

SWEARING IN OF JUSTICE PETER McCLELLAN AS CHIEF JUDGE OF THE LAND AND ENVIRONMENT COURT

MONDAY, 25 AUGUST 2003

Chief Justice, your Honours, Attorney, ladies and gentlemen:

I greatly appreciate the kind personal remarks of both the Attorney and Mr Benjamin. As this is a special occasion for the Land and Environment Court I would like to reflect briefly on the origins of environmental law and the role which the court plays in New South Wales.

At the end of the 19th century the industrial and agricultural development of modern Australia was just beginning. Our wealth was still derived from the land. The common law was the guiding force for the rule of law. However, change was coming. At the same time as Federation there was a concerted effort to provide legislation to control many aspects of our lives. In the abridged version of Manning Clark's History of Australia,¹ the period 1851-1888 is given the title "The Earth Abideth Forever". 1888-1915 is titled "The People Make Laws". At the time of Federation, New South Wales had no environmental law and there was no town planning law.

In 1906 the State Government passed the first comprehensive Local Government Act.² Recognised quickly as inadequate it nevertheless provided control by local Councils over the subdivision of land and the opening of roads. An appeal against a Council's decision lay to the judges of the District Court. There were not many appeals. The 1906 Act was replaced by the Local Government Act of 1919.³ It continued to provide the legislative structure for local government until repealed in 1993.

Part XI of the 1919 Act was titled Building Regulation and Part XII carried the label Town Planning. However the reality was that, apart from the introduction of Residential District Proclamations designed to stop industry, commerce and flats in areas given over to bungalows, "town planning" was confined to the control of subdivision and the opening of roads. The 1919 Act provided for rights of appeal to the District Court.

In 1945, and only after considerable pressure was applied by the Commonwealth Government, (grant monies were threatened to be withdrawn) the Act was amended and Part XIIA titled Town and Country Planning Schemes was incorporated.⁴ It was the legislative foundation for the County of Cumberland Planning Scheme and other county

schemes. They were followed by local planning schemes. The primary responsibility for development control remained with Councils, subject in many areas to a power of veto at State level.

The 1945 legislation did away with appeals to the District Court. That jurisdiction was given to the Land and Valuation Court which had been erected in 1921 to deal with Crown land and related problems.

With the commencement of Part XIIA, and the introduction of development control, the legal profession inevitably became involved in planning problems. Town planning, as a discipline, was in its infancy and for many years surveyors, engineers and architects did the work on the ground. But with development now regulated by written instruments, questions of statutory construction emerged and complex concepts required explanation. The limits of the discretion available to the decision-maker, the permissible intensity of development, the compatibility of disparate forms of development, the need for an acceptable level of public facilities, such as roads, water and sewerage, public transport, schools and recreation facilities, and the problem of existing use rights were major issues, amongst many others, which the Land and Valuation Court had to resolve.

In 1958 the Parliament legislated to provide for Boards of Appeal in subdivision and building matters.⁵ Control of development appeals remained with the judges of the Land and Valuation Court until 1973, when the Local Government Appeals Tribunal was created.⁶ That Tribunal had responsibility for appeals in relation to all discretionary decisions made by Councils. The Supreme Court continued to have a role deciding questions of law which arose in appeals to the Tribunal, and, particularly following the decision in **Sutherland Shire Council v Leyendekkers**,⁷ an increasing role in determining and enforcing the law.

The Local Government Reports, as they were known, reflect the extraordinary contribution which the judges of the Land and Valuation Court made to the development of principled decision making in town planning. I do not have time to dwell upon them today. Many of those decisions and the appeals determined from them, together with the decisions of the Supreme Court declaring the law, survive today. A quick glance at the early reports also reveals the extent to which the great names of the Bar of the day and those who were soon to be recognised appeared in planning cases. Volume 1 of the Local Government Reports records these appearances, as they then were: G P Stuckey QC, E H St John, R J Marr, J D Holmes QC, A B Kerrigan QC, Forbes Officer, J A

Lee, J F Nagle, B T Thorley, R Else Mitchell QC, A C Saunders, P Woodward QC, R M Hope, J W Smyth QC, Wallace QC, A F Mason, K S Jacobs, N H Bowen QC, D L Mahoney, D B Milne, M E Pile QC, D A Staff, Sir Garfield Barwick QC, M F Hardie QC, A Moffitt QC, E S Miller QC, L K Murphy, C R Evatt QC, P J Kenny and G J Samuels. Many of those counsel appear more than once in that volume of the reports.

It must have been a stimulating enterprise for all involved. To the extent that any legal text can capture the mood of the times. Murray Wilcox's classic "The Law of Land Development"⁸ managed to do so.

The contribution which the courts could make to the planning process was assisted by the form of the early planning instruments. With the County of Cumberland Planning Scheme as the model, local schemes, when made, followed a familiar pattern and adopted standard phraseology. In recent years this approach has been largely abandoned, making decisions in relation to the provisions of one plan of little if any, relevance to others. This has substantially increased the work of the Court and, I suspect, has contributed to the complexity, uncertainty and cost of the whole system.

Throughout the 1960s and 1970s the population of Sydney continued to grow apace. Notwithstanding cyclical recessions, the rate of urban, industrial and commercial development increased significantly. The so-called baby boomer generation, educated with the assistance of Commonwealth scholarships, was entering the work force.

In the early 1970s young graduates began to emerge from the universities with an increased understanding of science and the interaction of development with the natural environment. Town planning became an academic discipline and university courses in environmental science began to emerge. At the same time very significant changes were coming as community values with respect to the value of natural areas, the acceptability of industrial pollution, the impact of noise, the quality of the natural and built landscape and many other environmental considerations were articulated. The environment became a political issue at the local and national level. It was not the only change occurring. As Bascow and Wheeler have observed, the wave of environmentalism which developed in the industrialised world grew in the turbulent period of political ferment and change which occurred in the 1960s and 1970s.⁹

In 1976, just prior to the elections of that year, the state Liberal government of the day introduced a Bill which proposed to repeal Part XIA of the Act and create a new system of environmental planning.¹⁰

I remember the announcement well, for I had laboured for months at night to prepare a draft of an updating supplement for Murray Wilcox's book – a task which I completed just days before the announcement. It rendered my efforts redundant before they arrived at the publisher.

The Coalition lost the election and the Labor Party, led by Neville Wran, who is here today, came to power. In 1979, the Wran government introduced far-reaching changes repealing Part XIA and enacting the Environmental Planning and Assessment Act 1979 (NSW). The inclusion of the word "environment" was not just incidental. It reflected the fact that all aspects of the built and natural environment including projects undertaken by government were now controlled by an Act of Parliament. It was a major step.

As part of the legislative package, the Land and Environment Court was created. For the first time merit appeals and enforcement of environmental law were provided for in the one location. The structure was then unique, although the change did not occur without controversy.

I myself joined in that controversy. But the Court has proved to be an enduring institution and has become a model for many similar courts in the developed world.

The Land & Environment Court has been led during the last twenty years by three people whose contribution to the development of the Court and environmental jurisprudence it is appropriate to acknowledge today. The late Jim McClelland was given the task of creating the court, defining its hearing processes and commencing the task of laying out the legal principles which would guide environmental law under the new legislation. I appeared before him many times and came to know him well as counsel to the Maralinga Royal Commission. Jim was a man of insight and courage with an enviable mastery of the English language. I am immensely pleased that his widow Gillian Appleton is here today to join in this occasion.

Jerrold Cripps followed Jim and was Chief Judge until appointed to the Court of Appeal. Jerrold came with a knowledge of planning, having formed a close working relationship with the late Justice Hope, one of the leaders in the field, before he was appointed to the Supreme Court. The Local Government and Environment Reports bear testament to the capacity which Jerrold demonstrated to not only master planning

problems, but, to give them a context within established legal principles. He contributed to the resolution of many of the most significant issues of the last twenty years, including the problems with the application of environmental legislation to government activities. Jerrold has given to the community in many ways. Through his work with the Legal Aid Commission he was also able to ensure that the Environmental Defenders Office was provided with a stable foundation.

Jerrold was followed by Mahla Pearlman who came to the Court with a great knowledge of property law and with the experience of leadership with the Law Society and the Law Council of Australia. Her judgments are models of clear expression and reflect the intensity of her endeavour to define the problem and reason to the correct answer. During Mahla's time the Court came under significant pressures leading to an inquiry which I am sure added to her burdens as Chief Judge. Although the criticism was, at times, strident, Mahla led the Court with dignity, engaging with its critics and responding to the issues.

The brief outline I have sketched this morning is sufficient to demonstrate that environmental law has a recent history. Its present form is a direct response to changing community structures, understanding, needs and expectations.

No doubt 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 from merit decisions made by councils or others. However, as I have indicated the Parliament has given a merit review role to courts or expert tribunals since the early days of planning control.

There are many reasons why such a merit review process is appropriate. However, its continuing legitimacy 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. As Sir Gerard Brennan said in *Drake* “inconsistency (of decision making) is not merely inelegant, it brings the process of deciding into disrepute.”¹¹ He was, of course, speaking in relation to immigration matters but his remarks hold true for decisions with respect to environmental problems. Those early and exciting days of the Land and Valuation Court reflect the intensity with which that Court approached the task of defining the principles which would enable the rational resolution of environmental disputes, both large and small.

Of course, the volume of merit appeals today is vastly greater than it was in 1950. One thousand one hundred and twenty-four development appeals were lodged with the Court in 2002. Most of those matters are decided by the Commissioners of the Court who, in many respects, carry out its most important work.

It cannot be assumed that environmental law and the role of the Land and Environment Court will be free of controversy in the future. Some of the issues which the Court must deal with raise questions of fundamental human rights. All of them affect the lives of some or a group of people in our community. Many will involve very substantial money profits or losses to individuals or corporations. The court must contribute to the task of balancing the immediate needs of the present generation with the trust we hold for those who will come after us.

The work of the judges of the Court is varied but has two significant elements. In recent years, criminal prosecutions have increased in both number and complexity. There remains a constant flow of judicial review matters. Because of the significance which environmental issues have in our community the judges have the task of ensuring that environmental jurisprudence both acknowledges and contributes to the development of

administrative law. Insofar as the common law is able to respond to contemporary problems, the environment, above almost any other area, will continue to bring forward issues against which the relevance and effectiveness of existing administrative law principles can be assessed.

It is no accident that environmental disputes have provided the factual matrix from which many significant legal principles have been developed. The intensity of the underlying dispute has given the names Australian Conservation Foundation,¹² Alcoa,¹³ Peko Wallsend,¹⁴ Tasmanian Dams,¹⁵ Oshlak,¹⁶ Caltex,¹⁷ San Sebastian,¹⁸ Brickworks,¹⁹ Boyce,²⁰ Wandsworth Board of Works,²¹ Murphyores,²² Dunlop²³ and Twist²⁴ to modern law. There are of course many more. Environmental problems raise fundamental questions about how we want to live and manage the community's resources.

I am honoured to have been asked to be Chief Judge of the Land and Environment Court. I consider it a privilege to be given the task of leading the dedicated men and women who comprise its members. In leaving the Supreme Court to take up my new role I thank my colleagues on the court for their friendship and support since I was appointed. The Supreme Court is a stimulating environment in which to work comprised as it is of judges dedicated to the resolution of complex disputes. Above

all I thank the Chief Justice for the opportunities he has provided for me to engage in interesting and challenging tasks.

This is not an occasion to dwell upon personal matters. That occurred when I became a judge of the Supreme Court. However, I would like to acknowledge the fact that both my parents are here today and I express my continuing gratitude to my wife and children for their support. I am also grateful for the extraordinary efforts of my associate Angela Flockhart, my research assistant Elisabeth Passmore and others who have worked to assist my leaving the Supreme Court on time.

I express my personal thanks to you all for coming. Your presence honours me but, more importantly, it honours the Land and Environment Court.

1 (Melbourne: Penguin, 1993).
2 Local Government Act 1906 (NSW).
3 Local Government Act 1919 (NSW).
4 Local Government (Town and Country Planning) Amendment Act 1945 (NSW).
5 Local Government (Amendment) Act 1958 (NSW).
6 Local Government (Appeals) Amendment Act 1971 (NSW).
7 [1970] 1 NSWLR 356; (1970) 21 LGRA 410.
8 (Sydney: Law Book Co., 1967).
9 L S Bascow and M Wheeler, *Environmental Dispute Resolution* (New York: Plenum Press,
10 1984) at 2.
11 Environmental Planning Bill 1976 (NSW).
12 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 639.
13 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; (1980) 45 LGRA
14 245; (1980) 54 ALJR 176.
15 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; (1981) 36 ALR 425; (1981) 55 ALJR 631.
16 *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors* (1986) 162 CLR 124; (1986)
17 66 ALR 299; (1986) 60 ALJR 560.
18 *Commonwealth v Tasmania* (1983) 158 CLR 1; (1983) 46 ALR 625; (1983) 57 ALJR 450.
19 *Oshlak v Richmond River Council* (1998) 96 LGERA 173; (1998) 152 ALR 83; (1998) 72
20 ALJR 578.
21 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; (1993)
22 82 LGERA 51; (1993) 118 ALR 392; (1993) 68 ALJR 127; (1993) 12 ACSR 452; (1994) 11
23 EPLJ 432.
24 *San Sebastian Pty Ltd v Minister Administering Environmental Planning Act* (1986) 162 CLR
340; (1986) 60 LGRA 405; (1986) 68 ALR 161; (1986) 61 ALJR 41; (1986) Aust Torts Reports
80-060.
Parramatta City Council v Brickworks Ltd (1972) 128 CLR 1; (1972) 26 LGRA 437; [1972-73]
ALR 3; (1972) 46 ALJR 254.
Boyce v Paddington Borough Council [1903] 1 Ch. 109.
Cooper v Wandsworth Board of Works (1863) 14 CBNS 180; (1863) 143 ER 414.
Murphyores Inc Pty Ltd v Commonwealth (Fraser Island case) (1976) 136 CLR 1; (1976) 38
LGRA 224; (1976) 9 ALR 199; (1976) 50 ALJR 570.
Dunlop v Woollahra Municipal Council [1981] 1 NSWLR 76; (1981) 45 LGRA 411; [1982] AC
158; (1981) 33 ALR 621; [1981] 1 All ER 1202; [1981] 2 WLR 693.
Twist v Randwick Municipal Council (1976) 136 CLR 106; (1976) 36 LGRA 443; (1976) 12
ALR 379; (1976) 51 ALJR 193.