The Planning & Environment Court – Innovation in Action

Delivered by Judge Rackemann DCJ to the 2016 Annual Conference of the Queensland Environmental Law Association

[1] The conference theme – innovate or renovate – challenges us to examine what, if anything, can or should be done, in our particular spheres of influence, in order to achieve one or other of those two things. Before launching into such an examination, in the context of the Planning & Environment Court (PEC) however, it is useful to first reflect on the concepts themselves.

[2] To "renovate" is to repair or restore, by replacing lost or damaged parts, so as to make the subject of the renovation like new again. To "innovate" is to make a change or changes to something which is established, so as to add something new. The concepts are distinct, but both assume retention of the fundamentals of what exists. Renovation refreshes, whilst innovation brings something new, but neither involve revolutionary reformation.

[3] In considering renovation or innovation in the context of the PEC, it should be borne in mind that its 50 year history is not so much one of mere survival, but rather is a story of adherence to certain core values, whilst embracing continual adaptation to address the ever evolving opportunities and challenges of the times and the needs of stakeholders. It is therefore unsurprising that there is no significant call for the PEC to be renovated. That is so for at least two reasons, namely:

(i) There is no significant concern that the PEC has any lost or damaged parts in need of repair or replacement; and

(ii) It is difficult to see why any change should be aimed at restoring the PEC to what it once was, rather than facilitating its continual evolution and adaptation. That is not to be at all critical of the PEC in earlier times – indeed the PEC has a proud history – but simply to recognise that the focus is not on what once was, but on how to best confront the challenges of the contemporary context.

This paper therefore focuses on innovation, that is, positive change to what is established by the introduction of something which is new, rather than renovation.

[4] Any change to a Court can, of course, take a number of different forms. One form of change may be to a court's resources. Another may be legislative change, including, for example, change to the constitution or jurisdiction of the Court, or the standing of persons to bring proceedings before it. Such changes can have a profound impact upon any court, but they ultimately involve policy issues, about which the author will not comment.

[5] Whilst changes of the kind described above are often the first to be debated in any consideration of "reform", the efficiency and effectiveness of any court has as much to do with the way it utilises its resources, manages its case load and otherwise fulfils its function. In short, what it does with what it has. That is the focus of this paper.

[6] In the paper "the Planning & Environment Court – Changing Faces, Longevity and a Stable Core"[1] nine enduring "core elements" of the PEC were examined. This paper does not dwell on those. It is appropriate, in the context of this year's

1 Rackemann DCJ, 2015, QELA Conference Paper, 15 May 2015.

conference theme, to instead reflect upon some respects in which the PEC has demonstrated an innovative approach and to examine some areas in which there is scope for further innovation.

Resources

[7] The PEC is, and has always been, extremely efficient in its use of resources. Whilst constitutionally a court with its own identity, it draws both its judicial and administrative resources from the District Court. So, for example:

(i) All judges of the PEC are District Court judges;

(ii) All judges of the PEC are also assigned work in the District Court;

(iii) The District Court has no greater complement of judges because some of us judges also sit in the PEC;

(iv) The PEC has no buildings or courtrooms of its own. It utilises existing District Court facilities in Brisbane and in regional centres throughout the State;

(v) The PEC does not have its own registry. It shares the registries of the District Court. Further, there are only two additional staff in the Brisbane Registry assigned to fulltime duties in relation to the PEC. There are no PEC specific staff in the registries in regional areas;

(vi) The PEC judges have no more resources than other District Court judges, and

(vii) The PEC has no budget of its own.

[8] Those matters are well known to practitioners in Queensland, but it is worthwhile to reflect on the efficiency of the Court in its use of public resources, lest that be taken for granted.

[9] The PEC has a history of making the most of any additional resources it gets. The most significant additional resource, in recent years, has been the addition of a fulltime ADR registrar. That person not only fulfils the role of a registrar for the PEC, but provides the following services free of cost to the parties throughout Queensland:

(i) Case management conferences;[2]

(ii) Chairing without prejudice conferences;[3]

(iii) Mediations;[4]

(iv) Chairing meetings of experts.[5]

This has been a significant positive change to the established resources of the PEC, by the introduction of something new (i.e. innovation).

[10] Since the introduction of the ADR registrar, the Court has continued to innovate by increasing the deployment of the services of the ADR registrar, including as follows:

- Encouraging parties to appeals which are only about conditions or infrastructure charges to divert their matter directly to ADR, without order of the Court;[6]
- Directing the ADR registrar to hear and decide some matters;[7]

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2 See r 39 of the *Planning & Environment Court Rules* 2010 (PECR's).
3 See r 41 of the PECR's.
4 See s 491 of the *Sustainable Planning Act* 2009 (SPA).
5 See r 25 of the PECR's.
6 See practice direction 7 of 2013.
7 Section 491B(2) of SPA.

- Investing the ADR registrar with the power[8] to make an order or issue a direction where:
    (i) the active parties consent; or
    (ii) the order or directions are which only concern the conduct of an ADR conference or made at the conclusion of an ADR conference, for the purposes of ensuring the appropriate and timely progress of the proceeding pending subsequent review by a judge; or
    (iii) the ADR registrar has been directed to hear and decide a proceeding.

That broader deployment of the ADR registrar has both encouraged efficient resolution of matters and has also reduced the costs involved in otherwise needless court appearances.

[11] The PEC will, of course, continue to look for ways to innovate in its use of the resources of the ADR registrar and any other resources the PEC receives. The scope for innovation would, of course, only be enhanced in the event that further resources became available.

Use of technology

[12] The boom in technology in recent decades presents all courts with the opportunity for innovation. The PEC is no different. Because of its use of District Court facilities, the PEC has benefitted from increased electronic infrastructure in modern courtrooms, including at the new Queen Elizabeth II courthouse. This has facilitated innovations which include:

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8 Practice Direction 8 of 2014

(i) telephone or videolink appearances in Court;

(ii) videolink evidence;

(iii) electronic document management at all stages of litigation, including disclosure and trial preparation;[9]

(iv) the presentation of evidence by the use of technology including by the use of DVDs,[10] computer modelling, computer generated virtual tours through proposed developments, and the overlaying of satellite imagery on digital plans of proposed developments, to name but a few examples;

(v) e-trials.[11]

[13] The use of technology also offers great potential in overcoming the tyranny of distance in a State as large and decentralised as Queensland. That is a matter which will be dealt with in the presentation by Judge Morzone QC.

[14] The PEC will, of course, continue to utilise technology, and future advances in technology, to best effect. It is not alone in this regard. It is pertinent, however, to reflect upon a particular aspect of the PEC's deployment of technology.

[15] Many courts have a strong focus on how technology can be utilised for the preparation and presentation of those cases which proceed to trial (e-trials is an example of that). When it is recognised however, that the vast majority of matters will resolve prior to trial, the more pressing issue becomes the best utilisation of technology for the benefit of all matters, not simply those which result in a trial.

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9 Practice direction 10 of 2013.
10 Practice direction 3 of 2013.
11 Practice direction 10 of 2013.

[16] The PEC is the only State court in Queensland to have created an e-search system, where all documents filed in all matters are available to anyone to search online at any time. It was implemented at minimal cost and with the cooperation and support of the profession, the members of which provide the Court not only with hard copies but also with downloadable versions of Court documents. The system has been both successful and extremely popular. The next logical step is to progress to full paperless filing when and if resources are made available to do so.

Case management

[17] Case management in the PEC is characterised by:

(i) active list supervision;

(ii) individual case management by judges; and

(iii) flexibility.

[18] The PEC was at the forefront of this approach. Continual list supervision and individual case management by judges in the PEC dates back at least to the early 1980s.[12] This approach is now widely accepted and practiced in environmental courts and tribunals (ECTs) both domestically and internationally.

[19] The PEC is also well known, and recognised internationally, for its innovative management of expert evidence, which has been the topic of other papers.[13] This paper does not dwell upon that.

[20] The rules and practice directions of the PEC have been designed to provide maximum flexibility in relation to the content of case management. Section 446(1) of SPA gives the Court the power to make any order or direction about the conduct

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12 With the introduction, in 1984, of r 18(4A) of the *Local Government Court Rules*.

13 E.g. Rackemann DCJ "The Management of Experts" (2012) 21, Journal of Judicial Administration 168, "Pring and Pring Greening Justice – creating and improving environmental courts and tribunals the access initiative" at pp 59-60.

of a proceeding it considers appropriate. Further, such an order or direction is effectual even if it is inconsistent with a provision of the rules. Rule 19 of the PECRs repeats that the Court may make any order or issue any direction about a proceeding that the Court considers appropriate, but goes on to provide that such orders or directions can be given on application by a party or at any time (that is, of the Court's own motion). Rule 19(5) gives some examples of orders or directions which can be made, but they are only examples.

[21] This broad and flexible power in relation to orders or directions permits case management not only to be tailored from case to case but for it to evolve more generally and to incorporate innovations, without necessarily having to change rules or practice directions. The desire for flexibility, and the scope for innovation that it presents, lies at the heart of the PEC's preference for individual judicial case management over administrative allocation of cases to defined management regimes.

[22] Importantly, the opportunity for innovation which this flexibility presents may be taken up not only on the initiative of the PEC but by the parties. It is always open to a party or parties to suggest a new or different management regime for a case. That may lead to innovation not just with respect to the case at hand, but more generally, if such an approach is seen to be of more general application. A few examples illustrate the point.

(i) Particulars

A few years ago, some practitioners developed a passion for lengthy requests for particulars of the issues in dispute. Such requests could extend for many pages and would routinely produce even longer responses. By the time a matter came to

hearing the issues in dispute, as particularised, would be voluminous and had obviously been the subject of great industry, but also much time and consequent expense for the parties. Inevitably, however, by the time of addresses at the end of a case, the real matters in dispute where able to be expressed with much greater brevity and clarity. This problem was addressed not by the changing of court rules or issuing practice directions, but simply through case management. In short, the judges of the Court became much less inclined to make orders for particulars, unless it could be demonstrated that they were actually required and that the scope of them was no more than was necessary. This had a salutary effect.

(ii) Experts

The expert meeting approach in the PEC, whereby experts are, in effect, "quarantined", during their meeting process[14] is well known. Difficulties arose in some cases where experts were either suspected of going "off track" or were simply not performing in accordance with the court ordered time table. This led to some frustration on the part of the parties whose legal representatives were disinclined to take the matter up with the experts while they were in the "quarantine" period. The PEC responded by encouraging the parties (and the experts) to make use of the avenues for communication

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[14] r 27(1) of the PECR's provides that experts attending a meeting of experts must, without further reference to or instruction from the parties, prepare a joint report.

which are provided for in the rules[15], but also by encouraging the parties to bring the matter back before the PEC, so that further orders or directions could be made to ensure that the experts were properly approaching their task and doing so in a timely way. That has led, in a number of cases, to the PEC ordering that the conclusion of the expert meeting process be supervised by the ADR registrar or ordering that, unless the joint report is earlier finalised, the relevant experts are to attend at the offices of the ADR registrar on a certain day and to remain there until the joint report is finished. Orders of that kind have invariably resulted in the expeditious finalisation of joint reports and brought greater discipline to the process.

The parties should also be aware of the flexibility which the rules provide for tailoring management in relation to any particular proceeding so as to obviate potential difficulty. For example, the author is currently managing a large case in which there are in the order of a dozen different fields of expertise, with multiple experts in each field and a potential for one or more fields of expertise to impact upon others. The parties contemplate a lengthy period during which the expert meetings will take place. They also contemplate that there will be meetings not only among the experts in each individual area, but also some meetings between groups of experts in different disciplines where the disciplines have the

15 See r 27 of the PECR's.

potential to interact with each other. Given the lengthy and complex expert meeting process contemplated by the parties, the author suggested consideration of orders or directions, at the outset, which would require the experts to provide conduct reports, in relation to their meeting process, at set times throughout that period. Such a regime would be aimed not just at imposing some greater discipline, but at keeping the parties abreast of progress and giving early notice of any emerging difficulties which might then be addressed by further orders or directions. The parties saw substantial merit in that suggestion.

(iii) Disclosure

Disclosure of documents is a step in litigation which is notorious for its cost implications. Of recent times, the author has, in a number of cases, questioned whether full disclosure, or indeed any disclosure beyond an examination of the Council file, should be required. This has led to some directions orders, particularly in respect of straightforward code assessable development applications, where disclosure has been limited. There will, of course, be cases where full disclosure is important, but the flexibility of individual case management offers the opportunity for the parties to have a more innovative approach than simply calling for, or making, full disclosure in each and every case, as a matter of routine, without thought to whether the cost involved is justified in relation to the matter at hand.

[23] The above serve as examples of how the Court has continued to evolve and adapt its case management innovatively, to address concerns or opportunities which present themselves either in particular cases or more generally. The examples are generally of Court led responses but, as has already been observed, the Court's flexible case management gives scope for the parties to be co-drivers of innovation. How much is achieved in the future will depend as much on the parties as on the Court itself.

Conclusion

[24] The PEC is a court of long standing, but one which has a history of innovation, including in its use of resources and technology and its flexible case management approach. It will look to continue that approach, but it also looks to those who appear before it, to help drive innovation into the future.