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Farewell Ceremony for the Honourable Justice Paul Stein upon the Occasion of his Retirement as a Judge of the Supreme Court of New South Wales

**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND JUDGES OF THE
SUPREME COURT**

Friday 11 April 2003

FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE PAUL STEIN UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

1 **SPIGELMAN CJ:** We gather here today to celebrate your Honour's contribution to the administration of justice of this State particularly as a judge over a period of almost twenty years. You were appointed a judge of the District Court in June 1983, became a judge of the Land and Environment Court in June 1985 and were appointed a judge and a judge of appeal of this Court in April 1997. On behalf of all those associated with the administration of justice in this State and in particular on behalf of the judges of this Court, I thank you for the contribution you have made.

2 Even before becoming a judge your Honour made a significant contribution to the law and to public administration, for example, in the position of the Deputy Ombudsman between 1977 and 1979 and as President of the New South Wales Anti-Discrimination Board between 1979 and 1982.

3 Your public service in a wide variety of spheres of discourse included acting as Chair of the Juvenile Leave Review Committee between 1985 and 1988; as President of the Intellectually Handicapped Persons Review Tribunal under the Child Welfare Act 1970 between 1983 and 1989; as Chair of the Council of the Community Justice Centres of New South Wales under the Community Justice Centres Act 1983 between 1987 and 1993; as Chair of the National Consumer Affairs Advisory Council between 1987 and 1993; as Chair of the Commission of Inquiry into the ACT Leasehold System 1995 and as a member of the Board of the State Records Authority of New South Wales between 2001 and 2003.

4 In addition to official appointments your Honour was associated with numerous community organisations, for example, the board member and Chair of the Australian Consumers Association between 1974 and 1986; a member of the NRMA Crime Safe Committee between 1997 and 2000; and Chair of the NRMA Community Advisory Committee between 1993 and 1998.

5 This is a lengthy and diverse period of service to the people of this State.

6 Your Honour's contribution to environmental law and to the community was recognised by the Award of Membership of the Order of Australia in 1994.

7 You have played an active role in judicial training, both of Australian judges and judges from Southeast Asia. Your Honour's contribution to environmental law in this country as a lecturer, as an editor, as an author, as chair and member of various organisations, and as a judge, is unsurpassed. You have spoken and published regularly, both in Australia and overseas, at conferences and in courses, on the full gamut of issues that arise in the context of the protection of the environment by the legal system.

8 This is a record of public service of great distinction. On this occasion, however, it is particularly

appropriate for me to focus on your Honour's contribution as a judge.

9 No doubt two seminal judgments at first instance in the Land and Environment Court are particularly close to your heart. In *State Pollution Control Commission v Caltex Refining Company Pty Ltd* (1991) 72 LGERA 212 your Honour held that the privilege against self-incrimination does not extend to companies. The Court of Appeal reversed your decision (*Caltex Refining Co v State Pollution Control Commission* (1991) 25 NSWLR 118), but the High Court reinstated it, with the judgments drawing on many of the same policy considerations which you had analysed in your judgment (see (1993) 178 CLR 477 esp at 508).

10 In *Oshlack v Richmond River Council* (1993) 82 LGERA 222 your Honour identified that the nature of the proceedings being a challenge to the validity of development consent at Evans Head on the basis of the impact of the development on endangered fauna was sufficient to constitute special circumstances to displace the usual rule that costs should follow the event. The Court of Appeal overruled your decision ((1996) 39 NSWLR 622). The High Court allowed the appeal (*Oshlack v Richmond River Council* (1998) 193 CLR 72).

11 As a judge of the Land and Environment Court your Honour made major contributions to every aspect to the burgeoning jurisprudence of the Court. Particular note should be made of litigation involving the Forestry Commission and wildlife protection (*Corkhill v Hope* (1991) 74 LGERA 33 and *Corkhill v Forestry Commission of New South Wales (No 2)* (1991) 73 LGERA 127). The Chaelundi State Forest which was in issue in these proceedings was described by your Honour as home to "a veritable forest dependant zoo, probably unparalleled in south-eastern Australia". This was the first occasion in Australia that wildlife protection law was enforced against a government authority. It laid the foundation for future statutory regimes, both in this State and at the Commonwealth level. On this occasion your Honour was affirmed by the Court of Appeal (*Forestry Commission of New South Wales v Corkhill* (1991) 73 LGERA 247).

12 In *Parramatta City Council v Peterson* (1987) 61 LGERA 286 your Honour's judgment was the seminal decision about the application of s94 of the Environmental Planning and Assessment Act 1979 as to when a consent authority may require dedication of land or payment of a monetary contribution for the increased demand for public amenities and public services arising from a development.

13 In a number of judgments you contributed to the evolution of the jurisprudence of the Aboriginal Land Rights Act 1983. In *Tweed Byron Aboriginal Land Council v Minister Administering of Crown Lands (Consolidation) Act* (1999) 72 LGERA 177, you set aside a ministerial certificate and granted part of land claimed by the Aboriginal community at Fingle Head. However, in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (1992) 76 LGRA 192, your Honour rejected the claim to the grand colonial New South Wales Department of Education building in Bridge Street, holding that, notwithstanding that the fact that it was virtually vacant at the time of the claim, it was nevertheless being used for a public purpose and was not claimable.

14 In *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270 your Honour considered the then recently developed precautionary principle in environmental law. Drawing on the growing body of literature and recognition in international instruments, you applied the principle in the course of litigation for the first time, I believe, in the common law world. Your judgment has attracted considerable attention in the international environmental law community. It has been referred to many times, not only throughout Australia, but also in judgments in England and New Zealand. It will long remain a seminal contribution to environmental law.

15 Upon your elevation to the Court of Appeal your Honour continued to make significant contributions to the development of environmental law. In *Coalcliff Community Association Inc v Minister for Urban Affairs & Planning* (1999) 106 LGERA 243 you considered that the lapsing of development consents and the requirement for compliance with conditions. In *Scharer v State of New South Wales* (2001) 53 NSWLR 299 your Honour considered the exclusive jurisdiction of the Land and Environment Court.

16 In this Court, of course, your Honour's contribution covered a broader range of the law. You have made a notable contribution to the application of the special laws of this State with respect to dust diseases. Your dissent on the issue of causation in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 was recently cited with approval by the House of Lords in *Fairchild v Glenhaven Funeral Services*

Limited (2003) 1 AC 32 at 64-65 and 116. You wrote the leading judgment in a case considering the relationship between the duty of care of an employer with respect to the use of asbestos products and the duty of care of the manufacturer of such products, including questions of apportionment and indemnity (Rolls Royce Industrial Power (Pacific) Limited v James Hardie & Co Pty Ltd (2001) 53 NSWLR 626.

17 Numerous other areas of this Court's broad jurisdiction attracted significant contributions from your Honour. This included the interaction between worker's compensation and migration legislation, in the context of the entitlement of an illegal entrant to worker's compensation (Nonferral (NSW) Pty Ltd v Taufin (1998) 43 NSWLR 312); the position of self-defence in circumstances of home invasion (R v Munro (2001) 51 NSWLR 540); the jurisdiction to deal with related summary offences under Pt 10 of the Criminal Procedure Act 1986 (DPP v Sinton (2001) 51 NSWLR 659); the discretion to allow representation of parties by unqualified persons (Damjanovic v Maley (2002) 55 NSWLR 149).

18 These are amongst the public contributions which are, and will remain, well known to practitioners of the law. However, what is not so widely known is the contribution that your Honour has made to the collegial life of the Court. The strength of the Court of Appeal arises from the willingness of each member to join the others in getting the work done. Your Honour is a man with strong and well-informed views about many things. Nevertheless your Honour is always able to present those views in tones of moderation and with an understanding of different points of view.

19 In every case on which you have sat your Honour has made a contribution of substance, whether your Honour has written a lengthy judgment or merely concurred. Even in the longest and most tiresome of cases, of which there have been several during your Honour's period on this Court, you have produced careful well-reasoned and unfortunately necessarily long judgments and have done so promptly and without leaving any argument uninvestigated.

20 Your colleagues on the Court will long remember the conscientious devotion that you have always displayed to your duties. We will particularly miss the sense of fun that you have always brought to our collective endeavour. We all wish you well in this new phase of your life, where we know that you will continue to make a significant contribution to the administration of justice particularly, by lecturing and writing about environmental law and also in judicial training.

21 Of course you must leave with regrets. Perhaps high on that list is your failure to convince your fellow judges to abandon wigs. You yourself may now do so. We wish you well in what we know will be an active retirement.

22 **MR B W WALKER SC PRESIDENT NEW SOUTH WALES BAR ASSOCIATION:** May it please the court to read your Honour's curriculum vitae. From the professional point of view, it is to be reminded there is more than one way of a career at the Bar being from the public point of view, a successful and valuable one. In August 1981 you took silk following the onerous, not always fully appreciated term as a thoroughly publicly spirited Deputy Ombudsman from 1977 to 1979 and the extremely important tasks attended upon the New South Wales Anti-Discrimination Board from 1979 to 1982.

23 It is difficult now to recapture what is just two decades thereafter the highly contested propositions which the legislation under which your Honour held office in that position had sought to advance and that a leading member of the Bar properly recognised with silk, was prepared to step aside from practice in order to take up a valuable position, is an inspiration to all of us.

24 I do not wish to repeat - it would be otiose - what the Chief Justice has pointed out about your other positions, but it is clear that the very early concern with the intersection between the concerns of ordinary life, for example, the Australian Consumers' Association connection and the high technique of the law, is one which continued thereafter in your Honour's career.

25 So far as concerns practice at the Bar, no mention of your Honour's career can leave aside that which has been the subject of such a fascinating account of when your Honour, as Queen's Counsel, set out in the Bar's recent latest chapter of its history, No mere mouthpiece, the trial conducted in 1972 for those accused of the murder of Mr Emmanuel, the District Commissioner at Rabaul.

26 It was one which could only be described as a watershed, bearing in mind the political and

constitutional departures which were under way, not always understood between Australia and Papua New Guinea, at the time.

27 Furthermore, the fact that the basis of the demonstration which led to the killing was about what might now be called land rights, with whatever tenaciousness that it might have been thought to have at the time, is one which could be seen to have made that trial a precursor of the conflicts which we have been fortunate enough to largely escape in this country.

28 Your Honour's insight gained from that experience, is one which, notwithstanding the exotic facts of that case, continue to have application and lessons for all of us, even perhaps especially in everyday practice at the Bar. As your Honour pointed out, counsel in that trial, all shipped-up from what might have been called the mainland for the purpose of defending the co-accused were, as your Honours put it, aliens. Aliens, not in any sense of noncitizenship, but in the sense of that colloquialism, a different part but, as your Honour pointed out in relation to the constant presence of the exercisable authority, which must never become merely the exercise of force for the rule of law, you were the aliens. I should say "we", of whom your Honour was a representative, trying to impose our norms.

29 Well, one of the less solemn aspects of that was the recollections your Honour had about the cultural differences. Some might be tempted to call them the cognitive differences in terms of points of reference in relation to cross-examination on temporal sequence, where your Honour warned that it was just hopeless; it would disintegrate very quickly and barristers had to learn that it was hopeless because otherwise they would just be wasting their time. Your Honour's sitting in impressive banc before me now could be forgiven for thinking that not all barristers have learned that and it may be that all lawyers, to that extent, with all lay witnesses are really alien is something that they must remember.

30 The Chief Justice has already referred to the great extent of your Honour's exposure to judicial work and the contribution of judicial work in this State. There is, so far as the Bar is concerned, an ongoing continuity to what your Honour did at first instance, particularly in the Land and Environment Court. That was a jurisdiction which had its birth in some matters of political controversy in relation to these new standards and new approaches exposed to be the subject of political ambition in relation to that court and a system of law to be administered.

31 As the Chief Justice has pointed out, in a very short time of which your Honour was a most notable contributor, that court had what might be called a round-about influence, values in seeking to administer an entirely new statutory regime according to well established methods of judicial technique improved for a purpose of special subject matter. It then had, in most signal and explicit fashion, a major effect on parliament's consideration of very important new changes and additions to that law, so that the interplay between judiciary and legislature in the Land and Environment Court area and the whole area of environmental planning and assessment and particularly wildlife protection has been perhaps the most important example of the cooperative rather than the most contentious government in relation to the rule of law.

32 I do not wish again to repeat matters which the Chief Justice has referred to, but it is impossible to pass over your Honour's contribution, at first instance, in the Land and Environment Court without recalling the jurisprudential thunder clap by which the precautionary principle moved from simply a discourse, by what I hope you will forgive me terming agitators, through to an established principle, if always factually contentious assessment, of governmental action reviewed by the judiciary.

33 Finally, it needs to be pointed out that one of the challenges to the very junior Bar, which will continue to be the case and which continues to be a proper concern, both among the very junior bar and to the extent to be provided, tutelage from the more senior bar, is that of accommodation needing to be obtained at the very time when capital outlay is least possible to be assayed, namely, when you are virtually starting at the beginning of one's career.

34 Your Honour's contribution, no doubt, in very best tradition, informed by a degree of self interest of an entirely proper and ambitious kind to the setting up of Forbes Chambers and then the later transfer to Macquarie Street for Frederick Jordan Chambers, is of a higher significance, as is the example of the kind of pulling together in common, but as competitors, which ought to characterise the Bar, certainly, in your Honour's day and which we hope continues to this day. The lessons to be learnt from the modesty of the risk but the ambition of the risk involved in setting up chambers in a building slated for demolition at a time when accommodation was urgently required of a decent kind for barristers in

your Honour's position, is one which I hope, we will not have to return to in physical terms, but which we hope in corporate terms and collusion terms, will remain typical of the Sydney bar.

35 Finally, in relation to your Honour's demeanour on the bench, I make a submission that cannot ever be made except on an occasion like this. Your Honour is most notable for a combination of penetration, humour and gentleness. It is not to be thought that the first and third referred to were in any way in conflict with each other, or contradictory with each other because, like Mahoney J of the Court of Appeal, the quietest comment could be the most devastating. It was highly significant for counsel always to recall that, in what I will recall the nicest possible way, the somewhat ironic comment your Honour would insist on inserting from time to time into the most blackest level of discussions, the mildest inquiry in how this might assist in adjudicating with each other in what some might recall are the merits of disputes.

36 It is to be recalled, particularly, in the Land and Environment area by reason of the public interest litigation which characterised this so much with the class four of litigation in this court, there were many occasions when, once again, it might have been thought there were contests in the court whereby what some people call the merits dominated entirely on one side and what one calls the blackest letter of law dominated entirely on the other side.

37 It is your Honour's great capacity with courtesy, skill and ability to mediate which the bar will long remember and which it appreciates as an example to your present and future colleagues and successors.

38 **MR R BENJAMIN PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the court, I would like to beg your indulgence to adopt a more musical approach than would normally be heard in a place such as this...

"Different types who wear a black robe
Pants with stripes and in wig mode
Perfect fits
Puttin' on the Ritz"

39 I am sure your Honour is familiar with the true lyrics of this Irving Berlin song, you will appreciate their significance. Just as, indeed, you did when delivering your reasons in the 1987 decision relating to the Ritz Private Hotel. At the time, I believe you stated, "Why don't you go where fashion sits, puttin' on the Ritz". That predilection for resorting to quotes had seen you a year earlier, in the case of *Bentham v Kiama Council*, where you regaled the Court with a little Shakespeare. Though one may ponder how the Bard's words might be applied to a development application. On the issue of whether a business was to be defined as a "motel" or a "hotel" you enquired, "What's in a name? That which we call a rose by any other name would smell as sweet." Colleagues must have made a comment about these literary references because you seem to have refrained from using them in later judgments.

40 In your complete and illustrious legal career, of which we have already heard much at this gathering, you have made a significant environmental impact for the people of New South Wales and beyond. This was appropriately recognised when you were awarded an Order of Australia for your contributions to environmental law and to the community. The Chief Justice has touched upon the *Caltex Refining* case and *Oshlack* case, all of which showed you as a passionate advocate about public interest rights in the courts and consequent access to justice by the broader community.

41 The impact of your decisions has been felt beyond State and national boundaries, and again both the Leader of the Bar and the Chief Justice have talked about the Rio Declaration.

42 I was told when I commenced the study of law that it was merely condensed common sense and your interpretation of this principle, in fact, put meaning to those words for it was adopting a principle of better safe than sorry.

43 Not all of your cases I am told have been in relation to verdant and populated areas by small furry creatures.

44 One of your important cases involved the Body Line Spa and Sauna - a gay men's club - which the Council was attempting to close down. Carefully and thoughtfully you reflected on the evidence and made a determination which reflected the needs of that particular community.

45 You have put into effect the words of John F Kennedy, delivered in June 1962, when he said, "The supreme reality of our time is the vulnerability of our planet." The civil libertarian part of your character has expressed itself in many offices you held prior to joining the Bench, one of which we have been told today, of course, is as President of the Anti-Discrimination Board. In that capacity, I believe you released a report into discrimination against homosexuals. You dressed in a purple shirt, purple tie and purple handkerchief. Now, if that's not putting on the Ritz... Though you may have strived for the height of fashion, this has not always been available to you. Sometimes the suit has not matched the occasion, such as - I am told - the infamous Queanbeyan Flambe debacle.

46 By her own admission, your tipstaff was lacking in driving skills when she was driving you around Queanbeyan. When she drove up to a petrol bowser to fill up your vehicle, there existed some discrepancy between the distance of the car's petrol tank to the bowser and the available length of the fuel hose. Against her protestations that she would move the car closer, you attempted to do the impossible hose stretch, with the result that petrol spurted all over you.

47 Now, as we all know, petrol is a very volatile and pungent liquid. Drenched as you were, the odour pervaded the car and later the Court. Indeed to every place you visited on that fateful day, you brought a certain aura, not entirely consistent with your office. There was no spare suit into which you might change, so you forged on regardless with your schedule. Everyone en route discreetly sniffed you out. One woman you visited at home thought this may have been an odour from a toddler and began sniffing each limb of the child. At the end of the day, you and your tipstaff drove back to Sydney, enveloped in fumes.

48 The Oxford dictionary defines "a tipstaff" as "an official carrying a tipped staff, a sheriffs officer, bailiff or constable".

49 You have broadened this definition well beyond the envelope. In your case it encompasses, teacher, friend, law lecturer, mentor, adviser, guide, counsellor.

50 In redefining this role, you have enjoyed launching the careers of many young solicitors who have been fortunate enough to work with you. It has been said, "If you were serious about environmental law, you should go and work with Stein JA." Many of the tippies have gone on to work in the area of environmental protection, whether in government or politics in my branch of profession or at the bar. Employment with you has meant that these young legal practitioners have launched their careers with a great base.

51 You are known to have given your tippies a fair amount of legal work, both in research and in debating legal issues and principles. I am told that you have always been prepared to hear them out if their position differed from yours - and then you would take the time to explain where they were wrong.

52 Somewhere along your career I am told you earned the nickname "Speedy" for your prompt and diligent work. One colleague has commented, "I wondered how he got the time and energy to do it all". Writing your judgments in long hand and often you had usually completed a first draft within a week of a hearing and it would be a virtually "perfect version".

53 You have maintained close contact with those who have passed through your chambers by holding an annual tipstaffs' lunch, the number attending increasing with each passing year. I wonder if the venue of these fine get-togethers is ever the local Burger King or Hungry Jacks, or perhaps you have had enough of those establishments.

54 Today is but one of a large number of ceremonies to mark your retirement and celebrate your career. One tippy, having difficulty keeping track of the dinners and events he was attending in your name, said, "He's popular without a doubt". He went on to observe that, "He's adored by his tippies and he'll be sorely missed by them."

55 You have been described by others as an extraordinarily generous and compassionate human being with a strong conscience who, even in retirement, will be out there making trouble.

56 I was interested to hear the Chief Justice talk about your involvement with the Community Justice Centre. This centre was one of the great resources that have been placed in this State in the early 1980s. It provides a wonderful source of resolution of dispute at minimum cost to the community and provides a way that those disputes be sensibly and inexpensively resolved by mediation. It was excellent to hear that your Honour was part of the provision of that service.

57 In winding-up, your Honour, I know that many of your colleagues are saddened by your leaving. We also have to count in that number, of the bereft, there are a few others, the powerful owl; the potted-tailed quoll; the crested shrike-tit; the rufous bettong; the beech skink; the large-footed myotis; the long-nosed potoroo, not to forget the eastern pygmy possum and the Hastings River mouse...all of which will no doubt miss your splendid judgments.

58 On behalf of this retinue of fans, and the solicitors of New South Wales, I wish you a long, healthy and productive retirement.

59 **STEIN JA:** Chief Justice, fellow judges, Mr Walker, Mr Benjamin, members of the profession, ladies and gentlemen.

60 I thank the Chief Justice, Mr President of the Bar Association, Mr President of the Law Society for their overly kind words.

61 It is always difficult to respond to such generous compliments, and, to use the words of Alexander Pope, I am in no doubt that you are complimenting me into a better opinion of myself than I deserve.

62 After nigh on 20 years on the bench - in three different jurisdictions, indeed 25 years of public service, there are, of course, many thank yous I wish and need to make. It is difficult to know where to begin but given that I must start somewhere I will begin with Australia, the country which gave me opportunities which probably would have been denied to me if I had remained in my country of birth, England. In 1953, as a teenager, I left the United Kingdom with my family. England was still emerging from the devastation of World War 2. In contrast to Canada and Australia, perceived as the future, England was not then seen as a land of opportunity.

63 We were not a poor family but my father's occupation as a musician did not allow for extras or luxuries. I am not saying that we were brought up in a cardboard shoe box, but believe it or not, my family tossed a coin between Canada and Australia and Canada lost. I was particularly chagrined at this turn of fate as my acquaintance with my new homeland to be was limited to my experience of a high school teacher from Australia who unjustifiably caned me for alleged cheating. I was given no opportunity to plead my case and summary judgment was immediately pronounced and executed. I hasten to add that I was not guilty but this plain injustice may have been the trigger for my rebellious streak.

64 Australia, however, gave me opportunities for which I am very grateful. I completed my schooling at Sydney Boys High, which fostered academic achievement. There I met John Hamilton, indeed many others who now grace the law. After high school, by means of a Commonwealth scholarship, Menzies' great legacy, I went to the Sydney University Law School.

65 My year included so many incredibly bright students that I was convinced that I would not last the distance, so I took a job as a to Bondi tram conductor. The year included: Alan Abadee; Jeremy Badgery-Parker - sadly no longer with us; Harry Bauer; Bryan Beaumont; Terry Cole; John Coombs; Kenneth Carruthers; Marcus Einfeld; Michael Grove; Roger Gyles (that is fat Roger); John McLaughlin; Jim Macken; Barry Mahoney; Malcolm McLelland (whose father's wig I now wear); Peter Newman; Murray Tobias and Bill Windeyer; and also someone by the name of John Howard.

66 1957 to 1960 were great years and we all benefited from excellent teachers, Professors Stone, Morrison, Benjafield and Parsons to name a few.

67 I was also fortunate to receive much guidance and training in my Articles of Clerkship. My Master

Solicitor was Phillip Goldman, a practitioner of infinite precision and exactitude. Probably the most important thing I learned from his busy practice was time management and the ability not to lose sight of important issues in the pursuit of attention to detail.

68 Unfortunately, my Master won a four-month Women's Weekly world cruise and sailed away. My articles were then assigned to John Pitman Webster of Uther Webster. There I experienced first-hand complex and often very messy conveyancing and building litigation. This whetted my appetite for advocacy, hence, after obtaining some practical experience in court, I commenced at the bar in Mena House Chambers in February 1964, almost 40 years ago. If I recall correctly I fought with Alan Abadee, John Hamilton, Tom Davidson and a number of others for a shelf in the basement library, affectionately known then as the dungeon.

69 Thereafter, as has been mentioned, I took part in the establishment of a number of chambers - Forbes Chambers in 127 Phillips Street (since demolished), Frederick Jordan in 233 Macquarie Street (now the National Dispute Centre), Wardell Chambers in the Prudential building and Level 43 in the MLC building.

70 Along the way I received much help from colleagues too numerous to mention. If I were asked to nominate the one person whom I learned most, it would have to be the late Edward St John QC. Ted was an amazing person – a man of great passion and intellect - forward thinking - an advocate of infinite capacity.

71 Apart from 15 years at the bar, I was also fortunate to spend 5 years at the Ombudsman's Office and as President of the New South Wales Anti-Discrimination Board, as has been mentioned. These were fascinating, exciting times and in many ways what we were advocating between 1979 and 1982 in relation to areas of discrimination was ahead of public opinion. We were, I think, effective beyond our resources in helping to change how society thought about treated minorities - particularly people with physical and intellectual disabilities, homosexuals and Aboriginal people, and of course that great majority, of Women.

72 Those were extraordinary years and I will never forget my talented and loyal staff, including Chris Ronalds, whom I am pleased to see today.

73 Turning to the courts in which I have been privileged to have sat, I have been singularly lucky to have been served under five first class leaders. At the District Court, Jim Staunton was a strong and fair Chief Judge. In the Land and Environment Court, Jerrold Cripps and Mahla Pearlman (in very different ways reflecting their personal style) provided great leadership. I wish that I possessed one tenth of the Cripps' wit, but wise counsel has convinced me not to try.

74 At the Supreme Court, who could wish for better Chief Justices than Murray Gleeson and Jim Spigelman. It is possible when I arrived at the Court of Appeal in 1997 Murray Gleeson thought he was getting some mad radical. I think he became disabused of this over time - radical yes but perhaps not mad.

75 As to the present Chief Justice - he is a leader whose first consideration is always for the court. A judge of considerable intellectual force, attuned to today's society, its predilections and aspirations.

76 My warmest tribute is reserved for the President, Keith Mason. It has been a pleasure and privilege to serve under him. The quality of his intellectual leadership of the Court of Appeal cannot be underestimated. He leads by example. His one fault is that he is a true democrat, which has acted as a brake on my, and dare I say some of my colleagues', autocratic tendencies.

77 The most enjoyable and stimulating aspect of the Court of Appeal has undoubtedly been the experience of collegiality. I hope that I will not scare any of my soon to be "exes" by saying I know aspects of them better than their families. After all, I have spent five days each week with them. They doubtless know my idiosyncrasies as well as I know theirs. Nevertheless, I have found working in full benches an intellectually stimulating and satisfying experience, which I will never forget.

78 Personal thanks must, of course, be made. To my friends for their consistent support over the years. I have always thought loyalty to be the most important of values. Given the time constraints, I

will not single anyone out. I am sure the usual suspects know who they are and I thank those who are able to be present today.

79 I have also been favoured with wonderful tipstaves since 1985 - a fantastic group of people who have become part of my extended family. Jane Reid sadly is no longer with us following a tragic accident.

80 I have also been fortunate to have had two outstanding associates. Noelene Barry, my private secretary and associate for 18 years sadly died several years ago, and Carol Richardson my associate since January 1996. No one could have wished for better associates.

81 Lastly, but by no means least, I need to mention my long-suffering family. Without the steadying influence and wise counsel of my wife Barbara, I would probably have become involved in unedifying public incidents. Thanks also to my three daughters, Yasmin, Giselle and Jesse for their support for my judicial voyage.

82 It is customary for departing judges to seize the opportunity to say something which they believe to be important for the law. So I beg your indulgence.

83 Like most judges, I have a soft spot with the judicial oath. It is a beautiful oath, compelling in its simplicity, "To do right to all manner of people"... "without fear or favour, affection or ill will." In New South Wales it is to undertake that task "after the laws and usages" of the State. The words differ from the oath of a High Court Justice, which requires a judge to do right to all manner of people "according to law" which, to some, may beg the question of "What is the law?"

84 In the few moments that I have available I want to say something about the Mason Court. A suggestion has been made that the members of that court between 1987 and 1995 misused their judicial power by using it for a purpose other than for which it was granted; that they pursued an illegitimate function of furthering some personal political, moral or social programme. This is a mighty charge to make. As usual, the most vehement criticism has been assigned to Mabo No 2. Those apparently dirty words "judicial activism" are claim to have constituted a threat to the rule of law.

85 Much of the debate rages around adherence to a doctrine of strict precedent. Of course, we need to recall that the Dixon Court did not slavishly favour a static unchanging law. Nonetheless, it accepted that change had to be gradual and principled, based on existing doctrine; certainly, never based on "contemporary values" or the like. However, it is worth noting that some have doubted the purity of the approach of that Court, citing as examples, Boilermakers and the Communist Party cases.

86 In 1995 Sir Gerard Brennan discussed precedent in circumstances where the law was demonstrably uncertain (*Cole v Whitfield*) or unjust (*Mabo*) or where interpretation of the constitutional text could rationally go either way (*Street's case*).

87 Brennan said:

"In such cases as these, where precedent fails to provide a solution, or offers a solution that is inconsistent with basic notions of justice or mocks the substance of a constitutional guarantee, the Court is forced to frame a new precedent that will not exhibit those defects. But that is not an exercise in idiosyncratic policy formulation."

88 As Professor Tony Blackshield has emphasised, there is not always one right answer to a problem.

89 I am reminded of what I heard the Vice President of the International Court of Justice, Judge Christopher Weeramantry, say in Colombo, Sri Lanka in 1997. He said:

"Those who philosophise on the judicial process have pointed out that [it] is not merely a scientific, fact-finding ... mission, where you proceed by pure logic to an answer which is definitely the right answer. Sociologists and philosophers of the judicial process point out that there are probably many

answers to a given problem that can be given within the framework of law and logic. Law and logic by themselves cannot lead you to the necessarily right answer. They may lead you to two, [or more] alternative solutions, and one of the tasks of the judicial function ... is to make a choice between the different alternative results that might equally well be available in terms of logic and the law. ... Cardozo and Holmes, together with many others, have pointed out that there are many factors - sociology, history, custom, the mores of the community - which the judge does use ... in order to make those judgments which would be in the best interests of society.”

90 No one can deny that the 1980s and 1990s wrought dramatic change to Australian society. The acceleration of globalisation has brought significant transformation. Economic rationalism, like it or not, has been a driving force. Fundamental economic restructuring and markedly changed domestic and international marketplaces have emerged. Rapidly changing technologies have spawned many problems and new managerialism has challenged basic ideas of transparency and accountability. In just about every way, including its social composition, Australia is a very different nation than it was in the first half of the 20th century.

91 Rapid change brought many issues to the High Court in a volume greater and often of a starker nature than before. Different views have been expressed as to how the Mason Court faced these challenges. My modest observation is that the court did so with sensitivity and integrity but particularly with the exposition of detailed reasons, there for all to see and scrutinise.

92 Certainly, it may be accepted that the reasoning process and methodology have changed - but there is nothing new in that. The point has been made by Justice Sackville that the necessity for reasons means that the development of the law will always be incremental and logical. Who can deny that the judicial process has become far more transparent over the past 20 years.

93 Compare this with complete and strict legalism, which sometimes tends to conceal rather than reveal the process of judicial reasoning. Brennan and Mason have been very clear on this - that strict legalism can be a mask or cloak for undisclosed and unidentified policy values.

94 Whilst this healthy debate about judicial methodology will continue, of one thing I am quite certain, that no Justice of the Mason Court could ever be accused of subverting or dishonouring his or her judicial oath. In my humble opinion, the Mason Court is something of which we can all be exceedingly proud.

95 Having got that off my chest, it remains only me to thank you for all your attendance today. You do me great honour for which, although undeserved, I am very grateful.

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Use of Expert Assessors in the Hearing of Environmental Cases

QUEENSLAND PLANNING AND ENVIRONMENT COURT ANNUAL CONFERENCE

26 MARCH 2002
BRISBANE

USE OF EXPERT ASSESSORS IN THE HEARING OF ENVIRONMENTAL CASES

While I am aware that the Queensland Planning and Environment Court utilises only judicial personnel - judges - the Chief Judge mentioned that you would be interested in hearing about the involvement of non-judicial personnel in the New South Wales Land and Environment Court.

Before turning to the experience of the Land and Environment Court, it is worth mentioning that other Australian jurisdictions have utilised lay assessors or commissioners, as they are often called. In particular the Environment, Resources and Development Court in South Australia, but also in the Resource Management and Planning Appeal Tribunal in Tasmania and the specialist Planning Division of the Administrative Appeals Tribunal in Victoria. The New South Wales system has now been operating for 22 years, the legislation creating the specialist Land and Environment Court, as a superior court of record, [1] being passed in 1979.

The second reading speech contained the following statements by the Minister:

Additionally, the proposed new court is a somewhat innovative experiment in dispute resolving techniques and it will utilize non-legal experts as technical and conciliation assessors.

Because of the extent and nature of the jurisdictions exercisable by the proposed court, provision is made in clause 36 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 or 3 of the court's jurisdiction. Clause 12 deals with the appointment by the Governor of suitably qualified persons to be conciliation and technical assessors of the court. The assessors have a particularly important function under clause 34 in relation to preliminary conciliation conferences where a number of appeals may be expected to be settled by the conciliation process.

and,

The court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. The court, in consequence, will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit in accordance with clause 38. The court will establish its own body of precedents on major planning issues, precedents sorely sought by councils and the development industry but totally lacking in the now to be abolished local government appeals tribunal.[2]

The *Land and Environment Court Act* (the LEC Act) prescribes the qualifications for appointment as a commissioner. Section 12(2) provides as follows:

A person is qualified to be appointed as a Commissioner if the person has, in the opinion of the Minister:

- (a) special knowledge of and experience in the administration of local government or town planning,
- (b) suitable qualifications and experience in town or country planning or environmental planning,
- (c) special knowledge of and experience in environmental science or matters relating to the protection of the environment and environmental assessment,
- (d) special knowledge of and experience in the law and practice of land valuation,
- (e) suitable qualifications and experience in architecture, engineering, surveying or building

construction,

(f) special knowledge of and experience in the management of natural resources or the administration and management of Crown lands, lands acquired under the *Closer Settlement Acts* and other lands of the Crown, or

(g) suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines.

Appointments are normally made for 7 years and a commissioner may be re-appointed from time to time. A commissioner must devote the whole of her or his time to the duties of office. A commissioner may only be removed from office by the Governor for misbehaviour or incompetence. Commissioners are appointed by the Governor on the advice of the Minister, who is the Attorney-General. One of the commissioners is appointed to be the Senior Commissioner. The remuneration of commissioners is fixed under the *Statutory and Other Offices Remuneration Act 1975*.

Acting commissioners may be appointed for a term not exceeding 12 months. There are presently nine (9) full-time commissioners, although this number may rise because of recommendations presently before the Government.[3]

Commissioners appointed by reason of their knowledge of Aboriginal matters under s 12(2)(g) are usually indigenous persons. They hear certain disputes within Aboriginal Land Councils and also sit (in panels of two) to assist and advise a Judge of the Court in the hearing of land claims arising under the *Aboriginal Land Rights Act 1983*. Presently there are 8 such commissioners. These are not native title cases. Pursuant to s 30 (2B) of the LEC Act, they only hear Aboriginal Land Rights cases while conversely, the other commissioners do not. [4]

Among the recommendations of the Working Party Report was one which would amend s 12 to add to the existing categories of qualifications, special knowledge and experience in heritage or urban design. Further, recommendation 18 was that the Court should have the power to appoint part-time commissioners. The Report recommended that commissioners continue to hear planning and development appeals, both major and minor. The report said that major or complex matters should, where resources permit, be heard by a panel of commissioners or a judge and commissioner(s). Another recommendation was to the effect that commissioners (and judges) should, continue to receive ongoing training in the principles of Ecologically Sustainable Development (ESD) and total catchment management.

The work of the Court is divided into six classes and the jurisdiction of commissioners runs to Classes 1, 2 and 3. [5]

The judges of the Court alone may hear proceedings arising in the remaining classes, namely civil enforcement and judicial review (Class 4), criminal enforcement (Class 5) and appeals from magistrates relating to environmental offences (Class 6).

The present commissioners of the Court include highly qualified architects, planners, lawyers specialising in environmental law, and engineers. Among their qualifications are tertiary studies in environmental studies, science and management. Five commissioners have Masters degrees and one a doctorate.

The jurisdiction of commissioners includes appeals under more than 30 statutes. The principal ones are:

Environmental Planning and Assessment Act 1979 (development appeals including third party appeals)

Encroachment of Buildings Act 1922

Heritage Act 1977

Land Acquisition (Just Terms Compensation) Act 1991 (Compensation for compulsory acquisition of land)

Land Tax Management Act 1956

Local Government Act 1993

Native Vegetation Conservation Act 1997

Protection of the Environment Operations Act 1997 (pollution licence appeals)

Real Property Act 1900 (boundary determinations)

Threatened Species Conservation Act 1995

Valuation of Land Act 1916

Water Act 1912

Conciliation Conferences

The commissioners may conduct conciliation conferences in appropriate cases. These usually take place at an early point of time in the litigation. Invariably, they take place on site in the presence of the parties, their advisors (legal and professional) and any objectors. Some 54 were conducted in the year 2000, with a high percentage of success. One of the recommendations of the Working Party was that such conferences became compulsory in 'minor' matters. If a conciliation does not succeed the parties may, and usually do, agree that the commissioner conduct a hearing in court and adjudicate in the normal way. If a party insists, the hearing will be by another commissioner.

The number of conciliations now exceeds the number of mediations in the court and with a higher settlement rate.

Legal questions

The rules and practice of the court are such that commissioners should not be called upon to determine issues of law. Of course, they must apply the relevant legislation and need to have a good working knowledge of it. However, questions of law are isolated at a very early point of time after the commencement of the litigation and determined by a Judge. If a question of law arises during a hearing by a commissioner, she or he must refer it to a judge for determination. However, the procedures of the court are such as to limit this occurring. Questions of law cannot be raised later than the first call-over except with the leave of a judge.

Appeals from the decisions of commissioners to a judge of the court are limited to errors of law, thus leaving to the commissioner the task of fact finding, a task which they are well trained and fitted.

Commissioners hear the bulk of development appeals before the court. Mostly they sit alone but when it is appropriate, and listing permits, they sit in panels of two (or possibly more). Commissioners may also sit to assist and advise a judge of the court, but not to adjudicate. In Aboriginal land rights appeals the court must comprise a judge and two commissioners (appointed under s 12(2)(g)).

If the Government acts on the recommendations of the Working Party, additional full-time or part-time commissioners will be appointed giving greater flexibility for panel hearings in appropriate cases.

Commissioners are permitted to bring their own expertise to bear on a case. After all, that is the reason they were appointed. Of course, if they have a particular concern, they must observe the rules of procedural fairness and draw the parties' attention to the matter so that it may be dealt with. An example from many years ago was when a commissioner used an observation he had made on a view to determine a case without drawing it to attention. His decision was set aside as denying the parties natural justice.

Subject to appeal confined to an error of law, decisions of commissioners are final and conclusive decisions of the court. Commissioners, indeed Judges, are instructed by the court legislation to hear appeals in class 1 2 and 3 with as little formality and technicality as the circumstances of the case permit. They are not bound by the rules of evidence^[6] and may inform themselves as they see appropriate.^[7]

Like Queensland, the appeals are rehearings (de novo) and the LEC Act requires that the court, in making decisions, has regard to the circumstances of the case and the public interest.

Attributes of lay assessors

My observations of the performance of Land and Environment Court commissioners over many years has been positive. Some of them are very good indeed. All are competent, diligent and perceptive. They are particularly adept at giving judgments ex tempore, which is generally popular with litigants. Their written reasons in reserved decisions are usually comprehensive in examination of the evidence and issues and well reasoned. Relatively few decisions of commissioners are appealed and of those, comparatively few succeed.

The commissioners benefit from a continuing education programme within the court (and assisted by the Judicial Commission of New South Wales). Particular emphasis is placed upon the formulation of

reasons for decisions, the most important part of any judgment so far as the parties are concerned, especially 'why we lost'.

While some might think that lawyers might 'pull the wool' over the eyes of a lay adjudicator, this has not been the general experience. For the very most part commissioners have the respect of the legal profession, partly because they run their courts professionally.

In a way it may be that non lawyer commissioners have an advantage over lawyers. We lawyers sometimes get buried in the legal aspects of a case and give those matters more weight and emphasis than they might deserve. Lay commissioners tend to keep the law in perspective. Commissioners are, for the most part, unlikely to allow the proceedings to be 'hijacked' by legal game playing.

Commissioners with expertise are also less likely to be 'snowed' by expert witnesses who may appear to be glittering on the outside but hollow within. They are unlikely to be misled by experts and are assisted in this regard by being at ease with planning concepts and philosophy.

The success of the commissioners is dependent on a number of factors. One is obviously ensuring the appointment of highly qualified and suitable candidates. Another is that their placement within a court, where their decisions are the decisions of the court, helps ensure that they act judicially, while not being 'mini judges'. There is no doubt that being officers of the court and making binding and conclusive decisions of the court, has given to the commissioners the same much cherished independence as judges necessarily enjoy.

I mentioned before that they are appointed by the Governor on the recommendation of the Attorney-General, not the Minister for Planning or a resource portfolio. While their appointment is for a term of 7 years, they are eligible for re-appointment. In the past 22 years there has only been one occasion when a commissioner seeking re-appointment was not so appointed.

For a government, utilising commissioners in the hearing of appeals in a court is also cheaper than appointing more judges. That said, since the court commenced in 1980, the number of commissioners has remained constant, while the number of judges has doubled to six.

In my view, the use of commissioners in the Land and Environment Court has been a considerable success. Specialist courts and tribunals make a great deal of use of lay assessors. Besides the Land and Environment Court, the Compensation Court and Industrial Relations Commission utilise lay commissioners, as does the NSW Administrative Decisions Tribunal (and its Federal counterpart).

It has been my opinion for some time that a court should be a place which offers litigants a full range of options for dispute resolution, along with traditional adjudication.

Parties should be able to select the dispute resolution option which best suits them, whether it be adjudication by a judge, conciliation, arbitration, mediation, neutral evaluation or whatever. The addition of lay assessors to the adjudicative personnel of a court can enhance the inter-disciplinary expertise of a court and its ability to effectively evaluate the ever expanding role of expert evidence. Judges can especially benefit from their advice and assistance.

THE ROLE OF THE COURTS IN THE EMERGENCE AND DEVELOPMENT OF ENVIRONMENTAL LAW

It has been said that there is hardly any area of existing legal doctrine which does not make some contribution to environmental law. Some of the obvious areas are land law, tort law, constitutional law, administrative law, criminal law, occupational health and safety, compulsory acquisition law, local government law, building and construction law, native title and land rights, together with public international law and conflict of laws. Add to this the veritable flood of specialist environmental legislation, which provides the lifeblood of modern environmental law. None of this is codified.

To understand (and apply) environmental law, it is necessary to be aware of its policy context. This is because context gives environmental law its purpose and explains its form. Understanding the policy background is often helpful in comprehending areas of law, eg. contracts and property law.

Environmental law is concerned with the relations between humans and nature, the most obvious example being pollution law. It is also concerned with the relations between human beings. A number

of disciplines also feed into the development of environmental policy and our responses to environmental problems. These are science, economics, philosophy and politics. These disciplines, sometimes inconsistent, often throw up options or choices - to seek to prevent environmental harm from human activity or to attempt to adapt to it. Environmental laws often straddle both of these choices, eg. Environmental Impact Assessment (EIA) and Greenhouse effect.

Environmental concerns sometimes express themselves in individual cases. Often a court, whether specialist or generalist, will be faced with questions relating to the veracity of scientific claims of environmental impacts or harm, or the reverse.

Whether courts like it or not, this sometimes means facing some of the ethical, strategic or methodological issues in environmental policy. To make it more difficult, these issues are sometimes hidden in statutes which do little to explain or clothe the concepts.

As judges, we are frequently called upon to construe the meaning of words and phrases in environmental legislation, often unaided by much, if any, precedent.

Conventional rules of legal interpretation assist and the trend in construing environmental legislation (indeed all modern statutes) is to take a purposive approach. Seeking to divine the object, scope and purpose often assists and much modern day legislation helps by stating objectives and purposes, sometimes in quite a lengthy fashion.

But with all the assistance which rules of construction and precedents (and the Interpretation Act) may offer, judges will still sometimes be faced with a choice of construction. One construction may favour the environment and one may not. It is in this area that it is my firm view that if the general purpose of a statute is, for example, the achievement of ecological sustainability (see eg. s 1.2.1 *Integrated Planning Act 1997*) and we are told by the Parliament that this purpose is to be advanced by ensuring that decision-making processes apply the precautionary principle and the principle of intergenerational equity (s 1.2.3), then the construction which advances the statutory objective is to be preferred.

It is only by constant application and interpretation, sometimes over many many years, that a body of law evolves on a particular topic. Sometimes, it will be on the meaning and application of a State Policy; on the construction to be given to words in a Plan; to the requirements of the environmental impact assessment process; or on the content of environmental offences, to name but a few at random.

It is fair comment to say that the New South Wales Land and Environment Court (and the Court of Appeal) have contributed substantially to the development of environmental law, both in its substance and procedures. Sometimes the development in the law has had much wider implications for the law generally. I will give two examples, although there are many more.

Privilege against self-incrimination for corporations

In the *Environment Protection Authority v Caltex Refining Co Pty Ltd* [8] the High Court held that the privilege against self-incrimination did not apply to corporations. If it had ever been part of the Common Law of Australia, the majority stated that it no longer was. In so doing, the court reversed the decision of the Court of Criminal Appeal and reinstated my decision at first instance.

The case involved prosecutions under the *Clean Waters Act 1970* for breach of licence conditions relating to discharges of pollutants into the Pacific Ocean. One of the licence conditions required Caltex to monitor and record its discharges of pollutants on a daily basis and provide the results to the EPA. The EPA charges against Caltex were that the licence had been breached on diverse days when the discharge of pollutants exceeded that permitted by the licence.

The prosecutor issued a notice to produce to Caltex to produce its monitoring records in court. It no doubt saw this as a convenient way of proving its case. The Court of Criminal Appeal held that the notice was invalid and that Caltex had the privilege against self-incrimination to resist production of its documents. The High Court reversed this.

At first instance, when the objection was taken by Caltex, I was faced with different lines of authority, but no authority of the High Court or NSW Court of Criminal Appeal which bound the LEC. Within Australia there was obiter by Murphy J in the High Court that corporations did not possess the privilege. There were a number of Federal Court decisions of single judges which either found that

corporations had the privilege or so found for reasons of judicial comity, while doubting the situation. Some interstate courts, following English authority, had also concluded that companies had the privilege.

The accepted position in England was that a corporation may claim the privilege. The principal decision was *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass* [9] in the House of Lords. However, the protection given by the privilege in *Triplex* had come under sustained judicial attack in the Court of Appeal and the House of Lords.[10]

In Canada *Triplex* had been followed although, on occasions, it was distinguished.[11] The New Zealand Court of appeal also held that a corporation held the privilege.[12]

By contrast, the U.S. authorities were to be contrary and the point was first decided by the Supreme Court in *Hale v Henkel* in 1906.[13] It seemed to me that the court's reasoning was persuasive and did not depend upon the US Constitution. It was a matter of general principle. A number of subsequent cases in the US confirmed that corporations did not have the privilege, unlike individuals.

I followed *Hale v Henkel*, since I was free to do so. Ultimately my decision was vindicated by the High Court. The case has had broad implications for criminal investigation of corporate crime and trials, so this is an example of an environmental law case causing a dramatic change in the general law.

Costs in Public Interest Litigation

My next example relates to costs. Over a period of years a number of decisions in the Land and Environment Court held that if a litigant brought proceedings in which he or she legitimately claimed to represent the public interest, this was a factor relevant to be considered on costs. Such a mere categorisation however was not seen, of itself, to be a sufficient circumstance to depart from the usual rule. Something more was needed. In *Oshlack v Richmond River Shire Council* [14] I discussed and applied the earlier cases and attempted to tease out some principles applicable to costs' considerations in public interest litigation. This decision was reversed by the Court of Appeal.[15] However, the High Court, by majority, reversed the Court of Appeal.[16] It held that there was no absolute rule that, in the absence of disentitling conduct, a successful party was to be compensated in costs by the unsuccessful party. It was not an extraneous consideration to take into account the nature of the litigation as I had done. In particular, the fact that the proceedings were brought under open standing provisions was seen as centrally relevant.

Again, as in *EPA v Caltex*, the decision in *Oshlack* has wider implications for the exercise of costs' discretion generally by courts.

Biodiversity Law

In the 1980s through to the early 1990s the Land and Environment Court heard many forest logging cases. These established many principles and made it clear that the Forestry Commission was liable to comply with environmental laws, especially EIA law. One controversial case was *Corkill v Forestry Commission* in 1991.[17]

This case was relevant to whether the particular forestry operations inevitably involved the 'taking or killing' of endangered fauna without a licence and contrary to law. I held that it did and, further, that 'disturb' in the definition of 'take' in the national parks legislation included indirect action such as significant habitat modification which adversely threatened the essential behavioural characteristics of fauna. This decision, upheld on appeal, led to a radical rewrite of legislation, including the enactment of fauna protection legislation and its integration into planning law. Indirectly it led to the resignation of the Premier and the Minister for Environment, but that is another story.

Environmental Impact Assessment

From its early days the court was called upon to scrutinise environmental impact assessment procedures and the validity of EIS's. The examination arises in two circumstances - merit appeals and judicial review. In exercising its jurisdiction, the court has spelt out the purpose and importance of an EIS to the public and decision-makers alike and has stressed that the document is not the decision itself, but part of the process leading to a decision. The meaning of 'likely to significantly affect the environment' (s 112 EPA Act) has been explored and explained.[18] In many instances the court has been assisted by US authorities on a similar legislative scheme.[19] As to the required contents of an

EIS, *Prineas v Forestry Commission* [20] (approved on appeal) set out a number of guidelines:

- An EIS is not required to be perfect. It need not cover every topic nor explore every avenue.
- It must not be superficial, subjective or non-informative.
- It should be comprehensive in its treatment of subject matter, and objective in its approach.
- It should be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out the particular activity.
- It should be written in understandable language.

Ecologically Sustainable Development (ESD)

The court has had to address core ESD principles since 1993. In that time a small body of jurisprudence has been developed, often in a virtual vacuum. Increasing statutory references to the role of core ESD principles has made it necessary for the court to consider, in individual cases, what the principles might mean and how they should be applied by decision-makers. It has not been easy, or without differences of opinion, but that is not surprising. In part it has been an iterative process, sometimes raising more questions than it answered. Nonetheless, it has been a useful development which is leading to clearer legislation and better decision-making.

I will not take time out to discuss the cases, some of which are well known to you. All I want to emphasise is that ESD is a dynamic area which will be pivotal to the development of environmental law. ESD related issues will doubtless confront many jurisdictions in the years to come.

The doctrine of Public Trust

The doctrine of public trust was actively agitated in cases before the courts of NSW in the second half of the 19th century. However, it disappeared from sight until 1973 when it was used to argue that the Commonwealth had a trust or obligation to use a reserve in Canberra as a public park and not for an exceedingly tall and highly visible telecommunications tower, *The Black Mountain Tower* case.[21] Public Trust issues started to be raised before the Land and Environment Court from around 1990. *Willoughby City Council v The Minister* [22] concerned a commercial use in part in a national park in Sydney. I said:

National parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law in order to achieve the objects of the National Parks and Wildlife Act.

See also Kirby P in the Court of Appeal, *Woollahra Municipal Council v The Minister for Environment* [23] and *Packham v The Minister for Environment*. [24]

Public participation and procedural reforms

Another area where decisions of the court have been prolific is public participation, central to environmental law and to many environmental statutes. Other areas in which the court has been active have related to procedural requirements which may sometimes hinder public participation. Open standing provisions cannot succeed in achieving their aim unless procedural barriers, often derived from private law, and from centuries past, are minimised.

Examples include costs, including security for costs; the need for undertakings as to damages on an application for interlocutory relief; discovery and inspection of documents and interrogatories; the limited relevance of the equitable defences of laches, acquiescence and delay, as well, as estoppel against public authorities and simple pleadings to identify issues.

In 1996 the court established a formal Court Users Group and this meets and consults regularly with court personnel to discuss issues relating to the running of the court.

Conclusion

I have said before, but I repeat, a well qualified specialist court with exclusive jurisdiction is best placed to administer environmental law, whether it be merits review, judicial review and civil enforcement or criminal enforcement. Such a court is most likely to develop a coherent set of

consistent principles and contribute to the development of environmental law.

oOo

The Hon. Justice Paul L Stein AM
Sydney
March 2002

- 1 See s 5(1) of the Land and Environment Court Act 1979
- 2 Hansard Parliamentary Debates 21 November 1979
- 3 Report of the Land and Environment Court Working Party, September 2001
- 4 ss 30 (2A) and (2B) LEC Act
- 5 See ss 17, 18 and 19 of the LEC Act
- 6 s 38(1) of the LEC Act
- 7 s 38(2) of the LEC Act
- 8 (1992 - 1993) 178 CLR 477
- 9 [1939] 2 KB 39 5
- 10 See in particular Lord Templeman in *Istel Ltd v Tully* [1993] AC 45 at 53
- 11 eg *R v Amway Corporation* (1989) 56 DLR (4th) 309
- 12 See *New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191
- 13 (1906) 201 US 43
- 14 (1994) 82 LGERA 236
- 15 (1996) 39 NSWLR 622
- 16 (1998) 193 CLR 72
- 17 (1991) 73 LGRA 126 and on appeal (1991) 73 LGRA 247
- 18 *Prineas v Forestry Commission* (1983) 49 LGRA 402 and on appeal (1984) 53 LGRA 160; *Guthega v Minister* (1986) 7 NSWLR 353; *Drummoyne Municipal Council v RTA* (1989) 67 LGRA 155
- 19 Part 5 of the EPA Act closely follows the National Environment Protection Act 1970 of the United States (the NEPA)
- 20 (1983) 49 LGRA 402
- 21 *Kent v Johnson* (1973) 21 FLR 177
- 22 (1992) 78 LGERA 19 at 27.34
- 23 (1991) 23 NSWLR 710
- 24 (1993) 80 LGERA 205

Down Under Perspective of the Environmental Court Project

THE UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION SEMINAR ON THE FINAL REPORT ON
THE ENVIRONMENTAL COURT PROJECT

**DOWN UNDER PERSPECTIVE
OF THE
ENVIRONMENTAL COURT
PROJECT**

27 JUNE 2000
LONDON

**The Hon Justice Paul L Stein AM
Judge
New South Wales Court of Appeal, Sydney**

One of the dictionary meanings of 'antipodes' is diametrically opposed. However, I find myself much in agreement with Professor Malcolm Grant's excellent report on the Environmental Court Project.

Preconditions

The report canvasses two necessary preconditions before any model Environmental Court may be considered. First and foremost, is there such a thing as environmental law? Grant Report 13.4.4 pp 419 - 420 There is no real point in creating a specialist jurisdiction if there is no body of law for it to administer. It is a fair comment to say that in the 1970s environmental law was embryonic. However, in the year 2000 environmental law is highly developed and broadly based, both domestically and internationally. True it is that it overlaps and intersects with other branches of law, in particular administrative law, torts and land law. Nonetheless, this does not detract from environmental law continuing to develop a comprehensive and sometimes novel set of principles, especially if one starts with a wide definition of 'the environment', as I believe we must.

Later, I will suggest the broad brief which I believe should be assigned to a specialist environmental court and what areas should remain with the general courts. Here I differ to some small extent from the preferred option in the Report (model 6). Grant Report 13.14 pp 441 - 451

The next preliminary question is why have a specialist court at all? I have to confess that normally I do not subscribe to the school of rationalist economics. However, in the present context economic efficiency is an important issue. A single specialist jurisdiction embracing all issues environmental (again in their broadest sense) can be a great deal more efficient in its use of scarce resources than a disparate system involving fragmented decision-making. Costs and delay, the twin anathema of any legal system, can be minimised by an efficient single all-embracing specialist court - the concept of a 'one stop shop'. Indeed, this was one of the principal reasons for the establishment of the New South Wales Land and Environment Court (the LEC) more than 20 years ago. Second Reading speech introducing the Land and Environment Court Bill, Hansard, New South Wales Parliamentary Debates, 21 November 1979

There were, of course, other important considerations, which remain relevant today. High amongst these were:

- A separate specialist court would be able to develop a coherent body of environmental law that would be highly unlikely to emanate from the pre-1979 fragmented system, or would take much longer to come about and, even then, lack consistency.
- Having a separate specialist jurisdiction would enable expert lay assessors to be involved in decision-making, especially in merit appeals. In 1979 the then Chief Justice of New South Wales did not accept that it would be

appropriate to have lay assessors within the Supreme Court structure.

- Public participation in environmental decision-making was seen as an ethic to be encouraged by various means, including open standing provisions and limited third party appeals for objectors.
- A greater degree of informality in judicial processing of applications was seen to be desirable. This would be more easily achieved by a separate specialist court than within the general court structure.
- The status of environmental law and the public importance of many environmental issues and decisions would be better handled by a superior court of record, with judges of equivalent status to the Supreme Court, than by a tribunal.

The Government saw a tribunal as not having the status and independence of a court. Moreover, a court possesses much wider powers than a tribunal. Significantly it can perform judicial review subject to appeal to the Court of Appeal. Also of practical importance is a superior court's powers to punish disobedience of its orders by contempt proceedings. The differences between a court and a tribunal are in my view far more than semantic. A diagram of the New South Wales court structure, and where the LEC fits in, is attached.

A word of caution nevertheless needs to be introduced into the debate, one which was well acknowledged by the Report. Grant Report 13.3 pp 414 - 415 New South Wales is not England or Wales. Our respective cultures differ. Our systems and practices vary, as do our laws. You cannot transplant a kangaroo and expect that it will automatically be accepted in the Royal Courts of Justice. That said, we do share many important values and similarities. Foremost among them is the common law and legal system. Our political systems are similar but different, especially since Australia has a federal system of governance. Nonetheless, we have inherited the Westminster system stressing the separation of powers between the executive, the legislature and the judiciary.

All that aside, many of our practical planning and environmental problems are common. It may be observed that eucalyptus trees seem to grow only too well in Europe. My advice, if I can be so bold (bearing in mind that I was born and educated in Britain) is to take the best and most appropriate from overseas jurisdictions and mould a model to meet the real needs of the system of environmental law in England and Wales.

Three important differences need to be accommodated, and I have little doubt that they can.

Planning inspectors

First, the planning inspectorate. I do not pretend to know enough about the issues except to say that I cannot see formidable obstacles in integrating the inspectorate into a separate tier of a new specialist court, as suggested by Grant.

Lay magistrates

Second, New South Wales no longer has any lay magistrates. All magistrates are full-time qualified lawyers. They have jurisdiction to summarily hear environmental prosecutions where the prosecutor seeks the imposition of a fine not exceeding \$22,000. They do not have jurisdiction to hear the most serious of environmental offences. Local councils often use the Local Courts to prosecute breaches of environmental law. One of the advantages is that penalties levied are directed to the councils concerned and not to Consolidated Revenue. A right of appeal is available from a magistrate's decision to the LEC.

Standing

Next is the issue of standing. In 1979 removing the barriers to access was seen as an essential ingredient in constituting a specialist environmental court. Accordingly, public participation and consultation were not merely encouraged in the legislation but open standing provisions were included in all environmental legislation permitting 'any person' to approach the court to seek to enforce any breach or apprehended breach of the law. No leave of the court was necessary. No 'interest' needed to be established.

Two decades of experience have underlined the positive success of open standing provisions. The floodgates of litigation have not been opened. There has been no 'shoal of officious busybodies agitatedly waiting, behind the flood-gates' (see Deane J in *Phelps v Western Mining Corp Ltd*). (1978) 20 ALR 183 at 189 - 190

Indeed, open standing provisions have been extended to all local government and planning and environmental statutes (in excess of 20) and have been adopted in Queensland, South Australia and Tasmania. Open standing provisions have, of course, been available in the consumer protection area since 1974 and the High Court of Australia recently affirmed the constitutionality of these provisions in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*. (2000) 169 ALR 616 This was a case brought under the *Trade Practices Act* (Cth) claiming that a prospectus for a motorway was misleading and deceptive in its claims

about anticipated traffic volumes. It had been contended that the open standing provision was unconstitutional. The court said that 'any other person' in the legislation should not be read down but that it meant what it said. The legislation was protective of the public interest and Parliament was entitled to modify the common law principles of the standing of private citizens to enforce public rights in their own names and not on the relation of the Attorney General.

In New South Wales however, the Parliament has gone further. The *Protection of the Environment Operations Act 1997* (the *PEO Act*) s 253 provides that 'any person' may bring proceedings in the LEC to restrain a breach or threatened breach of any Act if the breach is causing or is likely to cause harm to the environment. No leave of the court is required. The only requirement is that the Environment Protection Authority (the EPA) is required to be served with the application and may become a party to the proceedings. This means that there is open standing to approach the court for relief where there is alleged to be a breach of any legislation eg. regarding forests, mining, water resources, fishing etc, providing there is harm or likely harm to the environment.

Moreover, 'any person' may bring *criminal proceedings* for a breach of pollution legislation if leave is granted by the LEC. s 219 of the *Protection of the Environment Operations Act 1997* The grant of leave is subject to the EPA deciding not to take action itself, the EPA being notified of the proceedings and the proceedings not being an abuse of process. Finally, the particulars of the offence must disclose, without any hearing of the evidence, a prima facie case.

The implications of the open standing provisions were underlined by Chief Justice Street in *F Hannan Pty Ltd v Elcom*. (1985) 66 LGRA 306 at 313 He said that the provision (s 123) made it clear that the task of the Court was to administer social justice and went beyond administering justice *inter partes*. He continued that the open standing provision:

... totally removes the conventional requirement that relief is normally only granted at the wish of the person having a sufficient interest in the matters sought to be litigated. It is open to *any person* to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court. The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all the factors falling within the purview of the dispute.

If nothing else, I would urge the UK to consider liberalising standing in environmental cases, not only to grant standing to mainstream environmental groups and NGOs, but to all citizens. This is especially important given the rights and responsibilities flowing from the *Aarhus Convention* and the *Human Rights Act 1998*.

Thus far, only relatively few such proceedings (under ss 219 and 253 of the *PEO Act* and its predecessor) have been brought. Nonetheless, the existence of the remedies are significant because they help to ensure that public authorities and prosecuting agencies do their duty. They keep the prosecutor's eyes on the ball. I should mention an aspect of criminal prosecutions of environmental offences which may surprise some in Britain. The EPA frequently prosecutes government departments and agencies, as well as local government councils, for environmental offences. For example, the LEC has imposed significant penalties on the Water Board, the State Rail Authority, the Urban Transit Authority, the Forestry Commission and the Waste Recycling Authority, to name a few.

Incidentally, I should correct a small error in the Final Report. It states that the criminal jurisdiction of the LEC is rarely invoked. Grant Report p 458 That is incorrect. In 1998 there were 150 prosecutions in the court and 109 in 1999. Disposals of prosecutions in those years were respectively 175 and 132.

Other barriers to access

In a speech in 1989 a former member of our High Court, Toohey J, drew attention to the need for procedural reform. He said that there was no point in opening the doors of the courts, by means of liberalised standing, if litigants could not afford to enter or were scared off by the devastating consequences for an individual or NGO in having to pay the costs of the successful party. This was especially so if the respondent was a multi-national corporation or government with, by comparison, unlimited resources.

From 1988 this difficulty had been recognised in a number of decisions by the LEC. By 1994 it was established that in genuine public interest litigation, costs should not automatically follow the event and the costs discretion extended to considering the quality of the applicant's case and the public interest in the subject matter. By majority, the High Court of Australia upheld the principle that the nature of public interest litigation was a relevant factor in exercising the costs discretion, *Oshlack v Richmond River Council*. (1998) 193 CLR 72; (at first instance (1994) 82 LGERA 236)

There are, of course, other barriers to environmental litigation. I will refer briefly to some where the LEC has taken a positive approach to encouraging access to justice.

Security as to costs

The Court has taken a fairly hard line on applications for security for costs, emphasising the importance of the public interest nature of the litigation. see, for example, Pearlman J in *Byron Shire Businesses for the Future Inc v Byron Shire Council* (1994) 83 LGERA 59 (the Club Med case) This has been supported by some statements by the Court of Appeal. see Priestley JA in *Brown v EPA* (Court of Appeal, 1 April 1993, unreported) and Kirby P in *Maritime Services Board v Citizens Airport Environment Association Inc* (1992) 83 LGERA 107 at 111

Undertakings as to damages

From the mid 1980s the need for an applicant for an interim injunction to give to the court an undertaking as to damages has been relaxed by the LEC. If an applicant declined or was unable to give an undertaking, this was seen as but one factor to be taken into account in the balance of convenience and weighed in the exercise of the discretion to grant or withhold relief, *Ross v State Rail Authority*. (1987) 70 LGRA 91. In *Phelps v Western Mining Corp Ltd* Deane J said that '[T]here is no merit in the erection of a curial ambush of shibboleths in which even a legislative intent evinced by the words as clear as those used in s 80(1)(c) of the [Trade Practices] Act would lie entrapped'. See also Bowen CJ in *CBA v Insurance Brokers Association of Australia* (1977) 16 ALR 161

Pleadings

Brief points of claim and points of defence only are required. It is wonderful how the ingenuity of lawyers can lead to obfuscation in pleadings. Designed to identify and narrow issues, pleadings sometimes have the opposite effect, and lead to unnecessary technicality, extravagance, increased costs and delay and on occasions sheer 'torture'. *Illich v Illich* [1971] 1 NSWLR 272

Discovery and inspection and interrogatories

Most public interest environmental cases require a more open access to documents than perhaps presently pertains. The issue was acknowledged by the LEC from its early days and the court has steadfastly resisted secrecy. Today, sterile arguments about privilege, commercial-in-confidence and Crown privilege are rare. Parties routinely produce documents without demur. The backing of freedom of information legislation *Freedom of Information Act* (NSW) 1989 assists but the culture of secrecy has all but gone. A recent example is to be found in a decision of Lloyd J in *Transport Action Group Against Motorways v Roads and Traffic Authority* (1998) 103 LGERA 338 where the authority claimed public interest immunity in producing tender documents. His Honour found that it was fundamental to the public interest that parties to litigation have access to documents. This was particularly so where a party was seeking to enforce a statutory obligation in furtherance of the public interest rather than a private right. The claim of public interest immunity was rejected. Put simply, it is necessary to overcome the culture of bureaucratic secrecy.

Ouster clauses

The LEC has continued the tradition of judicial scepticism of privative clauses with a strict approach to their application. This is exemplified by litigation under the *Aboriginal Land Rights Act* 1983. A series of LEC decisions lead the Government to all but abandon the use of preclusive ministerial certificates which had effectively denied Aboriginal land councils procedural fairness and avoided merit appeals on land claims. *Worimi Local Aboriginal Land Council v The Minister* (1991) 72 LGRA 149

Laches, acquiescence and delay and estoppel

The LEC has acknowledged that these equitable defences have only limited relevance to Public Law remedies, especially in the context of liberalised standing.

Wide discretion

The LEC has been confirmed to have a very wide discretion to grant or withhold relief and to mould its orders to best suit the case before it. *Warringah Shire Council v Sedevic* (1987) 10 NSWLR 335 It will look beyond the parties to the public interest. *Sedevic* at 340 (Kirby P) The Court of Appeal accepted the public interest that lies in the equal compliance with law by all, including the rich and powerful.

Time standards

The LEC was one of the first courts in Australia to introduce time standards for disposal of cases and for reserved judgments. It was also one of the first courts to form a Court Users Group to liaise with the court.

Alternative Dispute Resolution

From the court's inception, alternatives to adjudication have been emphasised. Conciliation by technical assessors was mandated by the legislation. Originally the process was compulsory but it is fair to say that this led to abuse. However, conciliation as a voluntary option is now quite popular in merit planning appeals, particularly for simple or more minor appeals. Conciliation conferences are often held on-site and have a consistent successful resolution rate of around 85%. Even if a conciliation does not succeed, issues are reduced and defined thus saving costs and court time.

Mediation in the LEC began in 1991, and was the first court annexed mediation scheme in Australia. The rate of successful mediations, carried out by highly qualified and experienced Registrars, is consistently around 70%. They usually take between one quarter and one third of the time of a hearing, thus the saving in money and court time is obvious. Issues Conferences in all but criminal proceedings are also undertaken as a case management tool.

The court legislation also provides for independent expert appraisal and neutral evaluation as further alternative dispute resolution options.

I have said before that my concept of a 21st century court is to provide citizens with a forum for dispute resolution which should not be confined to traditional judicial adjudication. When a litigant comes through the door of the court she or he should be informed of the alternative mechanisms available for dispute resolution. These should be provided by the court and not 'out-sourced'. Litigants should be entitled to choose the means best suited to the particular nature and subject matter of the suit.

Legal Aid

This is, of course, crucial to access to the courts but obviously depends upon government policy. In New South Wales the legal aid tap for environmental cases has been turned on and off with some regularity. Today it is barely dripping. However, the situation has been greatly aided by the existence of Environmental Defenders Offices. For a history of the EDO see the collection of articles and contributions in Special Anniversary Edition - 10 Years of EDO (1996) 13(3) *Environmental Planning Law Journal* 149 - 234 and see the discussion in the Grant Report 5.21 pp 232 - 233

Exclusive jurisdiction

The court has exclusive jurisdiction to determine proceedings under various statutes, mostly concerning environmental law in the broad sense but also including much land law. It has ancillary and pendant jurisdiction but this does not extend to determining common law claims for damages, for example in trespass or negligence. *National Parks and Wildlife Service v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 The court's jurisdiction is divided into 6 classes.

Class 1 comprises merit appeals in planning, pollution, heritage, threatened species and contaminated lands, and appeals arising under a variety of other environmental statutes.

Class 2 includes many local government and related appeals but also appeals arising under a variety of other enactments. For example catchment management, strata title, swimming pools and noxious weeds.

Class 3 includes assessment of compensation for compulsory land acquisition, land tax appeals, rating appeals, property boundary determination, encroachment of buildings, water appeals, fisheries management, Aboriginal land rights, surveyors etc.

In each of these three classes the Court may be constituted by a lay commissioner, or a panel of them, or a judge sitting with a commissioner(s). In Aboriginal land rights matters a judge is assisted by two Aboriginal assessors.

Class 4 concerns civil enforcement (by the granting of declarations and injunctions, including mandatory orders) and judicial review. This jurisdiction arises under some 21 specified planning and environmental statutes. However, the jurisdiction is potentially much wider because s 253 of the *PEO Act* extends jurisdiction to the breach of *any* Act which is likely to cause harm to the environment.

Civil enforcement and judicial review are arguably the most important functions of the court. It is the principal jurisdiction in which the law is developed. It would be a mistake, I hesitate to say, if the proposed specialist court's civil jurisdiction was triggered only by a transfer from the High Court. Grant Report 13.14.8 p 446

Class 5 is the summary criminal jurisdiction and includes all pollution prosecutions (water, air, noise and land), ozone pollution, waste disposal, transport of dangerous goods, heritage, planning, contaminated land, clearance of native vegetation, uranium mining, local government, fisheries, rivers and foreshores, national parks and wildlife and threatened species, marine pollution (mainly oil) and certain other offences.

Generally speaking the maximum penalties which can be imposed by the court are \$1 million for a corporation and \$250,000 and/or 7 years imprisonment for an individual. In such prosecutions, the general criminal law is

applied. However, given the nature of environmental offences, some distinct features have already emerged. These are particularly evident in strict liability offences.

Class 6 deals with appeals from Local Courts in summary criminal matters.

I regard the summary criminal jurisdiction as a significant aspect of the LEC's jurisdiction. It should be closely evaluated for inclusion in the British model and the recommendation in the Grant Report ought, I believe, be reconsidered. Grant Report 13.14.6 p 445 Criminal enforcement complements the civil enforcement mechanism and also allows pollution law to develop some distinct and relevant criminal law principles.

Commissions of Inquiry

You will have noticed from this jurisdictional review that the LEC does not have jurisdiction to conduct Environmental Commissions of Inquiry. These Commissions of Inquiry have always been separate in New South Wales. There are competing arguments as to whether incorporation of Commissioners of Inquiry, as a division of the court, would be a good idea. On the one hand, the Commissioners make only recommendations to the Government, which some fear would have the capacity to embroil the court in policy and politics. On the other hand, the Commissioners have a great deal of expertise to bring to the court and their membership would diffuse arguments that they are not independent of government.

Torts

The LEC does not have any jurisdiction in tort (or contract for that matter). As a result, it cannot hear claims for damages for negligence, nuisance or trespass, even by virtue of its ancillary or pendant jurisdiction. Toxic tort remedies are therefore not available in the court. My view of this is that it is not a bad thing. Lengthy common law trials have the capacity to distract the court from its Public Law tasks and may detrimentally affect the length of delays in the court, which have always been kept to a minimum. Personally, I would have no objections to a judge of the LEC being assigned to the Supreme Court to hear, for example, toxic tort cases.

Third party appeals

Third party merit appeals in the LEC are limited to matters in which projects or developments require environmental impact statements. These are usually developments with the potential to pollute or otherwise harm the environment and its amenity. This is the filter. It seems to me that it could be unwieldy to give third party appeal rights to every planning or environmental decision. Provided residents who object can be accommodated by the court hearing their concerns, without them formally becoming a party, this half-way house goes some distance to satisfying resident objections. This in fact presently occurs in the LEC. *Double Bay Marina Pty Ltd v Woollahra Municipal Council* (1985) 54 LGRA 313 Full third party appeal rights, without limitation or filter, have the capacity to overburden the system and introduce unacceptable delays and costs.

A current review

You will be interested to hear that recently the New South Wales Attorney General set up a Working Party to review planning laws on development applications and the role of the court in reviewing them on appeal. This review has been brought about by complaints by some local government councils that their decisions were being reversed by a single unelected commissioner of the court or that the court did not pay sufficient regard to local community views. The Terms of Reference are annexed. The chair of the Working Party is the Hon Jerrold Cripps QC, a former Chief Judge of the LEC and a retired judge of the Court of Appeal. The Working Party is to be assisted by a reference group of so-called 'experts' which, for some inexplicable reason, includes me. In announcing the Working Party the Attorney General said:
I believe the Land and Environment Court objectively and independently decides matters before it, according to the law and the evidence. Some criticisms of the court have been ill-informed and misconceived. However, some reform may be appropriate.

The major focus of the working party will be to review the legislation underpinning the Court and the mechanisms for reviewing Local Council decisions on development applications.

I see the inquiry as a means of enhancing the role of the LEC and of perhaps pointing to the need to amend planning laws and policies, within which framework the court must work. Amendments may assist in providing the court with greater flexibility to make decisions in merit appeals which reflect the public interest.

The development of environmental law

It is a critical adjunct of a specialist environmental court that it have the capacity to develop the principles of environmental law and also a capacity for procedural innovation. In the past the LEC has demonstrated that it has those capacities.

Our environment poses endless challenges. Most of our environmental laws are directed towards the goal of

environmental protection and enhancement, rather than its degradation. An environmental ethic therefore permeates the law. Specialist judges and commissioners approach the construction of legislation and assessment of factual situations (often premised on the basis of prophecy) with that philosophy in mind.

Over the last two decades the court has made many contributions to the development of environmental law, indeed to the law in general. The Grant Report provides some illustrations. They include procedural and substantive law. Let me mention some of the areas where the court has contributed to the jurisprudence, often almost from scratch. They are the protection of biodiversity of native fauna and flora, the enhancement of public participation in planning and environmental decision-making, the scrutiny of environmental impact statements and public projects, the re-emergence of the doctrine of public trust and the principles of ecologically sustainable development (ESD).

I will return to ESD in a moment but I want to mention two procedural reforms (emanating from the court) which have had general law application and impact. One has already been mentioned - that costs should not automatically follow the event of litigation where the public interest is involved in the proceedings. The second is the holding by the court that a corporation is not entitled to the privilege against self incrimination in the production of documents. This decision was against the weight of authority, including British, albeit authorities not directly binding. The High Court of Australia upheld the ruling, holding by majority that Caltex was not entitled to the privilege against self incrimination in facing prosecutions under the *Clean Waters Act 1970*. *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 The court declared that the privilege against self incrimination did not extend to corporations and was not part of the common law of Australia. This decision has had a significant impact on investigations into, and trials of, white collar crime.

Reverting to ESD, it is patent that the development and application of the Rio principles and Agenda 21 are crucial to the future protection of the environment, nationally and internationally. All nine Australian jurisdictions have statutes which incorporate core ESD principles. New South Wales alone has in excess of 30 such statutes. Since 1993 the LEC has on occasions been called upon to construe, interpret and apply ESD principles in practical situations. I have rehearsed some of these instances in relation to the precautionary principle in a recent article in the *Environmental Law Review*. Stein, 'A cautious application of the precautionary principle' (2000) 2(1) *Environmental Law Review* 1

I mention some recent decisions in the LEC which continue the process of interpreting and applying ESD. In *Carstens v Pittwater Council* [1999] NSWLEC 249 Lloyd J held that the encouragement of ESD referred to in the objectives of the *Environmental Planning and Assessment Act 1979* meant that ESD principles are mandatory considerations to be applied when assessing a development application even though they do not appear in the statutory list of considerations to be taken into account. In addition, ESD principles are encompassed within 'the public interest', which is specifically required to be considered.

Another judge of the court, Cowdroy J, emphasised the fundamental importance of public participation in the plan-making process in *John Brown Lenton v The Minister*. (1999) 106 LGERA 150 His Honour said that:

... [P]ublic participation is an important objective of the Act and should be regarded as crucial to the transparency and fairness of the plan making process (see *Scurr and Ors v Brisbane City Council and Anor* (1973) 133 CLR 242 at 252). In *Carstens v Pittwater Council* [1999] NSWLEC 249 at [20], Lloyd J drew attention to the need to interpret statutes by reference to their objectives. In the instant case the relevant objective is s 5(c) which states:-

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

Principle 10 of the Rio Declaration and Agenda 21 of the United Nations Conference on Environment and Development 1992 acknowledges the desirability of public participation in management of the environment. The Rio Declaration is not legally binding in Australia but it serves as a reminder that the provisions of Pt 3 of the Act ensuring public participation in the making of a local environmental plan should be strictly observed.

In *Sustainable Fishing and Tourism Inc v Minister*, (2000) 106 LGERA 322. For a discussion of the implications see Hurrell and Jardim, 'Part 5 Nets Another Big Fish' (2000) 5(4) *Local Government Law Journal* 230 Talbot J held that the Minister was required to obtain an environmental impact statement (EIS) before granting a commercial fishing licence. This was because the Minister was bound to consider the effect of the activity on threatened species. Since the activity was likely to significantly affect the environment of threatened species and their habitats, an EIS was required.

In *Laura D'Amato, Filipowski v Fratelli D'Amato S.r.l. and Ors* [2000] NSWLEC 50 16 March 2000 Talbot J fined the shipping line responsible for a large oil spill in Sydney Harbour in 1999 the sum of \$510,000, 50% of the maximum and ordered it to pay clean-up costs of \$4.5 million together with \$400,000 legal costs. The Chief Officer was also fined \$110,000.

The South Australian specialist environmental court The Environment Resources and Development Court of

South Australia has also contributed to the development of ESD, in particular to the understanding of the precautionary principle. In *Conservation Council of SA Inc v Development Assessment Commission* [1999] SA ERDC 86 the court found that a proposal for tuna farming in Spencer Gulf contravened the precautionary principle, which had to be taken into account by the decision-maker. The court examined the difficult question of who bears the onus of proof under the principle.

It held that the proponent had the onus of satisfying the court that the development would be carried out in an ecologically sustainable fashion. That requirement arose whether or not the appellant had established a threat of serious or irreversible damage to the environment. However, the appellant would need to show that there was a prospect of serious or irreversible damage to the environment. If that is shown, the burden of proof shifts to the proponent to demonstrate that the measures to be taken will avoid serious or irreversible damage and that the risk-weighted consequences, when assessed, do not suggest that serious or irreversible environmental damage will be sustained.

The particular problem raised was the importation of pilchards for feed. There was evidence that the method of feeding had led to entrapment of marine mammals and seals and the predatory killing of native and migratory birds. There was also evidence of scientific concern that local pilchards were becoming infected by exotic disease entering the food chain. While the Australian Quarantine Service had assessed that there was no risk, the court did not accept that the risk analysis process was consistent with the precautionary principle. It was critical of the World Trade Organisation process as being 'scientifically-based'. The Court said:

It assumes that science is able to identify risks, and concludes that where there is no evidence of a risk, there is no risk. The evidence is that there is a significant lack of scientific information on disease in non-salmonid marine finfish, and the susceptibility of Australia's native marine species to exotic pathogens.

...

There is some risk in using imported pilchards as feed. It might be a manageable risk but nothing was suggested in this regard. There is ongoing research. We do not know the full scientific consequences of using imported pilchards as feed.

Conclusion

The Grant Report argues persuasively for a separate specialist environmental court. Some may see this as a bold recommendation. However, England and Wales have had a tradition of specialist jurisdictions, including in relatively recent times the Employment Appeals Tribunal. New South Wales has also had a similar experience. We have almost always had a specialist industrial court or tribunal and a specialist court hearing workers' compensation claims. We now have an Administrative Decisions Tribunal hearing administrative appeals. Interestingly, in the 19th century, New South Wales had a specialist Land Court.

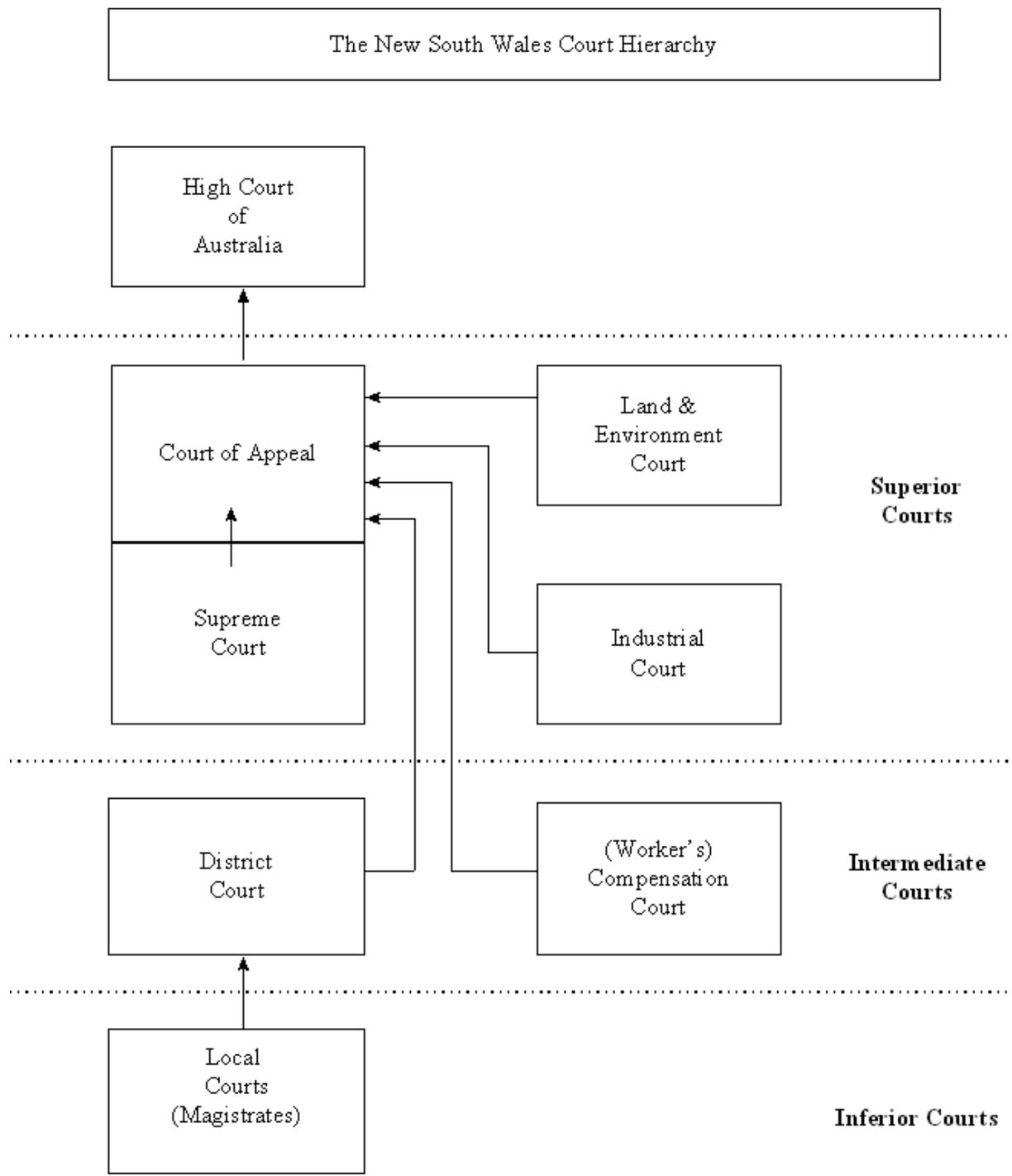
One matter is I think of critical importance. Judicial personnel appointed to an environmental court, including lay commissioners, need to be of high quality. The judges, besides being good lawyers, need to have an empathy for and understanding of environmental law. The court also requires strong leadership, especially in its early days and it needs more than a sprinkling of judicial creativity.

Above all, for the concept to be achieved, it will require community enthusiasm, judicial support and political will. I hope it gets all three.

OoO

15 June 2000
The Hon Justice Paul L Stein AM
Judge, NSW Court of Appeal, Sydney

The NSW court hierarchy looks something like this:



Terms of Reference

That the Working Party examine the legislative basis upon which decisions in relation to development applications are currently reviewed by the Land and Environment Court in accordance with the provisions of the Land and Environment Court Act 1979 and the Environmental Planning and Assessment Act 1979, including but not limited to:

- (i) the most appropriate manner in which to review the decisions of councils in relation to development applications;
- (ii) the constitution of the Land and Environment Court in reviewing the decisions of councils, including whether the Court should be constituted by more than one judge or Commissioner or by Commissioners possessing specified qualifications or expertise;
- (iii) whether the Court should have regard to any additional matters in reviewing a council decision in relation to a development application;

(iv) ways in which to streamline the manner in which development applications are processed by councils and the Department of Urban Affairs and Planning so as to reduce the incidence of such reviews; and

(v) whether greater reliance could be placed upon alternative dispute resolution mechanisms in resolving disputes in relation to development applications.

In conducting its review, the Working Party is to call for written submissions from all interested parties, and may call upon stakeholders to attend meetings of the Working Party, as appropriate, in the course of considering their submissions.

Are Decision-makers Too Cautious With The Precautionary Principle?

The Hon. Justice Paul L Stein AM
Judge, NSW Court of Appeal
Supreme Court of New South Wales, Sydney
Delivered at the
Land and Environment Court of New South Wales Annual Conference
Peppers Hydro Majestic, Medlow Bath, Blue Mountains
14 & 15 October 1999

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Precaution, (1603) a measure taken beforehand to ward off an evil.
Shorter Oxford English Dictionary

Overview

Over the last decade the principles of ecologically sustainable development (ESD) have permeated inexorably into the interstices of environmental law. Many of the principles, particularly the precautionary principle, have become part and parcel of international, national and domestic laws and custom.

The core principles of ESD have come into regular use by decision-makers at a federal, state and local government level. This is partly because of governmental policies and practices and in part because of statute law, the highest form of expression of government policy. The legislation of all nine governments in Australia contain numerous references to ESD and its core principles, see the appendix to this paper. There are more Acts which include ESD in New South Wales than anywhere

else in Australia. Most important for our purposes are those now contained in the objects of the *Environmental Planning and Assessment Act 1979* and the *Protection of the Environment Administration Act 1991*, as well as the new federal environmental legislation.

What may be noted, however, is that the inclusion of the principles in Australian legislation has been largely confined to objectives of statutes or agencies without any real guidance to decision-makers as to whether and how to apply the core principles or what weight to give them. Moreover, some of the principles contain vague statements, some might call them aspirations, as well as ambiguities, inconsistencies and uncertainties. Difficulties of interpretation and application are manifest. There is even discussion on whether the principles are merely guiding or whether they are also operational. In these circumstances, who can blame the courts for proceeding, like the precautionary principle, with a degree of caution. Nonetheless, my thesis is that there is the opportunity, if not the obligation, in the absence of clear legislative guidance, to apply the common law and assist in the development and fleshing out of the principles. Our task is to turn soft law into hard law. This is an opportunity to be bold spirits rather than timorous souls and provide a lead for the common law world. It will make a contribution to the ongoing development of environmental law.

Introduction

The origins of the precautionary principle

The origin of the precautionary principle lies in the German concept of *Vorsorgeprinzip*, literally translated as meaning the 'foresight principle' or 'precautionary principle'. The principle first appeared in the mid 1960's when environmental issues were becoming a major political theme in Germany. At around the same time the hypothesis of 'implementation shortfalls' emerged. The hypothesis identified that there existed a clear discrepancy between legal provisions and the goals of environmental policy, on the one hand, and its practical application on the other. The precautionary principle was originally used as a yardstick by which to judge political decisions. By the early 1970's the principle could be found in domestic West German legislation in respect of environmental policies aimed at combating the problems of global warming, acid rain and maritime pollution.(1)

The precautionary principle has played an instrumental role in the policy reform of marine pollution. Despite regulation of both land based pollution and ocean dumping by regional bodies, the quality of the North Sea was seen to be continuing to decline. The German government, when calling the first North Sea meeting in 1984, had as a negotiating aim, the inclusion of the precautionary principle, *vorsorgeprinzip*.

The earliest international agreement which explicitly refers to the precautionary principle is the Ministerial Declaration of the Second International Conference on the Protection of the North Sea, issued in London in November 1987. It was accepted that:

... in order to protect the North Sea from possibly damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolutely clear scientific evidence.(2)

The precautionary principle has since been widely used in international environmental law and has been applied to areas such as climate change, hazardous waste and ozone layer depletion, biodiversity, fisheries management and general environmental management. Many treaties, some of which are extracted below, illustrate the various circumstances in which the precautionary principle has been utilised.

The precautionary principle received strong endorsement in the Rio Declaration on Environment and Development (adopted in 1992 by the United Nations Conference on Environment and Development [UNCED] in Rio de Janeiro). The Rio Declaration contains 27 principles to guide the International Community in the promotion of sustainable development.

Principle 15 states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The revision to the Treaty of Rome as agreed at Maastricht states:

The Community policy on the environment *shall* be based on the precautionary principle and on the principle that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.(3) [Emphasis added]

Article 3.3 of the 1992 U.N. Framework Convention on Climate Change states:

The parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost effective so as to ensure global benefits at the lowest possible cost.

Agenda 21, agreed to at the 1992 Rio conference, recommends in relation to radioactive waste that States should not:

... promote or allow the storage or disposal of high-level, intermediate level and low-level radioactive waste near the marine environment unless they determine that scientific evidence, consistent with the internationally agreed principles and guidelines, shows that such storage or disposal poses no unacceptable risk to people and the marine environment or does not interfere with other legitimate uses of the sea, making, in the process of consideration, appropriate use of the concept of the precautionary approach.

Agenda 21 on the Protection of the Oceans expressly requires:

new approaches to marine and coastal area management and development at the national, subregional, regional and global levels, approaches that are integrated in content and are precautionary and anticipatory in ambit.

The June 1990 Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer states:

[The Parties to this Protocol are] determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations and bearing in mind the developmental needs of developing countries.

The 1992 OSPAR Convention (Convention for the Protection of the Marine Environment of the North East Atlantic) provides in Article 2 that Contracting Parties *shall* apply:

... the precautionary principle, by virtue of which preventative measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and effects.

The Convention on Biological Diversity signed at the United Nations Conference on Environment and Development in 1992 notes in its preamble:

... that where there is a threat of significant reduction or loss of biological diversity, lack

of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat.

These are but a few of the international instruments which have incorporated the precautionary principle. Australia has ratified almost all of these environmental treaties and conventions which are relevant to our part of the world.

Defining the precautionary principle

The Intergovernmental Agreement on the Environment (the IGAE) endorses the precautionary principle in the following terms:

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- (ii) an assessment of the risk-weighted consequences of various options (4) [Emphasis added]

Defining the application of the precautionary principle with any degree of precision has proved problematic because of the rapidly evolving nature of the concept. (5) While the precautionary principle has proved to be useful in reformulating the way in which the law structures decision-making processes, 'ambiguity in the conceptualisation of the precautionary principle at the policy level has led to it being given a wide range of divergent meanings, providing a fundamental barrier to attempts at implementation'.(6)

The precautionary principle has been described as a decision-making approach which ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage.(7) Briefly stated, the precautionary principle, both in its conceptual core and its practical implications, is preventative. The principle provides the philosophical authority to make decisions in the face of uncertainty. In this way, it is symbolic of the need for change in human behaviour towards the ecological sustainability of the environment.

It is accepted that the precautionary principle is a guiding principle. As I mention later, the principle also has operational effect. The purpose of the principle is to 'encourage, perhaps even oblige, decision-makers to consider the likely harmful effects of their activities on the environment before they pursue those activities'. (8) The concept is linked to ideas of acceptable risk in attempting to deal with scientific uncertainty. It challenges scientific understanding and advocates caution in dealing with risk. Proponents of the precautionary principle acknowledge that the principle does contain some ambiguities and uncertainties but strongly maintain that such problems do not discredit the principle. An understanding of the principle is more easily facilitated by considering the conceptual elements that form the basis of the concept.

The threshold - threats of serious or irreversible environmental damage

The existence of threats of irreversible environmental damage is the threshold which must be satisfied before the precautionary principle is deemed appropriate for use in decision-making. Not only do uncertainties associated with scientific investigation exist, but there are also different disciplinary approaches adopted by scientists in assessing evidence and the possibility of environmental damage. Science does not present a unified view of the consequences of a particular action. The precautionary principle takes into account the conflict within science and the social construction of acceptable risk.

According to Farrier, the precautionary principle is 'triggered by proof of threats falling short of the degree of probability currently *recognised by science* as constituting proof'.(9) [Emphasis added] However, the principle fails to offer any clear guidance in respect of what degree of proof is required before the principle becomes operational. In this respect, the application of the concept becomes

somewhat problematic. However, it is submitted that in utilising the principle *in a legal setting*, the civil standard of proof on the balance of probabilities is apposite.

Lack of full scientific certainty

No scientific method will be able to ask all the right questions about what we do to the environment, let alone find the answers. Science does not give absolute proof; it is intrinsically 'soft' and its results are always open to interpretation ... Rather than commit society to a blind faith that scientific knowledge can and does address all uncertainties, mature and rational policy should recognise the inherent limitations of scientific knowledge. A greener science would make these limitations explicit, and so promote more critical public debate about the interventions in nature that are made in the name of economic necessity. (10)

The ongoing dilemma of decision-makers, in both the public and private sector, is how environmental uncertainty should be addressed in decision-making. Lack of full scientific certainty will always exist because full scientific certainty is neither achievable nor provable. 'Science and the data on which it is built contains inherent uncertainties which may be ignored or misunderstood' by decision-makers.(11) The precautionary principle highlights the fundamental fact that the interpretation of environmental uncertainties is not only a scientific issue but also has far reaching social and political implications requiring further debate. The precautionary principle is a step forward in the development of an environmental framework within which 'soundly based scientific data can be integrated with the political, economic and social processes and considerations upon which policy must ultimately rest'. (12)

Measures to prevent environmental degradation

The precautionary principle offers little guidance on precisely what measures ought to be taken when posed with a threat of serious or irreversible environmental damage. An important question confronting decision-makers is what type of measures does the precautionary principle advocate? At what point in time and at what stage of a process should these measures be taken? Is the principle aimed at the beginning stages of a development activity or is it aimed at a continuing process of actions?

Not to be used as a reason for postponing measures

'Once the threshold test has been satisfied (ie. proof of threats of serious or irreversible environmental damage falling short of scientific certainty) the burden of proof in relation to scientific questions falls on those wishing to engage in the activity. If the suggested threat cannot be disproved by evidence advanced by the proponent, then it is a factor to be taken into account in the cost benefit calculus'.(13)

The threat of serious or irreversible environmental harm is clearly an important factor to be taken into account but there is no guidance (in the principle) as to the weight to be given to such a factor in reaching a final decision. Neither does the precautionary principle provide any guidance about how decision-makers should approach conflict between environmental and economic values, ie. how to balance them. Farrier identifies that 'even if the proponent fails to undermine the prima facie case in favour of a threat of serious or irreversible environmental damage, it apparently remains open to the decision-maker to decide that the activity should be allowed to go ahead because of economic imperative'.(14) Once the effect of an activity is scientifically proved, the precautionary principle does not appear to mandate the decision.

The precautionary principle and ecologically sustainable development

The precautionary principle needs to be considered in the broader context of the wider principles and philosophies forming the concept of ecologically sustainable development (ESD).(15) It is accepted that ESD should be treated as a complete package where no one principle should dominate over any other.(16) This requires that the precautionary principle be applied with consideration of other principles forming part of ESD.

The modern manifestation of ESD stems from the 1987 report of the World Commission of Environment and Development (The Brundtland Report)(17) where development was defined as

sustainable:

... if it meets the needs of the present without compromising the ability of future generations to meet their own needs.

The idea is premised on the integration of economic and environmental processes in decision-making. In 1992, the IGAE committed all nine Australian governments to the concept, as well as local government. ESD has since been incorporated into almost all Australian environmental legislation as an appropriate objective for environmental agencies and decision-makers. Often core principles are extracted for particular emphasis and utilisation, especially the precautionary principle. See, in particular, s 6(2) of the *Protection of the Environment Administration Act 1991*, adopted in many New South Wales statutes.

In essence, ESD is development which aims to conserve and effectively manage the environment for the benefit of future generations. In 1990 the Commonwealth Government suggested the following definition for ESD:

... using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.(18)

Two features are characteristic of an ESD approach. First, decision-makers need to consider the economic, social and environmental implications of actions for the local and international community and biosphere. Second, in reaching decisions, decision-makers must adopt a long-term rather than short-term view.(19) In this sense, the precautionary principle ensures a better integration of environmental considerations in decision-making.

The core concepts of ESD include:

- the conservation of biological diversity and ecological integrity
- inter-generational equity
- the precautionary principle
- improved valuation, pricing and incentive mechanisms

According to the 1992 National Strategy for ESD the guiding principles include:

- decision-making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations
 - where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
 - the global dimension of environmental impacts of actions and policies should be recognised and considered
 - the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised
 - the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised
 - cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms
 - decisions and actions should provide for broad community involvement on issues which affect them.
- (20)

The central objectives of ESD are:

- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
- to provide for equity within and between generations [inter and intra

generational equity]

- to protect biological diversity and maintain essential ecological processes and life-support systems.
(21)

ESD represents a delicate balancing of the often competing interests of development and environmental protection.(22) Application of the precautionary principle is considered appropriate in circumstances where a proposed activity carries with it a risk of potentially serious environmental damage which may threaten the interests of present and future generations. Properly evaluating risks is likely to be aided by the guiding principles and indicators of sustainability.(23)

Legislation incorporating ESD and the precautionary principle

As shown by the appendix to this paper, an astounding number of federal, state and territory statutes have expressly referred to or incorporated ESD principles. However, an analysis of the legislation reveals that much of it adopts ESD in general terms without necessarily assigning a specific role to the principles. The following examples of centrally relevant environmental legislation are indicative of the lack of consistency in the approach to inclusion of ESD principles within Acts of Parliament. It will be readily appreciated that ESD is often included among the objects of an Act without further reference, whereas some legislation requires all decisions or specific decisions to take into consideration core principles or to have regard to principles of ESD. It will be seen that no statute gives any precise guidance as to the weight to be given to the principles, nor their particular role in the balancing of considerations in arriving at a decision.

Status of the precautionary principle in Commonwealth legislation

The *Environment Protection and Biodiversity Conservation Act 1999* provides the most detailed legislative exercise in its reference to ESD and the precautionary principle. It lists, among the objects in s 3, the promotion of *ecologically sustainable development through the conservation and ecologically sustainable use of natural resources*. The principles of ESD, including the precautionary principle, are then defined in s 3A. Section 391 is important and requires that the Minister *must take account of the precautionary principle* in making a decision listed under s 391(3) which relates to: whether or not to grant a permit under s 237 and s 238; making a recovery plan or adopting a plan as a recovery plan under s 269A; whether or not to have a threat abatement plan for a key threatening process under s 270A; making a threat abatement plan or adopting a plan as a threat abatement plan under s 270B; approving a variation of a plan adopted as a recovery plan or threat abatement plan under s 280; making a wildlife conservation plan or adopting a plan as a wildlife conservation plan under s 285; approving a variation of a plan adopted as a wildlife conservation plan under s 295; making a plan for managing a property that is included in the World Heritage List and is entirely within one or more Commonwealth areas under s 316; making a plan for managing a wetland that is designated for inclusion in the List of Wetlands of International Importance kept under the Ramsar Convention and is entirely within one or more Commonwealth areas under s 328; making a plan for managing a biosphere reserve entirely within one or more Commonwealth areas and approving a management plan for a Commonwealth reserve under s 370. It will be most interesting to see how these provisions work in practice.

Status of the precautionary principle in New South Wales legislation

At the last count 47 Acts of the New South Wales Parliament included ESD principles! The *Protection of the Environment Administration Act 1991* establishes the EPA, making provisions with respect to its general responsibilities and management. Section 6(1) of the Act lists the *need to maintain ecologically sustainable development* as one of many objectives of the EPA. The defining principles of ESD, including the precautionary principle, are defined in s 6(2). Many other NSW statutes define ESD by reference to this section. Some of the more important references are extracted below.

Section 3 of the *Protection of the Environment Operations Act 1997* lists the protection, restoration and enhancement of the quality of the environment in NSW, with *regard to the need to maintain ecologically sustainable development*, as one of many objectives of the Act. Indirect reference is made to ESD principles in s 13 which requires that, in preparing a draft policy, the EPA *must take into consideration*, inter alia, the principles of environmental policy set out in the IGAE. Under s 45 the EPA is further *required to take into consideration the objectives of the EPA as referred to in s 6 of the Protection of the Environment Administration Act 1991* in relation to its licensing functions under Chapter 3 of the Act.

Section 37A of the *Coastal Protection Act 1979* provides that the Minister is to *have regard to the principles of ecologically sustainable development* in exercising functions under Part 3 of the Act which concerns the use of the coastal zone. Principles of ESD are defined by reference to the definition contained in s 6(2) of the *Protection of the Environment Administration Act 1991*.

The *Contaminated Land Management Act 1997* establishes a process for investigating and remediating land areas where contamination presents a significant risk of harm to human health or some other aspect of the environment. Section 10(1) provides that the EPA is to *have regard to the principles of ecologically sustainable development in the exercise of its functions* under the Act and is to *seek the implementation of those principles* in the management of contaminated land. Core ESD principles are defined in s 10(2).

The *Threatened Species Conservation Act 1995* attempts to conserve threatened species, populations and ecological communities of animals and plants. The conservation of *biological diversity* and the promotion of *ecologically sustainable development* is listed in s 3 as being amongst the objects of the Act. Section 4 defines references to ESD made in the Act as having the same meaning as under s 6(2) of the *Protection of the Environment Administration Act 1991*. Section 44(2) provides that the Minister, upon receiving a recommendation from the Director-General, *must* consider, along with factors listed in s 44(1), whether consistent with the principles of ESD the recommendation might be amended to avoid or lessen any adverse consequences of the making of a declaration of critical habitat. By way of s 97, in considering whether to grant or to refuse to grant a license application, the Director-General must take into account, inter alia, the principles of ESD.

Section 110(2)(h) provides that a species impact statement must include, a description of 'any feasible alternatives to the action that are likely to be of lesser effect and the reasons justifying the carrying out of the action in the manner proposed, having regard to the biophysical, economic and social considerations and the principles of ESD'.

Section 116(1) provides that a person against whom an order is made may appeal to the Minister against the making of the order. Pursuant to ss 2(b) on hearing an appeal the Minister *may* 'modify or rescind the order, but only if this is consistent with the principles of ESD'.

Section 140(1) provides that the Director-General is to prepare a Biological Diversity Strategy setting out how the objects of the Act are to be achieved. Sub section (2)(b) requires that the strategy is to include proposals for preparing or contributing to the preparation of strategies for ESD in New South Wales, including the integration of biological diversity and natural resource management.

The *Native Vegetation Conservation Act 1997* relates to the conservation and sustainable management of native vegetation and the clearing of land. Section 3 provides that the objects of the Act are to be *considered in accordance with the principles of ecologically sustainable development*. Section 4 defines references to ESD made in the Act as having the same meaning as under s 6(2) of the *Protection of the Environment Administration Act 1991*.

Section 7 of the *Local Government Act 1993* lists, among the purposes of the Act, that councils, councillors and council employees *have regard to the principles of ecologically sustainable development in carrying out their responsibilities* under the Act. Section 8, which contains the council's charter, refers to ESD in properly managing, developing, protecting, restoring, enhancing and conserving the environment. Section 89(1)(c) also refers to council's obligation to *take into consideration the principles of ecologically sustainable development* in determining applications lodged for approval.

The *Fisheries Management Act 1994* lists the promotion of *ecologically sustainable development* as one of the objects of the Act in s 3. Section 4 defines ESD as having the same meaning as under s 6 of the *Protection of the Environment Administration Act 1991*. Section 30(1)(c) provides that in determining total allowable catches the Total Allowable Catch Setting and Review Committee (the TAC) is to *have regard to the precautionary principle, namely, that if there are threats of serious or irreversible damage to fish stocks, lack of full scientific certainty should not be used as a reason for postponing measures to prevent that damage*. Section 57(2)(a) states that a management plan *must* include performance indicators to monitor whether the objectives of the plan and ESD are being attained. Section 143(5) is of similar effect but relates to aquaculture industry development plans instead of management plans. In relation to matters to which the Minister is to have regard in declaring critical habitat, s 220S(2) provides that the Minister must also consider whether, consistent with the principles of ESD, the area identified might be amended to avoid or lessen any adverse consequences of its declaration as a critical habitat. Section 221A(1)(e) states that in considering

whether to grant or refuse to grant a license application, the Director *must take into account* the principles of ESD. In relation to the content of a species impact statement as to threatened species and populations under s 221K(2)(g), there must be the inclusion of a description of any feasible alternatives to the action that are likely to be of lesser effect and the reasons justifying the carrying out of the action in the manner proposed, having regard to, inter alia, the principles of ESD. Subsection 3 (e) is of similar effect but relates instead to a species impact statement including information as to ecological communities. Section 221(2)(b) provides that the Minister, after hearing an appeal against a stop work order, may modify or rescind the order but only if this is consistent with the principles of ESD.

Principles of ESD have now been expressly incorporated into the objects section (s 5) of the *Environmental Planning and Assessment Act 1979* by 1997 amendments. Prior to such amendments, ESD had only been specifically referred to in the Regulation for the purposes of preparing environmental impact statements. However, prior to the inclusion of ESD in s 5, the Land and Environment Court had accepted that it could be a head of consideration arising under s 90.(24)

It is worthwhile noting that an increasing number of planning instruments made under the *Environmental Planning and Assessment Act* are including ESD principles. Further, a number of state environmental planning policies are based on ESD principles, eg. coastal wetlands, urban bushland preservation (25) and littoral rain forests. The *National Parks and Wildlife Act 1974* does not explicitly refer to ESD principles but indirectly includes it by reference to 'sustainable development'.

However, in *Leatch v National Parks and Wildlife Service* (26) the principles of ESD were considered to fall within the subject matter, scope and purpose of the legislation in relation to a licence to 'take and kill' endangered fauna. The Act is presently under review and it is possible that it will be amended to include express reference to ESD.

Section 4(b) of the *Sustainable Energy Development Act 1995* lists as an object of the Act, the encouragement of the development, commercialisation, promotion and use of sustainable energy technology in accordance with the principles of ESD contained in s 6(2) of the *Protection of the Environment Administration Act 1991*. Section 6(b) provides that the principal objectives of the Authority are the facilitation of the 'development, commercialisation, promotion and use of' that technology, 'particularly in those areas (other than fundamental research) where the development, commercialisation, promotion and use of that technology is impeded by lack of appropriate information or finance or by other barriers, in accordance with the principles of ESD contained in s 6(2) of the *Protection of the Environment Administration Act 1991*'.

Section 4 of the *Marine Parks Act 1997* defines 'ecologically sustainable use of a marine park' to mean 'the taking of plants, animals or materials from the marine park, or some other use of the marine park, in accordance with the principles and programmes for ESD set out on s 6(2)' of the *Protection of the Environment Administration Act 1991*.

Section 11(5) of the *Sydney Water Catchment Management Act 1998* provides that the Board may 'request the Minister to review a direction if the Board considers that compliance with the direction is likely to result in environmental degradation, or that the direction is otherwise inconsistent with the principles of ESD referred to in s 14(1)(c)'. Section 14(1)(c) provides, among the principal objectives of the Authority, that where its activities affect the environment, it is to conduct its operations in compliance with the principles of ESD contained in s 6(2) of the *Protection of the Environment Administration Act 1991*.

Section 3(d) of the *Rural Fires Act 1997* lists among the objects of the Act, 'the protection of the environment by requiring certain activities referred to in paragraphs (a) to (c) to be carried out having regard to the principles of ESD described in s 6(2) of the *Protection of the Environment Administration Act 1991*'.

Subparagraphs (a) to (c) provide for the:

- (a) prevention, mitigation and suppression of bush fires
- (b) co-ordination of bush fire fighting and bush fire prevention
- (c) the protection of persons from injury and property from damage by fire

Section 9(3) requires that the Rural Fire Service is *to have regard* to the principles of ESD in carrying out any functions that affect the environment. Section 48(3) is of similar effect but applies to the Bush

Fire Co-ordinating Committee as opposed to the Rural Fire Service. Section 51 provides that the Bush Fire Management Committee is *to have regard* to the principles of ESD in carrying out any function that affects the environment.

Section 5 of the *Catchment Management Act* 1989 lists among the objects of the Act, the promotion of 'sustainable use of natural resources'. Section 4 states that total catchment management is the 'co-ordinated and sustainable use of and management of land, water, vegetation and other natural resources on a water catchment basis so as to balance resource utilisation and conservation'.

These are but some illustrations of the numerous NSW Acts of Parliament which incorporate ESD principles but gives some indication of the diversity of application of the principles.

Status of the precautionary principle in Tasmanian legislation

The new Tasmanian resource management and planning system actually places an 'obligation' on any person performing functions or exercising powers under the legislation to do so in accordance with the stated objectives of 'sustainable development'. This suggests that decision-making processes in relation to planning and environment protection covered by the new package of legislation may be challenged in law as not having been based on, or having failed to reasonably consider, principles of sustainable development .(27)

An example of the indirect inclusion of ESD principles in the Tasmanian legislation is the *Resource Management and Planning Appeal Tribunal Act* 1993 - Schedule 1. Clause 1(a) lists the promotion of *sustainable development of natural and physical resources and the maintenance of ecological processes and diversity* as one of the objectives of the resource management and planning system of Tasmania. Clause 2 defines *sustainable development* to mean:

managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while:

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.

Clause 1(a) of the *Environmental Management and Pollution Control Act* 1994 - Schedule 1 lists the promotion of '*sustainable development*' of natural and physical resources and the maintenance of ecological processes and genetic diversity as one of many objectives of the resource management and planning system of Tasmania. [These are the same definitions as contained in *Resource Management and Planning Appeal Tribunal Act*]. 'Sustainable Development' is defined in cl 2. Clause 3(h) lists, as an objective of the environmental management and pollution control system established by the Act, the adoption of a 'precautionary approach when assessing environmental risk to ensure that all aspects of environmental quality, including ecosystem sustainability and integrity, and beneficial uses of the environment are considered in assessing, and making decisions in relation to the environment.'

Judicial application of the precautionary principle

Discussed below are a selection of Australian and overseas judicial decisions which have made reference to the precautionary principle. They are by no means a complete list. While international and domestic policy instruments, such as the IGAE, incorporate the precautionary principle, the statutes forming the basis of many of the cases discussed here do not expressly refer to the principle. (28) However, even in the absence of an express legislative mandate to apply the principles of ESD, the judiciary in New South Wales (and elsewhere in Australia), has sought to apply such principles. (29) Such cases illustrate the judicial application of the precautionary principle, to the extent that it is

emerging as a common law doctrine.

Australian cases

Leatch v National Parks and Wildlife Service (30) was the second NSW case to apply the precautionary principle. This was a 'merits' appeal against the granting of a license to Shoalhaven City Council to 'take and kill' endangered fauna from an area where a road was proposed to be constructed. The third party objector claimed that the precautionary principle should be applied to refuse the license because of scientific uncertainty surrounding the effects on endangered fauna following from the road construction, particularly on the giant burrowing frog and the yellow bellied glider. (31)

I noted that while almost every recent international environmental treaty, convention and policy document, as well as the IGAE, referred to ESD and in particular to the precautionary principle, the *National Parks and Wildlife Act*, under which the Director-General of the National Parks and Wildlife Service granted the license, did not expressly do so. I said:

When Part 7 of the Act is examined it is readily apparent that the precautionary principle, or what I have stated this may entail, cannot be said to be an extraneous matter. While there is no express provision requiring consideration of the 'precautionary principle', consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the Act.

and

... the precautionary principle is a statement of commonsense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.

I added:

... caution should be the keystone to the Court's approach. Application of the precautionary principle appears to me to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to 'take or kill' the species until much more is known. It should be kept steadily in mind that the definition of 'take' in s 5 of the Act includes disturb, injure and a significant modification of habitat which is likely to adversely affect the essential behavioural patterns of a species. In this situation I am left in doubt as to the population, habitat and behavioural patterns of the Giant Burrowing Frog and am unable to conclude with any degree of certainty that a licence to 'take or kill' the species should be granted.

The appeal was upheld and the license refused.

In the context of immigration law, in *Minister for Immigration and Ethnic Affairs v Teoh* (32) the High Court discussed the domestic application of international agreements to which Australia is a party. The Court said:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.

As noted by Pearson in her article about incorporating ESD after *Teoh*, (33) it is likely that ESD is a factor which courts may take into account, and their decisions would not be vitiated by taking them into account. I am not aware of any judicial review challenge to a decision on the basis of the taking into account of the precautionary principle as an irrelevant consideration or the converse. No doubt there will be occasion in the future for the courts to consider such a challenge.

Mason discusses the importance of the precautionary principle to environmental law in Australia in the context of *Teoh*. (34) He notes the national and domestic recognition of the principle, seen as an

emerging norm of customary international law. This is important since statutes will be interpreted and applied in conformity with customary international law.(35) Citing the provisions of the IGAE, Sir Anthony Mason comments on the beginning of recognition of international ESD principles in cases such as *Leatch* and *Greenpeace v Redbank Power* in the NSW Land and Environment Court.

In the *Friends of Hinchinbrook Society Inc v Minister for Environment* (36) the Minister had granted development consent for a proposed tourist resort located near the Great Barrier Reef. In 1981 the Great Barrier Reef was included in the World Heritage List, pursuant to the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage. Friends of the Hinchinbrook Society contended that the Minister had improperly exercised his powers conferred under the *World Heritage Properties Conservation Act* 1983 and failed to have regard to the precautionary principle. It brought a challenge in the Federal Court.

Sackville J, at first instance, accepted *Leatch*, saying 'it may be that the "commonsense principle" identified by Stein J is one to which the Minister must have regard'. His Honour did, however, say that if the principle was a mandatory consideration for the Minister, that would 'flow from a proper construction of the relevant legislation and of its scope and purpose' (37), rather than as a result of Australia's adoption of 'policies and objectives relevant to a national strategy on the environment'. His Honour held that the precautionary principle, in the form adopted by the IGAE, was not a consideration that the Minister was bound to take into account in exercising powers conferred under the *World Heritage Act*. His Honour however found that the Minister did take into account the need to exercise caution in the situation of scientific uncertainty:

It is true that the Minister did not expressly refer to the precautionary principle or some variation of it, in his reasons. But it is equally clear that before making a final decision he took steps to put in place arrangements designed to address the matters of concern identified in the scientific reports and other materials available to him. The implementation of these arrangements ... indicate that the Minister accepted that he should act cautiously in assessing and addressing the risks to World Heritage values ... he took into account the commonsense principle that caution should be exercised where scientific opinion is divided or scientific information is incomplete.(38)

The case of *Nicholls v Director-General of National Parks and Wildlife* (39) involved an appeal against a decision by the Director-General of National Parks and Wildlife Service to grant a license to the Forestry Commission permitting forestry operations in the Wingham Management Area to 'take or kill' endangered fauna. The applicant contended that the fauna surveys and fauna impact statement obtained under the legislation contained deficiencies, and that the precautionary principle should be taken into account by the Court in considering the appeal. Talbot J noted that the IGAE created no binding obligation on the Director-General or the Court.(40) By way of obiter, his Honour referred to inherent difficulties associated with the application of the precautionary principle:

Furthermore, the statement of the precautionary principle, while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument. Taken literally in practice it might prove to be unworkable. (41)

However, his Honour added that the application of the precautionary principle, as provided in the IGAE, was 'a practical approach which the court finds axiomatic, in dealing with environmental assessment' (42)

In refusing the application, his Honour held that the fauna impact statement did include to the fullest extent reasonably practicable the information required by s 92D of the *National Parks and Wildlife Act* 1974 and that the fauna impact statement was but one of a number of tools to be used in determining whether to grant a license to 'take or kill' protected fauna.

In *Greenpeace Australia Ltd v Redbank Power Co* (43) the Singleton Shire Council granted development consent to Redbank Power Co. Pty Ltd for the construction of a coal-based power station at Warkworth in the Hunter Valley. *Greenpeace* objected to the proposal contending that the impact of carbon dioxide emissions from the project would unacceptably exacerbate the greenhouse effect and that the Court should apply the precautionary principle, as defined in the IGAE, to refuse development consent. Again, it was a 'merits' appeal by a third party objector.

Pearlman J noted that the Framework Convention on Climate Change, (ratified by Australia) the IGAE and the National Greenhouse Response Strategy relied upon by *Greenpeace*, were not binding policy documents. Whether such proposals 'should be prohibited is a matter of government policy and it is

not for the Court to impose such a prohibition'. (44)

Her Honour accepted that the precautionary principle could be incorporated as a factor to which the Court must have regard as a matter of 'public interest' under s 90 of the *Environmental Planning and Assessment Act 1979*, and s 39(4) of the *Land and Environment Court Act 1979*. Her Honour concluded:

There are, however, instances of unscientific uncertainty on both sides of the issues in this case. For example, *Redbank* has contended that tailing dams pose environmental problems, whilst *Greenpeace* has denied that there are serious environmental problems surrounding current methods of tailing disposal. On the other hand, *Greenpeace* has asserted that co2 emission from the project will have serious environmental consequences, whilst *Redbank* has asserted that there is considerable uncertainty about its consequences. The important point about the application of the precautionary principle in this case is that 'decision-makers should be cautious': per Stein J in *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270 at 282. The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent, it does not require that the greenhouse issue should outweigh all other issues.(45)

In so concluding, her Honour highlighted the balancing act required by s 90. The precautionary principle was but one factor to be weighed in the balance.

Alumino (Aust) Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 (46) concerned an appeal seeking to establish an aluminium dross plant. Talbot J reiterated what he had said in *Nicholls*. He stated:

It is obvious that where development involves the handling and processing of materials which have the potential to cause significant harm to the health of human beings and vegetation, *extreme caution must be used* in determining whether development consent will be forthcoming. In the present case the Court has sat and listened to the testing of technical opinions and advice tendered by expert witnesses in the relevant fields ... the Court has the advantage of knowing that none of the applicant's expert witnesses were persuaded to deviate from their conviction that the plant could be operated in a way which would not have any significant environmental consequence ... this is not a case which there really is a competing expert view demonstrating different scientific opinions which remain unresolved. Rather it has been demonstrated that the dross recycling process can be managed and controlled in such a way that the predictions will be met. (47) [Emphasis added]

His Honour was satisfied that there was no relevant scientific uncertainty, endorsing at the same time the taking of a cautionary approach.(48)

Bridgetown/Greenbushes Friends of the Forest Inc v Department of CALM is a decision of the Full Court of the Supreme Court of Western Australia. (49) One of the conditions imposed on a proposal to log karri forest included it being managed 'in accordance with a precautionary approach'. The plaintiff claimed that, when read with the IGAE, it involved an application of the precautionary principle, which it alleged had been breached. Templeman J noted that the condition referred to the precautionary *approach*, not the principle. His Honour was of the view that such a precautionary approach did not dictate one specific course of action to the exclusion of others, citing *Nicholls*.

The precautionary principle is also discussed by Cox J in *R v Resource Planning and Development Commission* in the Supreme Court of Tasmania. (50)

Northcompass v Hornsby Council (51) was interesting because the development was a bioremediation plant which, in theory, would advance ESD. However, there was relevant scientific uncertainty as to the effect of odour and air pollution from windrows on young children and residents living in close proximity. The case is a good example of how a number of ESD principles can come into play and sometimes conflict. The decision concluded:

It must be said that this case is not an example of the so-called NIMBY (not in my back yard) syndrome. On the evidence, it is simply inappropriate to locate a bioremediation plant with open windrows so close to sensitive land uses. One would need a trial which proved an environmental success, rather than a failure, to lend confidence in good environmental performance given the present location. Alternatively, a proponent could demonstrate the soundness of a proposal by field or laboratory tests simulating operating conditions, as suggested by the EPA. This has not occurred.

The Council argues that the concept of a bioremediation facility is an excellent example of ecologically sustainable development. We agree. It is consistent with ESD to have a facility which takes green waste away from diminishing landfill and provides valued added end products. This is consistent with the core principle of intergenerational equity. It must, however, be noted that another core ESD principle is the precautionary principle. This was mentioned by the EPA and a cautionary approach was quite specifically adopted by Commissioner Cleland in his Report and recommendations to Council. We think that he was correct to do so, given the particular factual context and bufferless location.

There are of course many Rio Principles which are relevant to environmental decision-making, including a case such as this. For example, the right to a healthy environment (Principle 1). Indeed, the principle of environmental harm is a major cornerstone of ESD. This is most effectively accomplished through environmental impact assessment processes (Rio Principle 17) involving full public participation (Principle 10).

The applicability of ESD principles to designated development under Part 4 of the *EPA Act* and the inter-relationship of the principles has never been fully explored in the Court. It is unnecessary to do so in this case given our conclusion that the application should be refused on its merits for the reasons we have given.

In *Planning Workshop v Pittwater Council*, a case concerning the habitat of squirrel glider, Pearlman J left open the application of the precautionary principle since she had determined to refuse the development on the basis of its significant effect on threatened fauna.(52)

Nicholls, Greenpeace and other subsequent cases in the Land and Environment Court indicate that while the Court has applied the precautionary principle since *Leatch*, it has not been found to be a factor to be given such weight as to lead to a refusal of consent in the circumstances of the particular appeals.

International cases

In the *Danish Bees* case (53) the European Court of Justice indirectly applied the precautionary principle to justify a measure having equivalent effect to a quantitative restriction in EC law.(54) The case involved a decision made by the Danish Minister for Agriculture which prohibited the keeping of bees on the island of Laeso and certain neighbouring islands other than those of the sub-species, *Apis Mellifera Mellifera* (the Laeso Brown Bee).

The issue before the Court was whether the keeping on the islands of any species of bee other than the sub-species, *Apis Mellifera Mellifera* constituted a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the European Community Treaty (the EC Treaty) and whether, if that were the case, such legislation was justified on the ground of the protection and health and life of animals. The Danish Government maintained that the establishment of pure breeding areas for the sub-species, in a particular area within a Member's State, did not affect trade between Member States. It was contended that this did not constitute discrimination in respect of bees originating in other Member States and was not intended to regulate trade between Member States. Further, the effects on trade flowing from the Minister's prohibition were too hypothetical and uncertain to be regarded as a measure likely to obstruct it.

Notwithstanding the lack of conclusive scientific evidence establishing both the nature of the sub-species and its risk of extinction, the Court concluded that the decision made by the Minister constituted a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EC Treaty and that the prohibition was also justified under Article 36 of the Treaty:

... measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population concerned. By so doing, they are aimed at protecting the life of those animals and are capable of being justified under Article 36 of the Treaty.

The legislation was also justified under the Biodiversity Convention ratified by the EC. In so holding, the Court took a precautionary approach to the preservation of indigenous animal populations and the conservation of biodiversity.

In *R v Secretary of State for Trade and Industry ex parte Duddridge and Others* (55) three children sought an order that the responsible Minister or Department issue a regulation to limit the electro magnetic radiation (EMR) which electricity licensees could emit. The applicants argued that the precautionary principle should be applied because there was scientific uncertainty about the possible link between EMR and health effects. In the Queens Bench Division, Smith J limited the application of the precautionary principle to environmental, rather than health risks, as well as finding that there was no catch-all 'any other circumstances' provision in the British legislation which would entitle her to take it into account. With respect to EC law, Smith J concluded that references in the Maastricht Treaty to ESD principles were mere policy and would permit, but did not compel, their consideration by the decision-maker. This result, is in sharp contrast to the Pakistani case of *Zia v WAPDA* (56) concerning EMR.(57)

In *Zia v WAPDA* the respondent authority was constructing an electrical grid station in a residential area. The petitioners, who were residents within the vicinity, alleged that the electromagnetic field created by the high voltage transmissions lines at the station would pose a serious health hazard to them. Article 9 of the Constitution of Pakistan (1973) provides that 'no person shall be deprived of life or liberty save in accordance with law'. Article 14 provides that 'the dignity of man and subject to law, the privacy of the home shall be inviolable'. Article 184(3) provides for public interest litigation. Where the 'life' of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Supreme Court, in exercising its jurisdiction under Article 184 (3) of the Constitution, may grant relief to the extent of stopping the functioning of factories/units which create pollution and environmental degradation.

The Supreme Court held, inter alia, that the existing scientific evidence regarding the possibility of adverse biological effects from exposure to power-frequency fields, as well as the possibility of reducing or eliminating such effects, was inconclusive. In responding to such scientific uncertainty the Court applied the precautionary principle.

To my knowledge there have been a number of cases in the Land and Environment Court which have considered the potential impact of EMR on animals and humans.

The Philippines case of *Minors Oposa v Secretary of State of the Department of Environment and Natural Resources* (58) involved proceedings in the Supreme Court for an order that the Government terminate forest destruction carried out pursuant to existing legislation and future licenses, on the basis that the issue of the licenses contravened citizen's environmental rights contained in the 1987 Constitution and a number of other instruments.

Section 16 of the Constitution provides:

The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

The Court applied the principle of intergenerational equity to grant standing to plaintiffs, who had not reached the age of the majority, to represent the interests of themselves and future unborn citizens. (59)

In *AP Pollution Control Board v Nayudu*, (60) the Supreme Court of India was considering a petition claiming that certain hazardous industries proposed to be established by the respondents without the necessary certificate from the State Pollution Control Board could not proceed. M. Jagannadha Rao, J discussed the difficulties faced by environmental courts globally in dealing with scientific data. He cited articles by Lord Woolf and Carnworth on the desirability of a specialist environmental court. In particular, his Honour discussed the status and application of the precautionary principle citing Barton and other articles.

His Honour said:

The 'uncertainty' of scientific proof and its changing frontiers from time to time has led to great changes in environment concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. In *Vellore Citizens' Welfare Forum v Union of India and others*, 1995 (5) SCC 647, a three Judge Bench of this Court referred to these changes, to the 'precautionary principle' and the new concept of 'burden of proof' in environmental matters. Kuldip Singh, J after referring to the principles evolved in various international Conferences and to the concept of 'Sustainable

Development', stated that the Precautionary Principle, the Polluter-Pays Principle and the special concept of Onus of Proof have now emerged and govern the law in our country too, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes, such as the *Water Act, 1974* and other statutes, including *The Environment (Protection) Act 1986*, these concepts are already implied. The learned Judge declared that these principles have now become part of our law. The relevant observations in the *Vellore Case* in this behalf read as follows:

In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the *Precautionary Principle* and the Polluter-Pays Principle are part of the environmental law of this country.

The Supreme Court discussed the development of the precautionary principle in replacing the Assimilative Capacity Principle adopted at an earlier point of time.

Rao J stated:

The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on Scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential. The precautionary principle was recommended by the UNEP Governing Council (1989). The Bomako Convention also lowered the threshold at which scientific evidence might require action by not referring to 'serious' or 'irreversible' as adjectives qualifying harm. However, summing up the legal status of the precautionary principle, one commentator characterised the principle as still 'evolving' for though it is accepted as part of the international customary law, 'the consequences of its application in any potential situation will be influenced by the circumstances of each case'.

The Court also discussed the issue of burden of proof in cases involving the application of the precautionary principle:

... Therefore, it is necessary that the party attempting to preserve the *status quo* by maintaining a less-polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden. (See James M. Olson, *Shifting the Burden of Proof*, 20 *Envtl. Law* p.891 at 898 (1990). (Quoted in Vol 22 (1998) *Harv. Env. Law Review* p. 509 at 519, 550).

The precautionary principle suggested that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

The case of *Ashburton Acclimatisation Society v Federated Farmers of New Zealand Inc* (61) was determined well before ESD principles became included in legislation. It is referred to by Burton and picked up by the Supreme Court of India in *Nayudu*. It involved an appeal, referring back to the Planning Tribunal for consideration, its report for a national water conservation order affecting the Raikaia River. The contest was between conservationists, who wished the flow and characteristics of the river to be conserved, and farmers who wished to use the water from the river for irrigation. It was submitted that if implemented the report would unduly prejudice the rights and expectation of the Farmers Federation.

At the heart of the appeal was the ground that the Tribunal had misconstrued of the Act by placing undue emphasis upon protection of outstanding features of the river and by failing to pay sufficient regard to the competing need of out of stream users, in particular the needs of primary industry and the community. The Tribunal had regarded the sustainability of the amenity afforded by the waters in their natural state as being the overriding consideration under the *Water and Soil Conservation Act 1967* (NZ).

The Court of Appeal held that the *Water and Soil Conservation Act*, as amended, placed emphasis on conservation of natural waters. Once it was determined that the amenity afforded by the waters in their natural state should be recognised and sustained, *primacy* was to be accorded to that object and it should not be defeated by striving to achieve a balance for other users of water. The needs of primary industry were to be given weight in considering an application for a conservation order, but this was to be done bearing in mind that the primary object of the Act was the conservation of waters in their

natural state. The case is a good illustration of a court adopting a precautionary approach given the scope, purpose and subject matter of the legislation.

The New Zealand High Court case of *Greenpeace New Zealand Inc v Minister for Fisheries* (62) involved a total allowable commercial catch (TACC) for orange roughy set by the Minister of Fisheries. *Greenpeace* applied for judicial review of the decision on the basis that the orange roughy fishery was depleted and that overfishing had endangered its survival. The New Zealand Fishing Industry Association and others argued that:

... the research into the fishery has not yet been sufficient to establish that the concerns of the applicant or the Ministry scientists are justified and sees an excessive reduction as being not only unjustified, but as imposing serious and unnecessary losses on the industry.(63)

Greenpeace argued that, in considering the TACC, the Minister was required to apply the precautionary approach. Counsel drew attention to a statement of the Minister referring to decisions of the kind under consideration, when he had said:

It must be a fundamental starting point that management decisions are based on the best data and science available and, in the absence of adequate data, upon the appropriate application of precautionary approaches to management.(64)

After referring to the decision in *Leatch*, Gallen J recognised that the precautionary approach would also apply in New Zealand. His Honour noted that in the case under consideration, there was no statutory obligation for the precautionary approach to be adopted under the *Fisheries Act* 1983, but the statute reflected international obligations accepted by New Zealand and that 'there is in that context at least a movement towards the view that in questions of such moment, a degree of caution is appropriate'. (65) His Honour went on to say that:

The fact that a dispute exists as to the basic material upon which the decision must rest, does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide upon the weight which can be given it with such care as the situation requires At the same time I note, as counsel did, that in the end this is a weighing and not a decisive factor. (66)

It was held that the precautionary approach must be applied by the Minister in formulating a TACC:

In assessing the information upon which a decision must be based, the precautionary principle ought to be applied so that where uncertainty or ignorance exists, decision-makers should be cautious. (67)

As noted by Mascher, the Court's finding signals an important landmark in New Zealand environmental law, with implications for fisheries law worldwide, as well as environmental law in general. (68)

The *Kernkraftwerk Krummel* case heard in the Supreme Administrative Court of Germany is of interest. (69) The Court overturned the lower Court's decision holding that the administration had an obligation to check whether or not radiation from the Krummel nuclear power station stayed within the limits of *precaution* required by the *Atomic Energy Act*. The Court held that if the latest scientific evidence indicated that earlier norms were now insufficient, the administration should set higher precautionary standards. While the weighing of risks was one for the administration, not to be replaced by the opinion of the courts, the lower Court should have checked whether the administration had ignored or paid unacceptably little interest in the increase in leukaemia cases noted in the vicinity of the plant.

Of particular importance to the development of ESD and the precautionary principle is the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* in the International Court of Justice (70), otherwise known as the *Danube Dam case*. The Separate Opinion of Judge Weeramantry, Vice President of the ICJ, is of signal importance, if not inspirational. While his Honour espoused the principle in commendable detail, the main Opinion has come under attack by some commentators as not taking the many opportunities presenting themselves (at different points of time) to apply the principle, describing the Opinion as a missed opportunity.(71) The Vice President, however, referred to the duty on States to carry out 'continuing environmental impact assessment' because of the potential for significant impact on the environment and that this was 'a specific

application of the larger general principle of caution’.

The Appellate Body of the World Trade Organization had to directly consider the status of the precautionary principle in the *Beef Hormone Case*. (72) The Appellate Body, in its report, spoke directly to the relevance of the principle in interpretation of the relevant Agreement. The report pointed out that the principle had, in essence, been incorporated into the Agreement. This is an indication of its acceptance as part of international customary law. However, it did not apply because it could not override the explicit wording of certain Articles in the Agreement which provided that measures be based on risk assessment, a duty the EU had failed to comply with.

Cameron has noted that:

The Appellate Body recognised that one of the issues in the appeal was ‘whether, or to what extent, the precautionary principle is relevant in the interpretation of the SPS Agreement’. The Appellate Body decided that, the principle was ‘the subject of debate among academics, law practitioners, regulators, and judges,’ and the status of the precautionary principle in international law was something they should not rule on. They decided that the *precautionary principle cannot override our finding ...* namely that the EC import ban ... in accordance with good practice, is, from a substantive point of view, not based on risk assessment. The Appellate Body did however agree with the European Communities ‘that there is no need to assume that Article 5.7 exhausts the relevance of a precautionary principle’.(73)

Deimann describes the reasoning of the Appellate Body on the relevance of the precautionary principle as containing ‘considerable ambiguity’.(74) Having found that the articles in question explicitly recognised the right of Members to establish their own levels of sanitary protection, which may be higher and more cautious than implied by international requirements and guidelines, it was difficult to comprehend how the principle could not override the text of the Agreement.

Some practical examples of the application of the precautionary principle

The application of the precautionary principle is becoming a daily occurrence for decision-makers, especially local government, given the requirements of the *Local Government Act* and an increasing number of local environmental plans incorporating ESD. Central Agencies are also having to consider the relevance of the principle in their decisions and recommendations. Both Commonwealth and NSW Commissioners of Inquiry have considered and applied the precautionary principle in their reports (75). The NSW Minister for Planning utilised the precautionary principle in refusing the proposed Lake Cowell gold mine in the central west of the state - ‘the application of the precautionary principle means that the unknown risks to this significant environment can only be avoided by refusing this mining proposal’. (76)

Applying the Precautionary Principle (by Deville and Harding) is a very useful book providing practical guidance to the application of the principle in a myriad of situations.(77)

The Industry Commission Report of the Inquiry into Ecologically Sustainable Land Management examined ESD and the precautionary principle. Its centrepiece recommendation was the establishment of a statutory duty of care to the environment. The proposed duty would require everyone who influences the management of the risks to the environment to take all reasonable and practical steps to prevent harm to the environment that could have been reasonably foreseen. (78)

Conclusion

Freestone sees the emergence of the precautionary principle as one of the most remarkable developments of the last decade and arguably one of the most significant in the emergence of international environmental law itself.(79) The great preponderance of opinion nowadays is that the principle has become part of international customary law.

How the rhetoric of the principle can be operationalised is one of the challenges for the first decade of the 21st Century. However, what is slowly occurring is that the bones of the principle are starting to be fleshed out. It must be remembered that the precautionary principle is not absolute or extreme. It does not prohibit an activity until the science is clear. It does however change the underlying presumption from freedom of exploitation to one of conservation.

One thing is clear - the precautionary principle will not go away. It is here to stay, with or without

legislative prescription. Decision-makers and courts (hearing appeals or challenges) will not be able to dodge it or merely pay lip-service to it. Undeniably the courts will be required to review its application and attempt to apply it. In doing so, we will be called upon to evaluate the principle and its place in environmental decision-making. We must not shirk this responsibility.

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- Antarctic Treaty (Environment Protection) Act* 1980
- Australian Centre for International Agricultural Research Act* 1982
- Australian Wool Research and Promotion Organisation Act* 1993
- Bounty (Fuel Ethanol) Act* 1994
- Environment Protection and Biodiversity Conservation Act* 1999
- Fisheries Administration Act* 1991
- Fisheries Legislation Amendment Act* 1997
- Fisheries Management Act* 1991
- Great Barrier Reef Marine Park Act* 1975
- Horticultural Research and Development Corporation Act* 1987
- Meat and Livestock Industry Act* 1995
- Murray-Darling Basin Act* 1993
- National Environment Protection Council Act* 1994
- National Environment Protection Measures (Implementation) Act* 1998
- National Heritage Trust of Australia Act* 1997
- Natural Resources Management (Financial Assistance) Act* 1992
- Primary Industries and Energy Research and Development Act* 1989
- Productivity Commission Act* 1998
- Resource Assessment Commission Act* 1989
- Trade Practices Regulations (Amendment)* 1997

New South Wales

Agricultural and Veterinary Chemicals (New South Wales) Act 1994
Catchment Management Act 1989
Coastal Protection Act 1979
Coastal Protection Amendment Act 1998
Contaminated Land Management Act 1997
Electricity (Pacific Power) Act 1950
Electricity Legislation Amendment Act 1995
Electricity Transmission Authority Act 1994
Energy Services Corporations Act 1995
Energy Services Corporations Amendment Act 1995
Environmental Offences and Penalties Act 1989
Environmental Planning and Assessment Act 1979
Environment Planning and Assessment Amendment Act 1997
Fire Brigades Act 1989
Fire Services Legislation Amendment Act 1998
Fisheries Management Act 1994
Fisheries Management Amendment Act 1997
Gas Supply Act 1996
Government Pricing Tribunal Act 1995
Government Pricing Tribunal Amendment Act 1995
Independent Pricing and Regulatory Tribunal Act 1992
Local Government Act 1993
Local Government Amendment (Ecologically Sustainable Development) Act 1997
Local Government Amendment (General) Regulation 1993
Marine Parks Act 1997
Murray Darling Basin Act 1991
National Environment Protection Council (New South Wales) Act 1995
National Parks and Wildlife Act 1974
Native Vegetation Conservation Act 1997
Olympic Co-ordination Authority Act 1995
Protection of the Environment Administration Act 1991
Protection of the Environment Administration Amendment (Environmental Education) Act 1998
Protection of the Environment Operations Act 1997
Rural Fires Act 1997
State Owned Corporations Act 1989
State Owned Corporations Amendment Act 1995
Sustainable Energy Development Act 1995
Sydney Harbour Foreshore Authority Act 1998
Sydney Water Act 1994
Sydney Water Catchment Management Act 1998
Threatened Species Conservation Act 1995
Timber Industry (Interim Protection) Act 1992
Transport Administration Amendment (Rail Corporatisation and Restructuring) Act 1996
Waste Minimisation and Management Act 1995
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Water Board (Corporatisation) Act 1994
Water Legislation Amendment Act 1997

Victoria

Agricultural and Veterinary Chemicals (Victoria) Act 1994
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Coastal Management Act 1995
Co-operatives Act 1996
Environment Protection Act 1970
Fisheries Act 1995
Flora and Fauna Guarantee Act 1988
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Murray-Darling Basin Act 1993
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Planning and Environment Act 1987
Water Act 1989

Queensland

Agricultural and Veterinary Chemicals (Queensland) Act 1994
Environment Protection Act 1994
Coastal Protection and Management Act 1995
Fisheries Act 1991
Integrated Planning Act 1997
Land Act 1994
Local Government Act 1993
Murray-Darling Basin Act 1996
National Environment Protection Council (Queensland) Act 1994
Nature Conservation Act 1992
Queensland Competition Authority Act 1997
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Water Resources Act 1989
Wet Tropics World Heritage Protection and Management Act 1993

South Australia

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Environment Protection Act 1993
Local Government Act 1934
Murray-Darling Basin Act 1992
National Environment Protection Council (South Australia) Act 1995
Water Resources Act 1990

Tasmania

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Land Use Planning and Approvals Act 1993
Living Marine Resources Management Act 1995
Marine Farm Planning Act 1995
Resource Management and Planning Appeal Tribunal Act 1993
State Policies and Projects Act 1993

Western Australia

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Fish Resources Management Act 1994
National Environment Protection Council (Western Australia) Act 1996

Northern Territory

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Fisheries Act 1988
National Environment Protection Council (Northern Territory) Act 1994
Parks and Wildlife Commission Act 1995
Pastoral Land Act 1992

Australian Capital Territory

Auditor-General Act 1996
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Major Issues Confronting the Judiciary in the Adjudication of Cases in the Area of Environment and Development

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Delivered in Manila on 6 March 1999 to the "South-East Asian Regional Symposium On The Judiciary And The Law Of Sustainable Development"

Sponsored by UNEP/UND, Hanns Seidel Foundation and the Government of the Philippines

INTRODUCTION

When I was asked to fill the shoes of His Excellency Judge Christopher Weeramantry, Vice President of the International Court of Justice, my feelings were of utter humility. Judge Weeramantry has been one of my heroes, at a time and in a profession where we have but few. My first knowledge of him was in the late 1970's when he was a Law Professor at Monash University in Melbourne, Australia. He was, in my opinion, a fine teacher but (I think) underrated by local academics. His background and experience led him to a deep respect for humankind and an acute awareness of injustice and inhumanity.

In 1979 he spent a sabbatical at Stellenbosch University in South Africa. The system of State Apartheid abhorred him. On returning to Australia he wrote a compelling treatise on the system and his hopes for the future of South Africa. Published in 1980 I commend Apartheid - The Closing Phases¹ to you. As we know Weeramantry's expressed hopes took longer to come to fruition. However, 20 years ago he could see the cracks appearing and the inevitability of change which others thought impossible because of the military might of the Afrikaners.

SUSTAINABILITY - THE RELEVANCE OF THE PAST

Fast forwarding 20 years to 1997 to the judgment of the International Court of Justice (ICJ) in the case between Hungary and Slovakia over the damming of the River Danube,² the separate opinion of the Vice President is a masterpiece. It comprehensively explains that today's concepts of sustainable development are modern counterparts of ancient examples of sustainability. He points out that some of the principles of traditional legal systems can be useful tools to develop modern environmental law. His judgment provides many examples ³/₄ from the Pacific, Asia, Africa, Australia, the Middle East, the Americas and Europe.

His opinion should be required reading for all of us, especially Euro-centrics, like myself. An example which His Excellency touched upon, with which I have some contact, are the Australian Aboriginals. Aboriginal people have inhabited Australia for 50,000 to 60,000 years, no-one is quite certain how long. In terms of climate, landform and soils, the Australian continent has often been described as the most inhospitable part of the world. Yet using the resources of traditional wisdom and a system of customary law, the Aborigines learnt to live in harmony with this environment in a remarkably successful fashion. A necessary reverence for nature informed their lives and daily practices. They knew what was necessary to conserve the resources of the land yet be able to comfortably live off them. Judge Weeramantry reminds us of the riches we can draw from ancient practices, such as the Australian Aborigines, in order to extend, develop and understand modern principles of sustainability.

It is time for us to learn before it is too late. A little more than 200 years ago so called 'civilised' white peoples from Great Britain took possession of Australia. By various means they destroyed Aboriginal culture and religion, indeed its whole society. Introduced diseases and vices combined with unofficial genocidal policies of the colonial population, and reduced the Aboriginal population to near extinction. Aboriginal people were seen as merely some form of degraded sub-human savage, as having no laws, no permanent settlements, no written language and no tilled agriculture. These were seen as indices of civilisation. However, their strong kinship links, spirituality, oral traditions, conservation techniques and ability to live off the land without depleting its resources, were all ignored. The land was seen as Terra Nullius, as belonging to no-one, and this was used as a justification for its seizure without compensation or treaty. This was only exposed as a convenient legal fiction by the High Court of Australia in *Mabo v Queensland*³ in 1992.

Of course, as His Excellency notes in his separate opinion on the damming of the Danube, Australian Aborigines had their own development projects. He cites the ancient example of extraordinary water control and storage techniques in what is today known as south-western Victoria. Here, many thousands of years ago, the native inhabitants displayed a perfect understanding of hydrology of a system of lakes and watercourses. They constructed a highly sophisticated network of weirs, sluices and inter-connecting channels in order to preserve the precious commodity of water.⁴

THE URGENCY OF SUSTAINABILITY

It is necessary for all of us to confront the reality of why the transition to ecologically sustainable development is no longer a soft option but rather an economic imperative for survival. We now have the knowledge to know that our patterns of production and consumption are unsustainable. We know what harm we are doing to our environment and to the future of our children and their children. We must face the challenge.

Maurice Strong, Head of the Earth Council, said this in 1995:

As we move into a new millennium, we face a challenge without precedent in human experience, one that will determine our future as a species. No longer a soft option, our survival and well-being requires the transition to sustainable development. We must change course.⁵

I had the great privilege of attending the Regional Symposium of the Judiciary in Promoting the Rule of Law in the area of Sustainable Development in 1997 in Colombo, Sri Lanka. I went as a resource person but soon realised that it was I who was on a learning curve. It was an immensely rich experience where judges and senior officers from Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka met and exchanged insights and experiences. We soon discovered that we had enormous commonality in our approaches and aspirations but also our problems, notwithstanding different cultural and legal backgrounds. I quickly developed a great respect for the judges of South-Asia, for their integrity, honesty and bravery. Behind the scenes, in discussions, I was able to discern a level of concern and unease at the multiple challenges faced and about to be faced by the judges. The inherent difficulties in balancing the protection of the environment and the right to development, usually pleasing no-one, promised a challenging future but one which they were all very determined to face.

DANGERS FOR SOCIETY AND THE JUDICIARY

That great jurist, Benjamin Cardozo observed that 'the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by'.⁷ A number of discernible trends make this statement inevitable today but bring with it more tensions for the judiciary. The development of international law and the incorporation of many of its principles into domestic law, especially environmental law, can sometimes put judges in apparent conflict with governmental and political aspirations. A notable retreat from government regulation and enforcement, apparent in many countries, together with a move towards greater self-regulation by powerful trans-national businesses and so-called market based solutions, has led to a greater resort to the courts. This has been spurred by a developing consciousness of justiciable rights. Political scientists have noted a drift to what they call the 'judicialisation of politics'.⁸ That is, people seeking to resolve social and environmental conflicts by resort to the courts, rather than through political institutions.

Justice Robert French, a judge of the Federal Court of Australia and until recently the President of the National Native Title Tribunal, recently noted that increasing resort to the courts for resolution of social issues is likely to generate both high expectations of what courts can deliver and tensions with other institutions (eg. government and the church) to which the court may have been preferred.⁹ With this in mind, we must accept that the fundamentals of the judiciary, in particular its independence from the Executive, must not be taken for granted. We must seek to maintain the cardinal principle of independence from government and from all litigants in order to protect what has sometimes been called the 'fragile bastion'.¹⁰ The fact of the matter is that the judiciary is the weakest branch of government and ultimately must rely upon community support. For this to occur we need to be sensitive to community values and to continue to determine cases impartially and fairly, according to law. This means that judges have a high responsibility to be sensitive to society and think about the ways in which our duty to society can best be achieved.

THE CHALLENGE OF SUSTAINABILITY

We judges are all part of a fundamentally exciting and challenging expansion of environmental law. Modern environmental law is a relatively newcomer to the legal agenda but it is the most rapidly expanding, sometimes in hand with developments in administrative law, another public law area. In the past two decades environmental law has progressed by exponential proportions. International

environmental law is turning from soft law into hard.¹¹ As the principles of sustainable development harden from mere aspirations into substantive law, so our delicate task of balancing the competing interests of development and environmental protection become more urgent. Many of the key principles of Agenda 21 have been received into national domestic law, sometimes into State Constitutions. In some jurisdictions, the principles of international law may have a part to play even if not expressly incorporated and received into domestic law. An example of this, in the context of immigration law, is the case of *Minister for Immigration and Ethnic Affairs v Teoh*, decided by the Australian High Court in 1995.

The court said:

The provisions of an international convention to which Australia is a party, especially one which declares fundamental rights, may be used by the courts as a legitimate guide in developing the common law.¹²

CORE PRINCIPLES OF ESD

The core concepts of ecologically sustainable development (ESD) include the:

- * conservation of biological diversity and ecological integrity
- * inter-generational equity (responsibility)
- * precautionary principle, and
- * valuation and pricing of environmental resources including the polluter pays principle

In seeking to apply these principles to given situations the objective must be to strive to maximise the quality of life of current generations while preserving the natural capital for future generations. This can only be achieved by accepting certain constraints. These constraints include maintaining a sustainable yield in renewable resources and conserving and replacing exhaustible resources as we use them. It also means that society must maintain ecological support systems and biodiversity. It follows that, in a sense, development becomes a more level static concept rather than one unnecessarily seen as requiring a rate of change denoted only by the concept of growth.

The working through of the principles of ESD by the courts (national, regional and international) is producing a body of environmental law which is contributing to our joint understanding of these crucial issues and the ways in which some of the issues may be resolved. Key to the principles of ESD is a renewed recognition of our duty to each other, including our neighbours - those living in the next village, town or island, further down the river system or even across national boundaries. It is trite that pollution and the environment have no man-made territorial boundaries. The recent forest fires in Indonesia confirmed this. Accordingly, we are forced into an era of co-operation and co-existence with our neighbours, whether we like it or not. But our responsibilities extend further than our neighbours.

They are to the earth itself because the consequences of our actions extend across generational frontiers. Environmental law has to deal with future generations. The decisions we make irrevocably mould the lives of generations to come. This imposes upon us a lofty responsibility from which we must not shirk. One tool at our disposal, as Judge Weeramantry points out, is learning from the wisdom of the past to fulfil our duty to those who will follow us. In this connection the decision of the Supreme Court of the Philippines in *Oposa v Secretary of State of Department of Environment and Natural Resources* has been catalyst.¹³ This judgment has created world-wide interest among judges and academics.

THE PROBLEMS OF MODERN LAW AND SOME ANSWERS

The way in which modern legal systems have developed provides a series of obstacles to successful implementation of sustainable development principles. In most jurisdictions courts merely determine disputes between the parties presenting themselves. These private disputes between party A and party B are often determined by adversarial procedures. The judge hears the evidence which the parties present, hears their submissions and proceeds to make a decision between them. But most environmental issues are not amenable to be determined as if they are private disputes. The decision may have wider ramifications for the environment and on the community affected by the decision. The case may have public law implications. How can a court ensure that these wider considerations are properly taken into account? This is where the international law concept of *erga omnes* may come into play. It is the concept of an obligation owed towards all of the world. Again, we are indebted to Judge Weeramantry for his exposition of the principle and its centrality to public environmental disputes.¹⁴

Weeramantry notes in the Danube opinion that the procedures applicable to deciding *inter partes*

disputes are scarcely appropriate, nor can they do justice, to rights and obligations of an erga omnes nature. This is particularly so where a case may involve potential or actual environmental damage of a far-reaching and irreversible kind. The issue raised has not yet been solved at an international level although many national jurisdictions are developing techniques and means to cope with issues which transcend individual aspirations.

Environmental law is developing a very public law face. This is apparent in the rapid growth of public interest environmental law. Here the mechanisms of liberalised locus standi and the strength and energy of many NGO's is challenging traditional practices and procedures. Some jurisdictions have deliberately liberalised standing in environmental statutes to acknowledge the public, as opposed to the private, nature of environmental issues. In my state of New South Wales, as I describe in my separate paper, any person may approach the court alleging a breach or threatened breach of environmental law.¹⁵ These 'open standing' provisions have had a dramatic impact on the development of environmental law. They have enhanced public participation (another of the key Rio principles). Open standing has also spawned public interest litigation and lead to a reappraisal of the appropriateness of many of the established practices and procedures of courts in determining litigation. For example, new approaches to the costs of litigation have been necessary.¹⁶

Also, other barriers or hurdles to public interest litigants have been modified or revoked.¹⁷ These initiatives attempt to reflect the public nature of such disputes and underline the public interest in the proceedings and the outcome. The erga omnes doctrine also involves reappraising the relevance of classical contract law and property rights where they touch upon environmental disputes.¹⁸ I will not take time out now to describe these developments. A discussion of the NSW experience is provided in my separate paper.

The doctrine of public trust is another aspect of public law which may be making a come back. Originating partly from the ancient Roman Empire, it has found favour in many parts of the world. For example, in India and the United States. The doctrine embodies the concept of stewardship of the land and its preservation for present and future generations. In my part of the world, it is starting to take its place in environmental decision-making, especially where publicly owned land is involved.¹⁹

CONCLUSION

In our work in the area of sustainable development, we can be assisted by expanding our knowledge of the environmental issues we face in our region. This does not mean that we do not decide cases on the evidence presented. However, the greater our knowledge, the better we are able to assess and understand the evidence presented, often of a technical scientific nature. In this respect, we also need to consider how we can obtain more independent expert advice in the hearings before the courts. Independent expert panels owing a duty to no-one but the court are a possible consideration.

Another issue of which we need to become more aware is the differing notions of property ownership prevalent in many societies. The importance of legal ownership and other rights and interests in land are particularly significant in cases affecting natural areas. Many cultures, particularly indigenous ones, have quite different concepts of their relationship to the land than modern western notions of land ownership. The rights of land-owners often clash with the aspirations of environmental law in the areas of sustainability and biodiversity. These clashes may provide difficult and tense situations for the courts to resolve. Determining environmental disputes requires all the skill and acumen we can muster. To successfully carry out our judicial functions, we must learn what we can from traditional wisdom and from each other.

Perhaps I can close by quoting from Timothy Wirth, Under-Secretary of State for Global Affairs in the US Department of State. He noted that ecological systems were the very foundation of modern society, in science, agriculture and social and economic planning. In the long term, living off our ecological capital is a bankrupt economic strategy. He said:

When the environment is finally forced to file for bankruptcy because its resource base has been polluted, degraded, dissipated, and irretrievably compromised, the economy will go down with it.²⁰

As judges it is our task to see that in determining cases in the area of sustainable development we do not end up in environmental as well as judicial bankruptcy.

Thank you.

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- 10 The Fragile Bastion published by the Judicial Commission of NSW (1997) being a series of essays on the independence of the judiciary
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- 12 Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273
- 13 33 ILM 193 (1994) GR No. 101083 Summarised in SACEP/UNEP Compendium of Summaries of Judicial Decisions in Environment Related Cases, 1997
- 14 ICJ Separate Opinion of Vice President Weeramantry in the damming of the Danube case at pp 220 - 225
- 15 See pp 10 - 12, New Directions in the Prevention and Resolution of Environmental Disputes - Specialist Environmental Courts
- 16 In Oshlack v Richmond River Council (1998) 72 ALJR 578 the High Court held that the public interest nature of the litigation was a relevant factor in determining costs
- 17 See pp 12 - 15 of my second paper
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New directions in the prevention and resolution of environmental disputes - specialist environmental courts

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End Notes

THE CONTEXT

1. New South Wales is the most populous Australian State containing one-third of the nation's population (6 million + out of 18 million +). Sydney is its capital and sprawls for 70 km to the west from the Pacific Ocean to the Blue Mountains. Its population is around 4 million and the venue for the year 2000 Olympic Games. New South Wales is a large but by no means the largest Australian State, having an area in excess of 800,000 km² (Australia is 7.7 million km²).

2. Australia is a truly multi-cultural society containing immigrants from almost every country in the world, large numbers arriving since World War 2. Many have English as their second language. It is also home for a significant number of indigenous Aboriginal people, the descendants of the original inhabitants of the continent. European settlement began only in 1788, a little over 200 years ago, and then as a convict colony for Great Britain. Australia's population includes many people from South-East Asia.

3. Given its size and spread of latitude, it is unsurprising that Australia contains an amazing

diversity of climate and land-form. From tropical rainforest to temperate climes, as well as large arid and semi-arid tracts of land and desert. It is a country of extremes, which alternately suffers from drought, bushfire, flood and cyclones, sometimes all in the one year. Its unique flora and fauna is well known and partly attributable to the relative isolation of the island continent, its comparatively small population and a lower level of development than many other parts of the developed world.

4. In social terms Australia, despite its size and the ethos of the 'bush pioneer', is a highly urbanised society with 80% of the population living in the cities and large towns in the fertile south-east. Australia is a federal state with law-making powers shared under the Constitution between the Commonwealth Government, the States and the Territories. The shared powers include the making of laws affecting the environment. In turn, the States have established local government as a third tier of government. Land-use planning and resource exploitation is generally the responsibility of state and local government. The court system reflects the same dichotomy between the States and the Commonwealth, ie separate state courts and federal courts. The High Court of Australia stands at the apex of the judicial system.

5. As a consequence of the shared powers of law-making, New South Wales (indeed Australia) does not have a single unified code of Environmental Law. Rather, Environmental Law consists of an accumulation of environmental statutes, regulations, policies and practices, together with judicial interpretation thereon, as well as the overlay of the common law, eg. nuisance, negligence and land law.

6. It should not however be thought that Australia's relative isolation as an island continent means that it has few environmental problems. On the contrary, barely 200 years of European settlement has bequeathed a myriad of environmental problems. For example, our soils (which are old, thin, and of poor fertility) have been severely eroded and, in some cases, literally blown away, by land-clearing, over-grazing and, until relatively recently, poor farming practices. Significant areas of rural land is salt laden due to a rising water table. The cities, in particular Sydney, suffer from poor air quality, polluted harbours and water-ways and land-based pollution from disposal of waste, including dangerous and toxic substances. Many of our coastal and interior wetlands have been filled or degraded, causing a loss of diversity of fauna and flora. This loss of biodiversity has also resulted from agriculture, mining, forestry, tourism and urban development and expansion.¹ Failure to protect historic and cultural heritage has meant the loss of much of our relatively short colonial history and much Aboriginal culture and religion, which is acknowledged to reach back at least 60,000 years. Our 'home made' environmental disasters may not be comparable to Bhopal, Chernobyl, Exxon Valdez or acid rain, but in cumulative environmental terms they are evidence that we are no longer the 'lucky country' many would have us believe.²

7. This brief discourse forms the context for an examination of the creation and role of the NSW Land and Environment Court (the LEC), a specialist court created to deal with all manner of environmental disputes.

8. Decisions of all kinds which effect the environment are made by numerous different decision-makers in agencies within the various levels of government in New South Wales. Many emanate from local government; a number of decisions are made by central government

agencies and an increasing number by Ministers of the State.

9. Granted that most mature planning and environmental law systems accept that a person aggrieved by a decision should have a right of appeal, the next step to consider is to consider the nature of that appeal process. This paper is about the fundamentals of such an appeal system and the reasons therefor. While it concentrates on the NSW experience of the Land and Environment Court, now in its 19th year, it is not argued that it necessarily provides the perfect model. Nonetheless, it encompasses the majority of what many regard as the necessary attributes of a fair and efficient environmental appeals system.

10. The starting point for examination is the content of Environmental Law. While it may involve many private disputes, it must be kept steadily in mind that its substance and content is indubitably that of Public Law. That is, decisions have implications, not only for the immediate parties, but for the broader community and the environment itself. The public interest almost always comes into play in adjudicating any environmental dispute.

11. The fundamental principle must be that appeals or challenges, whether by applicants or third parties, must be to a tribunal independent of the Executive. The Executive will not, indeed cannot, conform to the Common Law requirements of procedural fairness or the rules of natural justice. The hearing, if there be one, is not going to be in public. It will be in private. There can be no right to call witnesses or to cross-examine. There can be no right of access to documents. There is likely to be no written reasons provided for a decision and no right of appeal, even for error of law. Such a system not only excludes public participation but inevitably, however honestly administered, will draw fire for its secrecy and suspicion of bias and pre-determination or corruption. It patently lacks any transparency. Moreover, such a system will never produce consistency of decision-making, nor make any contribution to the development of a body of legal principle so necessary for the development of Environmental Law.

12. Certain principles of a fair environmental appeal system may be regarded as essential. These include:

- * independence of the appellate tribunal from the Executive arm of government
- * proceedings must take place in public
- * procedural fairness and obedience to the rules of natural justice
- * comprehensive and integrated jurisdiction to avoid delay and duplication
- * ease of access and relative informality to assist in public participation and contain costs
- * expertise of adjudicators and capability for panel hearings for appropriate disputes
- * elucidation of 'real' issues in dispute
- * early access to documents including government documents

- * reasons for decision to be given
- * efficiency of tribunal processes and speed of decision-making
- * appeals on questions of law to a higher court
- * enforcement mechanisms which are simple, speedy and efficient
- * availability of full range of alternative dispute resolution (ADR) mechanisms to allow choice to litigants

13. I would not be so bold or presumptuous as to suggest what path any State should follow. Rather, my task is to describe the NSW experience in order that decision-makers in the government, bureaucracy and judiciary may, hopefully, receive some benefit from our bold experiment.

ENVIRONMENTAL DECISION-MAKING AND THE ESTABLISHMENT OF THE LAND AND ENVIRONMENT COURT

14. Decisions of all kinds which affect the environment are made by numerous different decision-makers in agencies within the various levels of government. As I have said, many emanate from local government; a number of decisions are made by central government agencies and an increasing number by Ministers of the State. The vast majority of these decisions can be appealed to the Land and Environment Court which, in administrative appeals, stands in the shoes of the decision-maker.

15. With the long overdue modernisation of the system of environmental planning in NSW in 1979, paralleled by the creation of a specialist environmental court, a unique opportunity arose for a new style of administration of Public Law. The legislation was innovative in many ways, as was the new court. Would the court be able to respond to the challenge?³ Both the Environmental Planning and Assessment Act 1979 (the EPA Act) and the cognate and complementary Land and Environment Court Act 1979 (the LEC Act) provided the opportunity for an almost completely new substantive approach to planning and development (both public and private), as well as new procedural rules and opportunities.

16. One of the most important decisions made was to opt for a specialist court to administer the law, rather than an administrative tribunal. This was to prove a crucial decision at a time when Australian governments believed specialist tribunals to be attractive, cheap and speedy as compared to courts, which were perceived as anachronistic, expensive and delay-ridden. The State Government also decided to place the court at the top of the judicial hierarchy of trial courts, as a superior court of record equivalent in status to the Supreme Court and subject only to appeal to the Court of Appeal.⁴

17. With hindsight, I think that had a new tribunal been established, the previous cycle of fragmented (and incomplete) jurisdiction shared between various tribunals and the courts, would have continued.⁵ Indeed, the establishment of a specialist superior court (with judicial independence) has, I have no doubt, served as a bulwark against political attack.⁶

PUBLIC PARTICIPATION

18. One emphatic theme which ran through the comprehensive package of legislation was the right of the general public to participate in the process of environmental planning. This is a specific objective under s 5 of the EPA Act. The objective is strengthened by other provisions in the Act relating to environmental plan-making, third-party appeals and open standing in order to enforce compliance with environmental laws. The legislation was an effort to progress from narrow traditional town and country planning, largely based on the English experience, to a broader and more integrated assessment of environmental issues. It was also a recognition and acknowledgment of the importance of the environment and the development of Environmental Law, as well as the right of members of the general public to participate in the processes and in decision-making.

19. The establishment of the LEC in 1980 was a crucial ingredient in the initiative. The court was created as an integrated court of record with exclusive jurisdiction to determine disputes arising under some 26 separate environmental laws. These statutes make provision for the protection of the environment and include, inter alia, planning, waste management, hazardous chemicals, coastal protection, ozone protection, heritage conservation, national parks and wildlife protection, wilderness, marine pollution, biological control of organisms, and air, water and noise pollution. Other categories of the court's jurisdiction include land valuation and rating (taxation) appeals, building approvals and Aboriginal land rights, to name but a few.

20. Under the LEC Act, numerous fragmented jurisdictions were consolidated. Jurisdiction was no longer to be split between different courts, boards, tribunals and authorities. Rather, the court was given an extremely broad jurisdiction to hear all civil and criminal (summary) enforcement matters, judicial review and merit appeals relating to all aspects of land and the environment, viewed in a broad fashion. For the first time, in the environmental context, non-judicial members were included alongside judges in a court (as opposed to a tribunal). The LEC Act also contained significant procedural innovations in an attempt to make it more accessible and effective. It stressed the centrality of public participation in determining disputes.

JURISDICTION

21. A wide-ranging jurisdiction is exercised by judges and technical assessors, now known as Commissioners. The latter are not required to have legal qualifications (although some do) but must be qualified in fields such as planning, local government, land valuation, engineering, architecture, environmental sciences, natural resources and Aboriginal land rights. The work of the court is divided into six areas or classes which encompass administrative appeals, civil enforcement, judicial review, compensation for compulsory land acquisition, Aboriginal land rights and criminal enforcement and criminal appeals.

- Merit appeals

22. One important aspect of the 1979 package, which has proved popular, is the concept of a one-stop shop. The legislation combined virtually all existing jurisdictions relating to land and the environment. This required the court to have a division relating to administrative appeals from development, building and licence decisions of local councils, state agencies and boards. This is an original jurisdiction where applications are heard de novo, with (as mentioned) the

court standing in the shoes of the decision-maker and exercising the decision-maker's powers.⁷ It is in this area that the expertise of full-time scientific and technical commissioners is utilised. They hear and determine cases singly or in panels of two, as well as assisting and advising judges in more complex and controversial matters. The court is directed to have regard to the public interest in determining appeals. In this area of jurisdiction, informality in receipt of evidence and examination of witnesses is the touchstone.⁸ However, informal procedures have not been relaxed to the extent of abandoning a traditional court framework and approach to adjudication.⁹ The rules of natural justice and procedural fairness require proceedings to observe a degree of formality. At the same time, a number of significant procedural rules of court (introduced in 1991) endeavour to ensure streamlined hearings and prompt decisions.¹⁰

- Legal Questions

23. One of the aspects of the one-stop shop, which has been universally applauded, is the ability to have legal questions arising in an administrative appeal determined quickly, without the delay and disruption of adjourning a case while an appeal is taken to another court. Commissioners may refer questions of law to a judge for an immediate answer.¹¹ Also, appeals against errors of law by Commissioners are promptly heard by a judge of the court.¹² It may be a tribute to the skills of Commissioners, as well as the effort of court registrars to isolate questions of law at an early stage in the process, which has led to a comparatively small number of such appeals. In addition, judges have been loath to permit an appeal on factual findings to be disguised as an error of law.

- Miscellaneous appeals

24. The court was also given a wide jurisdiction to hear and determine appeals relating to rating (taxation) and valuation of land, as well as the assessment of compensation to landowners for the compulsory acquisition of their land for public purposes. Other important facets of jurisdiction includes Aboriginal Land Rights appeals, where a judge sits with two Aboriginal Assessors to determine land claims refused by the Government.¹³ Aboriginal assessors also sit and determine disputes within and between Land Councils.

- Environmental Crime

25. Another important (and expanding) area of jurisdiction is summary criminal trials for environmental offences. This is the exclusive province of judges, who hear prosecutions by state agencies and local councils under at least 20 enactments concerning every aspect of land management and pollution.¹⁴ It is also possible for individual members of the public to bring criminal prosecutions, by leave of the court, alleging breaches of pollution legislation. These have been few in number but the existence of the right acts as an impetus for the lead agency, the Environment Protection Authority (the EPA) and other agencies, to be vigilant in prosecuting breaches.¹⁵ The maximum monetary penalty the court may impose is A\$1,000,000

and/or 2 years imprisonment. Remedial orders and the payment of compensation may be directed. The prosecutor may elect to proceed on indictment in the Supreme Court before a judge and jury if it is seeking a sentence of imprisonment of up to 7 years. It is important to note that no such trials have been initiated since the relevant statute commenced in 1989, the EPA preferring to prosecute in the LEC. The environmental court also hears appeals from magistrates decision's on environmental prosecutions.¹⁶

26. The number and range of environmental offences within the court's jurisdiction has continued to expand. The court's decisions (and those of the Court of Criminal Appeal) have made a significant contribution to the development of the law on environmental crime. I will return to this later.

- Civil enforcement and judicial review

27. Arguably the most important area of the court's jurisdiction is civil enforcement and judicial review by the judges of the court. The innovation of 'open standing' provisions and the elevation of public participation meant that the court would have to respond to an entirely new situation not hither to faced by the courts. This was Public Law in action. No longer would the court have to wrestle with sterile and expensive arguments of locus standi. That hurdle no longer needed to be jumped.

STANDING

28. An early test of the open standing provisions was whether the court would seek to construe the new provisions narrowly. Would the prophets of doom be right and the floodgates of litigation open and deluge the new court? Would the court be able to adapt to the new opportunities for public interest litigation or would the twin hurdles of the giving of undertakings as to damages and costs trip and thwart the new public participation rights? Many of these questions have by now been answered, although some remain to be finally determined.

29. Floodgates and the reality: Court statistics reveal that the number of proceedings brought by individual citizens or NGO's under the various statutory open standing provisions¹⁷ have never exceeded 20% of registrations for civil enforcement and judicial review in any year. The balance of applications are by local councils and state agencies. It must also be kept in mind that of the 20%, an unknown percentage would, in any event, have had Common Law standing.

30. Early in the history of the court, some litigants were submitting that the 'any person' provision did not really change the law. It was argued that it was still necessary for the applicant to prove a 'relevant interest' in the subject matter of the proceedings. Submissions to this effect were rejected by Cripps J in cases in 1980 and 1981.¹⁸ The same argument was taken to the Court of Appeal in 1985 (*Sydney City Council v BOMA*) and rejected.¹⁹ The words of s 123 of the EPA Act 'whether or not any right of that person has been or may be infringed by or as a consequence of that breach' removed the restriction imposed by *Boyce v Paddington Borough Council*.²⁰ The Court of Appeal held that there was no basis for reading down the words 'any person'. Priestley JA observed:

It is a convention that all people in NSW are subject to the same laws ... The convention

is disturbed when individuals are observed by others to be breaking a law with impunity ... The observer who feels strongly enough about the particular breach may well ask, since all are subject to the same law, why should this person's breach of it be allowed, and if it should not be allowed, why should not it be dealt with at my instance.²¹

31. Since 1979 open standing provisions have been progressively extended to all environmental and planning statutes. In addition, 'any person', with the leave of the court, may bring proceedings to restrain a breach of any statute, if the breach is likely to cause harm to the environment.²² The need for leave has now been eliminated but the Protection of the Environment Operations Act 1997 has not yet been proclaimed to commence. Similar (but more qualified) open standing provisions have been adopted by other Australian states (eg. Queensland, Victoria, South Australia and Tasmania).

32. However, the availability of open standing provisions has highlighted the existence of other significant procedural hurdles inhibiting access to the court in environmental cases. Some of the rules and traditions derived from private law have thrown up these barriers. The question to be asked was, are they appropriate principles to apply to Public Law issues? In an address to the National Environmental Law Association in 1989 Toohey J (a former member of the High Court of Australia) drew attention to the need for procedural reform. Otherwise, as he observed, 'relaxing the traditional requirements for standing may be of little significance'. He made particular reference to the general rule that 'costs follow the event' of litigation. Toohey J said that there was little point in opening the doors of the courts if litigants cannot afford to enter, or are scared off by the devastating consequences for an NGO or individual of having to pay the costs of the successful party. As he stated, the opponent will often be a government instrumentality or wealthy private corporation. As to the reality of open standing, I have had the occasion to observe that the influx of litigants has been barely enough to 'wet the wellingtons'.

33. Because it is fundamental, I will return to the issue of costs a little later.²³ Other potential barriers exist and I briefly address them. They include:

- undertakings as to damages on applications for interim injunctions
- overly complex pleadings
- discovery and inspection of documents and interrogatories
- Crown privilege
- final and conclusive certificates, ouster or preclusive clauses
- laches, acquiescence and delay (equitable defences)
- security for costs

PROCEDURAL ISSUES

- Undertakings as to damages

34. The ordinary rule (developed from private law litigation as opposed to Public Law) is that, other than in exceptional circumstances, the giving of an undertaking as to damages is a condition precedent to the granting of an interim injunction.²⁴ The capacity of an individual or NGO to give such an undertaking is invariably limited, especially if the project is large and damages likely to be high.

35. From the mid-1980s, judges of the court would customarily make an inquiry of an applicant for interim relief as to whether an undertaking as to damages was forthcoming. In the event that it was not, this would become a factor to be taken into account in the balance of convenience in the exercise of the discretion to grant or withhold relief. The 'test' case in the court was *Ross v State Rail Authority*.²⁵ Cripps J considered relevant judicial authorities in the UK and US.²⁶ Turning to the Australian context, his Honour referred to *Phelps v Western Mining*²⁷ and a statement by Deane J, then a judge of the Federal Court, that:

It is patently desirable that the legislature does not assume that traditional rules of the common law relating to locus to institute civil proceedings are universally appropriate to circumstances where laws are increasingly concerned with the attainment and maintenance of what are seen as desirable national economic and commercial objectives and standards and with the protection ... of the environment ... There is no merit in the erection of a curial ambush of shibboleths in which even a legislative intent evinced by words as clear as those used in s 80 (1) (c) of the [Trade Practices] Act would lie entrapped.²⁸

36. Cripps J noted the often quoted statement of Street CJ in *Hannan v Elcom (No 3)*²⁹ that the task of the court was:

... to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice inter partes. Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having sufficient interest in the matters sought to be litigated. It is open to any person to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court.³⁰

37. He also made reference to a similar situation arising under the Trade Practices Act 1974 (Cth) where in *CBA v Insurance Brokers Association of Australia*³¹ Bowen CJ (of the Federal Court) said:

The approach of the Court, I think, should be that it will inquire from a private person seeking an interim injunction whether he is willing to give an undertaking as to damages. The Court should then take into account on the balance of convenience the presence or absence of such an undertaking as one of the factors to be considered in exercising its discretion.³²

38. His Honour adopted and followed Bowen CJ and stated the practice of the LEC, recording the fact that it had already been followed in a number of cases. Ross has stood for a decade or so, despite occasional rumblings.

- Overly complex or formal pleadings

39. While pleadings can assist in identifying and narrowing issues, they also have the capacity to complicate, obfuscate and unnecessarily add expense and delay to the finality of litigation. In the hands of a skilful (or not so skilful) pleader, they may be so profuse and technical as to defeat their real purpose and object.³³ To avoid the pitfalls (or sometimes torture) of pleadings, the court determined to have no formal pleadings. Rather, each application (initiating process) would be required to precisely state the relief sought. In addition and where appropriate, particularly on judicial review, brief points of claim and defence are directed by the court. This has worked reasonably well. Further, issues of law are sought to be defined at an early stage in the litigation and well prior to the hearing. No 'ambush' is permitted.

- Discovery and inspection of documents and interrogatories

40. From its early days, the court perceived the need for more open access to documents and less frequent sterile arguments about privilege and relevance. It was better to get all of the documents out in the open at an early stage (especially in judicial review where cases are often determined on the documents) and to minimise adversarial posturing. A liberal approach was taken to discovery and inspection of documents and to the administration of interrogatories. Over the years, I think it may be said that attitudes to secrecy and professional, commercial-in-confidence and Crown privilege have softened. This has been spurred by freedom of information legislation.³⁴ For the most part, local councils and state instrumentalities produce their files without the necessity for formal subpoenae. There was a time, in the early 1980's when Crown privilege was regularly raised before the court but today it is a rarity. Indeed, it has all but disappeared.

- Laches, acquiescence and delay (equitable defences)

41. The court has acknowledged that the equitable defences of laches, acquiescence and delay have limited relevance to Public Law, especially where standing has been liberalised. Likewise, estoppel against public authorities will be unlikely to block an applicant seeking to enforce breaches of Environmental Law.

- Preclusive clauses and certificates

42. It is reasonable to observe that the court has continued the tradition of judicial scepticism

with a strict approach to preclusive or ouster clauses and certificates. This is exemplified by Aboriginal land rights litigation between 1985 and 1991 when judicial review in the court between the Government and Aboriginal Land Councils reached the proportions of trench warfare. Sensibly, the Government appears to have retreated and abandoned the use of preclusive certificates as a means of avoiding merit hearings on land rights appeals, no doubt partly because the court held that procedural fairness needed to be afforded to a land council prior to the issue of such a preclusive certificate.³⁵

- Wide discretion as to the granting of relief

43. The court's wide discretion to grant or withhold relief, or to mould its orders to best fit the circumstances of the case, is a valuable tool to prevent injustice. The Court of Appeal has made it plain that the LEC may need to look beyond the parties themselves in order to properly exercise the discretion.³⁶ Moreover, *Warringah Shire Council v Sedevcic*³⁷ has directed attention to the need to consider, inter alia:

... a legislative purpose of upholding, in the normal case, the integrated and co-ordinated nature of planning law. Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid.³⁸

44. Kirby P (now a High Court justice) referred to 'the public interest in equal compliance with the law'.³⁹

- Security for costs

45. Ordering an applicant to provide security for costs has the obvious capacity to terminate litigation then and there. If the applicant is an individual or NGO and the respondent a Minister, government agency or wealthy corporation, the disparity is obvious. Therefore, the ordering of security for costs has the capacity to stifle public interest litigation, almost before it has been launched. The court, accordingly, adopted a policy of closely scrutinising applications for security. As a result, such applications have been comparatively few and rarely successful. Pearlman CJ emphasised the importance of the public interest nature of litigation to the discretion to order security in the so-called Club Med case.⁴⁰

46. In addition, impecuniosity of an applicant is only one factor to be considered in exercising the discretion, and one which is not necessarily determinative. The Court of Appeal has also approached applications for security of costs of appeals in public interest environmental litigation with an acknowledgment of the importance of not thwarting such litigation. See for example, Priestley JA in *Brown v EPA*⁴¹ and Kirby P in *Maritime Services Board v Citizens Airport Environment Association Inc.*⁴² In the last mentioned case the President noted that

applications utilising the open standing provisions of the EPA Act 'reflect the high social importance of protecting the environment by the processes of law' not merely the interests of two private parties locked in litigious dispute. In considering an application for security of costs (of an appeal) it was appropriate to keep in mind the public interest reasons which lay behind the bringing of the case.

- Costs

47. Given the ever increasing costs of litigation this is potentially the most important barrier to participation and probably the most controversial. The LEC, like most Australian courts, has on its face an apparently open-ended discretion as to costs. In practice, however, we know from precedent that it is not. Australian courts have followed the principle established in England that costs ordinarily follow the event and a successful litigant is awarded costs against the losing party (see *Ritter v Godfrey*).⁴³ This is subject to the exceptions regarding the conduct of the proceedings. However, there have been cases where a court has taken into account the fact that an unsuccessful party acted in the public interest and not for personal gain. Since 1988 the LEC has recognised that a party who is legitimately claiming to represent the public interest may not be ordered to pay the costs of the successful party.⁴⁴ Some of the matters to be considered in such an exercise of discretion include the quality of the applicant's case and the public interest in the subject matter of the dispute.

48. Nonetheless, the court has never regarded the mere categorisation of the proceeding as public interest litigation alone as sufficient to depart from the ordinary rule.⁴⁵ In 1994 in *Oshlack v Richmond River Shire Council*⁴⁶ I attempted to draw the cases together and tease out principles relevant to costs in public interest cases. These 'considerations' were followed by Pearlman CJ in *Friends of Hay Street*.⁴⁷ However, the Court of Appeal reversed *Oshlack*⁴⁸ in June 1996. The members of the court considered that the practice of the LEC was in breach of the principles set out by the High Court in *Latoudis v Casey*,⁴⁹ a summary criminal proceeding.

49. Sheller JA said that:

If persons acting in the public interest are not to be discouraged from bringing proceedings ... by the fear that, if unsuccessful, they will have to meet the costs of the other party, the legislature may need to consider whether the costs of the other party, if it is successful, should be met from the public purse rather than the private purse of the person so acting.⁵⁰

50. The court held that the public interest nature of the litigation and the motive of the applicant in bringing the litigation is an irrelevant consideration on costs.

51. The High Court of Australia granted special leave to appeal and, by majority, reversed the Court of Appeal.⁵¹ It held that the costs discretion in the LEC Act was unfettered and extended to the awarding of costs in public interest proceedings contemplated by the open standing

provisions of the EPA Act. The special circumstances I had identified as arising in the public interest litigation were sufficient to warrant displacement of the ordinary rule that a successful defendant should receive costs. It is disappointing that the subsequent decision of the High Court in *South-West Forest Defence v Conservation Department* confined Oshlack to the special features of the NSW legislation.⁵²

52. It should also be mentioned that the LEC has a practice of not awarding costs in merit appeals, unless the circumstances are exceptional. Reference must also be made to the importance of legal aid to the ability of citizens and NGO's to access the court. In NSW, the tap has at times been turned off - or half-off. Nonetheless, the Environmental Defenders Office (a non profit community legal centre) began to run environmental cases from January 1985 and its skill, dedication and energy has been crucial to the advancement of public interest law.⁵³

SUBSTANTIVE LAW

- Overview

53. While procedural barriers to access to environmental justice are important, the substance of the law is of equal or greater significance. In 1979 the phrase 'environmental law' was rarely heard. There was planning law, local government law, some little utilised pollution statutes (mostly derived from the UK) and miscellaneous other related legislation. However, by the mid 1980s, Environmental Law had become established as a distinctive branch of the law. Moreover, the last decade has seen its development escalate by geometric proportions. Nowhere in Australia has it progressed at the rate (and to the extent) that it has in New South Wales. By contrast, Commonwealth (or federal) Environmental Law has remained more or less static and the subject of a relatively small number of cases and statutory construction. The dual reasons for the development of the law in NSW is undoubtedly the existence of open standing provisions and a specialist court.

54. In every aspect of Environmental Law, the LEC has been called on to construe and interpret the meaning of the law. It has settled how legislation is to be administered and interpreted. In doing so, it has championed one of the main tenets of the EPA Act (as well as other legislation), namely the right of members of the public to fully participate in the processes of Environmental Law. Decisions of the court have frequently led to changes in the law, a notable example being the *Endangered Fauna (Interim Protection) Act 1991*. The court has also commenced a tentative interpretation of the core principles of Ecologically Sustainable Development (ESD) which have been included in a large number of Environmental Law enactments.⁵⁴

55. Other areas which have benefited from judicial construction and elucidation are the responsibilities of public authorities to prepare Environmental Impact Statements (EIS) for projects which are 'likely to significantly affect the environment',⁵⁵ the adequacy and quality of EIS's; the development of pollution law and the construction of a number of state environmental planning policies eg. SEPP 5, 9, 10, 14, 19, 26 and 46.⁵⁶ Unsurprisingly, decisions of the court have not always been popular with the government of the day, hence occasional statutes to overturn or 'get around' decisions of the court, as well those of the Court of Appeal.

56. I propose to briefly discuss some of the illustrations mentioned above. The first concerns the protection of biodiversity.

- Biodiversity

57. From its inception in 1980, the court heard a number of challenges by individuals and environmental NGO's to the logging of rain forests and old growth forests. Most were brought against the State Forestry Commission. In the vast majority of cases the applicant proved that the Commission had breached or was likely to breach the law.⁵⁷ Predictably the response by the Commission was a political one. That is, to try to convince the Government to exempt forestry operations from formal environmental impact assessment procedures and compliance with Part 5 of the EPA Act.

58. In 1991 the North East Forest Alliance (NEFA), an NGO, became concerned at logging in an inaccessible forest known as Chaelundi in the north of the State. It claimed that the forest was 'mega diverse' and many threatened and endangered species were likely to be lost through logging and other forestry activities. NEFA and other conservation groups attempted every available political activity to endeavour to stop the logging, including road blocks and demonstrations which lead to the daily arrest of large numbers of demonstrators and widespread media attention. When these confrontations appeared to fail, John Corkill, on behalf of NEFA, launched an application in the court under the open standing provisions of the National Parks and Wildlife Act 1974. His case was that the forestry operations would inevitably include the 'taking or killing' of listed endangered fauna without a licence and contrary to the statute. The definition of 'take' included 'disturb'. Mr Corkill sought declaratory and injunctive relief.

59. The Forestry Commission fought the case largely on technical legal grounds. It also argued that the Act did not bind the Crown (the Government). This was a submission that was difficult to accept, given the statutory provisions. The Commission also submitted that the definition of 'take and kill' extended to the direct and intended consequences of conduct, and not to the indirect loss or modification of the habitat of endangered fauna.

60. Relying on ordinary principles of statutory construction, and a number of United States authorities on a similar legislative code, I held that 'disturb' in the definition of 'take', included indirect action such as significant habitat modification which placed fauna under threat by adversely affecting essential behavioural characteristics relating to feeding, breeding or nesting. 'Disturb' included habitat destruction which affected an endangered species by leading immediately, or over time, to a reduced population.⁵⁸ It was held that the Forestry Commission's logging operations were in breach of the National Parks and Wildlife Act (NPW Act) and this finding was upheld on appeal to the Court of Appeal.

61. The decision provoked an extreme reaction from the Government of the day which tabled a Regulation to exempt the Forestry Commission, and other State agencies, from the NPW Act. The Regulation was, however, disallowed by the Parliament. The Opposition (with the aid of Independent Green MP's) then introduced its own legislation, the Endangered Fauna (Interim Protection) Act 1991 which drew on the Corkill decision in relation to habitat protection and the

need for Fauna Impact Statements where any activity was likely to have significant effect on the environment of endangered fauna. No project, which might have that effect, could proceed without obtaining a licence from the National Parks and Wildlife Service. Third party appeals were permitted by any objector if a decision to grant a licence to 'take or kill' fauna was granted. This legislation, which lasted until the passage of the Threatened Species Conservation Act 1995 (commencing in 1996), significantly slowed the loss of endangered and protected fauna and their habitat. The case also had political ramifications which led to the resignation of the Premier and the Minister for the Environment; but this is another story.

- ESD principles

62. As a result of the Rio Earth Summit and Agenda 21, the Commonwealth and the Australian States and Territories entered into the Intergovernmental Agreement on the Environment (IGAE).⁵⁹ The Agreement provided that all signatories would implement certain core ESD principles in policy and decision-making. These were:

- The precautionary principle
- Intergenerational equity
- Conservation of biological diversity and ecological integrity
- Improved valuation, pricing and incentive mechanisms including 'polluter pays'.

63. By 1998 in excess of 50 Acts of Australian parliaments have been passed which incorporate these core ESD principles. In NSW alone, there are 15 statutes.⁶⁰

64. Were these adopted principles any more than pious hopes or motherhood statements? From 1993 onwards, ESD principles began to be raised in cases before the court. One of the first such cases was *Leatch v National Parks and Wildlife Service*.⁶¹ This was an appeal by an objector to the issue of a licence to a local council to take and kill endangered fauna in the construction of a link road. The fauna involved were Yellow Bellied Glider and the Giant Burrowing Frog. In light of the evidence of scientific uncertainty, I was asked to take the precautionary principle into account. It had, at that time, not been specifically incorporated into the NPW Act, although it had been included in to the objects of a number of other environmental statutes. However, the subject matter, scope and purpose of the National Parks legislation made consideration of the Precautionary Principle clearly relevant. The licence was refused. Since *Leatch*, there have been a number of cases in the court (and in other jurisdictions) which have considered the principle, as well as other ESD principles.⁶²

65. In *Nicholls v National Parks and Wildlife Service* Talbot J expressed concern with the workability of the precautionary principle. It was framed appropriately for political aspirations but as a legal standard, it had the potential to create interminable forensic argument. Nonetheless, he said that it was a 'practical approach which this court finds axiomatic'.

66. *Greenpeace Australia v Redbank Power Company* led Pearlman CJ to examine the

precautionary principle in the context of an approval for a new coal based power station. Greenpeace argued that the development would exacerbate the greenhouse effect and, applying the precautionary principle, should be refused. Her Honour found that there was instances of scientific uncertainty on both sides of the issue. Pearlman CJ applied Leatch but held that application of the principle did not require that the greenhouse issue outweigh all other issues. See also Talbot J in *Alumino v The Minister*, wherein it was held that while extreme caution must be used in determining whether consent ought be granted where there was potential to cause significant harm to the environment, there was no relevant scientific uncertainty.

67. *Northcompass v Hornsby Council* was interesting because the development was a bioremediation plant which, in theory, would advance ESD. However, there was relevant scientific uncertainty as to the effect of odour and air pollution from windrows on young children and residents living in close proximity. The decision concluded:

It must be said that this case is not an example of the so-called NIMBY (not in my back yard) syndrome. On the evidence, it is simply inappropriate to locate a bioremediation plant with open windrows so close to sensitive land uses. One would need a trial which proved an environmental success, rather than a failure, to lend confidence in good environmental performance given the present location. Alternatively, a proponent could demonstrate the soundness of a proposal by field or laboratory tests simulating operating conditions, as suggested by the EPA. This has not occurred.

The Council argues that the concept of a bioremediation facility is an excellent example of ecologically sustainable development. We agree. It is consistent with ESD to have a facility which takes green waste away from diminishing landfill and provides value added end products. This is consistent with the core principle of intergenerational equity. It must, however, be noted that another core ESD principle is the precautionary principle. This was mentioned by the EPA and a cautionary approach was quite specifically adopted by Commissioner Cleland in his Report and recommendations to Council. We think that he was correct to do so, given the particular factual context and bufferless location.

There are of course many Rio Principles which are relevant to environmental decision-making, including a case such as this. For example, the right to a healthy environment (Principle 1). Indeed, the principle of environmental harm is a major cornerstone of ESD. This is most effectively accomplished through environmental impact assessment processes (Rio Principle 17) involving full public participation (Principle 10).

The applicability of ESD principles to designated development under Part 4 of the EPA Act and the inter-relationship of the principles has never been fully explored in the Court. It is unnecessary to do so in this case given our conclusion that the application should be refused on its merits for the reasons we have given.

68. In *Planning Workshop v Pittwater Council*, a case concerning the habitat of squirrel glider, Pearlman CJ left open the application of the precautionary principle since she had determined

to refuse the development on the basis of its significant effect on threatened fauna.

69. From these illustrations, one can see that the judges of the LEC are attempting to grapple with and interpret ESD principles, sometimes drafted in vague and general terms and in the absence of any real legislative guidance. The court has highlighted the difficulty of translating the principles into practical terms which can be applied by decision-makers. It has given its tentative acceptance to the Precautionary Principle by adopting a 'cautious approach' to situations of scientific uncertainty where harm to the environment is likely. The decisions have also revealed the need for legislation to clearly assign the role which ESD principles are to play in decision-making. Are they to guide the decision-maker? If so how? How are they to be balanced against other relevant considerations eg. social and economic? What weight is to be given to them? Should they be defined more closely and in a fashion which eliminates vague and uncertain expression?⁶³ Thus far, none of these questions have been answered. ESD is undoubtedly a dynamic area, pivotal to the development of Environmental Law and one which will doubtless confront the court, as it will other jurisdictions, over the next decade.

- Public Participation

70. I mentioned this earlier but it is well to note that Principle 10 of the Rio Declaration embraces the philosophy of public participation in environmental decision-making. Fortunately for NSW, public participation has been a central feature of the environmental planning system since the 1979 EPA Act, see its objects.⁶⁴ It has also emerged as an issue in a significant number of cases before the court. These have mainly involved participation in plan-making and in the development process. Consistent with the clear legislative intent and purpose, the court has stressed the importance of public participation in the making of informed decisions on the environment. Its decisions have built upon the decision of the High Court in *Scurr v Brisbane City Council*.⁶⁵ The court has always emphasised participation rights and the difficulty of knowing whether public notices, which are found to be inadequate in some way, have failed to alert citizens to exercise their rights as objectors. I will mention some examples in brief point form.

- *CSR v Yarrolumla Shire Council*.⁶⁶ This concerned a misleading statutory sign erected on a quarry site to advertise the project. It failed to name the developer. Development consent declared invalid.
- *Monaro Acclimatisation Society v Minister for Planning*.⁶⁷ Here the court held that a Local Environment Plan (LEP) was invalid because of a failure to publicly exhibit the draft. The relevant documents were kept under the counter by the council, without any sign or notice of their exhibition or availability.

In *Porter v Hornsby Shire Council*⁶⁸ it was held that the council had denied procedural fairness in failing to notify an adjoining owner of a building application. The decision was affirmed on appeal albeit on the basis of statutory construction.⁶⁹

- *Canterbury Residents and Ratepayers Association Inc v Canterbury Municipal Council*⁷⁰ held that a public notice of a draft local environmental plan to change a zoning must not be relevantly misleading so as to negate its purpose. The statement of principle was specifically approved by the Court of Appeal in *Litevale Pty Ltd v Lismore City Council*.⁷¹
- *Johnson v Lake Macquarie City Council*⁷² set aside a development consent on the basis of a failure to exhibit the application for the period of time required by the Regulation.
- *Maybury v The Minister for Planning*⁷³ was a case of a failure to notify tenants of land in the near vicinity of an application to erect an aluminium dross plant. The consent of the Minister was set aside because of the non-compliance.
- In *Curac v Shoalhaven City Council*⁷⁴ the Council failed to give the required 30 days' public notice of a proposal for a shale quarry. This was held to be a breach of a mandatory requirement in the public interest which required strict adherence.
- In *Helman v Bryon Shire Council*⁷⁵ the Court of Appeal approved *Curac* and upheld an appeal holding that the absence of a fauna impact statement being lodged with the development application, as required by the enactment, was a precondition to jurisdiction to grant development approval.

*Nelson v Burwood Municipal Council*⁷⁶ concerned a failure to notify a development application in accordance with council's policy. The residents had a reasonable and legitimate expectation to be notified and given the opportunity to comment. Likewise the decision-maker deprived itself of the opportunity of considering submissions. The consent was set aside.

71. These decisions need to be understood in the light of the extensive public participation provisions in the EPA Act (and other environmental legislation) and the provision in the LEC Act (s 39(4)) that, in making a decision on an appeal, the court shall have regard, inter alia, to the public interest.

72. In order to enhance participation, in 1996 the court appointed a formal Court Users Group which meets and consults regularly with the personnel of the court to discuss issues relating to the running of the court. This has been welcomed and has been an unqualified success. It has a broad and representative membership.

- Public Trust Doctrine

73. The doctrine of public trust was actively agitated in cases before the courts of NSW in the second half of the 19th century. However, it more or less disappeared from sight until 1973 when it was used to argue that the Commonwealth had a trust or obligation to use a reserve in Canberra as a public park and not for an exceedingly tall and highly visible telecommunications

tower, the Black Mountain Tower case.⁷⁷ Public trust issues started to be raised before the LEC from around 1990. *Willoughby City Council v The Minister*⁷⁸ concerned a commercial use in part in a national park in Sydney. I said:

... national parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law in order to achieve the objects of the National Parks and Wildlife Act.

74. See also Kirby P in Court of Appeal, *Woollahra Municipal Council v The Minister for Environment*⁷⁹ and *Packham v Minister for Environment*.⁸⁰ For a discussion of the Public Trust Doctrine see *Ethical Issues in Land-Use Planning and the Public Trust*.⁸¹

- Pollution Law

75. Through its summary criminal jurisdiction the court has been interpreting statutes involving environmental crime for the past 17 years. The principal areas have been water pollution, air pollution, marine oil pollution and land degradation and clearing. This jurisprudence, aided by decisions of the Court of Criminal Appeal, has led to a more coherent body of environmental crime and its acceptance as a defined aspect of criminal law.

76. There have been some significant decisions which have had an impact on practice, policy and new legislation. However, the most important, in terms of its implications for the law generally, was *EPA v Caltex*.⁸² The EPA prosecuted Caltex for a large number of alleged breaches of its pollution control licence. It was a licence condition that Caltex daily monitor its discharges of certain toxic substances into the South Pacific Ocean. The EPA gave Caltex a notice to produce its monitoring data. In refusing to produce documents, Caltex claimed that it was entitled to rely on the privilege against self-incrimination. The issue was whether a corporation was entitled to rely on the privilege.

77. Taking the cue from Lord Denning, I was bold enough (some thought silly enough) to hold that corporations were not so entitled. This was in the face of the highest authority in England, as well as Canada, New Zealand, a number of Australian State Supreme Courts and the Federal Court.⁸³ On the other side of the debate were decisions of the US Supreme Court and *Murphy J* in the High Court of Australia (which court had not authoritatively decided the issue).⁸⁴ My first instance decision was reversed by the Court of Criminal Appeal but upheld in the High Court.⁸⁵ The declaration by the High Court that the privilege against self-incrimination is not available to corporations (and not part of the Common Law of Australia) has had a significant impact on white collar crime investigations and trials.

78. Another case of note is the extra-territorial effect given to the NSW Clean Waters Act 1970 by Cripps CJ in *State Pollution Control Commission v Brownlie*.⁸⁶ The Court of Criminal Appeal

confirmed that the NSW Act applied to acts or omissions outside the state provided they had, or are likely to have, relevant consequences within NSW.⁸⁷ In this case the defendant had aeri-ally sprayed crops in Queensland with a toxic solution. The land was contiguous with a river which formed the border with NSW. Rain washed the pesticide down the river (into NSW) where it killed thousands of fish.

- Scrutiny of Environmental Impact Statements (EIS)

79. From the early 1980's the court was called upon to scrutinise environmental impact assessment procedures and the validity of EIS's. The examination arises in two circumstances - merit appeals and judicial review. In exercising its jurisdiction, the court has spelt out the purpose and importance of an EIS to the public and decision-maker alike and has stressed that the document is not the decision itself, but part of the process leading to a decision. The meaning of 'likely to significantly affect the environment' (s 112 EPA Act) has been explained.⁸⁸ In many instances the court has been assisted by US authorities on a similar legislative scheme.⁸⁹ As to the required contents of an EIS, *Prineas v Forestry Commission*⁹⁰ (approved on appeal) set out a number of guidelines:

- An EIS is not required to be perfect. It need not cover every topic nor explore every avenue.
 - It must not be superficial, subjective or non-informative.
 - It should be comprehensive in its treatment of subject matter, and objective in its approach.
 - It should be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out the particular activity.
 - It should be written in understandable language.
- SEPPs and new legislation

80. A significant proportion of detailed environmental and planning regulation is contained in State Environmental Planning Policies (SEPPs). These policies, made by the Minister, have the force of law and are the highest form of statutory instrument under the EPA Act. They often cover innovative areas of planning - social, economic and environmental. The court has frequently to apply, interpret and enforce these policies. I refer to some examples:

Social and economic

Housing for Aged and Disabled Persons	(SEPP 5)
Group Homes	(SEPP 9)
Retention of Low-Cost Rental Accommodation	(SEPP 10)
Caravan Parks	(SEPP 21)
Residential Allotment Sizes and Dual Occupancy Subdivision	(SEPP 25)
Urban Consolidation (Redevelopment of Urban Land)	(SEPP 32)
Major Employment Generating Industrial Development	(SEPP 34)

Manufactured Homes Estates	(SEPP 36)
Multiple Occupancy of Rural Land	(SEPP 42)

Environmental

Coastal Wetlands	(SEPP 14)
Bushland - Urban Areas	(SEPP 19)
Littoral Rainforests	(SEPP 26)
Cattle Feedlots	(SEPP 30)
Hazardous and Offensive Development	(SEPP 33)
Koala Habitat Protection	(SEPP 44)
Protection and Management of Native Vegetation	(SEPP 46)

81. The interpretation of state policies, such as the above (indeed all new environmental regulation), is routinely undertaken by the court. After an initial period of litigious activity, whereby the court helps to set the bounds and intent of the instrument, the experience has been that the situation settles down with little need for further 'testing'. Alternatively, the court's decision may lead to legislative refinement. I think it is fair comment that the court has sought to give effect to the intent of instruments in an effort to make them work as practical planning documents and not to be overly legalistic and nit-picking in its approach to construction.

ALTERNATIVE DISPUTE RESOLUTION

82. From its inception the court was mandated to emphasise alternatives to traditional adjudication of disputes. Section 34 of the LEC Act provides for conciliation conferences by technical assessors of the court with a view to conciliating merit appeals. Such a conciliation conference is also required to be undertaken where the claim is for compensation by reason of the compulsory acquisition of land.⁹¹ Conciliation conferences often take place on-site. They enjoy a high percentage of success in the resolution of disputes, indeed around 85%. If unsuccessful, and a hearing is necessary (before a different Commissioner unless the parties consent to the original one) the issues are usually reduced in number and well-refined. Consequently the hearings are usually short.

83. The popularity of conciliation conferences has fluctuated. Up until 1986 they were a frequently used alternative, partly because they were expeditious, inexpensive and convenient. However, by the mid 1980s, it had become apparent that parties were often attempting to 'test the waters' and 'discover' the opponent's case, rather than a genuine desire to conciliate the dispute. As a result, the number of conferences fell markedly. However, since 1995 their popularity has started to return as a viable option. Given the increase in costs of merit appeals - expert evidence and legal fees - parties have become much more committed to conciliating disputes and ensuring the necessary delegations are in place to seal an agreement. Conciliation conferences are now almost as popular as mediation as a means of dispute resolution.

84. Mediation became an option in the court in May 1991, with a government supported pilot scheme. Its success led to mediation becoming a permanent feature. The rate of successfully mediated disputes has been consistently around 70%. Mediations usually take about one-third

to one-quarter of the time of contested hearings. Over 450 mediations have now been conducted within the court, ranging from small matters to very substantial mineral projects and public works. Mediations are not undertaken by judges but by well trained and experienced 'in-house' mediators.⁹²

85. Another ADR option is Issues Conferences, introduced in 1991 primarily as a case management tool in complex legal and factual applications. Skilfully conducted conferences are often conducive to promoting settlement negotiation or resort to other court sponsored ADR mechanisms. At the very least, they sort out the real issues and set aside the illusory, obstructive or imaginary ones.

86. These ADR mechanisms account for 6 to 10% of filings which go to a full hearing. In 1994 the governing statutes for all courts were amended to promote and strengthen ADR. Apart from regularising the LEC practice and providing statutory protections for participants, mediators and the courts, the amendments enabled the court to refer matters out to accredited mediators if it was the wish of the parties.⁹³

87. In an effort to boost ADR, the court has been considering ways of introducing independent expert appraisal and neutral evaluation as further tools to enhance dispute resolution in appropriate classes of cases.

88. A modern court should be a multi-option forum for citizens to resort in order to resolve their disputes. There is no magic in traditional adjudication by a judge. For many disputes it will be the most appropriate and preferred alternative. For others, the alternative mechanisms - arbitration, conciliation, mediation etc will be more fitting to the nature of the subject matter and the desire of the parties. A modern court should provide a range of dispute resolution options so that parties may choose what means best suits the particular circumstances of their case.

89. In 1996 the court adopted time standards for disposal of cases in each class of litigation and in the delivery of reserved judgments. The court monitors performance against those standards. Other courts have followed suit.

ADVANTAGES OF A SPECIALIST ENVIRONMENTAL COURT

90. There are many reasons why the advent of the court has been a benefit in the environmental arena. The mixed personnel of the court and its specialist nature (including the substantial use of expert witnesses) has been successful in generating the expertise and precedents required to facilitate better, more consistent environmental decision-making. This has positive ramifications for administrative decision-makers, business and industry. The range of practical skills possessed by Commissioners permit of specialist appointments to match the diversity of jurisdiction, either through the mix of judges and technical Commissioners or the matching of the expertise of Commissioners to particular cases. Importantly, the creation of a specialist court has elevated public and industry awareness of environmental issues. This has been considerably aided by improved access for parties through open-standing provisions serviced by legal aid and a non-profit community legal centre, the Environmental Defenders Office.⁹⁴ By contrast, where jurisdiction remains fragmented, the impact of Environmental Law on the public consciousness is diminished.

91. The experience of 19 years of the court has demonstrated, in terms of cost, efficiency and justice, a number of advantages of having an integrated, wide-ranging jurisdiction. The following are some examples:

- * decrease in multiple proceedings arising out of the same environmental dispute
- * litigation will often be reduced with consequent savings to the community
- * a single combined jurisdiction is administratively cheaper than multiple separate tribunals
- * a greater degree of certainty in development projects
- * reduction in costs and delays may lead to cheaper project development and cost for consumers
- * greater convenience, efficiency and effectiveness in development control decisions

Independence and inherent jurisdiction

92. Some commentators have voiced concern regarding the independence of the court as a result of it being a 'creature of statute' and, therefore, vulnerable to the whims of parliament. They had previously pointed to a perceived lack of inherent jurisdiction. In 1993 the Court of Appeal confirmed that the LEC had inherent jurisdiction.⁹⁵ The court is in the same position as any other court in Australia, as all courts are created by statute - albeit by statutes of longer standing than the LEC 1979. In addition, the judges of the court, in fact all state judges, were relatively recently granted constitutional protection to ensure judicial independence. Inter alia, these provisions ensure that no court can be abolished unless the judges of that court are appointed to a court of equivalent status.⁹⁶

93. With regard to these arguably legitimate concerns, a court has substantial advantages over a tribunal. These include judicial independence, which is pertinent in the environmental area where the government is often a party to litigation. Importantly, a superior court is able to secure obedience to its orders through contempt procedures, thus enhancing its ability to protect the environment.

Damages

94. The absence of power in the Court to award damages for tort and the issue of exemplary/ aggravated damages is another issue. My answer to this is that it is a matter for law reform. Proposals have been made for the provision of civil damages, particularly as a means of moving away from criminal sanctions, which are considered by some as inappropriate in certain environmental contexts. Civil enforcement is regarded as better able to achieve environmental protection. It is, therefore, possible that the court will acquire this jurisdiction. At present the court has only limited power to award damages, although this has been extended by changes to local government law and environmental offences.

Circumventing the Court

95. On occasions there has been the temptation for Governments to seek to overrule court

decisions or exclude the Court's jurisdiction. Indeed, there has been some history of this, particularly prior to 1988, which resulted in a public backlash. It may, however, be pointed out that many of the legislative aberrations have followed rulings or appeals in the Court of Appeal, rather than the LEC. Political manoeuvrings can be expected to arise from time to time and have the benefit of taking place in the public arena, where a final resolution is often influenced by public opinion and lobbying. However, the case of *Brown v EPA* is to be noted. Legislative amendments were made following the decision in the LEC. These effectively thwarted a major portion of the appeal before the Court of Appeal. As a result, the appeal was withdrawn. Another reversal came in 1996 when the Government legislated to reverse a decision of the LEC over a large open-cut coal mine and validate a state policy declared to be void by the court (*Rosemount Estates v The Minister*).⁹⁷ This occurred while the case was waiting to be determined in the Court of Appeal.

OTHER AUSTRALIAN JURISDICTIONS

96. The issue of a preferred system of appeals and enforcement in the areas of planning and environmental law has been the subject of scrutiny and debate around Australia for many years. A report commissioned for the federal government in 1990 recommended a single combined appellate and enforcement jurisdiction for development control in each state, necessarily providing a broad jurisdiction to resolve all planning and environmental issues.⁹⁸ The authors recommended a specialist court, including judges and commissioners and modelled substantially on the LEC. The principal difference was that the specialist court would exist as a division of the Supreme Court of a State. The thrust of the report was adopted by all Australian planning ministers in 1991 and a number of states have moved towards meeting the recommendation, notably Queensland, South Australia and Tasmania.

97. Queensland has built on the previously existing Local Government Court by renaming it the Planning and Environment Court and expanding its jurisdiction. The court is serviced by District Court Judges and remains an intermediate court. The jurisdiction of the court now includes the ability to make declarations and orders that were, under the old legislation, solely the province of the Supreme Court. The expansion of the statutory powers of the court was accompanied by an open-standing provision substantially modelled on the wording of s 123 of the EPAA 1979 (NSW). However, jurisdiction remains fragmented to the extent that criminal matters are still heard in magistrates' courts, where open standing has also been granted to any person to bring proceedings by way of complaint and summons for certain breaches of the law.

98. In South Australia a new court known as the Environment Resources and Development Court has been established by the Environment Resources and Development Act 1993 (S Aust). The court is a specialist court, established to deal exclusively with building, environmental and planning disputes and is separate from the existing Supreme, District and magistrates' courts. The court is comprised of legal and non-legal appointments, and includes District Court Judges, magistrates and Commissioners (who are equivalent to assessors in the LEC). It hears all merit appeals and criminal and civil enforcement proceedings. The court is not bound by the rules of evidence and is mandated to conduct itself with the minimum of formality and inform itself as it thinks fit, characteristics drawn from the LEC. While the establishment of the court is a positive step and to be commended, there are major deficiencies. The court does not have jurisdiction over judicial review proceedings, which remain with the Supreme Court, and is a court of intermediate status. At this stage its jurisdiction over environmental issues is

limited, although it is hoped to be expanded over time.

99. Tasmania has established the Resource Management and Planning Appeal Tribunal, as part of a package of legislation to reform planning, development and environmental protection. The tribunal utilises both legal and non-legal members. Its jurisdiction includes merits or administrative appeals and civil enforcement but not judicial review. An attempt to relax the common law rules of standing has been made for civil enforcement. While the legislative package contains laudable and innovative changes in statutory powers, it has failed in its conception of a curial body. The outcome, I think, will be less efficient and effective than an integrated court of a superior status.

100. In the remainder of the Australian states and territories, jurisdiction over EL continues to be fragmented. Most jurisdictions have planning and building appeals located within their administrative appeal tribunals. Western Australia is presently re-appraising its approach. Usually, although not exclusively, judicial review or civil enforcement occurs within state or territory Supreme Courts. Criminal prosecutions are normally heard in the magistrates' courts. In the Commonwealth area, jurisdiction is shared between the Administrative Appeals Tribunal and the Federal Court. However, judicial review of environmental law is restricted because of the requirement to establish common law standing and the provisions of the Environment Protection (Impact of Proposals) Act 1974 (Cth) being drafted in such a way as to make it almost non-justiciable. In any event, due to the division of powers under the Constitution, State jurisdiction is the more important.

CONCLUSIONS

101. The success (or otherwise) of the LEC must be judged not only in terms of efficiency and effectiveness, but in terms of access. Without statutory open standing the role of the court would be considerably reduced. The number of civil enforcement and judicial review applications by individuals, residents, conservation groups and other third parties (as distinct from consent or regulatory authorities) has shown modest but significant growth over the last decade. Importantly, a high proportion have succeeded in exposing and remedying breaches of the law, sometimes by the state or local government. In short, open standing has not been abused. The existence of self-help remedies to the public at large also acts as an incentive for regulators to do their job. Additionally, civil enforcement of pollution breaches is slowly becoming more popular, leaving the more serious breaches to be dealt with by the criminal law.

102. One of the successes of the original legislative package has been Part 5 of the EPA Act 1979 which controls the bulk of development activities by public authorities and draws on the National Environmental Policy Act 1970 (the NEPA) in the United States. Part 5 compels the anticipation of environmental problems and requires them to be accounted for in the decision-making process. Section 111 of the EPA Act is pivotal and imposes on a determining authority (usually a government agency) a duty to examine and take into account 'to the fullest extent possible' all matters affecting or likely to affect the environment by reason of the proposed activity. In addition to this obligation, a duty to prepare and assess an environmental impact statement (EIS) will arise if the carrying out of the activity is 'likely' to 'significantly affect the environment'. The court may therefore be called upon to examine the lawfulness of an approval in the absence of consideration of an EIS, or the correctness of the decision, if any, by the agency, that an EIS was not required. Extensive case law has developed over the past decade

to interpret these provisions and has acted as a guide to proponents and citizens alike.

103. The work of the court has made a substantial contribution to the development of Environmental Law. This has occurred through building up a body of case law precedents, by interpretation of statutes and environmental planning instruments and on occasions by 'making' law.

104. The former Chief Justice of NSW, now Chief Justice of Australia, The Hon. Justice Murray Gleeson has emphasised four principal objectives of the legal system - effectiveness, efficiency, timeliness and, above all, justice. The Land and Environment Court has sought to achieve each of these objectives. It has demonstrated the appropriateness of easy access to a superior court with an integrated, exclusive jurisdiction in environmental law. Part of the court's success is, I believe, due to its mixed personnel - legal and technical. The opportunity of a judge to sit with or to delegate matters to lay assessors ensures determination by persons with appropriate qualifications and experience. The wide discretion to make orders 'as it thinks fit' and to punish for contempt those who disobey its orders, enhances its role as a specialist curial structure. The court's wide-ranging jurisdiction enables it to administer social justice in the legislative scheme of environmental laws, which travel far beyond justice inter partes. Its status as a superior court, with an integrated jurisdiction, means that it can, as far as is possible, completely resolve all matters in controversy between the parties and avoid multiplicity of litigation. An important by-product of the court's jurisdiction is the enhancement of the environmental decision-making process. Having a specialist court has also served to elevate public, government and industry awareness of environmental issues and treat them more seriously.

The Hon. Justice Paul L Stein AM
Court of Appeal of NSW, Sydney, NSW, Australia
February 1999

END NOTES

1 State of the Environment Report, Australia 1996, State of the Environment Advisory Council, Department of Environment, Sport and Territories, Canberra

2 Donald Horne, *The Lucky Country*, Penguin Books 1964

3 The second reading speech of the late Paul Landa, Minister for Planning and Environment stated that:

the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute-resolving techniques will utilise non-legal experts as technical and conciliation assessors ... The court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. The court, in consequence, will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit ... The court will establish its own body of precedents on major planning issues, precedents sorely sought by [local government] councils and the development industry but

totally lacking in the now to be abolished local government appeals tribunal. The decision of the court its civil jurisdiction is final, except for appeals to the Court of Appeal on questions of law ... (Hansard, NSW Parliamentary Debates 21 November 1979).

4

5 Prior to 1979, jurisdiction was split between the Local Government Appeals Tribunal (a lay tribunal with no power to determine questions of law); the Land and Valuation Court (part of the Supreme Court which dealt with compensation for compulsory acquisition of land); the Subdivision Appeals Board (a lay tribunal); the Equity Division of the Supreme Court with jurisdiction to grant declarations and injunctions; summary criminal prosecutions in the Supreme Court (and also in the Magistrates Court), as well as certain matters being assigned to the District Court. In addition, there were significant gaps where no administrative appeal or review existed.

6 From time to time the court has been subject to criticism by politicians. On a few occasions it has been suggested that the court should be incorporated within the Supreme Court. Such proposals have never been seriously considered by government. In my view, the principal reason has been the general popularity of the court with the public and resident and environmental groups. In addition, developers prefer the speed of decision-making in the LEC to any alternative and do not perceive the court as biased against them.

7 Land and Environment Court Act, 1979, s 39(2)

8 Land and Environment Court Act, 1979, s 38

9 The court attempts to strike a 'happy medium' between old fashioned formality and extreme informality. In the Australian Capital Territory a planning tribunal failed because it eschewed all formality to the extent of conducting hearings with the participants (including the adjudicators) sitting around a table calling each other by their first names and without taking sworn evidence.

10 In 1991 the court promulgated new rules for merit appeal hearings. These included strict requirements for any questions of law to be identified at the first callover with no right to raise any further question of law without leave of the court. Strict timetables were imposed relating to service of issues and experts' reports. Examination in chief and cross-examination of experts on their reports was only permitted with leave of the presiding judge or assessor. The implementation of these rules dramatically advanced preparation of appeals and prompted the use of Alternative Dispute Resolution (ADR) mechanisms available within the court. It also halved the average hearing time. This led to a saving of costs and reduction in delays.

11 Land and Environment Court Act, 1979, s 36(5)

12 Land and Environment Court Act, 1979, s 56A

13 These and other miscellaneous areas of jurisdiction are to be found in s 19 Land and Environment Court Act (Class 3) and see s 37(2) regarding the constitution of the court to hear land rights appeals.

14 Land and Environment Court Act, 1979 s 21, (Class 5)

15 Environmental Offences and Penalties Act, 1989, s 13

16 Land and Environment Court Act, 1979, s 21A, (Class 6)

17 Environmental Planning and Assessment Act, 1979, s 123 - 'any person'

Heritage Act, 1977, s 153

National Parks and Wildlife Act, 1974, s 176A

Local Government Act, 1993, s 674

Environmentally Hazardous Chemicals Act 1985, s 57

Fisheries Management Act, 1994 s 282

Uranium Mining and Nuclear Facilities (Prohibition) Act, 1986, s 10

Wilderness Act 1987, s 27

Ozone Protection Act, 1989, s 18

Threatened Species Conservation Act, 1995, s 147

18 Rowley v NSW Leather Trading Co Pty Ltd (1980) 46 LGRA 250

National Trust (NSW) v Minister Administering Environmental Planning and Assessment Act (1981) 53 LGRA 37

19 Sydney City Council v BOMA (1985) 2 NSWLR 383

20 [1903] 1 Ch 109

21 BOMA at 449

22 Environmental Offences and Penalties Act, 1989, s 25

23 By majority the High Court held in *Oshlack v Richmond River Council* (1998) 72 ALJR 578 that the Land and Environment Court had an unfettered discretion as to the awarding of costs in the public interest proceedings contemplated by s 123 of the EPA Act. But see *South-West Forest Defence v Conservation Department* (1998) 72 ALJR 1008

24 *Smith v Day* (1882) 21 Ch D 421, *Auto Securities Ltd v STC Ltd* [1965] RPC 92

25 (1987) 70 LGRA 91

26 *Ross* at 98-99

27 (1978) 20 ALR 183

28 *Phelps* at 190

29 (1985) 66 LGRA 306

30 *Hannan* at 313

31 (1977) 16 ALR 161

32 CBA v Insurance Brokers Association at 169

33 Ilich v Ilich [1971] 1 NSWLR 272 at 273

34 Freedom of Information Act, 1989

35 Worimi Local Aboriginal Land Council v The Minister (1991) 72 LGRA 149

36 Hannan at 313

37 (1987) 10 NSWLR 335

38 Sedevcic at 340 A-B

39 Sedevcic at 340 F-G

40 Byron Shire Businesses for the Future Inc v Byron Shire Council (1994) 83 LGERA 59

41 Court of Appeal, Unreported, 1 April 1993

42 (1993) 83 LGERA 107 at 111

43 [1920] 2 KB 47

44 These cases are collected in the Role of the NSW Land and Environment Court in the Emergence of Public Interest Environmental Law Vol 13 No 3 EPLJ 179 (June 1996) Stein at 181

45 Rundle v Tweed Shire Council (1989) 69 LGRA 21

46 (1994) 82 LGERA 236

47 Friends of Hay Street Inc. v Hastings Council (1995) 87 LGERA 44

48 Richmond River Council v Oshlack (1996) 39 NSWLR 622

49 (1990) 170 CLR 534

50 Oshlack (on appeal to Court of Appeal) at 636

51 (1998) 72 ALJR 578

52 (1998) 72 ALJR 1008 and South Melbourne City Council v Hallam (1994) 83 LGERA 307, Attrill v Richmond River Shire Council (1995) 38 NSWLR 545 and Ratepayers and Residents Association Inc v Auckland City Council (1988) 1 NZLR 746 at 780

53 For the history of the EDO see collection of articles and contributions in Special Anniversary Edition, Ten Years of EDO, Vol 13 No 3 EPLJ 149-234 (June 1996)

54 For example:

Rural Fires Act, 1997

Catchment Management Act, 1989

Environmental Offences and Penalties Act, 1989

State Owned Corporations Act, 1989

Protection of the Environment Administration Act, 1991

Local Government Act, 1993

Environmental Planning and Assessment Regulation, 1994

Fisheries Management Act, 1994

Water Board (Corporatisation) Act, 1994

National Environment Protection Council (New South Wales) Act, 1995

annexing Intergovernmental Agreement on the Environment (IGAE)

Sustainable Energy Development Act, 1995

Threatened Species Conservation Act, 1995

Waste Minimisation and Management Act, 1995

55 EPA Act, 1979, s 112

56 State Environmental Planning Policies (SEPPs) are statutory instruments made by the Minister. They are the highest form of environmental planning instrument under the EPA Act. SEPPs prescribe the detail of policies on specific social, economic and environmental issues and have the force of law. Pages 21-22 of the paper refer to a number of policies which have frequently been scrutinised by the court.

57 For example, *Kivi v Forestry Commission of NSW* (1982) 47 LGRA 38; *Prineas v Forestry Commission* (1983) 49 LGRA 402 and on appeal (1984) 53 LGRA 160; *Jeradius v Forestry Commission* (1988) 71 LGRA 79; *Bailey v Forestry Commission* (1989) 67 LGRA 200 and *Corkill v Forestry Commission* (1991) 73 LGRA 126 and on appeal (1991) 73 LGRA 247

58 *Corkill v Forestry Commission* (1991) 73 LGRA 126, confirmed on appeal *Forestry Commission v Corkill* (1991) 73 LGRA 247

59 The Intergovernmental Agreement on the Environment (IGAE) was entered into by the Commonwealth, the six States, two Territories and the Australian Local Government Association in May 1992. It provided for the creation of the National Environment Protection Council (NEPC), since legislated in each jurisdiction. It also provides for the manner in which the parties will exercise their environmental responsibilities, in particular regarding pollution control. Core ESD principles are incorporated to guide environmental policy and decision-making.

60 Rural Fires Act, 1997

Catchment Management Act, 1989

Environmental Offences and Penalties Act, 1989

State Owned Corporations Act 1989

Protection of the Environment Administration Act, 1991
Local Government Act, 1993
Environmental Planning and Assessment Act 1979 (by amending Act 1997)
Fisheries Management Act, 1994
Water Board (Corporatisation) Act, 1994
Sustainable Energy Development Act, 1995
Threatened Species Conservation Act, 1995
Marine Parks Act, 1997
Waste Minimisation and Management Act, 1995
National Environment Protection Council (New South Wales) Act, 1995 annexing
Intergovernmental Agreement on the Environment (IGAE)

61 (1993) 81 LGERA 270

62 Northcompass Inc v Hornsby Council, Unreported, 26 August 1996, Stein J
Nicholls v National Parks and Wildlife Service (1994) 84 LGERA 397
Greenpeace v Redbank Power Co (1994) 86 LGERA 143
Alumino v The Minister (1995) 88 LGERA 388
Planning Workshop v Pittwater Council, Unreported, 22 August 1996, Pearlman CJ
See also, Greenpeace New Zealand v Minister for Fisheries, Unreported, New Zealand High
Court, 27 November 1995
R v Secretary for State for Trade & Industry, Ex parte Duddridge, Unreported, Queens Bench
Division, 4 October 1994
Friends of Hinchinbrook v The Minister (1997) 142 ALR 632

63 Turning Soft Law into Hard - An Australian Experience with ESD Principles in Practice,
Stein, Vol 3 No 2 The Judicial Review 91 (March 1997)

64 EPA Act, 1979 s 5(b), (c). The later subsection provides for the 'increased opportunity for
public involvement and participation in environmental planning and assessment'.

65 (1973) 133 CLR 242

66 LEC, Unreported, 2 August 1985, Cripps J

67 LEC, Unreported, 2 March 1989, Stein J

68 (1989) 69 LGRA 101

69 Hornsby Shire Council v Porter (1990) 70 LGRA 175

70 (1991) 73 LGRA 317

71 Court of Appeal, Unreported, 27 August 1997

72 (1996) 91 LGERA 331

73 (1995) 87 LGERA 154

74 (1993) 81 LGERA 124

75 (1995) 87 LGERA 154

76 (1991) 75 LGRA 39

77 Kent v Johnson (1973) 21 FLR 177

78 (1992) 78 LGERA 19 at 27, 34

79 (1991) 23 NSWLR 710

80 (1993) 80 LGERA 205

81 Vol 13 No 6 EPLJ 493 (December 1996) Stein

82 (1993) 178 CLR 477

83 Triplex Safety Glass v Lancegaye Safety Glass [1939] 2 KB 395

Rio Tinto Zinc v Westinghouse Electric [1978] AC 547

New Zealand Apple & Pear Marketing Board v Master and Sons [1986] 1 NZLR 191

Klein v Bell [1955] 2 DLR 513

Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs [1984] VR 137

Webster v Solloway Mills (No 2) [1931] 1 DLR 831

84 Hale v Henkel (1906) 201 US 43

US v White (1944) 322 US 694

Bellis v US (1974) 417 US 85

Braswell v US (1988) 487 US 99

Rochfort v TPC (1982) 153 CLR 134 at 150 (Murphy J)

R v Amway (1989) 56 DLR (4th) 309

Pyneboard Pty Ltd v TPC (1983) 152 CLR 328 at 346 (Murphy J)

85 Report of Court of Criminal Appeal is (1991) 25 NSWLR 118

Report of first instance judgment (1991) 72 LGRA 212

86 (1991) 76 LGRA 419

87 Brownlie v SPCC (1992) 27 NSWLR 78

88 Prineas v Forestry Commission (1983) 49 LGRA 402 and on appeal (1984) 53 LGRA 160;

Guthega v Minister (1986) 7 NSWLR 353; Drummoyne Municipal Council v RTA (1989) 67

LGRA 155 and many others

89 Part 5 of the EPA Act, 1979 closely follows the National Environment Protection Act, 1970 of the U.S. (the NEPA)

90 (1983) 49 LGRA 402

91 s 34(1A) LEC Act, 1979

92 The court uses Registrars who are trained in mediation at the highest level and possess considerable practical experience in carrying out mediations

93 For articles on ADR in the LEC see Planning Quarterly, Journal of the New Zealand Planning Institute No 124 March 1997 pp4-6,9; No 125 June 1997 pp3-4, Stein

94 'Special Anniversary Edition, 10 years of EDO', Vol. 13 Environmental and Planning Law Journal, June 1996 No. 3 (LBC)

95 Logwon Pty Ltd v Warringah Council (1993) 33 NSWLR 13

96 Constitution Act 1902 (NSW) as amended in 1992 (Part 9)

97 (1996) 90 LGERA 1 and (1996) 91 LGERA 31, the former judgment being effectively overruled by the State Environmental Planning (Permissible Mining) Act 1996

98 B. Hayes and C. Trenorden, Combined Jurisdictions for Development Appeals in the States and Territories. Department of Industry, Technology and Commerce; AGPS, Canberra (1990)