
‘Carrots, Sticks & Toolkits’

Keynote Speaker

His Honour Justice I.D.F. Callinan
High Court of Australia

Sir Robert Menzies described constitutional law as a mixture of politics, history and statutory interpretation. Town planning and town planning law have elements of all of these and more. Town and environmental planning provokes political debate of the most impassioned and sometimes irrational kind. Town planning can be rather like a civil war without the bullets, neighbour against neighbour, brother against brother, municipality against municipality, and nimby against interloper, each infallibly convinced of one side of the argument. Ministers, local representatives and the voters all become involved. This is politics at its rawest and most basic.

History is the second of the elements. How did what exists now come about? Is the history relevant? Who was consulted at the time? Did what has occurred, occur naturally? To what extent have usages and standards changed? Do these justify planning changes? Is what exists now worth preserving on historical or other grounds? Every town planner and judge of an environmental court must ask these questions.

And town planning certainly involves statutory interpretation, often of the most difficult kind. There are a multiplicity of different planning instruments, by-laws, strategic plans, statements of intent, local plans, tables of zones, and intricately worded and elaborate conditions of approval to be mastered. All of these have to be understood, reconciled and given effect. The language is often aspirational. It is rarely the language exclusively of lawyers. That is not to say that lawyers always write literate and clear legislation. But legal drafts-people on the whole try to eliminate inconsistency, and to use terms that have established meanings. With all due

respect, town planning legislation often uses the sort of well sounding but vague language of mission statements of a kind which have become fashionable, but which are, at best, opaque. Take the *Integrated Planning Act* 1997 (Qld). It sets out the purpose of the Act in the following way:

“The purpose of this Act is to seek to achieve ecological sustainability by -

- (a) coordinating and integrating planning at the local, regional and State levels; and*
- (b) managing the process by which development occurs; and*
- (c) managing the effects of development on the environment (including managing the use of premises).”*

Section 1.3.3 of the Act defines ecological sustainability:

“...a balance that integrates -

- (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and*
- (b) economic development; and*
- (c) maintenance of the cultural, economic, physical and social wellbeing of people and communities.”*

Surely the purpose could have been concisely and accurately stated as being the purpose of promoting, coordinating, integrating and administering development compatibly with the environment.

So too, I would have thought that ecological

sustainability could have been more simply defined as balancing the protection of the environment with economic, cultural and social objectives.

As these provisions are, it seems to me that there may be a tension between, on the one hand, improving the total quality of life, and, on the other, of maintaining the cultural, economical, physical and social well being of people and communities. This raises a question to which I will return, as to the extent to which town planning instruments seek to achieve too much, are too prescriptive, promise much more than they can deliver and, by their very verbosity invite controversy.

The three elements to which I have so referred fall short of a catalogue of all of the elements of environmental protection and of town planning. These are many and varied: sociology, geography, hydrology, demography, chemistry, physics, botany, economics, engineering, traffic and transport, pollution in its many forms, including visual, odorous and sonic, husbandry and agriculture, and even meteorology, aesthetics, and, let's face it, social engineering.

Social engineering is one of the elements of town planning, that I wish to say something more about. Many years ago when I first went to the United Kingdom I visited Welwyn Garden City. At the time I was appearing frequently in the Local Government Court. Welwyn Garden City had been held up as a model of town planning before the Second World War. In 1969 when I saw it, the buildings had mellowed somewhat, but there remained a certain incongruity between this carefully planned transplant and the country side into which it had been inserted. Inducements had been held out at the time to tempt people to go there; suburbia in the country side. It may have had its detractors, but as an exercise in town planning and social engineering it was neither too intrusive nor too didactic. It has survived.

The so called estates, a misnomer if there were one, in the United Kingdom are, on the other hand disasters: tall forbidding brick and concrete monoliths providing cheap and uncongenial public housing that have bred crime, violence and despair. Many have already been demolished. As a form of social engineering these have been

lamentable failures. I can remember seeing pictures of the openings of these buildings. The politicians took great pride in them. They looked fine then. Good intentions do not always produce good results.

What is the lesson to be drawn from this? It is I think that people need a choice, that there needs to be room to allow freedom of expression, not only in design but also in location. Big Brother does not always know best and the problem for local and environmental authorities is to ensure that they are not seen as Orwellian bodies demanding their own inescapable conformity.

Another, and related, element of planning that I would wish to say something further about is aesthetics. That beauty is in the eye of the beholder is almost a complete truth. Any incompleteness lies in the universal acceptability, of a relatively small number of things, the Mona Lisa although she has her detractors, St Peters, the Alhambra, although some say it was Jerry built at the time, Tuscany despite that it is now criss crossed by great autostradas, Venice even though it sinks further each year, and so on. As for most of the rest, opinions solidify and clash. Take Canberra where I do much of my work. A great deal of it consists of disparate public buildings each located in its own watered and mown paddock just far enough away from the others to be beyond comfortable walking distance, but too close for motoring. No doubt when each of these buildings was erected, it was someone's pride and joy. Indubitably a great deal of planning went into it. What is the position today? In many cases the building is a focus for derision rather than an object of aesthetic gratification.

You may think that I am wandering from the theme of this conference, "Carrots, Sticks and Toolkits". I hope that I can demonstrate that this is not so. For the present I am merely trying to show that the task that you are all engaged in is a complex one and for its success does need, each of the sustenance of carrots, the application of sticks and the provision of toolkits, the words and means of getting the right result. In one sense, the title, with its unstated but nonetheless unmistakable reference to the unfortunate target of the carrots and sticks, the donkey, is an unhappy one. In the end it is to people that town

planning laws are applied, and people are not donkeys.

There is a further element of town planning about which I would like to say a little more. Because I am in Cairns, once the heart of the Queensland sugar industry, and because that industry is much in the news today, I will say something about agriculture. Let me enter this caveat at the outset, I've never got dirt under my finger nails cultivating any crop, let alone sugar cane but for almost 30 years before my appointment to the Court, I was retained by the Queensland Cane Growers Council, as a result of which I learnt something of the history of the industry. What did I learn? Initially it was not an industry in which Caucasian people did the hard work. Indentured labourers, almost slaves by another name did that. Much of the land that was cleared and cropped could never have been used but for the backbreaking work that these people did. But things changed. The industry thrived. For decades, those who worked in it after 1910, almost always by then Caucasian people, prospered. The industry was heavily regulated. Great volumes of sugar were exported to the United Kingdom under the protective cloak of the British Sugar Agreement. Within Australia almost all of the sugar sold was Queensland sugar, and at a subsidized price somewhat above the world market price.

That has all changed again. Venezuela and Brazil have stripped and burnt their forests, and, using cheap labour, have grown great crops of sugar there to flood the world markets and to leave other countries, including Australia, and even Cuba uncompetitive. The local industry is accordingly to be reformed.

What is to happen to the land which used to grow cane but which will no longer be used for that purpose? Will this be a blessing in disguise? Does a reduction in the scale of the industry mean that a threat to the Great Barrier Reef has been removed? What will happen to the farmers no longer able to earn a living as their parents and grandparents did, by cultivating sugar cane? And the factories, mills, and the people in them, what is to happen to them?

I do not know the answer to these questions. But it is likely that ultimately environmentalists, town planners and town planning authorities will be

the ones who will be required to provide them. One thing is certain. There is unlikely to be unanimity about the answers. Economic rationalists may find themselves on the same side as the environmentalists. The answers will not be so easy for the politicians. This is an industry that in the past has generated much export income and prosperity for local communities. If social engineering to going to be engaged in, it will need, in order to be successful, to be of the most sensitive kind.

Why have I taken so much time in raising these matters? It is certainly not for the purpose of imposing any views upon you. It is to remind you of something which you all, at least unconsciously, acknowledge daily, but may not perhaps always have at the forefront of your minds. Practically any issue of town planning, almost every element of it, gives rise to tensions and to the application of contestable principles and opinions. And, equally, it must be remembered, and kept very much in mind that when opinions and contestable matters are involved, there is great room for error. The metaphor, indeed the fable, implicit in the title of this conference has another perhaps unfortunate implication, that whilst the stroke of the stick on the donkey's back is real, the prospect of his getting his teeth into the carrots is illusionary. Those in this industry need to remember that the public, unlike the donkey, quickly become aware that the carrot may in truth be an illusion, a desired object always just out of reach.

What I have said makes important I think, two particular aspects of town planning in Queensland. One is the role of the Planning and Environment Court. Its predecessor was the Local Government Court the jurisdiction of which, for all practical purposes, has remained largely unchanged since its establishment in 1964.¹ Before that year all appeals against town planning decisions were made directly to the relevant minister who conventionally appointed a delegate to conduct a hearing to make the decision. The current court is constituted by District Court Judges by Commission and it has all of the usual powers and apparatuses of a court. In 1990 the *Local Government (Planning and Environment) Act 1990 (Qld)* was enacted. It enlarged the

jurisdiction of the court to include declaratory and injunctive powers, but it restricted further the courts already limited power to award costs. The last significant legislative development was the enactment of the *Integrated Planning Act* 1997 (Qld). It introduced to this area what has become fashionable throughout the litigious common law world, Alternate Dispute Resolution. By contrast with the first relevant enactment of 16 pages this last act contains more than 300 pages.

The Queensland position may be contrasted with Victoria. Section 52 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) provides:

“(1) The Tribunal is to be constituted for the purposes of a proceeding under a planning enactment by -

- (a) one member who has a sound knowledge of, and experience in, planning or environmental practice in Victoria; or*
- (b) if it is constituted by 2 members, at least one member who has a sound knowledge of, and experience in, planning or environmental practice in Victoria; or*
- (c) if it is constituted by 3, 4 or 5 members, at least two members who have sound knowledge of, and experience in, planning or environmental practice in Victoria.”*

Clearly it is not necessary that the Tribunal be constituted by a lawyer. Similarly, the tribunal is not obliged to furnish reasons for its decisions.² The difference to which I have referred leads naturally to a difference in the role of experts in the jurisdictions. In Queensland, until now, experts have been simply, but invaluablely, witnesses, and not the decision-makers. It has been for the judge to choose between competing viewpoints. The judge who is a lawyer does this on the basis of the evidence. He or she is not there to impose any personal expertise upon the result. Inevitably by contrast, a town planner constituting a tribunal determining planning matters will take into account his or her own expertise. Which is better? Each of course has its adherents. It probably won't surprise you to learn that I prefer the court, and that the expert

remain as an expert to assist the court and not to determine the result. Why is this so? I would hope that I have already provided the answer to that in part at least. Planning instruments are extraordinarily complex, and I regret to repeat, usually not clearly drawn. For their elucidation they need the application of the talents of a lawyer. They provide the occasion par excellence for the skill of statutory interpretation. The second part of the answer is, as I have already foreshadowed, that matters of expertise particularly in the social sciences with which town planning is concerned are often very contestable matters. I will take a recent example. Bjørn Lomborg, a highly reputable Scandinavian statistician with sympathy for the environmental cause, set out to write a treatise³ to prove the greenhouse effect and other sacred environmental theories. In the course of doing so he almost completely persuaded himself to the opposite conclusion. He suggested that de-forestation is not a novel concept, indeed that it formed the subject of some of Plato's writings. He acknowledged a statement by the World Watch Institute to the effect that de-forestation has been accelerating in the last 30 years. But his studies led him to a dissenting view. He wrote:

“The fact is...that this civilization has over the last 400 years brought us fantastic and continued progress. Through most of the couple of million years we have been on the planet we had a life expectancy of about 20-30 years. During the course of the past century we have more than doubled our life expectancy, to 67 years.”

He referred, with some criticism to some more recent survey reports compiled by the United Nations, in 1995 and 1997 which reported a decline in forest coverage from 27.25 percent to 25.8 percent. His criticism stemmed from the United Nations' accepted definition of what constitutes a 'forest' and their decision to exclude Russia, which apparently has the world's largest forest cover, from the study. On the related topic of endemic demand and consumption of paper, he suggests that human-made plantations adequately satisfy this demand, such plantations, which are continually harvested, accounting for no more than five percent of the earth's forest cover⁴.

On the subject of global warming, one which will no doubt interest those who reside in the tropics during the summer months, he points out that thermometers have only been systematically used for about 150 years. Something more is required he says if we are to appreciate and understand the “long-term development of climate”. Long term climate development can only be gauged by what he terms “proxy indicators” that is, other ways of measuring temperatures.” He proceeds to list a number of “proxy indicators”. For example, he writes,

“...temperatures have in many ways affected the ice that has accumulated in polar regions, so when we drill out an ice core, we can count the layers backwards in time and measure the fraction of melted ice, the concentration of salts and acids, the load of pollen or traces trapped in air bubbles⁵.” He carefully analyzes various data and concludes that although it is an identifiable problem, one which will be costly to limit, the current stage of the effect is “still a limited and manageable problem⁶.”

In his concluding chapter Lomborg presents what he considers to be “The Real State of the World” in the following way:

“The fact is...that this civilization has over the last 400 years brought us fantastic and continued progress. Through most of the couple of million years we have been on the planet we had a life expectancy of about 20-30 years. During the course of the past century we have more than doubled our life expectancy, to 67 years.

Infants no longer die like flies - it is no longer every other child that dies but one in twenty, and the mortality rate is still falling...

...

Because our food production will continue to give more people more and cheaper food. We will not lose our forests; we will not run out of energy, raw materials or water. We have reduced atmospheric pollution in the cities of the developed world and have

good reason to believe that this will also be achieved in the developing world. Our oceans have not been defiled, our rivers have become cleaner and support more life, and although the nutrient influx has increased in many coastal waters like the Gulf of Mexico, this does not constitute a major problem - in fact, benefits generally outweigh costs...

Acid rain did not kill off our forests, our species are not dying out as many have claimed, with half of them disappearing over the next 50 years - the figure is likely to be about 0.7 percent. The problem of the ozone layer has been more or less solved. The current outlook of global warming does not indicate catastrophe - rather, there is good reason to believe that our energy consumption will change towards renewable energy sources way before the end of the century. Indeed, the catastrophe seems rather in spending our resources unwisely on curbing present carbon emissions at high costs instead of helping the developing countries and increasing non-fossil fuel research⁷.”

I hasten to say that I do not have the slightest idea whether Lomborg is right or wrong. Nor can I say whether, if Lomborg is right, his opponents are entirely wrong. I do not know whether, for example, 1,000 hectares of a flourishing wheat crop planted annually would consume more or less carbon dioxide than undisturbed old forest on the same area. This is but one of 100 different questions relating to the environment to which I would like to know the answer. I do know this however, that I would prefer the answer to be given by a person trained in the sifting of evidence and disciplined in detachment, a skeptical person without any preconceptions, to a person such as Mr Lomborg, or his opponents, each holding a strong and probably intractable view on one side or the other.

And that brings me to another point regarding experts, and that is the movement towards the selection and appointment by the court of an expert. I cannot leave this topic without expressing some reservations about this trend. Because so much of what experts deal in is contestable, it is important for the Court to hear

each of the contested views. Even shades of difference may be critical. The truth is usually nuanced, especially in non-exclusively scientific matters. Experts are not advocates but there is no reason why there may not be, in some areas, a range of legitimate, conscientiously held views. The matters to which I have referred already show this to be so. If a court has only one expert, it risks the chance of not hearing all sides of the story. Over the years the courts, and in particular the Local Government Court, and its successor the Planning and Environment Court, have not been so overwhelmed by technicalities that they have been unable to decide the technical issues. Indeed, it is the very presence of the conflicting experts, presenting their views, and the definition of the issues by them, that have enabled the court to reach the right result. This is in no way to disparage the essential role of experts. Indeed it is to emphasize their importance.

It is also open to question whether the appointment and presence of one expert only by the court will save costs. In order effectively to cross-examine and test the expert, each party is likely to have to employ his or her own expert anyway.

There is another, more subtle problem, which is a little difficult to articulate but is nonetheless a real one. It is that over time, judges, particularly judges in specialist jurisdictions, will come to prefer one, or a handful of experts eligible to be court-appointed, over others. The judge will then tend to become naturally receptive to the views of that particular expert or experts. The same expert or experts, regularly appointed by the judge, equally will come to know how the judge approaches matters, and the propositions and type of thinking most likely to appeal to that judge. Human nature is such that each inevitably will become unduly, if silently deferential to the other. And even if this should not in fact be so, there is a very real risk of a perception that it is so. Those who are of the Bjørn Lomborg turn of mind would very much like him to be their court appointed expert in litigation but imagine how the proponents of the Green House Effect would feel about that.

No system is perfect. The social sciences are practised by ordinary people, and people have different views. In Town Planning and

Environmental matters we need always to be careful to be not too prescriptive. It may sound attractive today to proscribe a Building Code that requires the use of “light” materials, corrugated iron, “engineered” timber, and various forms of fibre-board masquerading as wood. But only time will tell whether they will age as well, and be as durable and attractive to future generations as the much deplored incongruous Tuscan villa which prescription demands that henceforth they will replace. It may be that the transplanted Tuscan villa, with time, will make its peace with the urban landscape just as Welwyn Garden City did in forty years, with the countryside, in which it was insinuated. I suppose that what I am really saying is that town planners, lawyers, environmentalists and those who make the decisions not go too hard with the stick, and make sure that the public be allowed to choose and savor the carrot.

References

- 1 City of Brisbane Town Planning Act of 1964 (Qld).
- 2 See Part 16, s 66 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic).
- 3 Bjørn Lomborg, ‘The Skeptical Environmentalist’ (2001).
- 4 Ibid at 171.
- 5 Ibid at 260.
- 6 Ibid at 323.
- 7 Ibid at 329.