions of each other, as well as be questioned by the parties' legal representatives or agents.

7 and often continuing.

other representatives and joint reports. This informs the ADR process, to facilitate problem solving, rather than just horse trading. It also narrows the areas of expert disagreement at any subsequent hearing.

This approach is supported by provisions of the 2008 PECRs. In particular:

(i) Division 3 of Part 3 of the 2008 PECRs makes provision for meetings of experts;
(ii) such meetings may be convened at the request of the Court or the request of the parties;
(iii) such meetings may be chaired by the ADR Registrar[8];
(iv) a party must ensure that their expert is ready to take part in a meeting[9];
(v) the meetings are held in the absence of the parties, their lawyers or agents[10];
(vi) a person must not give, and an expert must not accept, instructions to adopt or reject a particular opinion[11];
(vii) each expert must be given written notice that their duty is to assist the Court, and that the duty overrides any obligation to any person who is liable for the expert's fee or expenses[12];
(viii) the meetings are held on a "without prejudice" basis, save for the content of the joint report[13];
(ix) the experts must prepare a joint report, without further reference to, or instruction from, the parties[14];
(x) the joint report must confirm that each expert understands the expert's duty to the court and has complied with that duty[15],
(xi) the parties may agree, or the Court may direct, that the parties to a "without prejudice" conference be accompanied by their experts[16].

This approach recognises that:

- the Court should be concerned with the entirety of its list, not just with those cases which will go to trial;
- because the majority of cases are likely to resolve, case management should focus on the path to resolution as much as the path to trial;
- case management does not stand apart from ADR, and
- the nature of planning and environment disputes means that ADR is more likely to benefit from the considered discourse among the experts. Unlike ordinary civil litigation, which is usually concerned with money claims, planning and environment disputes usually concern the likely effects and impacts of prospective development. The experts can assist the parties in

8 Rule 24.
9 Rule 25.
10 Rule 21 – definition of "meeting of experts" and "party".
11 Rule 28.
12 Rule 25(e).
13 Rule 27.
14 Rule 26(1), but see the exception in rule 26(2) for a joint enquiry by the expert to the parties jointly.
15 Rule 26(3)(a).
16 Rule 40(2).

understanding the nature and extent of those likely impacts and effects, and the options for amelioration.

The Court's approach is achieving pleasing results.

The success of ADR is too often measured just by the number of cases which have been resolved and the Court time and legal costs which have been saved. ADR in the Planning and Environment Court has been positive in those terms, but that should not be the only concern. If it were, then ADR based on the toss of a coin or a game of paper/scissors/rock would produce outstanding results statistically. ADR, and the case management which supports it, should be judged as much by quality as quantity.

A dispute resolution process which involves the parties, assisted by the experts, identifying and working through the issues in a problem solving manner is more likely to reach a genuinely satisfactory resolution than one which is ill informed, relies on horse trading or, worse still, the potential of the process to intimidate one or other (or all parties) into agreeing to settle. Further, dispute resolution through informed problem solving is more likely to result in a better development outcome, to the benefit of the community. That is relevant in the Planning and Environment Court, given the public interest nature of the matters which come before it and the stated purpose of the IPA, to seek to achieve ecological sustainability[17].

These qualitative matters are not readily susceptible to measurement, but anecdotal evidence suggests that the Court's case management is promoting these objectives.

Trial Management

The Court's increasing emphasis on pretrial management and ADR does not distract from the need for vigilance concerning trial management. The Court must ensure that trials are conducted both promptly and efficiently.

In earlier times, judges were somewhat more cautious about interfering with the traditional right of the parties to present cases as they wished. This understandable caution resulted in some notable excesses. For example, in the early years a party was free to call as many experts as that party wished on any relevant issue. There were some larger cases, in which a party would call multiple traffic engineers or multiple town planners to express essentially the same opinion on the same topic, so as to "build a body of evidence" in support of its case. Similarly, parties were not constrained in the time they could spend in evidence-in-chief. Considerable time could be devoted to taking witnesses through the reports which were otherwise before the Court.

The Court moved some years ago to trim these excesses. Rules were introduced to limit the number of experts who could be called[18], and to restrict evidence-in-chief[19]. Judges will now often have the parties deliver relevant material (such as joint reports) to their chambers in advance, so that time is not unduly wasted bringing the judge "up-to-speed" at the commencement of the hearing.

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17 Section 1.2.1.

18 Rule 23(1) of the 1999 PECRs, see now rule 33 of the 2008 PECRs.

19 Rule 23(4) of the 1999 PECRs, see now rule 32 of the 2008 PECRs.

In more recent times, even greater trial management has been applied, particularly in longer or complex cases. A non-exhaustive list of examples of the types of orders and directions now made is to be found in rule 18(5)(c) of the 2008 PECRs which provides, in part, as follows:

> "(5) Without limiting sub-rule (1), (2) or (3), an order or directions, or an application for an order for directions, about a proceeding may be for 1 or more of the following–
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> …
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> (c) an order about the conduct of the proceeding or directions about a procedural matter not provided for in these rules or under another law, including an order or directions about 1, or more of the following–
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> …
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> (vii) giving, for use by the court before the hearing, a copy of–
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> (A) document identifying the issues in dispute in the proceeding; or
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> (B) an extract of any planning instruments relevant to the proceeding; or
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> (C) a statement of evidence, including a joint report, for the proceeding; or
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> (D) a book of documents for the proceeding;
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> (viii) limiting the duration of the hearing;
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> (ix) limiting the time to be taken by a party to the proceeding presenting the party's case;
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> (x) requiring evidence to be given by affidavit, orally or in another form;
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> (xi) requiring expert witnesses in the same field to give evidence consecutively, concurrently or in another way;
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> (xii) limiting the number of witnesses a party may call on a particular issue in dispute in a proceeding;
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> (xiii) limiting the time to taken in examining, cross-examining or re-examining the witness;
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> (xiv) requiring an opening address or submissions to be made in the way the court directs;
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> (xv) limiting the time to be taken for an opening address or in making oral submissions;
>
> (xvi) limiting the length of a written submission, affidavit or statement of evidence;
>
> (xvii) any other matter the court considers appropriate.
>
> …"

The Court endeavours to apply these trial management techniques selectively and flexibly, to meet the needs of the particular case. The length of hearings in typical cases has generally been contained, notwithstanding an increase in the complexity of the issues and the statutory planning documents which now fall for consideration in

even a relatively straightforward matter. The duration of longer trials has been significantly reduced.

Rules and Practice Directions

The 2008 PECRs follow their predecessors in providing a limited number of rules which specifically apply to the Planning and Environment Court, but otherwise rely upon the *Uniform Civil Procedure Rules* 1999 (the UCPRs), which apply by virtue of rule 3(2) of the 2008 PECRs. The UCPRs are commendably comprehensive in dealing with ordinary civil litigation. It would have been possible to produce an even shorter version of the PECRs had even greater reliance been placed upon parties having recourse to the UCPRs to "fill the gaps". On the other hand, the UCPRs are too lengthy and complex to be easily comprehended by all litigants in the Planning and Environment Court, particularly the self-represented individuals and community groups which participate. Accordingly, the 2008 PECRs have been kept relatively brief, but at the same time, aim to be sufficiently comprehensive to obviate over-reliance on recourse to the UCPRs.

The 2008 PECRs were the subject of my presentation to a QELA seminar earlier this year. The detail is beyond the scope of this paper. A brief précis of some of the changes however, serves to highlight the ways in which the rules have evolved. It also reflects the Court's abiding concern for flexibility, through individual case management and the promotion of problem solving, including through the management of expert evidence, the use of ADR and trial management techniques. The changes include the following:

- the Court's power to excuse non-compliance with the rules has been enlarged (rule 4);
- a respondent by election may now withdraw from a proceeding by filing and serving a notice (rule 15);
- the discretion to hear a proceeding at a different place than where it was filed has been enlarged (rule 16);
- the previous requirement for an entry for hearing has been deleted;
- an application for orders or directions can now be brought at any time (rule 18);
- the Court's power to make orders or issue directions of its own motion is recognised (rule 18(1));
- the requirement for a party with the onus to promptly bring a proceeding before the Court for directions is entrenched (rule 18(3));
- there is a broad discretion in relation to the orders or directions which the Court may make. The rules specify a non-exhaustive list of examples. These include dispute resolution plans, expert meetings, joint reports and other matters already referred to;
- the requirement for parties to provide draft directions or orders to one another, to promote discussion and agreement, is entrenched (rule 19);
- the consequences for non-compliance with the rules are more open-ended (rule 20);
- the expert meeting and joint report process is now entrenched in the rules (Division 3 of Part 3);

- the position and powers of the ADR Registrar are now provided for in the rules.

The 2008 PECRs are complemented by PD 2 of 2008, which superseded PD 1 of 2006. The new practice direction is largely evolutionary, but somewhat shorter than PD 1 of 2006. That is partly because some provisions of the former practice direction are now incorporated into the 2008 PECRs.

A practice direction guides parties in conducting proceedings in accordance with the rules. Practice directions should therefore be read with the rules and ordinarily do not simply repeat them. Parts of PD 2 of 2008 do however, repeat some of the requirements of the rules. That has been done deliberately, so that the practice direction reads as a relatively self-contained overview of the procedure of the Court, in a relatively standard case. This was thought desirable, given the nature of the jurisdiction and the parties who regularly appear before it, including self-represented parties.

Best Practice

The Court, under its former guise of the Local Government Court, was first created by section 27 of the *City of Brisbane Town Planning Act* 1964. It has provided an open, transparent, independent and judicial forum for the resolution of planning and environment disputes in Queensland for many years. It, and the evolution of its identity, practices and processes, are well known in this State. It is also well known, at a judicial level, throughout Australia and New Zealand. That is due, at least in part, to the ongoing inter jurisdictional contact maintained through the Australian Conference of Planning and Environment Courts and Tribunals (ACPECT). At other levels however, it has flown somewhat "under the radar" in terms of acknowledgement beyond the State's borders.

It was against this background that I was pleasantly surprised to receive a visit, on Easter Thursday of 2008, from the internationally renowned academic and consultant Professor George Pring and Catherine Pring, who is an accomplished professional mediator, from Denver, Colorado, USA. They were in Australia for the purposes of research for a detailed comparative study of Environment Court and Tribunals (ECTs) worldwide. Their work will be published later this year. It will identify success factors and best practices, distilled from their comparative analysis. They showed great interest in Australian ECTs, including the Planning and Environment Court in Queensland.

Their interest survived our initial four hour discussion. In January of this year I was pleased to be able to travel to Colorado, to take up an invitation to speak about Australian ECTs, particularly the Planning and Environment Court in Queensland and to hold discussions with academics and judges. I was assured that Australian ECTs, including our Court, are regarded as among the leading jurisdictions and will be influential in the identification of best practice principles. It became clear to me that at least some of what we now take for granted, is regarded as quite ground breaking elsewhere.

For example, while in Colorado, I met with Justice Hobbs, who is a member of that State's Supreme Court, which is the highest court in the State system. Justice Hobbs is a former specialist in water law, which is a very important specialist jurisdiction in Colorado. Justice Hobbs was in the process of reviewing the management of expert evidence in that State's specialist water court. He showed great interest in our Court's management of experts and in the 2008 PECRs, a copy of which he studied. He has subsequently advised that the Colorado Water Court Rules have been amended to provide for:

(i) meetings of experts, in the absence of the parties or their attorneys, conducted on a "without prejudice" basis;
(ii) joint expert statements following the meetings;
(iii) a prohibition on instructing an expert to alter the expert's report, disclosure (of the expert's prior reports) or opinion, and
(iv) declarations by experts that they have complied with their duty to the court.

Justice Hobbs has kindly acknowledged the encouragement which he received from the 2008 PECRs.

None of this is cause for future complacency. There is always room for improvement. Any reform process necessarily focuses on what we could do better. That should not however, detract from an appreciation of what has been achieved to date. The indications are that the Court is progressing reasonably well on its never ending journey. That is due, in part, to the efforts of the judges over the years, but it is also the product of the cooperation and support which the Court has enjoyed from both branches of the legal profession and from other stakeholders. The Court looks forward to that continuing.

Rackemann DCJ
25 May 2009