Address to the College of Law
15 November 1997

The Honourable Justice D H Lloyd
Land and Environment Court of New South Wales

In this paper I intend to give a general overview of the Court's jurisdiction and some of the rules that govern its practice and procedure. I will do so with reference to particular cases I have dealt with over the course of this year. I have assumed that most of those present are practitioners who are interested in the jurisdiction but have no detailed understanding of either its structure or its operation.

The Land and Environment Court is a specialist superior court of limited statutory jurisdiction as set out in s 16 of the *Land and Environment Court Act* 1979. The Court is presently comprised of five judges and nine assessors. Each of these assessors has some expertise in one of more of the technical matters with which the court deals: architecture, civil engineering, town planning and so on.

The Court's jurisdiction is divided into six different classes. The first two deal largely with administrative appeals from decisions by local councils to either approve or refuse development, building and subdivision applications. Class 3 deals with a range of matters including ratings appeals and compensation for the compulsory acquisition of land. Class 4 concerns civil enforcement and judicial review of administrative decisions, whilst Class 5 involves criminal matters concerning environmental offences. Class 6, which is rarely used, deals with criminal appeals from convictions in the Local Court.

The Court's Administrative Power

As can be seen from even this brief outline, the Court exercises an amalgam of administrative appeals and judicial functions. Section 39 of the *Land and Environment Court Act* 1979 (which I shall refer to as "the Act"), for instance, establishes that in hearing appeals under Classes 1, 2 and 3 the Court has all the powers and functions of the body whose decision is the subject of the appeal; and that the hearing occurs *de novo*. The Court thus sits in the place of a local council or other consent authority in what constitutes an exercise of administrative power. As such, the court may hear fresh evidence, evidence in addition to, or evidence in substitution for, the making of the decision on appeal.

Assessors

The fact that proceedings in Classes 1, 2 in particular are appeals *on the merits* ensure that usually they can be heard either by judges or by assessors. Section 36(1) of the Act enables the Chief Judge to direct any Class 1, 2 or 3 matter to be heard by one or more assessors. Section 36(5), however, allows an assessor to refer questions of law to a judge, either on their own request or on that of the parties. In such cases, the judge determines the point of law and then remits the matter back to the assessor.

Section 56A allows parties to appeal to a judge of the Court from a decision of an assessor on an alleged error of law. Such appeals frequently occur. One s 56A appeal before me recently, for instance, was *P D Mayoh Pty Ltd v North Sydney Council* (7 October 1997, unreported). In that case I had to decide whether a decision of two assessors had erred in law in its construction of a clause of the *North Sydney Local Environment Plan* 1989. The clause provided that a residential flat building should not be erected in a certain zone if attached dwellings could reasonably be erected on the site in a manner which enabled their occupants to enjoy reasonable sunshine and privacy. In considering this question I was required to determine whether interpretation of the term 'reasonably' should include questions of the economic viability of a development proposal. As in *Fabcot Pty Ltd* v *Hawkesbury Council* (10 April 1997, unreported) I held that the economic viability of a particular development is not a consideration with which courts should involve themselves. As the assessors' construction of the clause had not been based on a finding that economic viability was a relevant consideration, however, no error of law had occurred.

I note in passing here that assessors are also involved in conciliation conferences with respect to Class 1, 2 and 3 matters. The circumstances in which this occurs are outlined in s 34 of the Act.

Procedural Rules in Classes 1, 2 and 3

As Classes 1, 2 and 3 are largely administrative in nature they are free from much of the formality of legal procedure. Section 38(1) of the Act - a provision similar to s33(1)(b) and (c) of the *Administrative Appeals Tribunal Act* 1975 (Cth) - sets out that proceedings in Classes 1, 2 and 3 "shall be conducted with as little formality and technicality, and with as much expedition" as the requirements of the Act allow.

Section 38(2) also sets out that the rules of evidence do not apply in Classes 1, 2 and 3. This provision does not, however, do away with the need to observe the principles of natural justice and procedural fairness. Natural justice may well require, for instance, that evidence is tested by an opposing party by means of cross-examination. Furthermore, in *Burwood Municipal Council* v *Harvey* (1995) 86 LGERA 389, a hearing in the Land and Environment Court which ran for 11 days was aborted by the Court of Appeal because the judge had cross-examined a witness himself to such an extent that it was held that rules of fairness had been denied. In *Cacalot Pty Ltd* v *Sydney* (1996) 90 LGERA 424 an assessor took a view of a site in a Class 1 matter without the knowledge of the parties. Pearlman J, Chief Judge of the Land & Environment Court, held that this constituted a breach of the rules of procedural fairness which in turn amounted to an error of law. The error was not serious enough, however, to overturn the assessor's decision.

Despite the absence of the rules of evidence there are nonetheless provisions in the Rules which govern procedure in Classes 1, 2 and 3. An example of this can be found in Pt 13 Div 7 r 16(a) and (b) of the *Land and Environment Court Rules* 1996 (which I shall refer to as "the Rules"), which establishes that an expert report will not be admissible unless it is served at least 14 days prior to a hearing. I add that, as a matter of practice, witness statements from non-experts may also be directed to be served prior to the date fixed for hearing.

If a party wishes to cross-examine an expert on the contents of his or her report, Pt 13 Div 7 r 16(c) of the Rules provides that they must inform the opposing party in writing at least 7 days before the hearing. Rule 16(d) further provides that oral examination of any expert can only occur with leave of the presiding judge or assessor.

Pt 13 Div 7 r 14 of the Rules establishes that a statement of agreed facts for Class 1 and 2 matters and certain matters in Class 3 must be settled at the first call-over before the registrar. Any issues of law to be determined must also be identified at the same time. None of the agreed facts and questions of law can later be added to or expanded without leave. There is a similar provision applicable to Class 3 matters concerning compensation for compulsory resumption of land. Pt 13 Div 8 r 23 of the Rules says that prior to the hearing of such Class 3 matters, each party must give notice to the registrar as to (a) disputed questions of law; (b) matters in issue arising from expert reports and (c) any contracts in issue. Rule 25 then provides that 14 days prior to the hearing the proceeding shall be mentioned before the Court to ensure that all the issues in dispute are ready to be heard.

I emphasise the above provisions here because of the time wasted whenever parties appear before the Court without having finally determined all of the issues between them. The High Court in *Queensland* v *J L Holdings Pty Ltd* (1997) 71 ALJR 294 has indeed recently ruled that failure to comply with case management rules should not bar a party from airing a legitimate question before the courts. Raising fresh matters at the hearing, however, usually requires an adjournment - with much resulting inconvenience to both the Court and the parties involved.

Paragraph 9 of the Court's *Practice Directions* 1993 provides that if parties settle in a Class 1 or 2 matter, the Court expects the consent authority to give effect to the settlement by granting the consent or approval. If the parties wish, however, they can apply to the Court for consent orders. This is done by reducing those orders to writing, filing them with the Court registry and having the matter listed before the Duty Judge. The parties will then be required to convince the Duty Judge that it is appropriate to grant the consent or approval having regard to the totality of the circumstances of the case. The consent authority must demonstrate that all statutory requirements have been met and that no submissions from objectors have been overlooked.

Class 4

1. Civil Enforcement

The Court's jurisdiction under Class 4 is elaborated in s 20 of the Act. Section 20(b) provides that the Court has the same jurisdiction as the Supreme Court to:

> (a) enforce a right, obligation or duty arising out of a planning or environmental law or development contract;
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> (b) review or command a function conferred or imposed by a planning or environmental law or development contract,
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> (c) make declarations with respect to rights, obligations, duties or functions relating to the laws or contracts just mentioned; and
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> (d) award damages for the breach of a development contract.

A planning or environmental law includes the *Environmental Planning and Assessment Act* 1979 (which I shall call the *"EP&A Act"*), any statutory instrument within the meaning of the latter Act, any of the Acts outlined in s 20(3)(a) and Pt 2, Chs 6, 7 and 15 of the *Local Government Act* 1993. A 'development contract' is defined as an agreement under the community land and strata title statutory schemes.

Section 22 of the Act, a provision identical to s 22 of the *Federal Court Act* 1976, says that the Court has power to:

> "... grant either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim brought forward by that party in the matter, so that, as far as possible, all matters in controversy between the parties may be ... finally determined and all multiplicity of proceedings concerning any of those matters may be avoided."

The Court's ability to provide a full range of remedies with respect to matters within its jurisdiction is thus clear. That the Court can provide declaratory relief, for instance, is illustrated in the recent case of *Doe* v *Cogente Pty Ltd and Ors* (8 August 1997, unreported). In that case, Cowdroy AJ issued a declaration that s 28(2) of the *EP&A Act* permitted a consent authority to displace an easement in order for a development to occur. This decision followed the Court of Appeal's judgment in *Coshott* v *Ludwig* (13 February 1997, unreported), in which it was held that s 28 makes it possible for a consent authority to displace private rights to the extent that they prevent a development from being approved.

The ability of the Court to provide remedies for matters which do not fall directly within its jurisdiction, however, is not so clear. In *National Parks and Wildlife Service* v *Stables Perisher Pty Ltd* (1990) 20 NSWLR 573, the Court of Appeal held that this Court does not have pendant jurisdiction to determine questions which form part of the dispute between the parties but which fall outside the court's statutory jurisdiction.

Section 16(1A) was added to the Act in 1993, three years after *Stables Perisher*. It provides that the Court has jurisdiction with respect to any matter which is "ancillary" to a statutory provision already within its jurisdiction. The definition of 'ancillary' was determined in *Nix and Dunn* v *Pittwater Council* (1994) 84 LGERA 199 where it was held to mean 'incidental, accessory or auxiliary'.

I note here that the word 'ancillary' is used in s 16A in place of the word 'associated', which appears in s 32 of the *Federal Court Act* 1976 (Cth). The latter term appears to be broader in its application that 'ancillary'. According to Barwick CJ in *Phillip Morris Inc* v *Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 479, "a matter may be associated with another matter and yet be separate ... therefrom". Associated matters before the Court, that is, do not have to be merely auxiliary or incidental. The more restricted conferral of jurisdiction in s 16A to that in s 32 of the *Federal Court Act* would hence seem to mean, in my view, that the former was not intended to afford the Court a pendant jurisdiction.

2. Judicial Review

The principles governing judicial review of administrative decisions are notoriously misunderstood. This Court is often required to determine actions which challenge the validity of executive decisions on a misconceived basis. The restricted circumstances in which an instrument can be found invalid for *Wednesbury* unreasonableness, for example, was highlighted in the *Rosemount Estates* litigation.

Rosemount Estates Pty Ltd & Ors v *Minister for Urban Affairs and Planning & Anor* (1996) 90 LGERA 1 concerned a challenge to the validity of *State Environment Planning Policy* No 45 ("SEPP 45"), an instrument which permitted mining activities which were otherwise prohibited under the relevant local environment plan. Stein J held that SEPP 45 was manifestly unreasonable because it rendered redundant the planning process at the local government level.

In *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd and Ors* (1996) 91 LGERA 31), however, this ruling was found to be incorrect The Court of Appeal held that Stein J had erred in deciding that SEPP 45 was manifestly reasonable because it ran contrary to good planning policy. The fact that the Court regarded SEPP 45 as having an undesirable effect was beside the point. The only relevant consideration was whether a 'real connection' existed between the SEPP and the purpose for which Parliament had conferred the authority to make it. Here the Minister had recommended the creation of SEPP 45 having regard to the objects of the *EP&A Act*. He clearly had authority to do this and his decision was not one which no reasonable Minister acting rationally could have made. Accordingly, it was not available to Stein J to find SEPP 45 invalid.

The only other matter I want to mention with respect to judicial review is the presence of two important privative clauses in the *EP&A Act*. Section 35 of that Act provides that:

> "... the validity of an environmental planning instrument shall not be questioned in any legal proceedings except those commenced in the court by any person within 3 months of the date of its publication in the Gazette".

Section 104A relates to consents which have been the subject of a public notice by the consent authority in accordance with the regulations. The section provides that challenges to the validity of such consents must be commenced before the expiration of 3 months from the date on which the notice was given. A similar provision can be found in s 675 of *the Local Government Act*.

A different opinion exists within the court as to whether these are truly privative provisions or are limitation provisions. The widest and most liberal approach is that of Stein J (now a member of the Court of Appeal) who has held that s 35 of the EPA Act does not preclude all challenges to the validity of an environmental planning instrument after the expiry of 3 months from publication in the Gazette: such a challenge might yet be made on the ground of bad faith, manifest jurisdictional error, ultra vires, or breach of the rules of natural justice (*Calkovics v The Minister for Local Government and Planning* (1989) 72 LGRA 269, *Yadle Investments Pty Ltd v Roads and Traffic Authority of NSW* (1989) 72 LGRA 409).

An intermediate approach has been adopted by Pearlman J in *Coles Supermarkets Australia Pty Ltd v The Minister for Urban Affairs and Planning & Anor* (1996) 90 LGERA 341. Her Honour held that s 35 should be interpreted in accordance with the principle enunciated by Dixon J in *R v Hickman; ex parte Fox* (1945) 70 CLR 598 (at 615):

> "Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."

The most restrictive approach is that of Bignold J. In *Breitkopf v Wyong Council* (1996) 90 LGERA 269 and in *Vanmeld Pty Ltd v Fairfield Council* (28 June 1996, unreported) his Honour held that s 104A and s 35 respectively amounted to an absolute bar to the bringing of proceedings outside the period of 3 weeks referred to in these sections, even if the challenge is based on the doctrine of *ultra vires* or jurisdictional error. A notice of appeal has been filed against both of the judgments of Bignold J in *Brietkopf* and *Vanmeld*.

Class 5

The criminal jurisdiction of the Court arises from the *Environmental Offences and Penalties Act* 1989 (which I shall call the *EOPA*). This Act provides for three tiers of environmental offences with three different levels of penalties. Tier One offences are serious pollution offences which involve an element of wilfulness or negligence on the part of the offender. They carry a maximum penalty of $250,000 for an individual or $1,000,000 for a corporation and/or a term in jail. If the prosecution of an individual occurs summarily in this Court, he or she is liable for up to two years imprisonment. If the prosecution occurs by indictment in the Supreme Court, however, he or she is liable for a maximum of seven years in jail.

Tier Two offences are offences of strict liability. They are comprised of those offences which before the advent of the *EOPA* were provided for by the *Clean Air Act* 1961, the *Clean Waters Act* 1970, the *Noise Control Act* 1975 and the *Pollution Control Act* 1970. Tier Two offences carry a penalty of up to $125,000 for a corporation and $60,000 for a natural person. Tier Three covers minor offences such as littering and is dealt with by an 'on-the-spot' infringement notice system attracting certain fines.

Under s 10 of the *EOPA*, if a corporation commits an environmental offence, the corporation's directors and managers are also taken to have committed it. This will occur unless they can show that the offence occurred without their knowledge, that they were not in a position to influence the corporation's conduct or that all due diligence was used to prevent the commission of the offence.

In addition to imposing a penalty for Tier One and Tier Two offences, s 14 of the *EOPA* sets out that the Court may order a person convicted of an offence to:

> (1) take steps to prevent, control, abate or mitigate any environmental harm they have caused or to prevent its reoccurrence; and / or
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> (2) compensate a public authority or any other person for expenses incurred in taking such steps in their place; and / or
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> (3) compensate for loss or damage to any property that occurs in the process.

The question of penalties is a vexed one for the Court. As I've just outlined, both Tier One and Tier Two allow for environmental offenders to receive massive penalties. The Court has never imposed penalties, however, that approach anywhere near the maximum. In my view, this is at least in part because the Court of Criminal Appeal frequently reduces sizeable penalties imposed by this Court. In *EPA* v *Axer Pty Ltd* (17 November 1992, unreported), for instance, a company allowed pesticide to discharge into a river. Evidence showed that many fish in the river had died. The company was charged and convicted of a Tier Two offence under s16(1) of the *Clean Waters Act*. Even though this clearly one of the most serious Tier Two offences to come before the Court in that a great deal of actual environmental harm was shown resulting from the act of pollution, the Court of Appeal reduced a penalty of $50,000 which had been imposed in this Court to $20,000.

A practical example of the matters to be considered in fixing penalties for environmental offences can be found in recent case which came before me, *EPA* v *Vicary Corporation Pty Ltd* (21 August 1997, unreported). The case concerned a company whose vehicles had emitted excessive air impurities contrary to s 21 B of the *Clean Air Act*; a Tier Two offence. The defendant company entered a plea of guilty to the offence. The company owned 20 vehicles, all of which were fairly old and most of which were diesel trucks. These trucks had received 24 penalty infringement notices for the emission of pollution in the past. Whilst all of the trucks had passed their RTA inspections every year, these inspections had never been performed when the vehicles were under load. The evidence made it clear that it was precisely when they were under load that pollution problems arose.

I fined the defendant a sum of $18,000, just under 14.5% of the maximum penalty of $125,000. The defendant also had to pay the prosecutor's costs of $5,500. In reaching this amount, I had regard on the one hand to the number of infringement notices and a prior air pollution conviction the defendant had received and the fact that pollution from an unserviced diesel truck can cause up to 100 times the amount of pollution caused by a single car. On the other hand, I had regard to the fact that the defendant had fully cooperated with the prosecutor; that it had pleaded guilty; and that it had replaced all the vehicles in its fleet with new ones, ensuring far less possibility of recurrence of the offence. I was also mindful of the *Axer* decision, as the penalty of $20,000 in that case has unfortunately set a standard within which judges of this court are obliged to operate.

Class 6

I mention Class 6 of the Court's jurisdiction only in passing because to my knowledge it has only once been used. Class 6 is detailed in s 21A of the Act and allows the Court to hear and dispose of appeals brought by persons convicted of an environmental offence by magistrates in the Local Court. That this has never occurred is, in my view, mostly due to a perception that Land and Environment Court judges are unlikely to be more lenient than Local Court magistrates.

Open Standing Provisions

One of the objects of the *EP&A Act* is to encourage public participation in decision-making. Section 123 of the same Act attempts to implement this aim by providing that any person may bring a proceeding for an order to remedy or restrain a breach of the Act

> "... whether or not any right of that person has been or may be infringed by or as a consequence of that breach".

Section 674 of the *Local Government Act* is worded in a similar fashion, and other environmental statutes have analogous provisions (s 147 of the *Threatened Species Conservation Act* 1995, for example).
Section 25 of the *EOPA* provides that any person can bring proceedings to restrain a breach of any Act which has led to environmental harm or the likelihood of such harm. To bring such proceedings you do not have to meet traditional standing requirements, although you do have to obtain the leave of the Court. This leave will be granted so long as the proceedings are not an abuse of process, there is a real or significant likelihood that the requirements for the making of an order under the section will be satisfied and that it is in the public interest that such proceedings be brought.

The kind of provisions just outlined are essential to any concept of participatory decision-making and environmental enforcement. They have not been frequently used, however, as the investment in terms of time and money required by legal proceedings act as a discouragement to most members of the public.

Costs

This mention of the money involved in legal proceedings brings me to a discussion of costs. Section 69(2) of the Act says that the Court has discretion to award costs. This is an unfettered discretion. In the past the Court has used this discretion, for instance, in order to refrain from making costs orders in cases brought in the public interest. In *Oshlack* v *Richmond River Council* (1994) 82 LGERA 236, Stein J made no order for costs because the case was brought by a citizen concerned to protect the interests of a koala colony on land clear-felled in breach of development consent. Mr Oshlack had no pecuniary or personal interest in the proceedings and Stein J accordingly held that he had brought them in the public interest.

In *Richmond River Council* v *Oshlack* (1996) 91 LGERA 91, 39 NSWLR 622 the Court of Appeal reversed Stein J's decision, however, on the basis that costs are to be compensatory only. As a result, the purpose for which proceedings are brought is an irrelevant consideration when exercising the discretionary power afforded the Court by s 69(2). I add here, however, that an appeal from this decision has already been heard in the High Court and we are presently awaiting its outcome with some interest. The ability of persons to make use of open standing provisions in environmental and planning legislation in order to litigate matters in the public interest will indeed be effectively determined at the same time.

In other matters relating to costs, the Court has made practice directions to serve as a guide for the exercise of the discretion under s 69(2). The practice of the Court as detailed in cll 10 and 10A of the *Practice Direction* 1996, for instance, is that no order for costs is made in planning, building, ratings and subdivision appeals in Classes 1 and 2 of the Court's jurisdiction unless exceptional circumstances exist.

Paragraph 10 of the *Practice Directions* makes no mention of preliminary questions of law in Classes 1 and 2. For some time the Court had no settled policy on whether such questions should fall within the terms of the Practice Direction. In *Scott Revay and Unn* v *Warringah Council* (1996) 90 LGERA 78, however, Pearlman J held that preliminary questions of law with respect to Class 1 and 2 matters should indeed be governed by par 10. *Outdoor Australia Pty Ltd* v *Auburn Council* (15 March 1996, unreported) is another of her Honour's judgments to the same effect. Accordingly, the Court will now make no order for costs when determining preliminary questions of law in Class 1 or 2 matters unless exceptional circumstances exist to justify such an order.

One of the most interesting cases concerning costs before me recently arose in *EPA* v *Taylor Woodrow Pty Ltd* (10 September 1997, unreported), in which I was asked to decide whether the services of one of the EPA's in-house solicitors in the conduct of criminal proceedings could be properly understood as "costs". In *EPA* v *Alkem Drums* (1996) 93 LGERA 83, Talbot J had ruled that if the EPA chose to use its own staff to prepare for or conduct proceedings it could not then claim compensation in the form of costs. This was because it could point to no actual costs incurred by reason of the proceedings. I decided not to follow this judgment, however, primarily on the basis that the definition of costs should not be so narrowly construed as to deny a party remuneration merely because the manner in which it pays for legal services is by means of a salary. I also emphasised the flexibility of the Court's power to award costs under s69(2) of the Act. I should add that an appeal has been filed against my decision in *EPA v Taylor Woodrow Pty Ltd*.

Pt 2 r 8

As a final observation I note that Pt 2 r 8 of the Rules is soon to be revoked. This means that as from the commencement of the first term in 1998, judges of this Court will robe. In conformity with courts of equivalent status, counsel will be expected to do likewise. If counsel is robed but does not wear a wig he or she will, however, be recognised. As I have indicated, this will bring the Court into line with courts of equivalent status such as the Supreme, Federal and Family Courts. Assessors of the Court, who are not necessarily lawyers and who perform the functions of an administrative tribunal and not any judicial function, will not robe. Accordingly, counsel will not be expected to robe when appearing before assessors.