

**Remarks to the dinner for the 30th anniversary of the Land and Environment
Court of NSW**

by

The Hon. Justice Brian J Preston

30 years ago on this day, 1 September 1980, the Land and Environment Court commenced operation. It was the first specialised environmental superior court of record in the world. But it was not then, and certainly is not today, the only specialised environmental court or tribunal. Indeed, a recent study identified 350 environmental courts and tribunals (“ECTs”) in 41 different countries today. The Land and Environment Court is, therefore, part of a large family of ECTs.

A considerable number of that family have come to Sydney this week to an international conference of courts and tribunals that deal with environmental disputes. Representatives come from each State of Australia, from New Zealand, Brazil, Canada, India, Indonesia, Kenya, Thailand, the Philippines and the USA. They honour us with their presence tonight. This important gathering is testament to the coming of age of environmental law and the recognition of the role of the judiciary in achieving the goals of sustainable development.

Tonight, therefore, we celebrate not only the 30th anniversary of the founding of the Land and Environment Court but also the contribution of the judiciary to upholding the rule of law, promoting environmental good governance, and ensuring a favourable balance between environmental, social and development considerations through its judgments.

I thank each of you who are who are here tonight for attending this celebration. You, have, in your own and different ways, enabled the Land and Environment Court to realise its potential and achieve its successes.

As one would expect after 30 years the Land and Environment Court has changed in many respects. In relation to personnel, the Court has grown. In 1980, there were 3 judges, including the Chief Judge, and nine conciliation and technical assessors.

Today, there are six judges including the Chief Judge, nine full time commissioners and 16 acting or sessional commissioners who act on a case by case basis.

The range of expertise of the conciliation and technical assessors or commissioners as they are now called has also expanded over time. Additions include knowledge of matters concerning land rights for Aborigines and disputes involving Aborigines (which was added when the Court acquired jurisdiction under the *Aboriginal Land Rights Act* 1983), urban design and heritage (added from 10 February 2003) and law (added when the Court acquired jurisdiction under various mining legislation from 7 April 2009).

The Court's jurisdiction has expanded over the three decades. In 1980, there were five classes of jurisdiction; today there are 8 classes. The new classes involve criminal appeals from conviction and sentence by the Local Court (Classes 6 and 7) and proceedings under the *Mining Act* 1992 and *Petrolololeum (Onshore) Act* 1991 formerly determined by the Mining Warden's Court (Class 8).

There have also been major changes within the classes of jurisdiction. When the Court commenced in 1980, environmental statutes were few in number and relatively uncomplicated. Each class of jurisdiction only had a handful of statutes under which proceedings could be brought. The main statutes were the *Environmental Planning and Assessment Act* 1979 ("EPA Act") and the *Local Government Act* 1919. Merits review appeals, applications and objections, civil enforcement and judicial review as well as criminal prosecutions under these statutes formed the bulk of the Court's work. Indeed, there were only five statutes identified in s 20 of the Land and Environment Court Act ("the Court Act") as planning or environmental laws, namely the EPA Act, the Heritage Act and three media specific pollution laws.

There were many more minor appeals, applications and objections under the EPA Act and *Local Government Act* 1919 than there are today. The Court exercised many functions of the executive arm of government that have now been transferred to executive. An example is various objections to compliance with building code requirements. Whole jurisdictions have disappeared such as appeals against local government decisions on building applications (which are no longer required).

Appeals against determinations of development applications under the *Environmental Planning and Assessment Act 1979* have also changed in nature. At the lower end of the scale, more types of development are exempt or complying development and no longer give rise to appeals to the Court. At the upper end of the scale, more development can be approved by State government under State environmental planning policies and Part 3A of the EPA Act, with the consequence also of lessening of the number of appeals to the Court.

With the significant increase in the number and complexity of environmental statutes, the jurisdiction of the Court has increased. In every class there is a long list of statutes under which proceedings may be brought to the Court. There are currently 34 statutes identified in s 20 of the Court Act as planning or environmental laws, a massive increase on the original five statutes in 1980. The statutes cover the full spectrum of environmental law. With this expansion in the breadth of the Court's jurisdiction came the need for a change in the knowledge and experience required of the Commissioners. The Court has been able to satisfy this demand not only within the ranks of full time Commissioners but also by the appointment of sessional Commissioners who are called upon as cases arise involving special areas of expertise.

In relation to caseflow, interestingly, the total number of matters has shrunk. At the end of the first complete calendar year of operation, 1981, the Court disposed of 1930 matters whilst in 2009 the Court disposed of 1644 matters. However, the nature of the matters has changed. Today, the matters are larger, more complex and more protracted.

The Court's criminal jurisdiction has grown considerably. In 1981, there were only 12 prosecutions and no criminal appeals from the Local Court. None were disposed of until 1982 when 22 were disposed of (which figure included 11 further prosecutions commenced in 1982). In 2009, there were 91 prosecutions commenced and 119 were disposed of and there were 7 criminal appeals lodged and 6 disposed of. The complexity of criminal prosecutions and sentencing hearings has also increased.

The Court's practice and procedure has been transformed over the years. In 1980, hearings of proceedings were always in court, views were rarely undertaken or, if undertaken, only at the end of the hearing and conducted in monastic silence with mime like gestures pointing out features referred to in the evidence adduced in court. Evidence of witnesses was adduced orally. There were no pre-hearing exchange of expert evidence or joint conferencing of experts. Concurrent evidence was unheard of. The court had a passive role in relation to the preparation for and conduct of the hearing, the responsibility in that regard rested primarily on the parties.

Today, of course, there has been a revolution in court procedure. The primary duty to ensure the just, quick and cheap resolution of the real issues in the proceedings rests on the court and secondary duties fall on the parties and their lawyers to facilitate the court achieving this duty. Active and differential case management is standard practice. Ambush is outlawed. Early and complete disclosure of each party's case and all evidence to be adduced is mandatory. Early exchange of expert evidence, joint conferencing and report to the court; concurrent evidence and court control of expert evidence are the norm.

Appropriate dispute resolution - the tailored matching of each particular dispute with the appropriate dispute resolution process – is the modern approach of the Court. Interestingly, when the Court was established, there was an emphasis on conciliation to resolve merits review proceedings. This was reflected in the appointment of persons as conciliation and technical assessors. I have chronicled elsewhere the brief rise then long fall after 1985 of this approach to dispute resolution. However, conciliation was revived in late 2006 and has since flourished.

The Court has been a crucible of innovation and experimentation. It has pioneered many initiatives in practice and procedure and dispute resolution. Examples are the use of eCourt or electronic court, on-site hearings, court appointed experts and concurrent evidence and the provision of comprehensive website information, court newsletters and an environmental crime sentencing database. The Court is the first court in the world to implement the International Framework for Court Excellence.

The evolution of the Court has corresponded with the evolution of environmental law. The Court has been at the forefront of development of environmental jurisprudence through its decisions. The Court's decisions have developed aspects of substantive, procedural, restorative, therapeutic and distributive justice.

The Court today stands as a more mature, sophisticated and responsive institution, proud of its achievements but also aware of the need to continue to adapt and improve. It looks forward to the challenges and the opportunities in the next 30 years.

We are honoured and privileged to have two distinguished persons speak to us tonight. The first is the Attorney General of NSW, the Hon. John Hatzistergos MLC who has kindly agreed to act as host so that we may gather for this dinner not only in a historic building but also in the same building in which Parliament passed the legislation that established the Court. I will call upon the Attorney to speak in a moment. The second is the Hon. Jerrold Cripps QC who amongst many other positions of office was one of the three foundation judges of the Court and then Chief Judge.

It is now time to call upon the Attorney General of NSW to address. Mr Hatzistergos is the Attorney General, Minister for Citizenship, Minister for Regulatory Reform and Vice-President of the Executive Council in NSW. As the First Law Officer of the State, the Attorney General is the most senior member of the Bar and acts for or represents the Crown in litigation. Mr Hatzistergos is a former Senior Legal Officer with the Commonwealth Director of Public Prosecutions and has been a member of the NSW Bar Association since 1989. He holds a Bachelor of Economics (1982), a Bachelor of Laws (1983) and a Master of Laws (1994).

I now call upon our dinner speaker, the Hon. Jerrold Cripps QC. Jerrold Cripps was a member of the judiciary for 15 years serving first as a judge of the District Court of NSW, next, in 1980 as one of the three foundation judges of the Land and Environment Court then as Chief Judge from 1985 to 1992 and finally as a judge of the NSW Supreme Court and Court of Appeal from April 1992 to October 1993. He continued as an acting judge in a variety of courts thereafter. He was Commissioner

of the NSW Independent Commission Against Corruption from 2004 to 2009. Mr Cripps has also served as Chair of the Electoral Commission, Chair of the National Electricity Tribunal, Chairman of the NSW Legal Aid Commission, President of the NSW Anti-Discrimination Board and Chair of the Australian Commercial Disputes Centre. Mr Cripps was also a member of the Judicial Commission of NSW, a part-time commissioner of the NSW Law Reform Commission, member of the Corporate and Securities Panel and is presently an Arbitrator of the International Court of Sport. Mr Cripps holds the degrees of Bachelor of Laws and Master of Laws from the University of Sydney. He was admitted to the Bar of NSW in 1959 and appointed Queen's Counsel in 1974.
