Presentation to Queensland Environmental Law Association virtual seminar

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Practical tips overview: technology, eTrials, and reviews

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Introduction

1. The photograph on the screen was taken last weekend on land at East Trinity near Cairns. It was a social outing. The man in the photograph is a flora expert. He had just pointed out a plant species, a specimen of which was said to have been collected by botanists Banks and Solander when Lieutenant James Cook landed briefly at Cape Grafton in 1770. Just out of the photograph was a Traditional Owner and ranger of the local Mandingalbay Yidinji people. He had just shown us a shell midden under the overhang of that rocky outcrop, and described its strategic location by reference to a camp, water and food sources. Evidence of the continued occupation and management of that land by Aboriginal people for thousands of years.

2. I tell this story not as a distraction but by way of introduction to an Acknowledgment of Country.

3. I acknowledge with respect the first and Traditional Owners of the land on which we are each gathered, and pay my respects to their Elders, those who have spoken for this land in the past and who do so today.

4. I respectfully adopt the remarks of The Honourable Chief Justice Helen Bowskill at her swearing in ceremony earlier this week to the effect that those words of acknowledgment are not mere platitudes.

5. An organisation such as QELA that is concerned with laws affecting the environment, development, and land should strive to include First Nations people and their accumulated knowledge and stewardship of the land as part of its core business.

6. I thank QELA for inviting me to speak.

Technology in court

7. Before turning to eTrials, I want to say something about the use of technology in courtrooms generally. As the topic of this session is "practical tips", my remarks will be directed towards some practical suggestions for your advocacy in court.

8. COVID has brought the use of technology in courts into sharp focus.

9. We have seen far greater use of remote or virtual appearances by parties and witnesses in court proceedings. The technological improvements achieved by the courts are unlikely to be wound back even when COVID becomes a distant, unpleasant, memory.

10. To some extent, remote appearances will continue into the future.

11. I say to some extent because the view expressed by many judicial officers (including Chief Justice Andrew Bell of the Supreme Court of New South Wales at his recent swearing in ceremony, and referred to by Chief Justice Helen Bowskill) is that the administration of justice is best served in open court with appearances in person. The remote practice of law by practitioners, while possible, is far from desirable.

12. Chief Justice Bell observed that an essential part of being a good lawyer is understanding human nature, how others react to different situations, perform under pressure and interact with each other. Much of this is lost in a professional practice or hearings reduced to video meetings. He urged senior members of the profession to return to professional life as we knew it more than two years ago.

13. Of course, there are real opportunities and benefits presented by the technology with which we have all become familiar, and advantages of workplace flexibility and cost savings.

14. I sit regularly in the criminal and civil jurisdictions of the District Court of Queensland, the Planning and Environment Court, and the Childrens Court of Queensland. In all, remote appearances by legal practitioners and self-represented litigants are now common. In the last two years, it has also become more common for witnesses to give evidence remotely. Proceedings frequently involve multiple persons appearing remotely. Remote appearances probably occur more frequently in a regional registry such as Cairns (where I am based) than in Brisbane.

15. In the Planning and Environment Court at Cairns, leave to appear remotely is commonly granted in applications and reviews where matters are not contested or not particularly lengthy, and which do not involve oral evidence. If you wish to appear remotely, always seek leave in advance by email to the hearing judge's associate.

16. If a party or witness is to appear remotely, my preference is that it is by audiovisual link rather than telephone. That is because it is easier to manage multiple links, and it facilitates clearer communication and therefore advocacy if all parties seeking to communicate can see each other as well as hear each other. When a party appears by audiovisual link on the platform currently used by the court, their name appears on the screen and they can be readily identified. When they link in by telephone, the court sees only their telephone number and no identifying information. This makes judicial management and prioritisation of long lists in court more difficult.

17. In many courts, the Pexip platform is now routinely used. It is controlled by the judge's associate rather than the bailiff. It is working reasonably well, particularly when practitioners link in via the audiovisual link.

18. The associate can control the practitioners' audio, so they can all be muted unless their matter is called. This is helpful to prevent accidental noise interference. But I am told that with Pexip the associate cannot control whether a practitioner's camera is turned on or off. It is important that if you are linked in via video, that you turn off your camera until your matter is called. In order to use the Pexip videolink, practitioners need to access the link via a web browser such as Google Chrome. If you call in via your mobile phone, you cannot use video. Some associates will use the chat

function to communicate with practitioners, and remind them to mute their audio and video. Again, if you are linked in by mobile phone only, you will not have access to the chat function.

19. Practitioners have been appearing remotely for almost two years now and are expected to have acquired a high standard of familiarity and proficiency with the technology. At the risk of stating the obvious, that includes the following:

    a. Be in an appropriate location that affords you privacy and without interference from external noise, so far as is possible;

    b. If you are in a room that does not have the requisite formality, blur your background, use an appropriate virtual background, or position yourself in front of a blank wall. The judge does not need to see your interior decorating or the contents of your bookshelf or kitchen shelves (as happened to me this week). It is a distraction, and does not lend itself to effective advocacy;

    c. Dress as if you were appearing in court *in person*. Some practitioners continue to appear in less than appropriate attire for court just because they are appearing by audiovisual link;

    d. Ensure the camera view of your face is appropriate and in the goldilocks zone: reasonably square on, not too close, and not too far. Take care to ensure the camera is not positioned too low (so the view is of your chin and nostrils) or too far away (at the far end of a long conference table). If you are using multiple screens, make sure you are facing the screen with the camera rather than the screen which may have your documents on it. Feel free to stand and use a lectern, with appropriate camera positioning;

    e. Invest in a decent, separate, microphone. It can make all the difference;

    f. Always mute your camera and microphone until your matter is reached. Equally, don't forget to turn them on when your matter is called and before you start speaking;

    g. Feel free to use headphones or earbuds if that improves the sound quality;

    h. My view is that you do not need to stand up when the judge enters the room. They will not be able to see you if you do that;

    i. If you are relying upon documents, make arrangements in advance for those to be filed or for someone to hand them up. Do not simply email them to the judge's associate a short time before the matter is due to start and expect the associate to print them for you. Associates are very busy before court starts and usually will not have enough time to do this.

20. These measures should all be obvious and are just good advocacy.

21. In future you can expect more technological reforms within the Queensland courts. That is likely to include electronic filing systems.

eTrials

22. eTrials have been around for a long time but were not so well utilised in the Planning and Environment Court early on. That is changing.

23. My co-presenter will speak in detail about how to use the eTrial platform.

24. My remarks will be more general, and are drawn from feedback received from Mr Wood, the Deputy Registrar - eTrials, Court Operations and Support Team, and other judges of the Planning and Environment Court both in Brisbane and the regions. I thank them for their input.

25. Judges may have slightly different approaches and preferences for eTrials. Good advocacy involves knowing your judge and what their preferences are, including for eTrials. If you don't know, ask your opponent or check with the judge's associate. In the absence of a court template for the structure of, and index to, mandatory parts of the eTrial appeal book, you should always check with the hearing judge. Particularly if the hearing judge is not the same as the review or case management judge.

26. Don't assume that all judges prefer the same structure for appeal books. Always check with the trial judge before trial. If you have not already done so, make this enquiry immediately after the callover. With your opponent's consent, send a joint email to the associate outlining the proposed structure for the draft appeal book.

27. Some judges prefer folders for specific categories of documents and use exhibit numbers that follow the document numbering in the folder, rather than conventional exhibit numbering. This avoids confusion with identifying documents.

28. Ask the associate whether the judge would like a hard copy of the appeal book as a working copy, or whether they are content to rely upon the electronic copy on eTrials which will become the exhibit.

29. Sometimes documents uploaded to the electronic appeal book are not ultimately tendered as an exhibit at the trial. If that occurs, when parties close their case the court may make an order that any document not tendered by the end of trial be deleted from the electronic appeal book. That is to ensure there is no confusion about which documents become the evidence in the trial and which do not.

30. Documents provided by parties for upload must be in text searchable pdf format.

31. It is never too early to get the electronic appeal book up and running. Early establishment also has the advantage that parties do not need to confer face to face when discussing the documents (for example, counsel and instructing solicitor, legal practitioners and experts and opposing advocates).

32. Liaise with your opponent to agree a consistent structure and index for the appeal book, grouped appropriately. Arrangements are most effective when legal practitioners talk to each other and discuss the organisation of their appeal book. Categorise your documents with appropriate and logical naming to identify the nature of the document rather than by mere number.

33. Orders in Brisbane are commonly in terms that: *By [date – minimum two weeks before trial] the parties must set up an electronic appeal book.* In Brisbane, the firms who are familiar with the eTrial process are taking the lead with setting up the appeal book, regardless of whether they represent the party that bears the onus in the proceeding.

34. If you have a matter in a regional registry, the same considerations should apply, subject to any local differences in technological capacity. If in doubt, always enquire of the judge's associate.

Practical tips for reviews and applications

35. For the benefit of junior practitioners, it is worth reinforcing some basic expectations that judicial officers will have. You should strive for legal excellence and intellectual honesty. That requires hard work and proper preparation. You should conduct yourself with decency and integrity. You should be civil in the practice of your professional obligations and when in court. You should be collegial with other practitioners. The court, the Bar, and the solicitors' branch of the profession work best in an environment that is mutually supportive, cooperative and congenial. The Planning and Environment Court has been fortunate to be served by many barristers and solicitors who have deep expertise of their subject matter. The court is grateful for that ongoing and critical assistance. Judges work under enormous pressure and they rely upon practitioners to act ethically, cooperatively, and to strive to assist the court at all times.

36. When appearing at reviews, whether in person or remotely, know the legislation and the relevant Practice Directions.

37. Be ready to provide to the judge a brief (and I emphasise, brief) summary of what the matter is about, what stage the proceeding is at, the key disputed issues, and the nature of the orders sought.

38. In the regions, reviews may be conducted by different judges in the course of the proceeding. The sitting judge may not have conducted the last review. Do not assume that the judge has had time to read the material. Don't be afraid to ask whether the judge has had an opportunity to read the material before you embark upon your submissions. That will help you frame your submissions.

39. Draft orders early, seek your opponent's consent, and request consent orders on the papers, where appropriate.

40. Alert the court to potential issues that might cause the trial to be delisted. Really think about whether you can be ready for the sittings you are listed in – if in doubt, raise the issue with the court as soon as possible. I am informed that in Brisbane some hearings are still being vacated at the last minute, too late for the court to fill the available time with another listing. For example, where parties wait until after pre-callover review and just before callover to seek adjournment of trial.

41. If you are seeking particulars, be in a position to justify why.

42. Beware the consent order: just because parties agree to it does not necessarily mean the court will make the order, particularly if it involves the exercise of a discretion. Be in a position to make submissions as to why the orders should be made.

43. In draft orders for complex cases, be cautious about identifying issues by reference to documents that don't yet exist. The judge may prefer to have the lists of disputed issues exchanged and to hear submissions before making an order identifying the issues.

44. Proofread your documents and ensure there are no typographical errors. Do not ask the judge to correct errors in your document. Make the changes yourself, at the bar table if necessary, before handing them up. If you no longer rely upon a part of your outline of submissions or an affidavit, strike it through rather than simply telling the court you no longer rely upon it.

45. Regional registries such as Cairns and Maroochydore usually conduct Planning and Environment Court reviews every few weeks in a running list on the same day as civil applications. Those days are usually very busy. The exception to that is if a matter is being actively case managed, in which case it will usually be given a fixed listing at 9am. With the consent of your opponent, ensure that you email to the associate the day before the review/hearing, your draft orders, outline of submissions and list of material to be read.

Planning and Environment Court (Expert Evidence) Amendment Rule 2022 (Qld)

46. I will mention briefly some new legislation which will be covered in detail in a future QELA seminar.

47. The *Planning and Environment Court (Expert Evidence) Amendment Rule 2022* (Amendment Rule) took effect on 18 March 2022.

48. The Amendment Rule is made under the *Planning and Environment Court Act 2016*.

49. The objectives of the Amendment Rule are to:

    a. set out requirements for the preparation of expert reports, including provision for the preparation of a supplementary report and actions relating to the supplementary report where there is a change of opinion by the expert;

    a. clarify that particular rules about costs in the *Uniform Civil Procedures Rules 1999* (UCPR) do not apply to the Planning and Environment Court (P&E Court) as the UCPR provisions are contrary to the intent of the costs rules that apply in the P&E Court, noting there is no change to the costs rules that apply in the P&E Court as a result of the proposed amendments;

b. provide for specific rules about evidence, including that expert evidence must be given in person before the P&E Court unless required to be given by audio visual link or audiolink in particular circumstances, to negate the effect of section 39PB of the *Evidence Act 1977* as that provision is not followed in the P&E Court; and

c. include an expert witness code of conduct consistent with the new schedule in the UCPR.

50. Thus, the P&E Court retains its own provisions for experts but harmonises the provisions with the UCPR, which has also been amended through separate legislation.

51. As I said, these details will be the topic of a later seminar. However, it is important that you are aware of these changes and familiarise yourselves with them.

Thank you.