A MODEL OF JUDICIAL SUSTAINABLE DEVELOPMENT: THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES AT 40

Opening Address to the Land and Environment Court Anniversary Conference

29 August 2022

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Chief Justice of New South Wales

Introduction

1 I begin by acknowledging the traditional custodians of the land on which we meet today, the Gadigal of the Eora Nation, and pay my respects to their Elders past and present.

2 I also offer my full support for the Uluru Statement from the Heart, as I did at my swearing in ceremony as Chief Justice in March of this year. It is a profound and dignified statement which all lawyers should champion and support.

3 It is a great pleasure to have been invited to deliver this morning's opening address in what is a deferred celebration of a significant milestone, achieved in 2020 but delayed by the pandemic, namely the Land and Environment Court's first 40 years as a specialist court. As we know, it is a Court which has been both a pioneer and leader in its field, nationally and internationally.

4 In the State of New South Wales, at all levels of the judicial hierarchy, judges and courts seem constantly to be busy, moving inexorably from one case to the next. The volume of cases that pass through our courts and tribunals is quite remarkable. As one matter is resolved, another crops up. Registrars and listing judges are constantly looking for time in the busy judicial diary to slot in an urgent matter or to bring forward a case which is ready for trial.

5 Some have likened this to "drinking from a firehose"; others have likened it to the Japanese arcade game "whack-a-mole", such that as soon as one case is

* The assistance in the preparation of this paper of Christian Andreotti, Researcher to the Chief Justice, is warmly acknowledged.

disposed of, the next one immediately presents itself. For even the most efficient judges, being up to date is a state that rarely lasts for long. It is a moment of temporary, fleeting and evanescent satisfaction and, as we all know, some judicial officers fare better than others with this often relentless press of work.

6 Now these opening observations are not a prelude to a lecture on judicial well-being or a plea for greater government and public appreciation of the invaluable but unrelenting work of judging — as important as those matters undoubtedly are. Rather, they are to observe that the nature and pace of a court's day-to-day life often precludes or at least restricts the opportunity for reflection and assaying the larger picture.

7 Anniversaries, by way of contrast, are a time not just for celebration but also and importantly offer a chance for reflection on what has been achieved over a particular period, as well as for contemplation of the future in light of past achievement. Significant institutional anniversaries also allow time for reflection on the nature of the particular institution and changes in its role over time. Time for such a reflection also allows one to place the particular institution in a larger social framework which is itself a valuable exercise.

8 There have been two significant legal anniversaries already celebrated in New South Wales this year. First, the law firm Allens recently celebrated its 200th anniversary, marking it as not only the oldest continuously operating law firm in the country, but one of the oldest in the world. Only last month, the Industrial Relations Commission of New South Wales celebrated 120 years of a system of industrial conciliation and arbitration in Australia. And in less than two years, the Supreme Court of New South Wales will celebrate its bicentenary.

9 But the focus of today's conference and tonight's dinner, as I have said, is to celebrate 40 years of the Land and Environment Court in this State, albeit that the Court is now in its 43rd year. In that period, its remit has grown and its work

has become increasingly important and diverse.[1] This is for a variety of reasons and not least because of the rapid changes in our environment and climate and the less rapid appreciation by some politicians and vast swathes of the public of the significance of that change.

10 As the current Chief Judge says in his opening essay in the excellent edited collection which will be launched later today, a court's history can be considered narrowly in terms of legal doctrine and the work disposed of or, alternatively, can be viewed more broadly and may provide a lens through which to track more profound changes, including in the context of the Land and Environment Court, in relation to attitudes towards urban growth, the pace and nature of development, community engagement and attitudes towards the environment more generally.

11 This Conference, with its array of speakers, including many international and interstate speakers who I welcome to New South Wales, will highlight these broader contextual matters and the Court's role in shaping and safeguarding our environment, in every sense of the word.

12 The birth of the institution was not smooth sailing nor was it without its critics and detractors. Roddy Meagher could not resist the temptation to accord the new Court the early sobriquet as the *Parks and Gardens Court*, taunting his friend Jerrold Cripps with the title of "Chief Viewer".

13 As some of you will know, Meagher was a classicist, although, in making his mischievous observation, he failed to direct his memory to Lysias, one of the ten Attic Orators, and his indictment around 396 BC for allegedly clearing an olive stump from his property in Athens. From the introduction to Lysias' defence it becomes clear that the facts of the case would not be out of place

[1] My own relatively limited appearances in the Land and Environment Court as counsel reflected the diversity of its jurisdiction: *Filipowski v Frey* [2005] NSWLEC 166; *Australian Gas Light Company v Mine Subsidence Board* [2006] NSWLEC 494; *Marina Bay Developments Pty Ltd v Pittwater Council* [2007] NSWLEC 41; *Residents Against Intermodal Development Moorebank Inc v Minister for Planning* [2017] NSWLEC 115; *Local Democracy Matters Inc v Minister for Local Government* [2018] NSWLEC 9.

before the Land and Environment Court, in its criminal jurisdiction, as Lysias states that:[2]

> " … I thought it possible for a person who so desired to avoid both law-suits and anxieties by leading a quiet life; but now I find myself so unexpectedly embarrassed with accusations and with nefarious slanderers … this trial has been made especially perplexing for me, because at first I was indicted for clearing away an *olive tree* from my land, and they went and made an inquiry of the men who had brought the produce of the State olives; but having failed by this method to find that I have done anything wrong, *they now say it is an olive-stump that I cleared away*, judging that for me this is a most difficult accusation to refute, while to them it allows more freedom to make any statement that they please. So I am obliged, on a charge which this man has carefully planned against me before coming here, and which I have only heard at the same moment as you who are to decide on the case, to defend myself against the loss of my native land and my possessions."

14 Plus ça change …

An uncoordinated miscellany

15 Prior to the creation of the Land and Environment Court, jurisdiction to deal with what is now its broad remit was dispersed between various courts and tribunals, most notably the Land and Valuation Court and the Local Government Appeals Tribunal.

16 The mechanisms available for the resolution of disputes concerning what may broadly be referred to as "land and environment" subject matters, prior to the commencement of the Land and Environment Court, was described as an "uncoordinated miscellany".[3] The relevant "jurisdictional arrangements" were said to promote inconsistency and incoherence by virtue of their significant variability in respect of:[4]

> "Content of jurisdiction, as covering a narrow or wide band of land-use matters;

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[2] Lysias, *Defence in the Matter of an Olive Stump* in Lysias, *The Speeches of Lysias*, translated by W R H Lamb (Loeb Classical Library, 1930).

[3] J R McClelland, "Address to Engineering Conference" (speech delivered at the Engineering Conference: Changing Society, a Challenge for Engineering, 24 January 1982) at 7.

[4] P Ryan, "Court of Hope and False Expectations: Land and Environment Court 21 Years On" (2002) 14 *Journal of Environmental Law* 301 at 305.

Nature of jurisdiction, as encompassing merit appeals, enforcement or judicial review;

Tribunal composition, as judicial or non-judicial; and

Level and/or location of jurisdiction, within or external to the regular court system."

The Land and Valuation Court

17 The Land and Valuation Court was established in 1921 as successor to the Land Appeal Court of New South Wales. The Court was "constituted by a judge having the same rank, title, status and precedence, and the same salary and rights as judges of the Supreme Court". Jurisdiction was conferred on the Court to hear objections to and appeals against valuations of land, the levying of rates or charges, compensation for acquisition, zoning or development and applications to build on or subdivide land.[5] A right of appeal from a decision of the Land and Valuation Court lay by way of a case stated for the Full Court of the Supreme Court or, eventually, the Court of Appeal.

18 As at the time of its abolition upon the commencement of the Land and Environment Court, the judge of the Land and Valuation Court was Sir Laurence Street, who held this appointment concurrently with that of Chief Justice and had replaced Justice Else-Mitchell following his retirement in October 1974. Interestingly, Sir Laurence had expressed the view that the judicial (cf, administrative) functions of specialist tribunals, such as the Land and Environment Court, were more properly the province of a "traditional" court such as the Supreme Court.[6]

19 A similar view had been expressed in 1975 by the New South Wales Law Reform Commission, comprising Justice Leycester Meares and then-Judge Ray Loveday QC, in a Report on the proposed abolition and replacement of the

[5] New South Wales Law Reform Commission, *Land and Valuation Court*, Report No 23 (1975) at [3.5]–[3.6].
[6] L Street, "Proliferation and Fragmentation of the Australian Court System" (1978) 52 *Australian Law Journal* 594.

Land and Valuation Court. Part 6 of that Report was titled "the need for a special court" and provided that:[7]

> "Advantages of having a special court to deal with land and valuation matters have been said to be
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> (a) greater consistency of decisions; and
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> (b) greater efficiency by reason of a developed expertise of the judge of the court in the complexities of land laws and principles of valuation.
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> The main disadvantage of a special court appears to us to be lack of flexibility in its ability to handle its workload. Insufficient work for the court means that an expensive public utility is not being fully used. Too much work may cause serious hardship to litigants through delays. A single court, for example, can only hear one urgent case at the one time. The great fluctuations in the volume of business of the court over the years demonstrates the seriousness of this criticism."

20 I have not heard the judges of the Land and Environment Court complaining of insufficiency of work for some time.

21 Interestingly, the observation about an insufficient workload was made in reliance upon the fact that "[d]uring the year 1973 and until his retirement on 1st October, 1974, Else-Mitchell J was the sole judge of the Court and … delivered forty-two judgments relating to thirty-six matters in the Court".[8] It would be interesting to study the comparative complexity of those matters. What could confidently be said without too much study is that the statute books have grown enormously in their complexity over the past 50 years.

22 In the pursuit of the dual objectives of "rationalisation and specialisation", the Law Reform Commissioners did not recommend the adoption of a specialist court to replace the Land and Valuation Court. Rather, in their view:[9]

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[7] New South Wales Law Reform Commission, *Land and Valuation Court*, Report No 23 (1975) at [6.1]–[6.2].
[8] New South Wales Law Reform Commission, *Land and Valuation Court*, Report No 23 (1975) at [4.1].
[9] New South Wales Law Reform Commission, *Land and Valuation Court*, Report No 23 (1975) at [7.1]–[7.2].

> "the advantages of consistency of decisions and expertise of the judge of the Land and Valuation Court may be retained otherwise than by the retention of a separate court. If the Supreme Court were invested with the jurisdiction and the work assigned to a Division, a judge of that Division would ordinarily deal with the work and would be available for other work when there was insufficient land and valuation business. On the other hand if there were more urgent land or valuation work than he could manage he would be able to call on other judges for assistance. In our view this would result in better use of judicial time and also of court staff.
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> Accordingly, we recommend the abolition of the Land and Valuation Court and the transfer of jurisdiction exercised by that Court to the Supreme Court".

The Local Government Appeals Tribunal

23 Where the Land and Valuation Court was seen as an important judicial institution, worthy of its status as a superior court of record and befitting of eminent jurists such as Sir Laurence Street, Thomas Waddell and Rae Else-Mitchell, the abolition of the Local Government Appeals Tribunal was very much seen to have been in the public or community interest, as borne out by the debate in the Legislative Assembly.[10]

24 The Tribunal was introduced in 1972 to resolve appeals against planning (including zoning) and development (including subdivision) determinations by councils across the State, jurisdiction which was previously exercised by the Land and Valuation Court. The creation of the Tribunal was said to have "represented a triumph for the development industry institutes",[11] who lobbied for the investiture of comprehensive jurisdiction in a non-judicial tribunal in view of the perceived delay and expense of courts conducting merits review.[12] For the Local Government Association and the Coalition of Resident Action Groups (which itself represented 45 metropolitan residents' associations), the

[10] See [40 *] above.
[11] P Ryan, "Court of Hope and False Expectations: Land and Environment Court 21 Years On" (2002) 14 *Journal of Environmental Law* 301 at 305.
[12] G Clarke, "Administrative Discretion, Officials, Experts and the Public" in R Else-Mitchell, *Land Laws Service* (Lawbook Co, 1969) at 499–507.

establishment of the Tribunal was decried as "making it easier for developers to get around local council decisions".[13]

25 The Tribunal proved to be highly dysfunctional in operation, as described by Professor Patricia Ryan in an article published for the 21st anniversary of the Land and Environment Court. Professor Ryan summarised that:

> "The Local Government Appeals Tribunal was constituted by boards of experts and it could hear objections against 'minimum requirements' for both building and development. From 1975, a board of one sufficed and an appeal could be determined ignoring any further consultation or approval obligations imposed on councils. Jurisdiction over the tribunal was limited to appeals to the Supreme Court on a question of law, raised and notified during the hearing and brought by 'parties', thereby ruling out objectors who had been granted leave to appear before the tribunal but who were technically not parties. *Inadequate due process safeguards concerning self-interest of tribunal members also affected public confidence in the Tribunal. Although at one time it had some 150 full-time and part-time members, it left a backlog of 564 matters*." (emphasis added)

26 And so it was from this state of dissatisfaction that the new Court was born.

27 In an effort to shed some light upon the Court's journey, from an "uncoordinated miscellany"[14] of courts and tribunals dealing with planning, valuation, land and the environment to a "one-stop shop" offering an "array of dispute resolution processes under one roof",[15] it is useful to note some of the Court's institutional history, with particular emphasis on the circumstances that led to its creation.

Full and frank debate

28 The *Land and Environment Court Bill 1979* (NSW) was introduced to the Legislative Assembly in April 1979, as part of a cognate suite of proposed legislation centred on the *Environmental Planning and Assessment Bill 1979* (NSW). Reform of the State's planning, development and environmental laws

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[13] *Sydney Morning Herald*, Commentary and Letters, 22 November 1971.
[14] J R McClelland, "Address to Engineering Conference" (speech delivered at the Engineering Conference: Changing Society, a Challenge for Engineering, 24 January 1982) at 7.
[15] B J Preston, "The Land and Environment Court of New South Wales: Moving Towards a Multi-door Courthouse — Part I" (2008) 19 *Alternative Dispute Resolution Journal* 72.

was a centrepiece policy of the second Wran Labor Government, which had been elected some six months earlier in the "Wranslide" of October 1978.

29 The introduction of the cognate bills was accompanied by a statement that they would "indicate clearly the importance that the Government places on planning, fostering and encouragement of economic developments in the interests of the community"[16] by "winding down inevitable delays that have occurred to date"[17] through the creation of a specialist court that would mitigate against "costly appeals which must at the present time go before the Local Government Appeal Tribunal",[18] in addition to "bringing together disparate planning appeal jurisdictions of the Land and Valuation Court, the Valuation Boards of Review, the Supreme Court and District Court".[19]

30 The bulk of the substantive debate on the suite of bills, including the *Land and Environment Court Bill*, was conducted over the week between 13 and 20 November 1979. At the outset, the Hon. Colin Fisher, a National Party MLA and previously the Minister for Local Government, Lands and Forests, stated that "the Opposition approaches the legislation in an entirely bipartisan manner. It seeks to ensure that the State of New South Wales has the best possible planning procedures".[20] This was said to reflect the fact that "all members of Parliament will agree that probably this is one of the most important bills to come before the House for a long time, [as] planning affects all citizens of the State and has a tremendous influence on the lifestyles of the people, business and development".[21]

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[16] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 17 April 1979 at 4278 (Rogan MLA).
[17] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 17 April 1979 at 4286 (Hatton MLA).
[18] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 17 April 1979 at 4280 (Rogan MLA).
[19] L Stein, "The Place of the Land and Environment Court in the Planning System of New South Wales" in E Fisher and B J Preston (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Hart Publishing, 2022) at 55.
[20] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 13 November 1979 at 2882 (Fisher MLA).
[21] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 13 November 1979 at 2885 (Keane MLA).

31 The following day, 14 November 1979, the *Land and Environment Court Bill* was read for a second time in the Legislative Assembly. The "three distinct objects" of the Bill, as framed in the second reading speech, were:[22]

> "to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and man-made resources; to share government responsibility for environmental planning between the State and local government; and to increase the opportunity for community involvement in environmental planning and assessment".

32 The Minister proceeded soon thereafter to speak specifically to the *Land and Environment Court Bill*. It was said that the Court:[23]

> "vitally complements the Environmental Planning and Assessment Bill in respect of the final determination of development appeals … that is, applicant and objector appeals, and proceedings … seeking civil enforcement of planning law and decisions taken under that provision.
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> …
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> The Government's decision to create the new court is an attempt to rationalize the present diversified jurisdictions of a number of courts or tribunals all pertaining to the use and development of land, land values and taxes, and the enforcement of those laws. The opportunity for such rationalization is obviously presented by the introduction of the new environmental planning legislation, which has been described by several eminent judges in Australia to be unreasonably complicated and unwieldy. A specialist court such as that proposed by the Land and Environment Court Bill will have a vital role to play in the task of judicial interpretation of the new legislation and its operation in much the same fashion as the eminent judges of the Land and Valuation Court expounded the fledgling town planning law in the late forties and the fifties."

33 The Minister also touched upon the novelty or "cutting-edge" nature of the Court which, to adopt the words of Justice Preston, lies in the fact that it is a "hybrid legal institution, being in effect both a superior court of record exercising judicial functions, such as judicial review of administrative actions and civil and criminal enforcement of laws, and an administrative tribunal exercising merits review of

[22] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 14 November 1979 at 3049 (Haigh MLA).
[23] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 14 November 1979 at 3050–3051 (Haigh MLA).

administrative decisions".[24] According to the Minister, the range of this remit was necessitated by "the extent and nature of the jurisdictions exercisable by the proposed court", such that:[25]

> "provision is made for the Chief Judge to delegate to one or more conciliation or technical assessors the functions of the court in determining proceedings in classes 1, 2 and 3 of the court's jurisdiction … The assessors have a particularly important function … in relation to preliminary conciliation conferences where a number of appeals may be expected to be settled by the conciliation process. The court is a novel concept bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. In consequence, the court will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit. The decision of the court in its civil jurisdiction is final, except for appeals to the Court of Appeal on questions of law".

Of course, the "conciliation and technical assessors" referred to by the Minister have evolved to become Commissioners of the Court.

34 Debate on the second reading of the Bill was adjourned to 15 November 1979 on the motion of the Hon Mr Fisher, the Opposition member for Upper Hunter, who had previously affirmed his commitment to a bipartisan approach to the cognate Bills. However, that did not preclude him from levelling stern criticism of the *Land and Environment Court*, in respect of both form and substance, as the Honourable Member drew attention to the fact that:[26]

> "Clause 2(3) of the Land and Environment Court Bill provides that section 83 will commence on the day appointed and notified under section 2(2) of the Environmental Planning and Assessment Act, but there is no section 83 — or clause 83 — in the bill. The last one is section 78. The Attorney-General and Minister of Justice is a lawyer. I should have thought that he would try to uphold the so-called institution of the legal profession and be accurate and precise. Obviously he has presented these bills to Cabinet or to the caucus without bothering to read them. The Premier has been making a song and dance about these measures … The Minister for Corrective Services represents the

[24] B J Preston, "The Many Facets of a Cutting-Edge Court: A Study of the Land and Environment Court of New South Wales" in E Fisher and B J Preston (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Hart Publishing, 2022) at 2.
[25] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 14 November 1979 at 3051 (Haigh MLA).
[26] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 15 November 1979 at 3115–3116 (Fisher MLA; Murray MLA).

> Minister for Planning and Environment in another place who, incidentally, is also a lawyer. I should have thought that he would read the bills, but how could he have read them without noticing that at least one of them refers to a proposed section that is not contained in it? On line 23 of page 19 of the same bill the following passage appears: 'an assessor, in making an inquiry pursuant to this section, shall have and may exercise the functions of the Court under section 79 …' There is no section 79 in the bill. It is absurd for the Minister to bring a bill into the House that contains references to sections that are not contained in it.
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> … When the Land and Environment Court Bill becomes law it will fall to the Minister to appoint judges. He will go to one of his mates and say, 'I want to appoint you a judge in the Land and Environment Court'.
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> Mr Murray: He will probably pick the wrong court.
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> I doubt whether the person who is offered the position will accept it. *It will be an inferior court, anyway*. One can imagine the future judge asking the Minister, 'When will the court start to function? And the Minister replying, 'It is all there in section 83 of the bill'. I repeat, there is no section 83 in the bill. I do not know what the Attorney-General and Minister of Justice has been doing for three and a half years while these bills were being drafted." (emphasis added)

35 These criticisms, going to the form and structure of the Bill, foreshadowed a more substantive critique levelled by Mr Fisher at the conclusion of what was a two and a half hour speech concerning all five of the cognate bills. He concluded by acknowledging that:[27]

> "*the concept of the Land and Environment Court is not without some merit*. For a number of reasons the Government has aimed towards a new concept of appeal which is acceptable to many people. *My main objection is that the court will be separate from the Supreme Court and, as a consequence, it will be regarded as an inferior court. It will not attract the same quality of judges. Lawyers will not be willing to serve on a court that is regarded as inferior by the legal profession. Even more disturbing is the fact that the court will almost certainly be regarded as the Minister's court*.
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> Those who appeal against all of the powers possessed by the Minister will feel that they are appealing to judges who have been appointed by him. That is a serious criticism of the creation of inferior courts.
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> It is inevitable that proceedings in a court will increase the cost of resolving disputes, but I acknowledge that the establishment of

[27] Hansard, *Parliamentary Debates*, Legislative Assembly (NSW), 15 November 1979 at 3135–3136 (Fisher MLA).

precedents by the court will tend to offset the cost of litigation where litigation is resorted to. A major amendment which represents a real advance is the appointment of multiple assessors. I conclude my summing-up of the Land and Environment Court Bill with a brief quotation from the submission of the Bar Association, which is competent to comment on the proposed legislation. It stated:

> The creation of a separate court has a number of disadvantages. At the present time a disputed compensation claim presents no difficulty. The Supreme Court may consider all aspects of the matter. If the proposed bill becomes law the Supreme Court will have exclusive jurisdiction to deal with claims as to title and the Land and Environment Court will have exclusive jurisdiction to deal with claims as to the quantum of acquisition compensation.

That is an indication of the chaos that could result if the court is not part of the Supreme Court. The submission continues:

> The creation of a separate court, *inferior in status to the Supreme Court*, must have consequences in relation to the appointments to the court.

That reinforces my assertion that the Government's proposal is strongly criticised by eminent legal opinion which deserves to be heeded." (emphasis added)

36 When the debate resumed five days later, on 20 November 1979, the Hon. Keith O'Connell, Government member for Peats, responded to Mr Fisher's trenchant criticisms of the proposed Court in substance, by drawing attention to what it stood to replace for his constituents. In his *purposive* response, Mr O'Connell stated that:

> "These bills provide for the long-awaited demise of the Local Government Appeals Tribunal. *That blatantly developer-oriented group, the decisions of which were consistent only in that they invariably favoured the interests of the developer, has long been a blot on the planning processes*. Gosford shire council, which covers much of my electorate, has apparently adopted a recent attitude of approving virtually everything that comes before it where it has a right to exercise discretion. The shire president has said that the council has adopted this attitude because a refusal means that usually the applicant appeals, the tribunal allows the appeal and the council incurs unnecessary costs. What a dreadful situation to face any local government body. *The Land and Environment Court, which will replace this discredited tribunal, will be fair and equitable in its handling of matters, will establish and observe precedent, and will be consistent in its decisions*. In short, after its

establishment, *a far greater concern for community interest will become apparent*.

With the passage of this legislation imminent I am informed that controversial development applications are being placed before councils in an effort to have them approved before this legislation becomes law. The developers want approval before the affected people are given appeal rights, the exercise of which could thwart their plans … I make one urgent plea: this legislation must be gazetted without delay in order to defeat the aims of the sharpies who, before the legislation becomes law, are seeking approvals from local councils for dubious developments." (emphasis added)

Back to the future

37 The enduring success of the Land and Environment Court of New South Wales in the 40 or so years since its establishment may be gleaned from a very simple quantitative metric. Since the turn of the 21st century, over 350 specialised environmental courts and tribunals have been established across 41 national jurisdictions.[28]

38 On 1 September 1980, the Court that we gather to celebrate today became the first such specialist court, the *Land and Environment Court Act 1979* (NSW) having received Royal Assent some nine months earlier, on 21 December 1979. Indeed, a study conducted by academics at the University of Cambridge of the merits review of planning decisions in the European Union, New Zealand, New South Wales, South Australia and Victoria concluded that the Land and Environment Court "was the model most frequently cited by other jurisdictions as the one that should be followed".[29]

39 The significance of this institutional innovation to the effective government of New South Wales cannot be overstated. However, it has not been uninterrupted smooth sailing over the past 42 years but, to quote Theodore Roosevelt, "nothing in the world is worth having or worth doing unless it means

[28] G R Pring and C K Pring, "The Confluence of Human Rights and the Environment: Specialised Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment" (2009) 11 *Oregon Review of International Law* 301.
[29] J Cripps, "25th Anniversary of the Land and Environment Court" (2005) (Summer) *Bar News* 51.

effort, pain, difficulty". That is to say, there is never innovation without controversy.

40 The Honourable Justice Rae Else-Mitchell, some two years after he retired from the Supreme Court of New South Wales and the Land and Valuation Court, and some four years prior to the promulgation of the Land and Environment Court, observed that "[t]he keystone of government policy must be a recognition that land is both a basic national resource of limited or finite extent and a necessity of life for all Australians".[30] It followed, according to Else-Mitchell, that "[l]and policy must be directed to ensuring that landowners are restricted to gains from the development or use of land and are excluded from gains associated merely with the passive holding of land".[31]

41 The inescapable reality, that land is a scarce resource the use of which is necessary for economic development whilst its preservation is critical for environmental, and therefore human, health, has meant that an aspect of the Court's function has been, and will continue to be, to act as the arbiter of ecologically and economically sustainable development,[32] whereby the Court must "hold the balance even between environmental and developmental considerations".[33]

42 This important concept has been applied by the Court through its recognition of constituent or subordinate principles including sustainable use,[34] precaution,[35] intergeneration and intragenerational equity,[36] conservation of biological

[30] *First Report of the Commission of Inquiry into Land Tenures (Cth)* (1976) at [2.3].
[31] Ibid at [2.7f].
[32] See, for example, *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 at 35–38.
[33] *Gabicikovo-Nagymaros* at 85 per Judge Weeramantry,
[34] *Hub Action Group Inc v Minister for Planning* (2008) 161 LGERA 136.
[35] *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270; *Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256.
[36] *Gray v Minister for Planning* (2006) 152 LGERA 258; *Taralga Landscape Inc v Minister for Planning* (2007) 161 LGERA 1; *Gloucester Resources Ltd v Minister for Planning* (2019) 234 LGERA 257.

diversity and ecological integrity,[37] and the internalisation of negative externalities, including the "polluter pays principle".[38]

43 The inherently difficult balancing exercise of "sustainable development" has been at the heart of the Court's jurisdiction since its very inception, with the inaugural Chief Judge, Jim McLelland, stating that he conceived of the Court's role as being "to draw the line somewhere between those who want high-rise building in the Botanic Gardens and those who want to turn Pitt Street into a rainforest".[39]

44 Eleven years later, Chief Judge Cripps provided his own, slightly more nuanced conception of the Court's function as being tied to the notion of the *public interest*, which appears in s 39(4) of the *Land and Environment Court Act 1979* (NSW). That sub-section provides that "[i]n making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case *and the public interest*" (emphasis added). Of this section, Cripps CJ of LEC wrote that:[40]

> "Judges of the Land and Environment Court are mandated by Parliament to have regard to the 'public interest' although it won't tell us what that interest is. The direction is part of the same legislative whimsy which directs us to inform ourselves on all relevant aspects of development and denies us any budgetary allocation to pursue our enquiries … the focus of its work is directed toward what might be loosely called 'public interest' considerations."

45 The Land and Environment Court has been fortunate during its life to have had strong and eminent leaders, commencing with Jim McClelland and then Jerry Cripps, followed by the path breaking Mahla Pearlman and Peter McClellan and most recently (although for the past 17 years) Brian Preston. I would also single

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[37] *Corkill v Forestry Commission (NSW)* (1991) 73 LGERA 126; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234; *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure* (2013) 194 LGERA 347.

[38] *Environment Protection Authority v Hanna* (2018) 235 LGERA 114.

[39] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-41290.

[40] J S Cripps, "Environment: Courting the Public Interest" (1991) 2 *Polemic* 40.

out the contribution of Justice Nicola Pain who this March notched up 20 years of service on the Court and is its longest ever serving judge, a remarkable achievement.

46 The role of the New South Wales Court of Appeal should also be noted in any reflection upon the Land and Environment Court's jurisprudence. Appeals from decisions of the Land and Environment Court lie to the Court of Appeal of the Supreme Court of New South Wales and that Court's calibre over the years has ensured that the body of jurisprudence that has emerged from the Court is not only consistent but calibrated to the complex legislative underpinnings that underwrite planning and development in New South Wales.

One enduring irony

47 In her afterword to *An Environmental Court in Action*, Professor Elizabeth Fisher writes that:[41]

> "In 2017, I published a short book on environmental law for a generalist audience. The last photograph of the book was of litigants celebrating a win outside the Land and Environment Court.
>
> …
>
> I picked the photograph to make a deeper point. My wonderful editor had encouraged me to include in the book a photograph of litigants standing outside a court after winning an environmental law case.
>
> The picture I included in the book was of a very different type. *The Land and Environment Court, being in an office building, was not visible*. There were no lawyers in the photograph, but litigants carried bundles of legal files and in the background was a shop sign for the 'Legal Grounds Cafe'." (emphasis added)

48 This occasion cannot go without noting and one cannot escape the irony that the Court exercising jurisdiction over planning, the built environment and sustainable development in this State is housed in such unsatisfactory quarters. The Court began its life with two floors of the old American Express Building,

[41] E Fisher, "Afterword: Law in ~~Un~~expected Places" in E Fisher and B J Preston (eds), *An Environmental Court in Action: Function, Doctrine and Process* (Hart Publishing, 2022) at 319.

then temporarily located, following service of a notice to quit on the Attorney-General's Department, in part in Hospital Road and now spread over eight small floors in Windeyer Chambers.[42]

49 This is not just a matter of aesthetics. Courts are important civic institutions. They must not only be functional but respected and recognised in the community for the important work they do.

50 Good court architecture is fundamental to productivity, efficiency, judicial and staff wellbeing, and institutional respect and integrity. In respect of those first three factors, the separation of six judicial chambers and thirteen courtrooms across eight floors limits interaction between colleagues and therefore the collegiality that is so necessary in the face of increasing and unrelenting workloads.[43] As to the last of those factors, namely institutional respect and integrity, the importance of a dedicated and visible structure to house a court cannot be overstated. It should be a recognisable representation of the judicial function, reflecting its social utility, that is, "it must be capable of manifesting justice in a world often ruled by its absence".[44] Put another way, a court should occupy facilities which are "an event in the life of an institution which perpetrates its authority through its own procedures".[45]

51 For an institution which has not just endured, but thrived for over 40 years, and which prides itself on being a "multi-door courthouse" and a "one stop shop" for justice in environmental, planning and land law disputes, it is not fitting of such an institution that the most notable feature of its physical presence is the café adjacent to its entrance. That the Court has endured and thrived in spite of such poor facilities makes the achievement all the more remarkable.

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[42] M L Pearlman, "20 Years of the Land and Environment Court of NSW" (2001) 38 *Australian Planner* 45.
[43] Guymer Bailey Architects, "Nine Key Considerations in Court Design" (Web Page, accessed 23 August 2022) <https://www.guymerbailey.com.au/designbox/nine-key-considerations-in-court-design>.
[44] T Wilkinson, "Typology: Law Court", (2018) *Architectural Review* (online) <https://www.architectural-review.com/essays/typology/typology-law-court>.
[45] T Wilkinson, "Typology: Law Court", (2018) *Architectural Review* (online) <https://www.architectural-review.com/essays/typology/typology-law-court>.

52 Physical facilities apart, in the Land and Environment Court of New South Wales, one observes all of the characteristics of a successful environmental court or tribunal, namely status and authority; independence and impartiality; a clearly-defined and comprehensive jurisdiction; specialist judges; alternative dispute resolution mechanisms and facilities; technical expertise; facilitation of access to justice; the just, quick and cheap resolution of disputes; adaptability to changing values; an authoritative jurisprudence; and flexibility.[46]

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[46] B J Preston, "Characteristics of Successful Environmental Courts and Tribunals" (Speech, Eco Forum Global Annual Conference 2013, Guiyang, China, 19 July 2013).