QELA Seminar – 31 March 2014

[1] My role tonight will be to take you through the new Practice Direction No 2 of 2014 which was issued on the 25 February 2014 and supersedes Practice Direction No 2 of 2011. It is very much an evolutionary document, not a revolutionary one, and those of you who were up with the details of the old Practice Direction and the Rules and Practice Directions will no doubt have seen that.

[2] So why do we bother doing it? Well, to some extent it updates things since Practice Direction No 2 of 2011 was published, and in part it was provoked by some comments which were made in the context of discussions concerning the proposed new planning legislation. The comments which got back to us were not widespread, I must say, but there were some that were somewhat ill-informed, which caused us to review the way we were communicating what was required.

[3] One of the comments was that the rules and procedures of the P&E Court were said to mandate a particular Rolls Royce regime in every case, and that it would be better to have flexibility to have was a Holden form of pre-trial regime for a Holden type of case. The comment was ill-informed, not least because s 19 of the Planning and Environment Court Rules always permitted the parties to ask for any pre-trial regime that they wanted.

[4] The Rules give a non-exhaustive list of examples of orders and directions that can be made and which include indeed some of the very examples of things which the critics were saying should be incorporated. So, for example, in r 19 the directions that can be made include limiting the duration of the hearing, limiting the time taken by a party, requiring evidence to be given otherwise than by way of oral evidence, the form in which experts will be giving their evidence, limiting the number of witnesses, limiting the time to be taken during cross-examination, limiting the length of submissions, etc. So they are just examples, but in short, they really allow the court a very wide power to grant pretty much any pre-trial and, indeed, trial mechanism that the parties choose to ask for.

[5] Secondly, far from mandating a particular approach, Practice Direction 2 of 2011 expressly required the parties to give "conscientious consideration to the orders or directions which are appropriate for a particular proceeding", and of course, the Court always encouraged a flexible approach.

[6] It must be said that this was not the general feedback, and its ill-informed nature was pointed out by others, but the fact that it was said (and said by people with some experience) was a concern to us. Informal enquiries through John Taylor suggested that there were some who were abiding by the "lore" (as in folklore) that there was a standard set of directions which would get you through on a directions day and from which you departed at your peril.

[7] So the main aim of Practice Direction No 2 of 2014 is to emphasise what we have always said, that is, that the P&E Court offers a flexible case-by-case approach to management and we encourage practitioners to make use of it to the extent useful for the particular case at hand.

[8] Now, having given you that background, I will just run you through, fairly quickly, the Practice Direction, and what I have done is reproduce parts of it with the markings where it differs from the previous Practice Direction.

[9] There is no real difference until you get to provision 4. The difference here is, as you know, once a matter is filed, we give you some time to negotiate things amongst yourselves or get it before the ADR Registrar, but we do require you to come before the court reasonably promptly to get the matter going. In the past, the period of grace, as it were, was up to three months; that has now been changed to six weeks. That was a particular initiative of the Chief Judge.

[10] The six weeks period which is referred to in the Practice Direction now is at odds with the three month period that is referred to in the Rules of Court, but, unusually in the case our jurisdiction, the statute provides that practice directions take precedence over the Court Rules. So, by reason of that provision of the statute, the six week period now applies. So you may be called up on the "naughty list" (as it is colloquially called) a little earlier than you have been in the past, if you have not done something.

[11] 5 and 6, I've reproduced, but there are really no changes to all of that. This is just to emphasise that we are talking about evolution.

[12] I'll get back to 7 in a moment; 7 was the one that said you had to give individual consideration to what was required in your particular case, and I'll get back to that in moment because it's been relocated.

[13] Section 8 of the old Practice Direction gave you a list of things which ordinarily would be included. It was always subject to the requirement to give conscientious consideration. It was always only a guide and intended to be helpful. But we focussed on this as being perhaps the source of the belief, in some quarters, that there was a set structure to the directions orders, and so we decided to get rid of it and to replace it with two sections. So we still have a section which talks about what will usually be contained – note "usually", not "always" – and that list is very much a pared back list. It deals only with compliance with statutory requirements, identifying the issues, having a dispute resolution plan and telling us how long the hearing is going to take. So that's the absolute core things. Again, only "usual" but we've pared back that list.

[14] Now, what we've then done is put the other things in another section, and please note the introductory paragraph. "A draft order is also to include such otherwise directions as may be appropriate in the circumstances depending on the nature of the matter and the issues involved and may" – note "may" – "include for example" – note "for example", I don't think we can be any clearer than this, this is not mandatory.

[15] Subparagraph (b) is in response to a person who said it would be really good if we had a provision whereby evidence could be given by affidavit rather than orally, even though that was always possible. (c) is whether expert evidence will be given and if so –how. We've enlarged this a little bit to acknowledge the fact that, in some very simple cases, where there's perhaps an uncontentious part of it, you might have a single expert. We're not against that; I've spoken against mandating single experts in controversial cases against the party's wishes, but if people want to have a single expert for a particular matter or particular part of a case, that's fine.

[16] And then, if the parties are proposing separate experts, we mention the exchange of lists of experts, the meetings and the experts' statements. What we've added in there is sub (c) which is very important. It is whether the meetings are to be chaired. Now, as you know, the rules allow for expert meetings to be chaired. Now, some of the commentary that came back to us – and some of you who will have been at some other talks of mine will have heard this already, but some people said to us, "well, look, these experts, they're terrible people, really." I see some of the experts are nodding. You know, the court sets a timetable, they just disregard it, they perform to their own timetables, they go off on their own frolics, we get these first reports that say they want to do, you know $17 million worth of research and we're powerless to do anything about it. That's not true. You are not powerless to do anything about it. What you can do is come and tell us about it. Don't sit in a corner and cry; we hate you doing that. Far less, don't sit in a corner and complain; we really hate you doing that. We much prefer you coming and talking to us and telling us about it, because we can do something about it and we'll get John Taylor on the job.

[17] We have been doing this proactively. Whenever anyone has come before me complaining about their experts, I have been proactively now doing this, saying, "well, there's an easy way of doing this: let's get it before John Taylor." And that's been a very effective process. We've had cases where we have said to the experts: if you do not produce within 48 hours, you can attend before the ADR Registrar and you can stay all night until produce something. That elicited an expert report within 24 hours. We told them that if they didn't do something by Monday, they'd be before the ADR Registrar, and something was produced on the Sunday afternoon.

[18] Two weeks ago in a major shopping centre case, the parties came before me and said, "oh, look, you know, this can't be ready in a couple of months' time, the economists have just started, you know what they're like, they'll take forever, they don't have enough material, you know, it'll be months before they're even ready for an expert report." So I said, well, let's just see about that, and I ordered them go before John Taylor the next Monday (that was last Monday) and an expert report was produced. It was meant to be Friday. They didn't perform, so I asked John to send them an email on Saturday saying: unless it's produced on Sunday, you'll be

before me [John] on Monday and you'll stay there until it's done. Something came in 2.30 p.m. on Sunday afternoon. So that was done within six days.

[19] In other cases where people say "look, we've got this first report from the experts that say they want to do all this extra work", I can make a direction saying: produce a report without doing that work. I don't mind doing that.

[20] Hopefully all these things would have been sorted out in advance of the expert meetings, by telling the experts what the issues are, what the timetables are and getting timetables which are realistic - which are the things that the experts complain that the solicitors are not doing properly. I'm not into blaming either the experts or the solicitors. What I'm into is if there is a problem, don't moan about it; come and tell us about it, and we will make orders or directions, and we'll get it sorted out. So we've put that in there to put up that ability, in lights, in the Practice Direction.

[21] Now, I told you I'd come back to 7, and indeed I have. That was the old 7, which was the "give conscientious consideration" provision. Obviously that was not highlighted in peoples' minds enough, so we've expanded it and relocated it into the new 9. What is in 9(a) was effectively the old 7, so the new bits are the introductory paragraph and the second paragraph. Now, again, I've tried to be very plain here, so in the first paragraph "there is no standard suite of orders or directions which are required in each case. The procedure used in any case can be as simple or as comprehensive as is appropriate in the circumstances." I don't know how much plainer we can be. And after the "conscientious consideration" point in (a), we then go, in (b), to create a presumption. This is a presumption against the Rolls Royce. This is a presumption to say that you should default to the simplest and most cost-effective procedure that is appropriate for your case. I've summarised it, but you can see the words up on the screen.

[22] So there is no standard suite of orders. If you want something different, ask for it, and in asking for it, default to the simplest and most cost-effective way that you can think of.

[23] Now, I know this means that some of you will have to take a risk in the sense that you might actually be asking for something that your opponent doesn't agree with. It might mean you actually have to argue about it. It might mean that sometimes you don't get what you ask for. But most of you are lawyers; we are supposed to argue and have decisions made. And if you constantly ask for something and you constantly get told "no" and you think that the court is being silly and stubborn, then you can criticise us. But don't sit there and ask for the "usual orders", as it were, and then go behind our backs and say, "oh, this is terrible, we should have something different", because "something different" has always been available to you. It has always been in your hands. None of this is new. This is just restating and stating more bluntly what has always been available. So hopefully the message will get out.

[24] The next bit was that we used to have a provision in the Practice Direction about getting consent orders on the papers. This was before the ADR Registrar had powers. So to prevent people having to come up to court, there was a procedure so the Judge could make an order on the papers. That's unnecessary now, so we've taken it out, because the ADR Registrar now has power to make consent orders, and so the new provision basically tells you if you've got a consent order, give it to the Registrar and the Registrar will be able to do it if he thinks it's appropriate. So that's just updating for the new procedure.

[25] The next bit is also important: the early reference to the ADR Registrar. Now, two of the ill-informed comments which were particularly heinous were, first of all, that s 491B, which is the one which says a Judge can make an order that the ADR Registrar actually hear and determine a matter instead of Judge doing it, was not being used enough by the court. This was really rich because the court to this point has never refused such an order when it's been asked for.

[26] When the legislation came in, we waited for people to apply. We thought that since it was reform, that it had come in, we had told you about it, if you had an appropriate case you might ask us. No-one in Queensland made any application for nine months. Not a soul. Not one. And so, after nine months, John Taylor and I got together and said, "Why don't we do their job for them? We'll go through and look at the files that we've got and we'll see if we can identify ones that we think

might be good candidates, and we'll tell the parties and remind them of this provision and ask them if they want to make an application." And all of a sudden, people said, "Oh, gee, that's a good idea. Wish we'd known about that." And about six orders were made. I think almost all of them ended up being resolved before a hearing, but one went to hearing.

[27] So having gone to the trouble of going through the files and provoking people and getting it out there, what we're hoping is that people will now actively identify cases themselves, because John and I have got enough to do already; we don't need to have to go through every file as it comes in to decide whether you should be making an application. We'd rather hope you do that yourselves.

[28] So one of the things we wanted to put in the Practice Direction at 11(a) there is: at the outset give consideration to whether you're a 491B case. So we're putting it up there in lights in the Practice Direction one of the things you should be thinking about right from the outset: ask yourself the question. Most times, the answer will be "no, I'm not one of those cases." But sometimes the answer will be "yes", and make an application early if that's what you want.

[29] I must say though that is not intended at all to divert the majority of the court's work to the ADR Registrar. It is not intended that John be given a six week shopping centre case. It is not intended that he even be given a four day batching plant case. It's intended really for those cases which can probably be disposed of in a day and it's intended to be for those cases where the process might be different.

[30] There's no point in having a trial before John in the same way as you would have a trial before a Judge. Not much is being achieved by that; you're getting a no-cost regime, but nothing else is being achieved. These are cases where, for example – and it's a matter for John, because I don't want to trespass on his area – but they are cases where the local authorities might use their own internal planners rather than get external planners, to save costs and give people experience. If there are consultant planners involved, they might have their junior planners doing it. It might be cases where you decide that there's not going to be any cross-examination; you'll just put in the reports, let John read them and have some oral submissions. They're certainly not cases where you would necessarily have disclosure. They

won't be cases where you have joint expert meetings. These are cases that I have in mind where you can look at the case and say "we could just get this thing on." And where from the time you come before me, we'll say, "Okay, we'll set it down for the hearing in four weeks time before John for one day. Go down before him and get some directions as to how he wants to handle it." That's what we're talking about. We're not talking about all the usual rigmarole and saying, "Oh, by the way, your trial Judge will be John Taylor rather than a Judge of the court." There's no point in that.

[31] So give consideration to whether you're a 491B case, and if you are, give consideration to the way you want to run that so that it is a cheap, informal, different regime to what is done before the court by the Judges in the more important, costly, complex cases. John will speak a bit more about that when he speaks today.

[32] The second thing that was said by someone or other was that, "gee, it'd be really good if we could go to ADR before John Taylor without needing it to go before the court for a directions hearing at all". Well, you always have been able to. When the ADR provisions were first introduced they (if you go back and read them) had always said he can do that if (a) the court orders it or (b) if the parties agree. So the parties have always been able to agree to go straight to John without any direction or court order, by agreement. That's always been the case.

[33] And indeed not only that, but the court published Practice Directions – the most recent of which is 7 of 2013 – where the court's Practice Direction says if you happen to have a case which involves only conditions of approval or only infrastructure charges – in other words, a case where the development is going to go ahead and we're just talking about conditions or money payments, we want to get the thing going if we can and get it resolved as quickly as we can, the Practice Direction says please go to John first. That's what you should be doing, and if you don't, we'll pull you up before us and say, "Why haven't you?"

[34] So it has always been the case that you could go to John without getting a court order and, in fact, for particular types of cases we have encouraged, by Practice Direction, people to do that. So, again, if I could simply say that because some

people – not all people, I'm not rousing on everyone. It's just because there were some people, even people experienced saying that sort of thing – we've put it in the Practice Direction there, and I've even given footnotes to the Rules, which have always provided that you can do that.

[35] So, again, none of this is new. None of this should be revolutionary. You all should have been up to speed with this already, and no doubt most of you were, but our investigations reveal that perhaps there were some who weren't. So this Practice Direction is all about updating the previous one to reflect the new powers of the ADR Registrar, to reflect some of the new changes, but it is primarily about communicating what we've always sought to communicate: that is, that the process that you have in the Planning & Environment Court is in your hands, and if you think there's a better way doing it in your case, ask. You might not always get agreement from the other side, there may be an argument, you might not always get what you ask for, but at least exercise your mind and ask, because the flexibility is always there. It was always there, and the Practice Direction is there to emphasise that.

[36] We're conscious tonight of trying to get through the speaking part within an hour and allowing about half an hour for questions, discussions, whatever. So I will leave it there for tonight, and I'll pass over to John, who wants to get a bit more into the detail of how he sees himself in performing his new tasks. He hasn't worked it out entirely yet. It is a bit of a work in progress, but it is within those parameters of, let's offer something that is different, that may suit some cases.

Judge Michael Rackemann