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ABSTRACT OF PAPER

This Paper will survey the origins of the Court and its achievements during the past 20 years.

It will concurrently examine the state of progressive development of environmental law during this period. The survey will be undertaken by reference to three distinct time frames during the life of the Court-(**i**) 1980 - its origins; (**ii**) 1990 after its first decade and (**iii**) 2000 after its second decade.

The paper will examine particular challenges encountered by the Court in establishing itself as a specialist Environment Court.

Next it will seek to distil valuable experiences and lessons learned during the past 20 years before finally contemplating future prospects, both for environmental law and the Court's role in its ongoing development.

INTRODUCTION

1 September 2000 marked the 20th anniversary in the life of the *Land and Environment Court of New South Wales* a Specialist Superior Court having wide ranging civil and criminal jurisdiction in the administration and enforcement of the environmental laws in force in the State of New South Wales.

A review of the achievements of the Court in the administration and delivery of environmental justice is apt to shed valuable light on this Conference's Theme: *Building Towards the Future: Does Our Future Lie in the Past?* Like the best of stated formulations of themes or objectives, this Conference's Theme is fertile with possible meanings and applications. For my part, I would understand the Theme to be a search for sound foundations for satisfying the ever increasing environmental challenges and demands. In this respect, the Land and Environment Court can be appreciated as a substantial "building" block significantly contributing to those necessary "foundations" because the effective enforcement of environment laws is universally recognised to be an absolute imperative.

I would also understand the Theme to focus attention on the past to gauge its influence on our future. Is it a shackle that needs to be thrown off? Are there mistakes that need to be corrected? Are there positive lessons to be learned? Are past and existing models and structures appropriate to respond to future environmental challenges? Again, a review of the achievements of the Land and Environment Court of NSW is apt to shed valuable light on these questions, recognising as we must (**i**) that society's collective understanding and awareness of the environmental challenges and demands are vastly more enlightened and advanced than was the situation 20 years ago; (**ii**) that both current and future environmental challenges and demands are vastly greater, more complex and all pervasive than was previously perceived to be the case; and (**iii**) the body of environmental law has greatly escalated in its content, scope and complexity.

AN OVERALL EVALUATION OF THE COURT

For convenience I have undertaken my review by examining the subject at three distinct time frames in the life of the Court-(i) its origin; (ii) after 10 years; (iii) after 20 years This method will indicate not only the progressive growth to maturity of the Court but will plot the expanding and progressive development in the State's environmental laws that confer jurisdiction upon the Court.

What clearly emerges from my review is that the creation of the Court can be seen to have been a bold and brave experiment which has proved to be a consistent and sustained success, thereby providing a very sure foundation in the overall administration of the State's ever expanding body of environmental laws and for the efficient delivery of environmental justice.

Whereas that conclusion is singularly validated by the statistics recorded in the Court's successive Annual Reports (which reveal enviable and unemulated results in the expeditious hearing and disposal of cases) in my review, I have attempted to explain how such an impressive result has been consistently achieved, beyond the obvious reason of the superbly efficient management and administration of the Court's business by the three Chief Judges who have held office. Efficient management in order to obtain optimal results requires a sound productive system which in turn depends upon proficient personnel.

My conclusion is that a qualitative reason for the result emerges from three related facets of the Court-(i) the organic coherence of the Court's jurisdiction; (ii) the ready accessibility of the Court's jurisdiction; and (iii) the organisational cohesion of the Court's membership.

Although each of these three facets ultimately derives from structural elements in the Court's composition and statutory functions, the organisational cohesion is an abiding personal tribute to the unity of purpose, goodwill and commitment that binds together the Judges and Commissioners in their work on the Court. I shall elaborate on these matters later in the paper, it being sufficient here to say that they, together with efficient court management and administration, have been the hallmarks of the life and success of the Court.

Lest it be thought that this is but a "rose-tinted" evaluation by somebody who is privileged to have been continuously involved with the Court since its conception (in the **Land and Environment Court Bill 1979**), I call in aid an independent evaluation forming part of the massive study on the "Environment Court Project", conducted by a Research Team chaired by Professor Malcolm Grant of Cambridge University on behalf of the UK Department of Environment Transport and Regions. That Study involved "in-depth" studies of existing jurisdictions administering environmental laws in Sweden, Denmark, The Netherlands, Spain, the Republic of Ireland, Germany, New Zealand, New South Wales, Queensland and South Australia.

The UK Study adopted an 18 point evaluative criteria including **procedural rationalisation; substantive integration; speed and delay; incorporating expertise; encouraging informality; access to justice; cost of justice; cost of the system; special rules of evidence and procedure; remedies; extent of jurisdiction.**

In its Final Report published on **18 February 2000**, the Study provides a detailed evaluation of this Court by reference to those 18 criteria (vide **Chapter 5 at pp 33 to 42 (incl)**). Time does not permit extensive quotation. However, the following extracts from the Report encapsulate the findings of the Study:

"5.18.1 General impressions

We encountered general satisfaction amongst practitioners with the performance of the Land and Environment Court, and it was also the model most frequently cited to us by judges and practitioners in other jurisdictions as the leader in its field. There was broad consensus that this is a highly effective body, which deals speedily and competently with planning and building matters, both as to the merits and the law, even although the resources available to it are limited. Those criticisms which have emerged are related more to the structure of the planning system within which the Court operates, rather than to either the structure or powers of the Court.

5.18.17 Balance in the system

We found general acceptance that the Court fulfils the basic requirements of a large cross section of the users of the Court. The main concern of many users is speed and the Court certainly delivers that. The other point sought by most is quality, in the sense of a high level of legal expertise and the personnel to adequately administer whatever legal framework has been imposed upon them by the legislature, and the Court is considered to have that. Developers complain about delays in the process but these seem to be usually at the local authority rather than the appeal level. The issue of use of the appeal and civil enforcement processes by business competitors also arose, but as in other jurisdictions few had any concrete suggestions as to dealing with it."

THE COURT'S ORIGINS

I have referred to the creation of the Court as a bold and brave experiment. Why was this so? There are a number of reasons all of which derive from the Court's **unprecedented** composition and jurisdiction, namely-

- (i) The Court was conferred with the status of a Superior Court, being only the third such Court that has been created in the history of New South Wales.
- (ii) The Court was created a Specialist Court comprising the Judges but with a unique composition whereby non-lawyer experts in technical disciplines (Assessors - later to be styled Commissioners) could exercise, by delegation, the planning administrative review functions of the Court.
- (iii) The Court was vested with a comprehensive and integrated jurisdiction (both civil and criminal) under environmental laws.
- (iv) In particular, the Court's comprehensive jurisdiction involved **exclusive** jurisdiction to interpret and to apply the new planning law regime enacted in the *Environmental Planning and Assessment Act 1979* and to enforce it by both civil and criminal process.

Indeed, it is fair to say that the enactment of the *Environmental Planning and Assessment Act*, widely acclaimed as the much needed radical reform of the State's existing planning laws, provided the opportunity, if not the necessity, for the creation of a new Specialist Court with a comprehensive and integrated jurisdiction. That 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**).

Whereas necessity is the mother of invention, it is most appropriate to generously acknowledge the perspicacity and the vision of the then Wran Labor Government (and especially that of the then Minister for Planning and the Environment, the late Paul Landa who sponsored the reforms and the then Attorney General Frank Walker who actively supported the establishment of the new Court and through his Department, brought it into existence).

But for that vision and the resolution and capacity to convert it into reality, the opportunity would have been lost. The unsatisfactory existing fragmented system of multiple jurisdictions could far more readily (and far less adventurously) have been employed, but such an outcome would have been self-evidently inadequate and, I venture to say, the course and impressive development of environmental law in NSW and in Australia that we have experienced in these past 20 years may not have occurred.

With the benefit of hindsight, the achievements of the Court in the past 20 years (and the extent to which other States in Australia have modelled their reforms on the Court) have entirely vindicated the reformist vision and initiatives taken by the Wran Government in 1979 in enacting the *Environmental Planning and Assessment Act* and the *Land and Environment Court Act*. Indeed, I venture to say that it is the proven record of the Court efficiently exercising its comprehensive and integrated jurisdiction that has profoundly influenced in two important respects the character and content of the ongoing development of environmental laws in NSW. Firstly, it is now firmly established that successful environmentalism ultimately depends upon effective enforcement such as is readily available via the Court's civil and criminal enforcement jurisdiction, considerably enhanced by the open standing to invoke that jurisdiction. Secondly, the character and pattern of the Court's comprehensive and integrated environmental jurisdiction has inspired similar organic integration of environmentalism with other statutory regulatory regimes, especially in the field of planning control.

Finally, there is a further witness to the brilliance of the Wran Government's initiatives in 1979, namely, the fact that for the past decade there has been continuing debate in influential circles in England for the creation of a specialist Environmental Court, yet to date no such Court has emerged. The illustrious proponents for reform in England include Lord Harry Woolf (the recently appointed Lord Chief Justice of England) who in his 1991 Garner Lecture: "*Are the Judiciary Environmentally Myopic?*" published in a **Journal of Environmental Law Vol 4 p 1** stated:

"...what I am contemplating is not just a court under another name. It is a multi-faceted, multi-skilled body which would combine the services provided by existing courts, tribunals and inspectors in the environmental field. It would be a 'one stop shop' which should lead to faster, cheaper and the more effective resolution of disputes in the environmental area. It would avoid increasing the load on already overburdened lay institutions by trying to compel them to resolve issues with which they are not designed to deal. It could be a forum in which judges could play a different role. A role which enabled them not to examine environmental problems with limited vision. It could, however, be based on our existing experience, combining the skills of the existing Inspectorate, the Lands Tribunal and other administrative bodies. It could indeed be an exciting project."

His Lordship expressly acknowledged that precedent for his model already existed in the NSW Land and Environment Court. His Lordship returned to the same theme in his 1997 **Lord Morris Memorial Lecture** ("*The Courts' Role in achieving Environmental Justice*") noting that England "*has a lot to learn from the interesting developments which have taken place in the Antipodes...among whose initiatives is the establishment of the environment court in New South Wales*" (considered by his Lordship to be a "*more radical solution*" for achieving environmental justice).

Upon its creation, the Court was vested with the specific jurisdiction as detailed in **Part III** of the *Land and Environment Court Act 1979*. Originally there were five distinct classes (or descriptions) of jurisdiction as follows:

Class 1	environmental planning and protection appeals
Class 2	local government and miscellaneous appeals
Class 3	land tenure, valuation, rating and compensation matters
Class 4	environmental planning and protection civil enforcement
Class 5	environmental planning and protection summary (ie criminal) enforcement

Some of the more important features of the ***Land and Environment Court Act 1979*** were (and subject to minor changes, remain) as follows:

- (i) The Court is constituted a superior court of record: **s 5**
- (ii) All proceedings in the Court shall be heard by a Judge, who constitutes the Court: **s 6**
- (iii) The Court is composed of the Chief Judge and such other Judges as the Governor appoints: **s 7**
- (iv) Qualified persons may be appointed by the Governor as Assessors: **s 12**
- (v) The Chief Judge is charged with responsibility for the orderly and expeditious discharge of the business of the Court: **s 30**
- (vi) Classes 1, 2 and 3 of the Court's jurisdiction may be exercised by a Judge or one or more Assessors: **s 33(1)**
- (vii) Classes 4 and 5 of the Court's jurisdiction shall be exercised by a Judge: **s 33(2)**
- (viii) Where proceedings are pending in Class 1 or 2 of the Court's jurisdiction, a preliminary conference presided over by an Assessor is to be held unless otherwise directed: **s 34(1)**
- (ix) The Chief Judge may delegate to an Assessor the functions of the Court in hearing and disposing of proceedings in classes 1, 2 or 3 of the Court's jurisdiction: **s 36(1)**
- (x) An Assessor may on his or her own motion, or at the request of a party, refer to the Chief Judge a question of law raised in the proceedings: **s 36(5)**
- (xi) Where a Judge presides in a proceedings in Classes, 1, 2 or 3 he or she may be assisted by one or more Assessors: **s 37**

- (xii) Proceedings in classes 1, 2 or 3 shall be conducted with as little formality and technicality and with as much expedition as the proper consideration of the matters before the Court permit and the Court is not bound by the rules of evidence but may inform itself on any matter as it thinks appropriate: **s 38(1) and (2)**
- (xiii) For the purpose of hearing and disposing of an appeal in class 1, 2 or 3, the Court shall have all the functions and discretions of the person whose decision is subject of the appeal: **s 39(2)**
- (xiv) The Court has plenary power to grant all available remedies so as to finally determine the case and avoid a multiplicity of proceedings: **s 22**
- (xv) The Court has plenary power to make orders, final and interlocutory, as are appropriate: **s 23**
- (xvi) The Court's class 4 jurisdiction (civil enforcement of environmental planning and protection) is exclusively vested in the Court: **s 71**
- (xvii) A person entitled to appear before the Court in proceedings may do so in person, by legal representative or by agent authorised in writing: **s 63**
- (xviii) The Crown may appear before the Court in which the public interest may be affected and the Attorney-General and Minister for Planning may intervene in any proceedings before the Court: **s 64**.
- (xix) An appeal against the Court's decision in Class 1, 2 or 3 lies to the Court of Appeal on a question of law: **s 57(1)** with a full appeal against the Court's decision in Class 4: **s 58(1)**
- (xx) An appeal to the Court of Criminal Appeal lies against a conviction of, or costs order made against, a defendant: **s 56(1)(b)**

Upon the commencement of the Court's life, there were **three Judges** (Chief Judge James McClelland, and Justices Jerrold Cripps and Ted Perrignon) and **nine** Assessors. At the time of their appointments, the Chief Judge was a Judge of the Industrial Commission of NSW, Justice Cripps was a Judge of the District Court and four of the Assessors were members of the Local Government Appeals Tribunal.

It would be very difficult to overvalue their sterling pioneering work. With the passage of 20 years, it is easy to forget the daunting task confronting the original members of the Court, particularly that posed by the needs for the judicial interpretation exposition and application of the *Environmental Planning and Assessment Act 1979* (which commenced to operate on the same day as the Court did) and its multitudinous offspring, in respect of which of the Court was truly in uncharted waters. However, the Court was fortunate to have in Chief Judge McClelland a very astute and urbane leader, in Justice Cripps a robust and dynamic personality with an immense capacity to master the specialist jurisdiction of the Court and in Justice Perrignon a wise and very experienced specialist practitioner in most of the areas of the Court's jurisdiction. The Assessors also responded enthusiastically and competently to the challenges presented by those pioneering times.

The expectation of "an exciting project" that had been anticipated by Lord Woolf in his 1991 Garner Lecture admirably captures the spirit and mood of what was living reality for the original members of the Court. Both collectively and individually, the Judges and Assessors applied themselves to that "exciting project" with concerted diligence, devotion and industry. The result for the Court was indeed a very happy childhood, albeit with a very accelerated development to full maturity (without the luxury of any intervening adolescence). More enduringly, the Court had been very soundly established upon sure foundations which have facilitated its ongoing development and standing in the judiciary and in the community.

In this nostalgic reflection on the Court's origins, it would be remiss not to acknowledge the indispensable contribution made to the work and stature of the Court by the specialist legal profession, both by the Bar and by the Solicitors who have practised in the Court. From its origins, the Court was especially fortunate to have leading specialist lawyers of the highest quality regularly appear before it, including a high representation by specialist solicitors. Some leading lawyers have regularly practised in the Court from the beginning. Obviously their learning and skills are immense. Many other leading practitioners have since been elevated to the benches of the Supreme Court and Federal Court. As may have been expected, the body of specialist practitioners in the Court has greatly expanded over the past 20 years. This too has greatly assisted and enhanced the work and stature of the Court.

Finally, in reflecting on the origins of the Court and the beneficial forces that combined to so obviously enhance the Court's nurture and rapid development to maturity, it is right to acknowledge the concurrent establishment

and growth of (i) the professional Environmental Law Associations (both in NSW and nationally); and (ii) the Environmental Defender's Office. These same creative forces were likewise importantly at work in establishing environmental law as an increasingly significant body of specialist law in its own right.

The Court After 10 Years

By this time, the Court was well and truly established and its influential role in the administration of the State's environmental laws was widely recognised. Jerrold Cripps had become the new Chief Judge and the Court now had four Judges and an internal appeals system allowing an appeal for error of law from an Assessor to a Judge.

The Court's jurisdiction had been significantly increased by virtue of new environmental legislation conferring administrative review and civil and criminal enforcement jurisdiction eg the *Environmentally Hazardous Chemicals Act 1985*; the *Environmental Offences and Penalties Act 1989*. New jurisdiction to adjudicate on aboriginal land claims had been conferred on the Court by the *Aboriginal Land Rights Act 1983*.

No more eloquent exposition of the public importance of the role of the Court in respect of its civil enforcement jurisdiction under the *Environmental Planning and Assessment Act* could be cited, than that contained in the judgment of Chief Justice Street in *F Hannan Pty Ltd v Electricity Commission of New South Wales* (No 3) (1985) 66 LGRA 306. The Chief Justice stated at 310 that "*the legislative scheme places upon the Court a wide ranging responsibility for the protection of the environment*". He continued:

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.

The Chief Justice elaborated upon the width of the Court's jurisdiction and power and of the Court's discretion in the exercise of those powers at 312 and 313. The Chief Justice perceived the combined effect of the express objects of the Act (s 5) and the open standing conferred by s 123 as delineating the Court's adjudicative responsibility "*as the task of administering social justice far beyond administering justice inter partes*".

The importance of open standing to invoke the Court's jurisdiction to enforce environmental laws, so profoundly expounded by the Chief Justice, cannot be overvalued. It is surely a striking coincidence that just a few months before the Court came into existence, the High Court of Australia in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 had held that the Foundation had no standing to maintain the action challenging the validity of the Commonwealth's decision to approve a tourist resort development in Queensland.

Nearly 20 years later, the High Court re-affirmed the strictures on the law of standing in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, McHugh J expressing the view that it "*was prudent for the Court to maintain the current doctrine leaving it to the legislature, if it thinks fit, to rationalise, modify or extend that doctrine*" (at 280).

The signal breakthrough achieved by the open standing provisions of the *Environmental Planning and Assessment Act 1979* had established the vital precedent and the fundamental building block for future environmental legislation vesting jurisdiction in this Court. The precedent has been regularly followed by the legislature eg the *National Parks and Wildlife Act 1974* (s 176A), the *Environmentally Hazardous Chemicals Act 1985* (s 57), the *Wilderness Act 1987* (s 27), the *Environmental Offences and Penalties Act 1989* (s 25).

The last-mentioned Act was particularly significant inasmuch as it applied to a breach or threatened breach of "*this or any other Act, or any statutory rule under an Act, if the breach....is causing or is likely to cause harm to the environment*" (the terms "harm" and "environment" being defined very broadly). However, it was necessary for the Court's leave to bring such proceedings to be obtained. Significantly, the requirement for the Court's leave was dispensed with upon the enactment of ss 252 and 253 of the *Protection of the Environment Operations Act 1997* (encapsulating a total review of the State's environmental protection laws).

The Court After 20 Years

The second decade in the Court's life has seen the continuing expansion of jurisdiction sustaining the organic coherence created by the subject and focus of "environmentalism" and extending the principle of "open standing" to newly conferred jurisdiction eg *Local Government Act 1993* (s 674); *Fisheries Management Act 1994* (s 282); *Threatened Species Conservation Act 1995* (s 147); *Contaminated Land Management Act 1997* (s 96); *Native Vegetation Conservation Act 1997* (s 63); *Protection of the Environment Operations Act 1997* (ss 252 and 253).

The increased growth in jurisdiction and responsibilities of the Court led to an increase to six in the number of judges (including the incumbent Chief Judge, the Hon. Mahla Pearlman A.M.), thereby doubling the original number of judges. (Two Judges, Chief Judge Cripps and Justice Stein were elevated to the Court of Appeal in 1992 and 1997 respectively, recognising not only their personal status, but their status as environmental lawyers.)

The original number of nine Assessors (now styled Commissioners) has been maintained throughout the life of the Court, reflecting the relative constancy of the number of planning appeals filed in the Court annually. Because of the increase in the Court's jurisdiction requiring adjudication by a Judge, the Commissioners have increasingly undertaken more and more of the planning appeal work of the Court. This workload, which involves specialist administrative review, has been undertaken with considerable competence and efficiency. Collectively, the Commissioners have amassed considerable specialist expertise in adjudicating planning appeals.

Their important work has always been enhanced by the organisational cohesion that I mentioned earlier, principally based upon the established practices and procedures of the Court, which are designed to ensure that cases are presented for adjudication upon clearly defined issues in dispute and upon the basis of previously exchanged expert evidence. This enables speedy determination on the planning merits untrammelled by the complications posed by questions of law. This involves a considerable degree of efficient case management because it is a notorious fact that modern planning law has become increasingly complex and very fertile ground for raising questions of law.

To some extent, legal complexity is an inevitable consequence of the increasing degree of integration into the planning system of specific environmental objectives eg the need for proper evaluation of the impact of proposed development on threatened species of fauna or flora: see *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55.

A further indication of the inherent legal complexity of modern day statutory planning (still essentially founded on the regulation of permissible and prohibited categories of development) is provided by the significant recent decision of the High Court of Australia (on appeal from the Full Court of the South Australian Supreme Court) in *City of Enfield v Development Assessment Commission* (2000) 106 LGERA 419.

In this intrinsically difficult area, the Court has been outstandingly successful in the efficient manner in which it delegates to Commissioners the hearing and determination of most planning appeals without them having to confront the complexities of questions of law, while at the same time providing that any relevant questions of law are determined by the Judges. The Court's success in this respect, is evidenced by the fact that in the 1999 Court year, there were only 25 appeals against decisions of Commissioners (of which 6 were discontinued).

FUTURE PROSPECTS

An ironic postscript to the foregoing favourable evaluation of the Court is the fact that earlier this year the Attorney-General established a Working Party to examine the State's planning laws and the role of the Court in relation to merit planning appeals. The impetus for this initiative was the widespread community debate that was generated late last year following strident criticisms made by sections of local government of the Court's merit review of Council's planning decisions.

Pending the completion by the Working Party of its task, it is not appropriate that I express my personal views other than to say that if the real object of local government's criticism is the abandonment of independent merit review of its planning decisions, it is an object that is entirely repugnant to the history of the administration of the State's planning system for the past 50 years. It is also entirely out of step with current trends and practices in Australia progressively developed during the past 25 years of promoting widespread general merit review of administrative decisions.

Having completed my review of the Court I return to the Conference's Theme. I trust that I have demonstrated that our responsiveness to the environmental challenges of the future is greatly assisted by the valuable lessons from our experience in the past (recognising that that past is relevantly confined to the relatively brief period of 20 years when environmentalism was nascent).

Environmental law is rapidly developing and its development can be anticipated to be ongoing. An established yet innovative specialist Environmental Court capable of responding to future developments in environmentalism has surely proved itself to be an indispensable foundation in the delivery of environmental justice and to maintaining the integrity of environmental law.