

Content :

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**The Honourable Justice Mahla L Pearlman AM
Chief Judge of the Land and Environment Court of New South Wales**

Abstract

The Land and Environment Court of New South Wales celebrates its 20th anniversary on 1 September 2000. Justice Pearlman reflects on its role and operation over its 20 year history. She reviews the basis for its establishment, and the principles governing its operation as a specialist court within the framework of the administration of justice in New South Wales. Justice Pearlman mentions the judges and assessors (now commissioners) who serve and have served as members of the Court, and the various physical locations the Court has occupied over its life. She considers the practices and procedures which underpin its efficiency and discusses such matters as the Court Users Group, time standards, mediation facilities and other processes designed to assist litigants and their representatives in their litigation. Justice Pearlman notes the 2000 Inquiry into the Court's role in merit planning appeals and considers the question of panels of commissioners to hear cases. She also explains the Court's role in the development of environmental jurisprudence and outlines some significant decisions in this connection.

On 1 September 1980 the Land and Environment Court came into operation. This paper reflects upon its 20 year life.

The Court was actually created by the Land and Environment Court Act, which was assented to on 21 December 1979, although no proceedings were able to be commenced in the Court until 1 September 1980. The reason for the delay was to constitute the Court by the appointment of judges and assessors and to establish appropriate rules and procedures.

The creation of the Court so many years ago was part of a far-reaching reform of environmental and planning law in New South Wales. In the second reading speech in the Legislative Council concerning the package of legislation which established the new environmental planning system, the Minister for Planning and Environment, the Hon D P Landa, said of the Court that it "... will have a vital role to play in the task of judicial interpretation of the new legislation and its operation" (1).

The Minister's words are important. They reflect the fact that the Court was created to be a court that is part of the administration of justice in the State, and that its role is to carry out functions which courts conventionally undertake, such as judicial interpretation of legislation. It was not created to set policy, nor to lobby for the reform of the law, nor to act as a planning or environmental consultancy, nor to undertake research. Its role is to administer justice in the adjudication and resolution of disputes and in the prosecution of offenders. It acts, as all courts do, independently and according to the law. The hearings before it are adversarial proceedings at the end of which the judge or commissioner reaches a decision on the evidence adduced during the hearing, and only that evidence, and in the result there will be a winner and a loser.

That is not to say that the Court has no role in the protection of the environment. It is vested with wide discretionary powers under the relevant environmental legislation which it administers, and it must exercise those powers having regard to the objects of that legislation. The principal piece of legislation which forms the basis for most of the decisions of the Court is the Environmental Planning and Assessment Act 1979, and that Act includes, amongst its objects, the encouragement of the protection of the environment and the encouragement of ecologically sustainable development (2). Similar objectives are found in the Protection of the Environment Operations Act 1997 (3), and the Local Government Act 1993 states that one of its purposes is to provide a legal framework for an environmentally responsible system of local government in New South Wales (4). The inevitable consequence of such directives is that the decisions of the Court in all its classes of jurisdiction broadly result in the protection of the environment (5). But the point I make is that the Court was not directly established to protect the environment; it was, rather, established as part of the State's court system with a comprehensive and exclusive jurisdiction in planning and environmental matters.

Of course, the Land and Environment Court, more than any other court in the justice system of New South Wales except perhaps the Industrial Court, operates in a political context. The cases it hears do not involve disputes between citizen and citizen; they involve disputes between citizens and government. And planning decisions are to a large extent subjective decisions, because the application of planning law has a subjective element. Moreover, the State government has more than once over the life of the Court stepped into the fray and legislated to bring to an end proceedings in the Court. The first time it occurred was in 1982 when the State government went so far as to terminate proceedings that were currently on foot in the Court, so as to allow the old Pagewood bus depot to be developed into a Westfield shopping centre (6). Soon after, the State government again intervened, this time in relation to Parramatta Park, passing an Act that circumvented the Court's decision, upheld on appeal, that development consent permitting a stadium in the park was null and void (7). There have been other similar political interferences, the most recent being the legislation which validated all approvals granted in respect of the Finger Wharf at Walsh Bay whilst those approvals were under challenge in proceedings in the Court (8).

That political context should not be forgotten, and members of the public should not be deterred from commenting upon the Court's decisions, from criticising the law or from suggesting its reform. But the political context does not justify criticism which is ill-informed and misconceived. Comment and criticism should be made without forgetting that the purpose of the Court is to administer justice according to the law.

An important feature of the establishment of the Court was that it brought together into one specialist jurisdiction the diversified jurisdiction of a number of courts and tribunals, in particular the Land and Valuation Court and the Local Government Appeals Tribunal. In a sense, the creation of the Court was not an innovation, because, for example, merit appeals in relation to building and subdivision had existed since the promulgation of the Local Government Act in 1919 (9). What was new, however, was to gather into one jurisdiction both judicial and administrative functions, and for that purpose to appoint both judges and conciliation and technical assessors who would deal with judicial matters and administrative appeals.

The Court's jurisdiction is divided into classes by reference to the nature of the subject matter of the particular application. There are seven such classes (10), but, speaking more broadly, the Court has three principal functions. It acts as an administrative tribunal, determining planning and building appeals on their merits. It also acts in a supervisory role, entertaining cases of civil enforcement of planning and environmental law and judicial review of administrative decisions in those fields. Lastly, it has a summary criminal jurisdiction, involving prosecution and punishment for environmental offences. Furthermore, its jurisdiction in all these matters is exclusive - no other court in New South Wales has the jurisdiction to hear any of the matters which are vested in this Court. It is, colloquially, a "one-stop shop".

The Court in the form I have outlined has become a model for environmental protection, because its specialist nature and the combination of judicial and administrative functions have continued to be regarded as critical to the proper enforcement of planning and environmental law. Similar although not identical courts have been established in Queensland and South Australia, and the establishment of a court modelled along the New South Wales lines has been recommended and is under consideration in the United Kingdom and in India (11).

As the Minister foreshadowed in 1979, the Court has been the catalyst for an emerging environmental and planning jurisprudence. The increasing complexity and range of the type of cases which have come before the Court since its inception have developed the law and extended its boundaries. That is the consequence, in my opinion, of an increasing public awareness and concern with the environment as one of the major global challenges of our generation and generations to come.

Another point to note is the constitution of the Court as a superior court of record, with its judges having rank and status equivalent to the Supreme Court in the hierarchy of courts in New South Wales. That status sends a message to the community about the importance of planning and environment. It is a response to the community's concern with the environment and a recognition of environmental issues as critical to the way we live and the way future generations will live.

Let me now reflect on the judges and assessors who have served in the Court. The first chief judge was Justice Jim McLelland, or "Diamond Jim" as he was known. He came to the Court from the Industrial Court, but he had, in a much earlier part of his life, been a solicitor, and he had later served as a minister in the Whitlam government. Sadly, he died on 16 January 1999, aged 83. For my own part, I can say that I did not know him well, but I recall with wry amusement the description of the work of the Court which has always been attributed to him, namely, that its role was to balance the aspirations of those who wished to turn Pitt Street into a rainforest and those who wished to turn a rainforest into an industrial estate.

Justice Jerrold Cripps had been a judge of the District Court before he was appointed to the Land and Environment Court upon its establishment. He was elevated to the position of chief judge upon Justice McClelland's retirement, and he served until early in 1992 when he was appointed to the Court of Appeal. Upon his retirement from the Court of Appeal in 1994, Jerrold Cripps became a consultant to Allen Allen and Hemsley.

When Justice McClelland retired in 1985, two new judges were appointed to the Court to join Justice Ted Perrignon, who, with Justice Cripps, were the remaining original judges. The new judges were Justice Neal Bignold, who had been the senior assessor, and Justice Paul Stein, who had been a judge of the District Court. Justice Bignold is remarkable for staying the distance. He is the only one of the members of the Court who has served since its establishment, and it is significant that he had a role drafting the new legislation in the first place. Justice Perrignon retired in 1987, and Justice Stein was appointed to the Court of Appeal in 1997, where he remains today, presiding over appeals from this Court and other courts.

Other judges have also served as members of the Court. Justice Joe Bannon served from 1991 to 1996, and, having reached the statutory age of retirement from the bench, a venerable 72 years, is now serving on the Parole Board. Noel Hemmings served for four years as a judge of the Court, and, upon resigning, became a partner in Allen Allen and Hemsley.

There are now six judges of the Court. I was appointed in 1992, as was Justice Talbot. Justice Bignold remains, as I have said. Justice David Lloyd was appointed in 1997, Justice Terry Sheahan in 1997, and Justice Dennis Cowdroy OAM in 1999.

When the Court was established, it provided for the appointment of nine persons, called "conciliation and technical assessors", one of whom was to be appointed as the senior assessor. They are required by the Court Act to have qualifications in any of a number of disciplines, including town planning, environmental science, valuation, law, architecture and engineering (12). The role of the assessors was to preside in merit planning, building and valuation appeals in classes 1, 2 and 3 of the Court's jurisdiction. Their role remains, but their name does not. In 1999, they became known as commissioners, a change designed to bring their description into line with the work they actually carry out and to conform to the nomenclature of similar positions in other courts.

There have always been nine assessors, although the incumbents of the position have changed over the years. The senior commissioner, Peter Jensen, is an architect/town planner who was first appointed in 1986. The other commissioners now in office in order of seniority are Tony Nott, who is a lawyer, and who is the longest serving

commissioner, Stafford Watts (an architect/town planner), Trevor Bly (an architect/town planner), Bob Hussey (an engineer/town planner), Kevin Hoffman and John Roseth (architects/town planners) and Graham Brown and Jan Murrell (town planners). Several distinguished people have served as assessors, and, although some have retired from active professional life, some still work in the planning and environmental field, such as Joan Domicelj, who is a member of the Heritage Council, and Catherin Bull, who is a professor at The University of Melbourne (13).

Provision is made in the Court Act for the appointment of acting judges and acting commissioners (14). Five persons have served as acting judges over the years. They are Kevin Holland and Tom Waddell, both formerly Supreme Court judges; Gay Murrell, a judge of the District Court, and David Lloyd and Dennis Cowdroy, who were subsequently appointed to the bench of this Court. There has only been one acting assessor, namely, Heather Irish, who is a partner of Corrs Chambers Westgarth.

Another interesting change was the adoption of robes by the judges when presiding in cases of civil enforcement, judicial review and criminal prosecution, that is, in classes 4, 5, 6, and 7 of the Court's jurisdiction and in those cases in class 3 which would formerly have been heard in the Land and Valuation Court. When the Court was established, a rule was promulgated that the judges would not robe. But as cases became more complex, and, more importantly, as the penalties for environmental offences became more severe, the judges felt that there was a need to reinforce the status of the Court as a superior court of record, especially in relation to environmental prosecutions. Accordingly, in 1998, the judges resolved to robe when sitting in cases in those classes of the Court's jurisdiction, but they decided not to wear wigs, in conformity with the judges of both the High Court and the Federal Court, and, I venture to say, in the faint hope that other courts in New South Wales might follow suit. Not only did the other New South Wales courts fail to follow that lead, the Bar Association also remained of the firm view that robing in New South Wales involves the wearing of wigs. The Court announced that it would have no objection to solicitor advocates appearing in robes, but no solicitor has yet taken up that invitation. The judges do not robe when hearing merit appeals in classes 1, 2 and 3 of the Court's jurisdiction.

The Court has been somewhat peripatetic in its 20 year life. At first, the chief judge, the other judges and the assessors all occupied different buildings on a temporary basis, until 1981, when two floors of the American Express Building at 388 George Street, Sydney, were refurbished to provide courts and chambers. The Court remained there for over 14 years, but in the last years its tenure was very insecure, since it was apparent that the building was on the market for sale. The inevitable consequence was a notice to quit served upon the Attorney-General's Department. Although it had been intended that the Court would relocate to its present home in Windeyer Chambers, at 225 Macquarie Street, the notice to quit meant that no time remained for their refurbishment, and so the Court moved for about two years to the old District Courts in Hospital Road. The Court seems set now to remain in Windeyer Chambers, because the eight floors which it now occupies are strata lots owned by the State government through the Attorney-General's Department, and comprise 13 courtrooms, chambers and registry.

There are a number of matters about the operation of the Court of which it may be justly proud. First, it has no backlog of cases and there is no significant delay in cases coming on for hearing. It is the only Court in New South Wales that can make that boast. No doubt that record is possible because the Court is relatively small, and thus easier to monitor and manage. But the Court has, since its establishment, been committed to timely and efficient management of its cases. For example, it has a process of review and revision of its rules and practice directions to ensure that they are working efficiently and are up-to-date. In 1996, it established time standards for the disposal of cases and the delivery of reserved judgments (15), and it publishes in each annual review statistics which show the extent to which those standards are being met.

Secondly, it has endeavoured to ensure that its services and facilities are adapted to the needs of litigants and their representatives. To this end, the Court has established a Court Users Group, which is a consultative committee whose role is to provide recommendations to the Chief Judge about improving the functions and services provided by the Court. About 25 organisations provide a representative to be a member of the Court Users Group. Those organisations are the professional bodies of solicitors, barristers, engineers, planners and surveyors to name but a few. The Court Users Group provides a forum by which the Court can readily

disseminate information about the operation of the Court, but, equally importantly, it provides a channel for communication to the Court and a catalyst for constructive improvements.

Thirdly, formal and restrictive practices and procedures are kept to a minimum in a number of ways, and the Court has a policy of assisting litigants as much as possible. For example, the rules of evidence do not apply in merit appeals in planning and building matters and in valuation cases. Costs do not automatically follow the event in those cases. Instead costs are awarded only in exceptional cases, the idea being to encourage appeals without the risk of a cost burden for losing. The Court publishes a booklet, available at the Registry free of charge, which in short and concise terms describes the operation of the Court, and how cases are commenced and heard and disposed of. The Court also provides a website (16), on which, amongst other things, the daily list of cases is published, and the decisions of judges are made available within hours of their delivery in open court.

Fourthly, the Court has espoused mediation as an alternative to full scale litigation. Since 1991, it has offered the parties the option of mediating in classes 1, 2, 3 and 4 proceedings, though a voluntary and confidential mediation process conducted by the Registrar or Assistant Registrar. In addition, the Chief Judge has compiled a list of persons considered to be suitable mediators in planning and environmental matters, and that list, which is reviewed annually, is made available to the public through the Registry and by publication in the Land and Environment Court Law and Practice. In this connection, it is important to note that the Court encourages the use of section 34 conferences, which are conciliation conferences conducted by Commissioners, often on site.

A significant feature of the Court's work is merit appeals in planning and building matters. Cases of this kind form about 50% of its work, and they are largely heard by the Commissioners. Towards the middle of 1999, the role of the Court in merit review of planning decision of local councils became the focus of considerable public debate and criticism, largely provoked by the public utterances of the mayors and councillors of some local councils. This has ultimately resulted in the setting up of a working party to examine the planning laws and the role of the Court in relation to merit appeals and to report to the government, hopefully by the end of 2000. It is important, however, in this connection, not to lose sight of the fact that merit appeals in class 1 of the Court's jurisdiction involve a thorough and focussed examination and assessment of the particular development application, often conducted over several days, and where the evidence of experts and others is tested by cross-examination. It is also important to note that the resources of the Court do not permit the regular listing of merit appeals before two commissioners instead of one, although the listing of cases before only one commissioner has been the subject of some criticism. If merit appeals were to be listed before two commissioners upon a regular basis, there would, of course, be a trade-off. The median time for disposal of cases would inevitably increase, and that may be an unacceptable consequence, since there has not been any complaint, nor could there be, that the disposal of merit appeals has been anything else but timely and efficient.

Another significant feature of the work of the Court is the cases which are brought pursuant to the open standing provisions in many of the planning and environmental statutes of this State. Any person can bring proceedings to remedy or restrain a breach of a planning or environmental law, whereas traditionally a direct right or interest was required to invoke standing. That has not resulted in a flood of cases, but it has had a significant consequence, which I earlier touched upon, in that cases brought under the open standing provisions usually provoke an analysis and testing of particular provisions of the law, and usually result in pushing of the boundaries of that law, Many of them underpin the development of environmental jurisprudence in this State. Some of them may loosely described as "public interest litigation", meaning that there is a public interest in the outcome of the litigation. Of course, as I have earlier said, the public interest rather than the private interest is a major characteristic of the jurisdiction of the Court.

The consequence, as I say, is the development of a body of case law which has set down legal principles crucial to the evolution of environmental and planning jurisprudence and to the role and function of the Court (17). Most often, of course, a case which develops legal principle is an important case and the decision is likely to be appealed to the Court of Appeal and in some cases to the High Court. The following examples of cases where important legal principle has been articulated in this Court and affirmed on appeal will be sufficient to illustrate the point. They are as follows:

SPCC v Caltex (18): Stein J held that the privilege against self-incrimination did not apply to corporations, that is, that the defendant was not entitled to resist the production of certain documents upon the basis of self-incrimination. Upon appeal, the Court of Criminal Appeal held that the privilege did apply to corporations, but the High Court reversed that decision, thus confirming the law to be as Stein J had found it.

Hale v Parramatta Council (19): The decision of Parramatta Council to grant development consent to the use of Parramatta Park for a sports stadium was challenged on administrative law grounds. One of the grounds upon which McClelland J held in this Court that the development consent was null and void was that the council had failed to give consideration to matters it was bound to take into consideration under the statute. On appeal, the Court of Appeal affirmed the decision in this Court, Street CJ and Moffitt P taking the opportunity to outline the extent of the obligation to take into account relevant matters in purple passages which have been continuously cited ever since;

Oshlack v Richmond River Council (20): In considering an application for costs, Stein J took into consideration a number of matters relating to the public interest nature of the litigation. The Court of Appeal held that the characterisation of the litigation as public interest litigation was an irrelevant consideration, but the High Court on appeal by majority reversed that decision and affirmed the width of the discretion of this Court in awarding costs, including the relevance of public interest litigation.

I should not fail to mention a landmark case in the history of the Court, that being *Environment Protection Authority v Gardner* (21), where, for the first time in New South Wales, a person received a custodial sentence for an environmental crime. Mr Gardner owned a caravan park near the Karuah River in northern New South Wales. The caravan park was not connected to a sewerage system. Instead, sewage had to be held in septic tanks which required regular emptying via a tanker. In order to reduce the necessity for emptying to only three times per week and therefore to make a considerable financial saving, Mr Gardner devised a system of concealed underground pipes to pump raw sewage from the septic tanks directly into the wetlands near to the Karuah River. Mr Gardner's actions did not come to light until after he had sold the caravan park to a new owner, who discovered and reported the underground system. It was estimated that approximately 130,000 litres of untreated effluent per week had been pumped out via this illegal system over a period of 128 weeks. Lloyd J held that extensive environmental pollution had been perpetrated in a deliberate and dishonest manner, and he convicted Mr Gardner of an offence and sentenced him to 12 months imprisonment as well as imposing a penalty of \$250,000, the maximum penalty available for an individual.

Important though this case is, it is only one of a large number of environmental prosecutions which come before the Court. The principal prosecutions are those for pollution of water, including prosecutions for oil spills, such as the spill of oil from the *Laura d'Amato* into Sydney Harbour in late 1999, where the owner of the vessel was fined \$510,000 and the chief officer was fined \$110,000 (22). But there are prosecutions for wilfully or negligently causing a substance to leak, spill or escape in a manner which harms or is likely to harm the environment, for air pollution, for noise pollution, and for the unlawful disposal of waste. In regard to environmental prosecutions generally, I think it is fair to say that, over the 20 years of its existence, the Court has consistently imposed penalties which have reflected the seriousness of environmental harm, but, on the other hand, it has a strong record of acting fairly and justly in criminal prosecutions, and has not resiled from the necessity to dismiss those prosecutions where the offence has not been proved beyond reasonable doubt.

It seems to me that the Land and Environment Court has fulfilled its role in the administration of justice. It has for 20 years been the independent body to which those who consider themselves aggrieved by decisions may have recourse and to which those who wish to enforce the law may resort. It has done its duty with resounding success in terms of justice, cost and efficiency. There is good reason to celebrate its anniversary.

ENDNOTES

1 Hansard, 21 November 1979, 3355

2 Section 5(a)(vi) and (vii)

3 Section 3(a)

4 Section 7(a)

5 See the comments of Street CJ in *Hannan v The Electricity Commission of New South Wales* [No 3] (1985) 66 LGRA 306 at 312 – 313

6 Botany and Randwick Sites Development Act 1982

7 Cumberland Oval (Amendment) Act 1983

8 Walsh Bay Development (Special Provisions) Act 1999

9 Until 1945, such appeals were heard in the District Court. In 1945, the Land and Valuation Court was vested with that jurisdiction. From 1958 to 1972 the jurisdiction resided in the Building and Subdivision Board of Appeal. From 1972 to the establishment of the Land and Environment Court in 1980 the jurisdiction was exercised by the Local Government Appeals Tribunal. Appeals in relation to development approval were introduced in 1945 and were heard by the Land and Valuation Court till 1972, and thereafter by the Local Government Appeals tribunal.

10 The classes are described as follows: Class 1 - environmental planning and protection appeals (merit planning appeals); Class 2 - local government and miscellaneous appeals (merit building appeals); Class 3 - land tenure, valuation, rating and compensation matters; Class 4 - environmental planning and protection (civil enforcement); Class 5 - environmental planning and protection (summary criminal enforcement); Class 6 and Class 7 - appeals from convictions for environmental offences in Local Courts.

11 For a recognition of the Land and Environment Court as a model for environmental protection, see the decision of the Supreme Court of India in *A P Pollution Control Board v Nayudu*, 1999 S.O.L Case No. 53.

12 Section 12(2) of the Land and Environment Court Act 1979

13 The full list of retired assessors is E. Chivers, T. Davies, J. Domicelj, J Fitz-Henry, F. Hanson, F. O'Neil, B. O'Neile, K. Riding, G. Andrews, C. Bull, A. Stewart

14 Section 11 and 13 respectively of the Land and Environment Court Act 1979

15 The time standards are:

Disposal of matters:

classes 1, 2 and 3 - 95% of applications to be disposed of within 6 months of filing;
classes 4, 5, 6 and 7 - 95% of applications to be disposed of within 8 months of filing.

Reserved judgments:

50% to be delivered within 14 days of hearing;
75% to be delivered within one month of hearing;
100% to be delivered within three months of hearing;

16 www.lawlink.nsw.gov.au/lec.nsf/pages/index

17 There is a view that the Court has not played a sufficiently leading role in the development of the idea of ecologically sustainable development - see B Preston SC, and J Smith, *Legislation Needed for an Effective Court* published in the proceedings of the Nature Conservation Council Conference, 27 - 28 August 1999.

18 (1991) 72 LGRA 212; (1991) 74 LGRA 46; and (1993) 82 LGERA 51

19 (1982) 47 LGRA 269; and (1982) 47 LGRA 319

20 (1994) 82 LGERA 236; (1996) 91 LGERA 99; and (1997) 96 LGERA 173

21 Lloyd J, NSWLEC, 14 August 1997, unreported

22 Filipowski v Fratelli d'Amato S.r.l. and Ors (2000) 108 LGERA 88

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