A TRIBUTE TO THE PLANNING AND ENVIRONMENT COMMUNITY AND QELA

QUEENSLAND ENVIRONMENTAL LAW ASSOCIATION (QELA)
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[1] My membership of the Queensland Environmental Law Association (QELA) and my participation in its annual conference, both as a delegate and as a speaker, date back to my days as a barrister. Since my appointment as a judge in 2004, QELA has graciously invited me to address each of its annual conferences. Because of my impending retirement, this is the last time I will address the QELA annual conference as a judge. Whilst my annual speeches have generally focussed upon the Planning and Environment Court (P & E Court), my presentation today will, instead, focus on the Planning and Environment (P & E) community and QELA.

[2] That there is great diversity amongst those who participate in the planning and environment jurisdiction is well known. Participants include the judges who constitute the P & E Court, the barristers and solicitors who appear before the P & E Court, the large number of experts from a wide array of professional disciplines who give evidence in the P & E Court, together with those from the development industry, government (at both State and local levels), environmental organisations (both formal and informal), community groups and others who become involved in the development assessment or enforcement process or in statutory planning or regulatory processes. There are also academics and others who might not directly participate in such processes, but make their own valuable contributions.

[3] Many within this diverse community have their own associations (for example the Bar Association of Queensland, the Queensland Law Society, the Planning Institute of Australia, the Local Government Association of Queensland, Property Council of Australia and the Urban Development Industry Association, to name but a few), but they nevertheless collectively form a broader community, and a collegiate one at that. Not only do the members share an interest and involvement in a vibrant and dynamic jurisdiction concerning tangible matters of substance and consequence which touch and concern us all, but they have demonstrated, time and time again, their capacity and willingness to work towards advancing the interests of the jurisdiction and the public interest which it, in turn, serves.

[4] Despite the diversity, there is a palpable sense of common purpose for the greater good. That is facilitated by QELA which provides both the "broad church" within which the P & E community gathers and the vehicle which facilitates the collaboration amongst and contribution of, its members. Importantly in an area which often lies at the intersection of competing interests, QELA is not a pressure group for any one interest or perspective. Rather, it harnesses the collective knowledge, experience, enthusiasm and energy of its diverse membership base.

[5] In preparing this paper I was reminded of other descriptors such as "club" and "parks and gardens court" which, in earlier times, were sometimes used, in a pejorative way, to refer to P & E practitioners and to the P & E Court. Those descriptors never had any validity. The charge that practitioners operate as a "club", to exclude others, is quickly dismissed by reference to the encouragement and assistance that is given to new practitioners entering the field, including through education, mentoring and networking opportunities. I will return to that later.

[6] Legend has it that the term "parks and gardens court" was first used by a senior judge in New South Wales to describe the then relatively new Land and Environment Court of New South Wales. In so far as it was then adopted, by some, as a "put down" of the P & E Court in Queensland and its work, it could never withstand scrutiny, having regard to the financial value and economic, social and environmental consequences of the subject matter of the Court's work and the legal rigour required by reason of the volume and complexity of the relevant statutory documents. The importance of the Court's work has always been reflected in the high quality of the solicitors engaged by the parties and the barristers, including leading silks, briefed to appear in the Court. Those who have appeared in a significant number of cases in the past[1] include the present Chief Justice of the High Court, Susan Kiefel AC and the former High Court Justice, the Honourable Ian Callinan AC KC.

[7] The use of pejorative terms in relation to the P & E Court or its work always said more about the ignorance/jealousy/insecurity of those who used the expressions. That they are now rarely heard reflects the wider acknowledgment that the value of the P & E Court and its work have received over time.

[8] There are many ways in which the P & E community works co-operatively in the best interests of the jurisdiction. I will refer to some examples to illustrate the point. The expert witness reforms were ushered in not long after my appointment. I have written much about that. In short, the traditional system, whereby the experts, on all sides, were left to prepare their reports for trial with only the assistance rendered by their client's lawyers, was abandoned in favour of the current system whereby like experts, appointed by each of the parties, meet prior to preparation

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[1] Including when the Court was called the Local Government Court.

of any reports for trial, to discuss and attempt to reach agreement about their evidence and to produce a joint report without reverting to their clients or their client's lawyers. That change came against the background of a national debate about the extent of adversarial bias affecting expert witnesses and also against the background of some local concern about the length of some cases in the P & E Court. Whilst the system is now embedded, successful and uncontroversial, that was not guaranteed in prospect.

[9] The reform presented challenges for clients, lawyers and experts. Clients and their lawyers had to be prepared to give up supervision and control over the context in which a retained expert produced a report. In particular, the client and the client's lawyer were asked to accept that they would not know and would not be able to speak to the retained expert about, the opinions the expert formed in the joint meeting and the way in which those opinions were to be expressed in the joint report. It is quite counter-cultural for any litigator to give up control of any part of case preparation, let alone the environment in which the retained experts in an expert heavy jurisdiction arrive at and record their opinions in what is to become, in effect, the primary report for the hearing.

[10] Although the reforms were aimed at respecting the professional objectivity of experts, they still presented a challenge for the experts. The challenge was to demonstrate the required independence and confidence to form opinions, including opinions that might be contrary to a preliminary indication given at the time they accepted appointment and, indeed, contrary to the interests of their client and then express those opinions in a joint report without the comfort of first giving some notice to the client and the client's lawyers.

[11] There was therefore, good reason to be concerned that the reforms would be resisted or that they would fail. Having not long left the Bar where I had worked closely with other P & E practitioners and with most of the experts who regularly gave evidence, I had a reasonable level of confidence that they would accept the challenge. There were doubters. I vividly remember being called naïve to my face by a senior Queensland judge (not from the Planning and Environment Court) to a room full of judges drawn from across the country at a judicial training program.

[12] Despite a level of confidence, I was, at the same time, somewhat holding my breath. Widespread resistance to and ultimate failure of, the reforms, would have had negative consequences for the jurisdiction and would have been personally embarrassing. I need not have worried. The P & E community readily understood what was being done, why it was being done and what was hoped to be achieved and set about implementing the changes in a way that has achieved their objectives.

[13] For the last decade the P & E Court has been the only court in the State which, subject to any order or direction of the Court with respect to a particular document, permits electronic searches of any document on any of its files by anyone without charge. It is a very transparent and popular feature. It is however, something that would not have got off the ground but for the co-operation of the P & E legal practitioners.

[14] Credit for the initiative goes to the second of the Court's three outstanding ADR registrars, namely Mr John Taylor. A very senior, experienced and respected solicitor prior to his appointment, Mr Taylor is someone attracted by practical solutions and timely, cost effective implementation with a minimum of bureaucratic fuss. He is a "let's get on with it" person. I very much enjoyed working with him. His success in achieving a full electronic search facility for the P & E Court within a

short timeframe and within registry staffing and budgetary constraints is remarkable. A vital component of the success was enlisting the support and assistance of the P & E community, in particular the solicitors, to relieve some of the burden that would otherwise have been placed upon the registry's resources.

[15] The legal practitioners were asked to assist by presenting at the registry, not just with a physical document for filing, as had always been the case, but also with a memory stick, that would allow for the document to be immediately downloaded, without the Court having to scan the physical document. The request was accompanied by the twin incentives of the benefit that would accrue to all from the electronic search facility and the benefit of priority service which was provided to those who presented at the Registry with their memory sticks. The judges made the same request for memory sticks in relation to documents, such as draft judgments and affidavits filed by leave, handed up in court. Whilst there was, at the time, no rule or practice direction requiring this (there is now – see PD 1 of 2016), the Court was confident that co-operation would be forthcoming and the P & E practitioners did not disappoint.

[16] Earlier this century it became evident that there was a dwindling supply of younger professionals being called as expert witnesses. Whilst those who regularly gave evidence were highly competent and experienced, it was evident that there was an emerging need to find the next generation.

[17] One of the difficulties in attracting people of expertise to make themselves available to give expert evidence is their unfamiliarity with the Court process and their consequent reluctance to engage with it. In much earlier times many experts got their first taste of being called as a witness when they were employed in local government. That experience would then serve them well when they entered the private sector. Local

government officers tend not now to be called to give evidence. A new form of training was needed.

[18] As the need to find the next generation of expert witnesses became more acute, the P & E community acted, through QELA, to address the problem. In particular, the expert witness workshops were created. That is a highly popular program in which experts who are considering making themselves available to give expert evidence are taken through a process in which they are "retained" in relation to a hypothetical case and then required to prepare for and participate in, a joint meeting and joint report process, followed by a mock court cross-examination before a judge. Along the way they are mentored by senior professionals who are very experienced in giving expert evidence. The mock cross-examinations are by experienced barristers who practise in the Planning and Environment Court. Feedback is given by the mentors, barristers and by the judge who presides over the mock court session. A significant amount of time is invested by those who design and run the course for QELA and by the mentors and barristers, for no personal benefit, in order to foster the sustained long-term health of the jurisdiction. This speaks volumes of their commitment to the best interests of the jurisdiction.

[19] The expert witness workshops have been running for a number of years and are bearing fruit. They have recently been extended to include the Land Court. At the last Australasian Conference of Planning and Environmental Courts and Tribunals (ACPECT) this program and indeed QELA itself, were the envy of some who face their own generational issues elsewhere.

[20] There is a similar interest in attracting and upskilling the next generation of P & E lawyers. It has, in recent years, come to the judges' attention that junior practitioners can find adapting to the P & E Court somewhat

challenging at first. That is a matter of concern, but the issue is being addressed.

[21] Part of the problem is that most law schools have not been offering planning law, even as an elective subject. Consequently, young graduates arrive into the profession with no, or little, relevant academic training. Last year I raised with both the University of Queensland and QUT the substantial importance, in practice, of a subject that neither was offering. Having received some positive response from the University of Queensland, I enlisted the assistance of QELA, which then took the matter up with each of the universities in south-east Queensland. As a consequence of these endeavours, the University of Queensland is re-introducing planning and development law as an elective in the second semester of this year. QUT is reconsidering its position as part of a whole of course review. QELA is also proposing to conduct an inter-university P & E moot competition in 2024 to further stimulate interest at the university level.

[22] In addition to those efforts, the judges have teamed with QELA to conduct an annual advocacy skills seminar, attended by all of the available P & E judges and targeted towards young practitioners appearing on reviews and applications. That provides an opportunity for younger practitioners to practice their advocacy before the judges, receive feedback, ask questions and then, during the informal part of the evening, meet and speak with the judges. That is intended to assist younger practitioners to become better equipped and more comfortable in appearing before the judges.

[23] The P & E community, through QELA, also encourages and assists junior practitioners, not just through QELA's excellent seminar program, but also through the provision of networking opportunities with more

experienced members. This year, for example, QELA held a combined students and early careers networking event. In addition to QELA's events and programs, P & E practitioners do much to encourage and assist young practitioners. For example, established P & E barristers encourage and mentor more junior barristers, whilst the law firms provide their own in-house training.

[24] The P & E jurisdiction is one of constant scrutiny, evolution and change, including as to relevant legislation as well as the rules, practice directions and procedures of the P & E Court. The P & E community, acting through QELA and other bodies, including the Bar Association of Queensland and the Queensland Law Society, have always devoted significant time and resources to make carefully considered and valuable contributions during consultation in relation to any prospective change. Reflecting the diversity of its membership base, those contributions are characteristically made in a balanced way.

[25] Sometimes the judges identify a deficiency in the way that practitioners are addressing a particular kind of matter, notice some undesirable practice beginning to emerge, or identify some desirable alteration to practice. I have found, as a rule of thumb, that if a view is expressed about that at three consecutive directions hearing days, the word spreads, triggering a co-operative response. In my experience, the P & E practitioners always stand ready to support and assist the Court's endeavours to achieve efficiency and effectiveness.

[26] Sometimes there are emergent circumstances, such occurred during COVID-19, where the Court looks to the P & E community for some particular co-operation and assistance. The Court is always confident of the support it will receive.

[27] The above are simply illustrations of the co-operative and collegiate nature of the P & E community and the significance of the contributions it makes. There are, of course, a multitude of other ways in which that manifested.

[28] Planning and Environment is, of course, not the only jurisdiction or area in which professionals volunteer their time to help younger professionals, otherwise participate in professional education and development, or do other things, through an association, for the common good. What sets the P & E community apart, in my view, is the combination of the tremendous breadth and diversity of its membership, the shared interest and involvement in such a vibrant and dynamic jurisdiction, the strength and vitality of the umbrella organisation that is QELA and the palpably positive culture. As a consequence, the P & E community:

(i) is a tremendous reservoir of knowledge, skill and experience covering a wide range of disciplines and interests;

(ii) can support an organisation as sophisticated, well-resourced and consequential as QELA;

(iii) can, and does collectively, achieve at a very high level and on a broad scale;

(iv) is a very vibrant and interesting community to be a part of, or engage with, on both a professional and a social level. There is, within the P & E community, not only appropriate respect for one another, but a real sense of collegiality.

[29] The P & E community and QELA have much to be proud of. Whilst judges are subject to many constraints, I was determined, upon my appointment as a judge, not to cut myself off from that community or from QELA. From the very outset of my judicial life I sought to further

the relationship between the Court and the P & E community, through QELA. Over the years I have, in addition to being a presenter in seminars or in formal parts of QELA conferences also, whenever possible, attended the whole of the annual QELA conferences, as well as QELA social events, so as to be able to mix and speak informally with members of the P & E community and to make myself available to them. I certainly both enjoyed and benefitted from that.

[30] Finally, I wish to express my gratitude to the whole of the P & E community and to QELA for the respect, support, assistance, warmth and kindness afforded to me in my nearly 20 years as a judge of the Planning and Environment Court. You have made my role more rewarding.