Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [11.08 a.m.]: I move:

> That this bill be now agreed to in principle.

The Civil Procedure Amendment (Transfer of Proceedings) Bill 2009 provides for amendments to institute a cross-vesting scheme between the Supreme Court and the Land and Environment Court to give each court the power to transfer civil proceedings to the other court where concurrent proceedings are running in each of the courts or where it is more appropriate for proceedings to be heard in the other court. On occasions the same set of circumstances gives rise to litigation in both the Supreme Court and the Land and Environment Court. There is limited scope for the Land and Environment Court Act to allow proceedings to be consolidated and dealt with by one court. This can lead to added expense for litigants, who are effectively forced to proceed in two courts at the same time with both courts examining the same issues or at least the same set of facts.

Currently the Supreme Court can transfer proceedings to the Land and Environment Court and the Land and Environment Court is given ancillary jurisdiction to deal with the proceedings under sections 149A to 149E of the Civil Procedure Act 2005. However, the Land and Environment Court does not have an equivalent power to transfer proceedings to the Supreme Court. The bill addresses this issue with a scheme that has been agreed to by the Chief Justice of the Supreme Court and the Chief Judge of the Land and Environment Court. The bill will amend the Civil Procedure Act 2005 so as to enable either the Supreme Court or the Land and Environment Court to transfer proceedings to the other court if the court is satisfied that it is more appropriate for proceedings before it to be heard in the other court or there are related proceedings pending in the other court and the court is satisfied that it is more appropriate for all the proceedings to be heard together in the other court.

The cross-vesting provisions apply only in civil proceedings at first instance, that is, not to appellate proceedings or criminal proceedings. The proposal will reduce unnecessary litigation by enabling one court to deal with the same set of issues instead of having concurrent proceedings running in each court. To illustrate the need for these changes I draw the attention of the House to the case of *Neighbourhood Association DP 285249 and Ors v Watons and Anor* [2007] NSW LEC 457 (20 July 2007), and quote the decision of Chief Judge Preston in this matter. It is the problems he identifies here that this bill is aimed at solving:

> The applicants in these proceedings, by notice of motion filed 21 June 2007, have sought orders that the proceedings be listed for hearing in November 2007 before a judge with appointments in both the Land and Environment Court and the Supreme Court; that evidence in these proceedings be heard at the same time as proceedings in the Supreme Court subject to a similar order being made by the Supreme Court; and that evidence taken in the Supreme Court be evidence in the proceedings in this Court.
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> The background to the motion is that there are proceedings in both this Court and the Supreme Court which concern the same land on the Murray River and the same legal arrangements flowing from the grant of a development consent and development contracts in relation to the land. The nature of the issues in the proceedings in the Land and Environment Court and the Supreme Court are different, although they spring from the same land and legal arrangements. In this Court, the applicants' case is that essentially the respondents are in breach of a development contract made subject to a development consent. That development contract provides for the developer to carry out certain works and to provide certain services. For example, one clause requires the developer to provide electricity services and another clause requires the developer to provide sealed access ways or driveways.
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> The applicants' allegation is that the developer, for whom the respondents are responsible, has failed to comply in certain respects with these obligations to construct these works and provide these services. The applicants seek rectification of these breaches and compensation by way of damages. The Supreme Court proceedings are of a different nature. They seek a variation of the community scheme based on the alleged impracticality of the current scheme. The applicants submit that there will be some overlap in the factual matrix and the evidence establishing that factual matrix in the two proceedings. The dealings between the applicants and respondents have extended from at least 1990 to date, so naturally a good deal of documents have been generated over time. The applicants submit that there will need to be a consideration of these documents in each of the Land and Environment Court proceedings and the Supreme Court proceedings.
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> It is common knowledge that certain of the Land and Environment Court judges have, in the last few years, also served as acting judges in the Supreme Court. This year the judge who will serve as an Acting Judge in the Supreme Court in November 2007 is Justice Biscoe. The applicants considered that there would be some economies of scale if both the Land and Environment Court proceedings and the Supreme Court proceedings were able to be allocated to Justice Biscoe. This might occur because evidence that was tendered and explained in one set of proceedings, when tendered in the second set of proceedings, could be dealt with in a briefer fashion because the explanation would have already been provided in the first set of proceedings. There does seem to be some economies of scale if the one judge could hear both sets of proceedings.
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> However, the proposed means set out in the notice of motion is not one which either can be achieved or in my opinion ought to be achieved. As I have indicated, the arrangement proposed in the notice of motion was that there be one hearing by the judge who has appointments in both the Land and Environment Court and Supreme Court of both sets

> of proceedings, that is to say, the proceedings would be heard simultaneously and evidence tendered in one would be tendered in the other. Having regard to the careful demarcation of jurisdiction in the Land and Environment Court Act 1979, particularly s 71, and also the fact that a judge of the Land and Environment Court cannot make directions as to how proceedings in the Supreme Court should be heard or determined, I am of the opinion that I cannot make the orders in paragraphs 1, 2 and 3 of the notice of motion.
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> However, as I have said, I think there is some advantage if one judge could hear both matters. That means, from the Land and Environment Court's perspective, I can as Chief Judge, allocate the hearing of the Land and Environment Court proceedings to the only judge whom I know for 2007 has an appointment as an Acting Judge in the Supreme Court, namely Justice Biscoe. I am also aware that Justice Biscoe will take up the appointment as an Acting Judge of the Supreme Court in November 2007. Accordingly, I can facilitate achieving economies of scale by now allocating the matter to Justice Biscoe and also directing that the matter be prepared for a hearing prior to November 2007, namely in October 2007. This would mean that the Land and Environment Court proceedings can be heard prior to the matter being dealt with in the Supreme Court.
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> It would be entirely a matter for the Supreme Court to determine whether to allocate the Supreme Court proceedings to Justice Biscoe. However, if the Supreme Court were to so decide, then it might be convenient for the proceedings to be allocated to him for hearing whilst he is sitting in that Court in November 2007. For these reasons I will make directions and orders as I have earlier indicated would be appropriate. Having regard to the fact that the alternate arrangement is a different arrangement to that which was proposed in the notice of motion, it is appropriate that I dismiss the notice of motion. In relation to costs, however, it was beneficial to both parties that the matter be brought before the Court now and for there to have been directions for the preparation of the matter and the allocation of the matter to Justice Biscoe at this stage.
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> Because there will be benefit to both parties, I consider that neither party has succeeded on the notice of motion and the appropriate order is that the costs of the notice of motion be costs in the cause.

I will also put on the record a number of other cases detailed in a report from the Land and Environment Court and the Supreme Court by Justices Bryson and Lloyd in 1999 entitled "Cross-Vesting and Transfer Between Land and Environment Court and Supreme Court". These cases suggest the need for an associated jurisdiction. The first is *Ross Nelson v Ballina Shire Council*, a decision of Justice Bignold on 30 July 1993, unreported. In this case the applicant, the owner of a parcel of land fronting Byrnes Lane, sought a number of declarations concerning a development consent for the subdivision of the land and a mandatory order requiring the council to carry out roadworks on Byrnes Lane. It was held by Justice Bignold that the facts of the case did establish a relevant obligation on the part of the council under section 94 (3) of the Environmental Protection and Assessment Act to construct the necessary roadworks. His Honour held at page 24:

> In my opinion the evidence establishes the necessary elements giving rise to a contractual obligation on the part of the Council to undertake the necessary roadworks on the basis that the Applicant's contribution towards the works was $32 000 being confined to sealing and that Council would itself be responsible for the necessary earthworks.
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> The Council submitted that the Court lacked jurisdiction to enforce such a contractual obligation. I am by no means certain that the contractual obligation is not relevantly an "obligation or duty conferred or imposed by a planning or environmental law" within the Court's express jurisdiction (see s 20(2)(a) of the *Land and Environment Court Act* 1979 ("the LEC Act").
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> I would be prepared to regard it as falling within the Court's express jurisdiction. However if I be wrong in this conclusion, I am nonetheless satisfied that it is a matter "ancillary to a matter that falls within its jurisdiction" within the meaning of s 16 (1A) of the LEC Act the latter "matter" being relevantly the enforcement of the duty imposed on the Council by s 94 (3) of the EPA Act.

In *Mitchell v Waugh*, reported at page 44 of (1993) 82 LGERA, the applicant brought proceedings in the court for relief under the Encroachment of Buildings Act 1942 in respect of an encroaching retaining wall that supported a dividing fence. It was held that the court had jurisdiction pursuant to the Encroachment of Buildings Act to order the insertion of further weepholes in the retaining wall. The applicant also sought ancillary relief for trespass, nuisance and orders under the Dividing Fences Act 1991, by virtue of section 16 (1A) of the Land and Environment Court Act. Justice Bannon held at page 49:

> Before the Court may exercise jurisdiction pursuant to s 16 (1A) it must be satisfied that there is a proceeding in front of it in which the subject matter for determination falls within the categories set out in ss 17 to 21 inclusive of the Court Act.
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> Once that determination is made, it is necessary to inquire if the further matter, or matter in respect of which relief is sought pursuant to s 16 (1A) of the Court Act, is ancillary to a matter falling within jurisdiction under s 16 (1) of the Court Act.

His Honour went on to say at page 49:

> I do not consider that the claims based upon trespass, such as cutting down bamboo on the neighbour's land, and nuisance caused by escape of water, soil and debris across the boundary are ancillary to the claimed encroachment, or incidental to the Court jurisdiction. However, with some doubt, I am prepared to find the claim under the *Dividing Fences Act* 1991 is ancillary within the meaning of s 16 (1A) of the Court Act.

Another case the House will be interested in is *N. Stephenson Pty Ltd and Traffic Authority of New South Wales*, cited at (1994) 83 LGERA at page 248. This case concerned a claim for compensation for the resumption of land taken under the Land Acquisition (Just Terms Compensation) Act 1991 for the purposes of the State Roads Act 1986. The applicant made an alternative claim for damages under section 96 of the Public Works Act 1912. Although claims under this Act are not within the express statutory jurisdiction of the court, the applicant contended that section 16 (1A) of the Land and Environment Court Act gave the court jurisdiction to hear and determine the alternative claim. Justice Talbot held at page 265:

> Section 16 (1A) was introduced to avoid multiplicity of proceedings in different courts to resolve issues between the same parties which are subordinate or subservient to a matter which falls within jurisdiction. The reference to a matter that is ancillary is intended to make it plain that the matter which is within jurisdiction relates to the primary dispute between the parties. In other words the jurisdiction conferred by s 16 (1A) is in respect of matters which are subordinate to but arise in conjunction with the primary matter before the Court.

His Honour went on to say at page 266:

> Although there may have been an expectation in some quarters that the purpose of introducing s 16 (1A) was to widen the jurisdiction of the Court, that is not, in my opinion, the result. It is no more than a machinery or supplementary provision designed to avoid barren jurisdictional arguments in respect of matters which must be disposed of to enable the Court to exercise the jurisdiction specifically vested by statute.
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> The claim pursuant to s 96 of the *Public Works Act* does not fall within that description and therefore is not justiciable before this Court.

A further matter of interest to the House is *Nigro v Newton and Sutherland Shire Council*, which was before Justice Bignold on 2 September 1994, and is unreported. This case concerned an application seeking injunctive relief to restrain a builder obstructing the right of ways appurtenant to the applicants' home. It was held by Justice Bignold that the applicant's claim did not fall within the court's statutory jurisdiction and neither of the conditions of building approval relied on by the applicant gave any independent or additional support for the applicant's entitlement under the right of ways or for the legal enforcement of those entitlements. His Honour held at page 3:

> In these circumstances, I do not think it can be reasonably concluded that the applicants' claim to enforce the ROWs falls within the Court's ancillary "jurisdiction" conferred by s 16 (1A) of the LEC Act.

A further case is *North Sydney Brick and Tile Company Ltd v Baulkham Hills Shire Council*, reported at (1995) 87 LGERA, page 131. This case concerned a dispute regarding the valuation of land. The applicant contended that the council had no power under the Local Government Act 1993 to issue an amended rate notice. If the applicant were successful it would be entitled to a refund. Justice Talbot found that under the law as it stood up to 30 June 1993 the applicant was entitled to a refund. His Honour held at page 138:

> The 1992 and 1993 payments were made pursuant to the old *Local Government Act* 1919 whereas the 1994 levy was pursuant to the new Act. It is Pt 15 of the new Act that attracts the jurisdiction of this Court. Any refund is payable by dint of s 36 of the *Valuation of Lands Act*. Neither the *Local Government Act* 1919 nor the *Valuation of Land Act* are a planning or environmental law for the purposes of s 20 of the *Land and Environment Court Act* 1979. It is therefore not appropriate for this Court to make an order for the payment of the refund. Section 16 (1A) of the Court Act does not enliven jurisdiction in this case.
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> Mr Webster acknowledges quite properly, on behalf of the Council, that his client would abide the effect of any declaration made by the Court. In those circumstances an order will not be required to achieve repayment. It would be most unsatisfactory, reprehensible and unfair if the applicant was now forced to commence separate proceedings to recover the money on a common money count.

The next decision is the *National Parks and Wildlife Service v Stables Perisher Pty Ltd*, reported in (1990) 20 New South Wales Law Reports at page 573. In this case the respondent claimed declarations that certain development and building consents granted to it by the appellants, who exercise powers to regulate buildings in a national park, were void. It is alleged that the appellants were guilty of negligence, or breach of statutory duty, in relation to the issue of a consent, and that damages were suffered in consequence. The principal issue in the appeal was whether the Land and Environment Court has the jurisdiction to deal with such a claim. Justice Kirby held at page 585:

> The Land and Environment Court is a superior court of record. But it is a statutory court of limited jurisdiction. It is therefore inevitable that, in marking out the limits of its jurisdiction a point will be reached where jurisdiction ends. When that happens, that court must refrain from purporting to exercise jurisdiction. It must do so however inconvenient it might be to the litigants [and] frustrating to the members of that court seeking to do justice in the case

He went on to say at page 585 and 586:

> The very fact that the Land and Environment Court is such a superior court of record will import the implication that, within its defined jurisdiction, amply construed, it will be entitled to do the large range of things that superior courts of record traditionally do. This approach to the elaboration of its powers is appropriate because the alternative is that the

> Land and Environment Court may resolve only part of a dispute. For the resolution of the rest of the dispute, the parties will then be required to proceed to another court if they have the will, the funds and the patience to do so. Inevitably, that will involve costs, delay, inconvenience and even the risk of inconsistent findings. It is a prospect which I do not welcome. I would strive to avoid it, if I could properly do so.

His Honour concluded at page 586:

> Therefore, the assertion of the jurisdiction of the Land and Environment Court to entertain a claim for damages in this case was erroneous. It cannot be found in the express conferral of jurisdiction. Nor can it be found in the extended jurisdiction provided by either s 22 or s 23 of the *Land and Environment Court Act*.

The next matter the House will be interested in is *Nix and Dunn v Pittwater Council* (1994) LGERA 199. This case concerned a cross-claim against the council alleging common law nuisance. Such a claim had already been filed in the Equity Division of the Supreme Court and those proceedings were pending. The appellants relied primarily on section 16 (1A) of the Land and Environment Court Act to assert that this court had jurisdiction to hear the proposed cross-claim. Justice Bannon dismissed the motion. This case was an appeal against that decision. Justice Gleeson, Chief Justice, held at page 203:

> As a matter of discretion, the decision made by Bannon J was one that was both open to him and, in my view, appropriate
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> it is inevitable that cases will arise from time to time in which a matter that falls within the jurisdiction of the court will be part only of a wider dispute or series of disputes. This may, on occasion, result in multiplicity of proceedings, but there is nothing unusual about it. It is the price to be paid for what are seen as the advantages of having such tribunals.

His Honour went on to say at page 205:

> The relationship between two matters referred to in s 16(1A) is clearly intended to be a narrower one than that of association. The relevant dictionary meanings given to "ancillary" are incidental, accessory, or auxiliary
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> The matter the subject of the equity proceedings in this case could not reasonably have been regarded as ancillary to the matters the subject of the Land and Environment Court proceedings.

A further matter is the case of *North Sydney Municipal Council v Janakis*, a decision of Justice Bannon, unreported, in which he stated:

> In this case the council sought a declaration that the use of certain premises was in breach of the relevant planning instrument and the Act. The respondents had entered into a deed with the council pursuant to which they covenanted not to use the premises otherwise than for a dwelling-house or home occupation, without council's consent. One submission made by the respondent was that this deed was voidable on the ground of economic duress. It was held on other grounds that the council was entitled to the relief it sought, but Bannon J refused to consider the claim of duress because such a claim was not within the jurisdiction of the Court.

At pages 7 and 8 His Honour said:

> While to some it may seem unfortunate that the effect of the Act was to divide jurisdiction and to require persons seeking relief in causes of action arising from the same matrix of facts to commence separate proceedings in two separate courts, thus effectively retreating from "the great leap forward" achieved by the Supreme Court Act 1970 and increasing legal costs, it has to be remembered that this was done by the Parliament, after due deliberation, and must be carefully researched. Although this court undoubtedly possesses incidental powers, in no way can it be said to be incidental or ancillary to this Court's jurisdiction to void a deed containing personal covenants upon the ground of duress.
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> Inherent incidental or ancillary power has been demonstrated by a series of cases arising under the Australian Constitution and otherwise to be narrowly confined and not to cover a subject matter of jurisdiction which is not listed in the Court. *Le Mesurier v Connor* (1929) 42 CLR 481, 497. See also *National Parks and Wildlife Service and another v Stables Perisher Pty Ltd* (1990) 20 NSWLR 753, 581, 585. For those reasons I must reject Mr Wilson's invitation to dismiss the Deed executed by the respondents upon the ground of economic duress, because the Court lacks jurisdiction to decide the matter.

There are a number of cases which suggest a need for cross-vesting, such as the *New South Wales Aboriginal Land Council v Worimi Local Aboriginal Land Council*, a decision of Justice Stein, unreported, 21 May 1993. This case concerned a claim by the New South Wales Aboriginal Land Council that the Worimi Aboriginal Land Council was holding certain land on trust, either for the New South Wales Aboriginal Land Council or for certain other local Aboriginal land councils. Declarations were sought to this effect. An injunction was also sought to restrain the Worimi Aboriginal Land Council from selling the property. It was held by Justice Stein that the declarations as to the existence of the trust were not within the jurisdiction of the Land and Environment Court. The injunction was, however, within the jurisdiction. The result was that the parties were in the position of having to seek a complete remedy in two jurisdictions rather than one. His Honour said:

> The Land and Environment Court, although a superior Court of record, is a Court of limited jurisdiction. The extent of its jurisdiction has been tested on previous occasions and has involved parties in expenditure and delay for the resolution of what is essentially an unproductive and sterile issue, see for example the discussion by Kirby P in *Stables Perisher*. This raises for consideration by the Government whether an appropriate provision for the cross-vesting of jurisdiction, or a similar remedial measure, should be made in the interests of access to justice and convenience to the parties.

The next matter is the case of *South Sydney Council v Jaksic-Berger* (1992) 78 LGRA 153. This case concerned a fire safety order issued by a local council against the owner of a building. The owner cross-claimed that if she was bound to be required to comply with the fire safety order, compliance ought to be undertaken by the other respondents, who were the tenants. It was held that the Land and Environment Court had no jurisdiction to entertain a cross-claim between the owner and the tenants arising as it did out of the leases and depending upon the construction of contractual rights inter se. Justice Pearlman said at page 156:

> I do not think this Court has jurisdiction to entertain the cross-application. It deals with claims in contract, which do not fall within s 20(2); it does not raise an issue inextricably bound-up with the central issue; and s 22 does not confer a jurisdiction which this Court would not otherwise have.
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> The result, of course, is that the first respondent must bring proceedings in another court, if she wishes to force liability for compliance with the fire safety notice upon the second and third respondents. That result is inconvenient, costly and time-consuming, and I deplore it, but it is the result which the law requires.

The next case I am sure the House would be interested in is that of *Doe v Cogente Pty Ltd* (1997) 94 LGERA 305. The applicant in that case was the owner of land who was entitled to a right of carriageway over a strip of land known as lot 11. The respondent applied for development consent for the erection of home units on a site which included lot 11. A pipe system was to be located within the bounds of part of lot 11. Consent was granted for the development application, subject to the developer lodging a public positive covenant under section 88E of the Conveyancing Act 1919 whereby the proprietor of the property was to be responsible for the maintenance of the pipelines. The applicants challenged the validity of the development approval. Acting Justice Cowdroy held that the development consent was valid. He further held that section 88E of the Conveyancing Act does not require that every person who has an interest in the land be signatories. His Honour held at page 317:

> Once rights of way and restrictive covenants have their source in an agreement, covenant or instrument, there is no reason why s 28 [of the Environmental Planning and Assessment Act] should not apply to a restriction on land, namely a right of way.
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> Even though its application may appear to constitute an invasion of traditional conveyancing and land law principles, s 28 can, in order to enable a development to proceed, interfere with proprietary rights.

A further case is that of *Doe v Registrar General* (1997) 96 LGERA 275. That case concerned the same facts as those in the case to which I have just referred. The plaintiff, the applicant in the former case, sought an order in the Supreme Court that the Registrar General cancel the recording on the register of the positive covenant affecting the subject land. Justice Windeyer considered many of the same sections in the Conveyancing Act as were considered by Acting Justice Cowdroy in the Land and Environment Court. His Honour went on to say at pages 286 to 287:

> The application before the Land and Environment Court was a class 4 application. Cowdroy AJ dealt with the contentions of the plaintiff so far as are relevant here on two issues. The first was that council assumed that the requirements of the covenant could be complied with without regard to the plaintiff's interest and second that there was no valid covenant because the necessary consents had not been obtained. The second matter was one of the matters before this Court. Cowdroy AJ dealt with this matter and found against the plaintiff. The parties were the same other than the Registrar-General, who is an additional defendant here. The issue was the same albeit that when the proceedings in the Land and Environment Court were commenced that issue was different because the covenant was not in existence
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> the chief claim put forward for the exercise of the jurisdiction of the court was that the covenant was not a valid covenant. That was the issue decided by Cowdroy AJ. He had to determine the claim in proceedings under s 20(2) of the Land and Environment Court Act 1979 and he did so determine it. The plaintiff is estopped from re-litigating that claim. There is a further point. The Land and Environment Court is a superior court of record so that its decision must be assumed to be within jurisdiction unless set aside on appeal or prohibition for lack of jurisdiction. The plaintiff has already taken steps to appeal.

The final case I am sure the House would be interested in is that of *Cogente Pty Ltd v Doe* (1998) 98 LGERA 162. That case concerned three appeals, two of which related to decisions of Justice Windeyer in the Equity Division of the Supreme Court and the third related to a decision of Acting Justice Cowdroy in the Land and Environment Court. The various proceedings arose out of attempts by the residents to stop what they regarded as overdevelopment of the servient tenement. They sought to do so by attacking both the validity of the development consent and the validity of the section 88E instrument. This resulted in three separate proceedings. Justice Beazley held at page 169 that it was:

> unnecessary to deal with the issue raised under s 28 of the *Environmental Planning and Assessment Act* and cl 26 of the local environment plan. It should not be assumed, however, that we endorse the reasoning of Cowdroy AJ on this issue. Rather the determination of the matter is not relevant to the outcome of the appeal.

The appeal was dismissed. The bill provides for amendments to introduce a cross-vesting scheme between the Supreme Court and the Land and Environment Court. It is with pleasure that I commend the bill to the House.