

# The Land and Environment Court of New South Wales—A Model for the United Kingdom?

By The Hon. Justice Dennis A. Cowdroy O.A.M.<sup>1</sup>

## (I) Introduction

1. In Australia we have inherited the priceless legacy of the English legal system. The combination of English common law and the Westminster system of government has provided the cornerstone of Australia's development as a nation.

2. On January 26, 1788 a fleet carrying the first British convicts landed in what is now known as Sydney Harbour under the command of Captain Arthur Phillip. From that date European settlement of the colony of New South Wales began under military rule. By act of the Imperial Parliament made in 1901 namely the Commonwealth of Australia Constitution Act, the nation of Australia was born consisting of the colonies of Australia.

3. In 1824 the Supreme Court of New South Wales was established and the English common law became firmly entrenched together with the traditions of the English legal system. A system of courts, both Federal and State has developed. The attached chart sets out the hierarchy of courts pertaining to New South Wales. Similar court structures exist in the remaining states of Australia.

4. The Australian legal system, which includes the judiciary and the legal profession follows the traditions of the English legal system. Until recently, members of the United Kingdom Bar could seek admission to the New South Wales Bar without the need for additional training, and until 1986 appeals lay from decisions of Australian Courts to the Judicial Committee of the Privy Council.

5. Yet neither the British nor the Australian legal systems have remained static. They have evolved as a response to the changing forces in our society. One of the most notable forces of change in the twentieth century has been the growing concern over our environment. This paper deals with an innovation in the State of New South Wales which responded to these concerns. The Land and Environment Court of New South Wales ("the Court") was a bold answer to calls for the protection of our built and natural environments.

## Need for a Specialised Court

6. As Australia's most populous and economically vibrant state New South Wales experienced unprecedented growth and development in the 1970s. In the years before the establishment of the Court, the New South Wales government was faced with mounting dissatisfaction with the existing regime dealing with planning and environmental issues. Even eminent members of the New South Wales judiciary had criticised the town-planning regime in the state.

7. During that time a maze of disparate enactments dealt with environmental and planning matters. These enactments were administered by a range of courts and administrative tribunals. The jurisdiction of these entities was not exclusive and overlapped in various areas. Local council decisions could be appealed in the Local Government Appeals Tribunal although this jurisdiction was shared with other

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bodies including the Land and Valuation Court, the Subdivision Appeals Board and the Buildings Appeals Board. Growing calls for reform were an indication that the laws of the State regulating planning and the environment were ill equipped to meet the new demands of the community. Accordingly the government introduced a package of radical legislative reforms that included the creation of the Court.

### Creation of the Court

8. The Land and Environment Court Act 1979 (“the Court Act”) established the Court on September 1, 1980. The Court was invested with jurisdiction to deal with planning and environmental matters throughout the state of New South Wales. In introducing the new Court in 1979, the Honourable D. P. Landa, the Minister for Planning and Environment said<sup>2</sup>:

The Government’s decision to create the new court attempts to rationalise the present diversified jurisdiction of a number of courts or tribunals, all pertaining to the use and development of land, land values and taxes, and the enforcement of those laws.

This rationalisation was in my view essential as the planning legislation in many respects travels well beyond the boundaries of the existing town planning legislation, which has been described by several eminent judges in Australia as being unreasonably complicated and unwieldy. A specialist court, such as that proposed . . . will have a vital role to play in the task of judicial interpretation of the new legislation and its operations in much the same fashion as the then eminent judges of the Land and Valuation Court expounded the fledgling town planning law in the late forties and the fifties.

The Minister stated eight objectives for the package of legislative reforms which included the Court Act as follows<sup>3</sup>:

- to broaden the scope of planning effectively to embrace economic, social and ecological considerations in the preparation of environmental plans and in development control
- to provide positive guidelines for the development process, to speed up decision making, to foster investment and facilitate economic growth
- to authorise the preparation of different types and forms of environmental plans each respectively designed to deal with state, regional and local planning issues and problems
- to ensure that the State is principally concerned with matters of policy and objectives rather than matters of detailed local land use
- to co-ordinate, especially at a state and regional level, the development programmes of public authorities
- to provide an opportunity for public involvement in the planning process
- to provide for a more simplified administration of the system of planning decision making
- to provide a system for the assessment of the environmental impacts of proposals that would significantly affect the environment.

9. The Court was invested with three principal functions which it retains. Firstly, it acts as an administrative tribunal by conducting merit appeals in planning and development matters. Secondly, it can enforce breaches of planning and environmental law in its civil jurisdiction and conduct judicial review of administrative decisions made in these areas. Thirdly, it can exercise criminal jurisdiction through the prosecution of environmental offences arising under various statutes.

<sup>2</sup> 1979 *Hansard*, p. 3354–5. The full name of the Court Act is “Land and Environment Court Act” (Act No. 204 of 1979).

<sup>3</sup> Second Reading Speech, NSW Legislative Council, 21 November 1979, *Hansard*, p. 3346.

10. Significantly, all areas of the Court's jurisdiction are exclusive. No other court in New South Wales has power to hear any matters which are vested in the Court. It is the only court in the State (with the exception of the New South Wales Court of Appeal) which may administer all forms of legal redress in respect of matters arising under environmental and planning laws.

## (II) THE COURT

### Place of the Court in Australia's judicial hierarchy

11. There are four tiers in the hierarchy of courts in Australia as follows:

- High Court of Australia
- "Superior Courts of Record", namely the two superior federal courts established in the mid 1970s, (one of which specialises in Family Law matters), the Supreme Courts of each state and territory of Australia and other specialised courts including the Land and Environment Court
- District or County Courts
- Local or Magistrate's Courts.

There are 937 judicial officers (513 judges and 424 magistrates) in Australia. Only a few deal exclusively with environmental matters.

11. As a superior court of record the Land and Environment Court is equal in rank to the New South Wales Supreme Court (the equivalent to the High Court of Justice of the United Kingdom). The Court's genesis reflects its status as a superior court. Supreme Court judges with dual commissions formerly presided over the replaced Land and Valuation Court. Accordingly the status of the Court as equivalent to that of the Supreme Court was established in the hierarchy of courts in New South Wales.

12. When the Court was established it was unique in Australia. The states of Queensland and South Australia have now followed by establishing specialist environmental courts, however, unlike the Court, they have not been invested with exclusive jurisdiction in the areas of their operation.

### Composition of the Court

14. The Court comprises of six judges and nine non-legal technical commissioners. Judges of the Court are appointed on merit having regard to their standing in the legal profession. They have the same rank, title, status and precedence as judges of the Supreme Court.

15. Commissioners are appointed for a term of seven years to assist the judges of the Court. Section 12 of the Court Act enunciates the qualifications and experience required by commissioners. The section provides that a person may be appointed as a commissioner provided the Minister is satisfied that they have "special knowledge of and experience in . . ." or "suitable qualifications and experience in . . ." one of the following areas:

- local government or town planning
- environmental science, protection of the environment or environmental assessment
- land valuation
- architecture, engineering, surveying or building construction
- management of natural resources.

16. Commissioners with expertise in dealing with disputes involving Aboriginal Australians and Aboriginal land rights claims are appointed to the Court on an *ad hoc* basis when such cases arise.

### Jurisdiction of the Court

17. To demonstrate the breadth of the jurisdiction of the Court a list of statutes administered by it is contained in Appendix A at the end of this paper. The Court's work regularly comprises applications made pursuant to environmental and planning laws such as the Local Government Act 1993 and the Environmental Planning and Assessment Act 1979 and prosecutions made pursuant to the Protection of the Environment Operations Act 1997 which are considered hereunder.

18. The Court's jurisdiction is divided by the Court Act into seven classes as follows:—

- *Class 1*: principally concerns environmental planning appeals.
- *Class 2*: deals with local government and other miscellaneous appeals
- *Class 3*: concerns valuation and compensation for compulsory acquired lands
- *Class 4*: concerns environmental planning and protection, civil enforcement, judicial review of administrative decisions and applications for declarations and injunctions
- *Class 5*: is the summary criminal jurisdiction for environmental offences. The Court exercises summary criminal jurisdiction in the prosecution of pollution offences and other breaches of environmental and planning law
- *Class 6*: which is rarely used, concerns criminal appeals from convictions in the Local Court
- *Class 7*: encompasses appeals from informants; who include a complainant, the Director of Public Prosecutions and any other person responsible for the conduct of a prosecution; against any conviction or order made, or sentence imposed, by a magistrate.

#### *Classes 1, 2 and 3: Administrative Appeals*

14. *Classes 1, 2 and 3* of the Court's jurisdictions principally comprise administrative appeals and include:

- appeals against decisions of local government councils on applications for the development of land, such as the use of land, subdivisions and the erection of buildings
- appeals against a range of other decisions made by local government councils<sup>4</sup>
- appeals relating to the valuation of land (for rating and taxing purposes)
- claims for compensation by reason of the compulsory acquisition of land
- boundary disputes
- disputes involving the encroachment of buildings
- land claims under the New South Wales Aboriginal Land Rights Act 1983
- disputes regarding the election to and administration of Aboriginal land councils.<sup>5</sup>

15. Such appeals involve a full hearing on their merits.<sup>6</sup> That is, for the purpose of hearing and disposing of an appeal, the Court has all the functions and discretions of the initial decision maker.<sup>7</sup> The Court substitutes the local government council or other decision making body thereby exercising administrative power.

16. In such appeals the Court may hear any relevant expert and lay evidence. That evidence may be adduced even if it was not previously before the initial decision maker.<sup>8</sup> Moreover such proceedings are required to be conducted with as little formality and technicality, and with as much expedition as the

<sup>4</sup> Sections 17, 18 Land & Environment Court Act.

<sup>5</sup> Section 19 Aboriginal Land Rights Act.

<sup>6</sup> Section 39(2) Land & Environment Court Act.

<sup>7</sup> Section 39(2) Land & Environment Court Act.

<sup>8</sup> Section 39(3) Land & Environment Court Act.

proper consideration of the matters before the Court permits.<sup>9</sup> The rules of evidence do not apply,<sup>10</sup> although the rules of natural justice and procedural fairness are observed on a hearing.

17. Commissioners usually adjudicate *Classes 1, 2 and 3* although a judge sitting alone, or with a commissioner, may determine more complex matters in these classes. Aboriginal land claims and disputes regarding Aboriginal land councils must be heard by a judge and two Aboriginal commissioners.

*Class 4: Civil Enforcement*

18. In *Class 4* the Court has the same civil jurisdiction as the Supreme Court of New South Wales and is empowered to hear claims:

- to enforce any right, obligation or duty conferred or imposed by a planning or environmental law
- to review or command the exercise of a function conferred or imposed by a planning or environmental law
- to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function.<sup>11</sup>

19. The Court can thus make declarations of right and grant injunctions to enforce planning or environmental laws. The Court's jurisdiction includes judicial review of decisions made by the government, by local government councils and by certain other public bodies. That is to say the Court can restrain such bodies (including the government) from acting beyond their power.

20. The principles governing judicial review of administrative decisions are often misunderstood, even by some lawyers. The Court does not conduct a rehearing of the merits of the particular administrative decision. It only examines whether the administrative decision was unlawful.

21. The grounds for relief in judicial review have been developed by the common law and may be broadly stated as follows:

- *Illegality*. The decision maker must understand correctly the law that regulates his decision making power and must give effect to it.
- *Irrationality*. The decision is liable to be set aside if it is so unreasonable that no reasonable authority could ever have come to it (often referred to as *Wednesbury* unreasonableness).<sup>12</sup>
- *Procedural impropriety*. This includes failure to observe procedural rules that are either expressly laid down by statute, or failure to act with procedural fairness.

22. Proceedings in *Classes 4, 5, 6 and 7* are judicial in nature and may only be heard by a judge. In all respects hearings are conducted in the same manner as proceedings in the Chancery Division of the High Court of Justice. The rules of evidence are strictly observed.

*Classes 5, 6 and 7*

28. The Court's criminal jurisdiction relates to offences against planning and environmental laws. This jurisdiction encompasses prosecutions for environmental offences (*Class 5*) and hearing of appeals from convictions in Local Courts and Magistrate's Courts relating to environmental offences (*Classes 6 and*

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<sup>9</sup> Section 38(1) Land & Environment Court Act.

<sup>10</sup> Section 38(2) Land & Environment Court Act.

<sup>11</sup> Section 20(2) Land & Environment Court Act.

<sup>12</sup> *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 233 at 234.

7). A judge sitting alone adjudicates all classes of criminal prosecutions. Jury trials are not conducted in the Court.

29. The Court hears prosecutions brought under the auspice of a variety of enactments. One of the primary statutes in this regard is the Protection of the Environment Operations Act 1997 (“the POEO Act”) which consolidated the now superceded Pollution Control Act, Clean Air Act, Clean Waters Act, Noise Control Act, Environmental Offences and Penalties Act, and the regulatory provisions of the Waste Minimisation and Management Act 1995 into one comprehensive piece of legislation. Accordingly the POEO Act creates offences covering a broad spectrum of subject matters, and these include:

- the unlawful disposal of waste and littering
- leaks, spillages and other escapes into the environment
- the pollution of waters
- air pollution
- noise pollution
- land pollution.

30. Under the POEO Act the most serious offences (those which involve an element of wilfulness or negligence on the part of an offender) attract severe penalties. The POEO Act provides that if a corporation commits an environmental offence, that corporation’s directors and managers are also deemed to be culpable unless they are able to satisfy certain specific exceptions.<sup>13</sup> The Act also provides that in addition to imposing a penalty the Court may order the offender to take steps to:

- prevent, control or mitigate any harm to the environment caused by the commission of the offence
- make good any resulting environmental damage
- prevent the continuance or recurrence of the offence.

31. In addition to the POEO Act, various other statutes create offences which are prosecuted in the Court. These enactments include the Heritage Act 1977, the Environmental Planning and Assessment Act 1979, the Fisheries Management Act 1994 and the National Parks and Wildlife Act 1979 to name but a few examples. In all, the Court Act lists fourteen enactments conferring criminal jurisdiction on the Court and also provides for any other subsequent enactment to do the same.

#### *Features of the Court’s Jurisdiction*

##### **Enforcement: contempt**

32. The Court Act enables the Court to exercise the same functions as the Supreme Court in respect of “the apprehension, detention and punishment of persons guilty of contempt, or of disobedience to any order made by the Court, or of any process issuing out of the Court.”<sup>14</sup> The Court is empowered to punish individuals guilty of contempt with fines or imprisonment and corporations with fines or sequestration orders.

33. The threat of contempt gives force to the Court’s orders and secures their compliance. Nevertheless, in certain cases even conviction for failure to comply with Court orders will not be enough to ensure the compliance of certain recalcitrant defendants. A typical example of such a case was *Environment Protection Authority v. Keogh* [2000] NSWLEC 237. The defendant had been convicted of

<sup>13</sup> Section 169 Protection of the Environment Operations Act.

<sup>14</sup> Section 67 of the Land and Environment Court Act.

an offence relating to the dumping of thousands of used tyres, piles of bricks and other debris on his property. He was fined and also required to carry out the necessary remediation work on the site. Having failed to comply with such orders he was charged with contempt and convicted. However, the Court deferred a three month prison sentence to allow him time to carry out remediation work, such concession being made in the public interest of having the site remediated. The defendant refused to comply with the Court's orders on three separate occasions and it was only on the third occasion that the period of imprisonment was enforced.

### ***Open Standing Provisions***

34. In respect of planning and development appeals, with specified exceptions, only the interested parties will be heard. However, a unique feature of the Court concerns open standing in respect of breaches of environmental statutes.

35. Generally at common law standing to institute proceedings is restricted to those who can demonstrate sufficient "special interest".<sup>15</sup> However, s 253 of the Protection of the Environment Operations Act 1997 provides:—

Any person may bring proceedings in the Land and Environment Court for an order to restrain a breach (or a threatened or apprehended breach) of any other Act, or any statutory rule under any other Act, if the breach (or the threatened or apprehended breach) is causing or is likely to cause harm to the environment.

36. One of the objects of the Environmental Planning and Assessment Act 1979 is to encourage public participation in decision making. The Act therefore provides in s 123(1):—

Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

37. Under a variety of other statutes proceedings may be brought on behalf of any person, including a corporation, having like or common interests in those proceedings.<sup>16</sup> The fact that actions may be brought by persons in a representative capacity makes such actions similar to class actions.

### ***Judgments in rem***

38. Orders of the Court relating to planning appeals, orders to restrain breaches of development consents, declarations and orders relating to the validity of consents or relating to the use of land result in a judgment *in rem*. This is because they determine rights of property. A development consent, for example, is a public document operating in rem for the benefit of the owner and of successors in title.<sup>17</sup>

A judicial decision in rem is one which declares, defines, or otherwise determines the status of a person, or of a thing, to the world generally, and therefore is conclusive for, or against, everybody as distinct from those decisions which purport to determine the jural relation of the parties only to one another, and their personal rights and equities inter se and which, therefore, are commonly termed decisions in personam.<sup>18</sup>

<sup>15</sup> *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27 at 42.

<sup>16</sup> See for example, s.674 Local Government Act 1993, s.219 Environmental Offences & Penalties Act 1997, s.147 Threatened Species Conservation Act 1995.

<sup>17</sup> *Paramatta City Council v. Shell Co. of Australia Ltd* [1972] 2 NSWLR 632 at 637 CA, *Eaton & Sons v. Warringah Shire Council* (1972) 129 CLR 270 at 294, *PE Bakers Pty Ltd v. Yehuda* (1988) 15 NSWLR 437 CA, *Sydney Serviced Apartments Pty Ltd v. North Sydney Municipal Council (No 2)* (1993) 78 LGERA 404 at 407–8 CA.

<sup>18</sup> Spencer Bower & Turner: *Res Judicata*, 2nd Edition, 1969, p.213.

***Court is concerned primarily with public law***

39. Another important feature of the Court's jurisdiction is that it is concerned primarily with public law, that is, citizens enforcing their rights against governmental authorities and government authorities enforcing the law against citizens. The Court is not generally concerned with private rights, that is, the claims of citizens against each other. However, the Court does hear and take into account the concerns of objectors in respect of developments which become the subject of appeals. Such objectors may be called as witnesses by the relevant authority. If the proposal is classified as "designated development" under the Environmental Planning and Assessment Act (*i.e.* having a substantial environmental impact) objectors have a right to appear individually.

40. A third party can only challenge the merits of a council decision granting development consent if the proposal is classified as "designated development". Thus unless a development application involves designated development the Court has no jurisdiction to hear an objector's case for merits review, although this restriction does not apply to judicial review. No such limitation is placed on developers seeking review of the refusal of their own applications or the conditions imposed with the grant of consent.

**(III) EXAMPLES OF THE COURT'S WORK**

41. A variety of subject matters fall within the jurisdiction of the Court described above. Broadly the areas of Court's practice can be divided into the following categories:

- Planning and development
- Valuation of land for the purposes of compulsory acquisition and rating
- Environmental protection including conservation of biodiversity and national parks
- Pollution control
- Heritage

The following section will give an overview of the Court's work in each of these areas.

**Planning and Development**

41. The Environmental Planning and Assessment Act grants to a consent authority (usually a municipal council) power to approve development. Development may consist of subdivision of land, new construction and the adaptive use of existing developments. In the event the authority declines approval a developer may appeal from the decision of the consent authority to the Court. The developer is entitled to call any evidence which may be relevant to the issues on appeal including expert evidence. Such appeal may be determined by a commissioner of the Court if the appeal is confined to merit issues.

42. Where issues concern the interpretation of statutory instruments such as local environmental plans or statutes, it is more likely that a judge will be allocated to determine such issues. In the course of a hearing before a commissioner any question of law arising incidentally may be referred to a judge. During the hearing of such an appeal the consent authority may also call expert evidence.

43. A dissatisfied litigant may challenge the decision of a commissioner upon an issue of law. Such appeal is determined by a judge of the Court. An appeal then lies to the New South Wales Court of Appeal from the decision of a judge of the Court, but only on questions of law.

### Objectives of Merits Assessment

45. The Environmental Planning and Assessment Act was enacted as part of the 1979 reforms “. . . to institute a system of environmental planning and assessment for the State of New South Wales.”. The objects of the Act are stated in section 5 as follows:—

- (a) to encourage:
  - (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
  - (ii) the promotion and co-ordination of the orderly and economic use and development of land,
  - (iii) the protection, provision and co-ordination of communication and utility services,
  - (iv) the provision of land for public purposes,
  - (v) the provision and co-ordination of community services and facilities, and
  - (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
  - (vii) ecologically sustainable development, and
  - (viii) the provision and maintenance of affordable housing, and
- (b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
- (c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.<sup>19</sup>

46. Modern town planning attempts to achieve these objectives by taking various factors into account. Those factors include social and economic considerations which combine to create the built environments of our towns and cities. Simultaneously there is recognition of the need to protect our natural environment. Thus it is necessary to achieve a balance between conservation and development.

47. The Court considers developments in the context of the planning regime applicable to a particular site. The applicable statutory instruments will usually delineate the objectives of a particular locality as well as the permissible development in that area. However the Court's role is not merely to apply specified requirements. Assessing the planning merits of a development requires the consideration of a variety of socio-economic questions. For example, in the case of a development involving a shopping centre, the Court might be required to determine:

- whether the existing infrastructure in the locality can support a development of this particular size and nature
- the effect of the development on traffic conditions
- whether sufficient account has been made for the amenity of employees at the development
- the environmental impacts of the development
- how the public will access the development, how they will move within it and whether this can be done safely.

48. The list of considerations as specified in the broad confines of the Environmental Planning and Assessment Act are extensive and dependent on the particularities of the development in question.

<sup>19</sup> EP&A Act s.5(a)(i).

49. A major planning decision that was challenged in the Court involved the development of a film studio complex on a Sydney landmark known as the Moore Park Showground. The Showground, home to various public events in Sydney, was to be vacated by the New South Wales Government and its events relocated to the site being developed for the Olympic Games at Homebush Bay. The Government enacted State Environmental Planning Policy No 47 to rezone the area of Moore Park to allow the film studio.

50. In *Save the Showground for Sydney Inc v. Minister for Urban Affairs and Planning* (1996) 92 LGERA 283 a public interest lobby group challenged the validity of this Policy. In New South Wales the Minister for Planning may draft a State Environmental Planning Policy where it relates to a matter which is of environmental planning significance to the entire State. The Minister may also “call in” certain developments and thereby become the consent authority for such proposals. One challenge to the Policy in this case was made on the ground that the Minister could not reasonably have formed the view that the development was of state significance. The applicants alleged that the Minister’s actions were motivated by improper purposes, *inter alia*, to avoid public participation in the approval which would otherwise be required.

51. The applicant was unsuccessful on all grounds of its challenge, but the case demonstrates how the Court may supervise exercises of governmental power. The case also shows how the jurisdiction of the Court may be invoked by public interest groups who may not have a direct personal interest in the proceedings.

52. A graphic illustration of an exercise of power by a local council is demonstrated by the decision in *Meriton Apartments Pty Ltd v. Minister for Urban Affairs and Planning* [2000] 107 LGERA 363. The applicant sought to develop a major apartment complex in a former industrial area of Sydney. The Minister approved a local environmental plan requiring any developer to provide, as a condition of consent a substantial number of apartments at no cost to the council, to be used as “affordable housing” for disadvantaged persons. The Court determined that such condition was for a purpose which was not contemplated by the Environmental Planning and Assessment Act 1979 and also amounted to acquisition of property without compensation. It was accordingly held invalid.

53. Another example of the Court’s planning work is the decision in *Misra v. Campbelltown City Council* (2001–2002) 118 LGERA 301. In that decision the Court was required to consider a challenge to an order made by a local council requiring the applicant to cease using the residence for the purpose of a Hindu temple. The applicant claimed that the use of the residence involved incidental activities associated with the religion including worship of an icon donated by the head priest of the late King of Nepal. The Court determined that the nature and extent of religious gatherings at the residence constituted “public worship” and upheld the validity of the council order.

### **Valuation of Land**

54. The Valuation of Land Act 1916 makes provision for valuation of land by the Office of the Valuer-General. Such valuations are used for the purposes of rating and compensation where compulsory acquisition of land has occurred. For the purposes of valuation improvements on land are to be ignored.

55. In *Justin John Enterprises Pty Ltd v. Valuer-General* [1999] NSWLEC 208 the land in question had no improvements except the fire damaged remains of a substantial building in the City of Sydney. The Valuer-General made his valuation ignoring the remains of the building. The land owner objected to the valuation claiming that the value of the land should be discounted because of the substantial costs

required to remove the remains. The Court rejected the challenge determining that the Valuer-General had correctly applied the statutory provisions.

56. Rating of land by local authorities is often contentious. Rates are based upon valuation made by the Valuer-General. In *Maurici v. Chief Commissioner of State Revenue* (1999) 105 LGERA 318 the land owner objected to the Valuer-General's valuation of his residence on the basis that he had used, as comparable properties, vacant parcels of land in a developed suburb of Sydney known as Hunters Hill. It was acknowledged by the Valuer-General that vacant parcels of land attracted a premium price in such locality. Accordingly the land owner claimed that his valuation was inflated and consequently the rates assessed were excessive. The Land and Environment Court accepted such submission. However the Court of Appeal reversed the decision. An appeal has now been made to the High Court of Australia.

### **Environmental Protection**

57. Environmental protection is achieved by the enforcement of numerous laws protecting the natural environment. These statutes are directed to a variety of issues including the preservation of threatened species of flora and fauna, marine life and the atmosphere. The Court administers more than 30 statutes which are directed to such protection.

58. The Court's role of protecting the natural environment is multifaceted. The Court not only applies law to individual cases before it but also develops the law where novel circumstances arise. Environmental law is dynamic and the Court regularly has the opportunity to develop its own jurisprudence.

#### *Principles of Environmental Protection*

59. Ecologically sustainable development is perhaps the most fundamental principle motivating the Court's work in this field. Sustainable development is development which "meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>20</sup> In the Intergovernmental Agreement on the Environment of May 1992<sup>21</sup> legislators throughout Australia agreed that this principle would govern various aspects of their environmental policy.

60. In New South Wales various enactments have expressly incorporated this principle as an objective of environmental protection. The most comprehensive legislative statement is contained within the Protection of the Environment Administration Act 1991 ("PEA Act") being the enactment which creates the New South Wales Environment Protection Authority ("EPA"). The PEA Act requires the EPA to protect, restore and enhance the quality of the environment in New South Wales having regard to sustainable development. Although such Act deals with sustainable development solely in reference to the EPA, its coverage is comprehensive and has been adopted in various other enactments in the State. The PEA Act highlights that sustainable development requires the effective integration of environmental and economic considerations in the decision making processes. It also lists the principles and practices that must be implemented in order to achieve sustainable development, these include:—

- *The precautionary principle*: where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not postpone measures to prevent degradation.

<sup>20</sup> World Commission on Environment and Development, Brundtland Report 1987, *Our Common Future*.

<sup>21</sup> On October 31, 1990, Heads of Government of the Commonwealth, States and Territories of Australia, and representatives of Local Government in Australia, meeting at a Special Premiers' Conference held in Brisbane (Queensland), agreed to develop and conclude an Intergovernmental Agreement on the Environment which was ultimately made on May 1, 1992.

- Inter-generational equity: the present generation should ensure that the health, diversity and productivity of the environment should be maintained for future generations.

61. Various decisions of the Court have investigated the scope of ecologically sustainable development, and in particular the application of the precautionary principle. This endeavour has highlighted the difficulty of translating such principles into applicable law. For example *Nicholls v. Director General National Parks and Wildlife Service* (1994) 82 LGRA 143 the applicant challenged a licence granted by the Director-General allowing the killing of certain endangered fauna during logging operations. The applicant argued that the precautionary approach should be applied by the Court even though no express provision was made in relevant statute. The Court observed:—

... 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.

62. Many of the emerging principles of environmental law have their origins in international agreements and conventions. As a part of its role the Court is required to take such broad statements of principle and create workable laws that can be applied in practice, and this is often a difficult task.

#### *National Parks*

63. The state of New South Wales covers an area of 802,000 square kilometres and encompasses a range of natural environments from desert to rainforest, coastal to alpine and mangroves to forests. An abundance of flora and fauna are included within these diverse environs, many of which possess spectacular scenic beauty. One area included in the World Heritage List,<sup>22</sup> for example, is the Blue Mountains which lie approximately 70 miles west of Sydney.

64. This natural and cultural heritage is protected by reserves or national parks which cover 6.28 per cent of the total area of the State. The National Parks and Wildlife Act 1974 (“the NPWA”) is the instrument which governs such places and the Court assumes an important role under its provisions.

65. The Court is also invested with jurisdiction with respect to the protection of Aboriginal relics and significant places under the NPWA Act. Aboriginal relics are any deposits, objects or material evidence tied to indigenous and non-European habitation of New South Wales. It is, for example an offence to engage in the wilful destruction of such relics. In *Director General of National Parks and Wildlife v. Histollo Pty Ltd* (1995) 88 LGERA 214 the defendant was charged with three separate offences of knowingly causing or permitting damage to relics from a pre-settlement Aboriginal quarry. Rocks from the property had been used by Aboriginals to produce stone tools and the area was subject to a “conservation agreement” under the NPWA. The defendant was aware of the conservation agreement but had made no further inquiries of the National Parks and Wildlife Service to determine the details of that agreement nor of relics on the site that were protected pursuant to the NPWA. The Court applied the following criminal law test of wilful blindness:—

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

<sup>22</sup> The World Heritage List was established under the terms of the convention concerning the protection of the World Cultural and Natural Heritage adopted in November 1972 at the 17th General Conference of UNESCO.

66. The Court held that the defendant's conduct in failing to make the appropriate inquiries was tantamount to possessing actual knowledge of the nature, quality and quantity of the location of the relics. Accordingly the defendant was found guilty of the charge.

67. However the decision was overturned on appeal to the Court of Appeal: see *Histollo v. Director General of National Parks and Wildlife* (1998) 45 NSWLR 661. The Court of Appeal overruled the decision on the basis that the offence required proof beyond reasonable doubt the accused knew the object to which he was causing damage was an Aboriginal relic. It was not enough to prove that the accused was recklessly indifferent as to whether his conduct would cause damage to the relics. Leave to appeal to the High Court of Australia was not granted.

#### *Conservation of biodiversity*

68. Concern over the loss of biodiversity (being the variety of all life forms whether flora, fauna, micro-organisms, the genes they contain or the ecosystems they comprise) came to the forefront of international environmental law in 1992 at the United Nations Rio Conference.<sup>23</sup> New South Wales had already enacted instruments designed to protect biodiversity although the emergence of the Convention on Biological Diversity did increase awareness of this issue.

69. As well as protecting flora and fauna by the establishment of national parks, threatened species and native vegetation are protected through specific enactments. Once again the Court has the responsibility of overseeing the administration of these Acts and punishing their breach. The Native Vegetation Conservation Act 1997 ("the NVCA") was enacted to address concerns over the clearing of native vegetation in New South Wales. The NVCA establishes a regime which requires development consent from the Minister for Land and Water Conservation before the clearing of native vegetation.<sup>24</sup> Such Act binds the Crown. Should a corporation or an individual conduct clearing without the proper authorization then the Department of Land and Water Conservation may issue an order preventing the continuation of such action and also require remediation work to be undertaken. In addition, the person responsible for the breach will be criminally liable for the breach of the NVCA and may be prosecuted before the Court.<sup>25</sup>

70. In *Director-General of the Department of Land and Water Conservation v. Warroo (Lands) Pty Ltd* [2002] NSWLEC 10 the defendant company pleaded guilty to a charge that it cleared native vegetation without development consent. An area of 329 hectares was cleared in order to make way for farming activities with around 900 trees being felled. The director of the company claimed the primary motivation to the clearing was the need to control two noxious weeds which had appeared in the area. Chemical control of the weeds was not a viable course and clearing of land in similar circumstances had proven effective in the past. Both species of weed found on the subject area were affected by laws requiring their control and management. The prosecutor acknowledged that development approval for the clearing would probably have been forthcoming had the defendants made an application. In deciding penalty the Court did not consider this factor to be pertinent, Justice Talbot said:—

It is no answer to assert that consent would have been forthcoming or that it was likely to be granted. The law requires that an application be made and considered to enable the relevant assessments to be made in advance

71. The penalty imposed by the Court reflected the offence was in the lowest range of seriousness. The

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<sup>23</sup> The United Nations Conference on Environment and Development (the Rio Conference) at which the Convention on Biological Diversity was conceived.

<sup>24</sup> NVCA Part 2 Division 1.

<sup>25</sup> See NVCA s.64.

defendant was required to pay a fine of \$AUS2,500 (£878) as well as the prosecutor's costs in the proceedings.

72. The minimal seriousness of the offence in the *Warroo* case can be contrasted with the offence in *Director-General Department of Land and Water Conservation v. Bungle Gully Pty Limited and Others* (unreported, Land and Environment Court, 8 August 1997). The charge related to the clearing of native vegetation covering 275 hectares being less than the area cleared in the *Warroo* case. However the intensity of clearing was far greater with an estimated 5,500 trees being destroyed. The majority of the trees were mature trees being not less than 100 years old.

73. The Court found the offence was serious in view of the extent of the clearing and the substantial environmental consequences. The defendants were fined \$AUS 20,000 (£7,000) in addition to the prosecutor's agreed costs in the proceedings of \$AUS 40,000 (£14,000).

74. Recently a matter was brought before the Court under the Threatened Species Conservation Act 1995 which establishes a scientific committee and empowers it to declare certain species or communities of flora and fauna as threatened. Such a listing may affect landowners in the vicinity to which the listing applies. The case of *VAW (Kurri Kurri) Pty Ltd v. Scientific Committee* [2002] NSWLEC 60, involved a challenge to a determination of the Scientific Committee by the owners of an aluminum smelter whose operations would have been affected by the classification of a particular ecological community. The case involved complex administrative law challenges to the validity of the Scientific Committee's determination, including the classification of the particular ecological community. Expert reports were tendered and submissions made upon the method of classifying an ecological community and its composition. The Court was required to address intricate questions which involved an appreciation of complex scientific issues, for example:

- was there a minimum number of particular species that were required before a locality could be identified as having the community?
- was there a distinct composition of species which defined the community?

75. This overlap of science and law is one which is frequently encountered by courts and tribunals operating in the environmental field. I note the comments of the Supreme Court of India in *A. P. Pollution Control Board v. Nayudu* (1999) in which it considered the difficulties encountered by environmental tribunals attempting to deal with highly technical scientific evidence. The Supreme Court of India concluded that there was an urgent need to make appropriate amendments to the Indian court structure to ensure that "the appellate authorities or tribunals consist of judicial and also technical personnel well versed in environmental law." The Court went on to say:—

The Land and Environment Court of New South Wales in Australia . . . could be ideal. It is a Superior Court of record and is composed of six Judges and nine technical and conciliation assessors. Its jurisdiction combines appeal, judicial review and enforcement functions. Such a composition in our opinion is necessary and ideal in environmental matters.

76. It is with some pride that I convey these sentiments. They demonstrate that the model of the Court is inspiring innovations in environmental law beyond Australia.

### **Pollution Control**

77. Pollution control in New South Wales was substantially reformed with the enactment of the Protection of the Environment Operations Act 1997 ("the POEO Act") which came into effect in July 1999. Prior to the POEO Act pollution regarding air, water, noise and land was regulated separately

under various statutes. Activities relevant to more than one type of pollution required several licences under several different regulatory regimes. The POEO Act integrated pollution control and simplified licensing for polluting activities by authorising a single licence for air, water, noise pollution and waste management.

78. The Court has jurisdiction to hear offences relating to such matters. The Act provides for the classification of pollution offence. Tier one offences comprise offences committed wilfully or negligently. Tier two offences are those which are not intentional but of similar gravity to tier one offence. Tier three offences are minor and are dealt with by on the spot fines Tier one and two offences are heard before the Court. Fines of up to \$AUS 1.1 million (£360,200) for corporations and \$AUS 250,000 (£90,600) and seven years' imprisonment for individuals may be imposed for tier one prosecutions.

79. Tier one prosecutions often demonstrate a callous lack of regard for the environment on the part of the defendant. In *Environment Protection Authority v. Gardner* (unreported, Land and Environment Court, 14 August 1997), described in the judgment as “the most serious environmental crime to have come before this Court”, a charge was brought against the owner of a caravan park who wilfully discharged sewerage waste into a river system. It was alleged that the defendant disposed of approximately 130,000 litres of sewerage waste per week from his property. During the trial it became apparent the defendant's actions had been conducted in an effort to reduce costs of sewerage disposal. The defendant had diverted such sewerage to the river rather than a holding tank which would have been emptied by tanker at his expense. In reflecting the seriousness of the offence the defendant was imprisoned for 12 months, fined \$AUS 270,000 (£98,000) and required to pay \$AUS 170,000 (£62,000) representing the prosecutor's costs of the prosecution.

80. An example of a tier two offence is the decision of the Court in *Environment Protection Authority v. Port Kembla Copper Pty Ltd* [2001] NSWLEC 174. The defendant was charged with several offences falling within the second tier of environmental offences under the POEO Act. The defendant operated a copper smelter which generated various gases including sulphur dioxide. It held a pollution licence which, *inter alia*, provided limits on the amount of sulphur dioxide which could be emitted from the smelter. Charges arose when the defendant monitored several breaches of the licence conditions and reported them to the prosecutor. Subsequently the defendant pleaded guilty to the charges.

81. In determining penalty the Court addressed the criteria which the POEO Act stipulates should be considered in assessing the seriousness of an offence. Those criteria include: the extent of harm; the measures taken to prevent the harm; the foreseeability of the offence and whether the defendant had control over the causes of the offence. The Court found the incidents were foreseeable and that the defendant had control over the conditions which led to the offence. However, the offence was a tier two offence because it was not committed knowingly or with the requisite degree of negligence. The Court imposed fines for the five offences totalling \$AUS 116,000 (£40,700).

#### *Water Pollution*

82. Cases involving marine pollution frequently come before the Court. A case which attracted a great deal of publicity was *Fillipowski v. Fratelli D'Amato* [2000] NSWLEC 50. On the night of 3 August 1999, the Italian flagged and owned oil tanker Laura D'Amato leaked 300,000 litres of crude oil into Sydney Harbour. The discharge of oil resulted from the deliberate act of two crew members who opened valves of the ship permitting oil to escape into the waters of the Harbour.

83. Reflecting the gravity of the offence the Court imposed a fine on the owner of the vessel exceeding

\$AUS 600,000 (£210,700). No fine was imposed on the Master although he was equally culpable by virtue of the strict liability provisions contained in the Marine Pollution Act 1987. Talbot J held:—

However, the Captain of the ship is properly to be regarded as the direct and immediate representative of the owner while the ship is under his command. To punish the Master or Captain of the ship personally for an occurrence over which he had no personal control, except in a detached overall sense where the owner had already been punished on the basis of vicarious responsibility and the person directly responsible will also be punished, would, in my opinion be an excessive and unreasonable punishment.

#### *Contamination of Land*

84. *Environment Protection Authority v. JK Williams Contracting Pty Ltd* [2001] NSWLEC 13 was an interesting case involving an unusual source of contamination. The defendant had entered into a contract with the Department of Defence to remove earth mounds from a rifle range which were heavily contaminated with spent lead bullets. Under the relevant legislation specific procedures were prescribed for the disposal of such waste.

85. Rather than disposing of all the contaminated soil properly the defendant used the soil as fill on a residential subdivision, thereby causing a potential risk to occupants.

86. Remediation work was undertaken by the defendant at a cost of \$AUS 336,497 (£118,200). A further \$AUS 1 million (£351,200) was paid by the defendant to the owners of the subdivision to be distributed among potentially affected residents. A fine of \$AUS 52,000 (£18,200) was imposed upon the defendant.

#### *Air Pollution*

87. In *Environment Protection Authority v. Capral Aluminium Ltd* (NSWLEC, 18 December 1998, unreported) the Court was required to assess the penalty in respect of pollution of the atmosphere by an aluminium smelter. The defendant held a licence which authorized it to pollute the atmosphere with a limited emission of fluoride. On two occasions the “never to be exceeded” limits were breached. The Court imposed a penalty of \$AUS 100,000 (£36,700) and costs.

#### **Heritage**

88. Influenced by developments in international law the protection of heritage has become a priority throughout Australia. The Court administers the Heritage Act 1977 which is primarily responsible for the regulation of heritage conservation in New South Wales. Such Act protects heritage sites which may comprise a natural formation or a man-made structure. Special provisions are also contained in the Environmental Planning and Assessment Act which require items of heritage to be the subject of special consideration in respect of development which may have an impact thereon.

89. A recent example demonstrates the Court’s powers. In *J & J O’Brien Pty Ltd v. South Sydney City Council* [2001] NSWLEC 128 the owner of a hotel located in a heritage area sought to retiling the façade of the building. Without consent it did so with ceramic tiles which did not conform to the heritage requirements. The Court upheld an order issued by Council that the tiling be removed and replaced with a conforming façade. The Court’s decision was upheld by the Court of Appeal.

90. An item that is on the State Heritage Register or subject to an interim heritage order is protected under the Heritage Act. Various offences can result from destruction of or interference with such items

without consent. Failing to properly maintain and protect heritage items is also an offence under the Act.<sup>26</sup> Breaches of the Heritage Act may be prosecuted in the Court's criminal jurisdiction and can attract fines of up to \$AUS 1.1 million (£396,000) and six months' imprisonment.

91. The Heritage Act protects places, building works, relics, movable objects and precincts of State or local heritage significance. Heritage significance is determined by having regard to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item. Of course heritage value is a largely subjective concept which is not easily quantifiable. In *Detita v. North Sydney Council* [2001] NSWLEC 209 the Court was faced with conflicting evidence as to the heritage significance of a row of Victorian terrace houses. Justice Lloyd mused;

I must confess to always being mildly surprised that two heritage experts can come to opposite conclusions as to the heritage value of the same building or group of buildings.

92. This dilemma was exemplified in *Winten Property Group v. Campbelltown City Council* [2000] NSWLEC 90. In this decision the Court was required to determine whether a subdivision of land intruding upon the curtilage of a fine colonial farm house should be permitted. Although the house itself remained untouched, the subdivision would have had adverse impacts on the views and vistas to and from the house. The house had been placed on the top of a rise to make it a prominent feature of the locality and further the plantings around the house had become, over time, a distinct feature of the landscape. Once again the Court was presented with conflicting expert evidence regarding the impact of the development on the house. Ultimately however, the heritage value of the house and its vulnerability persuaded the Court to refuse the application stating:—

... the Court considers that the integrity of the House and of its setting is in such a precarious position that any development in close proximity to, or which is inconsistent with its preservation would be likely to destroy its heritage significance.

93. Recently approval was granted by a local council for a subdivision in close proximity to a similar heritage item in the same local government area. The house is unfortunately now surrounded by a residential estate. Such development was not approved by the Court, but by a local authority.

94. The state of New South Wales possesses the oldest architectural heritage items in Australia. The Court consistently works toward achieving a balance between modern development and the retention of those items. Sometimes heritage buildings can be adapted for modern usage. For example the General Post Office in Sydney has been adapted to a modern office building and hotel complex.

#### **(IV) OPERATION OF THE COURT**

95. There are a number of matters relating to the operation of the Court which should be noted. The Court has no backlog of cases and there is no significant delay in cases coming on for hearing. The Court is relatively small and therefore its administrative operations can be expeditiously managed. The Court has been committed to timely and efficient disposal of its cases. For example, it has a process of review and revision of its rules and practice directions to ensure that they are working efficiently and are up-to-date. In 1996 it established time standards for the disposal of cases and the delivery of reserved

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<sup>26</sup> Heritage Act s.118.

judgments.<sup>27</sup> The Court's annual review published each year shows the extent to which those standards are being met.

96. The Court has endeavoured to ensure that its services and facilities are adapted to the needs of litigants and their representatives. To this end, the Court has established a Court Users Group, which is a consultative committee whose role is to provide recommendations to the Chief Judge concerning the improvement of the functions and services provided by the Court. About 25 organisations provide a representative to be a member of the Court Users Group. Those organisations include for example engineers, architects, planners, surveyors and representatives of the legal profession. The Court Users Group provides a forum by which the Court can readily disseminate information about the operation of the Court. It provides a channel for communication to the Court and a catalyst for constructive improvements.

97. Formal and restrictive practices and procedures are kept to a minimum in a number of ways, and the Court has a policy of assisting litigants as much as possible. For example, the rules of evidence do not apply in merit appeals in planning and building matters and in valuation cases. Costs do not automatically follow the event in those cases. Instead costs are awarded only in exceptional cases, the idea being to encourage appeals without the risk of a cost burden for losing. The Court also provides a website<sup>28</sup> which lists the daily business of the Court and decisions of judges are made available within hours of their delivery.

98. The Court has espoused mediation as an alternative to full scale litigation. Since 1991 it has offered the parties the option of mediation in Classes 1, 2, 3 and 4 proceedings, through a voluntary and confidential mediation process conducted by the Registrar or Assistant Registrar. In addition, the Chief Judge has compiled a list of persons considered to be suitable mediators in planning and environmental matters. Such list is made available to the public. In this connection it is relevant to observe that the Court encourages the use of conferences designed to achieve conciliation. Such conferences are conducted by commissioners and are often held on site.

## **(V) ADAPTABILITY**

99. In addressing the question of adaptability I refer to the opinions of two eminent English scholars who have considered the need for an environmental court in the United Kingdom. In particular I refer to the comments, set out hereunder, of the Right Honourable the Lord Woolf and Professor Malcolm Grant of the University of Cambridge.

100. In the Garner Environmental Law Lecture of 1991,<sup>29</sup> His Lordship offered his vision for an environmental court in this country. His Lordship considered that the present system in the United Kingdom of dealing with complex environmental issues painted an "unsatisfactory picture". He continued:—

<sup>27</sup> The time standards are:

*Disposal of matters:*

classes 1, 2 and 3—95% of applications to be disposed of within 6 months of filing;

classes 4, 5, 6 and 7—95% of applications to be disposed of within 8 months of filing.

*Reserved judgments:*

50% to be delivered within 14 days of hearing;

75% to be delivered within one month of hearing;

100% to be delivered within three months of hearing;

<sup>28</sup> [www.lawlink.nsw.gov.au/lec.nsf/pages/index](http://www.lawlink.nsw.gov.au/lec.nsf/pages/index)

<sup>29</sup> Sir Harry Woolf. *Are the Judiciary Environmentally Myopic?* 5th Garner Environmental Law Lecture delivered at Church House, Westminster on 23 October 1991. Reproduced in *Journal of Environmental Law* (1992) vol 4(1) at 1.

A High Court, overburdened already and without the specialist input to deal with an influx of complex environmental issues. Problems of multiplicity of proceedings . . . The next question therefore is whether there is a better solution than that which is offered by the legal system at present?

In conclusion His Lordship offered a glimpse of the solution that he had in mind:—

[I hope] To indicate that what I am contemplating is not just a court under another name, nor is it an existing tribunal under another name. It is a multi-faceted, multi-skilled body which would combine the services provided by existing courts, tribunals and inspectors in the environmental field. It would be a “one stop shop” which should lead to faster cheaper and the more effective resolution of disputes in the environmental area.

101. The model that His Lordship proposed bears marked similarities to the Land and Environment Court of New South Wales. His Lordship echoed these sentiments in an article published this year entitled *The Court's Role in Achieving Environmental Justice*.<sup>30</sup>

102. Further Professor Grant conducted a comprehensive review of the New South Wales Land and Environment Court as part of a major research project investigating the viability of introducing an environmental court in England and Wales. The findings of that study are contained in a report entitled *Environmental Court Project—Final Report*.<sup>31</sup> Professor Grant reserved high praise for the example set by New South Wales in the establishment and implementation of the Court. In respect of the Australasian experience generally he said at page 422:—

The Australasian experience demonstrates that a better integrated, more democratic and more effective approach to environmental and planning enforcement is possible in an environmental court.

103. With respect to the New South Wales Land and Environment Court Professor Grant concluded at 424:—

One court which has demonstrated how a specialist jurisdiction can develop a new environmental jurisprudence is the New South Wales Court. In a series of important rulings, the Court has shown itself willing to use its unique combination of a merits appeal jurisdiction and its status as a superior court of record, to give direct effect to the precautionary principle, by developing a cautious approach to situations involving scientific uncertainty where harm to the environment is likely, and balancing it against the advantages of proposal which could make some claim to constituting ecologically sustainable development. The Court has also taken a hard line on participation rights, and has struck down development consents where public notices have been shown to be misleading or inadequate, or where there has been a failure to observe the prescribed periods for public advertisements. It has held that costs need not always follow the event in its enforcement jurisdiction, and that in public interest litigation there may be instances when that normal rule should be waived. It has revived the public trust doctrine in relation to nationally owned parks and other public property. And in its criminal jurisdiction, it has held that the privilege against self-incrimination was not available to corporations.

A former judge of that Court has no doubt about its unique role:

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<sup>30</sup> The Right Honourable The Lord Woolf. *The Court's Role in Achieving Environmental Justice*. 2002 Environmental Law Review vol 4(2).

<sup>31</sup> Malcolm Grant. *Environmental Court Project—Final Report*. February 2000. Department of the Environment, Transport and the Regions, London.

“The administration of environmental law, whether based on statute or common law, is a matter of enormous consequence to the future well-being of our planet, as well as of crucial significance domestically. To the extent that much of it comprises public law and results in litigation (often between a citizen or group and the Crown, a Government instrumentality or corporation), it is important that the courts are able to respond with the development of coherent and consistent principles, as well as efficient and effective case management. My thesis is that a well qualified specialist court, with exclusive jurisdiction in all matters environmental, has the best chance of succeeding.”

(Endnotes omitted)

104. The creation of the Court in New South Wales has proven to be an outstanding success. It is a jurisdiction which offers speedy resolution of the matters before it. The Rules of the Court ensure that procedural matters are kept to a minimum with the result that the Court is able to dispose of matters effectively. The prompt determination of such matters is of obvious benefit to developers, and to the community. The Court recognises that its specialist jurisdiction is one which must be able to deliver justice speedily in order to avoid becoming an impediment to development.

105. When the Court was created the legislature had the foresight to grant it exclusive jurisdiction in planning and associated matters. As a result the complex and unwieldy tribunals which had previously existed were abolished. It was considered that the creation of one court possessing such jurisdiction was the most efficient method of obtaining uniformity and the development of a special jurisprudence.

106. The Court complements the existing court structure. In principle there would be no impediment to a similar court being created in the United Kingdom as a Division of the High Court of Justice. Obviously legislative changes would be required to transfer existing jurisdictions in order to create its jurisdiction as a specialist division. Since New South Wales underwent such process 22 years ago it should not be an insurmountable difficulty to achieve the same in this country.

## **(VI) EPILOGUE**

107. The law of the United Kingdom is undergoing major changes. For example, the Human Rights Act 1998 (U.K.) has made the European Convention on Human Rights part of the law of England. The incorporation of such law may have a profound effect upon public law, considered by their Lordships in *Alconbury*.<sup>32</sup>

108. The creation of a Land and Environment Division of the High Court of Justice would be one way of meeting the challenges created by these changes. The experience of the Court in New South Wales suggests that such an innovation could be an advantage. The reform would serve the dual purpose of meeting the requirements of the Human Rights Act, and simultaneously bringing planning and environment into one administration. Such a division would readily assimilate into the existing court structure.

109. The environment touches every person. The law of the environment is now firmly entrenched in Australia's legal system in recognition of the public demand for its protection and regulation. We are all the custodians of the environment for future generations. The law of the environment gives recognition to the concept articulated by Chief Seattle to the President of the United States of America in 1854. The President had written to Chief Seattle offering to buy “Indian lands” which had been their ancestral home. In a letter which is regarded by some as the most profound statement on the environment ever made, Chief Seattle replying to the President's offer, wrote as follows:

<sup>32</sup> *Alconbury* [2001] UKHL 23, 9th May 2001.

How can you buy or sell the sky, the warmth of the land? The idea is strange to us if we do not own the freshness of the air and the sparkle of the water how can you buy them. This we know. The earth does not belong to man. Man belongs to the earth.

110. Let me close on one final thought. Having been the recipient of the English legal system, it would be fortuitous if Australia, as beneficiary, could retribute its experience of a land and environment court to the United Kingdom.

## **APPENDIX A: ENACTMENTS CONFERRING JURISDICTION UPON THE COURT**

1. Aboriginal Land Rights Act 1983,
2. Access to Neighbouring Land Act 2000,
3. Biological Control Act 1985,
4. Catchment Management Act 1989,
5. Coastal Protection Act 1979,
6. Contaminated Land Management Act 1997,
7. Crown Lands Act 1989,
8. Disorderly Houses Act 1943,
9. Encroachment of Buildings Act 1922,
10. Environmental Planning and Assessment Act 1979,
11. Environmentally Hazardous Chemicals Act 1985
12. Fisheries Management Act 1994,
13. Forestry and National Park Estate Act 1998,
14. Growth Centres (Land Acquisition) Act 1974,
15. Heritage Act 1977,
16. Irrigation Corporations Act 1994,
17. Justices Act 1902,
18. Lake Illawarra Authority Act 1987,
19. Local Government (Regulation of Flats) Act 1955,
20. Local Government Act 1993,
21. Mine Subsidence Compensation Act 1961,
22. Miscellaneous Acts (Planning) Repeal and Amendment Act 1979,
23. National Parks and Wildlife Act 1974,
24. Native Vegetation Conservation Act 1997,
25. Nature Conservation Trust Act 2001,
26. Noxious Weeds Act 1993,

27. Olympic Co-ordination Authority Act 1995,
28. Ozone Protection Act 1989,
29. Pesticides Act 1999,
30. Pipelines Act 1967,
31. Plantations and Reafforestation Act 1999,
32. Protection of the Environment Administration Act 1991,
33. Protection of the Environment Operations Act 1997,
34. Real Property Act 1900,
35. Rivers and Foreshores Improvement Act 1948,
36. Road and Rail Transport (Dangerous Goods) Act 1997,
37. Roads Act 1993,
38. Rural Fires Act 1997,
39. Rural Lands Protection Act 1998,
40. Strata Schemes (Freehold Development) Act 1973,
41. Strata Schemes (Leasehold Development) Act 1986,
42. Swimming Pools Act 1992,
43. Threatened Species Conservation Act 1995,
44. Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986,
45. Valuation of Land Act 1916,
46. Very Fast Train (Route Investigation) Act 1989, and
47. Waste Avoidance and Resource Recovery Act 2001,
48. Waste Disposal Act 1970,
49. Waste Recycling and Processing Corporation Act 2001,
50. Water Act 1912,
51. Water Supply Authorities Act 1987,
52. Western Lands Act 1901,
53. Wilderness Act 1987,

\* Any other enactment which by its provisions confers jurisdiction on the Court