Paper delivered at NSW Young Lawyers' Seminar
28 February 2001

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Judge of the Land and Environment Court

A. Introduction

The *Land and Environment Court Act 1979* (the LEC Act) created the Court with an 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.

In the past 20 years, the Court's jurisdiction has been regularly increased as the consequences of the enactment of an increasing body of environmental law consonant with its rapidly established reputation as a Specialist Court in environmental law.

B. The Constitution and Composition of the Court

The *LEC Act* makes the following provisions-
(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 Commissioners: **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 Commissioners: **s 33(1)**
(vii) Classes 4, 5 and 6 of the Court's jurisdiction shall be exercised by a Judge: **s 33(2)**

Currently six Judges (including the Chief Judge) and nine Commissioners hold office. The increased growth, over the life of the Court, in its jurisdiction and responsibilities has seen the number of Judges double. The number of Commissioners has been consistently maintained.

C. The Court's Jurisdiction

Sections 16 to 21B (inclusive) vests the following jurisdiction in the Court-

Class 1 - environmental planning and protection appeal division (merit planning appeals)
Class 2 - local government and miscellaneous appeal division (merit building 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 criminal enforcement)
Class 6 appeals by defendants from convictions relating to environmental offences imposed by magistrates in the local Court.

Section 16(1A) confers ancillary jurisdiction upon the Court.
Registrations during the calender year 1999 of new matters totalled **1903** made up as follows:-

Class 1 1152
Class 2 87
Class 3 331
Class 4 224
Class 5 109
Class 6 0
Class 7 0

D. The Court's Procedures

The procedures and practices of the Court are found collectively in the following sources-
(i) The LEC Act
(ii) The Rules of Court
(iii) Practice Directions of the Court.

The underlying policy of these sources is to provide a simplified system of procedure with the accent on full and early disclosure of the issues raised by the proceedings to enable the efficient discharge of business.

The *LEC Act* provides for the following matters
(i) Where proceedings are pending in Class 1 or 2 of the Court's jurisdiction, a preliminary conference presided over by a Commissioner is to be held unless otherwise directed: **s 34(1)**
(ii) The Chief Judge may delegate to a Commissioner 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)**
(iii) A Commissioner 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)**
(iv) Where a Judge presides in a proceedings in Classes, 1, 2 or 3 he or she may be assisted by one or more Commissioners: **s 37**
(v) 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)**
(vi) 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)**
(vii) 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**
(viii) The Court has plenary power to make orders, final and interlocutory, as are appropriate: **s 23**
(ix) The Court's class 4 jurisdiction (civil enforcement of environmental planning and protection) is exclusively vested in the Court: **s 71**
(x) 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**
(xi) The Crown may appear before the Court in which the public intent may be affected and the Attorney-General and Minister for Planning may intervene in any proceedings before the Court: **s 64**.
(xii) 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)**. There is an internal appeal to a Judge from a decision of a Commissioner on a question of law: **s 56A**.
(xiii) An appeal to the Court of Criminal Appeal lies against a conviction of, or costs order made against, a defendant: **s 56(1)(b)**

(xiv) Mediation and neutral evaluation is available under **Part 5A**.

The **Rules** regulate in greater detail the practice and procedures in the Court. A number of the Parts of the Supreme Court Rules have been adopted by the Court's Rules. The Rules were completely revised in 1995.

However, the Rules prescribe their own detailed requirements in respect of classes 1, 2 and 3 proceedings.

Practice Directions govern a number of important matters eg the award of costs in development and building appeals; consent orders; concurrent class 1 and class 4 proceedings. In 1999, two important additions were made, namely **(i)** a Practice Direction on Pre-hearing procedures in classes 1, 2, 3 and 4; and **(ii)** the Expert Witness Practice Direction.

The Court constantly keeps under review its practices and procedures and is assisted in this respect by the Court Users' Group, a consultative Committee representing some 25 organisations.

Throughout most of last year a Working Party established by the then Attorney-General Mr Jeff Shaw QC under the chairmanship of the Honourable Jerrold Cripps QC, a former Chief Judge of the Court, has been investigating the current planning laws concerning the determination of development application and in particular, the Court's role in determining planning appeals on the merits. It is anticipated that its Report may soon be completed.

As the abovementioned statistics demonstrate, the planning appeal jurisdiction (class 1) constitutes more than 50 % of the Court's workload.

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 of the Court, 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).

E. Conclusions

Coinciding with the life of the Court, these past 21 years, there has been an explosion in the development of environment laws as a recognised body of specialist law at international, national, state and local levels.

These developments have undoubtedly resulted in both the comprehensiveness and complexity of environmental law-a trend that is likely to continue as new environmental challenges affecting the world and countries and local communities emerge and demand solutions.

Where these solutions are manifested, as they invariably are, in the enactment of more environmental laws, it is axiomatic that effective mechanisms for enforcement of these laws is imperative for their effectiveness.

This emphasises the important interpretive and enforcing role of the Court, as an established yet innovative Environmental Court capable of responding to future developments in environmentalism in the delivery of environmental justice and in maintaining the integrity of environmental law.

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