

**Keynote Address, Australia - New Zealand Planning Congress
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**The Honourable Justice Mahla L. Pearlman AM
Chief Judge of the Land and Environment Court of New South Wales**

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Synopsis

The Land and Environment Court has exclusive jurisdiction in environmental and planning matters. It provides a forum for the merits review of decisions of local councils in planning appeals, for judicial review of administrative decision-making and it has criminal jurisdiction and extensive powers with respect to environmental offences. The jurisdiction of the Court is based on the interpretation and application of environmental and planning law as prescribed in statutes, regulations and environmental planning instruments. This address will outline the role of the Court and explore the interaction between the legislative actions of Parliament and the decisions of the Court in the context of managing the environment.

It is with great pleasure that I give this address at the first Joint Congress for the New Zealand Planning Institute and the Planning Institute of Australia.

The theme for this Conference is 'IMPACTS', and the theme for this session is 'governance'. I take that to mean, in the present context, the structures or mechanisms for regulating or controlling environmental change. Bearing that in mind, what I hope to explore in this address is the role and work of the Land and Environment Court of New South Wales, and the interaction between the legislative actions of Parliament and the decisions of the Court in the context of managing the environment.

The Land and Environment Court was established almost 22 years ago as part of a far reaching reform of the planning and environmental law of 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*" [Hansard, 21 November 1979, 3355]. 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, and in particular, had conferred upon it both judicial and administrative functions.

The Court's jurisdiction is divided into classes by reference to the subject matter of the particular application. There are seven such classes, 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. The Court's 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 just outlined has become a model for environment 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 India [For a recognition of the Land and Environment Court as a model for environment 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].

One of the most important features of the Land and Environment Court is that it is a court. It is part of the administration of justice, and its role is to carry out functions which courts conventionally undertake in the adjudication and resolution of disputes and in the prosecution of offenders. 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. It acts, as all courts do, independently and according to law.

The most obvious function of the Court is therefore to apply the law, and in so applying the law there is often little scope to achieve the advancements in environmental law that some people may wish to see. For example, when one considers the challenge posed by the term 'ecologically sustainable development' (ESD), often the Court is the subject of criticism. One commentator has said:

"Although it is an object of the Environmental Planning and Assessment Act to encourage ecologically sustainable development, the Court does not appear to have embraced the challenge of interpreting and applying this concept, and has failed to develop a jurisprudence as fully as it could have."

[David Barr MP, in submission No.84, p.2 at p.37 of the *Report of the Land and Environment Court Working Party September 2001* available at www.lawlink.nsw.gov.au/lap.nsf]

I would like to spend a little time discussing this criticism because I do not think it to be a well-founded criticism of the Court. In my view, the difficulties posed by the practical implementation of ESD are, to a significant extent, a consequence of the evolutionary nature of environmental and planning law.

The Environmental Planning and Assessment Act 1979 is the primary legislation governing land use in New South Wales. It prescribes what types of development require development consent, the method of environmental assessment, the considerations that the decision-maker must take into account in making its assessment, the rights of appeal from its decisions and so on. Much of the Court's work is concerned with the construction, interpretation and application of this legislation and its accompanying Regulation [Environmental Planning and Assessment Regulation 2000, NSW].

In 1979, when this legislation was enacted, the concept of ESD did not exist. By this I mean that although the legislature may have been aware of it as a result of the 1972 United Nations Conference on the Human Environment in Stockholm, this awareness did not translate into the insertion of this concept into the key environmental and planning legislation in New South Wales. Indeed, it was not until 1997, 18 years later, that ESD was finally incorporated into the Environmental Planning and Assessment Act by being inserted as an object of that Act [Section 5(a)(vii)- Environmental Planning and Assessment Amendment Act 1997 No. 152 sec 3 sch.1].

From the perspective of the Court, there are a number of challenges that arise as a result of this amendment. The first is that it has become necessary for the Court itself to try to ascertain what the objective of ESD means in a real and practical way. The legislature has not provided any guidance to assist judges and commissioners in this task. The Court is often in the position of having to determine whether a specific development proposal should be approved. How is one meant to assess that development in the light of ESD? This challenge is particularly evident when one is otherwise generally applying clear and specific legislative provisions.

In my opinion the successful application of ESD requires the principles themselves to be made more workable and tangible. It is for the legislature to provide more guidance to the Court as to how it wishes this objective to be achieved, and particularly how it relates to other provisions. The Court has a limited role in that it must act according to law. It cannot be expected to fill gaps in policy, or to stretch the law where it does not go.

There are signs however that the legislature is taking more of an initiative in directing how ESD is to be applied. A good example of this is the addition of division 5 of part 5 to the Environmental Planning and Assessment Act concerning the environmental assessment of fishing activities. Section 115H provides that the assessment of certain fishing activities is to be guided by the principle of ESD which in this division is expressly defined by reference to the Protection of the Environment Administration Act 1991. This is a more useful approach to ESD from the perspective of the Court as it considers ESD in relation to a specific activity and gives that term a particular meaning. This is contrasted to the broad objective of 'ecologically sustainable development' which is an undefined object of the Environmental Planning and Assessment Act as a whole.

My comments regarding ESD should not be taken as meaning that the Court can do nothing. To the contrary, the Court has been the catalyst for an emerging environmental and planning jurisprudence that is quite unique. The increasing complexity and range of cases which have come before the Court have developed the law and extended its boundaries, but this all within the scope of what the law allows.

An early case that demonstrates this is *State Pollution Control Commission v Caltex*. In that case, 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 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 [*State Pollution Control Commission v Caltex Refining Co. Pty Ltd* (1991) 72 LGRA 212; (1991) 74 LGRA 46; and (1993) 82 LGERA 51].

Another key case is *Oshlack v Richmond River Council*. 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 [*Oshlack v Richmond River Shire Council & Anor* (1994) 82 LGERA 236; (1996) 91 LGERA 99; and (1997) 96 LGERA 173]. Both this case and the previous case are examples of how the Court has expanded traditional areas of law to cater for the type of public interest litigation that takes place in the Court.

Another landmark case in the history of the Court is *Environment Protection Authority v Gardner* [*Environment Protection Authority v Gardner* Lloyd J, NSWLEC, 14 August 1997, unreported] in which for the first time in New South Wales, a person received a custodial sentence for an environmental crime. Mr Gardner owned a caravan park in northern NSW. The caravan park was not connected to a sewerage system. Instead, the 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. 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.

Another case which I would like to mention is one of my own [*Environment Protection Authority v Simplot Australia Pty Ltd* [2001] NSWLEC 264]. The defendant in this criminal prosecution, Simplot Australia Pty Ltd, had been charged with the pollution of waters. It operated a food processing facility and in the course of its business, food waste discharged into an underground stormwater pipe from which it was carried by water to an open storm

water drain. The defendant entered a plea of guilty and the matter came before me for determination as to penalty.

It came as some surprise when instead of strong submissions from the prosecution as to the gravity of the offence, it handed up joint submissions on penalty. The prosecution did not seek a penalty at all, but rather requested the Court to make orders requiring the defendant to participate in an extensive environmental management program, including in particular, the conduct of a RiverCare program in the area in which it committed the offence, and participation in a Greenhouse Reduction Strategy.

The Court has power under the Protection of the Environment Operations Act 1997 to make an order requiring an offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit [Protection of the Environment Operations Act 1997 s.250(1)(c)]. In the circumstances of this case, where the defendant had a good environmental record, was contrite for what it had done and had modified its operations so that the incident could not be repeated, I considered it in the interests of the environment that the orders sought be made, instead of imposing the standard monetary penalty.

Finally I wish to mention a case that was resolved only very recently [Wilson on behalf of the Gurrungar Environment Group v Bourke Shire Council and Others (2001) 114 LGERA 35]. It concerned an application for the construction of a large dam and cotton irrigation facility in Bourke, central western New South Wales. Under the Environmental Planning and Assessment Regulation, the dam was 'designated development' which meant that interested third parties, specifically the Gurrungar Environment Group represented by Mr Bruce Wilson, could appeal to the Court against the council's approval of the development. Thus it fell to the Court to review the development application on its merits and to determine whether or not it should be approved.

The council and the developer immediately challenged the scope of Mr Wilson's appeal. Mr Wilson sought to adduce evidence demonstrating that a dam and irrigation of a cotton farm of the size proposed would have serious and extensive consequences for the inland river system, soils and groundwater supply throughout the Murray Darling Basin. In response, the council and the developer sought for the appeal to be limited to a consideration of the environmental impact of the proposal in the immediate locality of the development, and, as only the dam was designated development, the appeal should not extend to considering the impact of the irrigation of the cotton farm.

I held that once part of a development application was designated development, then the rights of third parties to appeal extended to the development as a whole. This meant that Mr Wilson could challenge the irrigation of the cotton farm as well as the dam. In addition, I held that it was impossible for the Court to rule out issues and impacts without evidence of those issues and impacts. Mr Wilson therefore won his first battle and was able to adduce evidence on all parts of the development proposed.

What is most interesting about this case is that it settled. After this decision, the parties prepared their evidence. From this, they were able to identify more clearly the matters of concern to the Gurrungar Environment Group. As a consequence of discussions, the design of the development was significantly modified to take into account their environmental concerns. The parties then approached the Court for consent orders, which, after a hearing, I granted.

In my opinion, this is a very important case. It concerned a very serious development, in terms of its potential environmental impacts, it highlighted the important role that third party objectors can play in protecting our natural resources, and it demonstrated that the Court's processes were effective in managing the environment.

All of the cases I have briefly mentioned demonstrate the role the Court can play in managing environmental impacts within the parameters of the law.

In addition, these cases demonstrate how the Land and Environment Court operates in a political context. Its planning and environment decisions affect not only the parties to the case, but have implications for the whole

community, and for future generations. Furthermore, the cases which the Court hears do not involve disputes between citizen and citizen; they involve disputes between citizens and the government.

Generally, the Court provides the forum at which these disputes are heard and determined. However, more than once during the life of the Court, the State government has stepped into the fray and legislated to bring to an end proceedings which had been started in the Court. The first time this occurred was in 1982 when proceedings were on foot before Justice Stein concerning a proposal to develop an old bus depot at Pagewood into a Westfield Shopping complex. Prior to the Court's determination, the State government brought in the Botany and Randwick Sites Development Act 1982 which had the effect of approving the shopping centre development. In particular, this Act provided that any proceedings before the Court which included the relevant parties were terminated [Section 4(1), Botany and Randwick Sites Development Act 1982 (NSW)].

Soon after, the State government again intervened, this time passing an Act that circumvented the Court's decision that a development consent permitting a stadium in Parramatta Park was null and void [Cumberland Oval (Amendment) Act 1983].

A more recent example concerned the proposal to develop the Finger Wharf at Walsh Bay in Sydney. Proceedings were brought in the Court by the National Trust challenging development approvals that had been given. During the appeal the government announced its intention to legislate to approve the development and the hearing was adjourned. The Walsh Bay Development (Special Provisions) Act 1999 was brought in, under which approvals under the Heritage Act were prescribed to be validated (s 7), the consents from other authorities were said to be valid (s 8), and all appeal rights were revoked (ss 10 - 12).

It is the prerogative of Parliament to act as it has done, because in the system of governance in New South Wales, it is supreme and, as the relevant second reading speeches show, the government was in each case endeavouring to protect projects which it considered were of State significance. It is however of some concern, as such legislation impinges on the right of the community to make government accountable to the law through having its decisions reviewed by an impartial body.

Nevertheless, these concerns do not diminish the powerful and important role that the legislature can and must play in achieving better environmental outcomes. The Court and the legislature generally operate in a kind of synergy. If better environmental outcomes are to be achieved, and if ESD is to be part of that, then it is for the legislature to translate ESD principles into binding statutory controls and standards. It then becomes the role of the Court to apply these standards and controls to the matters that come before it. Through understanding these separate functions, one can appreciate how governance can play a vital role in achieving better environmental outcomes.
