RECENT DEVELOPMENTS IN PLANNING AND ENVIRONMENTAL LAW, UNSW CLE PROGRAM, 19 FEBRUARY 2015, SYDNEY

OPENING REMARKS

Introduction

1. Before I begin, I would like to acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation. I pay my respects to their elders past and present.

2. These remarks will be uncharacteristically brief.

3. At the macro level, the short answer to the question of what is new in planning and environment law over the past 12 months in New South Wales may be summarised as: not much. This is because the long awaited reforms to the statutory planning regime appear to be moribund; changes at the ministerial level the result of various ICAC investigations have caused disruption thereby delaying reform; and the usual policy stasis exists in the lead up to the State election.

4. At the micro level, the other speakers in today's conference will cover, in far greater detail, far more eloquently, and no doubt with far greater insight, the topics that I had planned to discuss.

5. Given that I have been allocated 30 minutes and still have 26 to go, you may all be getting a very early morning tea break.

General Observations

6. Before I bring to your attention to some recent procedural reforms in the Land and Environment Court, I do, however, want to offer remarks prompted by the recent Productivity Commission's report into *Access to Justice Arrangements*[1] and drawn from the Chief Justice of New South Wales' recent Opening of Law Term Address criticising some aspects of the report.[2]

7. The report was commissioned to inquire into Australia's civil dispute resolution system. Its principal focus is on promoting access to justice.

8. The report's aim of increasing affordable access to justice is plainly both laudable and highly desirable. But the report somewhat misguidedly attempts to monetise the work of the courts in its discussion of: the concept of user-pays justice; the need for the courts to move towards a much higher level of cost recovery; and conceiving the work of the court as a 'service' with the concomitant beneficial, or negative, 'spillovers' of providing this service.

9. This conceptualisation, however, fails to take into account the fact that judgments, and therefore courts, have a much wider sphere of influence than the mere adjudication of disputes between individual litigants. It is what has been referred to as "the shadow of the law".[3] As his Honour Bathurst CJ has

[1] Inquiry Report No 72, 5 September 2014.

[2] The Hon Chief Justice T F Bathurst AC, *Reformulating Reform: Courts and the Public Good*, Opening of Law Term Address, 4 February 2015.

[3] H Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 20-21, 35, referred to in Lord Justice Jackson, *Review of Civil Litigation Costs* (Final Report, December 2009), Ch 4 at [1.10] and Productivity Commission, *Access to Justice Arrangmentments* (Inquiry Report No 72, 5 September 2014) at 142, 537, referred to ibid, at [26].

observed, " a great deal occurs in this particular shade: contracts are negotiated and completed, government departments make decisions within the bounds of legislation, disputes arise and are settled on the basis of previous decisions and we are deterred from engaging in conduct which has been criminalised."[4]

10. But the measure of a healthy justice system is much more than the measure of its economic prosperity.

11. This is not to say that we can ignore the burgeoning cost of justice. We can't. Legal costs have become prohibitive; an impenetrable barrier denying access to justice.

12. This is so notwithstanding that the operation of and access to our courts is a central pillar in the functioning of our government. It is the courts that uphold the rule of law. We must therefore continue the search for new ways in which our justice system can be made more efficient and less financially burdensome for litigants.

13. Arguably one of the most innovative examples of reform in this regard has been the promulgation of the *Civil Procedure Act 2005*, which celebrates its 10th anniversary this year. It is now difficult to conceive of an era when the overriding purpose enshrined in s 56 of that Act of "facilitating the just, quick and cheap resolution of the real issues in the proceedings" did not inform almost every aspect of civil litigation in this State.[5]

[4] Ibid at [27].

[5] Section 56(1) of the *Civil Procedure Act 2005*.

14. The Act has been transformative in permitting a wide degree of flexibility in the way in which courts manage – hopefully for better, not for the worse – the litigation process. It has also been powerfully normative insofar as it has effected a culture of change among those who operate within the justice system, either as decision-makers or as litigants. Delay without good reason will no longer be accepted and the incursion of unnecessary costs without good cause will no longer be tolerated.

15. Robust case management that aims to drive efficiencies in the litigation process has been judicially endorsed in cases such as *Aon Risk Services Australia Ltd v Australian National University*[6] and more recently in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited,*[7] where the plurality of the High Court said:[8]

> In *Aon Risk Services Australia Ltd v Australian National University*, it was pointed out that case management is an accepted aspect of the system of civil justice administered by the courts in Australia. It had been recognised some time ago by courts in the common law world that a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants. … Courts will continually be driven to achieve greater efficiencies in the disposition of litigation. Not only is it axiomatic that greater efficiency reduces the financial and emotional price that all litigants must endure, it also assist those who are waiting to gain access to the system, which in turn

[6] (2009) 239 CLR 175

[7] (2013) 250 CLR 303.

[8] Ibid at [51].

assists the wider community by minimising the overall cost of, and to, the justice system.

16. Of course in order to be successful, any reform must be directed not only to the courts' internal systems and processes, but also externally to the behaviour of those using the courts. As Frank Sinatra said, "you can't have one without the other."[9]

Specific Reforms

17. With these observations in mind, let me move to some of the more concrete changes to the Land and Environment Court's procedures that are designed to achieve, or at the very least facilitate, the outcomes canvassed above.

Electronic Reforms

18. Three are worth mentioning. First, a redesigned Caselaw website has been launched, with versions of the website now available for mobile devices. Forget the 'Candy Crush' app, download 'Caselaw' instead. Much more fun!

19. Second, improvements are being made to the Court's e-filing system to, it is envisaged, eventually enable the commencement of matters and the filing of all documents electronically. Although this falls far short of the 'paperless' registry nirvana that the Federal Court of Australia is moving towards, the benefits of avoiding the time consuming exercise of counter-filing multiple copies of originating processes are nevertheless obvious and real.

[9] *Love and Marriage*.

20. Third, the innovation of ePlanning, which I understand other speakers will discuss, and therefore, I will refer to only in passing.

Procedural Reforms in the Land and Environment Court

Subpoenas Practice Note

21. More prosaically, the Court has a new practice note governing subpoenas. It commenced on 2 January 2015. It applies to subpoenas and notices to produce across all classes of the Court's jurisdiction.

22. The salient features of the practice note include:

    (a) the ability of an issuing party to nominate a convenient return date for the subpoena on the document filed in the Registry, provided that the date is five days after filing;

    (b) copies of the subpoena must be served on all active parties to the proceedings;

    (c) importantly, the issuing party can include a proposed access order, if not the default access order will apply. The reasons for any proposed order must be included in the subpoena or a covering letter. The default access order means an order allowing general access to all parties. It includes permission to copy the documents. **What this means is that if no party objects to either the proposed order or the default order, there is no requirement for the parties, including the issuing party, to attend Court at**

the return of the subpoena;[10] to date this seems not to have been grasped by the profession;

(d) it is no longer necessary for the originals of documents to be produced unless the subpoena specifically requests it. Copies will suffice; and

(e) where appropriate, the parties are encouraged to agree to electronic production, particularly where the material produced is voluminous. Documents produced electronically can be emailed to the Registry.

23. As will be evident, the aim of the practice note is to reduce the number of Court and Registry attendances by the issuing and producing party, thereby saving both time and, by way of corollary, costs.

Urgent Interlocutory Applications Practice Note

24. In addition, the Court is about to introduce a practice note concerning urgent interlocutory applications. A more colloquial description of the practice note might be, 'the uses and abuses of the duty judge'. Let me elaborate.

25. In a court with limited judicial resources such as the Land and Environment Court (six judges, with only four or five sitting at any one time due to leave and other commitments), it is not possible to have a dedicated duty judge who has the luxury of only sitting on duty judge matters. More often than not, the

[10] See paragraph 17 of the practice note.

allocated duty judge will be sitting on listed cases in addition to his or her duty judge matters.

26. This means that the duty judge must be reserved for urgent matters or very short matters (minutes, not hours) that are not complex, and that cannot ordinarily be dealt with by the list judge during the Friday list. An application concerning the jurisdictional limits of the Court is not an example of such a matter.

27. Clearly there are some urgent applications for injunctive relief that will fall outside this description and will be lengthy in duration.

28. **But urgent means urgent and not merely convenient.** Urgent means the tree is about to be cut down; the house is about to be demolished; or public safety is presently at risk.

29. Merely because interlocutory relief is sought does not automatically render the matter appropriate for listing before the duty judge. If it is not urgent, then the matter should be listed for hearing before a judge in the ordinary way. The duty judge is not a mechanism for avoiding the judicial queue. The duty judge is not the short matters judge. And, if an informally fast-tracked hearing before a judge is more appropriate, rather than immediate listing before the duty judge, this can often be accommodated. This is important if, to reiterate, the matter is likely to be lengthy (more than an hour) or complex.

30. Unless there is some extraordinary reason for not having done so, the Court expects (and will ask) an applicant for urgent interlocutory relief to have informed the respondent of the application. This includes applications for

injunctive relief, urgent or otherwise. **Rarely will the Court entertain an *ex parte* application where there has been no attempt to contact the respondent.** This is a fundamental aspect of procedural fairness, if not the rule of law.

31. This point was emphasised by the Court in *McCullagh v Autore*:[11]

> 17. In this regard I rely on the observations made by Heydon J in *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 (at [150]) (where his Honour quoted from *National Commercial Bank Jamaica Limited v Olint Corporation Ltd* [2009] UKPC 16; [2009] 1 WLR 1405, footnotes omitted):
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> > 150 Another instructive aspect of equitable practice is afforded in relation to the question of whether an ex parte injunction should be granted at all. It was summarised thus by Lord Hoffmann, delivering the opinion of the Privy Council in *National Commercial Bank Jamaica Ltd v Olint Corporation Ltd*:
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> > > "Although the matter is in the end one for the discretion of the judge, audi [alteram] partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. ... Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none." (Emphasis in original.)
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> 18. *International Finance* has been quoted and endorsed by this Court on many occasions (for example, in *Shoalhaven City Council v Bridgewater Investments Pty Ltd* [2010] NSWLEC 103 at [6]).

32. In addition (just as any competent practitioner would, when appearing in any other matter before the Court), a party should prepare properly for urgent interlocutory applications. Evidence should be ready and a brief outline of

[11] [2014] NSWLEC 46 at [17] and [18].

written submissions should be prepared which include reference to the power of the Court to provide the relief sought; the applicable legal principles; and the material relied upon grounding the relief. The provision of such a document will facilitate the expeditious delivery of an *ex tempore* judgment.

33. In order to ensure that appropriate applications are listed before the duty judge and not matters that ought properly be listed in the normal course before a judge, or before the Registrar, a ‘triage’ system will be implemented by the Court.

34. Thus parties requesting that a matter be listed before the duty judge will be asked whether:

    (a) the Registrar has the power to deal with the matter, and if so, why the Registrar should not deal with it;

    (b) the matter is urgent, and if so, the reason for the urgency;

    (c) the respondent has been notified of the application, and if not, why not;

    (d) how long the matter will take; and

    (e) the matter is ready to proceed, including the preparation of short written submissions.

35. Depending on the answers to these questions, the matter may or may not be referred to the duty judge. In other words, merely requesting that the matter be referred to the duty judge is no guarantee that he or she will hear it, even if the parties are ready to go with counsel waiting in the wings.

Mediation in Class 4 Matters

36. Court statistics demonstrate that approximately 50% of the matters referred to mediation in Class 4 matters, either at the request of the parties or by the Court's own motion, settle. True it is that not all Class 4 matters are amenable to mediation, but many are. This is particularly the case in three categories of proceedings within that Class:

    (a) first, civil enforcement cases; especially where breach is admitted;

    (b) second, disputes between neighbours concerning the granting of, or the conditions attached to, a development consent. Typically the council has filed a submitting appearance in the matter; and

    (c) third, where the substantive matter has settled and all that remains to be determined is the question of costs.

37. While conciliation conferences are part of the fabric of the Court in Class 1 proceedings, historically less emphasis has been placed on alternative dispute resolution in other classes of the Court's jurisdiction. The reasons for this are not readily apparent. However, in my view, both the Court and the parties should demonstrate a greater willingness to engage in mediation wherever possible. This Court has the advantage of being able to provide free, specialised mediators, namely, our Commissioners, all of whom are accredited. Therefore, come to Court armed with instructions as to your client's attitude to mediation.

Lists

38. Finally, the first return date should not be the first time, after the filing of the originating process, that parties turn their minds to the preparation of the matter. The preparation of proceedings for hearing should commence as soon as, and preferably prior to, the filing of the summons or application in the Court.

39. Alarmingly, from the Court's case management perspective, with increasing frequency early attention to the preparation of evidence, especially expert evidence, is being delayed until after the first return date. The result is an increase in the number of court appearances required prior the allocation of a hearing date and a commensurate increase in legal costs. Plainly this is unacceptable. In short, 'prepare early and prepare often'.

40. This exhortation includes not just civil matters, but also criminal proceedings.[12] While a defendant retains a right to silence, this should not be equated with a right to do nothing in the preparation of his or her defence until such time as the entirety of the prosecution's evidence has been filed. This is particularly so in sentencing matters where a defendant has entered a plea of guilty and will typically be ordered to pay the prosecutor's costs. In simple terms, more Court appearances equates to more costs.

[12] *Criminal Procedure Act 1986*, ss 134, 149E and s 247B of Div 2A.

Conclusion

41. To conclude, as the Productivity Commission's report recognises, courts must continue to initiate reform to maximise the efficiency of the litigation process in order to minimise the costs associated with that process, thereby increasing access to, and participation in, our system of justice.

42. These reforms require, if not depend, on the cooperation of the broader profession for their success. And cooperate and participate we must. For if we do not, we risk eroding, and ultimately destabilising, the entire edifice upon which our government depends, upon which social and commercial activity relies, and upon which the rule of law is predicated.

43. Thank you.

19 February 2015

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Land and Environment Court of New South Wales