Resource Management
Theory & Practice

2011

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Subscriptions
Resource Management Theory & Practice is published annually by Thomson Reuters for the Resource Management Law Association of New Zealand Inc. Subscription to the journal costs $110 per year (plus postage), the subscription cost for RMLA members resident in New Zealand is $36 per year. Back volumes are available.

Call for Contributions
Contributions should be sent to the Executive Officer for consideration by the Editorial Committee by 31 July. Papers should be within the range of 4,000–8,000 words and should conform with the *New Zealand Law Style Guide*. Copies of the final paper should be sent as an email attachment in Microsoft Word by 15 September. Communications should be addressed to:

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Citation
This volume of the journal may be cited as [2011] *RM Theory & Practice*.

ISSN 1177-1003

Designed by Daniel Golding

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Environmental decision-making, the rule of law and environmental justice

A case study of the Planning and Environment Court of Queensland

■ **Judge Michael Rackemann, Planning and Environment Court of Queensland**

History

The Planning and Environment Court of Queensland (PEC) is a longstanding, specialist court, constituted of judges, which determines a range of planning and environment disputes, pursuant to State legislation. It was first created by the City of Brisbane Town Planning Act 1964 (CBTPA), which was proclaimed into force on the 21 December 1965. The Court's first judge, his Honour Judge Byth, was appointed on and from 20 January 1966.[1]

The PEC was first constituted under its former name as the Local Government Court. Its primary function, at the outset, was to hear appeals from those dissatisfied with decisions on applications for rezoning, land subdivision or land use. Decisions were previously determined on appeal to the Minister for local government, or the delegate of the Minister.[2] By reason of the CBTPA and amendments to the Local Government Act 1936, appeals to the Minister's delegate were replaced with appeals to the newly created Court. By removing such controversies from the hands of a politician (the Minister) and placing them within the jurisdiction of the judges of an independent, specialist court, the potential for the perception that appeals may be influenced by political or extraneous considerations was neutralised.

The statutory provisions dealing with planning decisions were replaced by the Local Government (Planning and Environment) Act 1990 (PEA), which commenced on 15 April 1991. By that Act,

the Court was preserved, continued in existence and constituted in a new name and style as the Planning and Environment Court.

The change of name was apt. At least by the 1980s, the PEC's decision-making had come to embrace environmental, as well as more traditional, land use considerations. In *Keys v Woongarra Shire Council*[3] for example, the Court in 1983 refused a proposed rezoning at Mon Repos to facilitate a proposed 40-lot residential subdivision, in part because of the detrimental effect which associated lighting would have had on the important turtle rookery on the beach at that location. By the time the Court's name was changed, the legislation which preceded the PEA had been amended to expressly make environmental impact relevant.[4] That was carried forward in the PEA[5] and in subsequent legislation.

The Environmental Protection Act 1994 (EPA) came into effect on 1 March 1995[6] with ecological sustainable development as its object.[7] The EPA provided, amongst other things, for:

- applications for environmental authorities, to authorise the carrying on of certain activities which may impact on the environment;
- environmental offences; and
- court proceedings to remedy or restrain an offence or a threatened or anticipated offence.

Jurisdiction was conferred on the PEC to hear appeals by persons dissatisfied with decisions under that Act, and also to hear proceedings to remedy or restrain offences.

In 1998 the PEA was repealed and replaced by the Integrated Planning Act 1997 (IPA). The PEC was continued under the IPA. The IPA's stated purpose was to seek to achieve ecological sustainability, which was defined to mean:

> *Ecological sustainability* is a balance that integrates—
> a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
> b) economic development; and
> c) maintenance of the cultural, economic, physical and social wellbeing of people and communities.[8]

As its name suggests, the IPA took an integrated approach to

pursuing that purpose. It did so in two ways. First, it sought to integrate planning at the State, regional and local levels, so that planning strategies were more consistent and coherent. Secondly, it introduced the Integrated Development Approval System (IDAS). IDAS permitted an applicant to make one consolidated application for one development approval, to authorise development to proceed. The single development application was then referred to all relevant government departments and agencies, with jurisdiction under various statutes. Those referral agencies had an input into the decision. This obviated the need for multiple approvals under various Acts dealing with different aspects of the development, and also avoided the potential for conflicting decisions on those various applications. Other relevant statutes were amended to roll their approval processes into IDAS.

IDAS had a consequential effect on appeals to the PEC. The one decision would come before the Court. All relevant parties, including government "referral agencies" exercising jurisdiction under their various statutes, would or could become parties to the appeal. The Court was then able to consider all relevant aspects of the development, whether they related to town planning, environmental impact, infrastructure provision or other aspects.

This integrated approach continues under the current legislation, the Sustainable Planning Act 2009 (SPA), which replaced the IPA in 2009. The PEC has also been continued under that Act.

Court structure

The PEC is constituted of certain judges who are selected from the ranks of judges of the District Court of Queensland. Each case is determined by a single judge. The Court does not sit as a "panel" and does not have any "non-judge" assessors or members. Consistently with its status as a court constituted of judges, it enjoys independence from other arms of government. It is not answerable to any politician, government department or agency for its decisions.

The PEC's decisions are final, subject to further appeal. Its decisions are appealable by leave to the Court of Appeal which is Queensland's highest appellate court. Appeals are however, limited to matters of law or jurisdiction. Decisions of the Court of Appeal are in turn appealable, with special leave, to the High Court of Australia (Australia's highest court).

Jurisdiction

Subject matter

The PEC has the jurisdiction given to it under any Act.[9] There are more than 30 statutes which are relevant to the jurisdiction of the PEC. They cover topics which include:

- Planning and development;
- Environmental protection;
- Coastal protection and management;
- Fisheries;
- Marine parks;
- Maritime conservation;
- Heritage;
- Transport infrastructure;
- Vegetation management.

The PEC's jurisdiction does not extend to the Mineral Resources Act 1989. In Queensland, mining is dealt with by the Land Court.

Generalist courts do not have jurisdiction to decide matters which fall within the jurisdiction of the PEC.

The majority of the PEC's work involves hearing appeals from decisions of local governments or government departments or agencies, relating to development applications and approvals.[10] Such appeals are conducted by way of a hearing anew[11] (ie a merits review on the evidence called before the Court, not limited to the material that was before the initial decision-maker). The PEC's jurisdiction also encompasses:

1) Appeals against the giving of an enforcement notice by a relevant authority;[12]
2) Enforcement proceedings, brought to the PEC in the first instance, for orders to restrain or remedy offences;
3) Appeals against decisions of local governments under local

laws, about the use of premises or the erection of buildings or structures;[13]

4) Appeals against decisions on claims for compensation for injurious affection resulting from changes to a planning scheme or from the issue of an erroneous planning or development certificate;[14]
5) Appeals about the imposition of charges for the provision of infrastructure;
6) Applications brought to the PEC in the first instance, for declarations and other orders.[15] This jurisdiction is sometimes used to conduct what is, in effect, judicial review of the lawfulness and validity of a decision which is not subject to a merits review. The jurisdiction to seek judicial review before the Supreme Court of Queensland is generally excluded, in light of the PEC's jurisdiction;[16]
7) Contempt proceedings, including proceedings to punish a party for non-compliance with an order of the PEC;
8) Appeals to the PEC from decisions of Building and Development Dispute Resolution Committees. Such committees are low-cost forums which exclude legal representation. They decide disputes about matters such as technical compliance with the applicable building construction, plumbing and drainage standards, and disputes about certain other relatively minor planning and environment matters[17]; and
9) A range of other proceedings under diverse statutes.

The PEC does not have criminal jurisdiction, except for its power to punish for contempt. Those charged with development or environmental offences in Queensland are brought before the criminal courts (ie the Magistrates Court or the District Court, depending upon the gravity of the offence). PEC judges deal with some such matters in their capacity as District Court judges presiding over trials or presiding over appeals from the Magistrates Court, but the PEC itself does not have that jurisdiction.

One consequence is that, where offences are committed, there may be multiple proceedings in different courts. The offender may be subject to proceedings for enforcement orders in the PEC as well as for conviction in a criminal court. There is a case for expanding the PEC's jurisdiction in this regard, particularly because the PEC

is constituted of judges, all of whom have criminal law experience in their capacity as District Court judges.

Geographical

The PEC has jurisdiction throughout the State and may sit at any place.[18] Being charged with the responsibility to decide disputes throughout Queensland brings particular challenges. Like Western Australia, Queensland is a very large state. It has an area of approximately 1.7 million km^2 and an eastern coastline stretching some 3,000 km.[19] Unlike Western Australia however, Queensland has significant cities and towns in regional areas, remote from the capital city (Brisbane) which is in the far south-east corner of the State. The Court cannot be confined to the capital city. It must serve the State as a whole.

The fact that the judges of the PEC are selected from the ranks of the District Court helps to address this challenge. The District Court has judges and infrastructure in regional areas. The PEC makes use of this to achieve a regional presence as well as a regional reach. There are PEC judges based not just in Brisbane, but in the District Court at Southport (Gold Coast), Ipswich, Maroochydore, Rockhampton, Townsville and Cairns (which is approximately 1,700 km north of Brisbane).

PEC judges, like all judges of the District Court, also travel "on circuit" to other significant regional towns which do not have resident judges. Because PEC judges are also judges of the District Court they can, whilst on circuit, hear District Court civil and criminal matters as well as PEC matters. Being mindful of the desirability of hearing cases near the communities which they affect, PEC judges also from time to time sit at places where there is no court at all. Community halls or other facilities are used on such occasions.

The use of existing District Court judges, staff and facilities minimises the public cost of the PEC. The PEC has no building of its own. Its judges use their existing District Court chambers and staff. The number of judges of the District Court of Queensland in proportion to the State's population, compared with similar courts in other States, suggests that the District Court of Queensland has no more judges than would be expected if the PEC

did not exist. Further, there are only three registry staff, based in Brisbane, which specifically support the PEC. The PEC is therefore extremely cost effective in its use of public resources.

The association of the PEC with the District Court also allows each to benefit from a flexibility in matching judicial resources to fluctuations in caseloads. For example, if a matter is resolved in the PEC, that judge can be reassigned to undertake work in the District Court or vice versa.

Court governance

Court governance

It has already been noted that the PEC is:

- a separate court;
- constituted of judges, who enjoy independence from other arms of government; and
- associated with the District Court, of which its members are also judges.

Judges in Queensland are appointed by the Governor-in-Council on the recommendation of the Attorney-General. They are drawn from the ranks of lawyers of at least 5 years standing (usually more than 10 years). Commonly they have been experienced and highly-regarded barristers, while some are drawn from the ranks of senior solicitors.

Judges are appointed to hold office indefinitely, during good behaviour, until retirement or resignation.[20] A judge may only be removed from office for proved misbehaviour or proved incapacity. That may only be done by a vote of Parliament, following an adverse finding by a tribunal of three former judges. If a court is abolished, a judge of that court is entitled to appointment to another office of equivalent or higher status. A judge's salary is also protected.[21] Judges of the PEC, as District Court judges, are paid the same as other District Court judges and have the same entitlements. The protection of the judges' tenure and conditions fosters their ability to make decisions, including decisions adverse to government departments or agencies, without fear or favour.

A judge of the District Court becomes a judge of the PEC by reason of the Governor-in-Council publishing a notice to that

effect in the Government Gazette.[22] In practice that process is commenced by the Chief Judge of the District Court making a recommendation to the relevant Minister. There are no formal requirements which qualify a judge of the District Court for appointment to the PEC. Matters of obvious relevance include that judge's interest in undertaking the work of the PEC, their past experience or perceived capability to undertake such work, as well as geographical considerations (ie whether another PEC judge is needed in a particular region). Approximately half the judges of the District Court of Queensland are also judges of the PEC, although not all of those regularly sit in the PEC. In practice, the vast majority of cases in the PEC are decided by about one-half of its judges (ie about one-quarter of the judges in the District Court), each of whom is experienced in dealing with such matters.

My appointment to the District Court was made with the intention that I also be appointed as a PEC judge. I had been a solicitor for 2 years, and then a barrister in private practice for 13 years, prior to my appointment. As a barrister I specialised in planning and environment law. My appointment was made in the context of the retirement of a senior and very experienced PEC judge.

PEC judges participate in continuing legal education. Although there are no mandatory requirements:

- the judges keep up to date with decisions of their fellow judges and of the Court of Appeal, each of which is published;
- the judges attend and make presentations at conferences, including those convened by the Bar Association of Queensland and the Queensland Environmental Law Association;
- the PEC is a member of the Australian Conference of Planning and Environmental Courts and Tribunals (ACPECT), which is the forum for judges and members of Planning and Environment Courts across Australia and New Zealand, in particular, to share experiences and discuss common issues. ACPECT conferences are held at least biennially; and
- the PEC holds it own annual conference during which judges attend presentations by various speakers, and have time for the discussion of current issues.

The PEC has judges based in nine centres throughout the State. As with other District Court judges, PEC judges may request the Chief Judge of the District Court to relocate them to a different region if a vacancy becomes available. Indeed, I was initially based in Southport (Gold Coast) before being transferred to Brisbane.

The association of the PEC with the District Court allows for PEC judges who no longer wish to undertake that work to be listed instead in the criminal and civil jurisdictions of the District Court. Other District Court judges who show an interest and potential aptitude for the work can be considered for appointment to the PEC.

All judges of the PEC also sit in the District Court from time to time. A number of judges who have considerable experience and expertise in the PEC, enjoy the stimulation of sitting in the civil or criminal jurisdictions of the District Court.

The PEC does not have its own President or Chief Judge. The Chief Judge of the District Court has responsibility for administration of that court and is responsible for deciding which judges sit in the PEC (and in the civil and criminal jurisdictions of the District Court), and when they do so. The Chief Judge also has the power to issue practice directions for the PEC[23] and must be one of two judges to approve its rules.[24]

The Chief Judge of the District Court is also a PEC judge, but her commitments otherwise mean that she does not often sit in the PEC. In practice, the day to day management of the PEC is carried out by the judges who are responsible for the PEC lists in each centre where there is a resident PEC judge. The day to day management more generally is, in practice, undertaken by the listings judge for Brisbane. I have fulfilled that role since being asked to do so in 2008.

My duties include:

- responsibility for the management of the Brisbane list, which comprises some 75 per cent of all cases in the PEC;
- monitoring the lists in those regional areas which do not have a resident PEC judge; and
- continually reviewing the practice and procedure of the PEC, as reflected in its rules and practice directions. In consultation with the Chief Judge of the District Court and other judges of

the PEC, I have been responsible for the current rules and practice directions, as well as for the preceding versions thereof.

Transparency

The PEC has a transparent decision-making process. Section 437 of the SPA requires each proceeding to be heard in public, unless the rules of court provide otherwise. In practice all matters are heard in open court, to which the public has free and unfettered access.

The PEC's files may be inspected at the registry and are also available for online searching.

Judges of the PEC are required to give reasons for their decisions. Those reasons are given in open court and are freely available on the Queensland Courts website: <http://www.sclqld.org.au/qjudgment/>.

Participation

As is discussed later, the PEC has:

- relatively open-standing provisions for participation in proceedings; and
- a rule that generally each party bears their own costs, so that people are not unduly discouraged from exercising their participation rights by reason of the prospect, which might otherwise exist, of an adverse costs order.

Further, the PEC does not require parties to be legally represented. A party to a proceeding may appear personally, or by a lawyer or even by a non-lawyer agent of their choice.[25]

Predictability

The decisions of courts and tribunals are never entirely predicable, but the PEC nevertheless enjoys a reputation for a relatively high level of predictability, particularly in respect of the principles which will be applied in determining each case.

An advantage of the PEC in this respect is that it is a court, properly so called, constituted of judges who are well used to disciplined, reasoned and principled decision-making. Further, the PEC does not have a multitude of full-time or part-time non-

judicial assessors or commissioners deciding cases. Each case is decided by one of a limited number of judges.

Integrity, credibility and legitimacy

Planning and Environment disputes are often associated with very substantial commercial, financial and/or political interests. It is vital that any Environmental Court or Tribunal (ECT) be, and be seen to be, a body of integrity and impartiality. In the Queensland context, this is assured by the adoption of a court constituted of judges. There are no, and have been no, credible allegations of corruption in the PEC's 44-year history.

It may be noted, that the legislation in Queensland permits certain government Ministers to "call in" an application of "State interest" for decision by the Minister. Ministerial call-ins are relatively infrequent. When they occur, it is not uncommon for those unhappy about a particular call-in to decry the loss of the right to take the decision to the "neutral umpire" which is the PEC. That observation is made not to criticise the reserve call-in power, but to underscore the public's confidence in the impartiality of the PEC.

There have been no known cases of judges of the PEC being offered bribes. As with any court, there are very occasional episodes of threats being received. These are dealt with by being referred to the police. None have been carried out or have caused any real difficulty for a judge in performing their duty to decide a case dispassionately.

The PEC enjoys a good reputation with "stakeholders" and in the community more generally. Its reputation is not just with respect to efficiency, effectiveness and impartiality, but also with respect to the quality of decision-making. Its decisions have been subject to relatively little public controversy.

There have been a number of debates and reviews over the years, as to whether the PEC should take a different form. None of these have resulted in any significant change to the structure of the Court.

The Court's achievements have been acknowledged in the recent publication *Greening Justice — Creating and Improving Environmental Courts and Tribunals*, by George (Rock) and

Catherine (Kitty) Pring.[26] That report draws attention to a number of aspects of the PEC including:

- the "problem solving" approach of its judges;
- the efficiency of its structure;
- its regional service, including "flying Judges" travelling to circuit centres (as the publication describes them);
- its efficient case management (the Court is identified as a leader in individual case management);
- its management of expert evidence;
- its alternative dispute resolution process; and
- the commitment of its judges to ongoing review and reform.

Hearing cases

Standing

There are relatively open-standing provisions for matters within the jurisdiction of the PEC.

The parties to an appeal about a decision on a development application will include: the applicant for development approval, the decision-maker and, potentially, relevant government "referral agencies" for the particular application, as well as the relevant Minister. The right of others, including members of the community more generally, to appeal or to elect to become a party to an appeal, depends upon the type of application as well as on whether they participated during the application process.

Development applications fall into two main categories:[27] those that are assessed against a published code, and those that are subject to what is called impact assessment. Whether development is subject to code or to impact assessment depends upon the legislation and statutory instruments, such as planning schemes. Impact assessment involves a somewhat greater degree of scrutiny. An application for impact assessable development is, prior to any decision, publicly notified by:

- advertisement in a newspaper;
- signs placed on the land; and
- notices given to adjoining owners.[28]

The application itself is available for inspection at the offices of the relevant local government.

Where the application has been publicly notified, any person may make a submission about it. That submission must be taken into account by the decision-maker. By properly making a submission objecting to a proposal, a person also obtains rights to appeal to the PEC, or to become a party to any subsequent appeal to the PEC. That person does not have to show a special interest, it is enough that they have lodged a properly made submission objecting to the development.[29]

The statutory provisions generally provide open standing for enforcement proceedings.[30] Consequently any person may commence proceedings in the PEC to remedy or restrain an offence: no special interest is required. Standing is not dependent upon the willingness of prosecuting authorities to take action. In *Booth v Yardley,* for example, Dr Booth, an environmentalist, successfully sought interim orders[31] and subsequent final enforcement orders[32] to prevent a farmer from using electronic grids to kill flying foxes (to prevent them from eating crops), even though the Environmental Protection Agency had taken no action and did not seek to be made a party to the proceeding.

Any person may bring a proceeding in the PEC for declarations, and for orders about declaration. This is sometimes used to challenge the validity of approvals, even where the applicant for relief has no right of appeal against the decision (eg someone opposed to a development which is only code assessable).

Court rules and practice directions

The Court's practice and procedure is governed by the Planning and Environment Court Rules 2010 (PECRs) and Practice Direction 1 of 2010.

Queensland also has Uniform Civil Procedure Rules (UCPRs) which apply to courts of civil jurisdiction, subject only to necessary variations for each court. Those rules apply to the Supreme Court, District Court and the Magistrate's Court. The UCPRs are, as the name suggests, designed to achieve a level of consistency across courts exercising civil jurisdiction. The rules are comprehensive, complex and lengthy (consisting of some 998 rules over some 500 pages).

Given the existence of the UCPRs, it would be possible to

prepare a very brief set of rules for the PEC which relied heavily upon recourse to the UCPRs. That would not be desirable. While many parties in the PEC are legally represented, it is also common for some (particularly local residents or community groups), to be self-represented. For them the task of working through a lengthy and complex set of rules, written for lawyers conducting civil litigation in the courts of general jurisdiction, would often be a daunting task. Similarly, if a comprehensive set of rules providing for every aspect of procedure were created for the PEC alone, they would not only be needlessly repetitive with aspects of the UCPRs, but would risk being too lengthy to be readily comprehensible.

The PECRs seek to chart a middle course. The rules (of which there are 50 covering 30 pages), aim to be comprehensive enough to be read as a "stand alone" set of rules, but not so bulky as to be unwieldy or incomprehensible. They do not provide the answer to every conceivable question. They apply the UCPRs where a matter is not dealt with in the PECRs. The PECRs do however, deal with the core matters governing the practice and procedure of the PEC including:

- how to start a proceeding;
- how to become a party to a proceeding which has already commenced;
- how to discontinue or withdraw from a proceeding;
- where a proceeding will be heard;
- pretrial orders or directions which the Court may give or make;
- expert evidence;
- pretrial applications;
- alternative dispute resolution;
- further appeals to the Court of Appeal;
- forms; and
- fees.

The need for recourse to the UCPRs is limited and encountered relatively infrequently.

The PECRs are complemented by Practice Direction 1 of 2010 (PD1 of 2010). The purpose of a practice direction is to provide guidance and direction to the parties in conducting their cases in

accordance with the rules. Practice directions generally assume a knowledge of the rules and do not repeat their content.

In drafting practice directions for the PEC, it must again be borne in mind that parties will not always be sophisticated, experienced litigants, or be legally represented. Some ECTs respond to this by publishing relatively lengthy practice directions or practice notes which provide a great deal of detailed information. The PEC takes a different approach on the basis that it is more helpful to give an unsophisticated party a relatively brief, but comprehensible document, which covers pretrial case preparation and management in the usual case. It is also helpful if it can be read and understood as a "stand alone" document, even if there is a degree of repetition of aspects also provided for in the rules.

Consequently, PD1 of 2010 is a four-page document which seeks to achieve those objectives. Relatively unsophisticated litigants should be able to read the four-page practice direction and obtain an understanding of the basic elements of the Court's pretrial case management. Beyond that, reference to the relatively concise PECRs should provide the answer to most other questions, with only infrequent reference to the more detailed UCPRs.

In practice, the PEC relies more on active list supervision and proactive individual case management by the judges (through directions and orders made at pretrial directions hearings and case reviews), than it does on sending people away to study the rules. One consequence is that the parties, including those who are relatively unsophisticated, are left in no doubt about the pretrial procedures. These are discussed, and orders made by the judge, in the presence of the parties, at directions hearings and case reviews.

Expert and scientific evidence

Planning and environment disputes generally involve expert evidence and commonly involve experts from a range of different disciplines. The effectiveness of any ECT depends to a significant degree on how it manages that evidence.

The traditional approach was to allow the parties to retain,

instruct and call competing experts to give divergent opinions at trial. This led to a perception of adversarial bias on the part of experts. In Australia this spawned a debate about whether courts and tribunals ought to instead appoint a single expert in each discipline, who would give the only evidence in that field of expertise. This was promoted by, amongst others, the then Justice of Appeal Davies JA in Queensland, and the then President of the Land and Environment Court of New South Wales, McClellan J. The model was flawed (a discussion of the reasons for that is beyond the scope of this paper), and proved inappropriate in most cases.

It was perhaps ironic to hear lawyers contending that other professionals were "paid liars". My own experience of experts in the PEC suggested that they were generally not so dishonourable. I could see however, that traditional court rules and procedures did not sufficiently foster and protect the professional objectivity that experts were expected to demonstrate. The preferred approach, in my view, was to change the rules and procedures so as to better protect that professional objectivity, and to elicit the objective professional discourse among the experts. The PEC has focussed heavily on achieving this.

That objective is now sought in other jurisdictions. For example, such considerations underlie the concurrent evidence (hot tub) model of adducing expert evidence, where all experts in the same field are sworn, and give their evidence at the same time. They ask questions of each other, before being questioned by the parties' legal representatives or agents. This has been used occasionally in the PEC and in the Land Court in Queensland, but more frequently in the Land and Environment Court of New South Wales.

The PEC however, has not been content to await a hearing before parties get the benefit of that expert professional discourse. Instead, case management is used to ensure that the benefit of that discourse is obtained at an early time through a system of early notification of lists of experts followed by joint meetings (in the absence of the parties or their legal or other representatives), and by joint reports. As is discussed later, this informs the ADR process and facilitates an informed problem solving approach. It

also narrows the areas of expert disagreement for determination at any subsequent hearing.

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

1) The rules make provision for meetings of experts;[33]
2) Such meetings may be convened upon the order of the Court or at the request of the parties;[34]
3) Such meetings may be chaired by the PEC's ADR Registrar;[35]
4) A party must ensure that their expert is ready to take part in a meeting;[36]
5) The meetings are held in the absence of the parties, their lawyers or agents;
6) A person must not give, and an expert must not accept, instructions to adopt or reject a particular opinion;[37]
7) Each expert must be given written notice that their duty is to assist the Court, and that that duty overrides any obligation to any person who is liable for the expert's fee or expenses;[38]
8) The meetings are held on a "without prejudice" basis, save for the content of the joint report;[39]
9) The experts must prepare a joint report, without further reference to, or instruction from, the parties;[40] and
10) The joint report must confirm that each expert understands their duty to the Court and has complied with that duty.[41]

Further, where a matter is not resolved:

11) An expert may only prepare a separate trial report on the matters of disagreement in the joint report;[42]
12) An expert may not, without leave, give evidence departing from what was agreed in the joint report;[43] and
13) There is no repetitious examination-in-chief of experts, save by leave.[44]

Experts have expressed satisfaction with the PEC's management of expert evidence, and experience shows that they have responded to it. Experts retained by opposing parties ordinarily will reach common ground on much, if not all, of the matters relevant to their area of expertise. Where areas of disagreement persist, the presiding judge has the benefit of the different points of view in reaching a final determination.

Remedies

When deciding a merits review appeal, the PEC has the power to make any orders it considers appropriate. These orders include, but are not limited to, orders to:

- confirm the decision appealed against;
- change the decision appealed against; or
- set aside the decision appealed against and make a decision replacing it.

The court is not limited to simply approving or refusing a development application. The PEC may approve an application in part and refuse it in part. It may also (and invariably does) impose conditions on any approval. Conditions may require modification of the proposal, additional restrictions, or further safeguards to minimise environmental or other impacts.

When making an enforcement order, or interim enforcement order about a development offence under the SPA, the PEC may direct a person or entity:

a) to stop an activity that constitutes, or will constitute, a development offence; or
b) not to start an activity that will constitute a development offence; or
c) to do anything required to stop committing a development offence; or
d) to return anything to a condition as close as practicable to the condition it was in immediately before a development offence was committed; or
e) to do anything about a development or use to comply with the legislation.

The PEC may make orders including (but not limited to) those requiring:

a) the repair, demolition or removal of a building; or
b) for a development offence relating to the clearing of vegetation on freehold land—
    i) rehabilitation or restoration of the area cleared; or
    ii) if the area cleared is not capable of being rehabilitated or restored — the planting and nurturing of stated vegetation on a stated area of equivalent size.

An enforcement order or interim enforcement order may

be made in terms that the PEC considers appropriate to secure compliance.[45]

The PEC's powers to make enforcement orders or interim enforcement orders under the EPA for development offences are in similar terms.[46] The PEC also has wide powers under the EPA, to remedy or restrain offences other than development offences.[47]

When deciding applications for declarations, the PEC also has the power to make orders about a declaration. This is sometimes used to grant what is, in effect, injunctive relief.

Where the PEC determines an appeal from decisions of a building and development committee, it may return the matter to the committee with a direction that the committee is to make its decision according to law.

The PEC has no monetary limit when considering compensation claims.

It is significant that the PEC not only has wide and flexible powers to make final orders, but that it also has broad powers to excuse non-compliance with procedural and other requirements, the basis of which might otherwise see proceedings being determined on technicalities, rather than on substance. The legislation and statutory instruments dealing with planning and environment matters are large and complex, containing many procedural requirements. As the Supreme Court of Victoria acknowledged as long ago as 1979:

> Planning is a difficult exercise with flexibility an essential ingredient. Those entrusted with its implementation should bear in mind that neither individual nor 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 ends 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.[48]

To that end, the PEC now has extensive excusal powers, which may be exercised in appropriate cases. Section 440 of the SPA

provides as follows:

How court may deal with matters involving non-compliance

1) Subsection (2) applies if the court finds a provision of this Act, or another Act in its application to this Act, has not been complied with, or has not been fully complied with.
2) The court may deal with the matter in the way the court considers appropriate.
3) To remove any doubt, it is declared that this section applies in relation to a development application that has lapsed or is not a properly made application.

Section 497 provides as follows:

Court may allow longer period to take an action

In this part, if an action must be taken within a specified time, the court may allow a longer time to take the action if the court is satisfied there are sufficient grounds for the extension.

Rule 5 of the PECRs provides:

Compliance with rules or an order of the court

The court may—

a) waive compliance with a provision of these rules if the court considers compliance would be likely to cause injustice, unreasonable expense or inconvenience or otherwise considers waiving compliance appropriate; or
b) excuse noncompliance with a provision of these rules; or
c) impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Examples for paragraph (c)—

1 The court may impose a sanction as to costs if, in breach of an implied undertaking under rule 4(3), a party does not proceed in an expeditious way.
2 The court may dismiss a proceeding if a party fails to proceed as required by these rules or an order of the court.

Costs

Parties to proceedings in the PEC generally bear their own costs. Unsuccessful parties are generally not ordered to pay the costs of any other party. This is appropriate given the community-interest nature of the matters which come before the PEC. A general discretion to award costs could otherwise act as a powerful disincentive to members of the community appealing, or participating, as parties to an appeal.

Despite that general rule, there are a limited range of circumstances in which a discretion to make a costs order arises.[49] Those generally involve some blameworthy conduct on the part of a party. Those circumstances are where:

a) the court considers the proceeding was instituted, or continued by the party bringing the proceeding, primarily to delay or obstruct;
b) the court considers the proceeding, or part of the proceeding, to have been frivolous or vexatious;
c) a party has not been given reasonable notice of intention to apply for an adjournment of the proceeding;
d) a party has incurred costs because the party is required to apply for an adjournment because of the conduct of another party;
e) without limiting paragraph (d), a party has incurred costs because another party has introduced, or sought to introduce, new material;
f) a party has incurred costs because another party has defaulted in the court's procedural requirements;
g) if the proceeding is an appeal against a decision on a development application or master plan application and the applicant did not, in responding to an information request, or to a request for information for the master plan application, give all the information reasonably requested before the decision was made;
h) the court considers an assessment manager, referral agency, coordinating agency for a master plan application, compliance assessor or local government should have taken an active part in a proceeding and did not do so;
i) an applicant, submitter, assessment manager, referral agency,

coordinating agency for a master plan application, compliance assessor, a person requesting compliance assessment or a local government does not properly discharge its responsibilities in the proceeding.

Case load, dispute resolution and management

Case load

Approximately 700 new matters are commenced in the PEC each year. Of those:

- approximately 75 per cent are filed in Brisbane (although some relate to areas outside of Brisbane);
- most of the balance are filed in Southport, Maroochydore, Townsville or Cairns; and
- a much smaller number are filed in diverse centres across the State.

Approximately the same number of matters are disposed of each year, mostly by consensual agreement prior to trial. Most cases are finalised within 12 months, although parties may have their disputes determined more quickly.

Listing

The PEC list in Brisbane is my responsibility. As already noted, I also monitor the lists in those regional centres which do not have a resident judge. Outside of Brisbane there is a judge with responsibility for supervising the PEC list based in each of Southport, Maroochydore, Rockhampton, Townsville and Cairns.

The PEC list in each centre is managed in its entirety. Judges are not given individual "dockets". A matter is listed for trial by order of a PEC judge at a directions hearing. That will usually happen at the first directions hearing, although the parties will sometimes wish that to be deferred, often for good reason.

A directions hearing may be listed on application by any party at any stage, or of the PEC's own motion.[50] The party with the onus in the proceeding has a duty to bring the matter before a judge for directions within 3 months of its commencement (unless a directions hearing has already been otherwise listed).[51] In

practice the 3-month period permits the parties time to attempt a consensual resolution prior to coming before the Court.

If the parties ask for a matter to be set down for hearing in Brisbane it will be allocated to a pool of cases to be heard in a particular month (the sittings). That will generally be approximately 3 months from the directions hearing, in order to allow the pretrial steps to be completed. The PEC accommodates requests for more expedited hearings, where that is appropriate.

The number of cases assigned to each sittings is up to three times the number which could be heard by the judges who are due to sit in the PEC in the relevant month. This allows for the practical certainty that most matters will resolve, by consensual agreement, prior to the month in which they are to be heard.

Approximately 2 to 3 weeks prior to the month in which the relevant sittings is to commence, pre-callover case reviews are conducted to check the progress of each matter. At that time it is ascertained which have been resolved, which are unresolved and ready for trial, and which are neither resolved nor ready for trial. A callover is then held, during which each matter which is unresolved and ready for trial is given a specific hearing date or dates in the sittings.

At the conclusion of the callover, there are often "spare" days available before a PEC judge or judges. These are progressively "back filled" with urgent matters or with other cases which, while not already set down for the hearing in the sittings, should or can be brought on to fill the available judge time. To the extent that there is still spare time, the Chief Judge of the District Court is informed that there is a PEC judge available to sit in the District Court. Conversely, if as a result of the pre-callover reviews there is an excess of unresolved cases ready to be heard, then the Chief Judge of the District Court is informed and is usually able to assign another PEC judge to that sittings.

The procedure for regional centres which have their own PEC judge or judges is similar, subject to relatively minor differences to suit the local context. Cases in regional centres with no local PEC judge are managed by the PEC judges who visit those centres on circuit, or are managed remotely from Brisbane. Inconvenience is minimised by permitting parties and their representatives in

those regions to appear at directions hearings or case reviews in Brisbane by telephone, rather than in person.

The length of hearings varies with the nature and complexity of the case. Proceedings which involve only legal issues can be set down for as little as one hour, while large and complex merits review cases may take up to 2 weeks of sitting time. Most merits review cases occupy 2 to 3 days, which includes a site inspection by the judge.

Some judgments are given orally immediately upon the conclusion of submissions, others are reserved for consideration. Where a judgment is reserved, a judge is generally expected to publish reasons for judgment within 3 months.

Case management

It has already been noted that the PEC is characterised by active list supervision and individual case management by the judges, through directions hearings and regular case reviews. Case management is applied in a way which encourages dispute resolution through a problem solving approach, and in furtherance of the following stated purpose of the PECRs:

1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in proceedings at a minimum of expense.
2) Accordingly, these rules are to be applied by the court with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.
3) In a proceeding in the court, a party impliedly undertakes to the Court and to the other parties to proceed in an expeditious way.

Not all ECTs actively supervise their lists and manage their cases in the same way. For example, in some jurisdictions management is conducted by "streaming" cases down a limited number of "tracks" with standard directions. The PEC 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 in open court.

This approach maximises flexibility in two ways. First, 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 pretrial 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, permits the judges to adjust case management more generally over time, without necessarily having to change the rules of court. In this way case management can be continually fine tuned.

Each matter in the PEC is required to be brought before a judge of the PEC at an early stage, for directions. At the first directions hearing a judge will commonly make orders and directions including as to:

i) compliance with statutory requirements, or excusal of non-compliance;
ii) identification of the issues in dispute, and particulars thereof;
iii) a dispute resolution plan, to narrow or resolve the issues in the proceeding by consensual agreement;
iv) an exchange of lists of experts and their fields of expertise;
v) disclosure among the parties of directly relevant documents;
vi) pretrial meetings of expert witnesses, in the absence of the parties or their representatives and the production of joint reports which notify matters of agreement, disagreement and the reasons for disagreement (if any);
vii) exchange of experts statements (if any) directed to the points of disagreements identified in the joint reports;
viii) the likely duration of the hearing, the month within which the proceeding is to be heard, review dates, including a date for pre-callover review, and the date for mention at the callover at which specific hearing dates are to be assigned.[52]

To prevent matters from languishing:

- the PECRs require matters to be promptly brought to the Court, for directions;
- any adjournment of a directions hearings or review is ordinarily to a specific date for further review, rather than for an indefinite time; and

- the judges, with the assistance of the Court's ADR Registrar (discussed later), actively monitor the lists and set down 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.

By virtue of the PECRs, the PEC's 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.[53] The purpose of such a conference 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 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, 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.[54]

The Court's increasing emphasis on pretrial management does not distract from the need for vigilance concerning trial management. In earlier times, judges were somewhat more cautious about interfering with the traditional right of 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 they wished on any relevant issue. There were some larger cases in which a party would call multiple experts in the same professional discipline to express essentially the same opinions 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 that 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[55] and to restrict evidence-in-chief.[56] 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.

In more recent times, 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 r 19 of the PECRs which provides, in part, for orders of the following kind:

vii) [Requiring the parties to give the judge] before the hearing, a copy of—
  A) a document identifying the issues in dispute in the proceeding; or
  B) an extract of any planning instruments relevant to the proceeding; or
  C) a statement of evidence, including a joint report, for the proceeding; or
  D) a book of documents for the proceeding;

viii) limiting the duration of the hearing;

ix) limiting the time to be taken by a party to the proceeding presenting the party's case;

x) requiring evidence to be given by affidavit, orally or in another form;

xi) requiring expert witnesses in the same field to give evidence consecutively, concurrently or in another way;

xii) limiting the number of witnesses a party may call on a particular issue in dispute in a proceeding;

xiii) limiting the time to be taken in examining, cross-examining or re-examining the witness;

xiv) requiring an opening address or submissions to be made in the way the court directs;

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; and

xvii) any other matter the Court considers appropriate.

The PEC applies these trial management techniques selectively and flexibly to meet the needs of the particular case. A significant achievement to date (and an ongoing challenge) has been the PEC's capacity to contain the length of cases notwithstanding the explosion in volume and complexity of planning and environment legislation, and in the range of relevant expert disciplines. Indeed, with management, the length of complex cases has generally been reduced.

The state of the lists is monitored with the assistance of electronically produced statistics. Each month I receive information as to the number of matters filed and the number finalised in the PEC. That information is presented both on a State-wide and a centre-by-centre basis. It shows the statistics for the preceding month, as well as the year to date. I am also now able to access an electronic list of every matter which is current in the PEC as at the end of each month. That list identifies each matter, the centre in which it is being held, the date on which the last step was taken, and what that step was. This enables the lists to be monitored and steps to be taken to address any developing backlogs or to bring before the Court, for review, those cases which appear to be languishing.

Dispute resolution

The PEC has placed an increasing emphasis on dispute resolution. The resolution of a dispute through a judgment of the Court is not, and should not, be thought to be the inevitable, or even usual, conclusion of litigation in the PEC. At least since the 1990s, courts in Australia have recognised the desirability of parties reaching a consensual agreement to resolve their differences. The majority of cases in the PEC are resolved without a final hearing. Case management is conducted with this in mind.

Courts of all descriptions have promoted what is referred to as "alternative dispute resolution" and/or case evaluation, which usually takes the form of mediation or third-party facilitated discussions. It has proved to be popular in resolving civil disputes in courts of general jurisdiction and is now well entrenched in the PEC. Its application to planning and environment disputes however, needs to be undertaken with some sensitivity.

Civil disputes in courts of general jurisdiction are essentially disputes about money between parties to a private cause of action. Resolution is usually achieved by reaching agreement on the amount of money which one is prepared to pay the other in order to extinguish the cause of action. In this context, mediation generally only requires the parties and their legal advisers to participate in a mediation on a given day, where a commercial resolution is reached, often as a result of a degree of "horse-trading".

Planning and environment disputes are generally of a different character. They concern matters of public, as well as private, interest. The parties to such disputes will not only include those motivated by commercial considerations but also public authorities charged with the protection of the public interest, as well as community groups and individuals concerned about their amenity and environment. This calls for a different approach to dispute resolution.

Resolution of planning and environment disputes often occurs as a result of a process of identifying actual, likely or perceived impacts, and finding ways to avoid or mitigate those impacts through the modification of a proposal or by the application of mitigation measures and safeguards. The process is one which often needs to be informed by the assistance of relevant experts, acting objectively. It is in this respect that the PEC's management of experts (discussed earlier) dovetails into the dispute resolution process. This informed "problem solving" approach is not only a more effective means of dispute resolution, but also a more satisfying one.

The success of ADR is too often measured just by the number of cases which have been resolved, and court time and costs saved. ADR in the PEC 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 would produce outstanding results statistically. ADR, and the case management which supports it, should be judged as much by quality as by quantity.

A dispute resolution process which involves the parties, assisted by the experts, identifying and working through the issues in a problem solving manner from an early stage, is more

likely to reach a genuinely satisfactory resolution than one which is ill-informed, relies on horse trading, or worse still, on the potential for the process to intimidate one or other (or all) of the parties into compromise. 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 PEC given the public interest nature of the matters which come before it and the stated statutory purpose, to seek to achieve ecological sustainability. These qualitative matters are not readily susceptible to measurement, but are nevertheless critically important.

Case management in courts of civil jurisdiction often treats ADR as an entirely separate "alternative" process which stands to the side of the process of preparing a case for trial. Indeed, under the UCPRs, a case which has been referred to mediation is stayed until the mediation is complete.[57] That is not a provision which applies in the PEC.[58] When it is recognised that the PEC list consists of cases most of which are able to be resolved, it is logical to adopt case management which from the outset promotes dispute resolution (rather than just preparing a case for adjudication), and allowing it to inform case management more generally. Indeed, I would prefer to see the expression "alternative" removed from the description of ADR.

The Court requires parties to have a dispute resolution plan. That plan will usually include (but not be limited to) a mediation before the Court's ADR Registrar, who is a senior and experienced planning and environment lawyer, and who has been appointed to provide free dispute resolution services (including mediation) to parties to proceedings in the PEC. The services of the ADR Registrar have proved to be popular and successful.

Elements of a dispute resolution plan may include for example, all or some of the following:

- a case management conference before the ADR Registrar, to discuss the best way for the dispute to be managed;
- early "without prejudice" settlement conferences between the parties, which may be chaired by the ADR Registrar;
- meetings of the parties' experts in the absence of the parties or their legal representatives, to discuss areas of professional

agreement and disagreement, which may also be chaired by the ADR Registrar;
- mediation conducted by the ADR at which the parties, their representative and the expert witnesses all participate.

Conclusion

The PEC is a longstanding, specialist court, constituted of some District Court judges. Its jurisdiction covers a wide range of issues but does not extend to criminal prosecution. There is a case for enlargement of its jurisdiction in this regard.

The PEC is characterised by its:

1) Standing as a court, properly so called, constituted of judges and its consequent integrity, credibility and legitimacy;
2) Stability of structure over its 44-year history;
3) Association with the District Court, which both facilitates service of a wide geographical area and minimises public expense;
4) Transparent processes and decision-making;
5) Relatively broad participation rights;
6) Reasonably concise rules and practice directions, complemented by an individual case management approach;
7) Innovative procedures for managing expert witnesses;
8) Flexible range of interlocutory and final remedies;
9) "No adverse costs orders" rule, subject to limited express exceptions in the case of misconduct;
10) Active list supervision;
11) Individual and flexible case-by-case management by its judges;
12) Commitment to dispute resolution; and by its
13) Commitment to ongoing review and reform of its practices and processes.

Acknowledgement

This paper was originally presented at the Asian Judges Symposium on Environmental Decision-making, the Rule of Law and Environmental Justice, Manilla, 28-29 July 2010, and appears in this journal by kind permission of the Asian Development Bank.

Notes

1 *Queensland Government Gazette*, 20/1/1966.
2 See the City of Brisbane (Town Plan) Act 1969, s 13, and the Local Government Act 1936, s 33.
3 [1983] QPLR 229.
4 See the Local Government Act 1936, s 32A.
5 See the Local Government (Planning and Environment) Act 1990, s 8.2.
6 Note that some provisions commenced on different dates.
7 Environmental Protection Act 1994, s 3.
8 Integrated Planning Act 1997, s 1.3.3.
9 Sustainable Planning Act 2009, s 436.
10 Ibid, Chapter 7, Part 1, Divisions 8 and 9.
11 Ibid, s 495.
12 Ibid, s 473.
13 Ibid, s 475.
14 Ibid, s 478.
15 Ibid, s 456.
16 Ibid, s 757.
17 Ibid, Chapter 7, Part 2.
18 Ibid, s 447.
19 Australian Bureau of Statistics, 2010.
20 Constitution of Queensland, s 60.
21 Ibid, ss 61, 62 and 63.
22 Sustainable Planning Act 2009, s 443.
23 Ibid, s 446.
24 Ibid, s 445.
25 Ibid, s 448.
26 Published by The Access Initiative, 2010.
27 There is also a third (limited) category — compliance assessment.
28 Sustainable Planning Act 2009, ss 295 and 297.
29 Ibid, ss 462 and 485(4).
30 The statutory provisions under the EPA are open for enforcement proceedings about development offences, but are more confined for proceedings to remedy or restrain other offences under that Act. Compare ss 504 and 507.
31 *Booth v Yardley* [2006] QPEC 116; (2007) QPELR 205.
32 *Booth v Yardley* [2006] QPEC 119; [2008] ALMD 5727; (2007) QPELR 229.
33 Planning and Environment Court Rules 2010, Part 3, Division 3.

34 Ibid, r 24.
35 Ibid, r 25.
36 Ibid, r 26.
37 Ibid, r 29.
38 Ibid, r 26(e).
39 Ibid, r 28.
40 Ibid, r 27(1).
41 Ibid, r 27(3)(a).
42 Ibid, r 30 (2)(b).
43 Ibid, r 30(3).
44 Ibid, r 33.
45 Sustainable Planning Act 2009, s 605.
46 Environmental Protection Act 1994, s 511.
47 Ibid, s 505.
48 *Pacific Seven Pty Ltd v City of Sandringham* (1979) 43 LGRA 395 at 403.
49 Sustainable Planning Act 1999, s 457.
50 Planning and Environment Court Rules 2010, r 19(1).
51 Ibid, rr 19(3) and (4).
52 Practice Direction 1 of 2010, s 8.
53 Planning and Environment Court Rules 2010, r 39.
54 Ibid, r 40.
55 Ibid, r 34.
56 Ibid, r 33.
57 Uniform Civil Procedure Rules, r 321.
58 Sustainable Planning Act 1999, s 491(1).