REMARKS BY THE HONOURABLE PETER UNDERWOOD AC, GOVERNOR OF TASMANIA TO OPEN THE 2014 AUSTRALASIAN CONFERENCE OF PLANNING AND ENVIRONMENT COURTS AND TRIBUNALS,

WEDNESDAY 5TH MARCH 2014

It is a great pleasure for me to welcome you all to the 2014 Australasian Conference of Planning and Environment Courts and Tribunals and it was a privilege to talk to some of you at the reception at Government House last night. To all the visitors to Tasmania, I extend a special welcome and express the hope that you will be able to find a little extra time to have a look around while you are here because our island is particularly beautiful in the early days of autumn.

I suppose that it is fair to say that a great deal of the evidence given in courts and tribunals that have jurisdiction over planning and environmental matters is given by expert witnesses. During my legal career, first as a barrister and then as a judge, I quite often had to lead and cross examine experts and later listen to it, and evaluate and assess it. Over the years, I came to realise that the trouble with expert evidence and expert witnesses - in all disciplines - is that, as each day goes by, the fields of expertise get narrower and narrower and more and more specialised. It seemed to me that expert knowledge is something that expands exponentially and consequently the fields of expertise become narrower and narrower and more and more specialised. Although often very detailed, the expert evidence is always tightly focused on the

narrow issues raised by the case at hand; each case is quite different, and the trouble for the lawyer, the judge and the tribunal member is that they have many cases to deal with and, once the case at hand is over, he or she forgets all that he/she has just learnt from the expert witness and gets on with the next case which, of course, involves another, quite different, but equally narrow field of expertise.

Thus, it has been said of experts that they are people who know a great deal about very little, and who go along learning more and more about less and less until they know practically everything about nothing.

Lawyers, on the other hand, are people who know very little about many things, and who keep learning less and less about more and more until they know practically nothing about everything.

But judges, of course, are people who start out knowing everything about everything, but end up knowing nothing about anything, due to their constant association with experts and lawyers.

I had a look through your programme and noticed that the issue of tribunal independence is not listed among the topics. Maybe this is because in the fields of planning and environment there has been an encouraging shift to vest these jurisdictions in Courts, although not here in Tasmania. But as you all know, there still remain many tribunals in Australia so independence is a perennial issue and often addressed; rightly so for unless it is addressed time and time again, it seems to

me that there is a risk of tribunal independence coming under threat from an over-enthusiastic executive. Just the other day I received from the AIJA an excellent research paper written by Associate Professor Pamela O'Connor of Monash University which examined the institutional provisions and arrangements that enable tribunals to perform their functions impartially and independently. [1] In the Foreword to the paper Justice Iain Ross wrote:

> "Tribunals are an important part of the justice system. They provide a quick, cheap and relatively informal means of dispute resolution." I might interpolate, or at least are set up in the belief that they will provide a quick, cheap and relatively informal means of dispute resolution. Justice Ross continued, "Like other justice institutions, tribunals rely ultimately on public confidence and the consent of the governed."

When I was on the Bench, I often reflected on the truth of that last proposition – ultimately courts and tribunals rely on public confidence and the consent of the governed. I sometimes had nightmares about a scenario in which I am sitting in the criminal trial court on a sentencing hearing. The nightmare runs like this: I have just delivered a few pompous statements as a prelude to imposing a sentence on a convicted person and then I say: "and I order a sentence of 5 years' imprisonment. ……[recount story]

---

[1] Tribunal Independence, Associate Professor Pamela O'Connor, Monash University published by the Australasian Institute of Judicial Administration Inc. 2013. ISBN 978-0-9590029-3-5.

In her research paper, Professor O'Connor makes a really good point that I had not considered before, and that is that tribunal independence is, what she calls, "under-theorised". She says that:

> "It has developed through analogy with judicial independence. The analogy is under strain because the case for judicial independence relies on the institutional separation of the judiciary from the other branches of government and tribunals are not accepted as part of the judicial branch." Professor O'Connor continues by explaining, "The concept of 'branch independence' – the independence of the judicial branch – is the collective aspect of judicial independence. There is also an individual aspect called 'decisional' or 'adjudicative' independence which is common to both courts and tribunals because it is required for impartial adjudication."

Now, in my judicial life I often banged on about the importance of independence for tribunals, but I always saw the attributes of judicial independence as being - not just the best model - but the only model. Professor O'Connor has made me re-think that completely. She points out

> "The case for tribunal independence starts, not with the separation of powers, but with a functional question: what is needed for tribunals to perform their adjudicative functions? All tribunals, whether they have executive or judicial powers, need a degree

of independence that is sufficient to ensure impartial adjudication."

What is needed for tribunals to properly perform their adjudicative functions will depend on the nature of the tribunal. Of course, security of tenure, and remuneration as well as administrative tenure are high on the list, but may relate to a fixed term, or only for a specific task. The research examines aspects of administrative independence, institutional independence and adjudicative independence and the degree of importance of each. They are all neatly summarised in three appendices at the end of the report. And each is assessed as being strong, intermediate or weak.

Obviously time does not permit me to discuss Professor O'Connor's research in any depth this morning, but I raise it with you at this conference because her ideas bring a new and, I respectfully think, productive approach to securing adjudicative and administrative independence for tribunals in which I think you all have a legitimate interest.

But now it's time for me to do what I came here to do and that is open your conference. So I wish you all a stimulating and interesting time at the 2014 Australasian Conference of Planning and Environment Courts and Tribunals which I now declare open.