Attorney General's opening speech for the Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) Conference 2010

Distinguished guests
Ladies and gentlemen

It is a pleasure to be with you today celebrating an important event.

Today marks the 30th anniversary of the establishment of the Land and Environment Court of New South Wales.

It is an honour for me to speak about the Court which has developed an outstanding reputation; a Court which plays an important role in delivering justice to the people of New South Wales.

History and Role

Since its establishment on 1 September 1980, the Court has exercised exclusive jurisdiction over environmental, planning, building and development matters.

This represented an innovative and revolutionary approach to creating a "one stop shop" for resolving environmental problems.

The Court is also a centre for excellence and is in some respects a think tank where a coherent and robust body of environmental jurisprudence can be developed.

When the first Chief Judge of the Court was asked what he thought was his role in the Court, His Honour James Robert "Diamond Jim" McClelland said it was:

> "…to draw the line somewhere between those who wanted high-rise building in the Botanic Gardens and those who wanted to turn Pitt Street into a rainforest."

Indeed, environment law was and is an exciting field for a judge to take on the tough question to determine where the balance of competing environmental, social and development considerations lies.

Wherever that balance may be, a judge of the Court is in the best position to determine it.

Before the Land and Environment Court came into existence, the mechanisms for resolving environmental disputes were very different.

There was a myriad of courts and government bodies which carried out different functions, and this was not done in a coordinated way.

This was also not helped by the inconsistencies in decision-making as well as the delays in various proceedings.

Prior to 1980, the Land and Valuation Court, the Valuation Boards of Review and the Supreme Court dealt with land valuation and compulsory acquisition matters.

In separate actions, the Local Government Appeals Tribunal oversaw building, subdivision and development matters.

The Local and District Courts dealt with criminal enforcement of environment law breaches while the Supreme Court handled judicial review and civil enforcement.

In those days, a person would have to first go to the right place to file their dispute, whereupon, if they got the outcome they wanted, they then had to approach the appropriate court to seek enforcement of the appropriate form of remedy.

The fragmented system that existed also impeded the development of effective law and policies to address the pressing environmental issues of the time.

Even if there was dialogue between the various bodies, change was often slow coming.

That is why Parliament decided that a single Land and Environment Court needed to be established.

This was to bring about major improvements to the way environmental matters could be dealt with.

But the Land and Environment Court is much more than just an efficient vehicle for dispute resolution.

It is, as the Chief Judge described, a multi-door courthouse which offers one of the world's most effective dispute resolution paradigms.

In proceedings before the Court, a range of dispute resolution processes is available to cater to the specific needs of parties to a dispute.

These processes include conciliation, mediation, early neutral evaluation, administrative merits review and litigation.

Since 2008, the Court has also adopted the powers of the Supreme Court to direct that a matter be referred to a referee.

The referee conducts an inquiry in relation to any aspect of the whole or part of the proceedings and then reports back to the Court.

It is clear that the Court is designed to be able to draw on the benefits of alternative dispute resolution.

At the same time, the Court, as distinct from a Tribunal or government body, is an independent judicial body with the power to compel compliance with environment law through civil and criminal enforcement.

As was explained in the Second Reading Speech when the *Land and Environment Court Bill* was introduced to Parliament, the Minister said:

> "The court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. The court, in consequence, will be able to

function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit”

There are numerous innovative features of the Land and Environment Court.

I will focus on four such features:

Firstly, the Court is an independent judicial body with the status of a superior court of record;

Secondly, although the Court administers environment law, it draws on the diverse expertise of its judges and Commissioners in the environmental field other than just legal expertise;

Thirdly, aside from just offering compensatory remedies, the Court can impose criminal sanctions and make other orders such as the carrying out of an environmental project; and

Fourthly, as I have mentioned briefly before, the Court is also an innovative institution because it makes use of various alternative dispute resolution processes which I will speak more about later.

Judicial independence and superior court of record

At its establishment, the Land and Environment Court was given the status of being a superior court of record.

This means that it has the same powers as the Supreme Court in relation to judicial review, the granting of equitable remedies in civil proceedings, the imposition of criminal sanctions and the carrying out of merits review of administrative decisions.

A judge of the Court has, in a real sense, judicial power and not just the limited administrative power of the various government decision-making bodies that existed prior to the Court's establishment.

A judge of the Court may direct enforcement of the Court's orders but a government body may not.

The establishment of the Land and Environment Court as a judicial body, rather than as an organ of the executive branch of government, means that it enjoys independence to keep check on the administrative decisions of government.

The establishment of the Court as a superior court of record provides public acknowledgement of the significance of the environmental issues the Court deals with.

Environmental expertise of the judges and Commissioners

The second innovative aspect of the Court is the diverse expertise of the judges and Commissioners of the Court.

While a person is required to be an Australian lawyer of 7 years standing or a judicial officer in a prior role to be eligible for appointment as a judge of the Court, the requirement to become a Commissioner is different.

Section 12 of the *Land and Environment Court Act 1979* provides that a person is eligible to be a Commissioner if they can demonstrate knowledge and experience in town planning, environmental protection, land valuation, architecture, engineering, surveying or building construction.

A person is also eligible to be appointed as a Commissioner if they have suitable knowledge of matters concerning land rights for Aborigines.

This is because Commissioners may hear certain disputes within Aboriginal Land Councils and also sit on panels to assist and advise a Judge of the Court in the hearing of land claims under the *Aboriginal Land Rights Act 1983*.

Throughout its history, Commissioners of the Court have included highly qualified lawyers, architects, town planners and engineers.

Their qualifications range from tertiary degrees in law, environmental studies, science and management to Masters degrees and doctorates in those fields.

The roles of the Commissioners at the Court range from conducting conciliation to hearing matters in Classes 1, 2 and 3 as delegated by the Chief Judge.

The diverse professional expertise of the judges and Commissioners beyond the law is important to the Court’s administration of environment law and of justice.

This is because an understanding of environment law is assisted by an awareness of its policy and practical context particularly as environmental concepts, values and issues change over time.

Criminal Jurisdiction

Since its establishment, the Land and Environment Court has been able to hear matters "punishable in the Court in its summary jurisdiction".

These matters include Class 5 matters which involve prosecutions by government authorities for offences under planning or environmental laws. These laws include the:

- *Environmental Planning and Assessment Act 1979*;
- *Protection of the Environment Operations Act 1997*;
- *Contaminated Land management Act 1997*;
- *Heritage Act 1977*;
- *Threatened Species Conservation Act 1995*; *and*
- *National Parks and Wildlife Act 1974.*

However, the Court also hears appeals from the Local Court against conviction and sentencing for environmental offences.

The criminal jurisdiction of the Court is an innovative aspect of a specialist environment court because it is a clear signal to the public that the Court has at its disposal the power to impose criminal sanctions.

That is, the Court will, when appropriate, uphold legislated standards with respect to the treatment and management of the environment by using the criminal law.

As a one-stop-shop with specialised environmental jurisdiction, the court's decisions have developed a consistent and transparent body of jurisprudence in relation to environmental crime and, in particular, sentencing.

Since environmental crime has unique characteristics, the Court is in the best position to deliver principled and reasoned sentences to offenders.

Additionally, I am also pleased to know that the Court's sentencing database for environmental offences is another innovation which is a world first.

Sentencing statistics for criminal matters dealt with by the Land and Environment Court have, since 2008, been accessible on the Judicial Information Research System managed by the Judicial Commission of New South Wales.

To appreciate the scope of the Court's sentencing powers, the *Protection of the Environment Operations Act 1997*, for example, allows the Court to impose maximum penalties on an individual of one million dollars or 7 years' imprisonment, or both.

This is for the most serious category of offences relating to waste disposal or spillage that harms the environment.

Those penalties apply if the commission of the offence was wilful. Otherwise, even if the offence arose from negligence, the maximum penalty that applies is $500,000 or 4 years' imprisonment, or both.

In addition to criminal sanctions, and aside from its compensatory remedies in its civil proceedings, the Court may also order the offender to do the following things:

- publicise the offence;
- notify certain people of the offence and its consequences (for example in an annual report of a company to its shareholders);
- complete a specified project for the restoration or enhancement of the environment in a public place;
- audit its activities;
- pay a particular amount to the Environmental Trust or other environmental organisation;
- attend a training course or to establish a relevant training course for employees or contractors.

These novel remedies allow the Court to be flexible in dealing with matters in a way it sees fit.

For example, where there is no immediate human "victim" in an environmental offence, compensatory remedies would not be possible.

However, where criminal sanctions may be too onerous, the judge may impose an alternative remedy such as requiring the offender to publish their wrongs for others to see.

Alternative dispute resolution

Finally, I would like to talk in more detail about the alternative dispute resolution or ADR processes used at the Court.

Section 34 of the *Land and Environment Court Act 1979* provides that the Court may arrange a conciliation conference between parties, with or without their consent, if there is a proceeding pending in Class 1, 2 or 3 of the Court's jurisdiction.

These classes are some of the most common areas of dispute which go before the court.

They relate to environmental planning and protection appeals, local government appeals and land tenure, valuation and compensation matters.

The conciliation conference is presided over by a single Commissioner. To ensure parties are given flexibility to resolve their disputes, they may reach an agreement and request that the conciliator dispose of their matter in accordance with the agreement.

Alternatively, the parties may disagree as to the outcome of their dispute but agree that the conciliator makes an adjudication and dispose of the matter.

If the parties cannot come to any agreement, their matter is brought before a judge of the Court for determination.

So why is conciliation provided for in the Act? Conciliation empowers parties, with the help of the conciliator, to come up with their own solution to the dispute.

Even if they cannot settle, the real issues in the dispute can be identified so subsequent litigation does not have to be protracted.

In 2005, there were 17 conciliation conferences.

In 2009 there were 481.

This is an excellent example of just how successfully the Land and Environment Court has promoted the just, cheap and quick resolution of dispute through ADR.

The Court's power in relation to ADR does not end with conciliation conferences.

The Court may, at the request of the parties or of its own volition, refer certain proceedings to mediation.

Mediation is a similar process to conciliation.

However, a conciliator is an expert in environmental matters so his or her role may have an advisory dimension.

A mediator, on the other hand, may be an expert in dispute resolution but he or she does not need to be an environmental expert.

In 2009, 70% of all matters which went to mediation at the Court were resolved before hearing.

Finally, another ADR process available at the Court is neutral evaluation. This is a confidential process in which an impartial evaluator seeks to identify and reduce the issues of fact and law in a dispute. The evaluator's role is to examine the strengths and weaknesses of each party's case and to offer an opinion as to the likely outcome of the proceedings.

All of the above ADR processes I have mentioned place the Land and Environment Court in a unique role to be able to effectively pursue the just, quick and cheap resolution of disputes.

This innovative feature brings the Court beyond the traditional adversarial system we often see.

It is clear that we have and will continue to look to the Land and Environment Court as a beacon for the future of dispute resolution.

I wish you all an enjoyable conference as you reflect on existing experiences in environmental law, policies and practices, and contemplate what will hopefully be a lush, green future.