Environmental Dispute Resolution – Lessons from the States

A paper delivered by

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Introduction

[1] While the topic for this session of the conference is about climate change litigation and ecologically sustainable development, such litigation takes place within the context of the existing structures for environmental governance more generally. This paper deals with that broader context.

[2] This paper provides a brief overview of the Commonwealth environmental dispute resolution system, in order to set the scene for a comparative examination of what is being done at a State level, with particular reference to the Planning and Environment Court of Queensland ('PEC').

Three pillars of good environmental governance

[3] In 1992, 172 nation states adopted the Rio Declaration on Environment and Development ('the Rio Declaration') at the United Nations Conference on Environment and Development ('the Earth Summit'). The Rio Declaration contains a number of principles including one (Principle 10) dealing with the establishment and operation of effective environmental jurisdictions. That Principle is based on three central pillars of good environmental governance: transparency, inclusiveness and accountability. Insofar as judicial and/or administrative oversight and enforcement is concerned, Principle 10 provides, in part, that:

> "Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

[4] Since the Rio Declaration (and the meeting of world leaders in Johannesburg, a decade later, to evaluate progress) much has been done (and is still being done) in many countries in order to establish effective environmental jurisdictions, including

access to judicial and/or administrative proceedings for challenge, review and/or enforcement.

The national debate in Australia – the Commonwealth/State divide

[5] In the context of international progress in the creation and refinement of environmental dispute resolution processes, some of Australia's State-based environmental courts or tribunals ('ECTs') have attracted, and continue to attract, significant international attention as exemplars of aspects of "best practice". Ironically, that is not always well acknowledged or recognised within Australia in national-level discussion and debate.

[6] The national stage in the environmental law field, as with so many other fields within Australia, tends to be dominated by the Commonwealth/State divide. Historically, the States have been responsible for the management of the environment. The Constitution contains no express head of Commonwealth power with respect to the environment. The Commonwealth may however, exercise its other powers for environmental purposes and has increasingly done so over the last few decades – most notably with the introduction of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act').

[7] Indeed, with the EPBC Act, close to 100 subordinate legislative instruments and the adoption of a range of international treaties and conventions of relevance to triggering federal jurisdiction, there are now many projects which potentially must negotiate a path through both Commonwealth and State legislative requirements and administrative regimes. Few participants view this positively.

[8] Frustration at needless and excessive duplication between Commonwealth and State-level statutory regimes and administrative authorities is not unique to the environmental law field. However, frustration is no doubt exacerbated in the field of environmental law by the uncertainties and difficulties associated with the EPBC Act.

[9] The EPBC Act aims to protect and manage nationally important flora, fauna, ecological communities and heritage places.[1] The Act identifies eight matters of National Environmental Significance, namely:[2] the world heritage values of a declared World Heritage property; the national heritage values of a declared National Heritage place; the ecological character of a declared Ramsar wetland; listed threatened species or endangered communities; listed migratory species; Commonwealth marine areas; the Great Barrier Reef Marine Park, and nuclear actions. Actions which have, or are likely to have, significant impact on a matter of National Environmental Significance are "controlled" actions which require the approval of the Minister.[3]

[10] Initially, the onus is on the proponent to identify whether the development has the potential to have a significant impact on a matter of National Environmental Significance. If the proponent believes it does, it must refer the project to the Minister for determination as to whether the action is a "controlled action" for which approval is required.[4] The Minister, a State or Territory, or another Commonwealth agency may also refer a proposed development to the Minister for

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1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3.
2 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Chp 2, Pt 3, Div 1.
3 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67.
4 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(1).

determination.[5] The effect of this complicated system is that at times it is difficult for the proponent, let alone any interested member of the public, to determine whether a particular development is one to which the Act applies.

[11] Further, decision making at a ministerial level under the EPBC Act is prone to create a perception (whether soundly based or otherwise) that political considerations are in play. That is particularly so with respect to controversial projects.

[12] The EPBC Act has been much criticised. In October 2008 the Commonwealth Government announced a review of the Act. An independent review was conducted by Dr Allan Hawke. A discussion paper was released in October 2008 and a final report was tabled in Parliament on 21 December 2009. Its first recommendation was that the EPBC Act be repealed and replaced with a new Act called the *Australian Environment Act* with the aim of clarifying, simplifying, streamlining and modernising the environmental processes.

[13] Subsequent national debate has tended to focus on the push to "streamline" the process and cut "green tape". Attention has focussed upon the extent to which the Commonwealth should, or should not, accredit the State and Territory systems, through bilateral agreements, so that they can act as a "one stop shop" for environmental approvals. This discussion is susceptible to becoming preoccupied with process and mired in philosophical and/or political debate, rather than focussing upon the identification of "best practice", as a guiding light for future reform.

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5 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 69, 70.

Dispute resolution under the EPBC Act

[14] The range of mechanisms available to those who are dissatisfied with a decision under the EPBC Act or who wish to take some form of civil enforcement action are:

1. internal review;
2. judicial review in the Federal Court of Australia;
3. merits review in the Administrative Appeals Tribunal;
4. declaratory and injunctive relief in the Federal Court.

[15] At first blush that might seem like a fairly comprehensive suite of mechanisms to provide "effective access to judicial and administrative proceedings, including redress and remedy" in accordance with Principle 10 of the Rio Declaration. Closer examination however, reveals limitations on the availability and utility of those mechanisms.

[16] Internal review or reconsideration is available for two types of decision under the EPBC Act, namely reconsideration of clearly unacceptable referral decisions[6] and reconsideration of controlled action decisions.[7] The internal review process is appropriate but is not, of itself, sufficient. It simply leads to a reconsideration by the Minister, rather than by any independent authority.

[17] Judicial review in the Federal Court carries four primary limitations. Firstly, it is limited to a person "aggrieved" by a decision. While the EBPC Act extends the concept of a person "aggrieved",[8] there is still some restriction on standing.

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6 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 74B(1)(a), 74C(3)(c).

7 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 78.

8 To include individuals or organisations who (or which) in the preceding two years have engaged in a series of activities for protection or conservation of, or research into the environment; see s 487 *EPBC Act 1999* (Cth).

[18] Secondly, and most significantly, judicial review only ensures that the decision made was lawful. If so, the applicant in judicial review proceedings will be unsuccessful, whether or not the decision was correct from a merits perspective. The Federal Court, in hearing an application for judicial review, is unconcerned with the merits of the decision. It is a legal, jurisdictional or process-oriented review. Some of the consequences of the limitations of judicial review in the context of the EPBC Act were described by Dr Chris McGrath as follows:[9]

> "If the Minister or their delegate has 'ticked all the right boxes' and been careful in writing their reasons for decision under the EPBC Act, then what is essentially a very poor decision allowing a highly damaging development may not be challenged. This leaves enormous room for political decision-making about a project, resulting in short-term, economic decision-making rather than the promotion of sustainable development. Decision-making subject to merits review would be expected to be less influenced by short-term, political considerations and more strongly based upon the evidence supporting or opposing a proposed development. Simply the existence of a right of merits review (as opposed to its exercise) can have a positive effect on the integrity of administrative decision-making, as decision-makers will act knowing of the potential that they may be required to justify their decision based on evidence in an independent court or tribunal."

[19] Thirdly, even where an application for review is successful, the usual "remedy" is simply to refer the matter back to the original decision-maker for reconsideration.

[20] Fourthly, the usual costs rules apply. Ordinarily, a successful party will have the benefit of an order that the unsuccessful party pay its costs. This is a substantial deterrent to "public interest" type litigation.

[21] The inadequacy of judicial review as a means of challenging decisions under the EPBC Act may be illustrated by the fact that, as at the time of publication of the

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9 'Flying Foxes, DAM and Whales: Using Federal Environmental Laws in Public Interest' (2008) 25 *EPLJ* 324.

independent review, there had only been 20 judicial review cases since commencement of the EPBC Act, only three of which had been successful.[10]

[22] Merits review in the AAT is a potentially much more useful mechanism. There are, however, three caveats. Firstly, the AAT, whilst well used to conducting merits review generally, is not a specialist environmental court or tribunal. Secondly, to have standing, one must be a person "whose interests are affected by the decision".[11] Thirdly, and most significantly, the range of decisions which can be subject to appeal to the AAT under the EPBC Act is extremely limited. The types of decisions which may be subject to such a review, pursuant to the EPBC Act are:[12]

- Permits for activities affecting protected species,
- Permits for the international movement of wildlife, and
- Advice about whether an action would contravene a conservation order.

The scope for merits review was further confined by the 2006 amendments which, in effect, confined merits review to decisions made by a delegate of the Minister rather than decisions by the Minister himself/herself.[13]

[23] The scope for declaratory or injunctive relief in the Federal Court is subject to limitations (discussed earlier) with respect to standing and the disincentive created by the costs regime in that court. It is also not a merits review process.

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10 Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (2009) 'Chapter 20: Review Mechanisms under the EPBC Act and Access to Court' p 314.

11 *Administrative Appeals Tribunal Act 1975* (Cth) s 27.

12 *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 303GJ.

13 *Environment and Heritage Legislation Amendment Act (No. 1) 2006* (Cth) s 530; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 303GJ(2).

[24] Overall, the suite of review and/or civil enforcement remedies available at a commonwealth level, viewed collectively, does not represent, or even approximate, international best practice.

State-based environmental courts and tribunals

[25] One of the key distinguishing features between the Commonwealth and State-based systems is the existence, at State level, of specialist planning and environmental courts or tribunals with broad powers to conduct full merits review. The legislation applicable to most provide, to varying extents, for third parties to institute and/or participate in appeals. Further, costs generally do not follow the event. Parties generally pay their own costs. That was the position in the Planning and Environment Court of Queensland until recent amendments which have given the court an open costs discretion (but without any "costs follow the event" bias) in merit appeals.[14]

[26] The justification for an independent review process was recently summarised by Justice Barker[15] as follows:

> "… an independent review process was considered to provide an effective means of remedying incompetent decision-making, at one level, and bad, even corrupt, decision-making at another. Generally speaking, where decision-making was perceived as requiring, not the application of higher order political priorities, but the application of generally accepted, rational principles, and sometimes expert considerations, the broader populace came to accept that administrative justice for individuals and better decision-making across the board was more likely to be achieved if the primary decision were to be subject to review by an independent body. Independent review was seen as serving the ends of a practical

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14 *Sustainable Planning Act 2009* (Qld) s 457.

15 Imagining The Future: Planning and Environment Courts and Tribunals in the 21st Century, keynote address to the Australasian Conference of Planning and Environment Courts and Tribunals, 30 August 2012.

> democracy, of achieving accountability, and enabling a reasonable balancing of private rights against public interests.
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> …
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> Part of the process of democratic liberalism that informs government in countries like Australia and New Zealand is that citizens do get, in the Australian vernacular, a "fair go". There is also a healthy scepticism in countries like ours about the ability of the first tier of political or administrative decision-making necessarily to get the answers to all the big questions right. For me, I can see an expanded role for planning and environment courts and tribunals in Australia and New Zealand, whereby the sustainability in environmental and social terms of the use of land and other resources will be increased, not diminished."

[27] At a State level within Australia, there has long been recognition that planning and environment decision-making should generally be the subject of an independent review process and that such a process is best dealt with by a specialist court or tribunal. That view is spreading across the world.

[28] In the 1970s there were only a handful of specialist and ECTs worldwide. By 2009 there were 41 countries which had created specialist ECTs. Over half had been created in the preceding five year period.[16] The spread of specialist ECTs across the world continues at pace, not least in China where there are now around 100.[17]

[29] Australia is home to some of the longest established and most respected ECTs, although they exist at a State level only. The longest standing of the State-based ECTs is the Planning and Environment Court of Queensland which was created, under its former name of the Local Government Court, in 1966. The Land and Environment Court of New South Wales is also a longstanding State-based ECT, having been created more than 30 years ago.

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16 Pring, G and Pring, C, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative, USA, 2009).

[30] There are a range of different ECTs across Australia. These include courts which are constituted, or primarily constituted, by Judges,[18] specialist lists of State administrative tribunals[19] and hybrid models.[20] Western Australia has a civil and administrative tribunal, with a specialist list, but it deals with planning matters rather than environmental matters, which are only subject to a ministerial appeal or judicial review in the Supreme Court.

[31] The first comprehensive study of environmental courts and tribunals worldwide was conducted by prominent United States academics George and Catherine Pring. In their study "Greening Justice – Creating and Improving Environmental Courts and Tribunals" ('Greening Justice') published in 2009,[21] the Planning and Environment Court of Queensland and the Land and Environment Court of New South Wales are specifically referred on multiple occasions as leading ECTs in a number of respects. Each of those courts has been asked to share their experience with other countries. For example, the Planning and Environment Court of Queensland is currently assisting the judiciary in a near neighbour nation-state which is considering the introduction of specialist planning and environment lists.

[32] While there is a growing international consensus that environmental disputes are best resolved by specialist ECTs, such bodies are not without their critics or their risks. A sobering caution in relation to specialist courts and tribunals, of all kinds, was recently sounded by Heydon J in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 590 as follows:

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17 Minchun and Bao: Specialised Environmental Courts in China: Statuts GNO, Challenges and Responses (2012) *Journal of Energy and Natural Resouces Law* 30(4).

18 E.g. Queensland and New South Wales.

19 Such as in Victoria.

20 Such as in Tasmania and South Australia.

21 http://www.moef.nic.in/downloads/public-information/Greening%20Justice.pdf.

> "Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. Medical students usually detect in themselves at a particular time symptoms of the diseases they happen to be studying at that time. Academic lawyers interested in a particular doctrine can too often see it as almost universally operative. So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are 'preoccupied with special problems', like tribunals or administrative bodies of that kind, are 'likely to develop distorted positions.' … "

[33] While a key justification for ECTs is the involvement of decision-makers who are knowledgeable about environmental law, it is fundamental that those constituting an ECT approach their task not as environmentalists (or developers) on a crusade but rather as independent and objective decision-makers and, in the case of judicial bodies, like the Planning and Environment Court of Queensland or the Land and Environment Court of New South Wales, as Judges. Similarly, no ECT should aspire to be the "greenest" court or tribunal, unless that is its statutory mandate.

[34] The risks of which Heydon J spoke are perhaps less prominent in the courts of law, such as the Planning and Environment Court of Queensland. Its Judges are drawn from the ranks of the District Court of Queensland. This allows the court to have not only registries, but also judges, stationed in the various substantial regional centres, the servicing of which is so important in the Queensland context. Those Judges of the District Court who are also authorised to sit in the Planning and Environment Court, are knowledgeable in matters of environmental law, but are not permitted to

sit exclusively in the Planning and Environment Court. Each Judge is required to spend some of their time undertaking other District Court work. In those circumstances, it is less likely that the Judges who constitute the Planning and Environment Court will "lose touch with the traditions, standards and mores of the wider profession and judiciary".

[35] In addition to conducting merits review of administrative decisions, ECTs commonly have declaratory[22], injunctive and civil enforcement powers. Best practice jurisdictions have provisions which permit any person to bring such proceedings, without any "standing" issues.[23]

[36] Those courts constituted by Judges are capable of having criminal jurisdiction conferred upon them. That is the case for the Land and Environment Court of New South Wales, which most closely resembles a "one stop shop", but is not yet the case in Queensland.

Mining in Queensland – A Special Case

[37] In Queensland, mining is a very significant industry. At $2.7 billion per year, total royalties from mining in Queensland are more than double those in New South Wales and represent three times the proportion of total budget revenue compared to New South Wales. The regime for the assessment and approval of mining in Queensland differs from the regime for other environmental activities. The Planning and Environment Court has no jurisdiction with respect to mining.

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22 E.g. *Sustainable Planning Act 2009* (Qld) s 456.

23 E.g. see *Sustainable Planning Act 2004* (Qld) s 601; *Environmental Protection Act 1994* (Qld) s 507.

[38] The *Environmental Protection Act 1994* is Queensland's principal environmental legislation. Chapter 5 provides the regime for the assessment and decision of an application for environmental authorities for mining activities and for enforcement. There are two levels of mining activity. Low risk activity which complies with the criteria specified in the *Environmental Protection Regulation 2008* is a level 2 activity. Other mining activities, with a medium to high risk of serious environmental harm, are level 1 activities.

[39] A multi-step application process applies for a level 1 activity. That process commences with the submission of the application to the Department of Natural Resources and Mines ('DNRM'), which checks the application and refers it to the Department of Environment and Heritage Protection ('DEHP') for a decision on whether an Environmental Impact Statement ('EIS') is required. Once any EIS is completed, the DEHP decides whether to proceed with or to refuse the application. If the application is to be proceeded with, the DEHP prepares a draft environmental authority with proposed conditions and gives a copy to the applicant and the DNRM. A public notification and objection period follows.

[40] In the event of objections, the application is referred to the Land Court (not the Planning and Environment Court). Whilst called a "court", the Land Court is, in effect, a tribunal constituted by non-judicial members. Its other work otherwise primarily consists of determining land valuation issues for rating or compulsory acquisition purposes. In the context of its mining jurisdiction, it has no power to make a final determination. Its decision (the "objection decision" takes the form of a recommendation to the Minister of DEHP. That Minister then seeks advice from the DNRM Minister about the decision prior to a final decision, by the DEHP

Minister, as to whether to grant the application on the basis of the draft conditions, or grant the application on different conditions or refuse the application.[24]

[41] In the case of large scale mining projects the Coordinator-General often becomes involved. The Coordinator-General has wide-ranging powers to promote economic development through the coordination of large scale projects under the *State Development and Public Works Organisation Act* 1971 ('SDPWO Act'). In particular, the Coordinator-General has a broad power to declare a project to be a "controlled" project.[25] The consequence is that the Coordinator-General becomes the one who undertakes the environmental assessment pursuant to an EIS process in the SDPWO, rather than that under the *Environmental Protection Act*. While the SDPWO process is not limited to mining, the majority of projects currently undergoing EIS process under the SDPWO are for mines or infrastructure supporting mining activities.[26]

[42] The Coordinator-General's evaluation report may state conditions for any draft environmental authority under the *Environmental Protection Act* and may state conditions for a mining lease under the *Mineral Resources Act*. The draft conditions to be included in a draft environmental authority under the *Environmental Protection Act* must include the conditions stated in the Coordinator-General's evaluation report.[27] Other conditions cannot be inconsistent with the Coordinator-General's conditions.[28] Objections cannot be made about the Coordinator-General's conditions.[29] The Land Court's determination must also

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24 *Environmental Protection Act 1994* (Qld) s 197; Div 7.
25 *State Development and Public Works Organisation Act 1971* (Qld) s 26.
26 www.dlg.gov.au/assessments-and-approvals/current-eis-projects.html.
27 *Environmental Protection Act 1994* (Qld) s 309(5)(a).
28 *Environmental Protection Act 1994* (Qld) s 309(5)(b).
29 *Environmental Protection Act 1994* (Qld) s 222.

include the Coordinator-General's conditions and it cannot propose conditions which are inconsistent with them.[30] Further, the Land Court must provide its decision to the State Development Minister who may then advise the EPA Minister about any matter that the former considers may help the latter in making a decision.[31]

[43] The above procedure has just been modified by reason of the *Environmental Protection (Greentape Reduction) and Other Regulation Amendment Act 2012*, which commenced on 31 March. The Act introduces a new streamlined approval process for resource activities. Rather than level 1 and 2 activities, there will be eligible (akin to level 2) and ineligible (akin to level 1) activities. There is to be a new single assessment process (similar to IDAS) for all resource activity ERA's, so that all resource ERA's can be contained in a single approval. There are also some refinements to the assessment process for a mining project which is a controlled project, but it is unnecessary to traverse these for present purposes.

[44] The Coordinator-General process is generally seen to be advantageous for proponents, but attracts critics otherwise. An illustration of the power of the Coordinator-General can be seen in the Land Court's decision in *Xstrata Coal Qld Pty Ltd & Ors v Friends of the Earth, Brisbane Co-Op Ltd & Ors* [2012] QLC 13. That case involved proposed mining leases for an open cut mine. The court found that certain water monitoring conditions proposed by the Coordinator-General would not establish a comprehensive monitoring program, but the court accepted that it could not recommend conditions inconsistent with them.

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30 *Environmental Protection Act 1994* (Qld) s 222.
31 *Environmental Protection Act 1994* (Qld) s 222(3).

Ecological sustainability, climate change and the integration of environmental and land use planning

[45] The object of Queensland's principal planning legislation, the *Sustainable Planning Act*, relates to seeking to achieve ecological sustainability. That expression is defined in s 8 as follows:

> "Ecological sustainability is a balance that integrates –
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> (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
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> (b) economic development; and
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> (c) maintenance of the cultural, economic, physical and social wellbeing of people and communities."

[46] The following may be noted about the definition:

- The concept is not development-specific. It is about ecological sustainability, not ecologically sustainable development.

- The concept is not about "trade-offs", rather it is about achieving a balance which integrates the three limbs of the definition.

- The concept is not an expression of pure environmentalism. Protection of ecological processes and natural systems is but one of the limbs of ecological sustainability.

- There is no statutory priority among the three limbs. Ecological sustainability, as defined, is as much about economic development and the maintenance of the

well-being of people and communities as it is about the protection of ecological processes and natural systems.

- Insofar as ecological sustainability is concerned, in part, with the protection of ecological processes and natural systems, the concern is for those systems at not only local, regional and State levels but also at "wider levels". Impact beyond the State borders is potentially relevant.

[47] Section 3 of the Act provides that the purpose is to seek to achieve ecological sustainability by:

(a) managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes; and

(b) managing the effects of development on the environment, including managing the use of premises; and

(c) continuing the coordination and integration of planning at the local, regional and State levels.

[48] Queensland's principal environmental legislation, the *Environmental Protection Act 1994* expresses its object in terms of "ecological sustainable development" which is defined as:

> "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends"

[49] That concept is, understandably, somewhat more environmentally focussed than the broader concept of ecological sustainability which is the focus of the *Sustainable Planning Act*, although it is a concept which is not just focussed on protection of the

environment, but on the facilitation of development. Sub-section 4(6) provides that the object is to be achieved by, amongst other things, "integrating environmental values into land use planning and management of natural resources".

[50] Climate change is expressly made relevant to the concept of ecological sustainability. Section 11 of the *Sustainable Planning Act* provides that the cultural, economic, physical and social well-being of people and communities is maintained if, amongst other things:

> "potential adverse impacts on climate change are taken into account for development, and sought to be addressed through sustainable development, including, for example, sustainable settlement patterns and sustainable urban design"

[51] Climate change is a relevant consideration in the Queensland context. The statutory provision assumes climate change to be real and requires it to be taken into account. It leaves no scope for climate change denial. The role of climate change however, is as one of the considerations relevant to one limb of the definition of the broader concept of ecological sustainability.

[52] Ecological sustainability is not about ensuring that each development proposal provides, in part, for protection of ecological processes and, in part, for economic development and, in part, for the well-being of people and communities. The contribution of a particular site, or a particular development proposal, to ecological sustainability is generally not capable of identification simply within the bounds of a particular site. Such an assessment depends upon an appreciation of the particular role which the relevant site or proposal is intended to play in achieving an ecologically sustainable balance at a particular level, be that a local, regional, State or wider level.

[53] The achievement of an appropriate overall balance may require some land to be entirely preserved, because of its important role in the protection of ecological processes and natural systems, while other land is entirely turned over to intense development to serve the economic limb of the ecological sustainable "tripod". For example, reference to Brisbane's City Plan reveals that, in order to achieve an ecologically sustainable balance at a city-wide level, it is intended that certain parts of the city form a strategic "green space" system, for the protection of ecological processes and natural systems, while other areas, such as the CBD, or strategically located industrial land, are intended for intense development for economic purposes. Some land is intended to provide cultural, sporting and recreational facilities for the well-being of Brisbane's people and communities.

[54] Accordingly, the maintenance of an appropriate ecologically sustainable balance might for example, require vegetation to be removed from a site which is strategically important to the achievement of the economic development limb of ecological sustainability whilst other vegetation, perhaps of similar quality, might need to be preserved where it forms part of the broader green space system, the integrity of which needs to be preserved in order to serve the first limb of the definition. That is not to say that an 'all or nothing' approach prevails, it is simply to illustrate that broader strategic considerations are relevant to a consideration of whether a particular development on a particular site, supports or detracts from the ecologically sustainable balance.[32]

[55] For this reason it is difficult to see how ecological sustainability, at least as it is defined in the *Sustainable Planning Act*, can be the guiding light unless there is

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[32] See e.g. *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QPEC 270.

integration of environmental and land use planning. That would be difficult to achieve at a Commonwealth level, since it is the States which are concerned with land use planning.

[56] In Queensland this integration is achieved not just by integrating environmental values into the formulation of planning schemes, but also by development assessment, through the Integrated Development Assessment System (IDAS).[33] Under the IDAS process, a single decision is made which integrates assessments not only against the land use planning controls, but also against legislation administered by other government authorities, called "referral agencies".[34] Not uncommonly, one of those referral agencies will be the administering authority under the *Environmental Protection Act*. The relevant referral agencies have input into the decision on the development application and may become parties to subsequent appeals in the Planning and Environment Court, depending upon the subject matter of the appeal.[35]

[57] In undertaking a merits review, the Planning and Environment Court reviews the assessment of a proposal not only against the planning documents, but also against the *Environmental Protection Act* (where referral is triggered and the appeal concerns the jurisdiction of the referral agency) and, indeed, any other legislation administered by a relevant referral agency. In this way, the decision-making, including at the appellate stage, can integrate ecological considerations with the other considerations of relevance to ecological sustainability.

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33 *Sustainable Planning Act 2009* (Qld) Chp 6.

34 There are two kinds of "referral agencies" namely advice agencies and concurrence agencies. The referral agencies and their jurisdictions are listed in Schedule 7 of the *Sustainable Planning Regulation*: *Sustainable Planning Act 2009* (Qld) s 252.

35 *Sustainable Planning Act 2009* (Qld) ss 482, 485.

[58] This integrated approach is not a feature of all States. It has already been observed that, in Western Australia, environmental considerations fall under a separate assessment process. Increasingly however, integration is seen as a "best practice" approach. Indeed, in their "Greening Justice" publication the Prings, in dealing with future trends, opined that:

> "The integration of land use planning laws with environmental protection laws will continue. … ECTs' jurisdiction, issues and caseloads will expand as they deal more holistically with multi-factor environmental decisions."

Management of environmental cases and of experts – the PEC approach

[59] One of the advantages of specialised ECTs is their ability to adopt case management protocols which are particularly suited to environmental cases. Case management across ECTs in Australia is generally characterised by active list supervision and case management with the objective of achieving the just, expeditious and cost-efficient resolution of the issues. However, the particular way in which each ECT pursues its objective differs, both from State to State and indeed, from time to time within one ECT, as practices evolve and new innovations are implemented.

[60] Each of the ECTs across Australia are conscious of the range of innovations which are being used in different jurisdictions. Judges and members of ECTs across Australasia gather every second year, at the Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) conference, in order to share ideas and experiences.

[61] The management of cases in the Planning and Environment Court of Queensland is underpinned by:

- A realisation that environmental cases can usually be resolved by agreement. Indeed only approximately 6% of cases filed in the Planning and Environment Court ultimately go to a full merits hearing. Accordingly, the court is primarily concerned with the management of cases towards resolution, which will ordinarily be a consensual resolution. Case management is therefore, dispute resolution focussed.

- A belief that appropriate dispute resolution in environmental cases involves a problem-solving approach. Unlike ordinary civil litigation, which is usually resolved by parties agreeing on an amount of money which is paid for the extinguishment of a cause of action, environmental cases are primarily concerned with existing or anticipated environmental impacts. They are often resolved by identifying the impacts or potential impacts and either obviating or managing them in an acceptable way, to the satisfaction of the parties and to the benefit of the environment.

- An appreciation that a "problem-solving" approach involves not only the parties and their lawyers, but also the relevant experts working together, cooperatively, from an early stage, and in an ongoing way, towards a resolution.

[62] The Planning and Environment Court of Queensland has an ADR Registrar, who is a former senior practitioner in the planning and environment field. At no cost to the parties, the ADR Registrar:

(a) conducts mediations;

(b) conducts case management conferences;

(c) chairs without prejudice meetings; and

(d) chairs meetings of experts.

[63] Importantly, ADR is not used simply as a last resort, prior to trial, in the absence of an agreement otherwise. Rather, the ADR Registrar will be involved from a relatively early stage, and often on multiple occasions, to assist both in identifying (and narrowing) issues and working towards their resolution in a problem-solving way.

[64] Because the resolution of environmental matters commonly involves bringing expertise to bear, in order to obviate or manage and mitigate environmental impact, the Planning and Environment Court has adopted a particular way of managing experts so that they too work cooperatively from an early stage. The result of their endeavours informs and facilitates the dispute resolution process.

[65] The traditional means of dealing with experts is inappropriate, particularly in the resolution of environmental issues. Traditionally, experts were highly dependent upon their client or their client's lawyers, not just for a retainer, but for instructions on the issues in dispute and for the briefing of relevant information. Once the expert began to form preliminary views (and sometimes earlier) a conference or conferences were typically held with the client's lawyers. The lawyers, doing their job, would ensure that the expert was fully conscious of all the matters of relevance which may be thought to favour their client and would tease out any preliminary views helpful to the client's case, while testing the expert on any doubts or misgivings the expert may have had about the client's position. The expert would then be asked to prepare a report, without reference to, or consultation with, professional colleagues retained by the other parties. Further conferencing often

occurred with the client's lawyers in the course of the expert settling his/her report. The experts retained by the other parties were typically going through a similar process.

[66] The traditional process might not have been designed to produce differences in the expert opinions expressed in the reports, but it did little to respect, foster and protect the professional objectivity of the experts. Further, it did nothing to harness the joint expertise of those professionals in a way which would assist the dispute resolution process.

[67] Most jurisdictions have looked at the management of experts. An early "reform" was the introduction of provisions to encourage, or even to generally mandate, the engagement of a single expert in each field of expertise, to be the only expert from that field to give opinion evidence in relation to the relevant issue. The arguments in favour of that model were based upon assertions or assumptions including the following:

1. The evidence of experts retained by the parties is significantly affected by adversarial bias;

2. That bias is caused by the retainer relationship;

3. Adversarial bias represents a significant hurdle to the just resolution of matters in controversy; and

4. Adversarial bias cannot effectively be dealt with other than by requiring, at least generally, that all expert evidence be by those who are either jointly instructed by the parties or appointed by the court.

[68] Experience suggests however that, at least in the context of the Planning and Environment Court of Queensland, the first and third of those assumptions or assertions were overstated, while the second and fourth were erroneous. The inherent limitations of this model are traversed in a separate paper[36] and do not need repetition for present purposes. Suffice to say that that earlier enthusiasm for the single expert model has waned over time. It remains a viable option in a limited number of cases, but is not the most common means by which expert evidence is adduced in Planning and Environment Court of Queensland, or indeed, in any other ECT, including the Land and Environment Court of New South Wales, where the measure was pioneered.

[69] The single expert model is sometimes still advocated by those who bring public interest legislation, as a way of reducing costs, but its inherent limitations remain. Further, the engagement of 'shadow' experts to review the work of the court appointed expert can lead to more money being spent on experts. It must also be acknowledged that ECTs are concerned with resolving disputes between the parties, generally on the basis of the evidence gathered by them, rather than on conducting public inquiries.

[70] Another "reform" has been the introduction of the concurrent evidence or "hot-tub" mode of calling evidence at trial. That is an available option for adducing evidence,

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36 'The Management of Experts' (2012) 21 *Journal of Judicial Administration* 168; 'Expert Evidence Reform – How are they working' (2011) 1 *NJJA* 40.

but it is a case of too little too late, insofar as the objectives which are sought to be achieved in the Planning and Environment Court of Queensland. It is simply a method of adducing evidence in the 6% of cases which go to trial. The management of experts in the Planning and Environment Court is aimed at obtaining the benefit of the professional discourse amongst the experts at an earlier time, when it can better inform the dispute resolution process.

[71] Key components of the PEC approach include the following:

- The overriding duty of the experts to the court is provided for in the rules and must be notified to each expert.[37]

- Each party is permitted to engage one expert in relation to each field of expertise[38] but must identify their experts at a very early stage.

- While the parties must ensure that their expert is properly briefed and ready to participate in an expert meeting process, [39] they may not instruct the expert as to which opinions the expert is to accept or reject.[40] Each expert must verify that they have not received or accepted any such instructions.[41]

- Once the experts have been retained, identified and briefed, they begin an expert meeting process, which generally involves meetings over a number of weeks and which results in a joint report. It usually takes the form of an iterative process among the experts involved.

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37 *Uniform Civil Procedure Rules 1999* (Qld) r 426; *Planning and Environment Court Rules 2010* (Qld) r 26(e).

38 *Planning and Environment Court Rules 2010* (Qld) r 34.

39 *Planning and Environment Court Rules 2010* (Qld) r 26.

40 *Planning and Environment Court Rules 2010* (Qld) r 29.

- That expert meeting process may be chaired by the ADR Registrar.[42]

- While the experts are ordinarily briefed about the issues in dispute, the PEC generally does not settle precise questions for the experts to answer. The experts are left to address the issues that relate to their field and expertise as they see appropriate.

- Critically, not only does this process take place before the preparation of any trial reports, but also, throughout the process, the experts are, in effect, "quarantined" — that is, subject to very limited exceptions, the parties and their lawyers are not permitted to communicate with the experts from the time the process begins until it ends with the publication, by the experts, of their joint report.[43]

- Save for the contents of the joint report, evidence may not be given of what transpired in the meetings.[44]

- The results of the above consultative process inform the dispute resolution process well prior to any hearing. The experts generally accompany the parties in mediation, and may do so even if the expert meeting process is incomplete.

- It is only if the matter remains unresolved that the experts may then prepare separate reports for a hearing. Those reports are limited to the areas of disagreement expressed in the joint report.

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41 *Planning and Environment Court Rules 2010* (Qld) r 31(3).
42 *Planning and Environment Court Rules 2010* (Qld) r 41.
43 *Planning and Environment Court Rules 2010* (Qld) rr 22, 27.
44 *Planning and Environment Court Rules 2010* (Qld) r 28.

- Save by leave, an expert may not give evidence that departs from the opinions expressed in the joint report.[45]

[72] The exceptions to the general "no communication" rule (eg participation in mediation, requesting information, informing parties of a matter which is affecting the proper and timely conduct of the process) during the "quarantine period" have been developed over time, to ensure that the process does not become bogged down or stalled and to ensure that it does not impede the progress of dispute resolution otherwise.

[73] The early joint meeting and report process has:

- virtually eliminated disputes about methodology;

- achieved a high degree of common ground with respect to the opinion evidence;

- harnessed the combined experience of the two experts — indeed, there have been a number of cases in which the experts have subsequently said that they were better informed as a consequence of the collaborative process and that the results of their joint endeavours were more satisfactory than either could have achieved individually; and

- promoted solution-based dispute resolution.

[74] The process is now well entrenched and supported. Its use has spread beyond the PEC. It was used in the Queensland Floods Commission of Inquiry. Justices of the

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45 *Planning and Environment Court Rules 2010* (Qld) r 30.

Supreme Court of Queensland in charge of the supervised case list are adapting it in the management of some of their civil cases. It has also been used by members of the Land Court although not by every member in every case. Indeed, the following speaker will address you on his dissatisfaction with a matter in the Land Court where, I understand, the process was not used. Internationally, the PEC's approach has been specifically acknowledged as influencing recent reforms to the way expert evidence is dealt with in the specialist water courts in Colorado in the United States of America.

Conclusion

[75] In the journey towards providing effective access to judicial and administrative proceedings for environmental disputes, significant elements of the international community are looking at what is being done in the relatively long standing State based ECTs in Australia. At the same time however, debate within Australia, at a national level, is dominated by the Commonwealth/State divide and, at least to some extent, on matters of process, philosophy and politics. If the identification of 'best practice' is accepted as the guiding light for future reform, then the Commonwealth has relatively little to offer. A re-examination of what is being done by the State based ECTs will be more informative. None are perfect and certainly none would claim to have reached perfection in the way that each case is determined, but they do offer lessons to be learned, as those beyond Australia's borders recognise.