

**Address to the NSW Young Lawyers' Seminar
15 May 2002**

**The Honourable Justice Neal R Bignold
Judge of the Land and Environment Court**

A. INTRODUCTION

The Land and Environment Court came into existence 22 years ago with the enactment of the ***Land and Environment Court Act 1979*** (LEC Act) as a Superior Court with a comprehensive jurisdiction in the specialist fields of planning and environmental and land matters.

During its lifetime, the Court's jurisdiction has been consistently expanded conformably to the rationale of an integrated and comprehensive system of environmental law and its judicial strength has increased from the original three to the current six Judges.

A distinctive feature of the Court's jurisdiction and composition is that it combines in the one body Judges and Commissioners (with qualifications in the disciplines of planning, architecture, engineering, environmental protection etc), where the latter, **by delegation from the Court**, exercise the jurisdiction of the Court in respect of planning and related appeals (which numerically constitute the largest component of the court's case load).

The procedures and practices of the Court facilitate the delegation of these matters to the Commissioners by providing a system which enables the adjudication of such delegated matters on the merits of the case untrammelled by legal complexities, according to the identified issues and the competing expert evidence filed in advance of the hearing.

There is an internal appeals system against decisions made by Commissioners for legal error (**s 56A** of LEC Act) and the fact that there have been so very few such appeals in the history of the Court is an impressive testimony to the Court's comprehensive capacity for legal questions to be determined by the Judges of the Court either by way of preliminary determination prior to the hearing on the merits or by reference during the hearing on the merits. This particular proven capacity of the Court has been widely recognised and acclaimed.

Because the Court's creation coincided with the enactment of landmark planning and environment legislation in NSW in the late 1970's and early 1980's, it has been at the forefront in the development of environmental law jurisprudence in Australia that has emerged with increasing and continuing importance and recognition in this period.

The role and model of the Court as a specialist Environment Court, has been widely acclaimed both within and beyond Australia. The present Lord Chief Justice of England Lord Woolf for more than a decade has consistently endorsed the NSW model of a Specialist Environment Court which in his opinion, England could do well to emulate.

B. THE RESPECTIVE ROLES OF JUDGES AND COMMISSIONERS

Judges of the Court are obviously competent to exercise the whole of the Court's jurisdiction which is divided into **7 classes** as detailed in **Division 1 of Part 3** of the *LEC Act*.

However, their case load has always been such that they are not heavily engaged in the planning and related appeals cases heard at the Court which as earlier mentioned, is principally discharged by Commissioners acting as the Court's delegates pursuant to **s 36(1)** of the *LEC Act*.

This feature of discharging the Court's business has not been an accidental development as it was always intended that the Commissioners (originally styled "Assessors") undertake the bulk of the Court's planning appeals case load, as is implicit from the fact that upon its creation, the Court comprised **three** Judges and **nine** Assessors.

One pronounced change in the Court's practice that was to occur within the first decade of the Court's existence was the virtual abandonment of what originally was routine recourse to **s 34** compulsory conciliation conferences as the Court's initial response to the filing of planning appeals. This occurred following a research project undertaken by the Court's Research Unit.

Conciliation Conferences originally held almost as a matter of routine had served an important twofold purpose—

- (i) to better and more particularly identify issues in dispute; and
- (ii) to conciliate a result, or with the parties' consent to arbitrate and thereby avoid the need for a hearing.

The first mentioned purpose was replaced by a Practice Direction requiring the filing of a statement of issues and the practice of the Court's Registrar conducting issues conferences and the second mentioned purpose was replaced by a "Duty Assessor" system offering an accelerated and simplified hearing for selected cases.

With the subsequent advent of widescale mediation practices and services (including those made available by the Court), the Court's conciliation conference power was to remain quiescent for a long period.

In more recent times the virtue and utility of the conciliation conference power has been rediscovered although recourse to it remains selective and numerically insignificant.

However, in this respect, it is interesting to note that one of the principal recommendations for change in the Court's practice contained in the Cripps' Working Party was for simplified hearing procedures ("on site hearings") to be adopted **for simple planning appeals etc.** Accordingly, it is very likely, given the Attorney-General's public endorsement of the Working Party's final Report, that the Court's practice for adjudicating upon simple planning appeals will be changed, in a manner that will see a revival to a marked degree, of the original rationale for **s 34** compulsory conciliation conferences, namely to secure the adjudication of simple planning appeals in a speedy, inexpensive and informal manner.

A number of features of hearings conducted by Commissioners should be noted but again I emphasise the fact that the Court's procedures and practices are wholly directed to facilitate an adjudication on the planning merits of the appeal with the benefit of prior notice of the issues requiring adjudication and of the competing expert evidence.

Section 38(1) of the *LEC Act* requires the hearing of proceedings in classes 1, 2 and 3 to be conducted with as little formality and technicality and with as much expedition as the proper consideration of the matter permits. **Section 38(2)** provides that at such hearings the Court is not bound by the rules of evidence and may inform itself in such manner as it thinks appropriate.

Despite the breadth of this statutory warrant, the Commissioners adjudicate in planning appeals according to their evaluation of the evidence. That evidence invariably involves competing expert opinions and doubtless the Commissioners bring to bear their own expertise in evaluating that evidence and in reaching their conclusion on the appeal which inherently involves the making of a discretionary planning judgment.

The Court's practice reflected in its Rules and Practice Directions is to require the exchange of expert evidence at least 14 days prior to the hearing and cross-examination is only permitted by leave. In more recent times, the resolution of conflicting expert evidence has been greatly facilitated by the Court's recourse to its Practice

Direction concerning expert evidence. The Court's current Practice Direction on Expert Evidence (August 1999) is likely to be soon amplified by the Court adopting, with appropriate adaptations, the detailed provisions of the Supreme Court's **Practice Note No 121** "Joint Conference of Expert Witnesses".

By contrast to the flexible and informal procedures governing the adjudication of proceedings in classes 1, 2 and 3 (all of which may be delegated to Commissioners), the Court's jurisdiction in classes 4, 5, 6 and 7 which must be exercised only by a Judge, is regulated by practices and procedures commensurate to the Court operating as a Superior Court exercising both the civil enforcement and criminal enforcement jurisdictions conferred upon it.

One final comment should be noted. Although it may be obvious, it is nonetheless crucial for an appreciation of the Court and its jurisdiction. It is that all of the specialist jurisdiction vested in the Court is founded upon public law and that feature necessarily gives colour and content to the Court's practices and procedures, which in many respects do **not** adopt or reflect practices and procedures of Courts, such as the Supreme Court, with its general jurisdiction which largely involves adjudicating on private law disputes.

By way of illustration, I refer to two obvious but important issues—

- (i) the exercise of its statutory costs power (s 69 of the LEC Act)
- (ii) consent orders in planning appeals.

The Court, from its beginning adopted a policy on costs in planning appeals that costs were not to be ordered except in special circumstances. This policy or practice has been long expressed in the Court's Practice Directions.

Similarly, with respect to consent orders in planning appeals, the Court has long followed the practice of requiring the consent authority to inform objectors to the proposed development of its decision to settle the dispute by consent orders, and the Court has afforded objectors the opportunity to address the Court if they are opposed to the "consent order" result in the litigation.

There are many other illustrations that could be mentioned eg **(i)** the parties to planning appeals and the Court's practice of enabling non-party objectors a limited form of participation pursuant to **s 38(2)** of the *LEC Act*; and **(ii)** security for costs in civil enforcement proceedings.

Oftentimes there will be tension encountered when the Court is propounding or reforming its practices and procedures which it considers to be most apt and appropriate for the fair and proper discharge of its specialised public law jurisdiction, when those practices and procedures deviate from conventionally settled Court practices and procedures. Despite this tension, it remains a legitimate imperative of justice that the practices and procedures adopted by the Court are those that best promote and secure the attainment by the Court of the most efficient and effective discharge of its ever increasingly important specialist environmental law jurisdiction. The Court is constantly reviewing its practices and procedures to secure that outcome.