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LAND AND ENVIRONMENT COURT
OF NEW SOUTH WALES

THE CHIEF JUDGE
THE HONOURABLE JUSTICE MCCLELLAN
AND THE JUDGES AND COMMISSIONERS OF THE COURT

THURSDAY 1 SEPTEMBER 2005

FAREWELL CEREMONY OF THE CHIEF JUDGE OF THE LAND AND
ENVIRONMENT COURT JUSTICE PETER MCCLELLAN

Mr I Harrison SC, President, New South Wales Bar
Association
Mr JE McIntyre, President, Law Society of New South Wales

MCCLELLAN CJ: Good morning, be seated please.
Mr Harrison.

MR HARRISON: If the Court pleases. It gives me great personal and professional pleasure to speak this morning on the occasion of your Honour's retirement as the Chief Judge of this Court. I have recently had the opportunity to speak at ceremonies to mark the judicial retirement, indeed as recently as yesterday, of Justice Wood as the Chief Judge at Common Law. However unlike that and similar occasions, your Honour's retirement from this Court today is not a retirement in the strict sense. Indeed, as is well known and applauded, your Honour leaves this Court to take up your appointment to replace Justice Wood as the Chief Judge at Common Law.

As events would have it I am able to speak with some authority about certain aspects of your Honour's career. For example you went to Normanhurst Boys' High School. I happen to know that because I was there at the time. That school was instrumental in assisting your Honour to overcome adolescent difficulties you had with low esteem, lack of confidence and self doubt. By all accounts the school did a good job!

Your Honour then went to Sydney University. I know that because I was there also. I did articles at Messrs Hall & Hall, Solicitors then at 60 Martin Place. Your Honour joined that firm doing post-graduate articles as I recall in 1974. For a time therefore we shared the same employer. I think your Honour was paid more than me, something that has not been a source of resentment which I have carried to this day.

We were both first admitted to practice in the same year. Your Honour also had opportunities to appear in or conduct public inquiries. I have had, for better or worse, a similar experience although in much less significant circumstances. Finally, for a time your Honour and I were members of the same golf club. Justice Talbot recently

expressed considerable surprise in these circumstances when I informed him that I neither owned nor was intending to purchase a vineyard.

I distinctly recall your Honour's work as an articled clerk at Hall & Hall. I remember reading documents prepared by you, particularly affidavits in proceedings in the Equity Division and other documents prepared for what was then the Local Government Appeals Tribunal. You had then an energy and capacity for work which was, if I may say so, extremely impressive. You did well at the firm. It is little wonder that your career led you to have one of the most, if not the most, extensive practices at the Land and Environment Bar.

You were however no means restricted to that area alone, having at the time of your appointment as a Judge of the Supreme Court a very extensive and successful commercial and appellate practice. As you indicated when you were sworn in as a Judge of that Court, your career was significantly influenced by the encouragement and direction given by Murray Wilcox, now Justice Wilcox of the Federal Court, and John Brownie, now a retired Justice of the Supreme Court of New South Wales. Nor did your appointment as Chief Judge of this Court come as a surprise to anybody. Indeed there was a certain inevitability in your appointment. It was only proper that you should have succeeded Chief Judge Pearlman as a former partner of the firm where you started your career.

Your involvement either as counsel assisting or as Commissioner conducting several Royal Commissions of Inquiry has given you a depth and breadth of experience which few can claim. Indeed, in your own words, the opportunity to join the Maralinga Royal Commission offered you the brief of a lifetime. It gave you the chance to work with and question some of the great scientists of the day including Lord Penney, the leader of the British expedition. It also gave you the opportunity, as you said on your swearing in, to know Sir Mark Oliphant, a man you have described as a truly great scientific mind blessed with an unusual insight into the human condition. As you have also noted Jim McClelland was of course the Royal Commissioner who did not hold back in his final report. He prepared a stinging attack on the Government of Margaret Thatcher and indeed on the whole notion of the British Empire.

I am told that this worked slightly to your disadvantage in the years to come. Apparently after having been appointed as a Judge of the Supreme Court of New South Wales you had an opportunity to attend a function conducted by Her Majesty the Queen Mother in London. You introduced yourself to her. The Queen Mother asked you where you were from and you told her. She asked you then what you did and you said, "I'm a judge ma'am". Her Majesty replied, "Oh really, a judge. Dogs or horses?"

Your significant skills and energy have taken this Court to an unprecedented level of significance in the Court hierarchy of this State. Three things in particular come to mind. First, you've had particular success in the reorganisation of Class 1, 2 and 3 merit appeals, all now dealt with under a new regime commencing on-site at 9.30 on the first day of the hearing. Objectors, experts, consultants, and I'm glad to say lawyers, congregate in the site before any evidence is taken in the normal course. This has proved to be particularly efficient in the saving of court time. Indeed, many cases are resolved on-site and never get to court. I am told this is a good thing. Secondly, you implemented the expert witness practice direction. Joint reports are published, evidence is given by experts concurrently. Merit appeals and particularly valuation cases have proved well suited to these new directions. Thirdly, you have promoted the use of court appointed experts. This has proved particularly successful to the extent that it has encouraged acceptance by responsible authorities of amended plans following the provision of preliminary reports. It has served often to break deadlocks in circumstances where that previously did not occur and has assisted parties to negotiate in a less confrontational way. Experts formerly afflicted by at least the potential for a conflict of interest have welcomed the changes. In these and other ways your Honour has provided huge intellectual stimulus to the work of the Court and the disposition of its important business.

I am aware that one of your brothers is a famous musician. Over the years I have heard your Honour sing. I think you did well to pursue a legal career.

You move from your role as Chief Judge of this Court to the Supreme Court and it is not without precedent. Jerrold Cripps who sits beside you today, a former Chief Judge of this Court, made a not dissimilar move some years ago. Justice Cripps had a career which saw him sit as a judicial officer in almost every capacity possible in this State with the exception of a Mining Warden at Brewarrina. For this reason if for no other your Honour's career will be watched closely by those of us with an interest in the just, quick and cheap administration of justice.

The Bar applauds your work as the head of this jurisdiction, coming to an end as it does on the 25th anniversary of this Court. We wish you well on the next stage of your important work.

May it please the Court.

MCCLELLAN CJ: Mr McIntyre.

MR MCINTYRE: May it please the Court. Your Honour on behalf of the solicitors of New South Wales it is my privilege to thank you for your contribution to this Court and bid you farewell today.

At your swearing in as a Judge of the Supreme Court in January 2001 your Honour commented that when at Law School you could never have imagined the life that was before you. You said that you had always been attracted to the role of an advocate but had no appreciation of the opportunities that would be given to you to be involved in so many fascinating aspects of the law.

Briefly reflecting on your career to date, you were a gifted advocate practising in many areas of law but accumulating particular expertise in planning and environment law. When you moved from the Supreme Court to become Chief Judge of the Land and Environment Court your Honour set about revolutionising the way in which the Court was run as well as the way in which expert evidence was given. You observed that in many cases parties had devoted considerable resources to obtaining experts' reports, sometimes only to find that at the end of the day they gave virtually the same evidence on issues such as traffic, noise and other matters. Your Honour held the view that it made no sense and was a waste of resources and as a result of your initiatives the Court now encourages litigants to agree on one expert and split the cost.

There have been other examples of your contributions to the jurisprudence of this Court and I am told that they can be measured in a number of the landmark decisions that you have handed down involving the elaboration of the application of the principles of environmentally sustainable development and the issue of estoppel involving alleged breaches of the exercise of the statutory power.

Your Honour is known to some of your closer associates as Peter Perfect and have always made it clear that nothing short of getting the best outcome in the public interest was acceptable. You are also known for your principled approach and respect that you accord others. Not afraid of hard work and long hours I am told that your Honour closed your first meeting with the Judges and Commissioners of this Court by telling them that if they had any questions or needed advice you would be in chambers at 7am every morning and they should feel free to drop in and see you. I have been unable to find out the number of times your colleagues at the Court avail themselves of this opportunity but I am well aware that Justice Bignold was not one of them.

Your Honour's other great passion and preoccupation in life is the making of wine. In this area I have been given a word of warning by one of your associates. Unless I have plenty time on my hands don't ask your Honour about how Wattlebrook is going. Words like Verdelho are likely to spring forth along with gold and silver medals, handpicked bunches, American Oak and above all, delivery free of charge. Your Honour is obviously a truly devoted vigneron but given the experience of others in the wine

industry you are obviously not a superstitious man otherwise who else would be brave enough to commence a vineyard in an area called Broke. Wattlebrook is said to be a small boutique winery and that its customers can be assured of prompt personal service. The parallel with this Court is uncanny, no doubt in large measure due to your Honour.

Your Honour you've endowed this Court with immeasurable increase in stature. You are leaving it a different place from the one that you took over just over two years ago with a job well done. On behalf of the many solicitors who in the past have briefed you and in more recent times have appeared before you I would like to extend the profession's gratitude for the contribution you have made to the development of the law in this jurisdiction and the administration of this Court.

May we bid you farewell today and wish you well in your new appointment as the Chief Judge at Common Law in the Supreme Court. You have big shoes to fill but the solicitors of this State are confident that you will do so admirably. May it please the Court.

MCCLELLAN CJ: Thank you. This is a significant day in the life of the Court. I am honoured by your presence this morning. May I particularly thank Justice McHugh and Judge O'Meally for taking time from their busy schedules to join us.

As you all know, today marks the 25th Anniversary of the Land and Environment Court, a significant event which we celebrate with a dinner tonight. When arrangements were being made for the dinner I had no idea that I would be asked to leave the Court and take up a position in the Supreme Court. However, that coincidence has provided all of us with an opportunity to reflect on the work of the Court and this morning, in particular, consider the changes which have occurred in recent years. To that end I greatly appreciate the kind remarks of Mr Harrison and Mr McIntyre. As ever, however, Mr Harrison has found humour where others fear to tread.

I have been asked on many occasions which of the reforms we have implemented in the past two years are of the greatest significance. Of course they are all significant in their own way but there are two matters which I emphasise.

The first is the changes we have made to the role of the expert in the resolution of environmental disputes. The use of court appointed experts and concurrent evidence were initially perceived as novel, treated with suspicion by some, and rejected as unworkable by others. Notwithstanding that starting point the reports I now receive suggest that the changes have received general acceptance from those involved in the work of the Court. When court experts were first introduced it was not

uncommon to find motions brought to a judge seeking to review the Registrar's decision to appoint a court expert. In recent times these motions are rare. It is much more common now to hear motions where the Registrar has not appointed an expert.

Some of you may have read in The Australian newspaper this week of the concerns expressed by experts giving evidence in the Family Court in relation to child custody disputes. The story related how medical experts are refusing to accept instructions when they may have to give evidence in that Court. The concern expressed by the doctors was that because the court process was not a search for the truth but rather an adversarial battle, the opportunity for them to utilise their expertise in a genuine search for the correct outcome was lost.

I have previously spoken of my concerns with the reports I have received that the adversarial nature of the contests in this Court has led many qualified and experienced persons to decline retainers which may involve them in giving evidence. As with the Family Court this should sound alarm bells about the adversarial system. Whatever be its suitability for resolving factual matters it has come under increasing scrutiny where experts are concerned. I am pleased by reports which I have received that now that the Court appoints experts and uses concurrent evidence to resolve problems where the experts are in disagreement, people who previously were not prepared to become involved in the court process are prepared to accept retainers. Of course, the changing of the Court's process must be accompanied by an understanding of how it will operate so that experts will feel comfortable when giving evidence. In this respect I am particularly grateful for the efforts of the Australian Property Institute in devising and conducting an intensive course of education for experts in conjunction with Sydney University. Although the course was originally designed for valuers it is now attracting a broad clientele which I have no doubt will grow as it becomes more widely known.

When I was sworn in as Chief Judge I spoke of the significance of identified principles in the resolution of environmental disputes. I have said on many occasions that without a body of principles merit decision-making becomes idiosyncratic and unpredictable. It seriously undermines the justification for an unelected body being given the power to review the decisions of elected councillors or the Minister. To address this problem I have encouraged the Commissioners to express their reasons in individual cases by reference to identified principles which are available to everyone involved in the process. I am pleased that this task has been enthusiastically embraced by the Commissioners. As a consequence of their efforts the Court is now able to provide ready access to the defined principles through its website.

In recent weeks I have learned of the work which has been

undertaken by a number of councils and in the offices of architects and planners to make the principles which have been identified by the Court available to all who participate in designing and making decisions about proposed development. Although the resolution of an individual dispute is of critical importance to the parties the contribution which appropriate principles can make to the planning system in this State gives them a pivotal role in the orderly and economic development of land.

I am conscious that the changes we have introduced in the court in the last two years have required all involved to respond with new ways of thinking about and completing their tasks. Because the Court is required to resolve disputes in which in almost every case one party represents the interests of the State or Local Government it is critical that its processes meet the community's expectations of cost efficient and reliable dispute resolution. Although there was an initial reluctance in some about change it has now been enthusiastically embraced by most who are involved in the work of the Court. However, there will remain a need in the future to constantly monitor the way the Court operates to ensure that it continues to meet legitimate public expectations. I pass that task to my successor who I am sure will receive the same cooperation from the legal profession as I have. That cooperation generously given by so many has greatly assisted the work of the Court.

The changes in the Court's processes have imposed significant burdens on the Registry staff. In particular the Registrar has been required to undertake a more complex role in organising the Court's business. The Court was extremely fortunate that shortly after I was appointed Susan Dixon indicated her preparedness to accept the role of the Registrar. I am not sure that when she agreed to take the job she had any real idea of the extent to which she would be required to manage the process of change. I cannot sufficiently express my appreciation for the energy, enthusiasm and wise judgment she has brought to her tasks. Her efforts have met with the universal appreciation of the legal profession and members of the Court and have, more than anyone else, contributed to the success of the reform process.

No court can function without an efficient listing manager. During my time Christine Skinner has carried out that role with a calm efficiency turning all potential crises into manageable incidents. I thank her and all of the Registry staff for their dedication to the work of the Court.

As you all know apart from the introduction of identified principles the hearing process for many merit appeals has now been significantly revised. Both in the development of planning principles and in the management of the day to day hearing process significantly greater burdens have

been imposed on the Commissioners than was previously the case. The resolution of many matters on-site has required the Commissioners to develop new skills in the management of informal processes in what can often be an emotional environment.

Notwithstanding the extra burdens which the Commissioners have been required to accept they have approached their tasks with universal enthusiasm. I express my immense gratitude for the contribution which they have made to the process of change. I have said many times to the Senior Commissioner that the planning principles which the Commissioners develop will be their lasting legacy to environmental control in New South Wales. I have no doubt that this will prove to be the case. When I was sworn in as Chief Judge I marked out the importance of the work which the Commissioners undertake. With the development of planning principles their decisions have far greater significance.

Finally, I wish to thank the Judges of the Court for their support during my time as Chief Judge. The Court had been through a difficult period before I arrived and no doubt some were hoping for a period of greater tranquillity. Successful change requires energy and dedication to achieve the desired outcome. I have been fortunate that the Judges of the Court accepted the need for change and contributed enthusiastically to its successful implementation.

Can I also express my gratitude that the Honourable Jerrold Cripps has joined us on the bench this morning. It was his inquiry which first initiated the process of change and made it possible for the Court to respond to many of the problems which he identified.

When I was sworn in as Chief Judge of the Court I remarked on the history of dispute resolution in environmental law and the significance of the various courts and tribunals which have been given the task. I also commented upon the importance of environmental disputes to the community, the mark of which was the level of expertise of the advocates engaged in their resolution. The legal principles by which environmental disputes are resolved are, apart from the statutory matters, drawn from the general administrative law. It is appropriate to ask whether those principles are sufficiently informed by consideration of environmental problems and whether the difficulties facing refugees and immigrants should be allowed to dominate when the courts are moulding appropriate principles.

That said, I have greatly appreciated the opportunity which my time as Chief Judge of this Court has given me to consider and write about those principles. Although I give up responsibility for considering them on a daily basis I will now have the opportunity to contribute to them at the appellate level.

The work of the Chief Judge of any court imposes burdens on the judge beyond those of a trial judge. Many of those burdens fall upon the judge's associate. I express my gratitude to Angela Flockhart who has willingly carried those burdens. I quite simply could not have completed my job without her loyalty and assistance.

Finally, I thank you all for coming here this morning. You honour me but more significantly you honour the Court. Could I now invite you all to join us for a cup of tea in the Library. Thank you.

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