25th anniversary of the Land and Environment Court

On Thursday 1 September 2005, a dinner was held in the Strangers Dining Room, Parliament House, to mark the 25th anniversary of the Land and Environment Court and the Environmental Planning and Assessment Act. The dinner was organised by Justice McClellan who, earlier that day, had completed his short but dynamic tenure as chief judge of the court before taking up his position as chief judge of the Common Law Division of the Supreme Court. Brian Preston SC was sworn in as the new chief judge of the Land and Environment Court on 12 November 2005. A full account of his Honour's swearing in will be contained in the next issue of *Bar News*.

At the dinner, speeches were delivered by the Hon Neville Wran AC QC who had been premier of the state at the time of the court's inception and former chief judge, the Hon Commissioner Cripps, who has held most judicial posts in New South Wales. The commissioner recorded the fact that, in 2000, a Cambridge University study which had focused on planning merit appeals in six European countries, New Zealand and three Australian states concluded that the NSW Land and Environment Court was the model frequently cited by other jurisdictions as the one that should be followed.

Mr Wran observed that the Land and Environment Court Act provided a number of key features:

> Firstly, it established a specialist court to deal with questions of law and merit, consisting of both judges and expert commissioners. As a specialist court it enabled the development of a specialised environmental jurisprudence. … Without the benefit of a separate court to develop environmental law I doubt whether the significant advances in environmental jurisprudence, which have occurred in the last quarter of a century, would have ever occurred in New South Wales.
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> Secondly, the court involved a novel amalgam of a traditional court with an administrative review tribunal providing a blend of legal and technical skills to provide a single point of appeal dealing with issues of law and merit. It provided a framework for developing user friendly, accessible and timely determination of appeals and environmental disputes.
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> Thirdly, when combined with the abolition of requirements for *locus standi* in the enforcement of breaches of environmental law under section 123 of the Environmental Planning and Assessment Act, it enabled citizen and community groups to take an active role in the enforcement of environmental law, irrespective of any private interests affected. The decision to permit open standing taken in the Environmental Planning and Assessment Act in 1979 reflected the important contribution of citizen enforcement of environmental laws in the United States particularly under the *National Environmental Policy Act 1970*, where liberal approaches to standing requirements by United States courts provided the real teeth in enforcing the need for environmental impact statements.

L to R: Austin QC, Judy Jacovides, the Hon N K Wran AC QC

> Fourthly, the Land and Environment Court provided an opportunity for objector appeals against the merits of planning decisions. The provisions in section 98 of the Environmental Planning and Assessment Act provided a right for objectors to appeal against the merit decisions of development applications for designated development, providing the first broad provisions for third party merit appeals in New South Wales, other than the narrow rights of appeal in relation to residential flat buildings formerly existing under section 342ZA of the *Local Government Act 1919*. I think it's fair to observe that in the 25 years since the commencement of operations of the court, the provisions for open standing and third party merit appeals have neither opened the flood gates to litigation nor have they resulted in any adverse effects upon the administration of the planning and development system.
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> Fifthly, the court was designed to provide a credible forum of appeal for applicants dissatisfied by the determination of local councils on development applications. Regrettably local government is not always the haven of rational decision making and the applicants and community need to have confidence there exists an informed, rational, considered but expeditious method of appeal on the merits of council decisions on development applications. That credibility did not exist in the former appeal system. Such credibility cannot be created by statute, but can only be earned through confidence of all stakeholders in the dispute resolution system.

Mr Wran concluded by observing that 'If environmental law descends into technicalities, timidity and narrow mindedness it will put at risk the achievements of the last 25 years. That is the challenge for the court and practitioners for the next 25 years.'

Commissioner Cripps delivered a reflective and entertaining romp through the court's quarter century in his own inimitable style. Parts of his speech are extracted below:

L to R: the Hon Mahla L Pearlman AO, the Hon Justice Wilcox , the Hon Justice Cowdroy OAM

Although the court was given a wide ranging jurisdiction (for example the function to hear and determine compensation and valuation cases and, as well, to enforce legislation creating environmental crimes) its principal function concerned the administration of the Environmental Planning and Assessment Act. There was nothing new about providing for merit planning appeals from local government decisions on development and building applications. But, has been pointed out by others, the Planning Act changed the nature and scope of planning itself by integrating environmental and conservation objectives with development objectives and providing for extensive public participation in the system.

Of singular significance, so far as the court was concerned, was the inclusion in the planning legislation of Part V. Part V was modelled on the provisions of the *National Environmental Policy Act 1969* and Regulations passed by the United States Congress. It required government instrumentalities to prepare and exhibit formal environmental impact statements and have regard to public submissions before undertaking projects that were likely to significantly effect the environment. Most of the wording of Part V came directly from NEPA.

In my opinion it was a pity that the courts when interpreting and applying Part V did not follow the American judicial system. The remedies provided by the American courts when a breach was established did not include declarations of invalidity and voidness. Rather they moulded an appropriate remedy. Once a breach of legislation is established the court necessarily has a wide discretion as to what orders it makes. But it was not I think, until the mid eighties and after the decision of *Hannon* in Court of Appeal that the significance of the legislation was fully realised. Regrettably the invitation extended by the court and in particular the observations of the chief justice, Sir Lawrence Street, and Justice McHugh were not I think fully taken up. I can afford to make this criticism because *Hannon* and post-*Hannon* occurred during my tenure as chief judge. ….

NEPA legislation was aspirational. It mandated, amongst other things, that government authorities 'examine and take into account to the fullest extent possible all matters effecting or likely to effect the environment by reason of the proposed activity.' The American view appeared to be that although we may not be able to reach the stars we profit from being aware of their existence.

Moreover the local legislation provided, section 123, that any person could bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the Act. Until the 1970s and probably as a hangover from the World War II, it was generally the judicial view that decisions of government departments and local councils should be accorded a respect that sometimes bordered on the subservient. The court would not intervene unless the person asking for intervention had a special interest or unless the attorney-general granted his or her fiat - and even then courts were slow to supervise or interrupt government activities.

The common laws rules concerning standing to challenge government decisions were restrictive. A few months before the legislation commenced the High Court had determined that the Australian Conservation Foundation had no standing to maintain an action challenging the legal correctness of a Commonwealth decision to approve a tourist resort development in an environmentally sensitive area in Queensland.

Although there were the beginnings of some form of public participation at the local level, the general view of government departments was that the views of members of the public were not welcome. In the early days of the court there were many challenges by way of judicial review to decisions made by government instrumentalities. There were cases against the forestry commission with respect to logging, against Elcom with respect to the construction of power lines, against the water resources commission with respect to the building of dams to name but a few. The challenges were by people who, under the common law, may not have had the standing to commence proceedings. Interestingly enough the department charged with the function of administering the planning legislation would not take proceedings against other government departments even though their breaches could only be described as egregious.

Although most judicial review work was directed to process and not to merit that was not the perception of members of the public including politicians and journalists who should have known better. Partly because the legislation was new and partly because of the misconceptions I have previously referred to in the early days the court's decisions attracted front page news and frequently editorial comment. A decision to halt logging because there had been no adequate EIS prepared and published did not mean that the court had

pronounced upon the merits of logging or not logging a given area. The decision merely meant that mandated process had not been observed. I remember one occasion when logging was halted because no EIS had been prepared when plainly it should have been. A politician was reported on the radio as saying that the Land and Environment Court had thrown 3000 people out of work because it was opposed to logging. ….

The planning legislation and the enforcement of it by members of the public took many government departments by surprise. Many believed that if forced to comply they could no longer function. The court was not popular with barristers because it was not part of the Supreme Court and, in those days, it was to some extent distrusted by some members of the Supreme Court because a significant part of the Supreme Court's jurisdiction had been removed and given exclusively to the Land and Environment Court. Many lawyers including judges had some difficulty in comprehending how a legal system could work if it permitted any person to take proceedings against decisions made by government and local government unless that person had a special interest over and above any other member of the public or unless the attorney-general granted a fiat.

The disbelief of what was intended by the legislation was illustrated by a number of early submissions put to the court. For example, it was submitted that the words 'any person' in s123 could not possibly mean what those two words plainly meant. It was submitted by an eminent barrister who later became a judge and whose identity I will not reveal – not so long at all events as he remains chief judge in Equity, that the words 'must be read down to mean any person with a recognisable special interest.' Where it otherwise it was submitted the court might be flooded with litigation commenced by a deranged Norwegian sailor jumping ship in New South Wales and rampaging through the state seeking to strike down environmental decisions of every kind. I have often wondered why Norwegian sailors were singled out for this discriminatory submission but I suppose it was because in those pre-equal opportunity and multi-cultural days their supposed activities could be seen as more plausible than that, for example, of Nigerian midwives.

The Hon Justice Cowdroy OAM and Angela Pearman

Environmental groups for their part seized on the aspirational language of the legislation and claimed that because the language mandated assessment 'to the fullest extent possible' an environmental impact statement was deficient because, for example, it failed to address the consequences of a proposal to a small colony of mosquitoes. There were heady proposals to incorporate trees and for the law to recognise that 'rocks had rights'.

Eventually, of course, things settled down and government departments and local councils accepted the new legislation and the role of the court.

In my opinion the survival of the court's jurisdiction owed a great deal to the extra judicial activities of its first chief judge, Jim McClelland. Jim was the chief judge for the first five years. His appointment like almost every other aspect of his public life was surrounded in controversy. First, he was opposed by the bar because he had not been a barrister. Second, he had been a controversial political figure in the Whitlam government. In 1980 at the time of his appointment the words November 11th and maintain the rage were apt to raise in the bosoms of some, rather deepish emotions. But whatever expectations some may have had concerning Jim's appointment both the government and the profession were in for a surprise. While Jim would be the last person to have claimed to be the spiritual heir of St Thomas A'Beckett it cannot be denied that his acceptance of the office triggered within him a determination not to allow the law and the court to be sidelined or undervalued.

The contribution he made to the court's continued existence cannot it think, be overestimated. The brush he took to deal with problems with government may have sometimes have been a great deal broader than that which would have been taken by a more conservative lawyer such as myself but one must say that meticulous attention to the law was never one of Jim's weaknesses. Jim brought to the court a healthy robustness which he expressed in one of his first speeches when he said, as many of you here now know, that he saw the role of the court to stand somewhere between people who wanted to throw up high rise in Hyde Park on the one hand and those who wanted to turn Pitt Street into a rainforest on the other.

He tended to write his judgements in the same racy way he wrote articles in his fourth professional life as a journalist. In the course of allowing a development in Kings Cross and dismissing local opposition to its architectural style he wrote 'it is true that few people will think this building was

The Hon Justice P D McClellan and the Hon Mahla L Pearlman AO

designed by Frank Lloyd Wright. But to the residents it will be an improvement on the can and condom littered moonscape upon which they presently gaze'. In another judgement he described a well-known environmental activist as the 'Founding mother and guiding spirit of the resident action group whose function it was to act as some sort of environmental posse to flush out dark doings in the neighbourhood'. ….

There were two actions of government in the early days that brought steam to Jim's nostrils. The first was the government passing legislation to avoid the consequences of a decision of the Land and Environment Court and the Court of Appeal that there had been inadequate environmental assessment of a stadium proposed to be erected at Parramatta in Australia's second oldest park.

The second was the termination of litigation that was being heard before me concerning the Pagewood site. The day before that case was due to commence lawyers retained by the government asked me to adjourn the proceedings because the government proposed to introduce legislation into the parliament removing the dispute from the Land and Environment Court. I declined to do so on the ground that I took orders from parliament but not from government. The next day when the litigation was to commence Mr McHugh QC for the government passed me an Act of parliament which had been rushed through both Houses and made legal that which was claimed to be illegal.

Rather sulkily I then said I would still have to determine who should bear the costs and that in turn might mean I had to decide who would have won had the government not legislated. Mr McHugh said no more than would I mind turning over the page of the Act he had handed up which I did and found that the court's jurisdiction to award costs had also been removed. I was not prepared to more closely examine the legislation fearing that if I did I might find I had been removed from office or even perhaps sentenced to death.

Jim McClelland responded magnificently to the challenge and delivered a series of much-publicised broadcasts about the government undermining the authority of the court and the effect that had on the perceived independence of the judiciary. There were people who criticised Jim for the political approach he took but what I say is thank god he did because without it I doubt whether the legislation (and hence the court) would have survived its infancy notwithstanding the wholehearted support it had from Premier Wran and Mr Landa. …

I have spent a little time on Jim's period as chief judge. I have done so for two reasons. First, because I do not think his contribution to the court can be overestimated. Secondly, in recent times, and long after his death, his reputation has been attacked and allegations have been made which I believe to incorrect. It would seem to me therefore that, on an occasion such as this, full recognition should be given to him for the part he played in the advancement of environmental law.

Apart from myself, the other early judge of the court was Ted Perignon. Ted's appointment was not the subject of any controversy. He bought to the court an immense amount of learning and experience acquired over many years at the Bar and his acceptance of office considerably added to the status of the court. …

At the time I left the court there had been four other judges Neil Bignold, Joe Bannon, Noel Hemmings and Paul Stein. Neil is the only one of the original court left standing. He was originally the senior assessor and he is now the senior puisne judge. Environmental law has been Neil's life. He and John Whitehouse were the founding fathers of the legislative package passed by the parliament in 1979. Neil represents the corporate memory of the court. His knowledge of case

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law is encyclopaedic. If I asked him if he knew any cases on a particular subject matter, he would say 'I think you will find this matter dealt with in some detail at page 11 of 118 *Commonwealth Law Reports* starting on the third paragraphs of that page'. He was always right. Neil told me he does not propose to continue remaining on the court until reaching retirement age and it is highly probable that he will have retired no later than 2050.

Noel Hemmings bought to the court a vast amount of knowledge of planning and compensation law. However he finally succumbed to those 'headhunters' who lured him away from court to the big end of town where he remains to this day wallowing, as he himself puts it, in his millions.

Paul Stein doggedly tracked my footsteps at least for a certain distance. He was a District Court judge, became a judge of the Land and Environment Court and was later appointed to the Court of Appeal. Paul told me that if there was one aspect of his character that he thanked god for it was his humility. As evidence of this he told me, in the strictest confidence, that he had never yet resolved the conundrum that faced him, which was, did God make him brilliant so he could doggedly follow in Jerrold Cripps' footsteps or did God make him follow in Jerold Cripps' footsteps because he was brilliant.

Joe Bannon, after a successful barristerial career, came to the court to replace Noel Hemmings. He was on the court for a few months before I left. There are some who say Joe was probably the only true radical on the court and probably owed his appointment to the perceived need for someone to counteract the dangerously reactionary views of Paul Stein.

There are now no commissioners who were the original assessors when the court was created. When I left the court in 1993 five of the original assessors were there. They were; Trefor Davies, Bryce O'Neile, Ken Riding and Joe Domicelji. There are three there now who were there when I left the court. They are; Tony Nott, Stafford Watts and Trevor Bly.

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After I left Mahla Pearlman became the chief judge. Mahla had been a singularly successful and eminent solicitor and had the distinction of being the first woman chief judge in NSW. She led a Court of Justices Bignold, Talbot, Lloyd, Cowdroy, Sheahan and Pain and Commissioners Roseth, Nott, Watts, Bly, Hoffman, Hussey, Brown, Tuor, Murell and Moore – each of whom has advanced the learning and erudition of the court. …

When the court was first created, it was suggested by some that it should become part of the Supreme Court. When I was a member of the court and its chief judge, I was unashamedly a supporter of the separate existence of the Land and Environment Court. After I had left and had the opportunity to view the matter more objectively I was more committed to the view that the court should remain a separate court and not become part of the NSW Supreme Court.

A leading proponent of amalgamation throughout my period on the court was, as many here would know, Peter McClellan its present, until this time tomorrow, chief judge. It was Peter's view, sincerely advanced but I am sure he would now concede to be erroneous viz, that unless the court was part of the Supreme Court it might not attract people of the appropriate calibre. It is, of course possible, that Peter prior to his appointment as chief judge had an absurdly modest assessment of his own legal calibre but if he had it was a view uniquely held by him.