Expert evidence in the Planning and Environment Court

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The management of experts in the Planning and Environment Court 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.[1]

Introduction

1. As you might surmise from the above comments of His Honour Judge Rackemann, this paper will focus on the role of expert witnesses in the Planning and Environment Court of Queensland. That is not to say that town planners may not be called to give evidence in other courts, such as the Land Court, the Magistrates Court, or the Supreme Court. However, the Planning and Environment Court is unique in its approach to expert evidence and it is the court in which planning evidence is most regularly called.

Role of the Court

2. To understand the role of expert witnesses, it is important to first understand the role of the court.

3. The court has a wide jurisdiction, given to it by enabling legislation,[2] and includes subjects such as environmental protection, vegetation and coastal management, heritage, transport infrastructure, and marine parks. However, most of the court's work concerns planning and development decisions of local governments and government agencies pursuant to the *Planning Act 2016*.

4. Matters will ordinarily come before the court in one of two ways: either as an appeal (usually against a planning decision of a local government) or as an application for declarations and/or orders about, inter alia, the lawfulness of land use or development, or matters to be done, or that should have been done, under the *Planning Act 2016*.

5. The rules that apply to expert evidence are the same whether the proceedings are an appeal or an application for declarations. However, this paper will focus on how the court hears and determines appeals and the role played by experts in that process.

6. Importantly, an appeal to the court is by way of hearing anew.[3] An appeal is not a review of whether the decision being appealed is "right" or "wrong", rather the court stands in the shoes of the original decision-maker (usually a local government) and determines the matter (usually concerning a development application) based on its merits.[4] In doing so, the court is not limited

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[1] Judge Michael Rackemann, 'Practice and procedure for expert evidence in the Planning and Environment Court of Queensland' (2012) 27(8) *Australian Environment Review* 276.
[2] *Planning and Environment Court Act 2016*, s 7.
[3] *Planning and Environment Court Act 2016*, s 43.
[4] *Planning and Environment Court Act 2016*, s 46.

to the materials that were before the original decision-maker at the time the decision was made and the court can hear new evidence that is placed before it. The preparation and giving of that new evidence is where expert witnesses play a large role.

7. In determining the appeal, the court must either confirm the decision being appealed, change it, or set it aside and make a decision replacing it or return the matter to the original decision-maker for re-determination in accordance with directions from the court.[5] A decision by the court to approve development will almost invariably include conditions which are informed by the expert evidence.

8. However, while the court will usually be assisted by expert evidence and is entitled to accept such evidence, the court is not obliged to accept it. For example, the court may instead prefer the subjective evidence of lay witnesses on matters such as amenity.[6]

9. Expert witnesses must always remember that the judge is the fact-finder and experts should be conscious not to attempt to usurp the role of the judge by expressing opinions that "answer the ultimate issue". Expert witnesses should therefore approach the preparation and giving of their evidence with an understanding of how the court will use their evidence in determining an issue in dispute.

10. Of particular relevance to town planners is the court's approach to the interpretation of planning instruments.[7] Generally, the court will adopt a purposive and non-pedantic approach to interpretation.[8] In doing so, the court will construe the instrument broadly, as a whole, and in a way which best achieves its apparent purpose and objects.[9] When construing a planning instrument it must be remembered that they are not drawn with the precision of an Act of Parliament and must be read sensibly and in context.[10] Where there is an ambiguity in the instrument, that ambiguity will usually be resolved in favour of the landowner.[11]

11. That said, the court is not the planning authority and it is not its role to determine the form which planning instruments should take.[12] That is the domain of the planning authority and the court will not interfere with the inferred intent of the drafter of that instrument.[13] It follows that the court's approach to interpretation cannot be taken to the point of re-writing provisions of an instrument which have a plain meaning, merely because they produce an inconvenient or surprising result.[14]

12. If expert evidence is prepared with an understanding of that approach to interpretation, the evidence is more likely to be accepted by the court.

Role of the Expert

13. The role of the expert witness is to assist the court by giving his or her opinion, relevant to a specialised field of knowledge, which may tend to resolve an issue in dispute.

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[5] *Planning and Environment Court Act 2016*, s 47.
[6] *Smalley v Whitsunday Regional Council* [2011] QPEC 105, [66].
[7] See generally, Stephen Fynes-Clinton, *A Commentary on the Sustainable Planning Act 2009* (Local Government Association of Queensland, 3rd ed, 2010) 135-136.
[8] *Westfield Management Ltd v Pine Rivers Shire Council (No. 1)* [2004] QPELR 337.
[9] *ZW Pty Ltd v Peter R Hughes & Partners Pty Ltd* (1992) 1 Qd R 352; *Luke v Maroochy Shire Council* [2003] QPELR 447.
[10] *Jenkinson Pty Ltd v Caloundra City Council* [2002] QPELR 527.
[11] *Taylor v Pine Rivers Shire Council* [2007] QPELR 4.
[12] *Bunnings Buildings Supplies Pty Ltd v Redland Shire Council & Ors* [2000] QPEC 1.
[13] *Loakes v Logan City Council* [2012] QPELR 351.
[14] See generally, Stephen Fynes-Clinton, above n 7, 137.

14. As a general rule, witnesses may only give evidence about their perceptions (what they saw or heard) and are not permitted to give evidence as to their opinion or conclusions about those perceptions. An exception to this rule allows the opinion of experts to be admitted as evidence. The use of expert evidence gives the court the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge.[15]

15. Therefore, for expert evidence to be admissible, there must be some issue in dispute involving a specialised field of knowledge, and the witness must demonstrate that they are an expert in that field by reason of specialised training, study, or experience.[16] Anyone can be an expert provided those criteria are satisfied.

16. As the court is relying on the expertise of the witness, the expert's paramount duty is to the court. The duty to assist the court overrides any obligations the expert may have to a party or a person liable for the expert's fees.[17]

17. The duties and obligations of expert witnesses are largely set out in the *Planning and Environment Court Rules 2010* and anyone contemplating a retainer to appear as an expert witness should read, and thoroughly understand, the rules before accepting the role.

18. The fact that the expert's paramount duty is to the court cannot be overstated. Experts are required to be independent and unbiased, unswayed by the pressures of the party, the party's legal team, or other constraints. The expert is not an advocate for the party, rather he or she is an advocate for the opinion they express and they must continue to support it for as long as they believe it.[18]

19. The court's rules reinforce this obligation and demand that a person must not give, and an expert must not accept, instructions to adopt or reject a particular opinion in relation to an issue in dispute.[19]

20. While those who regularly practise in the jurisdiction (and most experienced clients) will understand and respect the independence of expert witnesses, that is not to say that the expert will not be confronted with pressures to conform to a position which best advances the party's case. As overwhelming as those pressures may seem, the expert's independence and impartiality is his or her professional currency. As soon as they fail in that duty, the confidence and trust of the court, the lawyers who brief them, and other experts, will be lost.[20]

Engagement of Experts

21. The requirements of the rules of the court almost invariably result in the experts being retained early in the appeal process, and in most appeals the experts will be retained shortly after the notice of appeal has been filed.[21] In some cases, however, the expert may have been involved earlier in the development application process (either as a consultant or local government employee) or has provided advice as to the potential grounds of appeal.

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[15] See Federal Court of Australia, *Expert Evidence Practice Note (GPN-EXPT)*, 25 October 2016.
[16] *Makita Australia Pty Ltd v Sprowles* [2001] NSWCA 305; see generally *Planning and Environment Court Rules 2010*, r 22.
[17] *Uniform Civil Procedure Rules 1999*, r 426.
[18] *Reservilt Pty Ltd v Maroochy Shire Council* [2003] QPEC 041.
[19] *Planning and Environment Court Rules 2010*, rr 29, 31(3).
[20] Judge Michael Rackemann, *The Management of Experts* (Paper presented at the Judicial Conference of Australia Colloquium, Alice Springs, 14-16 October 2011) [34].
[21] See generally *Planning and Environment Court Rules 2010*, r 19; Planning and Environment Court, *Practice Direction No 2 of 2014*.

22. Regardless as to when the expert is retained, he or she must always remain cognisant of their duty to the court and remain independent. While there is no requirement that an expert have no prior involvement in the matter to be independent, it will be a potentially easier task for the cross-examiner to challenge the expert's objectivity if they prepared the application or made the recommendation to the decision-maker. The point is not made to dissuade those who may have prior involvement in the matter from going on to be the party's expert - in fact, that built-up knowledge of the development proposal may be an asset - but it is a relevant consideration in deciding whether to accept the role of expert witness.

23. Once the issues in dispute are identified the lawyers will consider the need for expert evidence. It may be that the issues touch on a number of expert disciplines including, for example, traffic, hydrology, noise, architecture, economic need, or air quality. Fortuitously for readers of this paper, town planning will almost invariably be in issue and a planning expert is required in most cases.

24. The lawyers will then approach their preferred expert/s and enquire whether the expert would be able to support the party's position in the appeal. Importantly, only one expert for each discipline may be called to give evidence by a party.[22]

25. At this early stage, the party seeking to engage an expert may have only limited materials in respect of the issues in dispute. Therefore, it is usual for the expert to only give his or her preliminary view of the party's case. As the appeal progresses more information will come to hand (particularly following disclosure) and the expert will need to continually reassess that preliminary opinion.

26. If the expert is to be retained, a brief containing the relevant materials will usually be sent to the expert by the lawyers. In response, the expert should send a retainer to the lawyers which clearly outlines their preliminary opinion, their independence and duty to the court, and his or her professional obligation to continually review their preliminary opinion in light of new information. This early setting of expectations can make the expert's life much easier if tensions later arise between the expert's duty to the court and the party's case.

Joint Meetings and Reports

27. The court's approach to the management of experts is unique and requires consultation between the respective experts retained by each party in each discipline. Once the experts have been identified, they engage is a consultative process known as the "meeting of experts", or joint meeting.[23]

28. At the joint meeting, the experts will attempt to reach agreement about the expert's evidence in relation to an issue in dispute relevant to their area of expertise. The aim of the joint meeting is for the experts to reach consensus as to the matters which can be agreed and those about which there remains disagreement. Those matters are then reduced to writing in the form of the "joint report".[24] Only the areas of disagreement will remain in issue in the appeal and be the subject of further evidence at trial.

29. The parties (usually through their lawyers) are responsible for ensuring that the expert is ready to take part fully, properly and promptly in the joint meeting. The expert should expect to be provided with reasonable notice as to the timing of the meeting and the issue/s in dispute, and be given enough information and opportunity to adequately investigate the matters in dispute

[22] *Planning and Environment Court Rules 2010*, r 34.
[23] *Planning and Environment Court Rules 2010*, r 22.
[24] *Planning and Environment Court Rules 2010*, r 22.

prior to the meeting.[25] If the expert has not been provided that information, it should be requested from the party or its lawyers.

30. Ensuring that the expert has all the relevant information and that he or she has a thorough understanding of the party's materials and the issues in dispute is of fundamental importance. That is because during the joint meeting process, which may take more than one meeting and extend over several weeks,[26] the experts are effectively "quarantined" and they may not discuss the matter with, or take further instructions from, the party who has retained them.[27] The process does not conclude until the experts produce their joint report.

31. The rationale for that approach is explained by His Honour Judge Rackemann:

> *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 final 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.*[28]

32. Although experts are quarantined until the joint report is produced, changes to the court's rules now allow the "cone of silence" to be lifted and the experts may communicate with the parties in certain circumstances. This gives the experts opportunity to request further information from the parties, and for the parties to request a "conduct report" from the experts as to when the joint meeting process is likely to conclude. The most welcome change, however, is that which now allows the experts to participate in a mediation involving the parties notwithstanding that the joint meeting process is yet to conclude.[29]

33. In most appeals, it is now usual for the planning experts to meet only after the experts in other disciplines have produced their joint reports. Those reports are usually a pre-requisite to the work of the planning experts. For example, the planners may be concerned with a planning issue concerning carparking or traffic congestion. It would prudent for the planners to wait for the joint report of the traffic engineering experts before committing to any opinion on those issues.

34. Once the joint report is produced, it is taken to be the respective experts' "statement of evidence in the proceeding".[30] It is the primary report at the trial. Often however, an expert will prepare a further individual statement of evidence addressing the areas of disagreement. It is sometimes forgotten that the preparation of a further statement of evidence is not mandatory even where a matter is proceeding to trial.[31] A properly prepared joint report, detailing the experts' reasons for their disagreement, should be enough.

35. However, if a further statement of evidence is to be prepared it must not, without the court's leave, contradict or depart from the expert's opinion about an area of agreement, or raise a new matter not dealt with in the joint report.[32] It would be unusual and inappropriate to "*resile from*

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[25] *Planning and Environment Court Rules 2010*, r 26.
[26] The meeting may also be chaired by the Court's ADR Registrar; *Planning and Environment Court Rules 2010*, r 25.
[27] *Planning and Environment Court Rules 2010*, rr 22, 27.
[28] Judge Rackemann, above n 20, [37].
[29] *Planning and Environment Court Rules 2010*, r 27(3).
[30] *Planning and Environment Court Rules 2010*, r 30(2).
[31] Judge Michael Rackemann, *Expert Evidence Reforms – How Are They Working* (Paper presented at Annual Conference of the Bar Association of Queensland, Gold Coast, 5 March 2011) 19.
[32] *Planning and Environment Court Rules 2010*, r 30(3).

or substantially qualify that opinion or raise substantial new matters of relevance not covered in the joint report, at least without good reason."[33]

36. Of course, an expert is entitled (it is in fact their duty) to change his or her opinion after the joint report is produced if new information becomes known or an important matter has been overlooked or an error made. In those circumstances, the proper approach is to raise the matter with the court so that consideration can be given as to whether the experts need to reconvene their meeting and produce an updated joint report.

37. It must be remembered that the expert's statement of evidence (whether it be his or her contribution to the joint report or an individual report) must be written to persuade of its contents. Again, the expert is an advocate for the opinion they express. He or she is engaged in an adversarial system and, in determining the issues in dispute, the court will invariably prefer one expert's evidence over the other. While demonstrated expertise is important, persuasiveness also plays a role.

Alternative Dispute Resolution

38. A significant feature of the court's process is its insistence on the use of alternative dispute resolution (**ADR**) to limit or resolve the issues in dispute before reaching trial.[34] As part of today's event, the court's ADR Registrar, Mr Steve Adams, is presenting about the ADR process and, therefore, it is not necessary to repeat those matters here.

39. However, it is important to remember that an expert's opinion, and usually the joint report if it has already been prepared, will inform the ADR process and assist in the formulation of alternative or ameliorating proposals which may treat and resolve the issues in dispute. The expert's role in the ADR process is integral to its proper functioning and experts should ensure that they are fully prepared for the mediation, and the uncertainties and surprises that often arise.

Giving Evidence in Court

40. If, despite all the good work of the experts in the joint meeting and during the ADR process, there remains issues in dispute, the appeal will almost invariably progress to trial. At trial, the parties will lead evidence in an attempt to persuade the court to find in their favour. Most appeals concern matters of specialist fields of expertise and, therefore, most of the evidence heard by the court will be expert evidence.

41. As noted above, if an expert has taken part in a joint meeting, the joint report is taken to be the expert's "statement of evidence". That may be supplemented by an individual report addressing the areas of disagreement, which will also be taken to be part of the expert's statement of evidence.[35]

42. Those reports are the "evidence in chief" of the expert; that is, the evidence the expert gives on behalf of the party who called him or her. Aside from answering some questions to establish the expertise of the witness and to confirm that he or she still holds the opinions held in their statement of evidence, the expert gives very little in terms of oral evidence in chief.

43. That said, some latitude is given for experts to summarise their opinion to the court, or to clarify or correct errors or omissions in their statement of evidence. However, during evidence

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[33] *SEQ Bond Stores Pty Ltd v Gold Coast City Council* [2006] QPEC 066, [39].
[34] *Planning and Environment Court Act 2016*, s 16.
[35] *Planning and Environment Court Rules 2010*, r 30.

in chief an expert cannot, without leave of the court, repeat or expand on matters contained in their statement of evidence or introduce any new material.[36]

44. Once the expert's evidence in chief is concluded, the barrister/s for the other party/s (or even self-represented parties) may then cross-examine the expert about his or her evidence. Cross-examination is an important part of the process and allows the evidence in chief to be tested before it is adopted or rejected by the court. The cross-examiner's goal is to diminish the weight the expert's evidence may carry with the court by undermining his or her opinion or by eliciting evidence which may be favourable to that party's case.

45. The process of calling witnesses, giving evidence in chief, and cross-examination will be repeated for each of the experts retained by the parties. It is now usual for expert evidence to be given consecutively "in block" where each of the experts called in a particular field are cross-examined consecutively before the next "block" of experts in another field are called.[37]

46. Under cross-examination, it is important that an expert maintain his or her impartiality and not be drawn into an argument with the cross-examiner. While the expert must remain an advocate for the opinion he or she expresses, they should not become adversarial, and should instead maintain an objective and professional disposition.

47. As part of today's event, Mr Chris Schomburgk has presented a paper[38] which contains a number of "practical tips" which would be invaluable to any expert witness, particularly those new to the experience. His advice regarding answering questions should be adhered to by all witnesses: listen carefully to the question and answer directly and in short, sharp statements; speak up, speak slowly, and speak clearly; be honest about your short comings; be polite.

48. Cross-examination is surely a stressful time for any expert. Not only must he or she be familiar with their own opinion and the facts underlying it, they must be as familiar with the opinions of opposing experts and, also, the opinion of experts from other disciplines where their opinion is dependent upon it. It is a consuming exercising but such a level of familiarity will induce confidence from the court which can only encourage the adoption of the expert's evidence. The importance of preparation cannot be overstated.

Moving Forward

49. As Mr Schomburgk advocates in his paper, there is a need for more expert witnesses. That is particularly so in regional Queensland.

50. It is always going to be difficult to blood new experts given the parties' desire to retain the most experienced expert they can. However, we as practitioners must work together to ensure that opportunities are afforded those who have an interest in the court process and a desire to appear as an expert witness.

51. That requires the trust, efforts, and understanding of lawyers practising in the jurisdiction to take a chance on up-and-coming experts. But the onus rests on the expert to make their interest known to those lawyers, and to take steps to gain any and all experience they can. Today's event is an important part of those efforts.

T C Schmitt
1 September 2017

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[36] *Planning and Environment Court Rules 2010*, r 33.
[37] Judge Rackemann, above n 31.
[38] Chris Schomburgk, *How to be an Expert Witness* (Paper presented to Planning Institute of Australia event, Townsville, 1 September 2017) 12-17.