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090527 Qld Environmental Law Assn Annual Conferenc

Queensland Environmental Law Association Annual Conference

"Are we there yet?"

Opening Ceremony

27th May, 2009

Gold Coast City Councillor and Chairman of the City Planning Committee, Councillor Ted Shepherd,

President, Queensland Environmental Law Association (QELA), Mr Michael Leong,

Distinguished Conference speakers and delegates,

Generous sponsors and supporters of QELA,

Ladies and Gentlemen,

In the spirit of reconciliation that we wish to promote throughout Queensland, I acknowledge the traditional custodians of the land on which we are gathered, the Eastern Yugumbah and their descendants.

Thank you for the invitation to attend and contribute to this important conference. I am impressed by the significant numbers of people who have committed time and effort to be here and by the range of professional interests and areas of expertise you represent. I see this, firstly, as a compliment to the Association - which has developed steadily since its establishment in 1987 and, building on its regular seminar program, has made this annual conference a highpoint for its members and wider network of contacts; and, secondly, as a reflection of the way that environmental law and legislation has insinuated itself into so many aspects of our lives - extending its reach and influence well beyond the world of the specialised legal practitioners - to be important and relevant for many other professions, disciplines and sectors. This growth and extended influence is reflected clearly in the break-up of participants - with roughly half of you from the legal profession, more than a third falling broadly into the category of 'planners', and the rest a mix of environmental scientists, managers, engineers, academics, property valuers and developers and a handful of politicians. The split between public and private sector is similarly revealing - with 40% from Local, State and Federal governments and more than 50% from private enterprise.

And the range of subjects you'll be covering is just as diverse: I know there is a unifying theme - designed, as I understand it, to focus in particular on the ever-changing policy and regulatory context of environment and planning law in Queensland - but the over-arching question - "Are we there yet?" - seems to me to be a little like trying to put one's finger on a piece of mercury ... so I'll be very interested to see how the presenters and speakers choose to address it or provide a response as they talk about regional planning, public private partnerships, transport issues, relations between Councils and State governments and various other subjects described broadly in the conference program as 'environmental topics'.

Given the diversity of your professional backgrounds and fields of interest, it was initially a little hard to identify a subject that might engage everyone's attention for this keynote address. When extending the invitation to me last November to join you today, QELA President Michael Leong noted my work on environmental issues, so I thought I would make that my starting point, as a lead-in to talking about a subject which is of profound importance for everyone - namely that of climate change - and offering some thoughts about its legal implications - and some of the issues that may arise down the track as governments and communities address its complexities.

In my former working life, until July last year, when I assumed the role of Governor, I was, like many of you here today, a bureaucrat, a government official; for over forty years, from 1968 to 2008, I served as a career diplomat, an officer of the Federal Government Department of Foreign Affairs and Trade (DFAT), involved with the formulation of Australian foreign policy and representing Australia's interests in a succession of overseas postings. In the early 1990's, following postings in Europe, the Americas, the Pacific and Asia and five years dealing with Australia's relations with China, Taiwan and Hong Kong, I was promoted to a Principal Adviser position in DFAT's International Organisations Division - and was suddenly thrust into an extraordinary world, dealing with the environmental issues which had exploded onto the international agenda. The trigger was the UN Conference on Environment and Development - UNCED - or the Earth Summit - to be held in Rio in 1992, which flowed in turn from the Brundlandt report on "Our Common Future", commissioned by and presented to the UN in 1987 - the same year that QELA was born.

The Summit spawned an intense series of negotiations - of preparatory conferences and meetings over two years, to negotiate 3 'soft law' documents - the Rio Declaration, Agenda 21, and a Declaration on Forests and three major Conventions - 'hard law', legally binding instruments - on climate change, biodiversity and drought and desertification. As government officials tackled these complex and challenging negotiations, the Australian government - like many governments around the world - headed into a welter of community consultations - with business, green groups, farmers, mining groups, foresters, engineers ... briefing them on what was happening, seeking their inputs and comments. A Special Ambassador was appointed to lead this necessary interaction with 'civil society' and community groups - former Governor-General, eminent lawyer and High Court judge, Sir Ninian Stephen. As Principal Adviser, I assisted him in this process for a while - but gradually the international negotiations and management of the international agenda consumed more and more of my time. I was appointed co-chairman of the Federal government's Inter-departmental Committee on International Environment Issues, responsible for the development of policy proposals to Federal government ministers on global environmental matters and was also appointed as the leader of the Australian delegation to the climate change negotiations, formally referred to as the 'Intergovernmental Negotiations to Develop a Framework Convention on Climate Change'. I was Australia's principal negotiator for the UNFCCC - as it came to be known by its acronym (or Kyoto's parent, some might call it) until its adoption in May 1992, becoming a Vice-Chairman of the International Negotiating Committee and continuing on in that role for some years. I succeeded Sir Ninian as Australia's Ambassador for the Environment and remained in that position also for several years, handling a host of negotiations and environment-related work in Australia and overseas - on those three big conventions, but also on the Basel Convention on hazardous wastes, on trade and environment, the protection of Antarctica and marine living resources, sustainable land management and landcare, water pollution control and wetland systems; I chaired the preparatory negotiations for

the first UN Conference on the Sustainable Development of Small Island States and launched the International Coral Reef Initiative.

Throughout all this, I continued working on climate change - specifically the implementation of and follow up to the Framework Convention. During those years I gave scores, if not hundreds of speeches, lectures and presentations to audiences across Australia on environment and development issues - to political groups, NGOs, the business community, and at universities. Looking through my records last night- (I have all the speeches) and thinking specifically about QELA's interests, I noted that I addressed international environmental law seminars in Sydney, Melbourne and Brisbane in 1992 and launched an edition of "Environmental Law - A Guide for Directors" at the Australian Institute of Company Directors in Sydney in 1994. Another presentation not irrelevant to today's meeting here at Main Beach was an address I gave on the Gold Coast in November 1992 at a Local government conference on the environment - called "Local Actions - National Partnerships".

I spoke on that occasion of the "critical importance of enhanced cooperation between Federal, State and Local governments if we are to secure the goal of a cleaner Australia and establish sustainable development as the pattern of development and growth for Australia in the 21st century". I drew delegates' attention to chapter 28 of the 40 chapter blue print that is Agenda 21 - the chapter which focussed specifically on the role of local authorities ... and I warned that the growing framework of international agreements, treaties, conventions, action plans, standards and regulations would impact on government at all levels - affecting capacity to do business, attract investment and tourists to the community, determining local transport systems and building design.

If you have been listening - and not glazing over with all my dates and details - you will have calculated that that Gold Coast conference was 17 years ago - and you might wonder about its relevance for today's discussions. I - in turn - am disposed to ask - in relation to Local government preoccupations and the calls for enhanced cooperation that I see are listed for discussion at **this** Gold Coast conference - and also in relation to the current state of public debate on some of those other issues with which I was so closely involved for so many years - what has changed? - and to conclude, in some respects at least - "not much". Or to put it another way, that "we are certainly not there yet" - and we are very definitely nowhere near in relation to climate change.

I guess part of the problem in answering the question - "Are we there yet?" - lies in knowing what we mean by "there."

If "there" means increased awareness about the environment - then yes, we are there.

If it means, an increased professional capacity to deal with environmental law and planning- then yes, we are there. QELA's membership of 600 and its network of 3,000 tells us that; the impressive expertise developed within some law firms in Queensland - notably Allens, Corrs and Deacons - on environmental law does the same; so, too, do the environmental law, environmental science and environmental management courses on offer at UQ, QUT and Griffith - which have grown from virtually nothing in the early 1990's to a significant aspect of the courses now on offer at our leading tertiary institutions and in demand by Queensland students.

The UQ's Environmental Law and Policy Research program reported recently: "Environmental Law is one of the fastest growing areas of the legal system. It now comprises a vast body of statute law comprising Acts of Commonwealth and State Parliaments and subordinate legislation in the form of regulations, orders and decrees."

And therein lies the rub: we may be "there" in that we are developing expertise and specialists, offering ever more sophisticated training and education, and building capacity to address environmental issues - but can we keep up? I am not sufficiently well versed on local legislation to provide authoritative comment about the local level, but at the State and Federal levels, there is a

bewildering proliferation of legislative instruments and instrumentalities to manage the environment. At the Federal level, the 1999 EPBC Act is the central legal framework - (rather like the UNFCCC) - but when one looks at the list of other Federal legislation administered by the Department of the Environment, Water, Heritage and the Arts (DEWHA) alone - it runs for pages. In addition, there are numerous statutory authorities with legislative oversight on a range of environmental matters. Just sorting out who does what is hard enough - let alone staying up to date AND determining the implications and impact at the local level. At the Queensland State level the story is more straightforward, with five key pieces of environmental law - and the website of the former Environmental Protection Authority (EPA) - now the Department of Environment and Resource Management (DERM) - setting out clearly the other legislation it handles relevant to environmental protection. The former EPA's Annual Report is also helpful. Where things become more tricky - in finding the way forward - is on the planning side - with the 1997 Queensland State *Integrated Planning Act* having now gone through - so I am told - 80 iterations ... so in that respect, it would seem we are not "there" yet either.

That's one for the experts here to consider during the course of the conference as you examine progress in environment and planning legislative reform. I know that this stocktake is one of the principal items on your agenda. In addition to this review of what has happened in recent years, however, I hope you will also look ahead and think about the bigger picture and what may be to come and how to plan better for this.

Specifically, I believe it important to be thinking more about climate change. Here, too, I am asking - can we keep up? And I answer by saying it is imperative that we do. The current public debate swirling around the Emissions Trading Scheme (ETS) is, I believe, while important, something of a distraction here - as is the somewhat troubling (at least to me) replay of old debates - indeed almost twenty-year old ones - as to whether the threat is real. I understand - and accept - that there remain persons with genuine reservations about the science behind climate change - but for the overwhelming majority of informed individuals and governments, the debate over whether climate change is man-made - as to whether there IS anthropogenic interference in the climate system - is over. It was over in 1992, when the UNFCCC was adopted. And since that time, with the ongoing work of the IPCC, the causes of the global rise in temperature since the dawn of the industrial revolution have been the subject of the most thorough research ever carried out. We have some 6000 of the world's most eminent scientists and over 10,000 of their referenced articles to back up this claim. The evidence is overwhelming.

Much of this is contained in the 4th report of the Intergovernmental Panel on Climate Change (known as the IPCC) published in 2007. Its projections on the increases in temperatures and the effects on the world's climate are worryingly consistent with the evidence. Even more worrying is that it shows the global community is falling well behind what the IPCC is saying it needs to do to avoid serious harm to the global environment. So here emerges a larger - global - version of my "Can we keep up?" question and your "Are we there yet?"

The IPCC - whose reports have always erred on the conservative side, but which have been becoming progressively more pessimistic, with rising temperatures - has been telling us that 2 °C is the maximum level to which global temperatures should be allowed to rise. (It's important for us to recall the reasons for this. Their research indicates that rises between the currently 0.7 °C increase and 2 °C produce reasonably predictable and proportionate influences on our climate - albeit highly disruptive and economically costly.) If we go beyond 2 °C there is the real danger of significant and largely uncontrolled non-linear increases in greenhouse gasses and temperatures.

Notwithstanding global greenhouse gas reductions produced by the Kyoto Protocol, the international community has been responsible for a sharp acceleration in global CO₂ emissions. Since 2000 they have been rising at an annual rate of 3%. That's well above the 1% annual increase during the 1990s. (Even the Kyoto Protocol members have collectively increased their emissions since 2000

albeit marginally. This is notwithstanding the commitment to reduce emissions by an average of 5.5% over 1990 levels.)

At these rates of increase the OECD (Policy Brief 2008) projects global greenhouse gas emissions will grow 52% by 2050 and raise the global temperature by between 1.7 °C and 2.4 °C. This would be at least twice the temperature increase seen between 1899 and 2005. This is a frightening prospect.

While the global financial crisis may prove these projections to be on the high side, the reductions we need to achieve are nevertheless daunting. To meet the limit of a 2 °C increase in temperature, emissions would have to peak globally in 2015 and be cut by at least 80% below the 1990 levels by 2050. The IPCC's 2007 Fourth Assessment Report called for Annex I developed countries to reduce greenhouse gas emissions 25-40% below 1990 levels by 2020, and 80-95% below 1990 levels by 2050. That, it estimated, would lead to stabilisation below 450 ppm - the level at which a 2 °C warming occurs. I should note however that the IPCC regards the 450ppm level as delivering only a "reasonable chance" of averting warming beyond 2 °C.

I know that sceptics make much of the fact that these are projections and cannot therefore be proven. As one such sceptic - a lawyer, in fact - recently asked me "Where is the forensic evidence?" I acknowledge readily that what the IPCC gives us as a guide to the future are indeed probabilities. But probabilities and risk management are the underpinning of much of what we do, and certainly much of what you do as environmental managers, lawyers, town planners, and property consultants. It is the central pillar of some of our largest commercial enterprises - including, most obviously, the insurance companies.

We all buy insurance based on these probabilities, you advise your clients based on probability and they build, or create entities based on them. The blunt message from bodies such as the IPCC is that the probabilities of temperatures rising by 2 °C are now exceptionally high - and indeed an increasingly uninsurable probability.

So what we need to do now is to look at much more carefully the implications of exceeding this level and confronting what are called 'tipping points'. These are the often dramatised points where the level of greenhouse gases in the atmosphere produce much larger and less predictable temperature rises. Again these probabilities are rising not receding. Precursors to these 'tipping points' are highlighted in the most recent 4th IPCC report. They are to be found in global warming's melting of the Arctic and Greenland ice masses. The IPCC points out the Arctic ice cap has been shrinking at an annual rate of 3% for the past three decades - a process, which if it continues, could lead to radically higher sea levels.

A tipping point is also to be found in the fact that 80% of the global increase in temperature is being absorbed by the world's oceans. This is expanding the oceanic mass and playing a major role raising global sea levels. Higher seawater salinity is also occurring through the ocean's absorption of CO₂ - a process which could seriously disrupt the ocean's foodchain ecology and disrupt the flow of the ocean's currents. Yet another tipping point lies in the IPCC's estimates that some 7% of the northern hemisphere's permafrost region has been lost since the beginning of the 20th century. That continuing loss opens the possibility of very large releases of the lethal greenhouse gas methane.

In short, the time for optimism about our ability to meet arguably the biggest and most serious challenge we have ever faced as a global community has pretty well run out.

That's why the Australian and State governments are now firmly embarked on a policy path designed to integrate us into the global community's efforts to limit GHG emissions to a controllable level. We're not doing this out of the goodness of our heart or to use a phrase that was popular some years ago - to be 'a good international citizen': it seems often forgotten that we have a legally-binding

obligation to do so: an obligation first accepted by Australia when it signed and ratified the UN framework Convention on Climate Change and confirmed when we signed the Kyoto Protocol in 2007. Under the Convention, we agreed to act to stabilise dangerous anthropogenic gases - although the Convention did not spell out how we had to meet this obligation. The more recently signed Protocol committed us to meet specific targets for lowering greenhouse gas emissions - as does the government's planned carbon trading scheme.

The legal obligations are there, but how do we meet them?

The current dense debate about carbon trading - including today the talk of it being the trigger for a double dissolution - conveys the sense of urgency governments feel about this - but that urgency should be felt by everyone - in all spheres of activity - private sector and public sector alike. Matching that sense of urgency, there should also be a sense of the complexity of the issues involved - and, perhaps paradoxically - a need for caution before proceeding with responses. Too often, I find, the public debates and discussions are oversimplified and over-emotional. We need to establish the facts carefully, digest their complexities, and deal with them in a measured way - otherwise, some costly mistakes could be made.

As lawyers, you know that with these treaties, protocols and laws come complex legal issues. Some specialists in international environmental law may know, for example, that the Kyoto Protocol carries penalties for non-compliance. But enforcing them assumes there will be a post-Kyoto agreement in which penalties can be applied. The difficulty will be if the Copenhagen round of global climate change negotiations later this year does not deliver a successor agreement.

Closer to home, to those domestic legal implications I referred to at the outset of my address, there are other legal questions attached to the adoption of a carbon trading scheme, including questions about the precise legal nature of carbon emitting permits. Of particular interest to us here in Queensland, I understand that some lawyers have suggested that the permits legality may need to be enshrined in Australian property law and, if so, be part of State rather than Federal legislation.

The recent collapse of agricultural tax schemes raises questions about the legal status of offsets. If bio-sequestration enterprises sell offsets and then collapse, there is the issue of how the responsibilities attaching to the offset commitments are to be honoured.

There are also legal issues surrounding the Clean Development Mechanism, which allows for investment projects in developing countries to offset emissions in a Kyoto Protocol member state. That is only permitted if the development would not have occurred in the normal course of business. Legal debate abounds on that judgement.

I doubt that I need to tell the lawyers in this room of those debates. I just wanted to give a flavour of some of the complexities of the legal issues associated with climate change with which we will have to grapple in the future. However, the nature of climate change is such that its effects and its challenges will reach far beyond the doors of legal firms and into our built environment, our agricultural sector, our resources and our natural environment. Several of these areas have direct relevance to Queensland. The first is rising sea levels. In a State with such a huge coastline and where so many people live, the relevance is obvious.

(The IPCC in its latest fourth report provides the hard science and the expected probabilities on this. Again, of concern are the accelerating trends they reveal. Global average sea levels rose an average of 1.8 mm between 1961 and 2003 but by over 3 mm in the decade 1993- 2003. Future projections have total sea level rises at between 0.2 and 0.4 meters in scenarios where the temperature rises do not exceed that critical 2 °C to which I referred earlier.)

Developers and town planners are therefore now having to incorporate probabilities relating to rising

sea levels in coastal developments. They must also factor in probabilities of greater variation in weather patterns. With most future urban growth to occur in coastal areas where 80% of Australians already live, the importance of climate change and the costs it will impose on our coastal communities is obvious. The Climate Change Review presented recently by Professor Ross Garnaut warns that without serious mitigation efforts, in the medium term - 2030 to 2070 - the major cost will come from increased repairs and maintenance, responding to more frequent storms and flooding. Preventive cost will also increase, involving a need to alter building designs, provide sea wall protection and improve drainage systems.

That issue will certainly have resonance in cities and urban centres such as the Gold Coast which is centred on expansive canal developments, let alone concerns about protecting and preserving our beaches, which play such a crucial role in sustaining our economy, through the attraction of domestic tourists and interstate and overseas visitors. (The impact of climate change on the Great Barrier Reef - affecting our corals - is another cause for concern in this regard.)

One of the ironies of climate change is that it can create both too much and too little water. It is well known that the Australian continent will on average receive less rainfall as the effects of climate change increase. It is less well understood, except by our farmers, that the effect of lower rainfall is being greatly magnified by much higher evaporation rates caused by higher average temperatures. That phenomenon is already apparent in the Murray-Darling basin, of which Southern Queensland is part. The basin produces 40% of Australia's total gross value of agricultural production and consumes 70% of Australia's irrigation water. The Garnaut Report presents modelling which shows that agricultural production in the basin would fall 20% by the end of the century, even if we meet the 2 °C target limit on temperature increases. More chilling - if that is the word - is the projection that if greenhouse gas increases continue at an unconstrained rate - the value of the basin's production would decline some 92%.

Of course the effects of climate change on a State as large as Queensland will not be even - there will be some winners as well as losers. But either way agricultural planning and development in the age of climate changes has suddenly got a lot harder.

As it has for our urban planners. Those of you involved with city planning know, for example, that the planning of water supplies is already a major issue. We need no reminder, as inhabitants of the world's driest populated continent, that we are already experiencing the effects of climate change-induced lower rainfall - and with the surge of population growth in the Gold Coast corridor and throughout South-East Queensland expected to continue and our Queensland population expected to reach 8 million by 2056, the headaches will only increase.

Ladies and gentlemen, my purpose today, in rehearsing these facts and offering these observations is not to create gloom - it is rather to impress upon this informed audience the sense of urgency that I believe we need to bring to address climate change and the legal and planning issues which flow from dealing with its challenges.

From my remarks, you will appreciate that there are many, many challenges before us and that we are "not there yet". Nevertheless, it is because professionals like you gather in meetings like this to discuss these issues; because associations like QELA show a willingness to assume the responsibility of enhancing our capacity to respond to the challenges; and because organisations like the Gold Coast City Council are ready and acting now to translate this capacity into their planning; that I remain positive that Australia will find the way forward and the necessary resolve to stay the course, so that we **will** reach that still-elusive, but essential destination.

I wish you thoughtful and interesting discussions and look forward to more opportunities to work with QELA and its members to assure the future prosperity and security of our State and to preserve the quality of life that we enjoy today, for tomorrow's generations.

Thank you for your welcome and for your considerate attention.

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