



QUEENSLAND  
COURTS

# Queensland Environmental Law Association 2011 CONFERENCE

*“Court in the Act”*

**Speaker:** His Honour Judge ME Rackemann





## P&E Court Work Flow

- 2009/2010 completion rate for P&E Court = 100.1%
- 2010/2011 completion of > 110% expected
- P&E Court matters are being disposed of at a rate faster than they are being received.
- ADR Registrar completing 3-4 mediations per week
- Pre-Trial Finalisations > 90% (Cf <60% across classes 1, 2 & 3 NSW Land and Environment Court - See 2009 Annual Review Table 5.2)





## Recent Further Reforms - ADR

- P&E Court, through the ADR Registrar offers free:
  - ❑ Mediations (s491 SPA)
  - ❑ Chaired Experts Meetings (s25 PECECR's)
  - ❑ Chaired Without Prejudice Conferences (r41 PECECR's)
  - ❑ Chaired Case Management Conferences (r39 PECECR's)
  
- The Rules were drawn to permit parties to use these services without the need for an order by a Judge
  
- Rules 25, 39 and 41 of the PECECR's each commence with the words:

“An ADR Registrar may, if directed by the Court or asked by all active parties...”





# Issues

- i. Where a development is approved, residual issues about conditions should be resolved expeditiously and at a minimum of expense;
- ii. That is usually best promoted by immediate recourse to the Court's free ADR service;
- iii. The maximum advantage should be taken of, the opportunity to proceed immediately to ADR once the proceedings have been instituted without any Court order or formal court process.





## Response

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### EARLY RESOLUTION OF INFRASTRUCTURE CHARGES AND DEVELOPMENT APPROVAL CONDITIONS DISPUTES

Rule 4 and Part 5 of the *Planning and Environment Court Rules 2010*

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1. This practice direction applies to a proceeding involving only –
  - (a) infrastructure charges; or
  - (b) conditions of a development approval.
2. The purpose of this practice direction is to ensure that such a proceeding is subject to a dispute resolution process at an early stage, preferably without the need for an order or direction by a Judge.



3. Within one month after commencement of a proceeding to which this practice direction applies the parties by agreement should participate in or should fix a date and time with the ADR registrar for them to participate in –
  - (a) a mediation conducted by the ADR registrar;
  - (b) a without prejudice conference chaired by the ADR Registrar; or
  - (c) a case management conference chaired by the ADR registrar.
  
4. Where the parties do not comply with paragraph 3 of this practice direction, the ADR registrar shall list the proceeding forthwith for review by a Judge, so that the Judge may make orders for a dispute resolution plan.



# Recent Further Reforms

## *Sittings in Brisbane*

- Availability of time in each sittings depends upon the equation:
  - *Judge Sitting Days v Hearing Days Requested*
- Allowing for likely settlements, each sittings has been closed off when:
  - *Hearing Days Requested = Judge Sitting Days x 2.5*
- In future the cut off will be:
  - *Hearing days Requested = Judge Sitting Days x 3*
- Each sittings will be open for longer – facilitating even earlier hearing dates



## Recent Further Reforms – Expert Meetings

- The P&E Court management of experts continues to be popular, successful and is copied, most recently in:
  - Supreme Court of QLD's Supervised Case List
  - New Zealand
- Refer 3 articles in the National Environmental Law Review, Issue 2011:1
  - “Expert Evidence Reforms – How are they working” by Judge M.E. Rackemann
  - “The Efficiency of Joint Reports in narrowing technical issues during litigation” by Neil Sutherland
  - “Expert witness conferencing in New Zealand” by CJ Thompson – Principal Environment Judge, New Zealand





# Feedback

- 9 December 2010 - QELA Seminar “The What, Why and How of Meeting Experts”
- Feedback
  - ❑ System supported
  - ❑ Some problems with narrowness of exemption in rule 27(2) to the general rule in 27(1)

## **27 Experts attending meeting must prepare joint report**

- (1) The experts attending a meeting of experts must, without further reference to or instruction from the parties, prepare a joint report in relation to the meeting.
- (2) However, the experts attending the meeting may, at any time before the joint report prepared in relation to the meeting is finished, ask all parties to respond to an inquiry the experts make jointly of all parties.



# Issues

- ❑ Experts need more flexibility to ask for information even if others don't agree and to inform parties of problems encountered in the process
- ❑ Parties need more flexibility to determine what, if anything, is holding up the completion of the process
- ❑ Parties need to be more aware of the opportunity to bring a matter before a Judge if problems emerge



# Response

## Amended Rule 27

- ❑ Amendment made 19 May 2011
- ❑ Made in consultation with Bar Association of QLD and Law Society of QLD
- ❑ Now provides as follows:

27 (1) The experts attending a meeting of experts must, without further reference to or instructions from the parties, prepare a joint report in relation to the meeting.

(2) The joint report must –

(a) confirm that each expert understands the expert's duty to the court and has complied with the duty; and

(b) be given to the parties



- (3) Despite subrule (1), any of the experts may –
- (a) Participate in a mediation involving the parties; or
  - (b) At any time before the joint report is finished, give 1 or more of the parties a notice –
    - (i) asking the recipient to respond to a request for information or other inquiry which may assist the proper and timely conduct or conclusion of the meeting or preparation of the joint report; or
    - (ii) informing the recipient of any matter affecting the proper and timely conduct or conclusion of the meeting or preparation of the joint report.

*Example or subparagraph (ii) –*

informing parties of a delay in gathering data for use in the joint report.





- (4) However, the notice may be given to a party only if –
- (a) all of the experts agree to the giving of the notice or, if the experts do not agree, the notice states the basis of the disagreement between the experts; and
  - (b) the notice is in writing; and
  - (c) a copy of the notice is given to all the experts and the other parties at the same time as the notice is given to the party.





- (5) The recipient may respond to the notice only if –
- (a) the response is made in a document not more than 10 business days after the notice is received by the recipient; and
  - (b) a copy of the notice is first given to all the parties at the same time; and
  - (c) the response is made not less than 5 business days, or the shorter period agreed to by the parties, after the copy of the response is given to the parties; and
  - (d) a copy of the response is given to all experts, not given the response under paragraph (c), at the same time as the response is made.





(6) Despite subrule (1), a party (the *requesting party*) may request the experts prepare a report (the *conduct report*) about the proper and timely conduct or conclusion of the meeting, or preparation of the joint report, if a copy of the request is given to all other parties at the same time the request is made.

*Example –*

A party may request an update on when the joint report will be completed.



- (7) The conduct report may be given to the requesting party only if –
- (a) the conduct report is given not more than 2 business days after the request is received by the experts; and
  - (b) all of the experts agree to the giving of the conduct report or, if the experts do not agree, the conduct report states the basis of the disagreement between the experts; and
  - (c) the conduct report is in writing; and
  - (d) a copy of the conduct report is given to all the other parties at the same time as the conduct report is given to the requesting party.



## Something to Remember

- Rule 27 is part of Division 3 of the PECR's
- Rule 24(2) provides:
  - (2) However, if, in a proceeding, the court makes an order or gives directions inconsistent with a provision of this division (the *relevant order*), the relevant order prevails to the extent of the inconsistency.
- Accordingly, you can always bring the matter before a Judge who can make whatever order is required to address a particular problem.





# Pre-Trial Procedure

## ISSUE

- Parties overcomplicating pre-trial procedures in some cases

## REMEMBER

- The content of Directions is not fixed
- Think about what your matter needs



## Some Questions to Ask

- Do I really need further particulars?
- Does my Request/Response need to be so detailed?
- Do I need Disclosure at all?
- If so, do I really need lists of documents from everyone?  
What about –
  - Disclosure by inspection only
  - Disclosure by inspection of assessment manager's file only
- Have I limited my disclosure/request to inspection of the documents that are directly relevant?



- Practice Direction 2 of 2011
- Made 24 May 2011
- Based on PD 1 of 2010
- S8 – Orders or directions ordinarily included in Draft Order – amended:
  - Reference to particulars is deleted
  - Disclosure is qualified by the words “if appropriate”