

TRANSCRIPTION
JUSTICE BRIAN PRESTON
CHIEF JUSTICE, NSW LAND & ENVIRONMENT COURT
ON PROCEDURAL JUSTICE

0:47:33 to 1:01:27

Well what a wonderful thing. All you guys coming along, in an evening, to talk about citizen participation in our environmental planning system and how we achieve better outcomes. It's a wonderful thing – good to see. But why do we do it at all? Well, looking at the heart of why people come to things like this, go along and make submissions to governments, either state or federal, is because we have a sense that we want to achieve justice, environmental justice. Now when you say you're going to achieve environmental justice, what do you mean by that? You see at least three ways. One is the concept of "distributive justice" and when we're talking about that, we're talking about the distribution of environmental benefits and burdens. There might be some benefits, for example, of development for them, houses for people, goods produced from factories, but there are burdens that come with that as well. All those externalities; the traffic, the noise, the pollution that comes, the loss of environmental space for species and the question is, how are they distributing those benefits and burdens? Ultimately, of course, what happens, is that there's an unfair distribution of those benefits. Certain groups in society get all the benefits, but others get the burdens. That's the injustice that people worry about. So when people are labelled "NIMBYs", they say they don't want it in their back yard, they may be saying there's distributive injustice here. They're getting the burdens, but others are getting the benefits and that's what's unfair.

A second way we can think about arriving at justice is "procedural justice". That's the right to participate in the polity. We've moved away from the technocratic, paternalistic, top-down approach that we know what's good for you and this is what will happen, to say that that's not part of democracy. We should have an opportunity to participate in that. Procedural justice involves firstly having access to all the relevant information. You can't participate if you don't get the information. The second is that you have meaningful opportunities to participate. Not tokenistic, not sort of we'll tell you about it, but you don't get an opportunity to respond. Meaningful opportunities to participate and, I'll come back to that as to how we can do this a bit better and of course, those procedural rights to have access to information; the right to know what is going on and the right to participate, having input into the decision-making processes. If they're infringed, the opportunity to go to courts or other tribunals to complain, or to uphold your rights, that's absolutely vital to have access to justice.

So these are ways of procedural justice and when people claim that they've lost those opportunities; they haven't been given the information, they haven't been consulted, they haven't been able to participate in a meaningful way and having been made to go to court to complain about that. That's where people rightly say there's been procedural injustice.

The third way where people can get justice, is by way of recognition. Now this is an interesting one. It's not dependent only on procedural justice or distributive justice. Everyone is equal before the law; everyone has equal worth. My say, is as good as your say. My right to participate is as good as your right to participate. My right to have access to environmental benefits and not to have all of the burdens is as good as the next person's and that needs to be recognised. What we see in society is a lack of recognition of certain sectors in society. This recognition and that is recognition that is wrongful and mal-recognition and that is recognition that is where they are actually starting to target, in a malevolent way, particular people or sections of society. Now when people use labels like "NIMBY" it's never done in a praiseworthy manner, is it? It denigrates. In rugby terms, playing the man not the ball. What you're saying, when you label somebody a "NIMBY", is what that person is saying is not worthwhile listening to. We want to write that off right at the start. Why? Because they're a "NIMBY" and, if you want to play with any other labels "NIMBYs" or any other labels – bananas, lulus, fruits – it doesn't matter – they're all designed to denigrate. Now you will see that when these groups take action, they get in the press, the powerful in society will try and denigrate them. They're not going to deal directly with their arguments, but denigrate the people. This is injustice in recognition. So what we want to do is we need to address that; we need to recognise that all are worthwhile and we need to find where that is. Where are the laws, where are the policies, where are the practices that are leading to this injustice in recognition? So when people are participating in a process and they're calling out and saying this has been an injustice, perhaps we can see elements of each of those three ways that I said lying at the heart of what they are saying is the injustice. So how can we do things better? Well, it's going to take me more than ten minutes, or the few that I've got left. One of the things – I'll pick out just a few - if we are looking at, for example, applications under the Environmental Planning & Assessment Act. This was an application for a particular project for approval. You can break that process down into these stages, the application stage, the assessment stage, the approval stage and the implementation stage. We can learn a few things from each of those stages. Let's take the application stage. One of the problems is that the current laws do not require any engagement with the community until the application is made. At that stage, the developer has already locked in that particular project; they are committed to it. So the opportunities for the public, the community, to participate are constrained, because they're not going to come up and say, yes, I am not opposed to this particular development but wouldn't it have been much better on a different site. The developer says, well that might be all very well, I bought this site, I'm not going elsewhere. Or I've already spent a lot of money having these plans drawn up by a very expensive architect and I've paid engineers and all these other

consultants and I've done all these environmental impact assessments and no, I can tweak the edges and paint it a different colour, but I'm not going to change the whole thing. So one of the things we need to do is to go and engage the community at a much earlier stage, so that they have a real opportunity to participate. In the assessment stage, we can find that, at the moment, it is rather perfunctory as how the community's views are taken into account. For one thing, they don't actually even ask the people. So the assessors, the people who are preparing those assessments, try to assess what the community might think; what might be their concerns, without actually finding out what they really are and I can assure you that with the three ways that I talk about, you will rarely see an assessment of those justice issues. About the equity with the distribution of benefits and burdens; about how to engage procedurally with the community, or about recognising the work of the community that's going to be affected. At the approvals stage, one of the problems is that there tends to be a pro forma approach. You might have made all those submissions and put them all in and they may be catalogued, put into categories – there were three hundred submissions, they fell generally into the categories of traffic, noise, planning, environment, but they won't actually engage with what it is. There's a disconnect between what you say and how they deal with them. So there's not a proper assessment of what the community is saying.

The final point (as I get another wind-up) is in the implementation stage. Why do we think that public participation stops at the assessment stage, the application stage? Why don't we continue to engage the community after an approval is given and after a development has been carried out? That is a vital stage and the community can continue to be involved and it is in the interests of developers, particularly for projects that do continue, not one-off ones, because that's where they get their social licence; that's where the community accepts the legitimacy of the business that is carrying out that development. By continuing to engage in those later stages, the community approves and gives that licence to the developer and the community can continue to proffer opportunities which will benefit the development and, of course, we can continue distributive justice, procedural justice and justice as recognition by continuing to engage the community at a later stage. Thank you.

1:40:35 to 1:44:10

This is important, because it is a conception of what we want as a society and it also is a conception of what we are as a society. So we do have to ask those questions and I think that you can extend concepts of equity beyond human beings if we want them to embrace nature. It can be done, it's not silly. You obviously know the article written by Christopher Stone, we've mentioned it and he's written a book about and it is difficult, because we have to then conceptualise – not only have to conceptualise, but we've also got to work out how do we make it operational in practice and that is difficult. There are some ways in past history, which I'll suggest as to how you do it.

But you can actually - one point about our laws and it comes back to what we want. One of the characteristics of environmental laws and this is true, not only in Australia, but all around the world is that we have the occupational process and not a substantive outcome and I don't know whether you've ever looked at certain bottles or cans, on the side it says "please dispose of thoughtfully" and I know it's harsh, but many of our environmental laws, could be characterised as saying "please dispose of thoughtfully". We will think about it, or dispose of it. So it's very hard, but why ought not we, as a society, say what it is that we value, what it is that we want to achieve, what outcomes do we want and then actually put that in our laws. Are there not some things in our world that we want to save and that they shouldn't be taken away regardless of the cost? Why is everything tradeable? So, that's an interesting thing. So whether it be our threatened species laws, or our heritage laws or something, they never actually say unconditionally that there should be something that we save. So it's an interesting thing but honestly, that's for governments and the community putting influence to governments, to say – aren't there some things that need saving and aren't there some things that we want to pass down to future generations and then just say it in the laws? Rather than always coming back to (couldn't hear the next few words because someone was clearing their throat, he was mumbling and then people were clapping).