The Management of Experts – A Queenslander's Perspective

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Management of Experts in the Queensland PEC

The management of experts in the Planning and Environment Court (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 which 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, not just for the purposes of a hearing, if the matter gets that far.

A key component in the PEC case management process is the use of early joint meetings among the experts. The concept of joint meetings is not new, but is used in a particular way in the PEC. The experts are given the appropriate time and space, free from supervision or interference by the parties or their lawyers, to consider and to formulate their opinions in consultation with one another, after they have been retained by the parties but before they have committed themselves to any opinions in trial reports. The benefit of their professional discourse is then fed into the dispute resolution process well prior to any final hearing.

Components of the Queensland PEC approach include the following:

1. The overriding duty of the experts to the court is provided for in the rules and must be notified to each expert.[1]

[1] *Uniform Civil Procedure Rules 1999* (Qld) r 426; *Planning and Environment Court Rules 2010* (Qld) r 26(e).

2. Each party is permitted to engage one expert in relation to each field of expertise,[2] but must identify their experts at a very early stage.

3. While the parties must ensure that their expert is properly briefed and ready to participate in an expert meeting process,[3] they may not instruct the expert as to which opinions the expert is to accept or reject.[4] Each expert must verify that they have not received or accepted any such instructions.[5]

4. Once the experts have been retained, identified and briefed, they begin an expert meeting process which generally involves a series of meetings over a number of weeks and which results in a joint report.

5. The joint meetings may be chaired by the ADR Registrar.[6]

6. *Critically*, not only does this process take place before publication 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.[7]

7. Save for the contents of the joint report, evidence may not be given of what transpired in the meetings.[8]

8. The results of the consultative process inform the dispute resolution processes well prior to any hearing. The experts generally accompany the parties in mediation.

9. It is only if the matter remains unresolved that the experts can then prepare separate reports for a hearing. Those reports are then limited to the areas of disagreement expressed in the joint report.

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[2] *Planning and Environment Court Rules 2010* (Qld) r 34.
[3] *Planning and Environment Court Rules 2010* (Qld) r 26.
[4] *Planning and Environment Court Rules 2010* (Qld) r 29.
[5] *Planning and Environment Court Rules 2010* (Qld) r 31(3).
[6] *Planning and Environment Court Rules 2010* (Qld) r 41.
[7] *Planning and Environment Court Rules 2010* (Qld) rr 22, 27.
[8] *Planning and Environment Court Rules 2010* (Qld) r 28.

10. Save by leave, an expert may not give evidence which departs from the opinions expressed in the joint report.[9]

The history and philosophy underlying this methodology is set out in the attached article and need not be repeated.

This process has:

1. Virtually eliminated disputes about methodology (the experts, in consultation generally agree upon the methodology to be used in investigations, the data from which is then common to them);

2. Achieved a high degree of common ground with respect to the opinion evidence; and

3. 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 of them could have achieved individually.

Further, and crucially, this approach aids the resolution of issues not only for trial but, more importantly, for the vast majority of cases that do not make it to trial.[10] A positive culture shift has now occurred whereby the focus is on a mutual endeavour to find problem-solving solutions prior to trial, often facilitated during without-prejudice or mediation sessions chaired by the Court's ADR Registrar.

Ongoing improvement

No system is ever 'mature' or perfect. Following introduction of the joint expert management model within the PEC, unintended consequences of the general 'no communication' rule during the 'quarantine' period were identified following consultation.

[9] *Planning and Environment Court Rules 2010* (Qld) r 30.
[10] Empirical evidence within the PEC shows that the number of matters finalised other than by final hearing has increased from 90% in the 09/10FY to approximately 94% in the 11/12FY.

Specific issues noted and remedied were:

1. **Participation of experts in mediation.** The 'no communication' rule was sometimes inhibiting dispute resolution otherwise during the quarantine period. The conduct of without-prejudice mediation, either facilitated by the Court's ADR Registrar or directly between parties, without expert participation was less productive. Rule 27(3)(a) now permits experts to participate in mediation notwithstanding their being in 'quarantine'.

2. **Requirement for additional information by experts.** Under the original PEC Rules, experts were unable to seek further information or make enquiries of parties during the joint expert process save by a joint request. This was found to occasionally lead to a Catch 22-type situation where experts could not complete reports but were unable to agree on the terms of a joint request for information. The amended Rule 27(3)(b)(i) gives any expert the authority to request any information or make inquiries of parties necessary to inform the expert meeting or report. Safeguards to protect the integrity of the joint expert process were introduced in Rule 27(4), which requires requests to be made in writing, noting any dispute between the experts about the request. Copies of the request are required to be provided to all parties. Further, the recipient of the request may only respond in writing after initially providing a copy of the proposed response to all parties—this gives the parties an opportunity to apply to the court for directions if there is any controversy about the communication.

3. **Informing parties of potential delays.** Prior to commencing the joint expert meeting, experts and their instructing solicitors and clients will have a pre-conceived estimate of the duration of the joint expert process and the court will have set a deadline on that basis. In practice however, the process may take longer than expected or ordered. Rule 27(3)(b)(ii) permits experts to inform parties of any matter affecting the proper and timely conduct or conclusion of the meeting or preparation of the report, subject to the same safeguards identified above.

4. **Capacity for parties to make enquiries of the experts.** The original Rule 27 did not permit parties to query experts on what, if anything, was holding up the joint

expert process. The amended Rule 27(6) gives parties the authority to request experts to produce a ‘conduct report’ regarding the conduct of the meeting or preparation of the joint report.

The process is now well accepted and, with the amendments, appears to be operating satisfactorily.

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Attachment:

M.E. Rackemann ‘The Management of Experts’ (2012) 21 *Journal of Judicial Administration* 168.