

"Land and Environment Court; Law and Practice New South Wales"

Longer Book Reviews

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LONGER BOOK REVIEWS

Land and Environment Court: Law and Practice New South Wales, the Law Book Company Limited, Sydney 1993; Foreword by Chief Judge Mahla Pearlman AM; Preface: Users' Guide: Contents: Table of Cases: Table of Statutes: Index, 1 Introduction; 2 *Land & Environment Court Act 1979 (NSW)* Annotated; 3 Land & Environment Court Rules 1980, Annotated; 4 Forms; 5 Fees; 6 Practice Directions; 6 Incorporated Supreme Court Rules 1970; Filing Instructions & Summary Loose Leaf Service: \$275.00

Specialised courts and tribunals can be rather terrifying for the newcomer. I will never forget my first venture, as a young barrister, into the Industrial Commission of new South Wales. I did not even know where the Commission sat, still less what a conciliation procedure involved. Commonsense, hard work, and a wise judge (Sheppard J) eased my path. Everyone is a newcomer once.

In the industrial field, there were a number of top silks who dominated the Federal and State jurisdictions. One of them was reputed to have a marvellous card index system. It reportedly contained every imaginable detail upon every statutory provision and case decision. Little wonder that the owner of this miracle of organisation always seemed so self-assured and smooth as an advocate. All he had to do was consult the cards.

When, later, this doyen of the Bar was appointed to judicial office, I naturally expected that his system would be passed on to the Bar, as a kind of memorial to his years amongst us. Nothing doing. He kept the cards to the end of his judicial tenure. So far as I know, he is still poring over them, in quiet retirement.

When I was appointed a Deputy President of the Arbitration Commission in 1974, I was determined to create my own system. When I was safely out of the industrial field, and labouring in the garden of law reform, I resolved to

share my "system". It remains the basis of the *Industrial Index to Australian Labour Law*, published by CCH Australia Limited. Anyone can acquire or use it.

Happily, Mr Terry Naughton QC, a leader in the Land and Environment Bar in New South Wales, has likewise shared his "system" with the rest of us. His *Land and Environment Court: Law and Practice* amounts to a detailed commentary on the history, legislation, cases and practice of that court. It will be an essential companion for members of that court (judges and assessors), the practitioners appearing before it, the local authorities, developers, and other repeat players in this field of law, and many besides. Drawing upon his experience as editor of the *Local Government and Environmental Law Reports*, Mr Naughton has referred generously to the decisions of courts in other States of Australia (mostly Supreme Courts, but also District Courts, and planning tribunals). He has used their decisions to illustrate commentary on the provisions of the New South Wales Act and Rules.

The service is produced in loose leaf format, to permit regular updating on "current developments of this highly specialised, and sometimes contentious, court". Its publication complements other initiatives of the Law Book Company Ltd in the same field, including the launching of the *Environmental and Planning Law Journal* - one of a series of new journals lately initiated. The users' guide at the front of the service explains the way in which updates are to be incorporated. Happily, for disorganised or over-busy practitioners, there is a promise of assistance from the company's customer service representative (on a free call number, no less) to spring to the rescue if updating proves too much. Such support is described in a friendly way as "part of our service".

The volume itself is neatly, clearly interspersed with colour-coded dividers, signifying the index material for substantive sections of the work. The index looks particularly detailed. This is an essential feature of a work of this character. It is designed to be used in court as a tool of practice. Only with a good index will a hard pressed lawyer be able to find ready access to relevant authorities in the text under the pressure of an urgent demand.

The authorities are set out in greater detail than in other Practice works with which many practitioners will be familiar. Doubtless, this is because of the comparative brevity of the *Land and Environment Court Act 1979*, and the specialised jurisprudence which has gathered around the Act since the court it established commenced operation on 1 September 1980. As well as commentary on that Act, and on the Land and Environment Court Rules 1980, the text includes standard forms, regulations governing fees, and the practice directions issued by the Chief Judge.

In an interesting opening section, Mr Naughton has collected the extracts from the Second Reading Speeches, which supported the passage of the legislation through the New South Wales Parliament. The establishment of a separate court was controversial at the time. The New South Wales Bar Association urged (as did other commentators) that the court should be a Division of the Supreme Court. However, this was not to be. The Government was determined to create a court with a new ethos, novel powers and procedures, a wider right of standing for citizens concerned with environmental issues, and new personnel, who would be unencumbered by the attitudes of the former courts and tribunals.

Some of the fears which were voiced about creating a new, separate court, have been justified by decisions fixing the limits of the power of the Land and Environment Court, to deal with matters urged as connected with the subjects within its jurisdiction. For example, in *National Parks and Wildlife Service & Anor v Stables Perisher Pty Ltd* (1990) 20 NSWLR 573 (CA), the New South Wales Court of Appeal held that the Land and Environment Court had no jurisdiction to deal with a claim, in tort, for general damages. In this respect, the jurisdiction of the court was contrasted with the pendant jurisdiction of the Federal Court of Australia. The inconvenience and cost of having different aspects of a single dispute, between different parties, dealt with severally in the Land and Environment Court, and on its statute, the author has carefully and fairly collected the relevant decisions on this problem - whilst not withholding criticism, of some of them.

As a superior court of record, the Land and Environment Court of New South Wales enjoys a large jurisdiction, implied from the very fact that it is a court of such a kind. Some of the cases cited in the text suggest that the court also has an inherent jurisdiction. Views differ in the authorities on this point. Some suggest that a statutory court of limited jurisdiction has only the powers expressly conferred or necessarily implied by the statute. But whilst some judges would confine inherent powers to the courts deriving their powers from the Royal prerogative (such as the State Supreme Courts in Australia), others have held that such powers devolve whenever Parliament creates a "superior court of record". See eg *Logwon Pty Limited v Council of the Shire of Warringah*, Court of Appeal, (NSW), unreported, 17 December 1993.

One section of the historical introduction to the court contains a list of the applications where a decision of the court has been effectively reversed by ad hoc legislation. The instances range from the *Cumberland Oval Act* 1981, designed to overcome the decisions in *Hale & Ors v Parramatta City Council & Anor* (1982) 47 LGRA 269 (LEC), affirmed (1982) 47 LGRA 319 (NSWCA), to *Sydney Harbour Tunnel (Private Joint Venture) Act* 1987. This last mentioned Act excluded the application of the broad locus standi provisions of s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW), in respect of the building of the Harbour tunnel. Such ad hoc legislation has been criticised, including by the first Chief Judge of the Land and Environment Court (McClelland J), as an attack on the independence of the judiciary. But my own view is that it is the legitimate action of an accountable government, and the price paid for keeping generally unconfined the large locus standi provisions, and facility of detailed scrutiny permitted generally under the statute. See *Citizens Airport Environment Association Inc v Maritime Services Board of New South Wales and Federal Airports Corporation* (1993) 79 LGERA 254 (NSWCA).

The text accompanying the provisions of the *Land and Environment Court Act* 1979 (NSW) is extremely detailed. It includes ample quotations, not only from decisions on the Act, but also on analogous provisions. There are also numerous

references to law reviews, and specialised journals, evidencing the wide reading of the author of what seems to be every Australian work of relevance to environmental law and practice.

In the section on the Rules of the Land and Environment Court, reference is made to the new practice authorising the Registrar, where appropriate, to refer proceedings to mediation or conciliation (Division 6A of Pt 12). The author suggests that the fundamental postulate of mediation is that it must be voluntary. He urges against imposed "mediation". On the other hand, experience teaches that litigation in, and from, the Land and Environment Court is highly technical, protracted, and expensive. Some means of promoting sensible settlement at an early stage in litigation is the legitimate obligation of a court, operating in a field where passions tend to run as high as the costs.

The provisions of several other statutes make reference to the Land and Environment Court, as Mr Naughton acknowledges in his commentary. As the service develops, it may be expected that it will include reference to the other statutes, which either confer jurisdiction on the court, or specify the ways in which, in particular cases, the court's jurisdiction is to be exercised. See eg *Criminal Appeal Act 1912*, s 5AA, and *Camelleri's Stock Feeds Pty Ltd v Environmental Protection Authority*, Court of Appeal (NSW), unreported, 17 December 1993.

One of the greatest tributes to the early success of the Land and Environment Court was the invitation extended to Justice Cripps, the second Chief Judge, soon after he retired as Chief Judge, to visit the United Kingdom to explain the court's workings to a generally appreciative audience in that country.

It is impossible to create a perfect court for environment disputes. The competing interests will always be discontented with whatever mix of legal and planning experience, formal authority, and informal procedures, property rights, and community concerns the law provides. As the first Chief Judge once quipped, the quandary is to reconcile those who would reduce historic buildings to a car park, and those who would turn Sydney's central business district into a rain forest.

But for all its problems, the New South Wales Land and Environment Court has done well in its first 14 years. The risks of its absorption by the Supreme Court seem to have faded, despite problems in the borderlands of jurisdiction. It is therefore appropriate that it should have its own practice book. No more diligent and knowledgeable author could have been found. He, and the publisher, can be commended for sharing this expertise with us all.

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