Keynote Address, NSW Coastal Conference
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Introduction

It is with great pleasure that I give this Keynote Address at the 11th Annual NSW Coastal Conference.

The theme for this Conference "*Making Waves- Exposing Gaps and Exploring Solutions*" is to be commended, as it is through reviewing the norm and challenging the boundaries that progress in important areas such as coastal management will be achieved.

The Land and Environment Court has also, in recent times, undergone its own process of review and re-evaluation. In September 2001, the final Report and Recommendations of the Land and Environment Court Working Party were handed down, The complete Report of the Working Party can be viewed at: http://www.attgendept.nsw.gov.au/report/lpd_reports.nsf/pages/rep_index and it is in this context, of both exposing gaps and exploring solutions, that I am pleased in this Address to address the question "What's Happening Now?" in relation to the Land and Environment Court of NSW.

The Court

The Land and Environment Court came into operation on 1 September 1980. It is a superior court of record with rank and status equivalent to the Supreme Court in the hierarchy of courts in New South Wales.

The establishment of the Land and Environment Court was part of the early evolution of environmental law in New South Wales. The growing amount of comprehensive and specialised environmental legislation in the 1970's in the areas of planning and environmental pollution created the necessity for a specialist court with specialist knowledge and expertise. 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.

The Court has now performed this vital role for 21 years. On 7 April 2000, the then Attorney-General for New South Wales, the Hon J W Shaw MLC, announced the establishment of an independent Working Party to review the way in which development applications are dealt with by the Court. This review was limited to the Court's role with respect to planning appeals on the merits, that is, with class 1 of this Court's jurisdiction. It did not address in any way the other classes of the Court's jurisdiction, such as its summary criminal jurisdiction or civil enforcement.

In September of this year the Working Party submitted its final report containing in total 37 Recommendations to the Hon. Bob Debus MP, the current Attorney-General. Although the report of the Woking Party has been made available to the public, it is currently before Cabinet so we await Cabinet's decision as to the final recommendations to be adopted. For this reason I will not delve into the report in any detail, but I will say that the most important recommendation of the Working Party was Recommendation14, which recommended that the Court's function with respect to merits review of development applications be retained. The balance of the Report is largely concerned with the mechanics of this function.

Nature of the Court's work

The most important thing to note about 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. The Court is not an investigator nor a commission of inquiry. It determines matters as they come before it in accordance with the law. The question then arises as to how matters come before the Court. In class 1, the Court is dependent upon the applicant for the development to invoke the Court's jurisdiction. The exception is when there is designated development, whereby a person who is an objector to a development can appeal to the Court, even if the applicant and the council have reached agreement. The extent to which the Court can even review a development is therefore dependent upon a process that brings a matter to the Court's attention.

More than any other court in the justice system of New South Wales, except perhaps the Industrial Relations Commission, 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. In particular, they often involve disputes between private property owners with private (and often development) interests, and councils or other public authorities with public (and often environment protection) interests.

This dichotomy is extremely evident in respect to coastal management. By way of example I would like to briefly mention two cases. The first may be well known to many of you here, and that is the case of *Warringah Council v Franks* (see *Warringah Council v Franks* (unreported) Pearlman J 19 May 1998; *Warringah Council v Franks* (unreported) Pearlman J 24 July 1998; *Warringah C*ouncil v Franks (1999) NSWLEC 65 per Bignold J; *Warringah Council v Franks* (1999) NSWLEC 136 per Bignold J. Mr Franks is a former first grade rugby league player who owned a property at Narrabeen near Collaroy Beach. On the evening of 10-11 May 1997, there was a significant storm event which affected areas of coastline and caused damage to properties and extensive erosion. In particular sand was eroded from the beachfront leaving a steep escarpment. One of the properties affected by the storm was that owned by Mr Franks.

Mr Franks was concerned about the potential loss of his land. He immediately contacted an engineer who advised that without the urgent construction of a rock seawall, sand would continue to erode away and much of the property would be lost. Mr Franks commenced immediate construction of the seawall, without development consent. An urgent injunction was sought by the council and granted by the Court preventing Mr Franks from continuing with this activity. Mr Franks ignored this order, and consequently I found him guilty of contempt and he was fined.

The council then sought an order from the Court requiring Mr Franks to remove the seawall. Justice Bignold discussed the conflict between property owners who in times of emergency feel compelled to act to protect their land, and the council who is concerned with broader matters concerning coastal policy and the protection of the coastline more generally. Justice Bignold considered Mr Franks' action to be understandable and not morally culpable, and noted that Mr Franks had obtained engineering advice before proceeding. The wall was not unsafe, although its long term efficacy, in terms of the council's coastal management policy, was doubtful. Ultimately, Justice Bignold refused to order the demolition of the seawall.

Another example is the decision of Commissioner Hussey in *Scott v Byron Council* (No.10513 of 1996, 21 November 1996).. That matter concerned a joint application by a number of residents along the Belongil spit at Byron Bay for the urgent construction of a 250m rock seawall to protect their properties following a significant storm event in 1996.

The proposal was refused by the council, who preferred a policy of 'natural retreat'. Although the property owners considered the threat to their land to be serious, one of the experts for the council did not share this view, and preferred to let natural processes take their course, even if that meant losing some properties.

In his judgment, the Commissioner found that (page 20):

"*the determination of this development involves an assessment of the relative private interests of the property owners to protect their properties from beach erosion, against the wider public interest in terms of future beach amenity.*

The reconciliation of these competing interests was compounded due to the absence of a detailed beach management strategy which encompasses development control provisions, arrangements for existing developments and an ongoing (if any) beach protection program. These basic steps were identified in the Coastline Management Manual...[this] lack of priority by council has resulted in the current unsatisfactory situation where the property owners have to undertake ad hoc protection works, if their properties are to be protected from further damage."

Commissioner Hussey refused the applicants' proposal, however, on the ground that the land in question was environmentally sensitive and should be protected. Although the proposed development may have afforded some protection to the properties, it could have adversely affected beach erosion processes. He saw a need for a more detailed approach to the issues and considered that approving this development would simply be a continuation of the 'band aid' approach to coastal management. This approach was supported by the Department of Urban Affairs and Planning as well as the Department of Land and Water Conservation.

The Court is continually engaged in a balancing act of these often fundamentally competing interests within the particular planning context that governs the development application in question. The Court itself does not set policy, nor lobby for the reform of the law, nor act as a planning or environmental consultancy, nor undertake research. It does not have a preference between development and environment, other than to uphold the law.

The means through which the Court should resolve these competing interests is sometimes said to be through the implementation of 'ecologically sustainable development' or ESD, which is enshrined as an objective in the Environmental Planning and Assessment Act 1979.

The challenge, as will be readily appreciated, is in turning this broad objective into action. Many submissions to the Working Party argued that the principles of ecologically sustainable development are not adequately applied by the Court. For instance, one submission claimed as follows:

"*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.

To an extent, this comment is true- I know of no case in the Court in which the principles of ecologically sustainable development have been specifically applied as the determinative factor. But this is largely because it is unclear how the principles of ecologically sustainable development actually operate. They are statements of policy not action. If ESD principles are to be implemented and used in a practical way by the Court, then they need to be translated into binding statutory controls and standards.

One principle of ESD however, (which is identified as such in the new Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999, s.3A(b)) is the precautionary principle, and this has been the subject of judicial determination in the Court.

In *Leatch v Director-General National Parks and Wildlife Service* (1994) 81 LGERA 270 a case that will certainly be familiar to some of you, his Honour Justice Stein (now in the Court of Appeal) held that the precautionary principle was a relevant consideration in the case before him. Perhaps equally famous is the comment by one of the current Judges of the Court, Justice Talbot in *Nicholls v Director National Parks and Wildlife Service Nicholls* (1995) 84 LGERA 397 as follows:

"*the statement of the precautionary principle, while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument. Taken literally in practice it might prove to be unworkable. Even the applicant concedes that scientific certainty is essentially impossible. It is only 500 years ago that most scientists were convinced the world was flat. The controversy in this matter further demonstrates that all is not yet settled*".

In *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd* (1994) 86 LGERA 143, I said:

"*The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues*."

Recently, his Honour Justice Sheahan applied the precautionary principle in *Davfast Pty Ltd v Ballina Shire Council* (2000) NSWLEC 128. That case involved a development application for the construction of two dwelling houses on land next to coastal sand dunes. The Court heard evidence from Professor Thom who had intervened on behalf of the Department of Urban Affairs and Planning and the provisions of the 1997 Coastal Policy were directly raised. Professor Thom's evidence highlighted the key role played by undisturbed dune vegetation in minimising the instability caused by wind and wave action. In reaching his decision to refuse the development application, his Honour applied the precautionary principle in respect to issues of coastal protection and in respect of the failure of the development to meet the goals and objectives of the Coastal Policy.

I wish also to mention the decision of Commissioner Brown in *Smyth v Nambucca Shire Council* (No.10537 of 1998, 3 February 2000). That case concerned a development application for subdivision of 45 rural residential lots at North Valla at a site located about 300m from the Pacific Ocean and near Oyster Creek. A key issue concerned the on-site effluent sewerage disposal system proposed for the site, particularly concerning the sensitivity of the nearby Oyster Creek. Professor Thom, again an intervener, identified for the Court that an estuary management plan had not be undertaken prior to council's assessment. The evidence before the Court revealed that Oyster Creek is an example of an intermittently closed/ open coastal lake or lagoon which is unusual, and as such, required special care and expert examination. Due to conflicting evidence about the capacity of the system and Oyster Creek, the Commissioner dismissed the appeal. In his conclusion, the Commissioner said:

"*The location and special characteristics of Oyster Creek dictate that there must be no uncertainty in relation to the disposal of effluent from the proposed lots. On the evidence, I could not be assured that the effluent disposal would not impact on the water quality of Oyster Creek and for this reason the appeal must fail*." *Smyth v Nambucca Shire Council*, paragraph 121.

This case is therefore another application of the precautionary principle, although it was not expressly identified as such.

The Local Government and Shires Association submitted to the Working Party that concerns surrounding ESD could be better addressed through training in these areas for judges and commissioners. As the Working Party noted, judges and commissioners presently receive ongoing training in matters including the principles of ecologically sustainable development. Such training should however certainly continue.

I have sought in the cases I have mentioned to highlight the determinative role of evidence in terms of how the Court balances these often competing interests and reaches an outcome. A recent and fairly controversial case that also highlights this issue is *Stockland Constructors Pty Ltd v Wollongong City Council* (No.10026-10030 of 2001, 18 September 2001).

That case involved an extensive residential development at Sandon Point. Although there were extensive objections raised, most of the issues were resolved between the council and the applicant prior to the hearing. One issue that did arise for determination concerned threatened species. One endangered ecological community - the Sydney Coastal Estuary Swamp Forest, was identified. Following an '8 part test', it was found that the proposed development would not have a significant effect on the community. The same '8 part test' was applied in respect to threatened

fauna species, namely the *Green and Golden Bell Frog*, *Painted Snipe* and *Australian Bittern*. In the absence of contrary evidence, Commissioners Watts and Hussey relied on this evidence and found that there would not be any significant impacts. The evidence in that case did however recommend the provision of a variable width riparian buffer zone, which would be likely to improve forage areas for fauna. Accordingly, conditions of consent required this to be implemented. Evidence was also given as to the impact of the development on an existing wetland. The applicant proposed mitigative measures to minimise this impact, particularly through the establishment of riparian buffers and deflection of storm water away from the wetlands. On the evidence, the commissioners did not think this issue justified refusal. For this and a number of other reasons, the development was accordingly approved.

A final example of the importance of evidence is one of my own cases, *New South Wales Glass and Ceramic Silica Sand Users Association Ltd v Port Stephens Council* (2000) NSWLEC 149. That case concerned a development application for the extraction of white silica sand from the northern dune at Tanilba on the Tilligerry Peninsula, Port Stephens. The case was complicated, involving a lengthy hearing, voluminous reports and oral evidence from 22 expert witnesses.

In brief, the council submitted that the development application should be refused due to the uncertain impact of the proposed development on the groundwater system and the consequent potentially adverse impact upon both the wallum froglet and the rehabilitation of the site. I found on the evidence that the extraction levels of the mining operation could be limited by conditions of consent, so that the groundwater would not be likely to be affected by the mining operations. It followed that the wallum froglet was not likely to be significantly affected by the proposed development. For these and other reasons, I approved the development.

The strength and clarity of the evidence is therefore the key to a win or loss in the Court. The Court is fully capable of understanding complex technical evidence so long as it is presented carefully, simply and logically.

Similarly important is preparation. Time must be spent carefully considering the issues and defining what the real issues in contention are. These will generally come down to a handful of issues. A party who takes a shotgun approach to the issues will rarely find this approach successful.

Once the issues are identified, then it's all about getting the right evidence, which is often about getting the right expert witnesses. This was a subject for some consideration by the Working Party.

The role of expert witnesses is clearly set out in the Court's Expert Witness Practice Direction 1999, which provides:

> *An expert witness's paramount duty is to assist the Court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party.*

An expert who acts as an advocate does nothing whatsoever for the party on whose behalf the evidence is given, as the Court will give that evidence little if any weight. The role of the expert is instead to educate the Court and to guide the Court in understanding complex and technical issues.

Expert witnesses should not be reluctant to appear before the Court due to matters such as cross-examination. Cross-examination, particularly when conducted inappropriately and excessively, is a significant deterrent to expert witnesses and results in wasted costs for the parties and of the Court's time. For this reason, the Court has had for some time a rule that all cross-examination of expert witnesses be the subject of leave of the court. This rule should be strictly enforced in the hope of encouraging more expert witnesses to assist the Court, and make the giving of evidence a more effective and efficient process.

Conclusion

The Land and Environment Court is undergoing its own process of reform and review, as indeed after 21 years of operation it must. The role of the Court in undertaking merits review is fundamental to the rights of both individuals with private interests, and to public authorities and groups with public interests. The balancing act undertaken by the

Court is just that- a balancing act. The factor which generally tilts the Court one way or another is the evidence. This balancing act does however occur in a planning framework, with legislation, regulations and policies all dictating the parameters within which the Court's function occurs. I hope that at this forum, and in particular through the summit workshops that you will be participating in, that you will embrace the challenge of both making waves and exploring solutions and put forward recommendations on how this planning framework can be improved for the benefit of our vitally important coastal ecosystems.

I thank you for giving me the opportunity to contribute to this important event.