

Keynote Address

Fleur Kingham
President, Land Court of Queensland

The Future of Ecological Governance and Regulation in Northern Australia

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"There is a place where time stands still. Where nature is harsh and demanding. Where only the quick and the strong and the deadly can survive. This place is no place for civilised man. In this place, man is just another one of god's creatures."

Good morning. Thankyou Aunty Anne for your acknowledgement to country this morning and I too acknowledge the Jagerra and Turrbal people, traditional owners of this area and their elders past, present and emerging.

I live in Jagerra country, only a few blocks up the hill not far from Musgrave Park, an important place always and still for Aboriginal people. My walk to work takes me through that precious open space. It lifts my spirits and launches me across our windy muddy river to the courts.

But I grew up in Turrbal country and was living there when, as a 10 year old, I saw the film *Walkabout*. When I think of central and northern Australia I recall some of the extraordinary images from that film. There are many ways to interpret the film. It is a survival movie. That is clear from the passage I read a moment ago, which was the narrative from the trailer. As a description of the Australian north it is loaded, value laden, inadequate and misleading. But it reflects a perspective your work must address, a view that the relationship between humans and nature is a struggle between the uncivilised man (quick, strong and deadly) and a harsh and demanding nature.

In preparing for today, I viewed other images, recalled some of my memories and read other people's stories about the north. Because that helped me, I thought some images might also prepare you for the discussions to follow. While I am speaking you will see some images of northern Australia gathered by my EA Amanda (who I think is now planning a trip north). Look out for a couple featuring my associate Georgia on horseback, droving cattle during her

gap year as a jillaroo on the Barkly Tablelands. That tells you something about the kind of young woman she is!

The images appear in no particular order and there is no subliminal message. Perhaps they will transport you to the Tropic of Capricorn and beyond. They did that for me. Some of them took me to 1994 and the tip of Cape York. I flew from Brisbane to Thursday Island, boarded a light plane to Horn Island and completed my journey by boat. My companions were academics from the Asia Pacific region: Malaysia, Indonesia, Brunei, Singapore, Thailand, New Guinea, New Zealand and more. We were meeting to discuss a regional interdisciplinary Masters' program in Environmental Management. Our destination was the Pajinka Wilderness Lodge, then run by the Injinoo community. Pajinka, more commonly called "the tip", is mainland Australia's most northern point. The lodge, sadly no longer open I believe, was located at the base of the tip on a horseshoe shaped bay fringed by the white sand of Frangipani Beach.

We arrived at dusk. We were to be guided from boat to lodge along the northern Australian equivalent of a red carpet. The sun was setting fast. The tide was falling. The boat could not make it all the way to the beach. We were told to take off our shoes, hitch up our skirts or roll up our trousers. In the sunset we stepped down into the warm clear water and walked the 50 metres or so along the sand bank flanked by welcoming staff forming a corridor lined with floating candles and frangipanis. It could have been a romantic entry by a wedding party rather than travel weary academics gathering for a talkfest. We were completely charmed. For some, the beauty of the scene meant the potential danger this guided entry was to guard us against did not even occur to them. But not a crocodile was spotted and, as you can imagine, we were warmed up for a wonderful conference. Something worth thinking about Don for the next meeting!

I am honoured by the invitation to address you this morning. I congratulate Professor Anton and his colleagues on this ambitious undertaking worthy of a future focussed centre. That is demonstrated by the quality of the participants the program has attracted.

Professor Anton described my role in a way that made me think of a coach before a game revving up the players in the dressing room. But I am not a coach and the players know far more than me. What can I add to the moderators' papers, which provide such an excellent starting point for your discussions? I decided all I could do is say what those papers prompted for me; not in any learned sense, but drawing on my personal experiences as a lawyer, a mediator and a judge. So let me take that in the order of the program and start with...

Professor Allan Dale's paper on *Achieving integrated governance*

Professor Dale posits two possible governance scenarios: a *Failed State* or a *Stable Alliance of Dynamic Regional Economies*. No prizes for his preference and mine. I will fix upon just one institution in the governance puzzle: the judiciary. You will discuss how to improve systems to develop policy, authorise activities and allocate resources. I suggest you also consider the relationship between those systems and the judiciary. How does that relationship need to evolve?

If that is a question you want to explore, you could draw into your network the Global Judicial Institute for the Environment. It is a nascent institution with an ambitious agenda. It recognises the role of judges in promoting what it calls "the environmental rule of law". I take the rule of law to mean that decisions are made according to law, not by exercise of arbitrary power. But what is the environmental rule of law?

Defining that concept seems to me to be a worthy topic for research and elaboration. So does exploring the implications of the environmental rule of law for Courts and Judges. Engagement with the northern Australian judiciary about these issues might contribute to Professor Dale's Stable Alliance.

From stable alliance to blue-sky thinking, Ms Clare Martin wondered if a new state of Northern Australia could overcome *compartmentalised regulation*. Closer to the ground, Ms Martin challenges you to translate high level exhortations into contemporary and regionally relevant ESD principles to more effectively underpin ecological governance. This addresses one of the gaps that all the moderators have observed between aspiration and outcome, between principles and decisions. That involves an enormous amount of front end work. I know of no shortcuts. As someone charged with "taking into account" the principles of ESD I strongly encourage you.

One value the law promotes is certainty. Courts, Judges and lawyers can falter in the chasm between broad matters that must be considered and the specific decision that must be made. Ecologically Sustainable Development is a socio-politico-legal concept. The structures and processes of our courts are largely concerned with only one aspect of that triumvirate. Judicial review is concerned with the legality of the decision. Even when undertaking merits review, a

judge who must take into account a suite of non-legal considerations may be deferential to the administrative process. More so if it has been inclusive, consultative and robust.

If I am asked to “consider and take into account the principles of ecologically sustainable development” I may well be at a loss to apply that meaningfully in a given case. If the ESD principles have been translated into a local or regional management plan with a greater level of specificity, my consideration will be better informed and more focussed. However, that requires strong linkages between these local translations and the law governing a contested application. They need to be strongest at this stage. So, when you articulate those ESD principles to underpin ecological governance in the north, consider how they might apply in judicial proceedings.

Dr Kate Andrews tackled the subject of *Embracing Diverse Values in Development*. Her challenge to you is how to broaden the decision making values beyond economic growth. I enjoyed Dr Andrews’ paper and found myself smiling at the passage she quoted from Huxley (I presume not Aldous)

“The fact is that any large, unused, unpeopled stretch of country presents a challenge to men of Anglo-Saxon origin.”

That sent me scrambling for the text of the speech given by our former Prime Minister Tony Abbott to a meeting of the **Global Warming Policy Foundation** at Westminster, London on 10 October 2017. I do not intend to be party political here or even to take an ideological or religious stance by quoting Mr Abbott. What led me to refer to the speech is that the former PM, by being so forthright in his opinions, has demonstrated Huxley’s point and then explained the source, at least for him, of the frontier development imperative:

“...Climate change is by no means the sole or even the most significant symptom of the changing interests and values of the West. Still, only societies with high levels of cultural amnesia – that have forgotten the scriptures about man created “in the image and likeness of God” and charged with “subduing the earth and all its creatures” – could have made such a religion out of it.”

Perhaps you expected me to quote his passage about primitive people sacrificing goats to appease volcano gods. It was certainly tempting. And in telling you I did not quote it, I have managed to get it in any way! But I found Mr Abbott’s reference to the scriptures far more interesting and enlightening.

His recourse to culture, more fundamentally to religion, exposes the great challenge in embracing diverse values in development. Spiritually, he is bound within a framework that entrusts, nay charges man (and I use that gendered term deliberately because that was the terminology of the scriptures) with the task of subduing the earth and all its creatures. It is ironic, then, that Mr Abbott draws on the scriptures in the same sentence as he reprimands climate change campaigners for “making a religion out of it.”

The fact is that values are derived from our worldviews. In this group we will have differing and sometimes conflicting conceptions of spirituality, of morality, and of humankind’s place in or relationship to the environment. So I ask what embracing diverse values means when you are faced with fundamental conflicts.

Are there some values you have to embed? Is that what ESD does or has tried to do? Do the principles of ESD create a playing field in which the contest of values takes place? Is that playing field even? Maybe it can never be.

I suggest that, in some things, societies must make choices about values. What role should law play in that?

Same-sex marriage may be an instructive analogy. I don’t want to talk about whether it was necessary to engage in a non-binding survey: that unusual experiment in participatory democracy “light”. I do want to ask whether the law nurtured the outcome.

During my adulthood, opinions about sexuality have shifted dramatically. This is not peculiar to Australia. No doubt many factors that have contributed.

Nevertheless, long before any opinion poll would have elicited the recent result, the Australian government made a value choice and used the law to do so. It prohibited discrimination on the basis of, amongst other things, sexual orientation.

I remember having energetic arguments with my peers at University about the legitimacy of that law. Even some who opposed discrimination were uncomfortable with the law dictating about such matters. My argument was that the law controlled words, actions, behaviours, not thoughts. Others (pro and anti) said the law did much more, and I think they were on to something. I believe that embedding the value of non-discrimination in the law changed how people thought about such matters, as well as how they behaved. It declared discrimination illegal but what is illegal is also, by and large, socially unacceptable.

When I look for the values about the environment, religion and culture that are embedded in our law I think it is a bit confused and contestable. Embracing diversity may confuse that further unless meaningful consideration of diverse perspectives, itself, is the value that is embedded in the law. Clarity about some fundamental value choices may be necessary in order to reflect diverse perspectives in our decision making. The international legal jurisprudence about environmental law principles might provide a starting point. If ESD is really going to be a useful legal tool the law may need to be more explicit where there is tension between different values.

And that reminds me of our innovative and progressive cousins in New Zealand. I am sure you all know about the declaration of the Whanganui River as a living entity. The river, which flows 145 kilometres from the central North Island to the sea, was given legal personhood by the country's parliament in September this year. It was described as a legal revolution recognising the Maori connection to the environment and shifting assumptions about human control of the natural world. The river is a sacred and revered waterway to New Zealand's Maori Iwi people. It will be jointly represented by a member appointed by the Maori community, and one appointed by the government. That is an example of embedding a value in the law. I will be watching with interest to see how that affects the practice and application of environmental law in that country.

That brings me to Professor Stuart Bunn who looked at *Using a Broader Knowledge Framework for Regulation*. His view was unsettling. He warned of a retreat from science, let alone a broadening of the knowledge base. Professor Bunn sees little indication that scientific research about sustainable water resource management will have much bearing on future water infrastructure investment decisions in northern Australia. Although there is more and better consultation with indigenous communities, Professor Bunn said effective strategies for achieving indigenous objectives are not incorporated in water planning arrangements. He called for active participation and engagement of indigenous communities to incorporate their perspectives and knowledge.

That reminded me of a story I heard early in my days as member of a tribunal making recommendations about mining projects. It was told to me by a colleague who had worked for government during the assessment and approval of the Century Zinc mine 250 km north of Mt Isa near the Lawn Hill National Park. The deposit is a silver, lead, zinc deposit. The mine was

to draw large amounts of water. One concern was the impact of this on the artesian basin, and, as a result, the Lawn Hill National Park. An elder who kept the stories for an area from Uluru to the Gulf was consulted. He said they did not have to worry about the water at Lawn Hill. It would not be affected by the proposed mine. The areas had different dreaming.

Although they were respectful, his insouciance was not shared by all the indigenous people involved in consultations. The Greens were alarmed. The miner wanted to believe it. The government did not. A confusion of scientific experts from multiple disciplines was set to work. Many months and I dare say many thousands of dollars later, the scientific consensus was that the deposit, which is of unusually high quality, is contained within a cone shaped granite extrusion (I am sure that is not the correct technical term). Within that granite formation was an aquifer which is entirely disconnected from the Great Artesian Basin. The elder was correct. Different dreaming. He did give them information that backed his certainty. The springs feeding the area to be mined went in and out of drought more quickly. The springs, the water, the country behaved differently to the surrounding areas. I have often thought of that story when indigenous knowledge and stewardship is discussed.

I am not suggesting the detailed investigations should not have been undertaken. Of course they should have been. But it does demonstrate the point that there are different ways of preserving and accessing knowledge. Non-indigenous Australia is just starting to value indigenous knowledge derived from tens of thousands of years of observation and experience. Decision making will be enhanced by access to a broader knowledge base. The challenge is preserving knowledge and developing protocols that bring knowledge to bear in culturally appropriate ways.

And that brings me to the end of the roundtables and you will soon start your discussions. The themes for the roundtables encapsulate multilayered goals in a few words. Your conversations will be well directed by the pragmatic and action oriented questions which ask “How to move from” the present “towards” an articulated goal.

So you need not waste time talking about present state. You all know where you are.

Nor do you need to locate your target on the horizon. It has already been pinpointed for you.

Your target has been distilled from commitments that have been made repeatedly and in so many international, national, regional and local statements, policies, plans and laws.

Your task is to chart the course from here to there:

- from fragmented to integrated governance;
- from compartmentalised regulation to regulating multiple and cumulative environmental effects;
- from development based on only economic priorities to politico-legal frameworks which embrace other values and priorities as well; and
- from the base of scientific knowledge to encompass diverse sources of knowledge.

And all in a day and half! Well, you will make a start at least. I wish you well in your discussions.

I started with a narrative presenting a harsh and dangerous image of Northern Australia. I will close with a different perspective of the environment from one of Australia's finest poets, Oodgeroo Noonuccal.

Return to Nature

Lover of my happy past
 Soothe my weariness
 With warm embrace.
 Turn not from me,
 Communicate.
 Am I strayed too long
 And now forsaken?
 Your cold winds freeze
 My offered love.

Was it yesterday
 Or a thousand years?
 My eager feet
 Caressed your paths.
 My opened fingers
 Counted grains of sand
 Hidden in the warmth of time.

Now my civilized self
 Stamps its imprint
 On reluctant sand
 And time has flown.
 Impatient to converse
 My brutality
 Turns you from my touch –
 Oh lost neglected love,
 My tear-stained eyes
 Open now to see

Your enemy and mine
Is - civilized me.