

The Rise of Environmental Law in New South Wales and Federally: Perspectives from the Past and Issues for the Future

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Introduction

When the British settled in Australia in 1788 they found a land that was very different to that which they had known. Australia's harsh conditions proved difficult for the early settlers. Early development had many environmental consequences.¹ However, there was some early recognition of concern about preserving our natural resources. Young notes that:

“We should not suppose, however, that all people were blind to the consequences of settlement. Many settlers and government officials expressed concern about forest clearance, and the first timber reserves were set aside in New South Wales in 1871. ... But there was no detailed or coordinated program of conservation, merely individual actions and isolated control measures by governments.”²

In 1879 the Royal National Park in New South Wales was created, being the first national park in Australia.³ However, as Young notes, “it was initially seen more as a recreation area than as an area solely for nature preservation”.⁴ By 1892 a third of the State's forests had been cleared⁵ and other environmental problems stemming from settlement had begun to be recognised. Those problems included that introduced species were reducing the abundance of native vegetation and that the use of particular species of trees for building and making furniture had led to a marked reduction in the number of those species of trees.⁶ Soil erosion

¹ See Young ARM, *Environmental Change in Australia Since 1788*, Oxford University Press, Melbourne, 1996 at 1-10.

² *Id.*, at 5.

³ *Id.*, at 7.

⁴ *Id.*, at 7.

⁵ *Ibid.*

⁶ *Id.*, at 9.

was recognised as a problem soon after settlement, although legislation dealing with the problem was not enacted in NSW until the *Soil Conservation Act 1938* (NSW).⁷

Despite some early recognition about environmental problems, environmental law itself is a fairly recent creation. Grinlinton noted that “many early property and tort cases had either a direct relevance to environmental protection, or indirect “spin-offs” affecting the human or natural environment.”⁸ The examples which he gives are:

“*Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 (Tort of strict liability for escape of dangerous things from land (relevance to pollution)); *McKell v. Rider* (1908) 5 C.L.R. 480 (Nuisance action upheld for air pollution); *Haddon v. Lynch* [1911] V.L.R. 230 (Nuisance action upheld for noise) and *Harris v Carnegie’s Pty Ltd* [1917] V.L.R. 95 (Nuisance action upheld for dust, noise, vibration and foul smell caused by construction operations).”⁹

Despite the relevance of these early cases to environmental issues, it must be recognised that the area of environmental law is essentially a creature of statute, rather than a creature of the common law. Furthermore, a discrete, specialised and coherent body of law relevant to environmental protection issues has not evolved until comparatively recent times. Early attempts at environmental protection and conservation statutes “were usually directed at localised problems of health and welfare and rectification of immediate problems of pollution and degradation of economically important resources.”¹⁰ As has been recognised, environmental legislation has moved away from being “anthropocentric-and-development-orientated” towards legislation that is “more environment-centred”.¹¹

We will then begin by looking at the development of environmental and planning law in NSW. Environmental issues and town planning law essentially developed separately in NSW, until the two concepts were brought together in 1979 with the introduction of the *Environmental Planning and Assessment Act 1979* (NSW), requiring environmental issues to play a significant role in town planning decisions. This paper will consider the development of environmental and planning law in NSW commencing with the earlier versions of the

⁷ Id, at 13 citing Mosley JG, ‘Towards a History of Conservation’ in Rapoport A (ed), *Australia as a Human Setting*, Angus & Robertson, Sydney, 1972.

⁸ Grinlinton D, ‘The “Environmental Era” and the Emergence of “Environmental Law” in Australia – A Survey of Environmental Legislation and Litigation 1967-1987’ (1990) 7 *Environmental and Planning Law Journal* 74 at 81.

⁹ Id, at footnote 60. Note that the majority of the High Court in *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520 at 556 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that in Australia the rule in *Rylands v Fletcher* has been absorbed by the ordinary principles of negligence.

¹⁰ Id, at 77.

¹¹ Id, at 79.

Local Government Act, then environmental legislation that began to emerge in the 1960s and 1970s in NSW and the developments that have occurred since then. The important role that the Land and Environment Court of NSW has played in the development of environmental and planning law in NSW is then considered. Some issues that will continue to challenge the Land and Environment Court in the future are considered. The role of the Commonwealth in environmental law and some of the important cases and enactments that have arisen at the Commonwealth level is also discussed.

The Development of Environmental and Planning Law in NSW

The beginnings of town planning law

In 1906 the *Local Government Act 1906* (NSW) was created. As Murray Wilcox noted in his classic book “*The Law of Land Development in New South Wales*” that Act:

“was an attempt to consolidate into one statute the law relating both to municipalities and to shires. As such it was not completely successful: in many important respects it was either incomplete or unhappily worded and extensive amendments had to be made in 1908. It is, however, of considerable significance in the growth of local government control over the opening of roads and the subdivision of land.”¹²

A right of appeal to a judge of the District Court against a council’s decision was conferred by the 1906 Act.

The 1906 Act was replaced by the *Local Government Act 1919* (NSW). The Chief Judge of the Land and Environment Court of NSW, McClellan J, recently summarised the scope of the 1919 Act as follows:

“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.¹³ 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.

¹² Wilcox MR, *The Law of Land Development in New South Wales*, Law Book Company, Sydney, 1967 at 8.

¹³ *Local Government (Town and Country Planning) Amendment Act 1945* (NSW).

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 XIA, 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.¹⁴ Control of development appeals remained with the judges of the Land and Valuation Court until 1973, when the Local Government Appeals Tribunal was created.¹⁵ 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**,¹⁶ an increasing role in determining and enforcing the law.”¹⁷

The *Local Government Act 1919* (NSW) continued in force until it was repealed and replaced by the *Local Government Act 1993* (NSW), which is discussed further below.

The introduction of environmental and planning legislation in NSW

The 1960s and 1970s have been widely recognised as the era when environmental issues came to the forefront of community concern and environmental movements began to emerge in Australia. The Australian Conservation Foundation was instituted in 1965 and a number of environmental bodies began to emerge in the following decades. Furthermore, environmental legislation relating to a number of conservation issues began to emerge during this era as the community's interest in natural resources became less concerned with economic initiatives designed to allow exploitation of natural resources and more concerned with the preservation of the environment.

The 1960s and 1970s saw the introduction in NSW of legislation specifically aimed at pollution control. Although there was legislation in the early 20th century which sought to

¹⁴ *Local Government (Amendment) Act 1958* (NSW).

¹⁵ *Local Government (Appeals) Amendment Act 1971* (NSW).

¹⁶ [1970] 1 NSW 356; (1970) 21 LGRA 410.

¹⁷ McClellan P, 'Swearing in of Justice Peter McClellan as Chief Judge of the Land and Environment Court', Sydney, 25 August 2003 at 2-4.

some extent to deal with pollution issues,¹⁸ these new pieces of legislation were the first to deal specifically with pollution issues. The Acts introduced were the *Clean Air Act 1961* (NSW), *Clean Waters Act 1970* (NSW), *Noise Control Act 1975* (NSW), the *Pollution Control Act 1970* (NSW) and the *Waste Disposal Act 1970* (NSW). This era also saw the introduction of the State Pollution Control Commission, a Planning and Environment Commission and a Metropolitan Waste Disposal Authority.

Although clearly a breakthrough for the environmental arena, this pollution legislation was often criticised as being far from perfect. Ryan stated that:

“In a nutshell, all of the State’s potentially relevant legislation, of which there was no shortage, lacked cohesive principles to govern the conduct of activity affecting the environment or the exercise of governmental discretion in relation to administration of the legislation.”¹⁹

Further legislation introduced in this era included the *National Parks and Wildlife Act 1974* (NSW), the *Heritage Act 1977* (NSW) and the *Pesticides Act 1978* (NSW). Ryan has noted that:

“By 1971, NSW and most of the Australian States had enacted legislation in relation to town and country planning; soil conservation; forests; clean air and water; oil pollution in navigable waters; and national parks and wildlife. The main thrust of the legislation was to protect public health, the amenity of local residential neighbourhoods and natural resources needed for the ongoing prosperity of the State, although public interest in natural areas and indigenous fauna and flora was also recognised.”²⁰ [footnotes omitted]

Perhaps the most important legislation was the *Environmental Planning and Assessment Act 1979* (NSW) (the EP&A Act) and the introduction of the Land and Environment Court of NSW, a superior court of record, with the passage of the *Land and Environment Court Act 1979* (NSW) (the Court Act). The objectives of the legislative changes were:

- ... first, to broaden the scope of planning effectively to embrace economic, social and ecological considerations in the preparation of environmental plans and in development control;
- second, to provide positive guidelines for the development process, to speed up decision-making, to foster investment and facilitate economic growth;
- third, to authorise the preparation of different types and forms of environmental plans each respectively designed to deal with state, regional and local planning issues and problems;

¹⁸ See Farrier D, Lyster R and Pearson L, *The Environmental Law Handbook: Planning and Land Use in New South Wales*, 3rd ed, Redfern Legal Centre Publishing, Sydney, 1999 at 239.

¹⁹ Ryan PF, ‘Did We? Should We? Revisiting the 70’s Environmental Law Challenge in NSW’ (2001) 18(6) *Environmental and Planning Law Journal* 561 at 563.

²⁰ *Id.*, at 570.

- fourth, to ensure that the state is principally concerned with matters of policy and objectives rather than matters of detailed local land use;
- fifth, to co-ordinate, especially at a state and regional level, the development programmes of public authorities;
- sixth, to provide an opportunity for public involvement in the planning process;
- seventh, to provide for a more simplified administration of the system of planning decision making; and
- eighth, to provide a system for the assessment of the environmental impacts of proposals that would significantly affect the environment.²¹

As Justice Bignold has noted the EP&A Act:

“did not merely modernise or renovate the existing planning system. It revolutionised it, changing the very nature and scope of planning by integrating environmental and conservation objectives with development objectives and providing for extensive public participation in the system. Significantly, it also conferred “open standing” for the civil enforcement of a breach or threatened breach of the Act (vide ss 122-1 124 [sic]).”²²

Public participation was one important aspect of the new legislation and was entrenched as one of the objects of the EP&A Act.²³ Its importance has been confirmed by a number of cases since the enactment of the EP&A Act.²⁴ Public participation in the new scheme was implemented through provisions relating to matters such third party appeals and open standing, which has often been emphasised as one of the most important features of the legislation and is a matter to which we will later return. Although, there were initial fears that open standing provisions would open the floodgates, that fear has not been realised.

In his Second Reading Speech, Minister Landa stated that the Court “will have a vital role to play in the task of judicial interpretation of the new legislation and its operation”.²⁵ The creation of the Court itself has been described as a “bold and brave experiment”.²⁶ The Court is often referred to as being a “one-stop shop”. It was instituted as a superior court of record equivalent to the Supreme Court of NSW and has been given exclusive jurisdiction to deal with environmental and planning issues that have been conferred upon it by the Court Act. Its

²¹ Sheahan T, ‘Environmental Law – Present and Future – Lessons Learned and Visions for the Future – The Experience of the Land and Environment Court of New South Wales, Australia’, paper presented to the *International Seminar on Environmental Law*, Brazil, 9 May 2001 at 18, citing Mr Paul Landa, New South Wales, Legislative Council, *Hansard*, 21 November 1979, at 3346 <[http://www.lawlink.nsw.gov.au/lec/lec.nsf/files/Brazil%20speech.pdf/\\$FILE/Brazil%20speech.pdf](http://www.lawlink.nsw.gov.au/lec/lec.nsf/files/Brazil%20speech.pdf/$FILE/Brazil%20speech.pdf)>.

²² Bignold NR, ‘NSW Land and Environment Court – Its contribution to Australia’s development of environmental law’, paper presented to the *National Environmental Law Association Conference*, Fremantle, 9 September 2000 <<http://www.lawlink.nsw.gov.au/lec/lec.nsf/pages/bignold1>>.

²³ s 5.

²⁴ See, for example, *Curac v Shoalhaven City Council* (1993) 81 LGERA 124 and *Helman v Byron Shire Council* (1995) 87 LGERA 349.

²⁵ Mr Paul Landa, New South Wales, Legislative Council, *Hansard*, 21 November 1979, at 3355.

²⁶ See Bignold, *supra* note 22.

status as a Court of superior record indicates the importance which Parliament attributes to environmental and planning issues and allows matters to be finally and completely determined without the necessity for a multiplicity of proceedings.

The Court is unique in New South Wales being a specialist Court comprised of Judges and non-legally trained Commissioners who are qualified in areas such as town planning, environmental science, land valuation, architecture, engineering and heritage.²⁷ The Court has a combination of judicial and administrative functions. The importance of the Court in the development of environmental law and its role in environmental protection is a matter to which we will return later in this paper.

Throughout the 1980s the jurisdiction of the Court continued to expand, with the enactment of a number of Acts including the *Environmental Offences and Penalties Act* 1989 (NSW), *Environmentally Hazardous Chemicals Act* 1985 (NSW) and *Aboriginal Land Rights Act* 1983 (NSW). In 1981 the NSW Environmental Law Association was established. In 1984 the *Environmental and Planning Law Journal*, which was the first environmental law journal in Australia, began. In 1985 the Environmental Defenders Office began running environmental cases.

New legislation continued to be enacted throughout the 1990s and the beginning of this century with the introduction of Acts such as the *Fisheries Management Act* 1994 (NSW), *Threatened Species Conservation Act* 1995 (NSW) (replacing the *Endangered Fauna (Interim Protection) Act* 1991 (NSW)), *Contaminated Land Management Act* 1997 (NSW), *Native Vegetation Conservation Act* 1997 (NSW) and *Water Management Act* 2000 (NSW).

The *Local Government Act* 1919 (NSW) was replaced with the *Local Government Act* 1993 (NSW) (the LG Act). The new LG Act emphasises the environmental responsibilities of Councils.²⁸ The LG Act states that its purposes include “to provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales” and “to require councils, councillors and council employees to have regard to the principles of ecologically sustainable development in carrying out their

²⁷ See the Court Act s 12(2).

²⁸ See Sheahan, *supra* note 21, at 14.

responsibilities”.²⁹ A council’s charter includes “to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development”.³⁰

The Environment Protection Authority was established in 1992, taking over from the State Pollution Control Commission. Pollution law was later “streamlined” by the introduction of the *Protection of the Environment Operations Act 1997 (NSW)*³¹ (the PEO Act) which replaced five major pollution statutes: the *Clean Air Act 1961 (NSW)*, *Clean Waters Act 1970 (NSW)*, *Environmental Offences and Penalties Act 1989 (NSW)*, *Noise Control Act 1975 (NSW)* and the *Pollution Control Act 1970 (NSW)* and incorporated the main regulatory provisions of the *Waste Minimisation and Management Act 1995 (NSW)*. It also increased the penalties previously available for criminal offences, the maximum penalties now being \$1 million for a corporation and \$250,000 and/or 7 years imprisonment for individuals for Tier 1 offences;³² \$250 000 for corporations and \$120 000 for an individual for Tier 2 offences relating to water pollution, air pollution and land pollution relating to waste;³³ and \$60 000 for corporations and \$30 000 for individuals for noise pollution offences.³⁴ The PEO Act also introduced a number of sentencing alternatives which can be imposed in addition to or in the alternative to a monetary penalty,³⁵ providing the Court with a wide discretion in sentencing. The PEO Act also provides that any person can bring civil proceedings to remedy or restrain a breach of the PEO Act³⁶ or, significantly, to restrain a breach of *any other Act* if it is causing or is likely to cause harm to the environment.³⁷

In September 2003 a new department, called the Department of Environment and Conservation (NSW) was created. The Department consolidates a number of agencies into one department. Those agencies include the Environment Protection Authority, National Parks and Wildlife Service, Royal Botanic Gardens and Domain Trust, and Resource NSW.

²⁹ LG Act s 7(a), (e).

³⁰ LG Act s 8.

³¹ See Farrier et al, *supra* note 18, at 239.

³² PEO Act, s 119.

³³ PEO Act s 123, s 132, s 143(1) and s 144(1).

³⁴ PEO Act, s 141.

³⁵ See PEO Act s 244, s 250.

³⁶ s 252.

³⁷ s 253.

The role of the Land and Environment Court of NSW in the development of environmental law

The first Chief Judge of the Land and Environment Court of NSW, Justice Jim McLelland, described the role of the Court as being to “balance the aspirations of those who wished to turn Pitt Street into a rainforest and those who wished to turn a rainforest into an industrial estate.”³⁸ In *F Hannan Pty Ltd v Electricity Commission of New South Wales [No 3]*³⁹ Street CJ reflected on the role of the Court created by the legislative scheme under the EP&A Act and the Court Act. His Honour stated:

“The scheme of the legislation ... places upon that Court a wide ranging responsibility for the protection of the environment. Commensurate with that wide ranging responsibility is a wide ranging jurisdiction designed to give to that Court exclusive control to determine how, in the public interest and in the interests of the parties and other affected or interested persons, particular dispute situations should be resolved.”⁴⁰

Despite the role of the Court in environmental protection there are clearly limits on the Court in advancing environmental law. As the former Chief Judge, Justice Pearlman, stated:

“The most obvious function of the Court is therefore to apply the law, and so in applying the law there is often little scope to achieve the advancements in environmental law that some people may wish to see.”⁴¹

Nevertheless, the Court has played an extremely important role in the construction and interpretation of the many statutes which come within the Court’s jurisdiction. As Justice Pearlman later noted:

“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.”⁴²

The Court is an important forum for environmental and planning disputes as its decisions often have ramifications for the community as a whole, rather than being strictly limited to the parties involved in the litigation.⁴³ It has been given a wide discretion in relation to the

³⁸ Pearlman ML, ‘Celebration of 20 years of the Land and Environment Court of New South Wales’, paper presented to the *Royal Australian Planning Institute Congress 2000 Conference*, 5 October 2000 <<http://www.lawlink.nsw.gov.au/lec/lec.nsf/pages/pearlman3>>.

³⁹ (1985) 66 LGRA 307.

⁴⁰ (1985) 66 LGRA 307 at 310.

⁴¹ Pearlman ML, ‘Managing Environmental Impacts – The Role of the Land and Environment Court of New South Wales’, paper presented to the *New Zealand Planning Congress*, Wellington, New Zealand, 9 April 2002 <<http://www.lawlink.nsw.gov.au/lec/lec.nsf/pages/pearlman5>>.

⁴² Ibid.

⁴³ Ibid.

granting of relief pursuant to s 124 of the EP&A Act.⁴⁴ It is worthwhile reviewing some important cases which have affected the evolution of environmental law in NSW.

In *State Pollution Control Commission v Caltex Refining Co Pty Ltd*⁴⁵ Stein J held, against the weight of English authorities and decisions in the Federal Court and Victorian Full Court, that a defendant corporation in criminal proceedings cannot claim the privilege against self-incrimination.⁴⁶ Stein J was reversed on appeal to the Court of Appeal,⁴⁷ but was ultimately upheld when the matter was appealed to the High Court.⁴⁸

Early attempts were made to confine the meaning of “any person” in the open standing provisions in ss 122 and 123 of the EP&A Act so as to require a “relevant interest” in the proceedings.⁴⁹ Early cases in the Land and Environment Court rejected this approach⁵⁰ and it was rejected by the NSW Court of Appeal in the case of *Sydney City Council v Building Owners and Managers’ Association of Australia Ltd*.⁵¹ In *Maritime Services Board of New South Wales v Citizens Airport Environment Association Inc*⁵² Kirby P reflected on the important nature of the open standing rights conferred by s 123. His Honour stated those rights “reflect the high social importance of protecting the environment by the processes of law”.⁵³ Open standing provisions are now a feature of many environmental and planning statutes that have been enacted in NSW since the introduction of the EP&A Act. We have already referred to the wide nature of such provisions now contained in the PEO Act. As Justice Pearlman has noted “cases brought under the open standing provisions usually provoke an analysis and testing of particular provisions of the law, and usually result in pushing of the boundaries of that law”.⁵⁴

⁴⁴ See *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339 (Kirby P).

⁴⁵ (1991) 72 LGRA 212.

⁴⁶ (1991) 72 LGRA 212 at 219.

⁴⁷ See *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 74 LGRA 46.

⁴⁸ See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 82 LGERA 51.

⁴⁹ See Stein PL, ‘New directions in the prevention and resolution of environmental disputes – specialist environmental courts’ paper presented to *The South-East Asian Regional Symposium on the Judiciary and the Law of Sustainable Development*, Manila, 6 March 1999 at [30]
<http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/stein_2>.

⁵⁰ *Ibid.*

⁵¹ (1985) 55 LGRA 444.

⁵² (1993) 83 LGERA 107.

⁵³ (1993) 83 LGERA 107 at 111.

⁵⁴ Pearlman, *supra* note 38.

In *Oshlack v Richmond River Shire Council*⁵⁵ Stein J held that the public interest nature of the litigation was a relevant factor to take into account when exercising the discretion in relation to costs (although of itself was not enough to constitute special circumstances). His Honour exercised his discretion so as to make no order as to costs. On appeal to the Court of Appeal⁵⁶ it was held that the public interest nature of the litigation was irrelevant to the exercise of the costs discretion. On appeal to the High Court,⁵⁷ the majority of the High Court reversed the decision of the Court of Appeal, holding that the public interest nature of the litigation could be taken into account when awarding costs and confirming the wide nature of the discretion available under s 69 of the Court Act.

From the early days of the Court numerous cases were brought before the Court which related to the logging of old growth forests and rain forests.⁵⁸ In *Corkhill v Forestry Commission of New South Wales [No 2]*⁵⁹ a challenge was brought pursuant to the open standing provisions in the *National Parks and Wildlife Act 1974* (NSW) against the logging of the Chaelundi State Forest in Northern NSW, arguing that the logging and other activities were “likely to disturb or injure certain endangered and protected species of fauna in breach of s 98 and s 99 of the *National Parks and Wildlife Act 1974* (NSW)”.⁶⁰ Those sections made it an offence to take or kill protected or endangered fauna. One of the issues in the case related to the interpretation of “take or kill”. The Forestry Commission had argued that “s 98 and s 99 are concerned only with the direct and intended consequences of conduct which is the killing and taking of animals. ... Indirect consequences or actions are not included.”⁶¹ The outcome of the case and the ensuing consequences have been summarised by Stein J, the Judge who sat on this matter, as follows:

“Relying on ordinary principles of statutory construction, and a number of United States authorities on a similar legislative code, I held that 'disturb' in the definition of 'take', included indirect action such as significant habitat modification which placed fauna under threat by adversely affecting essential behavioural characteristics relating to feeding, breeding or nesting. 'Disturb' included habitat destruction which affected an endangered species by leading immediately, or over time, to a reduced population.”⁶² It was held that the Forestry Commission's logging operations were in breach of the *National Parks and Wildlife Act* (NPW Act) and this finding was upheld on appeal to the Court of Appeal.

⁵⁵ (1993) 82 LGERA 236.

⁵⁶ *Richmond River Council v Oshlack* (1996) 91 LGERA 99.

⁵⁷ *Oshlack v Richmond River Council* (1997) 96 LGERA 173.

⁵⁸ See Stein, *supra* note 49, at [57]

⁵⁹ (1991) 73 LGRA 126.

⁶⁰ (1991) 73 LGRA 126 at 128.

⁶¹ (1991) 73 LGRA 126 at 136.

⁶² *Corkill v Forestry Commission* (1991) 73 LGRA 126, confirmed on appeal *Forestry Commission v Corkill* (1991) 73 LGRA 247.

The decision provoked an extreme reaction from the Government of the day which tabled a Regulation to exempt the Forestry Commission, and other State agencies, from the NPW Act. The Regulation was, however, disallowed by the Parliament. The Opposition (with the aid of Independent Green MP's) then introduced its own legislation, the Endangered Fauna (Interim Protection) Act 1991 which drew on the Corkill decision in relation to habitat protection and the need for Fauna Impact Statements where any activity was likely to have significant effect on the environment of endangered fauna. No project, which might have that effect, could proceed without obtaining a licence from the National Parks and Wildlife Service. Third party appeals were permitted by any objector if a decision to grant a licence to 'take or kill' fauna was granted. This legislation, which lasted until the passage of the Threatened Species Conservation Act 1995 (commencing in 1996), significantly slowed the loss of endangered and protected fauna and their habitat. ...⁶³

This decision illustrates the wide impact that decisions of the Land and Environment Court have had on important issues. It is also one example of where the outcome of a case has provoked a response from government to legislate for a different outcome than that provided by the Court. Justice Pearlman also gives a number of examples where the government has “stepped into the fray and legislated to bring to an end proceedings in the Court”.⁶⁴

Issues for the future in NSW

Environmental law has developed substantially in NSW in the past few decades. There are a number of challenges which the discipline of environmental law and the Court face in the future.

Ecologically sustainable development

A number of environmental statutes in NSW refer to the concept of ecologically sustainable development (ESD). For example, its encouragement is one of the objects of the EP&A Act,⁶⁵ although there is no definition of the term provided in that Act. The Intergovernmental Agreement on the Environment requires all signatories to implement the core principles of ESD in policy and decision-making.⁶⁶ The core principles are:

- The precautionary principle
- Intergenerational equity
- Conservation of biological diversity and ecological integrity
- Improved valuation, pricing and incentive mechanisms including ‘polluter pays’.⁶⁷

⁶³ Stein, *supra* note 49, at [60]-[61].

⁶⁴ Pearlman, *supra* note 38. The examples given are *Botany and Randwick Sites Development Act 1982* (NSW), *Cumberland Oval (Amendment) Act 1983* (NSW) and *Walsh Bay Development (Special Provisions) Act 1999* (NSW).

⁶⁵ See s 5.

⁶⁶ See Stein, *supra* note 49, at [62].

⁶⁷ *Ibid.*

*Leatch v National Parks and Wildlife Service*⁶⁸ was one of the first cases to grapple with the principles of ESD. Stein J, the judge who heard *Leatch*, has summarised that case as follows:

“This was an appeal by an objector to the issue of a licence to a local council to take and kill endangered fauna in the construction of a link road. The fauna involved were Yellow Bellied Glider and the Giant Burrowing Frog. In light of the evidence of scientific uncertainty, I was asked to take the precautionary principle into account. It had, at that time, not been specifically incorporated into the NPW Act [National Parks and Wildlife Act 1974 (NSW)], although it had been included in to the objects of a number of other environmental statutes. However, the subject matter, scope and purpose of the National Parks legislation made consideration of the Precautionary Principle clearly relevant. The licence was refused.”⁶⁹

In *Carstens v Pittwater Council*⁷⁰ Lloyd J was considering an appeal under s 56A of the Court Act (which is an appeal from a Commissioner’s decision on a question of law). It was argued that the Commissioner had erred by holding that ESD principles must be a factor in an assessment of the impact on the environment of a combined development application and construction certificate, on the basis that ESD was not a factor that was required to be taken into account under s 79C(1) of the EP&A Act which sets out the matters which must be taken into account when assessing a development application.⁷¹ Lloyd J held that although s 79C sets out the matters which must be taken into account, a decision maker was not precluded from taking into account other matters relevant to the development application and which were in furtherance of the objects of the EP&A Act, one of which was the encouragement of ESD.⁷² Furthermore, in taking into account “the public interest” in s 79C(1)(e) it was legitimate to give effect to the objects of the EP&A Act.⁷³

Despite the inclusion of ESD in a number of pieces of legislation and its consideration in a number of cases, concern has been raised as to how the Court is to properly apply it and whether it is a workable principle. In *Nicholls v Director-General of the National Parks and Wildlife*⁷⁴ Talbot J stated:

“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.”⁷⁵

⁶⁸ (1993) 81 LGERA 270.

⁶⁹ Stein, *supra* note 49, at [64].

⁷⁰ [1999] NSWLEC 249.

⁷¹ [1999] NSWLEC 249 at [72].

⁷² [1999] NSWLEC 249 at [74].

⁷³ [1999] NSWLEC 249 at [74].

⁷⁴ (1994) 84 LGERA 397.

⁷⁵ (1994) 84 LGERA 397 at 419.

What has been emphasised in the discussions on the application of the principles of ESD by the Court is that although the Court may be willing to apply the principles of ESD, there is clearly a lack of legislative guidance as to how its principles, often expressed in “vague and general” terms in the legislation and riddled with “ambiguities, inconsistencies and uncertainties”, are to be applied by decision makers,⁷⁶ leaving “the Court itself to try to ascertain what the objective of ESD means in a real and practical way.”⁷⁷ Indeed Justice Pearlman has stated:

“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.”⁷⁸

In contrast, Stein J stated:

“my thesis is that there is the opportunity, if not the obligation, in the absence of clear legislative guidance, to apply the common law and assist in the development and fleshing out of the principles. Our task is to turn soft law into hard law. This is an opportunity to be bold spirits rather than timorous souls and provide a lead for the common law world. It will make a contribution to the ongoing development of environmental law.”⁷⁹

As Pearlman J further noted, some enactments have been more helpful in providing guidance on how Parliament intended the principles of ESD to be applied.⁸⁰ The example her Honour gave is Pt 5 Div 5 of the EP&A Act, which relates to the environmental assessment of fishing activities. Section 115H of the EP&A Act refers to the principle of ESD as described in s 6(2) of the *Protection of the Environment Operations Act 1991* (NSW) which sets out more fully a description of the four principles of ESD to which we have referred above.

While greater legislative guidance is obviously of more assistance to the Court in applying the principles of ESD, it is apparent that issues relating to the application of the principles of ESD are likely to continue to be an issue for the Court in the future.

⁷⁶ Stein, *supra* note 49, at [69]; Stein PL, ‘Are Decision-makers too Cautious with the Precautionary Principle?’ paper present to the *Land and Environment Court of New South Wales Annual Conference*, Medlow Bath, 1999 <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/Stein_3>. See also Pearlman, *supra* note 41.

⁷⁷ Pearlman, *supra* note 41.

⁷⁸ *Ibid.*

⁷⁹ Stein, *supra* note 76.

⁸⁰ Pearlman, *supra* note 41.

Expert Witnesses

We have just highlighted some of the challenges which can arise when principles, such as ESD, are in issue before the Court. In the context of environmental law issues, scientific evidence given by expert witnesses often plays a central role in determining the legal issues in question. Applying the evidence to the legal issues is not an easy task. For example, applying the principles of ESD, such as the precautionary principle, can be very challenging as the Court is necessarily dealing with matters of scientific uncertainty. Matters are often further complicated by the fact that each party's expert will hold a different opinion.

An issue for the immediate future is what role expert witnesses should continue to play. Spigelman CJ recently stated:

“there has been one other consideration influencing the change in court practice with respect to expert evidence. That consideration is the issue of bias by experts. When I refer to bias, I do not refer to unprofessional conduct, let alone to dishonesty. ... The issue is one of partisanship, of the expert acting as an advocate, of the expert identifying him or herself as a member of an adversarial team, whose role is to formulate arguable propositions ...

The difficulty posed by partisanship is not simply one of cost and delay, although there are such effects. Rather it is a question of the quality of the decision-making process.

Where a judge is reliant on experts to assist in determining important issues in dispute, it becomes extremely difficult to determine the best or correct outcome in the face of conflict between experts that is driven by partisanship of this character. The more esoteric the relevant area of expertise, the greater the risk of an inappropriate outcome. From what source is the judge to acquire the information that will enable him or her to choose in a proper and informed way between expert testimony that bears this partisan character? ... The predominant view in the relevant discipline may not even be presented to the court.”⁸¹

Schedule 1 to the Court's *Expert Witness Practice Direction* 2003 emphasises that:

“An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.

An expert witness's paramount duty is to the Court and not to the person retaining the expert.

An expert witness is not an advocate for a party.”⁸²

That Practice Direction also provides for a joint experts conference and the filing of a joint report before the hearing.⁸³ Furthermore, that Practice Direction provides:

⁸¹ Spigelman JJ, 'Forensic accounting in an adversary system' (2003) 41(9) *Law Society Journal* 60 at 63.

⁸² Par 2-4.

⁸³ See Sch 1.

“An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.”⁸⁴

Nevertheless, despite these provisions, as Spigelman CJ recognised, the Court is often faced with the competing opinions of different experts and is faced with the difficult task of deciding which expert’s evidence should be accepted.

One possible solution to the problem is the use of a single joint expert in appropriate cases.⁸⁵ It has been suggested that the use of a jointly selected expert would lead to evidence of a more useful nature to the Court and assist in early settlement.⁸⁶ Part 39 r 1 of the *Supreme Court Rules* 1970 (NSW) provides for an expert witness to be appointed by the Court either on the application of a party or on the Court’s own motion.⁸⁷ The Court has implemented changes, effective from 1 March 2004, to make provision for the use of a single joint expert in Class 1, 2 and 4 proceedings through *Practice Direction No 17 – Pre-Hearing Practice Direction* (proceedings in Classes 1 and 2 are merits hearings, Class 4 relates to civil enforcement of environmental laws). The new practice direction requires that:

- (a) At the first callover or directions hearing the parties must inform the Court of the issues in respect of which it may be appropriate to call expert evidence at the hearing and the reasons, if any, why the Court should not appoint an expert for this purpose pursuant to the *Supreme Court Rules* Part 39 r 1.
- (b) Before the callover or directions hearing the parties are to confer and, if possible, agree upon the identity of any expert or experts appropriate to be appointed by the Court and to ascertain whether that person is able to complete a report at least 21 days prior to the likely hearing of the matter. Wherever possible the Court must be informed of the fees which the expert will charge.
- (c) If the parties cannot agree the identity of the expert in relation to any issue they are to agree upon a list of at least three persons, in respect of each issue, from which the Court can appoint an expert.
- (d) A court-appointed expert will confer with all parties and their legal representatives and make such other inquiries as may be necessary to prepare a report for the assistance of the Court. The report shall be provided to the parties and the Court at least 21 days before the date fixed for the hearing of the matter.
- (e) The Court may make any other directions it considers necessary, including:
 - i. fixing the expert’s fees;
 - ii. making arrangements for payment of the fees; and
 - iii. requiring a party to lodge security with the Court for all or part of the expert’s fees.⁸⁸

⁸⁴ Sch 1, par 18.

⁸⁵ See Spigelman, *supra* note 81, at 64-5.

⁸⁶ *Id.*, at 65.

⁸⁷ Part 39 r 1 of the *Supreme Court Rules* 1970 (NSW) is adopted by Pt 6 r 1 of the *Land and Environment Court Rules* 1996 (NSW).

⁸⁸ Paragraph 18 (Class 1 and 2), par 36 (Class 4).

The Chief Judge of the Land and Environment Court of NSW, McClellan J, has recently explained the nature of these changes and why they are necessary.⁸⁹

Where a joint expert is not appointed by the Court then the Court makes directions in accordance with the *Expert Witness Practice Direction* 2003 for a joint conference of experts and the filing of a joint report before the hearing setting out the matters agreed and matters not agreed and reasons for any non-agreement.⁹⁰

New statutory regimes

A number of new statutory regimes have been set up relatively recently to provide a legal framework for managing certain natural resources in a new way in NSW. Two examples are the *Native Vegetation Act* 1997 (NSW) (the NVC Act) and the *Water Management Act* 2000 (NSW). Over the past couple of years there has been an increasing number of cases brought under the NVC Act, particularly an increasing number of prosecutions for clearing of land⁹¹. There have also been a few judicial review⁹² and merits⁹³ proceedings brought under the NVC Act. These cases have led to judicial interpretation of a number of provisions of the NVC Act.

In December 2003, the NSW Parliament passed the *Native Vegetation Act* 2003 (NSW), which repeals the NVC Act and introduces a new scheme in relation to native vegetation. However, that Act is not yet in force.

⁸⁹ See McClellan P, 'Land and Environment Court – Achieving the Best Outcome for the Community', paper presented to the *Environment and Planning Law Association, NSW Conference*, Newcastle, 29 November 2003.

⁹⁰ *Pre-Hearing Practice Direction* par 19 (Class 1 and 2), par 37 (Class 4); see also the *Expert Witness Practice Direction* 2003, par 6 and Sch 1.

⁹¹ See *Director-General Department of Land and Water Conservation v Jackson & Ors* [2003] NSWLEC 199; *Director-General of the Department of Land and Water Conservation v Bailey* [2003] NSWLEC 160; *Director-General of the Department of Land and Water Conservation v Leverton Pastoral Company Pty Limited* [2002] NSWLEC 212; *Director General of National Parks and Wildlife v Wilkinson & Anor*; *Director General of the Department of Land and Water Conservation v Wilkinson & Anor* [2002] NSWLEC 171; *Director-General Department Of Land And Water Conservation v Jackson And Ors* [2003] NSWLEC 81; and *Director-General of the Department of Land and Water Conservation v Greentree & Anor* [2003] NSWCCA 31.

⁹² See *Slack-Smith and Another v Director-General of the Department of Land and Water Conservation* [2003] NSWLEC 189; and *Director-General of the Department of Land and Water Conservation v Prime Grain Pty Ltd & Ors*; *Greentree v Director-General of the Department of Land and Water Conservation* [2002] NSWLEC 93.

⁹³ See *Greentree v Director-General of the Department of Land and Water Conservation* [2002] NSWLEC 53; *Patra Holdings Pty Ltd v Minister for Land and Water Conservation* [2001] NSWLEC 265; and *Carr v Minister for Land and Water Conservation* [2000] NSWLEC 89.

The *Water Management Act 2000* (NSW) provides a complex regime in relation to water management. There has been little decided case law on the interpretation of the provisions of this Act as cases in relation to it have only recently begun to reach the Land and Environment Court. This is likely to change in the near future with a number of challenges being brought in relation to water sharing plans made by the Minister.⁹⁴ There have also been a few challenges in relation to water licences.⁹⁵

The relative newness of these regimes, and especially the complexity of the *Water Management Act 2000*, means that the Court will be interpreting new statutory provisions in the numerous cases now filed in the Court.

The role of the Commonwealth in environmental law

When the Commonwealth of Australia Constitution Act (the Commonwealth Constitution) was enacted a little over 100 years ago there was no direct provision for the Commonwealth to legislate on environmental matters. Indeed there is no specific reference to the environment contained in the Commonwealth Constitution. There are, however, a number of heads of power contained in s 51 of the Commonwealth Constitution which give the Commonwealth power to legislate on certain matters relating to the environment. For example, the Commonwealth can:

- “use its power to make laws with respect to ‘trade and commerce with other countries and among the States’ (Constitution s.51(i)) to regulate exports of endangered species, timber and minerals. ...) ...
- pass legislation under the external affairs power (Constitution s.51(xxix)) to implement international conventions dealing with environmental matters ... or to regulate environmental degradation of the sea ...
- legislate in relation to foreign corporations and financial corporations, as well as trading corporations, at least in connection with things done for the purposes of their trading activities (Constitution s.51(xx)) ...
- pass legislation, under the taxation power (Constitution s.51(ii)), taxing environmentally harmful activities (e.g. pollution taxes) or allowing deductions for environmentally friendly products ...
- pass legislation relating to the decision-making processes of the Commonwealth government and bureaucracy, as well as public bodies which have been set up at the

⁹⁴ See, for example, *Murrumbidgee Horticulture Council Inc v Minister for Land and Water Conservation* [2003] NSWLEC 213, which was the first such challenge determined by the Court, *Nature Conservation Council of New South Wales Inc v Minister for Sustainable Natural Resources* [2004] NSWLEC 33, and *Upper Namoi Water Users Association Inc & Ors v Minister for Natural Resources* [2003] NSWLEC 175 which were interlocutory proceedings relating to an application challenging a different water sharing plan.

⁹⁵ See *Williams v Water Administration Ministerial Corporation & Ors* [2003] NSWLEC 220 and *Corowa and Anor v Water Administration Ministerial Corporation and Anor* [2001] NSWLEC 226.

Commonwealth level, provided that those processes relate to areas of Commonwealth power (Constitution s.51(xxxix)). ...”⁹⁶

Throughout the 1970s and 1980s there were a number of important cases and pieces of legislation passed at the Commonwealth level which confirmed the Commonwealth’s power to legislate with respect to environmental issues and recognised the increasing importance of environmental protection at a political level. The Acts passed by the Commonwealth during this era included the *Environment Protection (Impact of Proposals) Act 1974* (Cth), the *National Parks and Wildlife Conservation Act 1975* (Cth), the *Whale Protection Act 1980* (Cth), the *Endangered Species Protection Act 1982* (Cth), and the *World Heritage Properties Conservation Act 1983* (Cth).

In 1974 the Commonwealth Government passed the *Environment Protection (Impact of Proposals) Act 1974* (Cth). The objects of the Act in s 5 were to ensure:

- “to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to –
- (a) the formulation of proposals;
 - (b) the carrying out of works and other projects;
 - (c) the negotiation, operation and enforcement of agreements and arrangements; (including agreements and arrangements with, and with authorities of, the States);
 - (d) the making of, or the participation in the making of decisions and recommendations;
 - (e) the incurring of expenditure, by, or on behalf of, the Australian Government and authorities of Australia, either alone or in association with any other government, authority, body or person, ... including matters of those kinds arising in relation to direct financial assistance granted, or proposed to be granted, to the States.”

Section 11 of the Act allowed the Minister to direct an enquiry into any of the environmental aspects of a matter in s 5. In 1975 the Minister instituted an inquiry under s 11 of the Act into “all of the environmental aspects of the making of decisions by or on behalf of the Australian Government in relation to the exportation from Australia of minerals (including minerals that have been subjected to processing or treatment) extracted or which may hereafter be extracted from Fraser Island in the State of Queensland”.⁹⁷

Murphyores Incorporated Pty Ltd and Dillingham Constructions Pty Ltd held mining leases on Fraser Island and intended to export minerals mined from Fraser Island out of Australia. The mining companies applied to the Minister for Minerals and Energy for a permit to export the minerals from Australia. They were told that no permits would be granted until the

⁹⁶ Farrier et al, *supra* note 18, at 16.

⁹⁷ See *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 7.

completion of the inquiry and consideration of its report. The mining companies instituted proceedings in the High Court arguing, inter alia, that the Act was invalid to the extent it allowed the inquiry to be conducted and that the Minister for Minerals and Energy was not entitled to take into account the report of the inquiry or the “environmental aspects of the mining operations involved in winning such materials” in deciding whether to grant an export permit.⁹⁸ The outcome of the case was that the High Court “upheld the ability of the Commonwealth to use its powers to prohibit the export of mineral sands by reference to whether the mining of such minerals would have harmed the environment of Fraser Island.”⁹⁹

In 1983 the Commonwealth government passed the *World Heritage Properties Conservation Act 1983* (Cth) in order to prevent the construction of the Gordon below Franklin dam in Tasmania and thereby damage to a wilderness area which the Commonwealth government considered to be of great natural significance. The Commonwealth government considered the area satisfied the World Heritage List criteria under the Convention for the Protection of World Cultural and Natural Heritage (the World Heritage Convention), which Australia had ratified in 1974. In *Commonwealth v Tasmania*¹⁰⁰ (the Tasmanian Dam Case) the High Court was called upon to determine the validity of a number of provisions of the *World Heritage Properties Conservation Act 1983* (Cth). The Commonwealth Government relied on various paragraphs of s 51 of the Commonwealth Constitution to maintain its validity, including the external affairs power¹⁰¹ and the corporations power.¹⁰²

In relation to the external affairs power, the:

“majority of the Court [Mason, Murphy, Brennan and Deane JJ] accepted, as a minimal proposition about the scope of s 51(xxix), that the Commonwealth Parliament could legislate to implement, for Australia, any international obligation which the Commonwealth Government had assumed under a bona fide international treaty; and they agreed that it was no objection that the subject matter of the obligation might otherwise lie outside the powers conferred on the Commonwealth Parliament.”¹⁰³

⁹⁸ See *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 8.

⁹⁹ Lindell G, ‘Scope of the Commonwealth’s Environmental Powers & Responsibilities’ in Leadbeter P, Gunningham N and Boer B (eds), *Environmental Outlook No 3 Law and Policy*, Federation Press, Sydney, 1999 at 110.

¹⁰⁰ (1983) 158 CLR 1.

¹⁰¹ s 51(xxix).

¹⁰² s 51(xx).

¹⁰³ Hanks P, *Constitutional Law in Australia*, 2nd ed, Butterworths, Sydney, 1996 at 422.

The High Court thereby confirmed the wide nature of the external affairs power, allowing the Commonwealth to legislate on matters arising out of international treaties relating to the environment (although we note that the power is not limited to this¹⁰⁴).

Recently, the Commonwealth Government has introduced the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act), which commenced on 16 July 2000. That Act repealed and replaced, inter alia, the *Environment Protection (Impact of Proposals) Act 1974* (Cth), the *National Parks and Wildlife Conservation Act 1975* (Cth), the *Whale Protection Act 1980* (Cth), the *Endangered Species Protection Act 1982* (Cth), and the *World Heritage Properties Conservation Act 1983* (Cth).

The Second Reading Speech for the EPBC Act stated:

“The bill represents the only comprehensive attempt in the history of our federation to define the environmental responsibilities of the Commonwealth. It proposes the most fundamental reform of Commonwealth environmental law since the first environment statutes were enacted by this parliament in the early 1970s.

Reform is necessary because the existing suite of Commonwealth law does not ensure high environmental standards in the areas of Commonwealth responsibility. Just as importantly, the existing legislation does not provide the community with certainty as to the Commonwealth’s role, nor does it provide an efficient and timely assessment and approval process.”¹⁰⁵

Chapple has described the EPBC Act as follows:

“The EPBC Act can be broadly divided into two main parts. A substantial part of the Act is devoted to an environmental impact assessment regime based on six “matters of national environmental significance” (NES). Much of the rest of the Act is devoted to tools and mechanisms for conservation of biodiversity and “protected areas”.

There is no doubt that the EPBC Act has fundamentally changed Australia’s national environmental laws. Improved transparency and opportunities for public participation, enhanced enforcement mechanisms, and increased powers for the Commonwealth Environment Minister are just some examples of improvements made by the EPBC Act ...” [footnotes omitted]¹⁰⁶

Matters of national environmental significance listed in the EPBC Act are declared World Heritage Properties, wetlands of international importance, listed threatened species and

¹⁰⁴ See Lindell, *supra* note 99, at 119.

¹⁰⁵ Mrs S Stone, Commonwealth, House of Representatives, *Hansard*, 29 June 1999 at 7770.

¹⁰⁶ Chapple S, ‘The Environment Protection and Biodiversity Conservation Act 1999 (Cth): One Year Later’ (2001) 18(6) *Environmental and Planning Law Journal* 523.

communities, listed migratory species, protection of the environment from specified nuclear actions and the Commonwealth marine environment.¹⁰⁷

There have been a few cases brought in the Federal Court under the EPBC Act. In *Booth v Bosworth*¹⁰⁸ the Applicant brought an application in the Federal Court seeking an injunction to restrain the Respondents from killing Spectacled Flying Foxes at their property. The Respondents owned a large lychee orchard at Dallachy Creek in Queensland. The Respondents had constructed electric fences around the orchard in order to kill flying foxes. The Respondents' orchard was located near the Wet Tropics World Heritage Area, which was included on the World Heritage List under the World Heritage Convention.

The Court held that on the evidence there would have been 9,900 – 10,800 female Spectacled Flying Foxes killed by the Respondents' electric fence in the 2000 – 2001 lychee season and such numbers would continue to be killed in the future if the Respondents were not restrained. The total number of Spectacled Flying Foxes in Australia in November 2000 was approximately 100,000. The probable impact would be that the species numbers would halve in less than five years and also render the species endangered. Branson J accepted that the Spectacled Flying Foxes resided in the Wet Tropics World Heritage Area and held that that species contributed to its heritage value. Branson J held that the Respondents' electric fences would have a significant impact on a World Heritage Area and granted an injunction restraining the Respondents from using the electric fence.

Conclusion

The emergence of environmental law as a discrete and coherent body of law in New South Wales and at the Commonwealth level has been fairly recent. Although environmental problems were recognised relatively soon after British colonisation of Australia, the environmental laws required to combat Australia's environmental issues and protect our country's natural resources have only begun to emerge in the 1960s and 1970s, with recognition of the need to move away from exploitation of resources to ensuring their continued protection.

¹⁰⁷ See ss 12 – 24A.

¹⁰⁸ [2001] FCA 1453.

The role of the Commonwealth in the evolution of environmental law has been somewhat limited due to the view apparently taken that it has limited powers to legislate in relation to environmental matters and the wide charter for the States to therefore legislate on any matters relating to the environment. The EPBC Act is likely to lead to an increasing number of Federal Court cases dealing with environmental law at the federal level. Whether these will inform, or be informed by, state law remains to be seen.

In NSW town planning law began to emerge early last century, although it was not until 1979 that a more complete system of town planning was established and environmental concepts were integrated into town planning decisions. Since the 1960s and 1970s the State Parliament has legislated on a number of issues relating to the environment and its protection. The Court itself was an unprecedented creation and has fostered the continued evolution of environmental law through its decisions on many important issues.

There are still a number of challenges which the Land and Environment Court and the discipline of environmental law will face into the future. Such issues include how to properly apply the principles of ESD and how best to grapple with the evidence of competing expert opinions, especially on technical scientific matters. It will also be called upon to provide interpretations of a number of new statutory instruments, the provisions of which have not yet been fully tested.

There is no doubt that environmental law is becoming more complex. The judgments in the first 10 years of the Court's operation were generally shorter and simpler. Judgments now deal with issues of more complexity, reflecting the development of environmental law as a discipline and the complexity of some of the legislation and issues with which the Court must grapple.

As the Chief Judge recently stated:

“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.”¹⁰⁹

¹⁰⁹ McClellan, *supra* note 17, at 11.

