20 years at the Land & Environment Court

Ceremonial sitting to celebrate the 20th anniversary of the Land and Environment Court, – Friday, 1 September 2000

Address by Bob Debus MP, Attorney General, Minister for the Environment, Minister for Emergency Services, Minister for Corrective Services and Minister Assisting the Premier on the Arts, 1 September 2000

The Hon. Bob Debus MP

It was twenty years ago today that the Land and Environment Court came into existence by virtue of the *Land and Environment Court Act 1979*. The creation of the Court was part of a number of major reforms introduced by the Wran Labor government in 1979 and 1980. These reforms completely changed the face of environmental planning decision making in NSW. Prior to the reforms it is generally agreed that there was an inadequate planning framework. The previous system had failed to demarcate the respective responsibilities of State and local governments; it had failed to provide a uniform and rationalised code for development control; it had failed to integrate land use planning with environmental assessment and protection; and it had failed to give members of the public any meaningful opportunity to participate in planning decision-making.

At the time of the reforms, the Government's key objects for the new system were to satisfy the current and future needs of the State in respect of planned development and economic growth, whilst enhancing the social environment. This balance was to be achieved by the proper management, development and conservation of the State's natural and human-made resources.

The new system shared responsibility for environmental planning between the State and local governments and greatly increased the opportunity for community involvement.

The centrepiece of this new regime is, of course, the Land and Environment Court, a specialised superior court of record with comprehensive jurisdiction in matters affecting the value and development of land and the enforcement of planning and related laws.

The superior status granted to the Court reflected the community's growing awareness of the importance of planning and the environment.

At the time of its creation, the Land and Environment Court was unique in Australia. The idea of bringing together in one body the best attributes of a traditional court and of a lay tribunal, functioning with the benefits of procedural reform and as few legal technicalities as possible, was a novel one in 1980.

The Land and Environment Court took on this pioneering role with great skill, making the Court a model for environmental protection both interstate and internationally.

Planning and development decisions are often hotly contested in the community, which can make the Court's position a very difficult one. Yet, since its inception, the Court has consistently managed to assess matters objectively and independently, deciding each case according to the law and evidence presented.

Any organisation that plays such an important role within the community will often be criticised.

In the case of the Land and Environment Court, many of these criticisms are ill-informed and misconceived. However, as it is unlikely that any system will ever be perfect, some fine tuning will always be necessary.

In this regard, I note that the Chief Judge has made a number of positive reforms in recent times, including procedures for consultation with court users and major stakeholders, the adoption of time standards and the promotion of alternative dispute resolution.

In addition to the internal reforms, the previous attorney general set up an independent Working Party to look at how the Land and Environment Court reviews decisions in relation to development applications. The Working Party is chaired by Mr Jerrold Cripps, a former chief judge of the Land and Environment Court, and includes representative from the Department of Local Government, the Department of Urban Affairs and Planning, the Local Government and Shires Association, the Attorney General's Department and the Land and Environment Court.

The terms of reference for the Working Party include:

- consideration of the manner in which decisions of local councils in relation to development applications should be reviewed;
- the constitution of the Land and Environment Court, and the matters to which it should have regard in reviewing decisions;
- ways in which to streamline the processing of development applications, and ways in which to reduce the number of appeals to the Court; and
- finally the Working Party will consider whether greater reliance can be placed on alternative dispute resolution mechanisms in resolving disputes.

During the course of the review the Working Party will be assisted by a reference group made up of a number of experts in environmental and planning law. These experts are drawn from a cross section of organisations with an interest in the Court. These include organisations such as the Property Council of NSW, the Environmental Defender's Office, the Environment and Planning Law Association, Royal Australian Planning Institute, Total Environment Centre, the Urban Development Institute and Justice Paul Stein of the Supreme Court.

Back row, left to right: Judges Sheahan, Talbot, Bignold, Lloyd, Cowdroy. Middle row: The Chief Justice of NSW, The Hon. JJ Spigelman AC, The Hon. Pearlman AM, Chief Judge of the Land & Environment Court, Jerold Cripps. Front row: Commissioners Nott, Watts, Bly, and Roseth.

There has been an overwhelming public response to the Working Party's call for submissions, with more than 200 submissions received to date.

This demonstrates the importance that the community places on environmental and planning law and the continuing importance and relevance of the Court today. I look forward to receiving the report of the Working Party in due course.

In conclusion, I am optimistic that these ongoing reforms will continue to ensure that NSW remains at the forefront of environmental and planning law reform and that the Land and Environment Court will continue to be as effective and important in twenty years time as it is today.

Ruth McColl S.C.

President of the New South Wales Bar Association

It is my privilege to speak today on behalf of the barristers of New South Wales in offering our congratulations to this Court on attaining its 20th anniversary.

The conception of the Land and Environment Court is well known. It was the product of a review by the then Labor Government in the 1970s of existing legislation relating to town and country planning and environment assessment.

That review had revealed a number of deficiencies, all of which caused unnecessary delays and costs in the development process.

In the words of the minister for planning and environment, Mr. Paul Landa: 'the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute-resolving techniques and it will utilise non-legal experts as technical and conciliation assessors.'

This point was developed by Mr Justice Cripps, as he then was, in a paper delivered in 1982 when he pointed out that:

> It is the intention of the legislature that the Court combine the characteristics of the superior Courts and the expert administrative tribunals in a manner designed to permit the discharge of its business by judges and assessors. The new Court exercises a more comprehensive jurisdiction in relation to planning and environmental matters than has hitherto been vested in any one appellate body.

McColl S.C., President of the New South Wales Bar Association

'the task of the court [is] to administer social justice in a manner that travelled beyond administering justice inter partes.'

Public Participation

One of the most significant aspects of the new scheme was the emphasis it gave to public participation in the development of environmental plans and enforcement of the legislation.

The new legislation was intended to confer equal opportunity on all members of the community to participate in decision-making concerning the contents of environmental studies, the aims and objectives and contents of draft planning instruments and many other matters.

As Justice Stein, formerly of this Court has said, the public involvement in the Court's work reflected the increasing recognition in the 1970s that the content of Environmental Law, while it may involve many private disputes, in its substance and content is indubitably that of Public Law. The decisions of this Court have implications, not only for the immediate parties, but also for the broader community and the environment itself.

In recognition of this fact, a significant part of the new scheme enabled objectors to applications for designated development to appeal to the new Court against the grant of development consent. Furthermore, any member of the public was given legal standing to bring proceedings in the Court to enforce compliance with the new planning laws and to remedy any breaches of those laws.

Significantly, s123 of the *Environmental Planning and Assessment Act* (1979) (NSW) gave 'any person the right to bring proceedings in this Court for an order to remedy or restrain a breach of the Act, whether or not any right of that person had been infringed by or as a consequence of that breach.' This provision, as chief justice Street was later to emphasise *(Hannan v. Elcom)*, recognised that the task of the court was to administer social justice in a manner that travelled beyond administering justice *inter partes*.

From the outset, the Court made it clear that it would not read down the broad standing provisions nor, would it set up barriers which would limit the intention of public participation in the process. Early in the piece, arguments that the 'any person' provision still required the applicant to prove a 'relevant interest' in the subject matter of the proceedings were sternly rejected.

These provisions have been a notable success. Contrary to the doomsayers who foresaw that such provisions would open the floodgates of litigation, the number of cases brought on the basis of such provisions has not been sufficient

as one former judge of this Court has observed, to 'wet a pair of wellies'

The success of the operation of such provisions in this Court has lead to the adoption of similar open standing provisions in Queensland, Victoria, South Australia and Tasmania.

The intention of public involvement has been enhanced by decisions such as *Oshlack* in which the High Court upheld a decision of Justice Stein that a party legitimately claiming to represent the public interest may not be ordered to pay the costs of the successful party.

Involvement of the Bar Association

The Bar Association can proudly claim a role in the new Court. It established a small committee to prepare submissions to be made to the then minister for planning and environment, Mr. Paul Landa, concerning the terms of the proposed package of legislation. The committee included the then Mr Murray Wilcox QC who, at that stage, had been active in environmental and planning cases for some years. The Bar Association's submission clearly made a substantial impact as is evident from Hansard of the day when the bills were read for the second time in the Upper House.

As a result of the Bar Association's submission, provisions which would have meant that appeals would be way of stated case, were amended to ensure that they were by way of normal appeal on questions of law. Secondly, the Bar Association's submission that appeals against demolition orders under s317B of the then *Local Government Act* [1919] which were then vested in the District Court, should be vested in the new Land and Environment Court, was also adopted.

The Bar was also concerned that the Bills did not provide for mandatory public participation for State planning policies in contrast to the extensive requirements for public participation in the preparation of regional and local plans. Amendments were made to ensure such consultation.

The Bar Association also criticised the proposal that the Land and Environment Court was be separate from the Supreme Court of New South Wales. We were concerned that true rationalisation demanded that the various functions which had previously been exercised by a variety of courts and tribunals should be vested in the Supreme Court. One of the reasons for that submission was an opinion expressed by the then chief justice, Sir Laurence Street concerning the increased costs of an entirely new court structure and the danger that the 'fragmentation inherent in [specialist tribunals] weakened the whole fabric of what ought to be regarded as an integrated and all embracing system of regular courts'. We were also concerned about the risks attendant on a court of limited jurisdiction not being able to provide all relief arising from the same factual matrix.

This last criticism proved to have force. In *National Parks and Wildlife Service and Another v Stables Perisher Pty. Ltd* (1990) 20 NSWLR 573 the Court of Appeal made it clear that this Court had no pendant or accrued jurisdiction of a like nature of that enjoyed by the Federal Court.

The Act was amended in 1993 by the addition of s16 (1A), which purports to grant that pendant jurisdiction. Whether or not it has truly had that effect is something which is yet to be worked out.

This year a Working Party has been convened to review the State's planning laws and the role of this Court in development applications. As the present Attorney General's predecessor, the Hon. Jeff Shaw QC MLC made clear he believed 'the Land and Environment Court objectively and independently decides matters before it according to law and the evidence. Some criticisms of the Court have been ill-informed and misconceived. However some reform may be appropriate.'

It would hardly be surprising if an innovative and youthful court such as this was not the subject of criticism however founded, particularly having regard to the way its jurisdiction touches so closely upon public matters as I have already indicated. The Bar has already made a submission to the Working Party, once again prepared by a small committee of dedicated Land and Environment practitioners.

We are confident any review will only lead to a strengthened jurisdiction which will continue to serve the people of NSW in the sterling manner it has done so for the last 20 years.

We wish the Court many happy returns.