

SPEECH FOR ANNUAL PROPERTY LAW CONFERENCE

PHILLIP HARRIS MEMORIAL LECTURE

“FUTURE DIRECTIONS FOR PROPERTY LAW”

FRIDAY, 12 MARCH 2004

I am grateful to the Australian Property Institute for the opportunity to speak at your conference this morning and I am honoured to have been asked to deliver the lecture in memory of Phillip Harris. I am aware of Phillip's deep interest in environmental issues and his concern to ensure that our planning processes and the operation of property laws achieved appropriate outcomes.

Last week I attended a meeting of Australasian planning courts and tribunals. It was held in Hobart, a modest but beautiful city. During the course of the meeting I learned that the footprint of the city of Hobart is virtually the same as the footprint of greater New York city. At the last census Hobart had a population of 191,169 people. In the area described as greater New York the population is estimated to be 21,200,000 people.

In Hobart, most people live in a dwelling with a significant discreet curtilage. In New York, most people live in apartments sharing modest open space provided in parks.

By the accidents of history which have created modern Australia, we have until relatively recently been spared the conflicts which characterised the industrial revolution and the increasing urbanisation of life in the northern hemisphere. Although many people cherish a romantic view of the world as immortalised by William Wordsworth's descriptions of the Lakes District of England, the words of William Blake reflect the harsh reality of the industrial revolution. Even today Blake's famous refrain "And did those feet in ancient time walk upon England's mountain green?" is sung with full voice by many who cling to the romantic vision, when the reality and Blake's true meaning are otherwise. However powerful the image of Australia depicted on canvas by the Roberts, Boyds and Nolans, it is Jeffrey Smart who reflects the world in which most of us live.

Whether or not as individuals we would prefer to live in an urban environment, a rural existence is, for many reasons, only available to a few. Even the 1960's version of a suburban lifestyle is increasingly being replaced by the 21st century form of the urban environment. And I have

no doubt that by 2040 the common dwelling for most people will be quite different to the form it takes today. It is part of the human condition to assume that the world will not change. Human experience teaches otherwise.

The increasing urbanisation of our community during the last 150 years has created the need for planning controls. Originally confined to controls over the opening of roads in the city of Sydney (and then the problem of protecting the public purse from having to maintain them), this was followed by control over subdivision. The need for planning was hardly recognised. But as the squatter has given way to the developer, the pressure of population growth together with the need for sophisticated urban infrastructure, created a need for planning control. Whereas in the 19th century an owner of land was, subject to the law of nuisance, virtually free to do with it as he or she pleased, by the end of the 20th century the successors of the original owner can neither demolish, subdivide or build without the consent of the relevant authority. The community, through its elected representatives, controls the evolution of our cities and must determine the acceptable urban form.

Planning control is a multi faceted process. This is recognised in the current legislation which provides for State, Regional and Local plans. And at each level, controls may be imposed on the development of individual parcels of land or even parts of buildings. At the macro level in New South Wales, there is no formal right of appeal from any decision of the regulatory authority although there are of course the conventional political processes. At the micro level, an appeal is available to the Land and Environment Court. It is the evolution of that appeal process and its future development on which I will concentrate this morning.

At the end of the 19th century, the industrial and agricultural development of modern Australia was just beginning. Our wealth was still derived from the land. The common law was the guiding force for the rule of law. At the time of Federation, New South Wales had no environmental law and there was no town planning law. However, change was coming. At the time of Federation, there was a concerted effort to provide legislation to control many aspects of our lives. The change occurring is well illustrated in the abridged version of Manning Clark's History of Australia, the period 1851-1888 is given the title "The Earth Abideth Forever". 1888-1915 is titled "The People Make Laws".

In 1906 the State Government passed the first comprehensive Local Government Act. Recognised quickly as inadequate, it nevertheless provided control by local Councils over the subdivision of land and the opening of roads. An appeal against a Council's decision lay to the judges of the District Court. There were not many appeals. The 1906 Act was replaced by the Local Government Act of 1919. It continued to provide the legislative structure for local government until repealed in 1993.

Part XI of the 1919 Act was titled "Building Regulation" and Part XII carried the label "Town Planning". However, the reality was that, apart from the introduction of Residential District Proclamations designed to stop industry, commerce and flats in areas given over to bungalows, "town planning" was confined to the control of subdivision and the opening of roads. The 1919 Act also provided for rights of appeal to the judges of the District Court.

In 1945, and only after considerable pressure was applied by the Commonwealth Government, (grant monies were threatened to be withdrawn), the Local Government Act was amended and Part XIIA titled "Town and Country Planning Schemes" was incorporated. It was the legislative foundation for the County of Cumberland Planning Scheme

and other county schemes. They were followed by local planning schemes. The primary responsibility for development control remained with Councils, subject in many areas to a power of veto at State level.

The 1945 legislation did away with appeals to the District Court, that jurisdiction being given to the Land and Valuation Court, which had been created in 1921 to deal with Crown land and related problems.

With the commencement of Part XIIA, and the introduction of development control, the legal profession inevitably became involved in planning problems. Town planning, as a discipline, was in its infancy and for many years surveyors, engineers and architects did the “on the ground” work. But with development now regulated by written instruments, questions of statutory construction emerged and complex concepts required explanation. The limits of the discretion available to the decision-maker, the permissible intensity of development, the compatibility of disparate forms of development, the need for an acceptable level of public facilities, such as roads, water and sewerage, public transport, schools and recreation facilities, and the problem of existing use rights were major issues, amongst many others, which the Land and Valuation Court had to resolve.

In 1958 the Parliament legislated to provide for Boards of Appeal in subdivision and building matters. Control of development appeals remained with the judges of the Land and Valuation Court until 1973, when the Local Government Appeals Tribunal was created. That Tribunal had responsibility for appeals in relation to all discretionary decisions made by Councils. The Supreme Court continued to have a role deciding questions of law which arose in appeals to the Tribunal, and, particularly following the decision in **Sutherland Shire Council v Leyendekkers**, [1970] 1 NSWLR 356 an increasing role in determining and enforcing the law.

The Local Government Reports, as they were known, reflect the extraordinary contribution which the judges of the Land and Valuation Court made to the development of principled decision-making in town planning. Many of those decisions and the appeals determined from them, together with the decisions of the Supreme Court declaring the law, survive today.

The contribution the courts were able to make to the development process was assisted by the form of the early planning instruments. With the County of Cumberland Planning Scheme as the model, local schemes, when made, followed a familiar pattern and adopted standard

phraseology. In recent years, this approach has been largely abandoned, making decisions in relation to the provisions of one plan of little, if any, relevance to others. This has substantially increased the work of the Court and, I suspect, has contributed to the complexity, uncertainty and cost of the whole system.

Throughout the 1960s and 1970s, the population of Sydney continued to grow apace. Notwithstanding cyclical recessions, the rate of urban, industrial and commercial development increased significantly. The so-called baby boomer generation, educated with the assistance of Commonwealth scholarships, was entering the work force.

In the early 1970s, young graduates began to emerge from the universities with an increased understanding of science and the interaction of development with the natural environment. Town planning became an academic discipline and university courses in environmental science began to emerge. At the same time, very significant changes were occurring with the emergence of community values with respect to the value of natural areas, the acceptability of industrial pollution, the impact of noise, the quality of the natural and built landscape and many other environmental considerations were articulated. The environment became a political issue at the local and national level. It was not the

only change occurring. As Bascow and Wheeler have observed, the wave of environmentalism which developed in the industrialised world grew in the turbulent period of political ferment and change which occurred in the 1960s and 1970s.

In 1976, just prior to the elections of that year, the state Liberal government of the day introduced a Bill which proposed to repeal Part XIIA of the Act and create a new system of environmental planning.

However, the Coalition lost the election and the Labor Party, led by Neville Wran, came to power. In 1979, the Wran government introduced far-reaching changes repealing Part XIIA and enacting the Environmental Planning and Assessment Act 1979 (NSW). The inclusion of the word “environment” was not just incidental. It reflected the fact that all aspects of the built and natural environment including projects undertaken by government were now controlled by an Act of Parliament. It was a major step.

As part of the legislative package, the Land and Environment Court was created. For the first time, merit appeals and enforcement of environmental law were provided for in the one location. The structure was then unique, although the change did not occur without controversy.

The Court has proved to be an enduring institution and has become a model for many similar courts in the developed world.

There are some in the community who believe that the role of the Court should be limited to declaring and enforcing the law and that there is no place for appeals from merit decisions made by councils or others. Nevertheless, as I have indicated, the Parliament has given a merit review role to courts or expert tribunals since the early days of planning control.

There are many reasons why such a merit review process is appropriate. However, its continuing legitimacy rests on consistency of decision-making in accordance with identified principles. Merit appeals provide the opportunity for the Court to address contemporary environmental problems and responses and, through the reasons for decision, articulate principles which can guide and inform decision-making at all levels of the process. As Sir Gerard Brennan said: "inconsistency (of decision making) is not merely inelegant, it brings the process of deciding into disrepute." He was speaking in relation to immigration cases, but his remarks hold true for decisions with respect to environmental problems.

It cannot be assumed that environmental law and the role of the Land and Environment Court will be free of controversy in the future. Some of the issues which the Court must deal with raise questions of fundamental human rights. All of them affect the lives of some or a group of people in our community. Many will involve very substantial money profits or losses to individuals or corporations. The Court must contribute to the task of balancing the immediate needs of the present generation with the trust we hold for those who will come after us.

When the Court was established, it was decided that so far as possible its hearing processes in merit appeals should be informal and expeditious. To assist in achieving this goal, the legislation provides that the rules of evidence do not apply and that the Court may inform itself in any matter as it thinks fit. Of course the over riding consideration, imposed not by the statute but by the common law, is that a hearing must be fair. This means that a party must have the opportunity to put its case and respond to the argument presented from any opposing party.

For reasons which are complex, the objective of the Parliament has not always been achieved. The hearing process has been substantially captured by lawyers and now, accompanied by experts, merit appeals in the court have become forensic contests which resemble conventional

trials. Simple issues are attended with lengthy witness reports often repeating fundamental material and with only limited analysis of the problem. Expert evidence is often called in relation to matters which, because of the expertise of the particular Commissioner hearing the matter, does not require additional expert consideration. There are many cases where the only issue is the compatibility of the proposed building with the existing urban street scape. To determine a dispute of this character all that is required is for the Commissioner to have the plans, perhaps any particular aspect of them explained and an opportunity to view the site and its surrounds. Commissioners must all have special training and experience in areas of environmental and planning issues. We must ensure as a community that the resource collected in the Court is used most efficiently and in a way which will minimise the cost to individual parties.

To assist these objectives, the Court has embarked upon a process of reform of various of its practices and procedures. I expect that further reform will be made, particularly in the area of mediation and conciliation. But significant changes have already been put in place. They will operate to reduce unnecessary disputation and achieve the best possible outcome for the community. They are intended to increase

the efficiency of the merit review process and minimise cost, so that community and individual resources are not wasted on litigation.

In future, provision will be made for the case management of complex merit appeals. The parties will be required to inform the Registrar whether the matter is suitable for case management. The Court will also consider each matter from this perspective and may refer the matter for case management even if the parties do not agree. Case management will normally be carried out by a judge, the Senior Commissioner, or another Commissioner of the Court.

The primary object of case management is to identify the real issues in dispute and lay out a blue print for the hearing. This will ensure that the real issues are resolved as efficiently as possible.

Case management is only appropriate where it can achieve savings in time and costs. Accordingly, matters will be carefully chosen for this process.

There are many merit appeals in the Court which have traditionally occupied two days of hearing time. They usually involve domestic or other modest development where the issues are readily defined and the

evidence adequately revealed by the written statements filed. However, a hearing process which requires the parties to come to court at the beginning of each case and for objector evidence to be led in court has the consequence that in many cases the view cannot take place on the same day as the hearing. Many cases are adjourned early in the afternoon of the first day, a view being held the following morning and final submissions thereafter. This is not efficient.

A process has now been adopted which requires every merit appeal to commence with a view on site at 9.30 on the first day fixed for the hearing, unless otherwise directed. I would not expect a different direction to be made in relation to any one or two day case. However, this procedure may be inappropriate for cases which will occupy four or more days. Those cases which commence on site will be conducted by a Commissioner who has had an opportunity to read the material filed and I expect the opening of the case will occur when the view is taking place. I also expect that on many occasions objectors will be present and will be content to put their point of view in an informal manner on site. This approach will be encouraged and managed to ensure that all parties receive a fair hearing.

Expert evidence has caused difficulties in recent years in all parts of the common law world. In part, this is a reflection of the increasing complexity of issues which require resolution. It is also a product of the increasing sophistication of the enterprises which make available assistance in contested litigation. In many cases the true purpose of expert evidence, which is to inform the court about an area of special learning, is lost. Instead, a contest takes place between the experts, which extends to both objective matters and their subjective opinions. Because there are only winners and losers in conventional forensic contests the pressures on experts to assist the client rather than the court are intense. This is particularly the case when the client is a frequent litigator and further work is likely if the expert performs to the client's satisfaction in a particular matter.

These concerns have compelled courts throughout the common law world to articulate the obligations which bind expert witnesses. Courts have moved to ensure that experts understand that their primary obligation is to the court and not to the party that has engaged them. Courts have also moved to impose a conferencing process on experts, with a view to production of a joint report and minimisation of issues which require resolution in court.

Many courts have the power to appoint an expert to assist the court. Some also use referees to investigate and report on particular aspects or sometimes the whole, of a matter.

Land and Environment Court Rules include that Part of the Supreme Court Rules which makes provision for a court-appointed expert. Once a court-appointed expert has been engaged, a party may only bring additional evidence on the issues dealt with by the court expert with leave. The parties are jointly liable for the fee of the expert.

The benefit of a court-appointed expert will be apparent in many cases. When utilised, only one expert will be engaged, with the cost shared by the parties. Because only one expert is engaged the court hearing time in relation to expert evidence will be significantly reduced. Of course, the parties are entitled to cross-examine the court expert but, if the process of the preparation of the expert's report has been properly undertaken, cross-examination will be minimised.

The use of a court-appointed expert can provide greater confidence in the evidence upon which the Court is relying and, accordingly, greater confidence in the determination which is ultimately made.

Not all issues are suitable for the appointment of a court expert and not all matters are amenable to that process. By the time the matter comes to court, the parties may have engaged their own experts who have undertaken significant work, making the appointment of a court expert inappropriate. However, matters such as noise, traffic, parking, overshadowing, engineering, hydrology, contamination issues, among others, are generally suitable for a court expert. The court-appointed expert has the responsibility to prepare a report after consultation with the parties. In some cases, this may mean consultation with experts the parties have already retained to advise them, but very often the court-appointed expert will be the only expert who looks at a particular problem.

As from the beginning of March this year, the Court requires the parties to consider whether or not there are issues in their case for which a court-appointed expert is appropriate. This will be done by the parties being required to tell the Registrar the reasons why the Court should not appoint an expert or experts. If the matter is appropriate for a court-appointed expert, the parties will be invited to agree as to who should be appointed.

One significant effect of appointing a court expert is to give back to people with special learning and experience an opportunity to use their expertise without the pressure imposed by a client who desires a particular outcome. A court-appointed expert is free to express his or her opinion in the knowledge that the purpose is to assist the Court irrespective of whether it assists one side or the other.

As you may be aware, the Court has operated with practice directions in relation to costs in merit appeals. The traditional direction provides that costs will only be awarded in exceptional circumstances. The practice direction was severely criticised by the Court of Appeal in **Maurici v Commissioner of State Revenue** (2001) 51 NSWLR 673 and has now been withdrawn.

Instead, a rule has been made which does not make an order for costs dependant on exceptional circumstances. The test is now whether in the circumstances of the case an order for costs is “fair and reasonable.”

In recent times as litigation has become more complex, the financial burden imposed upon councils, individuals and corporations has increased. Ambit claims and ill-considered development applications by developers add greatly to the costs burden carried by some councils.

Equally, if a council does not exercise its decision-making functions in a reasonable time, sometimes not until the appeal is well underway, or with appropriate regard to the needs of the whole community, both public and private resources can be wasted. The Review of the Court by the Honourable Jerrold Cripps QC brought forward requests for a review of the appropriate principles for making an order for costs. I have previously stated that where matters raised in class 1 proceedings have the character of ordinary litigation, a costs order may be appropriate. There will be other cases where an order for costs should be made.

I have already spoken of my view that the continuing legitimacy of merit review by the Court relies upon decisions made in accordance with established principles which are available to, and understood by all, who are involved in the development control process.

To assist this objective, the Court has now begun to publish the decisions of Commissioners on the internet. Anyone who has access to the net is able to understand the outcome of a particular matter and identify the reasoning processes of the Commissioner who decided it. As a reflection of the greater significance which the community will attach to Commissioners' decisions, the Commissioners are intent upon including in their reasons for decision a discussion of both general and particular

planning principles. You can expect that with time, a body of decisions which reflect the principles appropriate to apply to various planning problems will be articulated.

I anticipate that the publication of Commissioners' decisions which embody these principles will enable councils and other decision-makers, as well as architects, planners and developers, to understand the principles which will be applied by the Court in the ordinary course. They should also enable local government to have a better understanding of the approach of the Court, and I have no doubt this will assist in the application by those bodies of appropriate principles to the decisions which they must make. The number of appeals is likely to be reduced and the capacity of the planning profession and those who advise councils and developers to predict the approach which the Court will take will be enhanced. The quality of decision-making will be improved at every stage of the process.

The changes which have been adopted by the Court are all designed to ensure that public and private resources which are invested in the development control process are used in the most efficient manner possible.

The conflicts inherent in the development of our cities have ensured that the planning system must evolve to respond to them. However, at the micro level of appeals in respect of development applications, we have not always given sufficient thought to the appropriate process.

Embracing the adversarial model, which is the only model with which Australian lawyers feel comfortable, we have assumed that by promoting “a contest” we will get the correct result. Whether or not the contest achieves the desired outcome in terms of decision-making quality, it has ensured that we have created a culture of “winners and losers”, when our true objective should be to ensure the best community outcome. Experts have been pressured into becoming advocates. Advocates measure and promote their services to clients by reference to their “win/loss ratio”. Significant sums are invested in arguing preliminary points, avoiding or deferring a hearing of the merits of the application.

The future evolution of the appeal processes of the Court must ensure that so far as possible the process is not a contest. The outcome must be understood not as a win or a loss but as a solution to the problems of a particular site. The “culture” must be one where problems are solved. The community resource of the Commissioners must be emphasised. They are all appointed because of their special expertise and everyday of their working lives are required to resolve disputes in relation to

development proposals which are, by their nature, controversial. As I pointed out earlier, many appeals are capable of resolution with little more than an explanation of each parties point of view, including that of the objectors, careful consideration of the plans by the Commissioners and an examination of the site.

Our society is already burdened by the increasing costs of interpartes litigation. We must all ensure that the costs of an appeal to the Court are not out of proportion to the value of the project to which they relate. To achieve this objective, the Court will work with all those involved in the process - councils, developers, lawyers and consultants - to ensure that legitimate community expectations are met.