Address to the International Conference on Global Environmental Issues
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[1] Mr chairman, co-chair, distinguished guests, ladies and gentlemen. Thank you very much for the opportunity to be at this conference and to speak to you this morning.

[2] I'm from Australia. In Australia, most environmental regulation and decision-making is done at a state government level. Accordingly, each State has its own system, and each State has its own environmental court or tribunal. I am from the State of Queensland and my job is the day-to-day administration of the Planning and Environment Court, which is the specialist court dealing with planning, environment and other issues for the State of Queensland. The Court is staffed by judges. Those judges are drawn from the ranks of judges who are judges of the District Court, which is one of the higher courts in our State's system. The Planning and Environment Court is in its fiftieth year.

[3] Today I will be speaking to you about dispute resolution mechanisms and, in particular, I will be speaking about certain important elements which I think should be part of any environmental dispute resolution process. Before doing that however, I want to say a few things about environmental disputes.

[4] Firstly, environmental disputes find their expression in a number of different ways in terms of actions seeking different types of remedies. Those who suffer economic loss as a result of nuisance created by interference with the environment can sue in the civil courts for money. Those who are dissatisfied with the performance of government agencies or with their decisions can seek prerogative relief to vitiate a decision which is unlawful or to apply for writs of mandamus or the like, to require

government agencies to do their statutory duty. People who commit environmental crime can be dealt with in the criminal courts and punished accordingly. The core work of the Planning and Environment Court in Queensland, however, has to do with two other areas. They are civil enforcement and merits review.

[5] Civil enforcement involves determining whether someone has done something, or is proposing to do something, which is against the law and will have an impact on the environment. If it is found that somebody has done or is proposing to do such a thing, then we order them not to do it, to stop doing it, and if they have done it and have caused damage, we require them to make that damage good. That can involve, and has involved, ordering people to rip up development and plant back a forest, and not only to plant it back, but to pay for experts to look after it and to monitor it for years until such time as it is successfully on its way to rehabilitation.

[6] The other important work we that we do, and probably constitutes the majority of our work, is merits review of decisions of agencies which give permission for people to do things. So if you want to carry out development or undertake an activity which might have some environmental consequence, you will typically need some permission or authority from the government or from a government agency. If someone is unhappy with that decision, they can appeal to our court; our court can change the decision. It can change the decision even if the decision made was entirely lawful and entirely available. It can change it if we think that a better decision should be made on the merits. So we sit as the new decision-maker. The decision of the judge is final on matters of merit. The only appeal from us is by leave on error of law.

[7] So that's what we do most of the time and that's the context in which I'll be dealing with dispute resolution mechanisms.

[8] Now, something about the nature of environmental disputes. We heard a bit about this yesterday. They are different to disputes that we see generally in the civil law field. Though different in many respects, I will mention just a few. As we know, rather than involving a factual inquiry into what has gone on before, environmental disputes are typically forward looking, particularly if you have a merits review case. We are looking to see what potential impacts there will be from development. We are making risk-weighted decisions. We are utilising scientific knowledge to predict things, rather than just applying jurisprudence. And importantly, decisions can be formulated which are not just "set and forget" decisions. Decisions can be formulated which not only deal with what we anticipate now, but decisions can be formulated in ways which put obligations on those carrying out development to utilise future best practice in the event that unforeseen consequences follow. We sometimes call that "adaptive management". And those sorts of obligations can be built into decisions made by the Court. All of this is very different to deciding who should pay who how much money in order to resolve a civil cause of action.

[9] There are other differences too. Environmental disputes do not arise in isolation. We all know that the ecological is only one part of the sustainable development tripod. We need to look at the economic and the social as well, and so when we're looking at ecological issues, we must look at them in context, not in isolation.

[10] Further, ecological issues arise not out of the ether. They arise because people want to do things. They want to carry out development which will be economic. They want to construct development or they may want to operate development in a particular way. It may not be only private enterprise; it may be the way that government instrumentalities do things. There is a whole range of reasons why ecological issues. We can't deal with the ecological impact as if it's occurring simply

in a theoretical way. It's occurring because people want to do things, and that affects people's interests and we must be cognisant of that.

[11] And so, in environmental disputes, not only do you have a type of dispute which is different from what we're normally dealing with, not only do we have a dispute which arises in the context of other considerations, but we have disputes which prick diverse interests. They prick monetary interests. Most of the cases we deal with involve millions of dollars. They provoke political interest. They provoke bureaucratic interest. They provoke public opinion interest. All of these things are part of the hotbed of environmental disputes.

[12] That leads me to the very first of the core elements of a dispute resolution system in the environmental law area, and that is independence. The body must be independent. It must be a body which is isolated from the pressures of politics, money, public opinion and government bureaucracy. In the Queensland context, that is done by having a court staffed by judges; judges who have security of tenure, judges who have their own commissions, judges who owe no allegiance to anybody. We might not always get things right, but no-one thinks we're making decisions because of money or politics. We are above that, and that is important. It is important that the court where the environment is being considered is a court which is clean from the taint of possible corruption or extraneous considerations.

[13] The second point: impartiality, and it doesn't flow necessarily from the first. Impartiality has two aspects in environmental law. There is impartiality between the parties to a dispute. Every litigant, whether in an environmental dispute or a civil dispute, expects impartiality as between the parties. But what environmental courts and tribunals have to be wary of is that they are also impartial in relation to what I would call their "agenda".

[14] Environmental courts and tribunals are populated by people, such as me and others who are here, who have a genuine interest in, and passion for, environmental law and its proper application, and that is as it should be. But it is critical that we do not confuse passion for environmental law with environmental advocacy or environmentalism. The decision-making body cannot be, and cannot be seen to be, an environmental advocate. Similarly we cannot be, and cannot be seen to be, a development advocate. We cannot be, and cannot be seen to be, an advocate for government policy. We cannot be, and cannot be seen to be, a slave to populism.

[15] There are members of some environmental courts or tribunals who stand up at conferences such as these and say, "We aim to be the greenest tribunal or court in the world." I don't. I don't, if being "green" means that I am seen as being an advocate, someone who is out there pushing a cause. The best thing I can do for the environment is to be impartial, because if I am not impartial, the legitimacy of my position and the legitimacy of my court is lost, which imperils the very institution.

[16] So be as passionate as you can be about the proper development and implementation of environmental law, but do not allow your enthusiasm to flow over to a situation where you or your court or tribunal is seen to be less than impartial. I am a judge for everyone who comes into my court. I am not a judge for a sectional interest.

[17] Next: timeliness. Obfuscation is the enemy of the environment and of all of its constituent parts. It is the enemy of ecological considerations, it is the enemy of economic development, it is the enemy of social good. No-one benefits from courts that drag their heels or allow the parties to drag their heels or obfuscate. In the context of the Planning and Environment Court, we operate active judicial list supervision and individual case management. Parties are not left to prepare the cases and tell the court when they are ready. When you start a case in my court, the first thing is that

you will be up before a judge on a Wednesday, Thursday or Friday morning at 9:15am, and will be directed as to the regime for your matter, this is what you will do and the timelines involved, and your case will be reviewed to make sure you keep moving it forward, because we are conscious that we are not just providing a service to the parties. My court is an important court for the community, and I need the parties to perform in a timely way if appropriate outcomes are going to be achieved.

[18] The next element is accessibility. All of the relevant stakeholders have to be able to get to the court. We have to have appropriately broad standing provisions to allow that to happen legally, including broad standing provisions for the general public. Indeed, when it comes to civil enforcement, when there are allegations of illegality involved, any person can start proceedings in my court in order to complain that someone has done something unlawful or is proposing to do something unlawful.

[19] Accessibility also has to have regard for cost considerations in the Court as well. Time doesn't permit me to go into that.

[20] The next thing is comprehensiveness of jurisdiction. There's no point talking about ecological sustainability if you haven't got the wherewithal to consider all elements of it. So there's no point looking at ecological impact as if that's the only thing.

[21] In Queensland we do that by way of what we call the Integrated Development Assessment System, or "IDAS" for short. What it means is this: typically there will be many government agencies in any country who have all sorts of jurisdiction. There will be an agency that is concerned with proper town planning, there will be agencies concerned with the environment, there will be agencies concerned with infrastructure. All sorts of government agencies with all sorts of approval processes. In Queensland you do not make applications to each of those; you make one application. It is then

referred out to each agency whose jurisdiction might be triggered. They all have a say in the decision. There is one decision. That one decision is appealable. When I sit on the appeal, I have the jurisdiction give the approval from all perspectives.

[22] So when I'm dealing with a case, I'm looking at ecological impact for the environmental licence, but I am also looking at how this fits into serving the community in a planning sense. I am looking to see how it impacts upon the infrastructure which serves society. In short, I have the power not only to have regard to, but to assess and decide and give permits which relate not only to the ecological but also the economic and also the social aspects of ecological sustainability.

[23] If you are really concerned about ecological sustainability, if you are really concerned about looking at environmental disputes in context, then you have to have an appropriately comprehensive jurisdiction, and that jurisdiction needs to not only deal with the various aspects but it needs to deal with what I call the relevant "plane of relevance". The plane of relevance for ecological sustainability under our Act is such that I am not just concerned with whether a development will have an ecological impact upon Brisbane or Queensland. I am permitted, in appropriate cases, to have regard for what impact it would have on a wider level. So, for example, I am concerned if there is a development which is going to impact on a migratory bird, which might have an impact on its population throughout the world. So you need to have a comprehensiveness of jurisdiction both in relation to topic and in relation to plane of relevance, so that the decisions you make can fit in with the protection of the environment on each of a local, regional, state and indeed wider level.

[24] The sixth is the optimal use of scientific resources. That has been a topic of discussion at this conference. In some jurisdictions, in some courts and tribunals, they deal with this by having people of expertise within the tribunal itself. We see that in India and

in some other places. To some extent, that blurs the distinctions between the adversarial, the inquisitorial and the investigative models. In some places, like the Planning and Environment Court, we do not do that.

[25] There are, if truth be known, both strengths and weakness to having internal expertise or not. There is much that has been written and considered about this topic. I think, for this morning, the best I can do is leave it by saying that there is no one completely correct answer. Which is the best model for you probably depends on your context.

[26] The truth, however, is that irrespective of whether you have internal expertise or you don't, you are going to have to deal with how you best manage the expertise that the parties bring to the table, because even if you have experts within your own tribunal or court, the parties will be wanting to also bring forward scientific expertise, and you cannot ignore that. You cannot brush the parties' experts off with the glib assertion that they are all just biased because they have been paid by the parties – I do not happen to think that is true – and you certainly cannot allow yourself to be painted or perceived as having a bias towards your own internal expertise. The parties have a right to bring evidence before you, they have a right for that to be seriously considered and not simply dismissed in favour of whatever you have in-house. I will discuss how we deal with that in the Queensland context – which is a bit different from most other places – in a moment.

[27] The last of my seven – I am not saying there are only seven, but these are the seven I picked for this morning – is crucial: you need to approach this from a problem solving perspective. When parties to civil litigation come before the courts, they own the cause of action. All we are concerned about is resolving their dispute, and often that is done by the payment of some money. But environmental disputes are different:

they're not about who owes who how much money; they're about the silent party in the case – the environment. Something which has a public interest and a public effect.

[28] I know that most cases, including most cases in my court, are going to resolve by way of agreement. That does not mean I am disinterested in those cases. I am *vitally* interested in those cases, because I do not want cases in my court settling because someone pays someone money or because someone has run out of money to run the case. The loser in that event is the environment.

[29] I want to have the cases resolved because we have looked at the problem, we have identified where the issues are, we have identified what the likely impacts are, we have found ways to deal with them, we have found ways to come to a result which is acceptable to resolve the dispute between the parties but also gets a good environmental outcome. I do not take great pride in the settlement rates. I can – our settlement rate is about 94% – but it's not quantity of settlements; it's the *quality* of them. It's the quality of the outcome. Too many courts pride themselves on statistics. We have got to pride ourselves on qualitative things when we come to the environment.

[30] So how do we do that? How do we, in the Queensland context at least, adopt this problem solving approach and utilise the expertise of the scientific evidence put before us by the parties? Well, as I've already said, we have a management approach. So if you come before me today I'll be saying you can expect to go to trial in August. We will work backwards from there. The first thing I want from the parties is a list of the issues. I do not want formal, technical pleadings; give me a list of the issues. The issues will be, "This development will have an adverse impact on koalas, it will have an adverse impact on air pollution and it will have an adverse impact on traffic." That is a statement of issues.

[31] The parties will then be required to identify which experts they wish to engage. The next thing that happens is that the experts get all of the information from the parties. From that point onwards, for about the next month, none of the lawyers or the parties can talk to them. They will pay them, but they will not talk to them, because these experts are going to be told that, irrespective of who's paying them, their obligation is to the court. Their obligation is to tell the truth. Their obligation is to give us the benefit of their expertise and they are going to be made to sign a declaration that no-one has told them what they should say or suggested to them what their opinion should be. They are then going to work collaboratively together. At the end of the month they will report jointly. They will say what they have done and what they have discovered, where they agree, the extent to which they disagree and why.

[32] This frees the experts from the tyranny of the parties and the lawyers. The experts have proved to be fiercely independent and objective. We had a case last year involving a huge development of many hundreds of millions of dollars. The developer engaged a whole pile of experts. At the end of the process they reported that the development was no good. Sometimes they will come back and are all agreed that, irrespective of the concerns of a party who has engaged one of them, from a scientific perspective the proposal is OK.

[33] More commonly they will come back and say that they all agree that, from a scientific perspective, there are some potential impacts, but also some potential solutions. That gives the parties and the court the benefit of the science.

[34] The next stage is a dispute resolution process. We have a senior lawyer provided by the court free of charge. Everyone attends – the parties, the solicitors and the experts. The experts will be treated as a resource for this purpose, even though they are paid by the respective parties. Through the mediation the problems and potential solutions

are discussed. What often results is a development, if it's going to go ahead, where it has been reduced in size, or has had extra protections applied to it in order to deal with the environmental issues to the satisfaction of the parties.

[35] It is only if, at the end of that process, there is still some disagreement that the matter can go to trial. It is at that point that the lawyers and the parties can speak to the experts, the experts prepare individual trial reports on the areas of disagreement and the parties then present their cases in the usual way.

[36] When I first postulated this approach I was told by some that I was naïve, that the reality was that no-one could be expected to express an opinion against the person who is paying them. The fact is we have been doing it now for years and it works. Indeed one of the experts has done a research paper where he looked at 120 cases that his firm had been involved in since the process was introduced and he found that in about 60% of cases he and the expert on the other side – paid by different people – came to complete agreement on everything in terms of the scientific advice to the court. I will not pretend that, for the first year or two, there was not a bit of skin and hair flying, but we got there.

[37] I am not saying that you have to implement that system. Everyone has a different context, but you have to think to yourself about how you are going to deal with maximising your use of the scientific expertise. That is the way we have done it. You may have a different way. But you have got to do it and, importantly, do it not so you can run a trial – because that is only 5% of cases – you do it so you can problem solve so that you can get matters resolved in a way which benefits the environment as well as solving the dispute between the parties.

[38] I know that what I have been speaking about is the way in which a local court in Queensland, Australia deals with its domestic decisions. I am conscious that we are a very small speck in terms of the world situation, but can I offer this opinion. Efforts at resolving environmental problems at an international level has what I call patchy success at best. At worst you would call it entirely ineffective. To me the greatest long term hope we have of dealing internationally with environment disputes and environmental protection is in the sum of the parts of what is done around the world. This is a classic case of thinking globally but acting locally. If, around the world, we have courts and tribunals which are effectively dealing with the environment in their part of the world and which exhibit those attributes of independence, impartiality, timeliness, accessibility, comprehensiveness, optimal utilisation of scientific knowledge and a problem solving approach, then I think that much can be achieved by the sum of the parts.

Judge Michael Rackemann
Planning and Environment Court of Queensland