

**THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**SPIGELMAN CJ  
AND THE JUDGES OF  
THE LAND AND ENVIRONMENT  
COURT**

**Monday 14 November 2005**

**SWEARING-IN CEREMONY OF  
THE HONOURABLE BRIAN JOHN PRESTON  
AS CHIEF JUDGE OF THE LAND AND ENVIRONMENT COURT  
OF NEW SOUTH WALES**

1 **PRESTON J:** I have the honour to announce that I have been appointed the Chief Judge of the Land and Environment Court. I present to you my Commission.

2 **SPIGELMAN CJ:** Thank you, Chief Judge Preston. Please be seated whilst the Commission is read. Registrar, please read the Commission.

(Commission read.)

Justice Preston, I ask to rise and take the oaths of office.

(Oaths of office taken.)

3 Registrar, I hand to you the form containing the oaths so that they may be placed amongst the records of the Court and the Bible on which they will be sworn, so that it may have the customary inscription placed in it and presented to his Honour as a memento of this occasion.

4 **THE HONOURABLE R J DEBUS MP, ATTORNEY GENERAL OF NEW SOUTH WALES:** May it please the Court.

- 5 It is my great pleasure, your Honour, to congratulate you on your appointment as Chief Judge of the Land and Environment Court of New South Wales.
- 6 You have distinguished yourself in your practice of the law in this State and I am confident that you will continue to serve the legal community and the people of New South Wales as an outstanding Chief Judge.
- 7 Your Honour's appointment comes at a particularly important time in the relatively brief history of this Court.
- 8 Under the leadership of your predecessor, his Honour Justice McClellan, the Land and Environment Court continued to undergo significant reform. Those reforms included a continued emphasis on the removal of the adversarial nature of many proceedings and encouragement of the parties to work toward the best outcome rather than towards winning or losing.
- 9 That too is a theory of the parliament. Sadly I suspect that the Court may be better able to convince people of its dedication to such principles.
- 10 Justice McClellan was responsible for the modification of a range of Court procedures and these included the introduction of the expert witness practice direction, which allows for Court-appointed experts in appropriate matters to ensure that experts are more clearly independent in their role of assisting the Court to resolve issues.
- 11 Also the prehearing practice direction now provides for Class 1 planning hearings to commence with a view on site at 9.30am on the first day of the hearing unless otherwise directed. This procedure saves time and money while providing an invaluable early context to proceedings.
- 12 The rules of Court have also been amended to provide a new basis for awarding costs, no order for costs will be made unless the Court thinks

that such an order is in the circumstances of the particular occasion fair and reasonable.

- 13 In cases where the actions of a party have caused unnecessary litigation or expense, cost orders are now possible even though exceptional circumstances may not apply. These changes and efforts to demystify the Court's operation through new website information have confirmed the Court as a best practice jurisdiction.
- 14 The Court has also been developing environment and planning jurisprudence. This was evident in the matter of BGP Properties Pty Limited v Lake Macquarie City Council in 2004. In that matter, the Court discussed the relationship between the myriad legislative and regulatory instruments and policies that guide environmental and planning decisions. In particular that case developed the application of the principle of Ecologically Sustainable Development (ESD) and the extent to which the precautionary principle could be applied.
- 15 That case touched also on the Rio Declaration which was agreed at the Earth Summit in 1992 and relevant case law.
- 16 One of those cases was Carstens v Pittwater Council, a case in 1999 in which council by the name of Mr Preston made apparently persuasive submissions about the basis and necessity for the Court to apply the principles of ecologically sustainable development.
- 17 In BGP Properties, McClellan CJ concurred with the view of Lloyd J in Carstens, that the ESD principle - though an undefined object in the Environmental Planning and Assessment Act - should be given effect to in determining a development application. His Honour said in that judgment, and I quote:

“In my opinion, by requiring a consent authority to have regard to the public interest, the Environment Planning and Assessment Act

obliges the decision-maker to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise.

This will have the consequence that ... consideration must be given to matters of inter-generational equity, conservation of biological diversity and ecological integrity. Furthermore, where there is a lack of scientific certainty the precautionary principle must be utilised."

- 18 His Honour later made another significant observation that "consideration of these principles does not preclude a decision to approve an application in any cases where the overall benefits of the project outweigh the likely environmental harm".
- 19 Your Honour, the full downstream impact of the Court having embraced these principles is yet to be seen. It seems conceivable that, beneath the broad heading of Ecologically Sustainable Development, the Court may develop particular jurisprudence in areas such as water and native vegetation. Time will tell.
- 20 Should the metaphorical heavens begin to fall, it is a distinct possibility that local government - that shy, unalloyed fan of the Land and Environment Court - will let us all know.
- 21 Your Honour, I now reach the stage where I provide an Attorney General's version of "This is your Life". This variant of that outstanding piece of commercial television will today be free of obscure friends you wished never to lay eyes upon again rushing on stage to seek a warm embrace. That is the kind of thing I hope to incorporate in next year's swearing-in ceremonies.
- 22 Your Honour graduated from law with first class honours from Macquarie University in 1981 and following your admission as a solicitor in 1982, you began your career in legal practice with Stephen Jaques & Stephen in the firm's resources group. And you then became associate to Mr Justice O'Leary of the Supreme Court of the Northern Territory.

- 23 Following that, you were the inaugural principal solicitor at Australia's first specialist environmental legal centre, the Environmental Defender's Office in this State and, after establishing that office, you returned to private practice as a senior litigation solicitor.
- 24 In 1987 you moved to the New South Wales Bar and you were appointed Senior Counsel in 1999. Although you developed a large practice in planning and environmental law, your time at the Bar also saw you engaged in the areas of administrative law, commercial law, equity, and building & construction.
- 25 You have contributed significantly to the development of the jurisprudence of planning and environmental law in New South Wales. Some of the important cases in which you have acted include: *Bankinvest v Seabrook*, the first major case on the scope and application of uniform cross-vesting legislation; *Legal and General Life v North Sydney Council*, a case heard by the Court of Appeal, involving judicial review of the scope and application of State Environmental Planning Policy Number 1; and *Jarasius v Forestry Commission of New South Wales*, involving an interlocutory injunction to restrain logging in south-east New South Wales forests.
- 26 You have proved yourself willing to assist all those who come before our courts without fear or favour, regardless of their public popularity or financial resources.
- 27 Your colleagues extol your energy, drive and commitment to your work and indicate that you are very generous with your time in assisting more junior members of the Bar.
- 28 As a senior member of the Bar, I am told you embrace the seemingly lost Australian tradition of occasionally wearing tracksuit pants in chambers.

- 29 While I commend you for this obviously effective effort to distinguish yourself from your colleagues at the Bar, I must enjoin you to refrain from adopting such casual tastes on the Bench.
- 30 My inquiries confirm the most widespread opinion that you possess an outstanding ability to understand and embrace and to shape the law.
- 31 You have also been a significant commentator on environmental law. You have published a textbook and authored numerous conference papers and articles on environmental law, a number of which have been published in journals such as the Environmental and Planning Law Journal and the Australian Law Journal and Business Law Asia.
- 32 Your travels as a student, teacher and advocate of the law have been extensive and have benefited many. A small sample warrant a mention.
- 33 You established a course in biodiversity law at the University of Sydney in 1992 before undertaking a lecture tour on environmental dispute resolution in Buenos Aires in 1995.
- 34 You were a member of a consultancy team to the World Bank in 1995 and '96 that was briefed to draft National Parks and Wildlife conservation legislation for Trinidad and Tobago.
- 35 From 1999 to 2004 you were a member of the teaching faculty for the Indonesian Environmental Law and Enforcement Training Program for the Indonesian Judiciary.
- 36 In 2003 you convened a tour to World Heritage sites in north-eastern New South Wales and Fraser Island.
- 37 You have just returned from a study tour of World Heritage sites in South America.

38 In your abundant spare time, you completed an Advanced Certificate in Urban Horticulture in 1999 at the Ryde TAFE and you were awarded a TAFE State Medal in consequence.

39 You have proven yourself at every level.

40 Despite your exhausting workload and diverse commitments, you have managed to forge enduring relationships with your colleagues at the Bar.

41 Your wife, Judith, and your children, Rachael, Rebecca and Matthew are here today and I am sure that they are especially proud of your achievements.

42 I am told that you have often been observed at 5.30am reading briefs by the pool in which your children train and I hope that the challenges of your new position will not make it more difficult for you to attend those sessions in the future.

43 Given all of your outstanding achievements so far, I am sure that your Honour will fulfil the duties of Chief Judge admirably and I congratulate you again on your appointment.

44 If the Court pleases.

45 **MR J E McINTYRE, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.

46 It is a pleasure to be here today to speak on behalf of the almost 20,000 solicitors in New South Wales and join with my colleagues in congratulating your Honour on your well-deserved appointment as Chief Judge of the Land and Environment Court.

47 The reputation and standing of any Court reflects in large measure the qualities of the Judges that serve on the Court and particularly by those

who lead the Court. I am confident that the reputation of the Land and Environment Court will only be further enhanced by the appointment of your Honour to lead it.

48 Your Honour's prominent legal and judicial career has already been referred to in most generous note by the Attorney and I would like to echo and endorse those comments.

49 Your esteemed colleagues speak generously of their admiration of your Honour's ability as a lawyer and for the extraordinary contribution you have already made to the environmental law in this State. Your predecessor, the Honourable Justice McClellan, describes your Honour as a very significant intellect. You will no doubt bring that intellect into the resolution of contemporary environmental problems. Your predecessor is well placed to make this observation because, for a considerable period of time, your Honour was Justice McClellan's junior of choice for many cases, especially those which involved significant complexity.

50 Peter Garrett MP, an environmentalist of some note, remarked that "Mr Preston has distinguished himself as a fine lawyer who has comprehensive experience in the realm of environmental law. He will make an outstanding contribution as a Judge and will enjoy the deserved confidence of the public, litigators and the legal profession as he exercises his new duties."

51 Those solicitors who have in the past briefed you remember well your ability to recall and cite particular cases and an unswerving ability to find the most relevant passage of a judgment.

52 I have it on good authority that your Honour is renowned for his detailed and lengthy written submissions. While all agree that your submissions are erudite and well reasoned, they are, however, not identifiable by their brevity. Some have suggested that your elevation to the Bench may see the introduction of a new Practice Note for written submissions, something



to the effect that any submission worth its salt must be no less than 50 pages in length and must contain a minimum of 100 footnotes.

- 53 Your mastery of the printed word and commitment to improving legal professional education has been clearly demonstrated by your prolific writing, including the 1989 publication "Environmental Litigation". This widely read and highly acclaimed publication is still referred to by solicitors around the State as the "bible of environmental law". Indeed, the publication was recently quoted in the Supreme Court of South Australia where the Environmental Defender's Office referred to it in support of the proposition that it shouldn't have to pay costs in an unsuccessful case on the grounds that it was public interest litigation.
- 54 Your passion for the environment, particularly Australian fauna and flora and natural ecosystems, has also become one of your favoured recreational activities. I am told that your Honour has devoted hours to landscaping your private gardens and you have created a spectacular masterpiece with various species of native palms.
- 55 Your study of horticulture has already been referred to by the Attorney, as has your award of distinction and State Medal for Urban Horticulture. It has even been reported to me that you have lectured various groups, including Justice McClellan's mother, on native palms at garden clubs.
- 56 Throughout your career you have shown great generosity in sharing your acquired knowledge with students and fellow practitioners. In particular, your contributions to the University of Sydney have been outstanding. You played an instrumental role in the teaching and development of the Master of Environment Law program at the Faculty of Law at the University of Sydney.
- 57 For more than a decade, your Honour has taught Biodiversity Law and Environmental Dispute Resolution. I am told that your Biodiversity Law Unit has always been extremely popular as it includes field trips to national

parks throughout New South Wales. The Environmental Dispute Resolution Unit is also said to be popular, although the moot Court before the Land and Environment Court apparently tests the nerves of students quite considerably.

58 Your Honour was one of the first environmental law lecturers to visit the Wuhan University in the People's Republic of China. During that visit you met Professor Wang Xi with whom the faculty has formed an ongoing relationship. Professor Wang Xi now hosts the Masters students in China who undertake the unit Sustainable Development Law in China.

59 You have served on many committee groups, including the National Environmental Law Association. I am told that the Association's annual conference is highly regarded and well looked forward to by those who attend. Evidently your Honour is a regular member of the NELE quartet which performs ditties consistent with the themes of the conference. Not always regarded as vocally sound, the quartet is wholly applauded for its entertainment value.

60 On behalf of the solicitors of New South Wales, I would like to extend the profession's congratulations to you on your appointment. May we wish you many challenging and rewarding years on the Bench.

61 As the Court pleases.

62 **PRESTON J:** Chief Justice, other justices and judges, members of the legal profession, ladies and gentlemen, thank you all for attending this swearing in ceremony. By your attendance, each of you extends to me a great honour.

63 I also thank the Attorney General, the Honourable Mr Debus, and the President of the Law Society of New South Wales, Mr McIntyre for your kind words about me.

- 64 More importantly, by your presence each of you honour the Land and Environment Court and the office of the Chief Judge. Ceremonies such as this are a public acknowledgement of the importance of the Court and the position of the office of Chief Judge in the administration of justice in New South Wales.
- 65 The Court is a special part of the judicial system of New South Wales. Its unique jurisdiction and structure and its performance have earned it plaudits in this State, within Australia and internationally. It has been the reference point and model for judicial institutions elsewhere in Australia and overseas.
- 66 The work of the Court has been and will continue to be of importance to present and future generations in a number of ways.
- 67 First, the Court was established with, as one of its aims, the development of environmental jurisprudence. Over the past 25 years, the Court has, in certain areas, performed that task. But the task is not- and perhaps never can be- complete. The development of environmental jurisprudence is of importance because it affects the environment and the society in which we live.
- 68 The famous architect, Frank Lloyd Wright pithily observed that “You will find the environment reflecting unerringly the society”.
- 69 We are not placed into our environment: we and our environment grow together into an interlinked whole. A careful look around us will tell us who we are. The landscape of our cities and countryside tells us from where we have come and how far we have to go.
- 70 On the level of the person, Wright noted that “all form is an effect of character”. He believed that a person’s character was an effect of the form and construction of the place in which they dwell.

“Whether they are fully conscious of this or not, they actually derive countenance and sustenance from the ‘atmosphere’ of the things they live in or with. They are rooted in them just as a plant is in the soil in which it is planted”.

- 71 Wright emphasised the interdependence between architecture and landscape, such that neither appears complete without the other. Wright designed for a balanced condition- man in nature and nature in man.
- 72 Wright was influenced by the transcendentalist poet Ralph Waldo Emerson. Emerson considered that the good life is not so much reasoned analysis, dominion over nature, and rebuilt environment conquering nature; rather life requires appropriate respect, sensitivity and caring, whether in culture or nature. Human life and society ought to be lived in continuity with nature.
- 73 The influential American forester, Aldo Leopold emphasised the need to build a permanent and mutually beneficial relationship between civilised man and a civilized landscape. Leopold characterised this relationship as “a state of harmony between men and land”.
- 74 Ian McHarg, a leading planner and landscape architect, strove to synthesise architecture and the natural sciences. McHarg sought to achieve built environments that were more compatible with their natural environment. His philosophy was encapsulated in the title of his seminal book, *Design with Nature*.
- 75 Edward Schumacher noted that in the simple question of how we treat the land our entire way of life is involved. Schumacher was an economist. His famous book *Small is Beautiful* was subtitled “a study of economics as if people mattered”. He saw economics as a way of sustaining, restoring and maintaining the immense diversity and complexity of the biosphere in addition to nourishing, nurturing and fulfilling appropriate human needs. In short, economics is to serve people and planet. For Schumacher, care for the land and for the soil was fundamental to caring for the whole natural world, as well as a way of creating a just and equitable society.

- 76 Secondly, the Court can play a role in developing mechanisms for foreseeing and forestalling environmental degradation and for the adaptive management of the environment.
- 77 Rachel Carson dedicated her classic book, *Silent Spring*, to Albert Schweitzer, the Nobel Prize laureate and doctor. She quoted Schweitzer's pessimistic statement "man has lost the capacity to foresee and forestall. He will end by destroying the earth". Of course, Carson's book itself was an attempt to warn society about and to forestall the adverse effects of pesticides on the environment.
- 78 Here too we can see a role for the Court in foreseeing and forestalling environmental degradation.
- 79 Garrett Hardin spoke of the tragedy of the commons. The commons is any ecosystem, lake, estuary, grassland or even ocean or atmosphere. Hardin argued that a commons subject to communal and unregulated use is at risk of tragic ecological collapse because of self-interested human behaviour. Hardin's view assumes the operation of self interest only; that there are no community feedback mechanisms for assessing the condition of the commons and acting upon those assessments.
- 80 But the Court can itself be a mechanism and can articulate other mechanisms for undertaking that assessment and giving the requisite feedback to stakeholders with the capacity to act and avoid ecological collapse.
- 81 Thirdly, the Court has a role in shaping concepts of justice. In particular, it can develop a concept of environmental justice.
- 82 The protection of the marginalised, the poor and the disenfranchised in society is a feature of the law. In an environment context, these sectors of society suffer disproportionately from environmental pollution and other

environmental degradations. Addressing these issues delivers justice to these sectors.

- 83 The Court can explore the concept of poverty in the environmental context. Poverty is not just an economic condition; it is an environmental one. It is a state of defencelessness against the forces of assault and expropriation. The Court has a role here too.
- 84 Fourthly, in developing environmental jurisprudence and in delivering environmental justice, the Court can also play a more far-reaching role in developing key concepts in the law. The Court's contribution is not then limited to a segregated area of the law; it develops the law itself.
- 85 We have seen examples in other courts of how the resolution of environmental disputes has influenced the wider development of the law. In constitutional law, well-known cases such as *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 concerning the export of mineral sands from Fraser Island, and *The Commonwealth v Tasmania (The Tasmanian Dams case)* (1983) 158 CLR 1 have established precedents on the nature and scope of the Commonwealth's constitutional powers. In administrative law, numerous cases including *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456, *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 have established principles of judicial review of administrative action.
- 86 Fifthly, a pressing challenge facing the Court now is to engage with and to explicate emerging international concepts and principles. In matters concerning the environment, the slogan "Think globally, act locally" is apt. There is an obvious interdependence between local and global processes.

- 87 The best illustration of an international concept that has taken root locally is that of Ecologically Sustainable Development (ESD). The ESD principles are hortatory but lack precision. The challenge is to articulate mechanisms for translating these laudable principles into specific actions. The Court has a role to play in this task. The Court has begun the task in a few cases, referred to by the Attorney General, but more work still needs to be done.
- 88 In doing so, the Court can instil a sense of realism and strike a balance between extremes. The Court needs to propose workable solutions. As Australian philosopher John Passmore has noted in his book *Man's Responsibility for Nature*, workable solutions must steer between primitivism and despotism: between wholesale rejection of a concern for economic progress and material welfare and the unconstrained, short-sighted pursuit of such goals. Such solutions require the application of scientifically and technologically informed cost-benefit analysis of our present practices and the alternatives to them, together with a judgement on the political viability and moral acceptability of these alternatives.
- 89 In performing the tasks I have outlined, the Court can be assisted by thoughtful academic study and discourse. I would encourage the universities to foster the study of environmental jurisprudence as a subject at university.
- 90 I come to a court in good shape. The Court and the people of New South Wales have been fortunate to have had the benefit of hard working and able judges. My predecessors in the office of Chief Judge, Justices McClelland, Cripps, Pearlman and McClellan have each made their own valuable contribution. So too have the other judges and Commissioners and court staff. I am fortunate to be able to benefit from their legacy.
- 91 I wish to publicly acknowledge the instruction, assistance and friendship of many people in my life.

- 92 My parents, John and Phyl Preston, have nurtured and supported me in all my endeavours in life and have instilled a keen interest in and respect for the environment.
- 93 My sister, Jill Shaw, has been a great sister, friend and supporter.
- 94 My wife, Judith, and children Matthew, Rebecca and Rachael have been an irreplaceable source of friendship, inspiration and solace.
- 95 I have benefited from a sound education at Knox Grammar School and the support of a number of teachers. It is a source of pride that one of the notes of congratulations came from my former headmaster, Dr Ian Patterson, and another from the Old Knox Boys Association. I particularly benefited from the outdoor education facility owned by the school during my time on the Hawkesbury River where my interest and activities in the environment were nourished. One of the teachers at the time kindly gave me a copy of Henry David Thoreau's classic book *Walden*, thereby introducing me to a key environmental thinker.
- 96 I benefited from a liberal and innovative legal education at Macquarie University. I particularly wish to acknowledge the teaching of Professor Ben Boer, now at Sydney University but then at Macquarie University, for his inspirational and passionate teaching of the then new subject of Environmental Law. I have had the privilege of continuing both a professional relationship and a friendship with Professor Boer.
- 97 I have had the privilege of teaching environmental law at a number of academic institutions, primarily the University of Sydney, but also the Australian National University and the Northern Institute of TAFE. I thank those institutions and all of my academic colleagues for their support and friendship. I have enjoyed the intellectual challenge. I also thank my students. Although I was the teacher, in truth I learnt something every time I taught and from student contributions. I have enjoyed the experience.



- 98 I have been fortunate to have always worked with quality people: as an associate to Mr Justice Kevin O'Leary of the Supreme Court of the Northern Territory and as a solicitor at the firms now called Mallesons Stephen Jaques and Freehills respectively and the Environmental Defenders Office.
- 99 On coming to the bar, I read with Justice Peter Jacobsen, now a judge of the Federal Court. I benefited from his instruction and guidance.
- 100 I was fortunate to be given the opportunity to float on 10 Wentworth Chambers for the first 8 months until I was able to purchase chambers on the 11<sup>th</sup> floor Wentworth/Selborne Chambers.
- 101 I was greatly assisted in my work as a barrister by many eminent barristers but I wish to particularly acknowledge Justice Peter McClellan and Justice Murray Tobias. I learnt a great deal from them about the skills of being a barrister and the field of environmental and planning law. On a personal level, I thoroughly enjoyed the experience of working with them and their friendship and support.
- 102 I have been blessed by having chambers on the 11<sup>th</sup> floor for most of my time at the Bar. I cannot imagine a better and happier place to have had chambers. The friendly, collegiate and supportive atmosphere of my colleagues is without equal. Thank you for 17 wonderful years.
- 103 A particular reason for the success of the floor, and my success, has been the floor's clerk, Paul Daley. Paul has been unfailing in his competent assistance, enthusiasm and friendship. I count Paul as a special friend.
- 104 The 11<sup>th</sup> floor has also always enjoyed excellent staff. I have been assisted and have enjoyed the friendly company of the receptionists Anne Deighton and Melinda Morris, WP operators Mary Boneham and Jennifer Campbell, librarian Janelle Moser and assistant clerk Ben Croft.

- 105 I have been ably assisted by a number of secretaries, including Ruth Murphy, Sue Roberts and Michelle Sammut.
- 106 My instructing solicitors have not only been loyal, but also have been a vital part of the team in preparing and presenting the cases in which I was briefed. I readily acknowledge their knowledgeable and helpful contributions. I count many of my instructing solicitors as friends.
- 107 I have enjoyed the experience of working with and learning from experts in many disciplines related to the environment. I feel privileged to have had the opportunity to work with so many eminent people.
- 108 I thank the many clients I have had over the years, many of whom have briefed me more than once. I thank you for the support and trust you have placed in me.
- 109 Finally, I wish to thank all the people who have contacted me to congratulate me and wish me well in the job ahead. It is of great assistance to me to know I have such a high level of goodwill and support.
- 110 I look forward to the challenge ahead.

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