5 September 2000

I am grateful for the invitation of the national trust to speak this morning about the Land and Environment Court. On Friday the Court had its 20th birthday, an occasion which we celebrated with a ceremonial sitting. But it is more than a time for celebration, it is also a time for reflection upon the Court's life. I welcome the opportunity to talk about the Court because I believe in the importance of public understanding of the system of justice in this state. The more the role and operation of the Courts is explained by those who work in them, the easier it will be for the public to understand the justice system and obtain benefits from it.

The first point which I would make about the Court is that it is a Court. It was established as a Superior Court of Record, and it ranks equivalent to the Supreme Court in the hierarchy of Courts in this state. It is part of the administration of justice and its role is to carry out functions which Courts conventionally undertake. 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 based on the evidence adduced at the hearing, and only upon that evidence, and in the result there will be a winner and a loser.

The jurisdiction of the Court is divided into seven separate classes according to the nature of the proceedings before it. But it is fair to say, speaking more broadly, that the Court has three principal functions. It acts as an administrative tribunal, determining planning and building appeals on their merits. Secondly, it acts in a supervisory way, by hearing cases of civil enforcement of planning and environmental law and judicial review of administrative decisions in those fields. Thirdly, 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 is New South Wales has the jurisdiction to hear any of the matters which are vested in the Court. It is, colloquially, a 'one-stop shop'.

Another important feature of the Court's jurisdiction is that it is basically concerned with public law, that is, citizens enforcing their rights against governmental authorities, and government authorities enforcing the law against citizens. The Court is not generally concerned with private rights, that is, the claims of citizens against each other.

It is also important, i think, to recognise that the exercise of the Court's jurisdiction involves the normal attributes of an adversarial proceedings - that is, the presentation of evidence and the testing of that evidence by cross examination. That presentation and testing of evidence is particularly significant in cases of merit appeals from the decisions of local Councils to refuse to grant development consent. A hearing of such a case involves a thorough, focussed examination and assessment of the particular development application, often conducted over several days. Each side, that is, the applicant for development consent on the one hand, and the Council, on the other hand, engage relevant experts, such as town planners, engineers, architects, noise consultants, ecologists and others to present expert evidence, each side addresses the Court and presents its submissions on the evidence and the relevant law.

That assessment is to be contrasted with the Council's own assessment of a development application. There, the Council, through its professional officers and the Councillors themselves, undertake an assessment of the proposed development. But it is not a two way affair, not adversarial, and, generally speaking, it is a less focussed examination. I am not suggesting that it is not an appropriate assessment process. It is, and it operates impeccably in 95 per cent of development application. The contrast is simply that the Court offers an independent adjudication of an adverse result to those who are aggrieved by the Council's decision.

There is an old adage that bad cases make bad law. There is no doubt that the better prepared and presented a case is, the better will be the decision. And in this connection the tools with which the Court is working are highly relevant. Clear and unambiguous environmental planning instruments lead to better decisions. No instrument can

be perfectly expressed; it is, after all, using language, a most imprecise tool. But if an environmental planning instrument says what it means and means what is says, all of us would be better served.

In understanding the work that the Court does, it is critical to note the distinction between merit appeals and judicial review. Merit appeals arise when an applicant for development consent is dissatisfied with the Council's decision, and wishes to have that decision reviewed on its merits. Judicial review, on the other hand, arises in connection with the Court's role in civil enforcement. Under the environment and planning acts in this state, any person is entitled to bring proceedings to remedy or restrain a breach of the law. That right is in contrast to the traditional position, where proceedings could only be brought by a person who had a direct interest in the proceedings. The right of any person to seek a remedy or restraint is known as 'open standing'.

So far as concerns merit appeals, the land and environment Court act provides that, in planning and building appeals, the Court has the same functions and discretions as the Council from whose decision the appeal is taken. In other words, the law provides that the Court stands in the shoes of the Council to determine a particular development application, and it must, as did the Council, determine the application in accordance with the law, either by granting consent conditionally or unconditionally, or by refusing consent. The Court, in such a case, is not reviewing the Council's decision. It is instead determining the development application afresh on its merits.

On the other hand, in cases of judicial review, the task of the Court, and its only task, is to review the decision of the Council to determine if the Council has, in reaching that decision, acted in accordance with the law. This distinction is little understood, and i see newspapers each day which criticise the Court about a particular decisions in the mistaken belief that the decision under challenge is the Court's decision not the Council's. The Court's only involvement in judicial review is to review the decision solely to see whether or not it is a legally valid. It does not as in merit appeals, conduct an inquiry as to whether the decision is good or bad on the merits.

The usual basis for judicial review is that the Council has failed to take into account a relevant factor, or it has taken into account an irrelevant factor, or its decision is manifestly unreasonable, that is, it is a decision that no Council acting reasonably could reasonably have come to. In such cases, the Court is not permitted to substitute its decision for that of the Council; its only power is to declare whether the Council's decision is valid or invalid.

Open standing has not, as some predicted, resulted in a flood of cases, but it has had a significant impact upon the quality of cases, because such cases usually provoke an analysis and testing of various provisions in the law, and usually result in developing planning and environmental jurisprudence. And it is interesting to note that it is often resident action groups which take proceedings to remedy or restrain a breach. Years ago, I was a founding member of the Paddington Society, one of the first action groups in the state. We laboured to prevent the widening of jersey road. I think we won because the department of main roads lost interest in the project not because of some infringement of planning law. But we were innocents abroad in comparison to the resident action groups of the present day. They are sophisticated and determined, and have access to incredible amounts of expert and other opinion which leaves me astonished.

So far as the Courts of New South Wales go, the Land and Environment Court has an enviable record. It has no backlog of cases, and no delays in getting a case on for hearing. In some ways that is the consequence of a smaller Court which is easier to monitor and manage. But it is also because the Court has, since its establishment, been committed to timely and efficient management of its cases. It has established time standards for the disposal of cases, and for the delivery of reserved judgments, and it publishes an annual review which sets out statistics to reveal the extent to which those time standards are being met.

It has also 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 make recommendations 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, and those organisations are the professional associations of barristers, solicitors, engineers, architects, town planners, 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 of communication to the Court and a catalyst for constructive improvements.

The Court has espoused mediation as an alternative to full scale litigation. Since 1991, it has offered parties the option of mediation in planning and building appeals and in civil enforcement cases through a voluntary and confidential mediation process conducted by Court staff who are trained mediators. In addition, the Court has compiled a list of persons considered to be suitable mediators in planning and environment matters and that list, which is reviewed annually, is made available to the public. The Court also encourages conciliation conferences known as s34 conferences, conducted by a Commissioner and usually on site.

In exercising its role and functions in the way i have described the Court has been regarded as a model for planning and environmental regulation in other parts of Australia and overseas. Similar but not identical Courts have been established in south Australia and in Queensland, and Courts based upon the New South Wales model have been recommended in England and in India.
Furthermore, the Court has been a catalyst for an emerging environmental jurisprudence, which is the result of the increasing complexity and range of the type of cases which are heard in the Court. A strong impetus for the development of planning and environmental law has been, in no small measure, an increasing public awareness and concern with the environment as one of the major global challenges of our generation and of generations to come.

I have painted a rosy picture of the Court, and I have done so in the hope that an explanation of its role will avoid some of the misconceptions which have flavoured the public utterances of the mayors of some local Councils over the past year. No Judge or Commissioner shirks from informed comment upon the Court's decisions, and public criticisms of the law and pleas for the reform of the law should be encouraged. But comment and criticism should be made without forgetting that the purpose of the Court is to administer justice according to law.

It is in that context that the current working committee is inquiring in the operation of merit appeals in the Court. I look forward to the recommendations of that committee, and the Court will work to implement those recommendation that the government ultimately espouses. But it is appropriate that i expand on the context in which the current inquiry is taking place.

First, the inquiry is concerned only with the operation of merit appeals. That is only 50 per cent of the Court's work, although it is the major part of the work of the Commissioners. But very important parts of the Court's work, such as civil enforcement and prosecutions for offences, are not the subject of the inquiry.

Secondly, it should not be forgotten that the decisions of the Court are delivered in a context of planning tension, if i might call it that. Policies adopted by the state government are not necessarily policies which local government wants. Take, for example, urban consolidation. That is not necessarily a policy warmly welcomed by local communities. Take, as another example, State Environmental Planning Policy no 5, which provides for housing for older persons and persons with a disability, and, in so doing, permits medium density development in areas where only low density development is otherwise permissible. Consider, as another example, local environmental plans, development control plans and policies promulgated by previous Councils whose membership has now been replaced by new Councillors with different agendas, hopes and aspirations, and who are working under constraints because those plans and policies are changed only through lengthy process.

Thirdly, it is useful to keep in mind the Court's rules and practices regarding the objections of residents. Objectors do not have a third party right of appeal in general development. By that I mean that neighbours cannot invoke the merit jurisdiction of the Court. When they become concerned about a proposed development in the neighbourhood they may make objections to the Council but they cannot appeal the Council's decision. As a consequence merit appeals are always developer appeals. But I do not use the word 'developer' pejoratively. Every person who brings a merit appeal in the Court is a developer because he or she is a person whose development has been refused by a Council. That development might simply be a carport, or it might be an upper storey, or it might be a house, or it might be a vast multi unit housing estate. However, despite the fact that resident objectors have no formal right of appeal, the Court has always had a practice of taking their objections

into account, and the Court will, upon a proper application by them, permit them to adduce evidence and be heard, especially when they can establish that the Council is 'going cold' in defending the appeal. In this connection, a significant practice implemented by the Court is to require a Council, where it has agreed on consent orders with the applicant on the appeal, to show that resident objectors have been notified of the terms of the consent orders, and have been invited to attend the Court when those orders are sought so as to voice their objections to the Court if they desire.

Another element of the context in which the Court's decisions are made is the availability of resources. I have always adopted a policy of listing two Commissioners, or a Judge and a Commissioner, in merit appeals where the proposed development is controversial, or the site is controversial, or where the issues are various and complex, or where the hearing is estimated to be lengthy. But there is a trade-off in the allocation of cases in that way, since it reduces the number of Judges and Commissioners available to sit on hearings. Accordingly, a balancing act is required in the utilisation of resources, and i try to reach that balance when setting the Court list.

Finally, I wish to say this. The Court provides a means by which a person who considers himself or herself aggrieved by a decisions of a Council, may appeal to an independent body. Such a right of appeal exists in relation to all sorts of other administrative decisions, such as, for example, immigration or taxation decisions. And a right of appeal in relation to planning matters has existed in this state since 1919. The local Council should not be the final decider, but, on the other hand, Judges and Commissioners, acting independently, should be accountable by means of the appellate process. That is a model which has stood the test of time, and i fervently hope it will not be disturbed.