"Perish the thought": Some remarks on the Land and Environment Court's 40th anniversary

by

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The Land and Environment Court of NSW turned 40 on 1 September 2020. This comment highlights some of the factors that have shaped the Court and the planning and environmental laws it administers and some of the ways that the Court in turn has shaped planning and environmental law and governance.

A conference and dinner had been planned to celebrate the 40th anniversary of the establishment of the Land and Environment Court on 1 September 1980.[1] The COVID-19 pandemic had other plans. The conference and dinner have had to be postponed to next year.

Implementing adaptive management, the Environment and Planning Law Association (EPLA) organised a virtual celebration instead – a Zoom meeting where members of both EPLA and the Court could join together to celebrate the Court's contributions to planning and environmental law and governance. I have been asked to make some introductory remarks and propose the toast to the Court on its anniversary today, 1 September 2020.

When the conference and dinner were postponed, I took the opportunity to enjoy the first days of spring skiing at Perisher in the Australian Alps. I make these remarks from Perisher. The name of this location inspired me to cluster my remarks and name them using other words beginning with "P". "Perish the thought", you may say, but bear with me. Surprisingly, this approach works.

Politics

Politics and the Court have shaped each other in a number of ways. First, the Court was established as part of a package of planning and environmental law reforms, including the *Environmental Planning and Assessment Act 1979* (Planning Act).[2] Politics was driving the reforms. The government at the time was a Labor Government, led by Neville Wran as Premier.

Neoliberalism was a catalyst for and shaped many features of the laws, especially the market-orientated reforms to encourage private development and economic growth. Other ideologies also had a role to play. Fundamental ideas of liberal democracy, such as the separation of powers, an independent judiciary and the State being subject to the rule of law, can be seen in the institutional design of the laws and the Court. So too, the increasing calls at the time for citizen participation in democratic decision-making processes were influential. In particular, the laws promoted procedural justice in at least three respects: access to information, public participation and access to

justice through the courts. These three pillars of procedural justice are manifested in the statutory provisions for publication, public participation and proceedings in the Planning Act and in the *Land and Environment Court Act 1979* (the Court Act).

Second, the Court's jurisdiction is political, in both origins and operation. The politics of the government of the day have led to the enactment or amendment of particular planning and environmental legislation and the vesting of jurisdiction in the Court to hear and dispose of disputes under such legislation. The Court's jurisdiction has grown significantly over the four decades it has operated. The different nature and content of the environmental and planning laws administered by the Court are reflective of the politics of the times at which the laws were introduced. The disputes under this legislation also are political, involving clashes of ideas, ideologies and values.

Third, some of these disputes involve political power relations, jurisdictional tussles between State government and local government, between different departments or agencies of the State government and between different local councils. The litigation by local councils challenging State government planning initiatives, such as urban consolidation and increased residential density, and challenges to local council amalgamations are examples of disputes about political power relations.

Fourth, politics has influenced appointments to the Court, including the appointment of former politicians of both major political parties as judges and as assessors or commissioners.

Philosophy

Different philosophies or ideologies have been, and continue to be, influential in shaping planning and environmental law and governance. As I earlier observed, neoliberalism was a catalyst for the reforms of planning and environmental laws and the establishment of the Court in 1979, and continues to exert a strong influence on planning and environmental law and governance. The political ideologies of liberal democracy and citizen participation have also been influential, both at the outset in shaping the Planning Act and the Court Act and subsequently in the implementation and enforcement of these and other planning and environmental laws.

In recent times, the political ideology of right-wing populism is exerting a strong influence on planning and environment laws and governance. The so-called climate wars in Australia, crippling sensible and effective governance on climate change, illustrate the influence of right-wing populism.[3]

Ideologies can also be seen more specifically in the planning laws themselves. Patrick McAuslan, in his seminal book *The Ideologies of Planning Law*, identified three ideologies: private property, public interest and public participation.[4] I will come shortly to address these three ideologies, all appropriately beginning with the letter P.

Before doing so, let me note another philosophical influence, that of legal culture. Legal culture is a way of describing patterns of legally orientated social behaviour and attitudes. Elements of legal culture include the laws, legal system, legal institutions, and lawyers and other actors in the legal system and legal institutions. But legal culture also embraces ideas, values, aspirations and ways of thinking about these elements.

It includes, for example, attitudes to the role of law and the rule of law. As David Nelken observed, "like culture itself, legal culture is about who we are not just what we do".[5]

As I have written elsewhere, legal culture includes recognising the enduring importance of the rule of law for planning and environmental law and governance and the vital role that legal institutions, such as the Court and the legal profession, play in upholding the rule of law.[6]

Legal culture also shapes what we perceive are the proper functions of the Court in resolving disputes and how the Court ought to perform these functions. The Court has, over its life, employed different dispute resolution processes, including adjudication, conciliation and mediation. The Court, legal profession and court users have had different views on which dispute resolution process or processes are preferable. Until 2006, adversarial adjudication was seen to be the ordinary and preferred dispute resolution process, a reflection of the legal culture at the time. In 2006, attitudes changed and consensual mechanisms of conciliation and mediation began to be increasingly used. A different legal culture became established. The aim shifted to "matching the forum to the fuss", that is to say, selecting the appropriate dispute resolution process for the particular dispute and disputants.[7]

This shift naturally led to fashioning different ways to organise and conduct the appropriate dispute resolution process. The forms of conducting dispute resolution processes have included, for adjudication, onsite hearings, joint conferencing and reports of experts, and concurrent evidence. In these times of the COVID-19 pandemic, the forms in which dispute resolution processes are organised have included conducting conciliations, mediations and hearings remotely by audio link, audio-visual link or digital platforms such as Microsoft Teams.[8]

Private property

A liberal democracy champions a market economy and private property. The law institutionalises private property, including by recognising and centralising property rights in the law. An economic analysis of law suggests three criteria for an efficient system of property rights. The first is universality: all resources (including land) should be owned by someone, except for communal resources. The second is exclusivity: the owner of the property must be able to exclude all others from exploiting the resource. The third is transferability: if a property right cannot be transferred, resources will not be shifted from less to more valuable uses through voluntary exchange.[9] An efficient system of property rights in land and its resources is vital for a market economy and in promoting economic growth. This liberal democratic ideology of private property underpins planning and environmental law and governance.

Land is the foundation upon which the edifice of laws regulating the exploitation and use of resources is built. In planning law, zoning and land use are structured on the location and attributes of land; application for consent to develop land needs the consent of the owner of the land; and development consent authorises the use not the user of the land and runs with the land. Under pollution laws, the owner or occupier of land on which a scheduled activity is carried out (premises-based scheduled activities) must hold an environmental protection licence. Under resource laws, authorisation to

extract or exploit resources is limited to the land on which the resources are located. Laws for the resumption, valuation and taxation of land turn on the nature of the land concerned and the person's interest in that land. Under most planning and environmental laws, liability for carrying out activity on land in breach of the laws rests with the owner or occupier of the land.

Public interest

Planning and environmental laws expressly or impliedly promote the public interest. The public interest is multi-faceted. The exploitation and use of land not only benefits the property owner but also the community and government, including by maintaining the economy and encouraging economic growth. There is an undoubted interest in economic and social development. But so too is there public interest in the conservation of the environment, both natural and cultural. Planning and environmental laws seek, with varying degrees of success, to balance these three goals of sustainable development.

Under planning law, for example, consent authorities are required, in determining a development application to carry out development on land, to consider the public interest.[10] The public interest has been held to include the principles of ecologically sustainable development.[11] The Court, in determining a merits appeal against a consent authority's decision, has an additional duty to consider the public interest.[12]

The public interest also affects the Court in a different way. A fundamental tenet of the rule of law is the open justice principle. Hearings should be open to the public, so as to provide a visual assurance of independence and impartiality. The Court's reasons for judgment need also to be publicly available, ensuring transparency and accountability. The Court has been vigilant in upholding these principles of open justice.

Public participation

The ideology of public participation emerged in the 1970s and was a key component of the Planning Act and the Court Act. Under the Planning Act, public participation was enabled in strategic planning under Part 3, development control and assessment under Part 4, particularly public responses to applications for designated development, and environmental assessment under Part 5. Under the Court Act, public participation was enabled by objector appeals for designated development, applications for joinder to other appeals, and citizen actions to remedy or restrain breaches of planning or environmental laws.

More generally, planning and environmental laws promote the three pillars of procedural justice by enabling the public's access to information, participation in decision-making and access to the Court (facilitated in many laws by open standing provisions).

The Court has, from the outset, recognised and upheld the importance of public participation. Many decisions have enforced the public's rights to access information, participate in decision-making and access the Court. The Court has facilitated these

rights by rules of Court. Special rules, for example, lower barriers to public interest litigation.[13]

Planet

The Court is, of course, a specialist environmental court. Its jurisdiction covers the full array of planning and environmental legislation. In particular, the Court has jurisdiction regarding laws that are concerned with conserving the environment, including maintaining and enhancing ecological functioning, services and health and critical components of the environment, such as threatened species and endangered ecological communities. Planning and environmental laws consider the environment at different levels, including the local, regional and state. But the impacts of activities regulated by the laws do not necessarily stop at these boundaries; the impacts can extend nationally and internationally.

The Court, in its consideration and determination of matters, has embraced the imperative of considering all impacts, both direct and indirect, on the environment, and viewing environmental impacts holistically and without regard to boundaries. An example is the Court's consideration of the impacts that development might have on climate change and conversely the impacts that climate change might have on development.

People

The people in the Court's life and work can be viewed in four ways. First, the Court's core business is the resolution of people's disputes under planning and environmental laws. This involves consideration of not only the rights and interests of the parties but also the interests and concerns of other people, including neighbours, communities, the State, and extra-jurisdictional people and communities. The Court has long recognised that litigation in the Court is not simply between the parties, but involves other affected people and the public generally. In exercising its civil enforcement function under the Planning Act, for example, the task of the Court has been identified as being "to administer social justice in the enforcement of the legislative scheme of the Act", a task "that travels far beyond administering justice inter parties".[14]

Second, there are various stakeholders in the Court's work. There are the Court users, including the parties, the legal representatives and the witnesses. There are the affected people and communities, and the public generally. There is government, both local and State. There are business and industry. There are various professional bodies, including those in the law, planning, architecture, engineering and science. EPLA is one of these stakeholders. There are the universities and higher education bodies, and their academics and students. The Court has engaged with these stakeholders in various ways, including by Court User Group meetings, hosting delegations, running clinics, and lecturing and speaking at educational institutions, events and programmes.

Third, there are the members of the Court who discharge the Court's functions and work. These are the judges, commissioners, acting commissioners, registrars and court staff. The Court, over its life, has indeed been fortunate to have had, as members of the Court, knowledgeable and capable people who are committed to the Court and

its important work. The valuable contributions of the Court to the law, legal system and legal thinking have been achieved through the efforts of these talented and dedicated people.

Fourth, the Court is not an institutional island but sits within a landscape of judicial institutions. The Court interacts with other courts in the judicial system. The Court's decisions are appellable to the NSW Court of Appeal and Court of Criminal Appeal, and ultimately to the High Court of Australia. The Court benefits from the guidance of these appellate courts. In turn, the Court serves an appellate function. The decisions of commissioners of the Court are appellable to judges of the Court and decisions of the Local Court convicting or sentencing persons for environmental offences are appellable to the Court. The Court's decisions in these matters also provide guidance on the law and legal decision-making.

Party

This brings me to my last P word, Party. This occasion, kindly organised by EPLA, is to celebrate the Court's 40th birthday today. I have introduced some of the ways that the Court has contributed to the law, legal system and legal thinking. Other people, soon to speak, will highlight other ways. The anecdotes will no doubt vary, from the personal to the professional, from the quirky to the sensible. But they all will tell a story of a Court that is important, innovative and influential.

May I propose the toast: to the Court!

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[1] *The Land and Environment Court Act 1979* was assented to on 21 December 1979 and commenced operation on 1 September 1980.

[2] Brian J Preston, "Operating and Environment Court: The Experience of the Land and Environment Court of New South Wales" (2008) 25 *Environmental and Planning Law Journal* 385, 387-388.

[3] Brian J Preston, "The End of Enlightened Environmental Law" (2019) 31(3) *Journal of Environmental Law* 399.

[4] Patrick McAuslan, *The Ideologies of Planning Law* (Elsevier, 1980).

[5] David Nelken, "Using The Concept of Legal Culture" (2004) 29 *Australian Journal of Legal Philosophy* 1.

[6] Brian J Preston, "The enduring importance of the rule of law in times of change" (2012) 86 *Australian Law Journal* 175.

[7] Brian J Preston, "The Land and Environment Court of New South Wales: A Very Short History of an Environmental Court in Action" (2020) 94 *Australian Law Journal* 631 , 635-638.

[8] Land and Environment Court, "COVID-19 Pandemic Arrangements Policy" (first published 23 March 2020, replaced on 8 July 2020).

[9] Richard Posner, *Economic Analysis of Law* (Little Brown & Co, 2nd ed, 1977) 29.

[10] *Environmental Planning and Assessment Act 1979* s 4.15(1)(e).

[11] *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10.

[12] *Land and Environment Court Act 1979* s 39(4).

[13] Land and Environment Court Rules 2007 r 4.2.

[14] *F Hannan Pty Ltd v Electricity Commission of New South Wales (No 3)* (1985) 66 LGRA 306, 313.