SPEECH TO BE DELIVERED BY THE CHIEF JUDGE, JUSTICE PETER McCLELLAN AT THE EPLA CONFERENCE
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NEWCASTLE

LAND & ENVIRONMENT COURT – ACHIEVING THE BEST OUTCOME FOR THE COMMUNITY

The Land and Environment Court was created by the Parliament with two primary functions. It has jurisdiction to declare and enforce environmental law. It also has jurisdiction to review the decisions of various bodies. By far the greatest volume of cases undertaken by the court relate to merits review of development applications.

For the purpose of exercising its merit review function the court is given all the functions and discretions of the body whose decision is the subject of the appeal (s 39(2)).

The court is also required by the legislation to conduct its proceedings with "as little formality and technicality as possible" (s 38(1)) The court is not bound by the rules of evidence and "may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the court permits." (s 38(2)). Of course the process must be fair.

The court is also provided with an express capacity to obtain the assistance of any person "having professional or other qualifications relevant to any issue arising for determination in the proceedings." (s 38(3)).

Commissioners of the court must have special qualifications which are detailed by s 12 of the Act. The matters in that list relate to the types of problems which they must commonly resolve.

The intention of the legislature is clear. When providing an administrative review function within the structure of the Land & Environment Court it was intended that by the appointment of persons with expertise in relevant areas, decisions in merit matters would be made, if possible, without the conventional trappings of adversary litigation. The court was provided with authority to make its own enquiries and obtain information subject of course to the right of the parties to respond to any information which is obtained in this manner.

It is not difficult to see that the expectations of the Parliament have not always been fulfilled. In large part this is the fault of the legal profession, (and I include myself), because of our inability to contemplate the resolution of any dispute without the conventional adversarial processes. This has meant that merit review is often an intense forensic contest in which there are “winners and losers” when the legislation intended instead that public and private resources would be applied to achieving the “best community outcome.”

In the context of planning law we should not think of any consent authority as winning or losing appeals. Rather we should see the review process as part of the structure designed to ensure that decisions in difficult matters are made after an appropriate level of informed scrutiny. This is true whether or not the impacts of a

particular proposal are confined to immediate neighbours or whether, as with many projects, the impacts are regional or state wide.

Because merits review has been seen as an adversarial contest there has been an investment of significant political and intellectual capital in achieving a “win”, very often whatever the cost in terms of time, money and other resources. Solutions to problems are secondary, the primary object being to beat the opposition. One consequence is that many cases are visited with a plethora of experts, sometimes each party calling more than one expert on the same issue. The purpose of this evidence is, in some cases, to influence the court by providing a weight of opinion, without recognising that the court is more likely to be influenced by the intrinsic quality of the opinion. The purpose for which expert evidence is admissible in proceedings is often lost. Rather than the evidence being tendered to inform the court about an area of specialised learning, where the court may need assistance, it is designed to found a submission which says that the weight of opinions in one direction should determine the outcome of the case.

There is no doubt that since the early days of the court merit review cases have grown in length, the number of witnesses have increased and the intensity of the forensic contest has also increased. There are many reasons for this but this is not the occasion to examine them.

The Land and Environment Court has existed during a time when pre trial processes, often referred to as case management, have become common place in many courts.

As the Chief Justice pointed out in his recent paper “Forensic Accounting in an Adversary System” (Law Society Journal) October 2003 p 60.

> “Over the past two decades or so the degree of involvement by judges and other court officers in the preparation for and the conduct of trials has been transformed. In many respects the changes have constituted the modification of the pure form of the adversarial system. Judges accept greater responsibility for the management of cases. This process may not have run its course.
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> Two distinct considerations have been driving this transformation. The first is the change in public expectations with respect to accountability for public funds that has affected all government institutions. The second is the traditional, albeit enhanced, concern for access to justice.”

Chief Justice Spigelman went on to identify the significance which our community attaches to the freedom of the individual and the influence it has had on the community’s attachment to the adversarial system. He emphasised the need to continually review the operation of the system if it is to continue to meet the needs of contemporary society.

The Chief Justice said;

> “For those of us who believe in the value of this historical tradition, it is incumbent upon us to continue it to improve the effective operation of the adversary system. That improvement may require limitations on the freedom of action of the legal profession and on other professions who appear as witnesses to give expert evidence. There are limits on the public resources which are appropriate to be devoted to the resolution of private disputes. There are difficulties in ensuring that the costs of the process are proportionate to what is at stake.”

Within the Land & Environment Court specific case management techniques have not been employed in relation to many disputes. The consequence is that legal practitioners have had control of the pre-trial processes, the issues to be litigated

and the evidence to be collected. Although in many cases this works satisfactorily problems frequently arise. They include:

- The identification of numerous issues many of which play no part in the ultimate resolution of the dispute.
- Multiplication of expert evidence about the same matters;
- The failure to comply with pre-hearing time-tables with consequential prejudice to the efficient resolution of the proceedings;
- Unnecessary cross examination of experts at hearings;
- Unnecessary formality in the presentation of evidence particularly the evidence of objectors,
- The identification of legal questions sometimes for the purpose of delaying the resolution of the merits of the matter and frustrate the development.
- The failure of experts to understand that their fundamental duty is to assist the court.

In recent years the court's merit review process has come under considerable scrutiny. It led to review of the court chaired by the Honourable Jerrold Cripps QC, a former Chief Judge of the court. Many recommendations were made. The court has embraced some of those recommendations but not all of them.

I have decided that it is appropriate to make some further changes. 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 the cost so that community and individual resources are not wasted on litigation.

Case Management

In future, provision will be made for the case management of complex Class 1 proceedings. The practice direction will be changed so that the parties will be required to inform the registrar on the first return date or as soon thereafter as appropriate 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 other commissioner of the court.

I expect it will, in most cases, involve one, or possibly two, case management conferences.

The primary object of case management is to identify the real issues in dispute and lay out a blue print for the hearing which ensures that those 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.

The hearing process

There are many merit appeals in the court which presently extend over two days. 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, the current 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 in many cases that 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.

The new process will require every class 1 matter 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 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

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 respective 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 is 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.

Because of these concerns courts throughout the common law world have sought 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 time.

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

The Land and Environment Court rules include Pt 39 of the Supreme Court Rules which make provision for a court-appointed expert. Once a court-appointed expert has been appointed, 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 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 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. However, typically matters such as noise, traffic, parking, overshadowing, engineering, hydrology, contamination issues, with others, appear suitable for a court expert. The court expert has the responsibility to prepare a report after consultation with the parties. In some case this may mean consultation with experts which the parties have retained to advise them but very often the court expert will be the only expert who looks at a particular problem.

Beginning next year the court will require the parties to consider whether or not there are issues in their case for which a court 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 expert, the parties will be invited to agree as to who should be appointed.

I understand that in a session which follows this morning Justice Talbot will discuss with you some of the problems with the operation of the present expert witness directions. Chris McEwen will also identify for you his understanding of problems.

Some of those problems derive from the failure of the legal profession to accept and inform experts of their obligations to the court. This cannot be allowed to continue.

There should be no misunderstanding about the matter. A court expert will only be appointed in circumstances where there are issues suitable for consideration in that manner and where it is apparent that savings in time and cost may be achieved. The parties will be invited to agree as to whom the expert might be and failing agreement, the court would make a decision. If the present approach, which allows the parties to retain their own expert with joint conferencing and reporting, functions effectively and efficiently the need for court experts may be minimised. However, if the present procedures fail, and the evidence suggests that in many cases they do, the only solution is for the court to appoint an expert.

In relation to court-appointed experts, the Chief Justice had this to say:

> "Where the parties jointly select an expert it is almost certain that a witness will be chosen who is not known for undue sympathy or for undue scepticism or for propounding views outside the main stream of opinion. In other words the parties will jointly select an expert who will be much more useful to the court than the experts who are sometimes now called. Furthermore, one would expect that a report of this character is more likely to lead to an early settlement."

The Chief Justice concluded:

> "I appreciate that some of you may understand these observations as a threat to cut your business in half. Recent history suggests that current practices are not sustainable in the long term. Unless the costs of conducting litigation are brought first, into a rational relationship with what is at stake and, then, into a proportionate relationship with what is at stake, significant areas of disputation will be taken away from a process in which expert evidence is used at all."

Costs

As you are aware the court has operated with practice directions in relation to costs in Class 1 matters. The present 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. It is about to be withdrawn.

Instead a rule will be made which is in the following terms:

> ”(2) No order for the payment of costs will be made in proceedings to which this Rule applies unless the Court considers that the making of a costs order is, in the circumstances of the particular case, fair and reasonable.”

The new rule does not make an order for costs dependant on exceptional circumstances. The test will be “fair and reasonable.”

The decisions of the court will now determine the appropriate approach to the exercise of discretion in particular cases. See **Gee v Port Stephens Council** [2003] NSWLEC 260.

The original justification for there being no order for costs in class 1 matters was the view that individuals should not be discouraged by the threat of having to pay the costs of the decision-making body when seeking a merit review. If you examine the decisions of the Land & Valuation Court you will appreciate that that court in the ordinary course made an order for costs. However, it did not do so in circumstances where the issue was novel and was one which required resolution by the court. (**Rio**

Pioneer Gravel Co Pty Ltd v Warringah Shire Council (1969) 17 LGERA 153 at 174).

In recent times as litigation has become more complex - the financial burden imposed upon councils, individuals and corporations have 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 Cripps Review brought forward requests for a review of the appropriate principles for making an order for costs. I indicated in **Gee** my view 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, depending on the circumstances, an order for costs may be appropriate.

Planning Principles

When I was sworn in I indicated that although 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 for merit decisions made by council or others, this has not been the approach taken by the parliament. I went on to indicate that there are many reasons why a merit review process is appropriate. I said:

> "The continuing legitimacy (of the merits review process) 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."

The court has now begun to publish the decisions of Commissioners upon 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.

With time 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 enhanced at every stage of the process.

Cross-examination

As you are all aware, cross-examination in merits appeals is only available by leave of the court. There is, amongst lawyers with whom I have discussed the matter, a

universal view that cross-examination is often excessive and in many cases unnecessary. In future it can be expected that the commissioners will confine cross-examination to matters where they are persuaded that cross-examination will do other than advance the contradictory opinion which is already contained in an expert's report.

Experts reports

It is common place to find that the expert report on both sides of a matter repeats pages of fundamental facts. This is wasteful of resources and reflects poorly upon a system which was designed to expeditiously and informally resolve disputes. In future councils will be required to file a statement of basic facts. That will include a description of the development, identification of the zoning, the locality, relevant planning instruments and development control plans and other material fundamental to the matter. That council document having been filed, the other party may file a document indicating where disagreement exists but my expectation is that disagreement will be rare.

Thereafter the statement of basic facts will be accepted by the court as correct and the decision will be based upon it unless the other party demonstrates there is an error. The material in the statement of basic facts must be accepted by all experts and their reports must not repeat the material in the statement of basic facts.

Conclusion

The measures I have outlined this morning are all designed to ensure an efficient decision-making process which arrives at the best possible decision in merit review

matters. Fundamental to that process is the work of legal practitioners and experts who are commonly called upon to provide evidence to the court. We can be certain that unless steps are taken to constantly refine the processes of merit review, pressure for change which minimises or eliminates the role of the legal profession and limits the involvement of “consultants” will increase.

I have described the merit review process as one which seeks the best outcome for the community. Although I can understand that for many people the best outcome of a merit review will be a win or a loss, we must not lose sight of the fact that public and private funds are being invested in order to achieve a community outcome. In particular councils and those who act for them must see merit review as such a process. Principled decision-making brings confidence in the whole system. It must be the foundation for the decisions of consent authorities and for merit review by the court.