Jim McClelland

Tribute by The Honourable Jerrold Cripps QC.

JIM MCCLELLAND died at home on 16 January aged 83. He was the Chief Judge of the Land and Environment Court from 1980 to 1985 after being a judge of the Industrial Commission. The judiciary was his third and penultimate career. After serving in the armed forces in WWII he returned to Australia and was, for many years, an enterprising and successful solicitor. Later he entered politics as a New South Wales Senator and was one of the few successful politicians in the Whitlam Government. After he left the Land and Environment Court he wrote witty and perspicacious articles for the *Sydney Morning Herald*.

At the public ceremony at the Town Hall, which followed a private ceremony at Wentworth Falls, a number of prominent people spoke of his contribution to Australia. The speakers included an ex-trade union leader, a prominent theatrical figure, parliamentarians from both sides of politics, two former Prime Ministers, a member of the Aboriginal community and, as well, his wife Gil Appleton. Every speaker remembered at least one witty epigram. Some have long since passed into the language such as 'the politics of the warm inner glow' which, incidentally, when made, was not intended to refer to people who ineffectually mean well but to people who love humanity but can't stand the humans.

One of his memorable utterances which was not referred to was made in the course of a debate in the House concerning the location of the new Parliament House. At issue was whether it should be located on Camp Hill or higher up on Capital Hill where it now is. Jim said 'in the matter of parliamentary edifices I have always been camp and opposed to presumptuous erections'.

The appointment of Jim as the first Chief Judge of the Land and Environment Court was a stroke of genius. The Court was created to administer a new environmental regime. He was the energetic and forceful figure the Court needed in its early days. From the outset he was wholly unfazed by the legal complexities of modern planning. And for that reason his appointment was viewed with concern by some members of the club. But Jim understood, better than his critics, that planning decisions, within the framework of the legislation, were essentially political decisions and that excessive legalism should be avoided. He made his position clear after his appointment when he said he saw his role as standing between, on the one hand, those who wanted to throw up high rise in Hyde Park and, on the other, those who wanted to turn Pitt Street into a rainforest.

Judicial prose, stripped of adjectives and humour was, as a rule, not for him. He was a brilliant writer and those of us who worked with him were envious of his style. But it was an envy tinged with misgiving. We were never sure what would come next. In a heated dispute about a marina development an energetic resident presented Jim with numerous photographs of minor breaches of the law. She said she had to steel herself to the sticking point when recording these matters because her station in life and previous experience had sheltered her from such things. Jim wrote in his judgment she "was the guiding spirit and founding mother of the local Resident Action Committee. Her sole mission in life was to mount up an environmental posse to flush out dark doings in the neighbourhood. The camera rarely left her 'trembling' hands".

He wrote that a Kings Cross development would not, except perhaps to the mind of the architect who designed it, be mistaken for a creation of Frank Lloyd Wright's but from the point of view of the local residents it would be an improvement on the 'can and condom littered moonscape on which they now gaze'.

One of his judgments resulted in some prominent architects blacklisting the Court. They supported Council's rejection of a development application on the ground that it infringed the 'gateway' concept which, they believed, was essential for CBD planning. Jim had difficulty understanding what they were talking about, but when he did, he said he thought it was a 'concept teetering on the edge of absurdity'.

A Touch of Class, one of Sydney's finer institutions, had been functioning successfully and unobtrusively for many years until the Sydney City Council in a burst of moral enthusiasm decided it should be closed. The issue before Jim was a question of law only, namely, whether the planning laws of the State could be used to close the brothel. Jim said that, on the authority of the High Court, he felt able to determine they could not. I say

'felt able' because his interpretation of the High Court's decision was fairly generous. But it gave him great satisfaction to employ the legal subtleties of planning law in the service of a noble end. Later he gave a speech to the Journalists Club. He referred to the musical 'Chicago' which was written in the 30s and which had a song called 'The Place that Billy Sunday couldn't close'. This was a place, said Jim, not unlike A Touch of Class. He said he hoped that when he was finally called to his maker someone would chisel on his tombstone the words 'A Touch of Class – the place that Jim McClelland wouldn't close'. But, he added:

> credit should be given where credit is due – the continued existence of A Touch of Class is owed not to the legal ingenuity of a humble judge of the Land and Environment Court but to a decision of those bewigged persons who ply their trade on the shores of Lake Burley Griffin.

A year before he was due to retire from the Court he was asked to preside over the Royal Commission into British nuclear testing at Maralinga. For many years Jim believed that the treatment of aboriginals by Europeans was a national disgrace and he welcomed the opportunity to unearth, if that were possible, skulduggery in high places. He told me he was relieved to be once again involved in executive decision making believing, apparently, that up until then he had exercised great restraint in the discharge of his judicial duties. He had a lovely time holding court in the desert, visiting London and jousting with England's brightest legal talent. And who can forget, at the end of the London hearings, the sight of Jim having, to use his words, 'taken the edge off my sobriety' in a BBC television interview fixedly opining that Margaret Thatcher was dressed by the KGB.

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The litigation for which he will be remembered by most serious lawyers was the *Parramatta Park* case. It was, as they now say, a landmark decision. Nowadays, if the facts repeated themselves, there could be no doubt about the outcome. But in those days it was seen as an adventurous decision. This Parramatta City Council was anxious to establish a stadium in Parramatta Park – Australia's second oldest park. Every government department was opposed to it and the prospect of a stadium generated enormous opposition in the nearby locality. Notwithstanding this the Council spent a few minutes debating the matter before it granted development consent subject to almost meaningless conditions. In those days it was generally assumed that unless there was corruption or bad faith a decision of a Council, open to it on the law, was legally impregnable. Jim decided that not only had the Council not taken into account matters of relevance when assessing the development application but that its ultimate decision was unreasonable in the *Wednesbury* sense. By a majority of two to one his decision was upheld on the first ground by the Court of Appeal.

Jim was a staunch defender of judicial independence and the importance of maintaining the integrity of judicial institutions. His outspoken public comments in support of both were at least a decade ahead of others and, unlike many since, were always timely and accurate. When legislation was passed to make legal the decision to establish a stadium at Parramatta Park, Jim wrote that while he did not deny to the Parliament the legal entitlement to change the law it was inappropriate for the Government to invite Parliament to maintain the law but to change the result.

But Jim's most blistering broadside came when the Parliament terminated the legal challenge to a number of decisions affecting land at Botany. In the week before the trial counsel for the Government asked the Court to vacate the hearing date because, it was said, the Government intended introducing legislation into Parliament which would have the effect of making lawful any decisions previously taken by the Government even if they had been unlawful when made. The application for an adjournment was opposed, and refused, on the ground that it could not be assumed that Parliament was merely the cat's paw of the Executive. It was also said that in any event enormous costs had already been incurred and it would be necessary for the Court to determine many of the issues in order to make appropriate cost orders. The following Monday morning legislation making lawful the earlier decisions was presented to the Court. It identified the litigation and provided, in terms, that the Land and Environment Court had no jurisdiction to consider the matter further. To make certain that no aspect of the litigation should ever become public it expressly provided that the Land and Environment Court had no jurisdiction to make any cost orders. This brought Jim out on to the streets once more. He said that the action of the Government and the Parliament had the effect of diminishing public confidence in the Land and Environment Court and of legal institutions generally and that without public confidence courts could not function properly. In later years, some have said that his criticisms were the result of the falling out between him and some members of the Government. That was not so. I never sought the details of his severed relationship with the Premier but I do know it took place a long time after the public statements referred to above.

I have mentioned some colourful aspects of Jim's judicial career. As I have earlier said, it was one of four. In my assessment the common thread in all was his wit and insight and, above all, his great understanding of, and attachment to, his fellow man.