The Planning and Environment Court – Changing Faces, Longevity and a Stable Core

Longevity

The Planning and Environment Court (PEC) has a remarkably long history. It was first created under its former name of the Local Government Court, by the *City of Brisbane Town Planning Act 1964*, which was proclaimed into force on 21 December 1965. The Court's first judge, His Honour Judge Byth, was appointed on and from 20 January 1966. The Court was continued, but renamed, by the *Local Government (Planning and Environment) Act 1990*,[1] which came into effect on 15 March 1991.[2] It has since been continued, in its current name, under the *Integrated Planning Act 1998* and its successor, the *Sustainable Planning Act 2009*.[3] The Court is approaching its 50th anniversary.

Longevity and stability mark the PEC. In a global context, it is rare to find a planning and/or environmental court or tribunal which dates back anything like 50 years. Most specialist planning and/or environmental courts have been established in the last decade or so.[4] Queensland, New South Wales and New Zealand are known for having relatively longstanding courts of this kind and, consequently, attract a deal of international attention from those who wish to benefit from that experience. Even within the Australasian context, however, the longevity of the PEC is notable. One can find examples of boards/tribunals/courts which dealt with land use issues in various jurisdictions prior to 1966, but have long since been superseded. The PEC, however, is a current and enduring institution that has remained constitutionally the same[5] for nearly 50 years.

The longevity of the PEC has not been due to a lack of scrutiny or a disregard for possible alternatives. The PEC, as with other courts or tribunals in the planning and/or environment field, has been the subject of recurring reviews with a view to its possible alteration or even abolition and replacement. The result of these numerous reviews, over almost half a century, has been a

[1] Section 4.1.1.
[2] Section 8.2.
[3] Section 435(1).
[4] George (Rock) Pring & Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, 2009) Executive Summary.
[5] The change in the Local Government Court was a change to the name of a court whose existence was continued.

consistent affirmation of the Court. This is consistent with the high level of public confidence which is enjoyed by the PEC. That is, in turn, reflected in the consistent, widespread, long term and continuing support the PEC receives from diverse stakeholders. This paper examines certain enduring core aspects of the Court, and its approach to its work, which provide a solid foundation for that confidence and support.

The measure of success

The longevity of the PEC is notable and the support it receives is gratifying, but that is not the measure of its success. Many courts or tribunals measure success by reference to key performance indicators, such as annual clearance rates. The PEC is, of course, conscious of such indicators and routinely performs well when measured in that way. That is, however, far from a complete or satisfactory measure of its success.

In assessing the magnitude of the PEC's contribution it is important to bear in mind that much of its work is appellate work, from decisions of local governments or government agencies in their role as assessment managers. Only a small proportion of decisions on development applications, however, result in appeals being filed in the Court. Further, the vast majority of those cases resolve in advance of a full merits hearing. If the contribution of the PEC was measured simply by the quantum or proportion of development application decisions made by it, then the PEC's contribution would not amount to very much. The court's more substantial contribution lies in the extent to which it improves the quality of, and public confidence in, the application and assessment process more generally, not just for those cases which ultimately come before it. This is not quantifiable, but is more important than what can be reduced to numbers.

The existence of an independent court, constituted by judges, with power to publicly scrutinise and to overturn decisions, generally has a positive effect on the diligence of a decision maker at first instance and the quality of their decisions (whether or not a particular decision is ultimately the subject of an appeal). The PEC no doubt has such an effect on referral agencies and assessment managers, as well as the planners and other professional staff involved in decision making at first instance.

The advent of the Integrated Development Assessment System (IDAS) saw a number of hitherto discrete approval mechanisms 'rolled into' the development application system. This resulted in an increase in the range of government agencies which became formally involved in the process, as

referral agencies. Those agencies have consequently become involved, as parties, in proceedings before the PEC and the PEC has come to scrutinise the subject matter of their referral agency responses. Experience has shown that the quality of the decision making of some agencies has markedly improved as a consequence.

The fact that an authoritative, independent and judicial dispute resolution body exists means that participants in the development application process do not have to tolerate or accept what they believe is poor, or even corrupt, decision making. Decision makers, in turn, know that incompetent or corrupt decisions are potentially subject to rigorous and transparent review by the court. This provides a level of protection against corruption of the process and supports public confidence in planning and environment assessment and decision making Queensland.

Further, principled decision making by the PEC provides guidance to stakeholders in the assessment process, in relation to the proper approach to the formulation and assessment of other applications. This is ultimately reflected in the quality of both applications and decisions upon them at first instance.

The PEC's positive contribution extends to the individual practitioner level. Many town planners, ecologists or other professionals who have found their opinions being tested by barristers in a hearing before the court, have acknowledged the positive effect that has on the level of their professionalism generally and the skill and care which they then apply when dealing with other matters, whether they are subject to a PEC appeal or not.

The core aspects of the PEC and its approach to its work, discussed later, have contributed to its success in these respects.

The changing faces of the Court

Whilst the PEC has remained constitutionally unchanged for nearly 50 years, there has been a progressive change of the faces of the Court. It has already been noted that the Court's first judge was Judge Lindsay Byth, who was also the chairman of District Courts.[6] Judge Byth was a great man and a fine judge. The Court could not have hoped for a better "founding father".

[6] What were the District Courts are now the District Court by virtue of the *Justices and Other Legislation (Miscellaneous Provisions) (No. 2) Act 1997*.

The PEC has, to this point, had no separate formal head of the Court. Its judges are drawn from the ranks of the judges of the District Court. In practice, the Chief Judge of the District Court has, from time to time, asked a particular judge to attend to the day to day management of the Court. That is how the day to day management of the PEC fell to Judge Kevin Row (to whom I was a clerk[7]) then to Judge Thomas Quirk and then to Judge Alan Wilson (as he then was) with supervision from Senior Judge Tony Skoien, before being passed to me. The new Chief Judge of the District Court, Chief Judge O'Brien, has asked me to continue in that role.

Each of my predecessors has made a substantial contribution to the PEC and to its success. For example, Judge Kevin Row was responsible for a rigorous list supervision and individual case management approach. Judge Thomas Quirk remodelled the listing system in Brisbane to introduce what is known as the 'pool' system. Judge Alan Wilson, under the supervision of Senior Judge Skoien, brought ADR to the fore. The regime for the management of experts has been a particular focus of mine.

The changing faces of the Court are, of course, even more evident at the level of the many judges who have constituted the Court from time to time. The PEC has been fortunate to have had the services of many fine judges. In the last year, the Court has seen the retirement of Judge David Robin QC and Judge Milton Griffin QC and their replacement with Judge Helen Bowskill QC and Judge Dean Morzone QC.

In more recent times, the PEC has had the advantage of an 'in house' ADR Registrar. The first was Ms Peta Stilgoe, who was succeeded by Mr John Taylor. Mr John Taylor's retirement is imminent. His service to the court, to the parties in the matters with which he has dealt, to professional associations, including the Queensland Environmental Law Association, and to the community has been outstanding. He will be sorely missed, not least by me. He is owed a debt of gratitude.

The stable core

Introduction

Whilst the Court has benefited from the individual and collective contributions of the 'changing faces' over its nearly 50 year history, its success is due more to what has remained constant than to what has changed. This paper examines certain enduring elements of the Court and the way in

[7] As an associate was then called.

which it approaches and undertakes its work. It is not suggested that these elements are the only important aspects of the court, but each is significant.

Because the core elements discussed below respond to the nature of the Court's work, it is pertinent to note some of the characteristics of that work. Planning and environmental disputes are different from those seen more generally in the civil law field. Although different in many respects, reference to just a few is sufficient to illustrate the point.

Rather than involving a factual inquiry into what has gone before, in order to determine existing legal rights, planning and environmental disputes are typically forward looking, in order to determine how a discretion to grant or withhold a new right ought be exercised. That is particularly so in merit review cases. Scientific knowledge is utilised to predict potential future impacts of a proposed development or a proposed environmentally relevant activity, in order to make risk-weighted decisions. Decisions can be formulated which not only deal with what is now predicted, but also to impose adaptive management obligations, so that future best practice is utilised in the event of unforeseen consequences. This is very different from deciding who should pay who how much money in order to resolve a civil cause of action.

There are other differences too. Planning and environmental disputes involve discrete, but interrelated considerations. For example, ecological considerations are only one part of the sustainable development 'tripod'. They must be considered in the context of economic and social issues as well.

Further, planning and environmental issues typically do not arise out of 'thin air'. They typically arise because someone wants to do something. They might want to carry out economic development and/or to operate development in a particular way. That might be a desire on the part of private enterprise, a government agency, a not-for-profit organisation or an individual. In that context, planning and environmental issues are not theoretical and decisions upon them have an impact on a range of interests. Such disputes often prick monetary, political, government agency and public opinion interests, to name but a few. This is a different and more complex context than applies to ordinary civil litigation.

Core elements

(i) Independence

The PEC is an independent court. Importantly, its constitutional independence means that it is seen to be independent. It is unlike what is sometimes referred to as a 'captured tribunal' that is, a tribunal which is part of a particular government department or agency. There are many examples of captured tribunals. The level of independence which their members demonstrate is variable, but even the best of them cannot entirely escape the perceptual issues which arise from their lack of full constitutional independence.

The PEC is not only constitutionally independent, but is constituted by District Court judges; judges who have security of tenure, owe no allegiance to anybody and are well used to making decisions without fear, favour or affection. The PEC is isolated from the pressures of politics, money, public opinion and any non-statutory 'agendas' of government departments or agencies. It is important that a court where planning and environmental issues are considered is a court which is clean from the taint of possible corruption or the undue influence of extraneous considerations or of particular interests.

(ii) Impartiality

Impartiality does not necessarily flow from independence. Impartiality has at least two aspects in the planning and environmental field. There is impartiality between the parties to a dispute. Every litigant, whether in an environmental dispute or a civil dispute, expects impartiality as between the parties. The PEC, as a court properly so called, constituted by judges, provides that. Planning and environmental courts and tribunals also, however, have to be aware of the need for impartiality in relation to what might be called any 'agenda'.

This risk is something which the High Court of Australia has recently spoken in *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531:[8]

> "A writer in the late twentieth century said[9]:
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> > History teaches us to be suspicious of specialist courts and tribunals of all descriptions. They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants. From the Court of Star Chamber to the multitude of military courts and revolutionary

[8] At 589, per Heydon J.
[9] Walker, *The Rule of Law* (1998), p 35.

> tribunals in our own century, this lesson has been repeated time and time again.
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> … There is a related danger in that course in that the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules. … Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. … So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind, are "likely to develop distorted positions"."

Planning and environmental courts and tribunals are often constituted by those with a genuine interest in, and passion for, that area of law and its proper application. There is nothing wrong with that. It is critical, however, that passion for planning and environmental law is not confused with environmental advocacy, environmentalism or with any other kind of advocacy or 'ism'. The decision-making body cannot be, and cannot be seen to be, an environmental advocate. Similarly it cannot be, and cannot be seen to be, a development advocate or an advocate for political policy or a slave to populism. It must also go about its work in a way which is consistent with normal judicial standards of fairness.

There are members of some planning or environmental courts or tribunals who proudly boast that their court or tribunal is particularly 'green'. Indeed, the relevant tribunal in India is called the National Green Tribunal. The adoption of a particular cause or ideological 'bent', however, unless it is one mandated by statute, undermines the legitimacy of the decision making body, public confidence in it and ultimately imperils its continued existence. Planning and environment judges should be, and be seen to be, judges for all, not judges for particular interests or agendas. Their decisions should be, and be seen to be, made without fear, favour or affection and without a view to the promotion of personal or institutional ideologies or agendas, beyond those the court is charged with pursuing.

The PEC has consistently avoided these risks. It has demonstrated impartiality in each of the respects referred to and is seen to have done so.

(iii) Principled decision making

Decision making in merit review cases generally involves the exercise of a discretion on the basis of an assessment on the merits. It is important, however, that the exercise not be, or be seen to be, an exercise in giving effect to the personal taste, preference, ideologies or philosophical sympathies of the decision maker.

The PEC has emphasised, on many occasions, that merit assessment is carried out against the relevant statutory documents and upon the application of settled principle. Accordingly, for example, when climate change became an issue in *Rainbow Shores Pty Ltd v Gympie Regional Council* [2013] QPELR 557, it was dealt with by reference to relevant statutory documents.[10] Similarly, when faced with the issue of the acceptability of accommodating development within a floodplain, on the basis of a proposal to create a flood refuge by raising a development (or part thereof) above the probable maximum flood, the court's decisions have been influenced by what the statutory planning documents have said about development in the particular floodplain at hand.[11]

The application of principled decision making promotes decision making which is just and respected by the parties and the wider community. It also provides guidance to decision makers at first instance, in dealing with other applications.

(iv) Focus on substance

It is important that those charged with decision making in planning or environmental cases do their best to deal with matters of substance, rather than technicality. As was said more than 30 years ago:

> Those entrusted with its implementation should bear in mind that neither individual or community interest is served by resource 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

[10] See para 358 of the reasons for judgment.
[11] Compare *Stockland Development Pty Ltd v Sunshine Coast Regional Council* [2014] QPELR 52 and *Arora Construction Pty Ltd v Gold Coast City Council* [2012] QPEC 52.

> substance of an application for permission to use or develop land in a certain way with maximum expedition and fairness.[12]

Whilst those remarks expressly related to the field of planning, they are equally applicable to the environmental field.

This does not mean that the court can, or should, shy away from legal points. It does indicate, however, the risks involved in a pedantic approach. Thankfully, the legislature has invested the PEC with power to excuse procedural non-compliance,[13] so that it can focus on matters of substance. The legislature has also acted consistently, over time, to broaden the scope of the power, and to remove undue limitations on its exercise.[14] The PEC has responded by exercising the excusal power on the basis of a 'broad and fair', rather than pedantic, approach.

(v) Optimal use of expertise

The optimal use of expertise is critical in planning and environmental cases. Some courts and tribunals utilise expertise within the court or tribunal itself. To some extent, that blurs the distinctions between the adversarial, inquisitorial and investigative models. The PEC does not do that.

There are both strengths and weakness in having internal expertise. Even where internal expertise is utilised, however, an environmental court or tribunal needs to consider how best to manage the expertise that the parties bring to the table. That is so because the parties will typically engage their own experts to give evidence or to at least 'shadow' experts within, or commissioned by, a court or tribunal. The parties' experts should not be brushed aside with the glib assertion that they are biased because they have been paid by a party. Nor should a court or tribunal allow itself to be perceived as having a bias towards its own experts.

The PEC's approach is well documented and is not traversed in this paper. In summary, it avoids those risks by reliance on the experts engaged by the parties, whilst managing those experts, to protect (and indeed require) their objectivity and to harness their joint endeavours from an early

[12] *Pacific Seven v City of Sandringham* [1982] VR 157, 163.
[13] *Sustainable Planning Act 2009* s 440.
[14] See *Curran & Ors v Brisbane City Council & Ors* (2002) QPELR 58 at 61 for a summary of the differences between s 4.1.53 of the *IPA* and the provisions which applied in the case of *Surr v BCC* (1973) 133 CLR 242. See also s 4.1.53 of the *IPA* as enacted, as amended in 2000, s 4.1.5A which was inserted in 2001 (and the observations in *Stevens v Pine Rivers Shire Council* [2006] QPELR 326 at 330 (fn 11) and now s 440 of the *SPA* and the explanatory notes to each of those.

stage, to inform the dispute resolution process. This approach has been successful and has gained attention, including international attention and acclaim. The Court's approach will, no doubt, continue to evolve, but the PEC can be expected to remain focused on ensuring the optimal use of expertise.

(vi) Timeliness

Obfuscation is the enemy not just of the development industry but also of the environment and all of its constituent parts. It is the enemy of ecological considerations, economic development and social good. Planning and environment courts and tribunals cannot drag their heels or allow the parties to drag their heels or to obfuscate. The PEC was one of the earliest courts to rigorously apply active judicial list supervision and individual case management to combat delay. It continues to do so.

(vii) A problem solving approach

Parties to ordinary civil litigation own the cause of action. The primary concern is resolving their dispute. That is often achieved by the payment of money. Planning and environmental disputes are different: they have significant economic consequences but are typically not about who owes how much money. The public good is the silent party in the case. The ultimate determination often has a public interest and a public effect.

Most cases resolve by way of agreement. That does not mean that the court is disinterested in those cases. It is in the public interest that those cases do not settle primarily because a party has run out of money, been 'bought out' or is intimidated by the court process. The potential loser in that event is the public interest.

It is better if cases resolve because the underlying problems or issues have been considered and resolved. So, for example, because there has been an identification of the likely impacts of a proposed development and the ways to ameliorate those impacts, so as to produce a result which is acceptable to the parties, whilst also resulting in a better outcome for the wider community and for the environment. Great pride should not be taken in settlement rates alone. It is not only the number of settlements but also their quality which is important. The PEC's approach to case management, ADR, and the management of experts demonstrates its encouragement of a problem solving approach.

(viii) Accessibility

Reasonable accessibility is, of course, an essential element of an effective court or tribunal. Accessibility, in terms of standing, is principally determined by statute. Given the breadth of the impact of decisions and the interests which they affect, there are sometimes difficult policy issues to resolve when the legislature considers laws that affect standing. It is not appropriate for me to comment upon matters of policy.

A detailed examination of standing provisions is beyond the scope of this paper. It is sufficient, for present purposes, to observe that there are (and historically have been) relatively broad standing provisions for the PEC. That includes not just in merits appeals (in which submitters can initiate appeals or become parties to appeals with respect to impact assessable development applications) but in relation to other matters, such as applications for declarations or for enforcement orders.

Practical accessibility also must have regard to cost considerations. The PEC applies an active list supervision and individual case management approach with a view to resolving the real issues in the matter at hand at a minimum of expense.[15] It does so with an emphasis on early dispute resolution, with the considerable assistance of the ADR Registrar.

Notwithstanding these endeavours, there is, inevitably, cost involved in proceedings. It is understandable that successful parties believe that they should be recompensed for the cost to which they have been put. It is equally understandable that those who are unsuccessful believe that they should not be saddled with adverse costs orders for bringing what is often a matter of public interest and controversy, to the court for determination. This presents difficult policy issues to be resolved by the legislature. The position with respect to costs has varied over the life of the court and a detailed examination of that history is beyond the scope of this paper. For present purposes it is sufficient to observe that, subject to some exceptions, the court is not and never has been, a costs-follows-the-event jurisdiction.

(ix) Comprehensive jurisdiction

The effectiveness of a court or tribunal is affected by the comprehensiveness of its jurisdiction. Put simply, the more comprehensive its jurisdiction, the more comprehensive the consideration of the problem and the more comprehensive the solution to the problem can be. The PEC's jurisdiction is not as comprehensive as is enjoyed by some other planning and environment courts or tribunals

[15] *Planning and Environment Court Rules 2010* r 4.

including, for example, those in New South Wales and in New Zealand. Its jurisdiction has however broadened and been augmented over time.

One significant change was the introduction of IDAS. As has already been noted, this had the effect of bringing within the court's purview those aspects of a development application which now trigger referral to government agencies or departments. The court, in deciding an appeal, may now examine the merits of a proposal more comprehensively than it could in the past. As has also been observed, this has had a beneficial effect, not only in reaching an appropriate resolution of particular cases, but in the quality of decision making more broadly.

Conclusion

None of the above will be news to those who are familiar with the PEC. It is, however, appropriate, as the court approaches its 50th anniversary, to reflect not only upon what has changed, but on what has endured and what is likely to remain as the foundation for the court's future. Whilst the faces of the PEC have changed and processes and procedures have evolved, it is what has remained unchanged which explains much of the court's success, the confidence which it enjoys and its consequent longevity. It is beneficial to reflect upon such matters, lest they be taken for granted or their continuing importance undervalued as we move into the future.