

PRACTICE DIRECTION NUMBER 5 OF 2023
PLANNING AND ENVIRONMENT COURT

**DETERMINATION OF PROCEEDINGS INVOLVING ENFORCEMENT NOTICES
AND ENFORCEMENT ORDERS**

Purpose

1. The purpose of this Practice Direction is to set out case management procedures for the just and expeditious resolution of disputed issues in the following proceedings:
 - (a) an appeal against a decision to give an enforcement notice under s 168 of the *Planning Act 2016*;
 - (b) an Originating application seeking enforcement orders under s 180 of the *Planning Act 2016*;
 - (c) an Originating application seeking relief under s 11 of the *Planning and Environment Court Act 2016*, which, if granted, requires a person to refrain from committing a development offence or remedy the offence in a stated way;
 - (d) an Originating application seeking relief under s 505 of the *Environmental Protection Act 1994*; and
 - (e) an appeal or Originating application that does not fall within (a) to (d) above,¹ but the Listing Judge is satisfied should be managed, and listed, as if this Practice Direction applies.

Application

2. The Practice Direction applies after 18 March 2024 to proceedings of the kind identified in paragraph 1 in the Brisbane registry of the Court.

Definitions

3. For the purposes of this Practice Direction, the following terms are defined:

“***Appellant***” means the appellant in an appeal against a decision to give an enforcement notice;

“***Applicant***” means the party seeking enforcement orders or declaratory relief and consequential orders akin to enforcement orders;

“***development offence***” is an offence created under Chapter 5, Part 2 of the *Planning Act 2016*, save for s 275L;

“***enforcement authority***” has the same meaning as defined in Schedule 2 of the *Planning Act 2016*;

¹ Such as an appeal against a decision identified in Schedule 2, Part 2, Division 4 of the *Environmental Protection Act 1994*.

“**First return date**” means the first mention of a proceeding before the Court to which this Practice Direction applies and is a date no later than 6 weeks after the proceedings were filed;

“**hearing schedule**” means a plan which contains the estimated duration of openings; the estimated duration of each witness’s evidence; the sequence in which the witnesses are proposed to be called; the estimated duration of oral submissions and the estimated duration of the hearing;

“**Listing Judge**” means a Judge of the Court who manages the Brisbane P&E List from time to time;

“**proceeding**” means the whole, or part, of a proceeding to which this Practice Direction applies;

“**Respondent**” means any respondent to an Originating Application seeking declaratory relief and consequential orders akin to enforcement orders;

“**Ready for hearing**” means a proceeding to which this Practice Direction applies where, to the extent relevant:

- (a) compliance has been achieved with the requirements of the Rules, orders, directions and this Practice Direction; and
- (b) alternative dispute resolution has been exhausted; and
- (c) the party who bears the onus has filed and served an Affidavit:
 - (i) deposing to the matters in paragraphs (a) and (b) above;
 - (ii) exhibiting a draft hearing schedule reflecting the times estimates of the advocate who will appear at the hearing (including any self-represented litigant, agent, solicitor advocate or Counsel);
 - (iii) exhibiting draft Annexures 1 to 6,² where relevant, as required by Practice Direction No. 7 of 2023;
 - (iv) identifying preferred hearing dates for all parties; and
 - (v) identifying dates to be avoided for all parties and the reasons for doing so;

“**Rules**” is a reference to the *Planning and Environment Court Rules* as made from time to time;

“**Written submissions**” means written submissions prepared by, or on behalf of, any party to the proceeding that complies with Practice Direction No. 7 of 2023.

² For the purposes of complying with this aspect of the definition, only the following parts of the Annexures need to be completed at the draft stage, namely: Annexure 1 – Columns 1, 2, 4 & 5. Where a reference in the Annexure calls for an exhibit number, at the draft stage, a description of the document should be provided instead.

Commencing proceedings

4. Unless urgent interim orders are sought, the Applicant or Appellant for the proceeding to which this Practice Direction applies is to obtain a First return date from the Planning and Environment Court list manager prior to filing the proceeding.³

First return date

5. The purpose of the First return date is to deal with notice of the proceeding and orders, or directions, to facilitate the just and expeditious resolution of the proceeding.
6. At the First return date, the Applicant or Appellant is to demonstrate compliance with respect to notice of the proceeding by way of affidavit material. In the event an extension of time is required for giving notice of the proceeding, the affidavit material is to demonstrate why an extension should be granted in the circumstances.

Orders or directions for the First return date

7. Upon the Court being satisfied with respect to notice of the proceeding, or granting an extension of time, the Judge may make orders or directions about the future conduct of the proceeding at the First return date.
8. There is no standard suite of orders or directions for each case. Each party is to conscientiously consider the orders or directions appropriate for the proceedings. Prior to proposing or committing to any directions or orders, each party must be satisfied they are appropriate, and compliance would be practical and realistically achievable.
9. Central to each proceeding to which this Practice Direction applies is an allegation that an offence has been committed, or will likely be committed, unless restrained. Having regard to the nature of the proceedings to which this Practice Direction applies, and experience, the just and expeditious resolution of the real issues in dispute at a minimum of expense will, ordinarily, follow a particular sequence. The party alleging a development offence (whether an Applicant or enforcement authority), and any other party to the proceeding who is supportive of the relief sought, will file and serve all documents that are intended to identify disputed issues, affidavits and Written submissions before an order or direction is made about a response, assuming the party the subject of the allegation elects to respond.
10. With this in mind, when preparing and proposing a draft order for the First return date, parties should consider providing for the following steps to occur in the proceeding prior to a subsequent review:
 - (a) the enforcement authority giving notice of the amendments it concedes should be made to any enforcement notice for the purpose of s 47(1)(c)(i) of the *Planning and Environment Court Act 2016*;
 - (b) the Applicant giving notice to the other parties of any proposed amendments to the Originating Application;
 - (c) the Applicant serving a proposed draft order that identifies the precise relief it is seeking from the Court;

³ P&E List Manager: Tel: 3738 7976; Email: DC-PEListManager@justice.qld.gov.au.

- (d) the Applicant, or enforcement authority, filing and serving the material it seeks to rely on, including Written submissions;
 - (e) the parties to the proceeding, other than the Applicant or enforcement authority, giving notice of any objection to the material filed and served in accordance with paragraph 10(d); and
 - (f) the proceeding returning to Court for a subsequent review after paragraphs 10(a) to 10(d) are complete.
11. It should not be assumed that orders or directions with respect to the provision of statements of facts, matters and contentions or disclosure will be made at the First return date. Given the nature of the proceedings the subject of this Practice Direction, it is expected that a party who seeks interlocutory orders of this kind will do so by way of an application with supporting affidavit material that is filed and served in accordance with the Rules. Such an application will be allocated for hearing in the next available P&E Applications week.

Subsequent reviews

12. At any review after the First return date, the parties must inform the Court:
- (a) whether there has been compliance with the requirements of the Rules, orders or directions and this Practice Direction and, if not, the nature and effect of all non-compliances; and
 - (b) of any matter bearing on whether further orders or directions should be made.
13. After the relevant steps in paragraphs 10(a) to 10(e) are complete and the proceeding returns to the Court for review, the Appellant, or any Respondent/s opposing the relief sought by an Applicant, will be invited to indicate whether they elect to:
- (a) proceed to hearing and, in advance of the hearing, file only Written submissions; or
 - (b) proceed to hearing and, in advance of the hearing, file Written submissions and a list of discretionary reasons said to militate against granting the relief sought; or
 - (c) file and serve material, including Written submissions and a list of discretionary reasons militating against the granting the relief sought.
14. After a party elects to proceed in accordance with paragraphs 13(a) or 13(b), the Court may make orders or directions that:
- (a) require the party opposing the relief sought to file and serve its written submissions and a list of the discretionary reasons, if any, to be relied on;
 - (b) define the issues in dispute;
 - (c) provide for a hearing about objections to affidavit material, if required;
 - (d) require the preparation of an agreed hearing schedule;
 - (e) provide for alternative dispute resolution, if not already the subject of an order or direction; and
 - (f) facilitate the listing of the proceeding for hearing.

15. After a party elects to proceed in accordance with paragraph 13(c), the Court may make orders or directions of the kind in paragraph 14. It may also make orders about:
 - (a) the party opposing the relief sought filing and serving affidavit material;
 - (b) the Applicant, enforcement authority or any party supportive of the relief sought giving notice of any objections to the affidavit material filed;
 - (c) the Applicant, enforcement authority or any party supportive of the relief sought filing and serving any material in reply; and
 - (d) the proceeding returning to the Court for a subsequent review after subparagraphs 15(a) to 15(c) are complete.

Orders and directions are to be achievable

16. Prior to proposing or committing to any directions or orders, each party must be satisfied they are appropriate, and compliance would be practical and realistically achievable. In considering whether compliance is realistically achievable with proposed directions or orders, it is expected that the parties will take into account, among other things:
 - (a) documents identifying the disputed issues in the proceeding are to be particularised appropriately for a proceeding that involves an alleged offence; and
 - (b) that Written submissions filed and served by, or on behalf of, any party to the proceeding must comply with Practice Direction No. 7 of 2023.

Provision of draft orders before First return date or subsequent reviews

17. The parties must comply with r 21 of the Rules dealing with the provision of draft orders and directions.
18. Compliance with r 21 of the Rules assists the Court to discharge its obligations under s 10(1) of the *Planning and Environment Court Act 2016*.
19. The times prescribed for compliance with r 21 of the Rules should be treated as the minimum required to ensure the First return date, or subsequent review (as applicable), can proceed expeditiously. The early provision of draft orders or directions permits parties to a proceeding to obtain proper instructions and give conscientious consideration to whether the orders or directions proposed are appropriate and realistic.
20. To facilitate the early provision of draft orders or directions, the party with the onus, or the party who has made an application for orders or directions, is encouraged to give the other parties a proposed draft order no later than four business days before the First return date or any subsequent review.
21. Upon receipt of the draft order, the other parties are encouraged to notify whether it is accepted. This should occur no later than two business days before the First return date or any subsequent review. Where different orders are proposed, the notification is to be accompanied by a draft order.

Listing a proceeding for hearing

22. A proceeding will be listed for hearing in accordance with Practice Direction No. 6 of 2023.

23. A proceeding will not be listed for hearing unless:
- (a) it is Ready for hearing; or
 - (b) the Listing Judge is satisfied there are exceptional circumstances in relation to the proceeding for the purposes of r 22(b) of the Rules.
24. To be Ready for hearing, the Applicant is required to file and serve an affidavit that complies with paragraph (c) of the definition of Ready for hearing in this Practice Direction. The definition requires the identification of preferred hearing dates and dates that are to be avoided. It is the responsibility of the party preparing the affidavit to ascertain the relevant dates from all parties to the proceeding. If a party to the proceeding, without reasonable justification, does not provide information about preferred hearing dates or dates to be avoided to the party preparing the affidavit within three business days of receiving a request for such information, that party is taken to accept the contents of the affidavit in so far as it identifies relevant dates to be avoided or preferred.⁴ Compliance with the requirement to serve an affidavit assists the Court to discharge its obligations under s 10(1) of the *Planning and Environment Court Act 2016*.
25. Nothing in this Practice Direction precludes any party making application, supported by affidavit material, for a proceeding to be listed for hearing.

Review by hearing Judge

26. After a proceeding has been listed for hearing or referred to the hearing Judge to allocate specific hearing dates, the proceeding will be reviewed. The purpose of the review is for the hearing Judge to make such further orders or directions to facilitate the efficient and expeditious conduct of the hearing.
27. It is expected that Counsel briefed for the hearing will appear at a review before the hearing Judge.
28. The parties should expect orders to be made about any of the following matters by the hearing Judge:
- (a) timing for the delivery of written submissions, including any alternative arrangement to that required by paragraph 6 of Practice Direction No. 7 of 2023;
 - (b) delivery of affidavit material to the hearing Judge (via the Judge's Associate);
 - (c) the delivery of any draft Annexures 1 to 6 as required by Practice Direction No. 7 of 2023, where relevant, to the hearing Judge (via the Judge's Associate);
 - (d) the delivery of an updated and agreed hearing schedule to the hearing Judge (via the Judge's Associate);
 - (e) arrangements for the hearing to proceed as an eTrial (or equivalent document management system).



Brian Devereaux
Chief Judge
7 December 2023

⁴ It is expected that parties will make early enquiries of their witnesses and Counsel and will inform their experts and Counsel of the need to notify them of any change to the situation previously notified.