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# Practice and procedure for expert evidence in the Planning and Environment Court of Queensland

***Judge Michael Rackemann*** *PLANNING AND ENVIRONMENT COURT OF QUEENSLAND*

The Planning and Environment Court (PEC) in Queensland is a longstanding specialist court, constituted by certain judges of the District Court of Queensland, which hears and determines a range of planning and environment disputes pursuant to state legislation. The court, which dates back to 1965,[1] is presently continued under the Sustainable Planning Act 2009 (Qld).

The PEC has power to hear a number of different types of proceedings, but much of its work involves hearing appeals from decisions of local governments or government departments or agencies relating to development applications and approvals.[2] Such appeals are conducted by way of a hearing anew (that is, a merits review on the evidence called before the court, not limited to the material that was before the initial decision maker).

The evidence adduced at hearings is primarily that of expert witnesses. The range of disciplines is diverse. The management of expert evidence is central to the efficiency and effectiveness of the PEC.

Practice in the PEC is characterised by active list supervision and individual case management, by the judges, towards dispute resolution. The court has its own ADR Registrar, whose services are free of cost to the parties. The ADR Registrar may, among other things:

- conduct mediations;
- chair without prejudice conferences;
- chair meetings of experts; and
- conduct case management conferences.[3]

More than 90% of matters are resolved without the need for a hearing on the merits

## The management of experts — the rise and fall of the single expert

The boom in the number of experts giving evidence and the range of disciplines from which they are drawn, together with the growth of the litigation support industry more generally and the contribution of those factors to the complexity, length and cost of litigation, led to a debate, over the last couple of decades, as to the best way to manage expert evidence. A central aim was to avoid expensive, adversarial and gladiatorial battles between teams of experts.

An early response, promoted particularly by Justice McClellan in New South Wales and then Justice of Appeal Davies in Queensland, was the single court-appointed expert model. The arguments in favour of that model were based upon assertions or assumptions, including the following:

- the evidence of experts retained by the parties is significantly affected by adversarial bias;
- that bias is caused by the retainer relationship;
- adversarial bias represents a significant hurdle to the just resolution of matters in controversy; and
- adversarial bias cannot effectively be dealt with other than by requiring, at least generally, that all expert evidence be by those who are either jointly instructed by the parties or appointed by the court.[4]

The rules of court applying in several jurisdictions — including, in Queensland, the Uniform Civil Procedure Rules 1999 (Qld) — were amended to encourage or generally require the use of single experts.[5] Experience suggested, however, that at least in the context of the PEC, the first and third of the above assumptions or assertions were overstated, while the second and fourth were erroneous.[6] The single expert model was not utilised in the PEC — except in a handful of cases where, for particular reasons, the parties wished that model to be used. The early enthusiasm for the single expert model more generally has waned over time. While it remains a viable option in a limited number of cases, it is not the most common means by which expert evidence is adduced either in the PEC or in the courts of civil jurisdiction in Queensland.

## Management of experts — the PEC approach

The PEC has a generally expressed power to make orders and to issue directions about a proceeding as the court considers appropriate.[7] That power includes (but is not limited to) the power to make orders and to issue directions about the preparation and presentation of expert evidence.

The management of experts in the PEC is underpinned by a belief that experts should be treated in an appropriately respectful way and that they can be

expected to show professional objectivity if that objectivity is respected and protected by the process that they are asked to participate in. Further, the aim is to harness the combined experience of the experts for the benefit of dispute resolution more generally at an early stage, not just for the purposes of a hearing. This is based on an acknowledgment that, since the vast majority of cases in the PEC lists are able to be resolved, case management, including the management of experts, should be resolution focused rather than trial focused. This is furthered by using the joint expert meeting and report process. That process is not novel, but the PEC manages it in a particular way.

Key components of the PEC approach include the following:

- The overriding duty of the experts to the court is provided for in the rules and must be notified to each expert.[8]
- Each party is permitted to engage one expert in relation to each field of expertise,[9] but must identify their experts at a very early stage.
- While the parties must ensure that their expert is properly briefed and ready to participate in an expert meeting process,[10] they may not instruct the expert as to which opinions the expert is to accept or reject.[11] Each expert must verify that they have not received or accepted any such instructions.[12]
- Once the experts have been retained, identified and briefed, they begin an expert meeting process, which generally involves meetings over a number of weeks and which results in a joint report. It usually takes the form of an iterative process among the experts involved.
- That expert meeting process may be chaired by the ADR Registrar.[13]
- While the experts are ordinarily briefed about the issues in dispute, the PEC generally does not settle precise questions for the experts to answer. The experts are left to address the issues that relate to their field and expertise as they see appropriate.
- *Critically*, not only does this process take place *before* the preparation of any trial reports, but also, throughout the process, the experts are, in effect, "quarantined" — that is, subject to very limited exceptions, the parties and their lawyers are not permitted to communicate with the experts from the time the process begins until it ends with the publication, by the experts, of their joint report.[14]
- Save for the contents of the joint report, evidence may not be given of what transpired in the meetings.[15]
- The results of the consultative process inform the dispute resolution process well prior to any hearing. The experts generally accompany the parties in mediation.
- It is only if the matter remains unresolved that the experts may then prepare separate reports for a hearing. Those reports are limited to the areas of disagreement expressed in the joint report.
- Save by leave, an expert may not give evidence that departs from the opinions expressed in the joint report.[16]

The exceptions to the general "no communication" rule during the "quarantine period" have been developed over time, to ensure that the process does not become bogged down or stalled and to ensure that it does not impede the progress of dispute resolution otherwise. Accordingly, during the quarantine period, the following apply:

- the experts may participate in mediation involving the parties;
- the experts may seek further information (in writing disclosed to all parties);
- the experts may inform the parties of any matter affecting the proper and timely progress of the process; and
- the parties may ask the experts to provide a "conduct report" about the proper and timely conduct or conclusion of the process.[17]

The early joint meeting and report process has:

- virtually eliminated disputes about methodology;
- achieved a high degree of common ground with respect to the opinion evidence;
- harnessed the combined experience of the two experts — indeed, there have been a number of cases in which the experts have subsequently said that they were better informed as a consequence of the collaborative process and that the results of their joint endeavours were more satisfactory than either could have achieved individually; and
- promoted solution-based dispute resolution.

The process is now well entrenched and supported.[18]

## Expert evidence at hearing

In the small proportion of cases that proceed to a hearing on the merits, expert evidence is usually adduced by calling the experts in "blocks" according to their field of expertise. For example, each of the traffic engineers will give evidence, one after the other, followed by each of the experts in some other field of expertise. The concurrent evidence, or "hot tub", approach has been tried without much success, and there is little enthusiasm for it among the legal profession or the experts.

The use of concurrent evidence has its greatest attraction where pre-trial management, to obtain the benefit of the professional discourse at an earlier time, has been deficient. In short, it is better to have some opportunity for expert discourse than none. Too little too late is generally better than nothing at all. While concurrent evidence is also an available tool where more extensive management has occurred at an earlier time, many of the perceived benefits will already have been realised.

Following a trial of concurrent evidence in the PEC, a seminar was held by the Queensland Environmental Law Association in 2008 to discuss the experience. The seminar brought together some 130 persons, including judges, lawyers and experts. The views expressed fell into two main categories. There were those who were ambivalent about whether concurrent evidence was used or not, given that an earlier and better opportunity for genuine professional discourse had already occurred prior to hearing. The majority were opposed to concurrent evidence, so long as the pre-trial expert meeting and joint report process had been used.

## Conclusion

Experience in the PEC suggests that it is the time between when the experts are retained and when they commit themselves to opinions expressed in reports that presents the greatest opportunity to ensure that professional objectivity is respected and protected and to maximise the benefit to be obtained from the combined professional discourse. The PEC utilises a joint meeting and report process, conducted early and while the experts are "quarantined", in order to realise the potential of the experts to assist in the resolution of a matter, usually by consensual agreement, but sometimes at hearing.

***Judge Michael Rackemann,***
*Judge of the Planning and Environment Court*

## Footnotes

1. The court was first constituted under its now former name of the Local Government Court by the City of Brisbane Town Planning Act 1964 (Qld). It was continued, and renamed, in 1991 by the Local Government (Planning and Environment) Act 1990 (Qld), s 7.3(1) and has been continued under subsequent statutory regimes.
2. Other types of proceedings include proceedings for declarations and civil enforcement orders.
3. Planning and Environment Court Rules 2010 (Qld), rr 39, 41.
4. Davies G, "Court appointed experts" (2005) 5 *Queensland University of Technology Law and Justice Journal* 89.
5. See, for example, Federal Court Rules 2011 (Cth), r 23.01; Family Law Rules 2004 (Cth), Div 15.5.2; Uniform Civil Procedure Rules 1999 (Qld), Ch 11 Pt 5; Uniform Civil Procedure Rules 2005 (NSW), Pt 31; Rules of the Supreme Court 1971 (WA), O 40.
6. For a further discussion of this, see Rackemann M E, "The management of experts" (2012) 21 *Journal of Judicial Administration* 168.
7. Planning and Environment Court Rules 2010 (Qld), r 19(1).
8. Uniform Civil Procedure Rules 1999 (Qld), r 426; Planning and Environment Court Rules 2010 (Qld), r 26(e).
9. Planning and Environment Court Rules 2010 (Qld), r 34.
10. Planning and Environment Court Rules 2010 (Qld), r 26.
11. Planning and Environment Court Rules 2010 (Qld), r 29.
12. Planning and Environment Court Rules 2010 (Qld), r 31(3).
13. Planning and Environment Court Rules 2010 (Qld), r 41.
14. Planning and Environment Court Rules 2010 (Qld), rr 22, 27.
15. Planning and Environment Court Rules 2010 (Qld), r 28.
16. Planning and Environment Court Rules 2010 (Qld), r 30.
17. Planning and Environment Court Rules 2010 (Qld), r 27.
18. Sutherland N, "The efficacy of joint reports in narrowing technical issues during litigation" (2011) 1 *National Environmental Law Review* 50.