An Introduction to the Queensland Environmental Legal System and the Role of the Judiciary in Achieving Sustainable Development

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The Hon P de Jersey AC, Chief Justice of Queensland[1]

Chief Justices, Judges, distinguished participants: it is my honour to welcome you to the State of Queensland and to this important Symposium which I am privileged to open. I warmly congratulate the United Nations' Environment Program, and the Queensland Government, for assembling this distinguished group of judges and members of the community to address what is a seminal topic. I should say I am distinctly honoured to have been asked to present the opening address at a Symposium which goes by the lengthy and impressive title of the "United Nations Environmental Program Pacific Island Judges' Symposium on Environmental Law and Sustainable Development"! Fortunately, my topic is less of a mouthful. I am asked to furnish innocuously a "Synopsis of the Queensland Environmental Legal System" – and a commendable system it is!

[1] I gratefully acknowledge the substantial assistance of my associate, Miss Ilona Turnbull and Mr Chris McGrath, Barrister-at-Law, in the preparation of this address.

The issue of sustainable development concerns us all – whether as judges or as members of the general community; a cliché, but one bearing repetition. The bringing together here of the senior judges of the Pacific region emphasises a most significant feature - the collective and inter-dependant nature of sustainable development. One need only reflect on concerns over international fisheries, migratory species and climatic change to realise countries must work collaboratively to achieve effective and positive environmental sustainability. More importantly, to protect our environment we should learn from each other's experiences, delving into mutual understandings. We have not only a national, but also a global responsibility to protect these things.

In the course of this paper, I will, first, seek to precis the Queensland environmental legal system, covering its relationships with international, commonwealth and the common law. Second, I will speak of the role of the judiciary in achieving sustainable development.

1. Precis of the Queensland environmental legal system

While Queensland may not be comparatively large population-wise, the State is geographically huge. As I last week mentioned to the Texan-bred United States Ambassador to Australia, the heart of even Texas would be very, very deep into the heart of Queensland. And, as our overseas guests would be aware from our most discreetly measured tourism commercials, we boast the World Heritage Listed Great Barrier Reef Marine Park and Central Eastern Rainforest Reserves, such as you see before you on the

overhead projector screen, thousands of kilometres of pristine untouched beaches and…arid deserts. Our State also commands many rich mineral deposits and supports a large primary industry base. These extraordinary and irreplaceable natural resources should pre-dispose an environmentally friendly mindset. I believe it is manifest.

Given the Australian Government has only limited direct constitutional power to protect the Australian environment, the majority of this country's environmental laws have been enacted and regulated by the states, territories and local government bodies. The Queensland Government has established a broad-based system of legislation and associated regulatory bodies to preserve resources and ensure compliance with the nation's international legal obligations, and also to fulfil our moral responsibility to conserve the environment for future generations and, of course, to protect our own personal interest in maintaining a healthy environment and high quality of life.

Queensland's environmental legal system recognises sectoral environmental issues like freshwater resources, coastal and marine ecosystems, soils, forests, biological diversity, nature conservation, erosion and land clearing, pollution prevention and control, production and consumption patterns, environmental emergencies, natural disasters, waste management and mining. Quite a list! But additionally, though this does not automatically spring to mind as perhaps a "true" environmental law concern, our State's environmental legislation encompasses the protection of cultural property and historic places. Finally, the framework focuses on interlinkages between environmental and other fields, such as trade, security and primary industry activities.

May we turn now to the four levels of environmental law in Queensland –first, those grounded in international law.

A. International Law

Increasingly, the law among nations affects and regulates activities within national boundaries. The various sources of international law, as noted in Article 38 of the *Statute of the International Court of Justice* are:

- international conventions of general or particular nature (treaties);
- international custom, as evidence of a general practice accepted as law (customs); and
- the general principles of law recognised by civilised nations.

Customary international law can impress fundamental environmental obligations such as the *Trail Smelter* principle[2], which imposes liability for cross-border pollution. But the more powerful tool in the environmental law arsenal is treaty law. Currently, Australia has treaty commitments covering the range of -

- atmospheric protection,
- biodiversity conservation,
- marine pollution,
- uranium and nuclear use restraints, and
- World Heritage protection.

Perhaps the most challenging example of international treaty obligations imposed upon Australia is per article 8 of the *Convention on Biological Diversity* 1992. This article

ensures Australia must conserve biodiversity for both terrestrial and marine ecosystems. If you look at the projection screen, you will see it stipulates:

Article 8: *In-situ* conservation

Each Contracting Party shall, as far as possible and as appropriate:

(a) Establish a system of protected areas or areas where special measure need to be taken to conserve biological diversity;…

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas with a view to ensuring their conservation and sustainable use:

(d) promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(e) promote the environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

(k) develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

The existence of such international responsibilities means the Commonwealth Government is constitutionally entitled, under the external affairs power (s 51(xxix)), to enact legislation reasonably capable of being "considered appropriate and adapted to implementing the treaty. Ergo, it is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end".[3]

[2] As espoused in the case of *United States of America v Canada* (1941) 9 Annual Digest and Reports of Public International Law Cases 315.
[3] *Victoria v The Commonwealth* (1996) 187 CLR 416 (The Industrial Relations Act Case) per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

Though Australia's intentional obligations are not specifically enforceable by the Australian community unless incorporated into domestic law, they are obviously relevant concerns for domestic decision-makers, as Mason CJ and Deane J asserted in what has become the somewhat controversial High Court decision of *Minister of State for Immigration and Ethnic Affairs v Teoh*[4]

> "…the ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention."

In short, international law interacts with the Queensland environmental legal system by:

- placing legal obligations upon Australia to preserve the environment,
- leading to the activation of Commonwealth legislative power to discharge those obligations, and
- enabling the consideration of those obligations by domestic decision-makers.

B. Commonwealth Law

Moving from international law, we arrive at the rather murky interaction of Commonwealth and State power.

As said, the Commonwealth has only limited direct constitutional power to make laws with respect to the Australian environment. But utilising the external affairs power, the

[4] (1995) 183 CLR 273 at 291

Commonwealth government may make laws reasonably and appropriately adapted to fulfil Australia's international legal obligations. In the interests of expedition, I will mention only two of the more important environmentally-based Commonwealth Acts, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (***EPBC Act***) and *Great Barrier Reef Marine Park Act 1975* (Cth).

I. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

This weighty tome is a consolidation and update of previous environmental legislation and reflects an expansion of direct Commonwealth involvement in environmental decision-making. The Act creates two broad areas of jurisdiction: those involving matters of national environmental significance, and those concerning Commonwealth actions and areas. Presently, the matters of national environmental significance are:

- the World Heritage values of a declared World Heritage property;
- the ecological character of a declared Ramsar wetland[5] (our Moreton Bay is an example) - if you look at the overhead screen, you may see what such a wetland looks like;
- listed threatened species and ecological communities;
- listed migratory species;
- nuclear actions; and
- Commonwealth marine areas.

[5] Such a wetland is defined in s 17 EPBC Act as a "wetland, or part of a wetland, designated by the Commonwealth under Article 2 of the Ramsar Convention for inclusion in the List of Wetlands of International Importance kept under that Article". Moreton Bay is an example of a Ramsar Wetland.

It is an offence, under this Act, to take an action, without approval, which has, will have or is likely to have, a significant impact on a matter of national environmental significance. As to what "significant impact" connotes, Branson J of the Federal Court noted in *Booth v Bosworth*[6] ("the flying fox case"), that the concept depends on impact which is "important, notable or of consequence having regard to its context or intensity". In that particular case, heard in Brisbane in July last year, Her Honour granted an injunction to restrain the mass culling of flying foxes on a property adjacent to the Wet Tropics World Heritage Area. Mr Keim was involved in that case and may mention it when he speaks later today. The case demonstrates the wide operation and diverse subject-matter of the Act.

The Act also establishes a range of devices for protecting biodiversity. Biodiversity is, we may know – but we will accept the politician's reminder! "essential for the maintenance of human life on earth as it supports the life-sustaining processes that purify our water, fertilise our soils and manage our climate".[7] With these issues in mind, the Act has provided for the creation of such bodies as the Australian Whale Sanctuary, "established in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters".[8] The protection of mammals crossing international borders is a great challenge, one in which the United Nations Environment Program and many of our respective jurisdictions are heavily involved.

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[6] [2001] FCA 1453

[7] Senator Robert Hill "Opening Address at the Australian Centre for Environmental Law's Third Environmental Outlook Conference: Reform of Commonwealth Environmental Law" in Leadbeter,

Bilateral agreements also find their way into the Act's administrative provisions. These agreements allow for accreditation of State and Territory assessment and approval processes to satisfy similar stipulations under the EPBC Act and to avoid duplication. There are two categories of "bilaterals": the first, *assessment bilaterals,* where State/Territory Environmental Impact Assessment processes are approved but the Commonwealth makes the final decision; the second, *approval bilaterals,* where assessment and approval remain under the auspices of the State or Territory environmental regulator.

What may be perceived as a most positive aspect of this Act is the widened standing provision for public interest litigants, such as conservation groups. The common law test for standing is constrained, as led me – notwithstanding some subsequent criticism – to deny judicial assistance to seasonal pregnant ghost bats frequenting Central Queensland caves in 1989. The case, a decision of the (appeal) Full Court, was *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd*[9] and the critique appears in the book "Environmental Protection and Legal Change", edited by Mr T. Bonyhandy in 1992 (pages 215-216). The recent Act provides in s 475 that an interested person or group may apply for an injunction if he/she or it has engaged, engages or proposes to engage in conduct consisting of an act or omission constituting an offence or other

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Gunningham and Boer (eds) *Envrionmental Outlook No 3: Law and Policy*, Federation Press, Sydney, 1999 p.4.

[8] Section 225(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

[9] [1989] 2 Qd R 512.

contravention of the Act or regulations. As you may see on the following overhead, an "interested person" is then defined to mean:

Section 475 Meaning of interested person—individuals

(6) For the purposes of an application for an injunction relating to conduct or proposed conduct, an individual is an *interested person* if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and:

(a) the individual's interests have been, are or would be affected by the conduct or proposed conduct; or

(b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:

(i) the conduct; or

(ii) in the case of proposed conduct—making the application for the injunction.

Meaning of interested person—organisations

(7) For the purposes of an application for an injunction relating to conduct or proposed conduct, an organisation (whether incorporated or not) is an *interested person* if it is incorporated (or was otherwise established) in Australia or an external Territory and one or more of the following conditions are met:

(a) the organisation's interests have been, are or would be affected by the conduct or proposed conduct;

(a) if the application relates to conduct—at any time during the 2 years immediately before the conduct:

(i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and

(ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment;

(c) if the application relates to proposed conduct—at any time during the 2 years immediately before the making of the application:

(i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and

(ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment.

Complementarily, and favourably to the intervenor, s 478 provides "the Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction". The significance of this dispensation, by contrast with the requirements of ordinary civil litigants, should not be gainsaid. These

two provisions give applicants a far greater chance of succeeding in an application for an injunction under this Act than was previously the case.

B. The *Great Barrier Reef Marine Park Act 1973* (Cth)

The second Commonwealth Act, which I will merely mention, is the *Great Barrier Reef Marine Park Act 1973* (Cth). As you will gather, it is designed to protect and manage the Great Barrier Reef Marine Park. The Act and its associated regulations create a zoning plan for the Marine Park premised on the notion of multiple-use management,[10] and they prescribe a licensing system to regulate discharges into the Reef[11]. Now to local law.

C. Queensland Environmental Law

The two principal pieces of Queensland environmental legislation are the *Integrated Planning Act 1997* (Qld) (***IPA***) and the *Environmental Protection Act* 1994 (Qld) (***EPA***).

A. The Integrated Planning Act

This Act creates a framework for the establishment of planning schemes by local governments, and a development approval system – the Integrated Development Assessment System (***IDAS***). The Act, and its two limbs - planning schemes and development approval - are coloured by the over-arching principle of "ecological sustainability", a concept to which I will return. The Act encourages an outcome-oriented approach to planning, by asserting "desired environmental outcomes" for areas against which development applications may be assessed.

[10] The *Great Barrier Reef Marine Park Regulations 1975* (Cth).

The Integrated Development Assessment System (***IDAS***) comprehends four stages:

1. the *application stage,* where the application is in fact made to the relevant government entity;
2. the *information and referral stage,* where the application is transferred to any relevant government agencies and a request made for any extra information necessary for its assessment;
3. the *notification stage,* where "impact assessable" developments are publicly notified; and
4. the *decision stage*, where the decision is made to approve, refuse or grant conditional approval of the application.

The governmental bodies involved in this rather cumbersomely styled system are the "assessment manager" and the "referral agencies". Generally, the assessment manager is the relevant local government authority. The application is initially made to this body, which then administers the IDAS process and decides what to do with the application. There are two levels of referral agencies – a *concurrence agency* – where the entity has power to refuse the application and to impose mandatory conditions, and an *advice agency* –where the entity may offer advice to the assessment manager, but is not entitled to refuse the application or impose mandatory conditions.

The majority of the decision-makers in the IDAS system are local government authorities. As the independent decision-maker to determine planning disputes through appeals from local government decisions, the well-established and respected Planning

[11] The *Great Barrier Reef Marine Park (Aquaculture) Regulations 2000* (Cth)

and Environment Court conducts a *de novo* merits review. At this point I note the involvement in this symposium of Her Honour Chief Judge Wolfe of the District Court of Queensland and His Honour Judge Quirk, a senior judge of the Planning and Environment Court, and I note the other members of that court present here today. This is an important limb of our State's judicial regime. The Planning and Environment Court determines disputes of substantial community and financial significance: as to the former, its decisions vitally affect people, within the constraints of the legislation; and as to the latter, we see those inclined to exploit pulled back, those acting reasonably, encouraged.

The Planning and Environment Court has repeatedly and properly recognised it is not free to do as it will in planning appeals. As His Honour Judge Quirk stated in the case of *Liongrain*[12]:

> "[The Planning and Environment Court] has no plenary power to do whatever may be seen to be of environmental advantage to the community. It must exercise the jurisdiction which it is given pursuant to the relevant provisions of the Act. That its owners should expect to be able to develop it in accordance with the relevant instruments of statutory planning control is fundamental to proper and fair town planning."

It is plain the protection the Court can give to environmental considerations is largely dependent on the relevant planning scheme and other planning instruments. That is as it should be, properly recognising the respective roles of the parliament and the judiciary. In critical respects, the people expect their parliament to speak. If however it fails to speak, or if it speaks in impossibly general terms, it may be warranted for the courts

[12] *Liongrain Pty Ltd v Council of Shire of Albert & Ors* (1995) QPLR 353 at 355.

responsibly to supply the omission, if necessary for the resolution of the issue, and provided that capacity may be seen as implicitly accorded by the legislature. This is a matter to which I will return.

B. The Environmental Protection Act 1994 (Qld)

I mention now the *Environmental Protection Act 1994*. Its object is environmental protection within the context of ecologically sustainable development. The Act generally regulates contaminant release/pollution control, and although it does not expressly cover wider issues such as land clearing, the recent case of *Maroochy Shire Council v Barns*[13] notes there is no basis for such limitation to its application.

The Act's cornerstone is s 319, the general environmental duty provision which states:

General environmental duty

Section 319(1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the **"general environmental duty"**).

(2) In deciding the measures required to be taken under subsection (1), regard must be had to, for example –

(a) the nature of the harm or potential harm; and

(b) the sensitivity of the receiving environment; and

(c) the current state of technical knowledge for the activity; and

(d) the likelihood of successful application of the different measures that might be taken; and

(e) the financial implications of the different measures as they would relate to the type of activity.

[13] Unreported, Maroochydore Planning and Environment Court, Dodds DCJ, 2 May 2001.

This expression of the general environmental duty is reminiscent of the extraordinarily recurrent "reasonable care" principle espoused in *Donoghue v Stevenson*.[14] The now somewhat clichéic nature of that principle cannot be allowed to obscure its enduring effect on the development of our law, and of characteristically Queensland flavour – Lord Atkin, you may not know, was a son of the Rector of our Brisbane Anglican Parish of Sandgate! The Act extends the common law duty of reasonable care beyond people and property to the environment generally. Upon proof one has taken reasonable care to prevent or minimise harm, one has a defence to the offence of causing serious or material environmental harm (ss 427 and 438).

2. The role of the judiciary in achieving sustainable development

I turn to the second part of this address –the role of judges in achieving ecologically sustainable development.

The primacy of our current-day preoccupation with environmental protection was judicially hinted at as long ago as 1837, by the United States Supreme Court in *Charles River Bridge v Warren Bridge*[15]: "We must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation". In modern day parlance, substitute for the word "community", "environment", producing a maxim ensuring both the rights of the environment, and the people who depend on it, are appropriately balanced. This fits comfortably with the

[14] [1932] AC 362 at 580 per Lord Atkin.
[15] (1837) 11 Peter, 420.

extension through the Queensland EPA of the "reasonable care" principle beyond people and property to the environment. The pivot on which the fulcrum of environmental law balances nationally is the concept of ecologically sustainable development (***ESD***).

The concept may be explained as "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased".[16] There are four constraints:

(1) maintaining a sustainable yield in renewable resources;

(2) conserving and replacing exhaustible resources as we use them;

(3) maintaining ecological support systems; and

(4) maintaining biodiversity.[17]

As evidence of Australia's commitment to ESD, the EPBC Act enshrines these principles in s 3A; which, as you may see on the overhead, provides:

Section 3A Principles of ecologically sustainable development

The following principles are *principles of ecologically sustainable development*:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

[16] Commonwealth of Australia, *National Strategy for Ecologically Sustainable Developments*, AGPS, Canberra 1992.
[17] Smith S, "Ecologically Sustainable Development: Integrating Economics, Ecology and Law" (1995) *Williamette Law Review* 261.

(c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;

(e) improved valuation, pricing and incentive mechanisms should be promoted.

As Mr Bates and Ms Lipman point out in their work "Corporate Liability for Pollution"[18], "ESD *is* the balance between development and environmental imperatives…ESD requires the effective integration of economic and environmental considerations in decision-making processes". Unfortunately, the use of ESD as a yardstick for legal decision-making is to a degree uncertain, especially given the paucity of judgments discussing these principles, broadly expressed as they are. Views will vary from person to person, judge to judge (without this, we would have no dissenting judgments for a start!), yet certain fundamental values must be preserved for the greater public good. The preservation and protection of the environment is one such core value.

What is the role of the judiciary in achieving sustainable development? In brief, to apply the law, remembering that the challenge posed by environmental policy considerations is not novel, but merely reflects new aspects of the public interest which has long motivated the courts to beneficial decision-making.

Judges exist to serve the public. As such, they resolve disputes between members of society, or between individuals and the state, but within the constraints of the law.

Judges primarily do not make law. They apply the law made by others. Where, however, the law is unclear, judges interpret it and some will regard this as developing the law. Where, furthermore, the law is broadly expressed, there may be wide scope for judicial assessment and discretion. In these respects, the judicial responsibility is enhanced. When judges resolve legal conundrums, the law inevitably sometimes develops and transmogrifies – it is a dynamic creature and judges are not automatons. On occasion, judges may quite properly influence the direction of the law in radical respects, and *Donoghue v Stevenson* is a basal example of that.

Of critical significance in this context – as in all, is judicial independence –ensuring the executive, which may be party to litigation over environmental disputes, does not inappropriately influence the outcome. Likewise, judicial independence ensures private parties, like mining companies, or large multinationals, do not unduly influence the decision-making process. Judicial independence is a state of affairs AND a practice. I note my fellow speakers will later discuss these aspects through examination of merits review in planning appeals, judicial review of administrative decisions, criminal trials and sentencing in environmental disputes and civil trials and access to justice.

The question has been asked, when judges ought leap to break with established law? The issue arises most often in ultimate courts of appeal, and much has been said on the topic. Chief Justice Beverly McLachlin of the Supreme Court of Canada[19], advances four prerequisites:

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[18] LBC, Sydney, 1998 at 47.
[19] In "The Supreme Court and the Public Interest", (2001) 64 *Saskatchewan Law Review* 309 at 318-319.

1. the matter must be one of paramount consequence to society and the rule of law;
2. there should be prevailing acceptance of the need for modification of the law;
3. such change or modification should be premised upon vital principles and basal values as espoused in earlier decisions; and
4. finally, the judiciary should only make fundamental changes to the law when legislative intervention fails or is unable to address the dispute or matters at hand.

It is only when these four features coalesce that judges should, she suggests, seriously consider "changing" the law. When legislators fail to respond to a clear call for social change, the judiciary has in some jurisdictions shown a willingness to respond. As that Chief Justice states, "at best, (responding) will allow the law to develop in a necessary way. At worst, it will provoke the legislature to needed action. In either case, the public interest will be well served."[20]

In my own view, while judges must be astute to comprehend, respect and uphold such pivotally important issues as environmental protection, they must be careful not to arrogate to themselves any radical power to vary the composition of environmental law as declared by the legislature. Their immutable obligation is to apply the law as determined by the Parliament. That is what the people expect of them: it is part of the "rule of law". That said, when circumstances dictate in accordance with plain community view that incremental development is justified, courts may effect it – but always provided that doing so may be seen as simply exercising a licence implicitly given by the legislature, by virtue, for example, of a lacuna in the legislation or very broad legislative prescription. There is a judiciary…and a parliament!

Thank you ladies and gentlemen. It is, I repeat, a singular honour that we should be hosting this initiative in the State of Queensland; and it has been my privilege to address you.

[20] Ibid at 319.