

The Hon Brian Preston

Chief Judge, Land and Environment Court



Brian Preston SC was the dominant silk in the land and environment jurisdiction since his elevation to silk in October 1999. Prior to that, he was the leading junior in the jurisdiction. His appointment as chief judge of the court had an inevitability about it of the best kind – the natural progression of a leader of the Bar in his field to be the leader of a court whose work is of immense importance to this

state. At his swearing in ceremony on 14 October 2005, the Hon Bob Debus MP, Attorney General of NSW, said:

It is my great pleasure to congratulate you on your appointment as chief judge of the Land and Environment Court of New South Wales.

You have distinguished yourself in your practise of the law in this state. I am confident that you will continue to serve the legal community and the people of New South Wales as an outstanding chief judge. Your Honour's appointment comes at a particularly important time in the relatively brief history of this court. Under the leadership of your predecessor, his Honour Justice McClellan, the Land and Environment Court has undergone significant reform.

We have now reached the stage where I provide an attorney general's version of 'This is your life'. This variant of that outstanding piece of commercial television is mercifully free of obscure friends you wished never to lay eyes on again rushing on stage seeking a warm embrace. That is the kind of thing I hope to incorporate in next year's swearing in ceremonies. But I digress.

You graduated from law with first class honours from Macquarie University in 1981. Following your admission as a solicitor in 1982, you began your career in legal practise with Stephen Jaques & Stephen, in the firm's resources group. You then became associate to Mr Justice O'Leary of the Supreme Court of the Northern Territory.

Following this, you were the inaugural principal solicitor at Australia's first specialist environmental legal centre, the Environmental Defender's Office. After establishing that office, you returned to private practice as a senior litigation solicitor. In 1987, you moved to the NSW Bar, and you were appointed senior counsel in 1999. Although you developed a large practice in planning and environment law, your time at the Bar also saw you engaged in the areas of administrative law, commercial law, equity, and building & construction.

You have contributed significantly to the development of the jurisprudence of planning and environmental law in NSW. Some of the important cases in which you have acted include:

- *Bankinvest v Seabrook*
- *Legal and General Life v North Sydney Council*
- *Jarasius v Forestry Commission of NSW*

You have also been a significant commentator on environmental law. You have published a text-book and authored numerous conference papers and articles on environmental law, a number of which have been published in journals such as the *Environmental and Planning Law Journal*, the *Australian Law Journal* and *Business LawAsia*.

Your travels as a student, teacher and advocate of the law have been extensive and benefited many. A small sample warrant mentioning:

- You established a course in biodiversity law at the University of Sydney in 1992, before undertaking a lecture tour on environmental dispute resolution in Buenos Aires in 1995.
- You were a member of a consultancy team to the World Bank in 1995 and 1996 that was briefed to draft National Parks and Wildlife conservation legislation for Trinidad and Tobago; and
- From 1999 until 2004 you were a member of the teaching faculty for the Indonesian Environmental Law and Enforcement Training Programme for the Indonesian judiciary.
- In 2003 you convened a tour to World Heritage sites in north-eastern New South Wales (particularly, the Central Eastern Rainforest Reserves), and Fraser Island.
- You have just returned from another study tour of World Heritage sites in Ecuador, Peru, Bolivia, Chile and Argentina, where you visited wetlands protected under the RAMSAR Convention on Wetlands and UNESCO Biosphere Reserves.

Given all of your outstanding achievements so far, I am sure that you will fulfil the duties of chief judge admirably. I congratulate you again on your appointment.

In replying to the attorney, Chief Judge Preston made an important statement as to the role of the court in society. Part of his remarks are set out below.

The court is a special part of the judicial system of New South Wales. Its unique jurisdiction and structure and its performance have earned it plaudits in this state, within Australia and internationally. It has been the reference point and model for judicial institutions elsewhere in Australia and overseas.

The work of the court has been and will continue to be of importance to present and future generations in a number of ways.

First, the court was established with, as one of its aims, the development of environmental jurisprudence. Over the past 25 years, the court has, in certain areas, performed that task. But the task is not- and perhaps never can be- complete. The development of environmental jurisprudence is of importance because it affects the environment and the society in which we live.

The famous architect, Frank Lloyd Wright pithily observed that 'You will find the environment reflecting unerringly the society'.

We are not placed into our environment: we and our environment grow together into an interlinked whole. A careful look around us will tell us who we are. The landscape of our cities and countryside tells us from where we have come and how far we have to go.

Edward Schumacher noted that in the simple question of how we treat the land our entire way of life is involved. Schumacher was an economist. His famous book *Small is Beautiful* was subtitled 'a study of economics as if people mattered'. He saw economics as a way of sustaining, restoring and maintaining the immense diversity and complexity of the biosphere in addition to nourishing, nurturing and fulfilling appropriate human needs. In short, economics is to serve people and planet. For Schumacher, care for the land and for the soil was fundamental to caring for the whole natural world, as well as a way of creating a just and equitable society.

Secondly, the court can play a role in developing mechanisms for foreseeing and forestalling environmental degradation and for the adaptive management of the environment.

Rachel Carson dedicated her classic book, *Silent Spring*, to Albert Schweitzer, the Nobel Prize laureate and doctor. She quoted Schweitzer's pessimistic statement 'man has lost the capacity to foresee and forestall. He will end by destroying the earth'. Of course, Carson's book itself was an attempt to warn society about and to forestall the adverse effects of pesticides on the environment.

Here too we can see a role for the court in foreseeing and forestalling environmental degradation.

Garrett Hardin spoke of the tragedy of the commons. The commons is any ecosystem, lake, estuary, grassland or even ocean or atmosphere. Hardin argued that a commons subject to communal and unregulated use is at risk of tragic ecological collapse because of self-interested human behaviour. Hardin's view assumes the operation of self interest only; that there are no community feedback mechanisms for assessing the condition of the commons and acting upon those assessments.

But the court can itself be a mechanism and can articulate other mechanisms for undertaking that assessment and giving the requisite feedback to stakeholders with the capacity to act and avoid ecological collapse.

Thirdly, the court has a role in shaping concepts of justice. In particular, it can develop a concept of environmental justice.

The protection of the marginalised, the poor and the disenfranchised in society is a feature of the law. In an environment context, these sectors of society suffer disproportionately from environmental pollution and other environmental degradations. Addressing these issues delivers justice to these sectors.

The court can explore the concept of poverty in the environmental context. Poverty is not just an economic condition; it is an environmental one. It is a state of defencelessness against the forces of assault and expropriation. The court has a role here too.

Fourthly, in developing environmental jurisprudence and in delivering environmental justice, the court can also play a more far-reaching role in developing key concepts in the law. The court's contribution is not then limited to a segregated area of the law; it develops the law itself.

We have seen examples in other courts of how the resolution of environmental disputes has influenced the wider development of the law. In constitutional law, well-known cases such as *Murphyores* concerning the export of mineral sands from Fraser Island, and the *Tasmanian Dams* case have established precedents on the nature and scope of the Commonwealth's constitutional powers. In administrative law, numerous cases including *Peko Wallsend*, *Mt Isa Mines*, *Timbarra* and *Enfield Corporation* have established principles of judicial review of administrative action.

Fifthly, a pressing challenge facing the court now is to engage with and to explicate emerging international concepts and principles. In matters concerning the environment, the slogan 'Think globally, act locally' is apt. There is an obvious interdependence between local and global processes.

The best illustration of an international concept that has taken root locally is that of 'ecologically sustainable development' (ESD). The ESD principles are hortatory but lack precision. The challenge is to articulate mechanisms for translating these laudable principles into specific actions. The court has a role to play in this task. The court has begun the task in a few cases but more work still needs to be done.

In doing so, the court can instil a sense of realism and strike a balance between extremes. The court needs to propose workable solutions. As Australian philosopher John Passmore has noted in his book *Man's Responsibility for Nature*, workable solutions must steer between primitivism and despotism: between wholesale rejection of a concern for economic progress and material welfare and the unconstrained, short-sighted pursuit of such goals. Such solutions require the application of scientifically and technologically informed cost-benefit analysis of our present practices and the alternatives to them, together with a judgement on the political viability and moral acceptability of these alternatives.

In performing the tasks I have outlined, the court can be assisted by thoughtful academic study and discourse. I would encourage the universities to foster the study of environmental jurisprudence as a subject at university.

I come to a court in good shape. The court and the people of New South Wales have been fortunate to have had the benefit of hard working and able judges. My predecessors in the office of chief judge, Justices McClelland, Cripps, Pearlman and McClellan have each made their own valuable contribution. So too have the other judges and commissioners and court staff. I am fortunate to be able to benefit from their legacy.