

# environmental**law** *News*

**SPRING 2020** No. 65  
ISSN 1327-3345



**EPLA 2020**  
**ZOOM CONFERENCE**

**DUE TO COVID-19**

**ANNIVERSARY ISSUE:**

*Celebrating 40 years of the  
Land and Environment Court*





**FELICITY ROURKE**  
*EPLA President*

## PRESIDENT'S MESSAGE

The annual EPLA conference which was due to be held at Western Plains Zoo in Dubbo can no longer be held in person, and we have deferred our booking at that venue to 2021. Due to the impact of COVID-19 we are adapting our conference planning and EPLA will now be holding its annual conference in the last week of October 2020 in an online format. We are grateful once again to have the support of Judges and Commissioners of the Court, as well as a range of esteemed speakers on a variety of interesting topics.

There will be a range of sessions offered across a number of timeslots (breakfast, mid-morning, lunchtime and after-Court) on 28, 29 and 30 October 2020. This new format is designed to allow greater flexibility for attendees and to avoid an all-in-one-day virtual conference, while still ensuring that attendees have the opportunity to obtain 10 CPD points.

In light of the changed format we can offer greater access to members across the whole of NSW, as well as revised pricing to encourage multiple attendees from member organisations.

I hope you will embrace the new format and support the 2020 conference and once again I thank our loyal sponsors who have indicated their continued support.

*~ Felicity Rourke*



## OFFICE BEARERS

### PRESIDENT

**Felicity Rourke**

Felicity.Rourke@allens.com.au

### VICE PRESIDENTS

**Paul Crennan**

paul@crennanlegal.com.au

**Scott Nash**

nash@mpchambers.net.au

### TREASURER

**Scott Nash**

nash@mpchambers.net.au

### SECRETARY

**Michele Kearns**

kearns@mpchambers.net.au

## COMMITTEE

**Anne Hemmings**

anne.hemmings@mpchambers.net.au

**Hasti Kalarostaghi**

HKalarostaghi@huntsw.com.au

**Andrew Laughlin**

andrew.laughlin@industry.nsw.gov.au

**Montana Linkio**

Montana.Linkio@ashurst.com

**Melissa Mallos**

Melissa.Mallos@maddocks.com.au

**Ros McCulloch**

RMcCulloch@pvlaw.com.au

**Janet McKelvey**

mckelvey@mpchambers.net.au

**Rebecca Pleming**

rebecca.pleming@allens.com.au

**Jacinta Reid**

reid@mpchambers.net.au

**Cecilia Rose**

cxr@swaab.com.au

**Robert White**

rwhite@12thfloor.com.au

**Tom White**

Tom.White@hdy.com.au

**David Morris**

david.morris@edonsw.org.au

**Richard Lancaster SC**

rlancaster@stjames.net.au

**Belinda Charlton**

belinda@belindacharltonlawyers.com.au

**Clare Brown**

cbrown@urbis.com.au

**Stuart Harding**

stuart@willanaurban.com.au

**Gary Shiels**

gary@gsaplanning.com.au

# CONTENTS

- 
- |    |  |
|----|--|
| 2  | <b>Editor's Note</b><br>Anne Hemmings  |
| 3  | <b>President's Report</b><br>Felicity Rourke   |
| 4  | <b>"Perish the thought": Some remarks on the Land and Environment Court's 40th anniversary</b><br>The Hon. Justice Brian J Preston                             |
| 8  | <b>The Court – 40 Years On – A Planner's Perspective</b><br>Dr Gary A Shiels   |
| 10 | <b>The Evolution of the Environmental Defenders Offices</b><br>David Morris  |
| 15 | <b>Tales from the trenches</b><br>Roslyn McCulloch & Janet McKelvey  |
| 19 | <b>A Q&amp;A with a Land and Environment Court Treasure: The Hon. R. N. (Angus) Talbot, Former Judge of the Land and Environment Court</b><br>Roslyn McCulloch |
| 21 | <b>Where are they now?</b><br>Michele Kearns, Janet McKelvey & Anne Hemmings   |
| 24 | <b>EPLA Meets a New Commissioner</b><br>Janet McKelvey   |
| 25 | <b>Land and Environment Court Vacation 2020-21</b>   |
| 26 | <b>EPLA 2019 Conference Pictorial</b>  |
| 30 | <b>EPLA Xmas Party &amp; AGM 2019</b>  |
| 32 | <b>The Land and Environment Court, Court Users Group – Update 2020</b><br>Roslyn McCulloch & Janet McKelvey  |
| 33 | <b>The Environmental Law Reporter</b><br>Mark Seymour  |
| 34 | <b>NSW Young Lawyers Environment and Planning Law Committee – Update 2020</b><br>Peter Clarke  |
| 36 | <b>Comings and Goings: 2019/20</b>   |



## Editor's Note

**Welcome to the Special Edition of the Environmental Law News for 2020 in which we celebrate the 40th Anniversary of the NSW Land and Environment Court.**

The *Land and Environment Court Act 1979* was assented to on 21 December 1979 and commenced operation on 1 September 1980. Like so many other celebrations, the planned events to mark the 40<sup>th</sup> anniversary of the Court have been postponed due to COVID-19. However, this did not diminish the collegiate spirit of our EPLA members and, quite remarkably, almost 200 EPLA members and supporters joined the virtual event to pay tribute to the Land and Environment Court. We are privileged to publish in this edition the Chief Judge's remarks from that occasion. Later in this edition, we publish some of the stories and anecdotes which were told by practitioners during that virtual event, aptly entitled "*Tales from the Trenches*".

The Land and Environment Court was established as part of a package of planning and environmental law reforms, including the *Environmental Planning and Assessment Act 1979*. We are very fortunate that in this edition Dr Gary Shiels shares with us his reflections on the Land and Environment Court from a town planning perspective, drawing on his involvement with the Land and Environment Court since its inception, as well as with the Court's predecessors – the Land and Valuation Court and the Local Government Appeals Tribunal. In this article, Dr Shiels provides us with his insights as to the early history of the Court and those who presided over it and his observations as to the vast development of planning controls and the Court's jurisprudence over the past 40 years and the impacts on merit based

assessment and achieving better planning outcomes.

David Morris, CEO of the Environmental Defenders Office then shifts our focus to the environment. David reflects on the evolution of the Environmental Defenders Offices from a small group of people who met in Sydney in 1981 to conceive a bold dream to the organisation it is now with a truly Australia-Pacific focus - with partner organisations across the Pacific and a physical presence in Adelaide, Brisbane, Cairns, Melbourne, Darwin, Perth and Sydney. David makes observations as to the contribution of the Land and Environment Court to that evolution and some of the landmark decisions.

On a more light hearted note, included in this Special Edition is a Q&A by Ros McCulloch with the Hon RN (Angus) Talbot, former judge of the Land and Environment Court.

Then in "*Where are they now?*", the ELN uncovers the whereabouts of former Land and Environment Court personnel from the past 40 years. Many people assisted with this piece and I give special thanks to Michele Kearns, Janet McKelvey, Sonali Seneviratne and James Fan for their assistance with this extraordinary collaboration.

The regular features of the ELN are again included, with the traditional photo spread from EPLA events in 2019 and updates from Managing Editor of the *Environmental Law Reporter*, the *Young Lawyers Environment*

and Planning Law Committee and the Court Users Group. Regrettably, the annual Mahla Pearlman Oration was also postponed this year due to COVID-19.

As always, included in this edition is an update on the movements of EPLA members and supporters in "*Comings and Goings*" and Janet McKelvey interviews a new Commissioner.

Regrettably, there is no report on the Mahla Pearlman Oration this year as the event has been postponed to 2021 due to COVID-19. We hope to bring you a report on the oration in 2021.

Finally, I note that as well as this being a Special Edition, this edition brings a new fresh format. The ELN welcomes onto the team our new publisher, Ben Pickles.

I thank the contributors for their time and support for EPLA in submitting articles for this Special Edition. Please contact me if you would like to submit a paper for a future edition.

I look forward to seeing you all "*virtually*" at this year's EPLA conference.

—

**Anne Hemmings**  
Editor



## President's Report

**2020 is proving to be a year like no other. Despite the profound impact that COVID-19 pandemic continues to have on our lives, on our economy and our society, we have nevertheless observed the incredible resilience of our governments, Courts and other civic institutions.**

---

**I**N the midst of all of this, the Land and Environment Court has continued to function without skipping a beat. The Court quickly introduced a COVID-19 Pandemic Arrangements Policy in March 2020 (subsequently updated), moved to the widespread use of virtual and telephone hearings, and thereafter provided guidance on MS Teams hearings. On behalf of all EPLA members I congratulate the Chief Judge, judges, commissioners, Registrar and all Court personnel on these very significant achievements. We are all very grateful for their patience, resilience and humour as they (and we) implemented these new and initially unfamiliar arrangements.

Despite the restrictions on in-person gatherings, EPLA has continued to be very active during 2020. Indeed, if there has been a 'silver lining' to the pandemic, it is the opportunity it has created to think differently about how we work, or in EPLA's case how we deliver EPLA's twilight seminars and other activities. Throughout 2020 we have run many more twilight seminars than would ordinarily be the case, with more attendees than in previous years. And, curiously, the virtual delivery of these seminars has made them more accessible to our members in regional and non-CBD areas than ever before.

These virtual events, while initially experimental, have been so successful that I

am sure they will be a permanent feature of the EPLA calendar in future years.

Also during this year we marked the Court's 40th anniversary on 1 September 2020. While the formal conference and dinner to mark this occasion was postponed, EPLA was very pleased to host an informal 'zoom drinks' event to mark this important milestone. Almost 200 attendees joined that event to hear opening remarks from the Chief Judge and a series of short recollections about the Court over the decades. The Chief Judge's remarks are reproduced elsewhere in this edition of the ELN.

Twelve months ago I was announcing, with much excitement, the prospect of the next annual conference being held in Dubbo in October 2020. Sadly that is not possible this year, but we have high hopes that we can head to the Central West for the 2021 conference.

Our 2020 conference will be run in a virtual format, with a range of sessions across a number of timeslots (breakfast, mid-morning, lunchtime and after-Court) on 28, 29 and 30 October 2020. This new format is designed to allow greater flexibility for attendees and to avoid an all-in-one-day virtual conference, while still ensuring that attendees have the opportunity to obtain 10 CPD points. We have secured a diverse and high quality range of speakers again this year, and thank

the Chief Judge for his continuing support which enables judges and commissioners to participate. I hope you will embrace the new format and support the 2020 conference, and I particularly thank our loyal sponsors who have continued their support despite these uncertain times.

This year saw the appointment of Commissioner Elizabeth Espinosa to the Land and Environment Court on 1 June 2020. EPLA warmly welcomes Commissioner Espinosa and we hope to host an event for members to acknowledge that appointment when gathering restrictions permit. We also welcome Acting Commissioners Peter Kempthorne, Paul Knight and Matthew Pullinger who were appointed during the year, and Acting Commissioner Jennifer Smithson who was reappointed during the year.

EPLA is only able to carry out its busy schedule of activities thanks to the considerable time and effort contributed by its committee members, and of course by the indefatigable Michele Kearns who, as EPLA's secretary, ensures that every event is superbly organised and lots of fun. We could not do what we do without Michele's time, talents and energy.

It has been a great pleasure to serve as EPLA's President again this year, and I look forward to seeing as many of you as possible at this year's virtual conference.

—  
**Felicity Rourke,**  
*President*



# “Perish the thought”: Some remarks on the Land and Environment Court’s 40th anniversary

**The Land and Environment Court of NSW turned 40 on 1 September 2020. This comment highlights some of the factors that have shaped the Court and the planning and environmental laws it administers and some of the ways that the Court in turn has shaped planning and environmental law and governance.**

---

A conference and dinner had been planned to celebrate the 40<sup>th</sup> anniversary of the establishment of the Land and Environment Court on 1 September 1980.<sup>1</sup> The COVID-19 pandemic had other plans. The conference and dinner have had to be postponed to next year.

Implementing adaptive management, the Environment and Planning Law Association (EPLA) organised a virtual celebration instead – a Zoom meeting where members of both EPLA and the Court could join together to celebrate the Court’s contributions to planning and environmental law and governance. I have been asked to make some introductory remarks and propose the toast to the Court on its anniversary today, 1 September 2020.

When the conference and dinner were postponed, I took the opportunity to enjoy the first days of spring skiing at Perisher in the Australian Alps. I make these remarks from Perisher. The name of this location inspired me to cluster my remarks and name them using other words beginning with “P”. “Perish the thought”, you may say, but bear with me. Surprisingly, this approach works.

## Politics

Politics and the Court have shaped each other in a number of ways. First, the Court was established as part of a package of planning and environmental law reforms, including the *Environmental Planning and*

*Assessment Act 1979* (Planning Act).<sup>2</sup> Politics was driving the reforms. The government at the time was a Labor Government, led by Neville Wran as Premier.

Neoliberalism was a catalyst for and shaped many features of the laws, especially the market-orientated reforms to encourage private development and economic growth. Other ideologies also had a role to play. Fundamental ideas of liberal democracy, such as the separation of powers, an independent judiciary and the State being subject to the rule of law, can be seen in the institutional design of the laws and the Court. So too, the increasing calls at the time for citizen participation in democratic decision-making processes were influential. In particular, the laws promoted procedural justice in at least three respects: access to information, public participation and access to justice through the courts. These three pillars of procedural justice are manifested in the statutory provisions for publication, public participation and proceedings in the Planning Act and in the *Land and Environment Court Act 1979* (the Court Act).

Second, the Court’s jurisdiction is political, in both origins and operation. The politics of the government of the day have led to the enactment or amendment of particular planning and environmental legislation and the vesting of jurisdiction in the Court to hear and dispose of disputes under such legislation. The Court’s jurisdiction has grown significantly over the four decades it has operated. The different nature and content of the environmental and planning laws administered by the Court are reflective of the politics of the times at which the laws were introduced. The disputes under this legislation also are political, involving clashes of ideas, ideologies and values.

Third, some of these disputes involve political power relations, jurisdictional tussles between State government and local government, between different departments or agencies of the State government and between different local councils. The litigation by local councils challenging State government planning initiatives, such as urban consolidation and increased residential density, and challenges to local council amalgamations are examples of disputes about political power relations.



Fourth, politics has influenced appointments to the Court, including the appointment of former politicians of both major political parties as judges and as assessors or commissioners.

## Philosophy

Different philosophies or ideologies have been, and continue to be, influential in shaping planning and environmental law and governance. As I earlier observed, neoliberalism was a catalyst for the reforms of planning and environmental laws and the establishment of the Court in 1979, and continues to exert a strong influence on planning and environmental law and governance. The political ideologies of liberal democracy and citizen participation have also been influential, both at the outset in shaping the Planning Act and the Court Act and subsequently in the implementation and enforcement of these and other planning and environmental laws.

In recent times, the political ideology of right-wing populism is exerting a strong influence on planning and environment laws and governance. The so-called climate wars in Australia, crippling sensible and effective governance on climate change, illustrate the influence of right-wing populism.<sup>3</sup>

Ideologies can also be seen more specifically in the planning laws themselves. Patrick McAuslan, in his seminal book *The Ideologies of Planning Law*, identified three ideologies: private property, public interest and public participation.<sup>4</sup> I will come shortly to address these three ideologies, all appropriately beginning with the letter P.

Before doing so, let me note another philosophical influence, that of legal culture. Legal culture is a way of describing patterns of legally orientated social behaviour and attitudes. Elements of legal culture include the laws, legal system, legal institutions, and lawyers and other actors in the legal system and legal institutions. But legal culture also embraces ideas, values, aspirations and ways of thinking about these elements. It includes, for example, attitudes to the role of law and the rule of law. As David Nelken observed, “like culture itself, legal culture is about who we are not just what we do”.<sup>5</sup>

As I have written elsewhere, legal culture includes recognising the enduring importance of the rule of law for planning and environmental law and governance and the vital role that legal institutions, such as the Court and the legal profession, play in upholding the rule of law.<sup>6</sup>

Legal culture also shapes what we perceive are the proper functions of the Court in resolving disputes and how the Court ought to perform these functions. The Court has, over its life, employed different dispute resolution processes, including adjudication, conciliation and mediation. The Court, legal profession and court users have had different views on which dispute resolution process or processes are preferable. Until 2006, adversarial adjudication was seen to be the ordinary and preferred dispute resolution process, a reflection of the legal culture at the time. In 2006, attitudes changed and consensual mechanisms of conciliation and mediation began to be increasingly used. A different legal culture became established. The aim shifted to “matching the forum to the fuss”, that is to say, selecting the appropriate dispute resolution process for the particular dispute and disputants.<sup>7</sup>

This shift naturally led to fashioning different ways to organise and conduct the appropriate dispute resolution process. The forms of conducting dispute resolution processes have included, for adjudication, onsite hearings, joint conferencing and reports of experts, and concurrent evidence. In these times of the COVID-19 pandemic, the forms in which dispute resolution processes are organised have included conducting conciliations, mediations and hearings remotely by audio link, audio-visual link or digital platforms such as Microsoft Teams.<sup>8</sup>

## Private property

A liberal democracy champions a market economy and private property. The law institutionalises private property, including by recognising and centralising property rights in the law. An economic analysis of law suggests three criteria for an efficient system of property rights. The first is universality: all resources (including land) should be owned by someone, except for communal resources. The second is exclusivity: the owner of the property must be able to exclude all others from exploiting the resource. The third is transferability: if a property right cannot be transferred, resources will not be shifted from less to more valuable uses through voluntary exchange.<sup>9</sup> An efficient system of property rights in land and its resources is vital for a market economy and in promoting economic growth. This liberal democratic ideology of private property underpins planning and environmental law and governance.

Land is the foundation upon which the edifice of laws regulating the exploitation and use of resources is built. In planning law, zoning and land use are structured on the location and attributes of land; application for consent to develop land needs the consent of the owner of the land; and development consent authorises the use not the user of the land and runs with the land. Under pollution laws, the owner or occupier of land on which a scheduled activity is carried out (premises-based scheduled activities) must hold an environmental protection licence. Under resource laws, authorisation to extract or exploit resources is limited to the land on which the resources are located. Laws for the resumption, valuation and taxation of land turn on the nature of the land concerned and the person’s interest in that land. Under most planning and environmental laws, liability for carrying out activity on land in breach of the laws rests with the owner or occupier of the land.

## Public interest

Planning and environmental laws expressly or impliedly promote the public interest. The public interest is multi-faceted. The exploitation and use of land not only benefits the property owner but also the community and government, including by maintaining the economy and encouraging economic growth. There is an undoubted interest in economic and social development. But so too is there public interest in the conservation of the environment, both natural and cultural. Planning and environmental laws seek, with varying degrees of success, to balance these three goals of sustainable development.

Under planning law, for example, consent authorities are required, in determining a development application to carry out development on land, to consider the public interest.<sup>10</sup> The public interest has been held

to include the principles of ecologically sustainable development.<sup>11</sup> The Court, in determining a merits appeal against a consent authority's decision, has an additional duty to consider the public interest.<sup>12</sup>

The public interest also affects the Court in a different way. A fundamental tenet of the rule of law is the open justice principle. Hearings should be open to the public, so as to provide a visual assurance of independence and impartiality. The Court's reasons for judgment need also to be publicly available, ensuring transparency and accountability. The Court has been vigilant in upholding these principles of open justice.

## Public participation

The ideology of public participation emerged in the 1970s and was a key component of the Planning Act and the Court Act. Under the Planning Act, public participation was enabled in strategic planning under Part 3, development control and assessment under Part 4, particularly public responses to applications for designated development, and environmental assessment under Part 5. Under the Court Act, public participation was enabled by objector appeals for designated development, applications for joinder to other appeals, and citizen actions to remedy or restrain breaches of planning or environmental laws.

More generally, planning and environmental laws promote the three pillars of procedural justice by enabling the public's access to information, participation in decision-making and access to the Court (facilitated in many laws by open standing provisions).

The Court has, from the outset, recognised and upheld the importance of public participation. Many decisions have enforced the public's rights to access information, participate in decision-making and access the Court. The Court has facilitated these rights by rules of Court. Special rules, for example, lower barriers to public interest litigation.<sup>13</sup>

## Planet

The Court is, of course, a specialist environmental court. Its jurisdiction covers the full array of planning and environmental legislation. In particular, the Court has jurisdiction regarding laws that are concerned with conserving the environment, including maintaining and enhancing ecological functioning, services and health and critical components of the environment, such as threatened species and endangered ecological communities. Planning and environmental laws consider the environment at different levels, including the local, regional and state. But the impacts of activities regulated by the laws do not necessarily stop at these boundaries; the impacts can extend nationally and internationally.

The Court, in its consideration and determination of matters, has embraced the imperative of considering all impacts, both direct and indirect, on the environment, and viewing environmental impacts holistically and without regard to boundaries. An example is the Court's consideration of the impacts that development might have on climate change and conversely the impacts that climate change might have on development.

## People

The people in the Court's life and work can be viewed in four ways. First, the Court's core business is the resolution of people's disputes under planning and environmental laws. This involves consideration of not only the rights and interests of the parties but also the interests and concerns of other people, including neighbours, communities, the State, and extra-jurisdictional people and communities. The Court has long recognised that litigation in the Court is not simply between the parties, but involves other affected people and the public generally. In exercising its civil enforcement function under the Planning Act, for example, the task of the Court has been identified as being "to administer social justice in the enforcement of the legislative scheme of the Act", a task "that travels far beyond administering justice inter parties".<sup>14</sup>

Second, there are various stakeholders in the Court's work. There are the Court users, including the parties, the legal representatives and the witnesses. There are the affected people and communities, and the public generally. There is government, both local and State. There are business and industry. There are various professional bodies, including those in the law, planning, architecture, engineering and science. EPLA is one of these stakeholders. There are the universities and higher education bodies, and their academics and students. The Court has engaged with these stakeholders in various ways, including by Court User Group meetings, hosting delegations, running clinics, and lecturing and speaking at educational institutions, events and programmes.

Third, there are the members of the Court who discharge the Court's functions and work. These are the judges, commissioners, acting commissioners, registrars and court staff. The Court, over its life, has indeed been fortunate to have had, as members of the Court, knowledgeable and capable people who are committed to the Court and its important work. The valuable contributions of the Court to the law, legal system and legal thinking have been achieved through the efforts of these talented and dedicated people.

Fourth, the Court is not an institutional island but sits within a landscape of judicial institutions. The Court interacts with other courts in the judicial system. The Court's decisions are appealable to the NSW Court of Appeal and Court of Criminal Appeal, and ultimately to the High Court of Australia. The Court benefits from the guidance of these appellate courts. In turn, the Court serves an appellate function. The decisions of commissioners of the Court are appealable to judges of the Court and decisions of the Local Court convicting or sentencing persons for environmental offences are appealable to the Court. The Court's decisions in these matters also provide guidance on the law and legal decision-making.

## Party

This brings me to my last P word, Party. This occasion, kindly organised by EPLA, is to celebrate the Court's 40<sup>th</sup> birthday today. I have introduced some of the ways that the Court has contributed to the law, legal system and legal thinking. Other people, soon to speak, will highlight other ways. The anecdotes will no doubt vary, from the personal to



the professional, from the quirky to the sensible. But they all will tell a story of a Court that is important, innovative and influential.

May I propose the toast: to the Court!

- 1 The Land and Environment Court Act 1979 was assented to on 21 December 1979 and commenced operation on 1 September 1980.
- 2 Brian J Preston, "Operating and Environment Court: The Experience of the Land and Environment Court of New South Wales" (2008) 25 Environmental and Planning Law Journal 385, 387-388.
- 3 Brian J Preston, "The End of Enlightened Environmental Law" (2019) 31(3) Journal of Environmental Law 399.
- 4 Patrick McAuslan, *The Ideologies of Planning Law* (Elsevier, 1980).
- 5 David Nelken, "Using The Concept of Legal Culture" (2004) 29 Australian Journal of Legal Philosophy 1.
- 6 Brian J Preston, "The enduring importance of the rule of law in times of change" (2012) 86 Australian Law Journal 175.
- 7 Brian J Preston, "The Land and Environment Court of New South Wales: A Very Short History of an Environmental Court in Action" (2020) 94 Australian Law Journal 631, 635-638.
- 8 Land and Environment Court, "COVID-19 Pandemic Arrangements Policy" (first published 23 March 2020, replaced on 8 July 2020).
- 9 Richard Posner, *Economic Analysis of Law* (Little Brown & Co, 2nd ed, 1977) 29.
- 10 Environmental Planning and Assessment Act 1979 s 4.15(1)(e).
- 11 Telstra Corporation Ltd v Hornsby Shire Council (2006) 146 LGERA 10.
- 12 Land and Environment Court Act 1979 s 39(4).
- 13 Land and Environment Court Rules 2007 r 4.2.
- 14 F Hannan Pty Ltd v Electricity Commission of New South Wales (No 3) (1985) 66 LGRA 306, 313.

## Membership Subscriptions & Enquiries

Membership of the Environmental and Planning Law Association (NSW) Inc. is open to individuals who have an interest in the law relating to the environment. EPLA (NSW) is a multi-disciplinary organisation providing an information service to its members.

Environmental Law News is available to non-members for \$33 including GST.

### Enquiries about membership of EPLA (NSW) should be sent to:

*Environment and Planning Law Association (NSW) Inc.*  
32/52 Martin Place  
Sydney NSW 2000  
DX 130 SYDNEY

### Requests for issues of Environmental Law News should be sent to:

*The Editor*  
*Environmental Law News*  
32/52 Martin Place  
Sydney NSW 2000  
DX 130 SYDNEY



# The Court – 40 Years On – *A Planner's Perspective*

**The Land and Environment has continued to evolve as a specialist court over the past 40 years since its inception in 1980. It has been my pleasure and privilege to observe this evolution which has been shaped by brilliant minds and colourful characters who have refined its systems and processes into the world recognised specialist environmental court it is today. Although there have also been some significant shifts in statutory interpretation that I have observed during this time, it has in the minds of our leaders, been in the pursuit of excellence.**

---

**I** have been asked to reflect on my forty years of involvement in the Land & Environment Court ("the Court"), since its establishment on the 1<sup>st</sup> September 1980 by the *Land & Environment Court Act 1979*. It is important to remember, the Court was the world's first specialist environmental superior court of record.<sup>1</sup> The Court enjoys the benefits of a combined jurisdiction and has been described as a "one-stop shop."<sup>2</sup> The Court seeks to firstly rationalise or amalgamate all the various jurisdictions and, secondly, to achieve specialisation by virtue of the Court's focused jurisdiction as well as the appointment of judicial members with specialist knowledge and expertise in professional disciplines relevant to planning and environmental matters.<sup>3</sup>

The Court was preceded by the Land and Valuation Court, established by the *Land & Valuation Court Act 1921*, and much later, the 1972 Local Government Appeals Tribunal ("the Tribunal"). Professor Patricia Ryan (a past lecturer of mine from Macquarie University five lifetimes ago) observes that the Tribunal represented a triumph for the development industry institutes, who had lobbied for comprehensive jurisdiction in a non-judicial tribunal to overcome the perceived delay and expense of hearing merit appeals within a court system.<sup>4</sup> I recall the Chairman, Fred Hanson, who presided over these hearings, as being an understated, stoic and fair adjudicator. The Tribunal normally comprised four experts that could hear appeals for both building and development applications. Jurisdiction over the Tribunal was limited to appeals to the Supreme Court on a question of law. Criticism of the Tribunal has suggested that, prior to the establishment of the Court, planning and land matters were dealt with in an uncoordinated manner by the tribunals and courts.

The first Chief Judge of the Court was Jim McClelland (1980 – 1985), an imposing gentleman who dressed immaculately. He was previously a judge of the Industrial Commission after serving in the armed forces in WWII. He was a successful solicitor who later entered politics as a NSW Senator and was a politician in the Whitlam Government. The Hon. Jerrold Cripps QC describes the appointment of Jim (often referred to as Diamond Jim) as *a stroke of genius. He was the energetic and forceful figure the court needed in its early days.*<sup>5</sup> One of his notable determinations was for an establishment known as 'A Touch of Class', which Cripps QC describes as *the place that Jim McClelland would not close*. Jim would later, in a speech to the Journalist Club, parallel his decision with the musical *Chicago*, written in the 30's which had a song called *The Place that Billy Sunday Wouldn't Close*. The Hon. Justice Cripps acknowledged Jim McClelland for his *wit and insight* and, above all, *his great understanding of and attachment to his fellow man*. Cripps QC was also an imposing figure, who carried out the first review of the Court, and I had a peripheral role in that process.

The late Pearlman CJ was the first female Chief Justice appointed in the Court in 1992. Mahla, as she preferred to be called, was incredibly popular and believed that the Court was a model for environmental protection and an important catalyst for development of environmental legislation in NSW. Mahla maintained that the Court provided the individual or a body of persons the opportunity to initiate environmental litigation in the public interest. In one prosecution, *EPA v Gardner*,<sup>6</sup> the Court imposed the first custodial sentence in NSW for an environmental offense. This case was considered a landmark decision because it indicated that the Court was willing to impose the maximum penalty for excessive environmental pollution perpetrated in a deliberate and dishonest manner.<sup>7</sup> The late Pearlman CJ also applied the precautionary principle in *Greenpeace Australia v Redbank Power*,<sup>8</sup> observing that *the application of a precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh or other issues*.

Professor Ryan observed that the *Court has operated in a climate of quite trenchant, often misconceived criticism, about its role, leading it's first Chief Judge [McClelland CJ] to declare the Court a fragile bastion.*<sup>4</sup> The former Lord Mayor of Sydney, Mr Frank Sartor, disliked the Court intervention and published a scathing booklet he called *Unwanted Legacies*, summarising a 'plethora' of the Court's 'poor' decisions.<sup>2</sup>

A more balanced approach was taken by Professor Ryan in an article that described the Court as 'hope and false expectations', concluding that *there is no single, harmonious court image because of:*

*unrealistic expectations, or misunderstanding about the Court role in development appeals; unmet expectations concerning how the overall NSW legal system deals with competing development, community and environmental interests and inadequate government monitoring.*<sup>4</sup>

## Changing Interpretations of Planning Controls

The changing emphasis on interpretation of planning controls over the past forty years has been interesting, if not concerning, to observe, as it has influenced decision makers. Four examples I have selected are development standards in Local Environmental Plans (LEPs); planning controls in Development Control Plans (DCPs); the adoption of the Australian Design Guidelines (ADG); and the introduction of planning principles. The change in emphasis of these controls has influenced merit considerations and planning outcomes.

Forexample, development standards contained in LEPs were previously varied by *State Environmental Planning Policy No. 1 – Development Standards*. This document, although relatively scant in its wording, was widely used to vary standards for height, floor space ratio (FSR) and other provisions contained in the LEP. SEPP No. 1 was generally applied without a great deal of rigor and provided flexibility to the standards. Although there has been criticism of this enabling statute, in my experience, it invariably resulted in merit based decisions. SEPP No. 1 has now been superseded by Clause 4.6 which has been the subject of extensive judicial review (including, but not limited to: *Rebel MH Neutral Bay Pty Ltd v North Sydney Council*;<sup>9</sup> *Initial Action Pty Ltd v Woollahra Municipal Council*;<sup>10</sup> and *Four2Five Ltd v Ashfield Council*<sup>11</sup>). Planners, councils and lawyers are now overly cautious with Clause 4.6, ensuring it has been appropriately prepared before merits and/or environmental planning grounds are considered. Frequently, the merit of a proposal is a secondary consideration.

The weight given to DCPs in the assessment process has also been subject of uncertainty for a number of years in the Court. In *Zhang v Canterbury City Council*,<sup>12</sup> the Court noted that DCPs should be considered as a ‘fundamental element’ in or a ‘focal point’ of the decision-making process and consequently were to be given significant weight. In contrast, McClelland CJ adopted a conflicting view in *Stockland Development Pty Limited v Manly Council*,<sup>13</sup> where I was in the trenches, holding that DCPs that had been consistently applied should be given greater consideration than those which had been applied erratically. In *Woolworths Ltd. v Wyong Shire Council & Ors*,<sup>14</sup> Pain J elevated uncertainty by observing that DCPs were not considered to be binding as a matter of law and that a consent authority could choose not to apply a DCP, provided that *Zhang* is complied with, “if acting reasonably, and lawfully, the Council considers it should not [be binding]”. The, then Minister for Planning, the Hon. Brad Hazzard, in a second reading speech observed that *DCPs have gone from guiding development to being given the same weight and sometimes seemingly more weight than the relevant LEPs*.<sup>2</sup> The emphasis given to the numerical provisions in DCPs remain a conundrum in the merit assessment of a proposal and is often lost in the interpretation of the objectives and numeric controls.

The ADG has grown in emphasis from its initial introduction from *State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development* to be given similar weight to a development standard rather than being simply guidelines introduced by the, then Minister, Bob Carr to enhance design of residential flat buildings. There are polarised opinions whether the ADG is a straight jacket or a facilitator of good design.

My final observations relate to planning principles first introduced by the, then Senior Commissioner, Dr John Roseth. Dr Roseth would always ask, what are the three issues in this case? There were seldom more than three. Planning principles are based on decisions in the Court and are designed to provide predictability and consistency.<sup>2</sup> My observations are that these planning principles have been of considerable assistance to practitioners in the court and indeed the Court itself in determining merit applications. *Tenacity Consulting v Warringah Council*<sup>15</sup> is arguably the most used and not revised planning principle. I am reminded of McClelland CJ’s comments upon being sworn in as Chief Judge: *Merit appeals provide the opportunity for the court to address contemporary environmental problems and responses and through the reasons for decision articulate principles which can guide and inform decision-making at all levels of the process.*<sup>2</sup>

It is appropriate to conclude with some words of wisdom from the current Chief Judge, The Hon. Justice Brian Preston, who is continually reviewing the process and introducing reforms to improve the operation of the Court. The Court is undoubtedly a model of a successful environmental court. The Court recognises the need for adaptive management and continues to monitor its performance against the court objectives of court administration – equity, efficiency and effectiveness. *Excellence is more the journey than a static destination.*<sup>1</sup>

1. Preston, Brian, ‘Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales’ (2008) 25(6) *Environmental and Planning Law Journal*.
2. Peace, Christopher, ‘Does the One-Stop Shop Need Refurbishing? Evaluating the Review Jurisdiction of the NSW Land & Environment Court’ (2018) 35(3) *Environment and Planning Law Journal*.
3. Biscoe, Peter, ‘Land & Environment Court Land & Environment Court of NSW – Jurisdiction, Structure and Civil Practice and Procedure’ (2010) *Australasian Conference of Planning Environment Courts and Tribunals*.
4. Ryan, Patricia, ‘Court of Hope and False Expectations: Land and Environment Court 21 Years On’ (2002) 14(3) *Journal of Environmental Law*.
5. Cripps, Jerrold, ‘On Reflection: Jim McClelland’ (1999), *Tribute by The Honourable Jerrold Cripps*.
6. *Environment Protection Authority v Gardner* [1997] NSWLEC 212.
7. Pearlman, Mahla, ‘The Land and Environment Court of New South Wales a Model for Environmental Protection’ (2000) 123(1) *Water, Air, and Soil Pollution*.
8. *Greenpeace Australia Limited v Redbank Power Company Pty Limited* [1994] NSWLEC 178 [154].
9. *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130.
10. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256; [2018] NSWLEC 118.
11. *Four2Five Ltd v Ashfield Council*<sup>13</sup> [2015] NSWCA 248.
12. *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; 115 LGERA 373; [2001] NSWCA 167.
13. *Stockland Development Pty Ltd v Manly City Council* (2004) 136 LGERA 254; [2004] NSWLEC 472.
14. *Woolworths Ltd v Wyong Shire Council & Ors* [2005] NSWLEC 400 [202]-[204].
15. *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.



DAVID MORRIS

Chief Executive Officer, Environmental Defenders Office Ltd.

---



# The Evolution of the Environmental Defenders Offices

**Tracing the 40-year evolution from its initial meeting in 1981 to now could be the subject of more than one book. This article will not do the journey justice, nor adequately reflect the enormous contributions of so many to it. Due to limitations of time and length, this article will simply traverse some of the memorable achievements of the EDOs over the last 40 years, as well as telling the story about recent changes we have made to ensure that bold dream evolves and remains alive and relevant for the next 40 years.**

---

*"In Sydney in 1981 a small group of people met to conceive a bold dream – that a system of law that over a millennium had been geared primarily to protect private property and individual freedom should be regularly used to protect the commons of mankind against the depredations of those very interests... what was remarkable about that gathering was that it was not a meeting of potential environmental clients seeking lawyers to represent them, but a meeting of lawyers who were themselves environmentalists and wanted to establish a legal service that would be on call to protect the environment, and indeed might event at times be seeking lay clients with the courage and fortitude to take up the role of litigant"*

Hal Wooten AC QC

**F**ROM my perspective and understanding, the EDO came to be because of the confluence of three important events. First, progressive reforms to NSW planning laws in 1979, which afforded communities greater rights, but also served to highlight the stark inequity where communities sought to challenge major developments. Lack of access to competent legal representation offended notions of fairness which would perhaps be considered romantic by current standards. Second, the creation of a specialist

environment and planning court, the NSW Land and Environment Court in the same year. The creation of the Court, with its particular specialisation, provided a unique forum for environmental law jurisprudence to flourish in NSW. Finally, the passion and drive of lawyers, Ben Boer, Michael Mobbs and the Hon. Murray Wilcox QC, determined to address that inequity, use this new forum and see lawyers engaged in the pursuit of environmental protection through law.

As with many great ideas, this one began with a small group committed to bringing their idea to life and so, some few years after that meeting of minds in Sydney, the Environmental Defenders Offices were born, with the first being established in Sydney in 1985 with the incorporation of the Environmental Defenders Office Ltd.

It was then, and remains, a lawyers' organisation. We do share it now though with a range of other experts spanning across fields of science, communications, and fundraising.

## Establishment in NSW & expanding across the country.

The first funding for the EDO came, surprisingly on one view, from developer LendLease. That funding was soon accompanied by a small sum of government funding which allowed the office to hire its first solicitor. The digs were (generously put) meagre, operating with a single lawyer at a spare desk in the offices of the solicitor Bruce Woolf.

The company's objects were: *"to provide legal assistance and undertake research regarding the conservation of the built or natural environment and to promote community education programs in matters relating to environmental law"*.

Following the NSW office's establishment in 1985, the first interstate office was opened in Brisbane in 1989. Then followed Victoria in 1991 with a grant from the Victorian Law Foundation.

The Australia wide nature of the EDOs was completed in 1995, with the Commonwealth Government committing funds to a national network of public interest environmental lawyers. This grant allowed

the establishment of offices in all States and Territories without an EDO and a second office in Queensland's far north, based in Cairns.

## Affecting landscapes, both legal and physical

Since their establishment in the 1980s and 90s, it is difficult to think of a major environmental issue that the EDOs have not been involved with. And, over that time, the EDOs contribution to environmental jurisprudence has been significant. This development can occur when lawyers and litigants have the courage to bring cases which challenge the status quo. In NSW, the EDO's evolution and positive community benefit is inextricably linked to the existence of the specialised Land and Environment Court. Specific features of the jurisdiction, like open standing and a public interest costs regime have seen NSW at the forefront of development of critical environmental law concepts from the principles of Ecologically Sustainable Development, to distributive inequity and the Carbon budget. Below I have outlined a few of the EDOs cases, in a variety of forums across Australia, the first of which was before its time.

In 1994, the EDO on behalf of Greenpeace filed a case challenging the approval of the Redbank Power Station. The case, *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*, was the first case in Australia to consider climate change. Upon reflection it is one of the world's earliest pieces of climate litigation. The EDO's track record in this space remains one of a world leader. Indeed, Australia, is second only to the United States in terms of number of climate change related cases – a fact in part attributable to the work of the EDOs.

Since that first case, the EDO has run a raft of important cases across Australia which relate to climate change.

In 2008, Acting on behalf of Jill Walker, the EDO challenged a development approval for a residential development and aged care facility proposed for flood-prone coastal land at Sandon Point. The case represented a major step forward in the development of jurisprudence around ecologically sustainable development and – while ultimately overturned on appeal – Justice Biscoe's judgement in first instance has aged well in respect of the way it grappled with climate change. At paragraph 161, his Honour stated:

*"Climate change presents a risk to the survival of the human race and other species. Consequently, it is, a deadly serious issue."*

Other notable cases which have considered climate change include *Grey v the Minister for the Environment* (in which it was recognised that indirect emissions were a relevant factor in decision making), cases for the Australian Conservation Foundation in respect of the predicted emissions from the Adani Carmichael Mine and of course the landmark case of *Gloucester Resources Limited v the Minister for Planning* [2019] NSWLEC 7 (the Rocky Hill case). The Rocky Hill case, in which the EDO represented local community group Groundswell Gloucester, is the first case of its kind anywhere in the world where a project was refused in part because of the contribution the project would make to global climate change.

The EDO has run a raft of other cases challenging major coal and fossil fuel projects across Australia, with some of our more well known challenges relating to the Acland Coal Mine project, the Shenhua Watermark Coal Project, the proposed gas plant at James Price Point in Western Australia, plans to explore Watarrka National Park for gas and plans to drill in the Great Australian Bight.

Like climate change, the EDO has always been at the forefront of voices calling for water reform in the Murray Darling Basin, a position we maintain to this day. Our work in this space has contributed substantially to the public exposure of mismanagement of water. This mismanagement was most damningly presented in the 4 Corners program *Pumped* on the ABC. The fallout from that program saw a raft of inquiries, including the South Australian Murray Darling Basin Royal Commission and the establishment of the new NSW Natural Resources Access Regulator. The EDO also filed on behalf of the Inland Rivers Network, the first civil enforcement case under the NSW *Water Act*.

Some of our most significant climate, mining and water related cases have been grounded in impacts to cultural heritage. Our work on behalf of First Nations peoples in Australia and Indigenous peoples in the Pacific is a source of great pride and key aspect of our future planning.

Some of the EDO's most iconic cases, have related to protecting nature and advancing the concept of ecologically sustainable development. These cases have been a prominent aspect of the EDO's work since the very get-go. For example, in 1988 - 1989 the EDO ran unsuccessful cases for Wendy Jarasius and the Australian Conservation Foundation, respectively. While unsuccessful, these cases explored important principles and lay the groundwork for later victories challenging logging and its environmental impacts. The EDO's impacts have spanned the Country. For example, in Tasmania the EDO worked between 2008 to 2010 to prevent a proposed canal estate in a conservation area at Lauderdale. In the well-known '*Nathans Dams Case*', the EDO acted for the Queensland Conservation Council to compel the environment minister to consider indirect impacts of proposals, significantly broadening the scope of federal environmental assessments.

In 2015, the EDO successfully represented the Mackay Conservation Group in the Federal Court, with the Minister conceding having fallen into error by not considering conservation advice for two threatened species. This case drew the ire of the proponent, Adani, and that of the Federal Government drawing accusations of "*lawfare*" and "*vigilante litigation*". These were, of course, a nonsense. Cases considering the impacts of projects on threatened species have been a significant feature of EDO work, with a key example, being that of *Booth v Bosworth* where the EDO acted for conservationist Dr Carol Booth to successfully obtain an injunction preventing a farmer's use of an electric grid to kill the spectacled flying fox on his lychee farm.

Another of our landmark cases, is the Federal Court case against the Japanese Whaling Company, Kyodo Senpaku Kaisha Ltd on behalf of the Humane Society International. That complex and ultimately successful case found that Kyodo owned ships had conducted unlawful whaling in the Australian Whale Sanctuary in breach of Australia's *Environment Protection and Biodiversity Conservation Act 1999*. The Federal Court granted our clients an injunction to restrain Kyodo from

further breaches. In another significant matter related to whaling, on behalf of Sea Shepherd Australia, the EDO successfully obtained - after many years of legal argument - footage from Australian vessels of Japanese whaling occurring in the Southern Ocean.

The EDO has a long-standing commitment to ‘defending the defenders’. This program began in 1990 with the EDO representing several hundred protestors arrested in connection with demonstrations against logging in the south-east forests of NSW. Our work continues today with our Citizen Representation Program representing hundreds of protestors in court and providing critical community legal education about the right to peaceful protest.

The EDO’s work is not confined to litigation, its remit extends far beyond its work in the courts.

Lawyers within the EDO also work to educate and inform the community through events, workshops, publications and engagement with the media. Early publications, like the *Law of the Land* and the Queensland *Mining Law Handbook* sought to make people in remote and rural parts of NSW and Queensland aware of their legal rights. These publications have assumed enormous significance as disputes about preferred land uses have raged in areas where mining and agricultural interests have come into conflict.

The organisation has also played a leading role in policy development, deploying expert resources to engage with all of the major environmental legislative reforms since the offices were established. Our pro-active reports have played a considerable role in informing the public and government alike about what best practice environmental laws look like and how they can be implemented. The impact of this policy and advocacy work is often underestimated, and often unclear until much later in time. For example, in 2002, the *Land and Environment Court Act 1979* (NSW) was amended – as recommended in an EDO policy submission – to allow third party joinder. Earlier this year, in a matter related to the KEPCO Bylong Valley Coal Project, EDO was able to successfully make an application for joinder, allowing our client, the Bylong Valley Project Association, to act as a contradictor to the mining company in that case.

## Controversy and funding, there’s always a funding issue

The EDOs have never shied away from taking controversial cases for clients, for standing up to powerful interests, for defending the voiceless. Some of those controversial cases are referred to above. Controversy aside, acting for clients in these circumstances is, of course, a hallmark of the finest traditions of the legal profession, a fact recognised by former Commonwealth Attorney General, George Brandis QC. Patron of EDO QLD, The Hon. Alan Wilson QC summed up the position eloquently in his ‘*Patron’s Statement*’ of 2 November 2017:

*“you may occasionally disagree with positions that some of the EDO’s clients take on environmental or planning matters but there is, I think, one critical question – how important is it that our community has an organisation dedicated to focusing*

*in on, considering and, if appropriate and necessary, arguing the contrary case on important environmental matters in the jurisdiction? For myself, I think it is vital; an adversarial system like ours languishes and is weakened if it does not provide for the contrary argument, the dissenting but reasonable and well-intentioned voice, to be robustly mustered and advanced.”*

Comments of this kind from within the legal profession are common and so, despite the controversy that often surrounds the organisation’s work, the EDO has, and continues to, enjoy support from Australia’s most eminent members of the judiciary, esteemed legal academics and other influential members of the profession.

Despite this support, controversial work against powerful interests is not always a recipe for funding success – particularly from governments. Funding challenges have, therefore, always been a feature of existence for the EDOs.

The EDOs receive modest grants from most State Governments. And, again, despite being relatively modest in amount, the EDOs did receive bipartisan funding support from the Commonwealth Government, via the Attorney General’s Community Legal Services Program, from their establishment in 1991 until 2013 when funding to all EDOs was ceased by the Commonwealth Government.

This defining act of bastardry by the Abbott Government has, in a deliciously irony, had the opposite of the desired effect. Instead of culling the EDOs, the EDOs redefined themselves. Pushed by necessity to find alternative funding sources emboldened the EDOs and caused a shift to a more pro-active fundraising footing. We bang our drum louder now, because we must. The Commonwealth Government cuts saw our near complete reliance on government funding disappear and through incredible support from the community and the legal profession we have gone from strength- to-strength.

But cuts have consequences and the years between 2013 and 2019 were an astronomic struggle for most EDOs. Running art auctions, charity runs and swims, fundraising dinners and the like, EDO lawyers did whatever we had to and each of the EDOs managed to survive until our merger in late 2019.

Murray Hogarth in his book about the EDOs stated “tough times test institutional strength” and that’s true. The EDOs have demonstrated an ability to find a way, in spite of the barriers. None of that is to say, however, that Government shouldn’t have a role in adequately providing access to justice on environmental issues – matters which routinely affect not only nature, but livelihoods, health and culture – it should. Public interest law centres like the EDO are one way our society makes good on that promise that we are all equal before the law. But, if Government fails to deliver on that promise, then we must find a way to achieve it without them.

If most of the EDO’s struggled, the exception to this general rule was the NSW office which prospered, underpinned by consistent and substantial grants from the *NSW Public Purpose Fund (PPF)* over a period of more than 20 years. At its highest, in 2011-12, the PPF funding for EDO NSW was \$2.4M, amounting to over 70% of the organisation’s



total revenue. While this amount had receded in recent years, the PPF was still until last year the EDO NSW's largest single source of funding. The decision then, to completely cut the EDO's funding without warning in May 2020, was a significant blow and out of keeping with the positive partnership that had developed between the EDO and the PPF over more than 20 years. The EDO is hopeful that in the future this partnership which has delivered such benefits to the NSW community will be reestablished.

## The EDO merger and the future

From a financial stability viewpoint, a merger was the best way of building financial resilience within the EDOs. A move away from reliance on governments to a model based on diversified funding streams, spearheaded by community support was best achieved through a single entity. The financial motivations were clear, but the rationale for a single EDO went much deeper than that.

Almost every aspect of what the EDO does will be enhanced by our coming together. Our single EDO can be smarter, stronger and streamlined by comparison to our previous loosely affiliated relationship to one another. In merging, the EDO has created a formidable legal team to rival the best in the Southern Hemisphere, with over 40 lawyers complimented by media and marketing professionals. In merging, the EDO has built the foundations to reinvent that bold dream conceived of in 1981 and recreate it for a new era.

The new EDO strategic plan makes clear our focus areas of empowering vulnerable people and pursuing a right to a healthy environment, achieving systemic change in the areas of biodiversity, freshwater and safe climate, and working more closely with and for First Nations and Indigenous Peoples. The EDO's structure has been changed to help deliver on our more focused set of priorities.

The EDO remains an organisation committed to the rule of law, to professionalism and to the continuation of our track record of excellence in legal service provision and the empowerment of communities through local connection and expertise.

The EDO is now a truly Australia-Pacific focused organisation. With partner organisations across the Pacific and a physical presence in Adelaide, on Kurna Country; in Brisbane, on the land of Jagera and Turrbal people; in Cairns, on the land of the Gimuy and Yirrganydji people; in Canberra, on the land of the Ngunnawal people; in Darwin, on Larrakia Country; in Melbourne on the land of the Kulin Nations; in Perth on the land of the Whadjuk Nyoongar people and in Sydney on the lands of the Gadigal people of the Eora Nation, this is a truly monumental time in the organisation's history.

Ten years ago – at the EDO NSW 25<sup>th</sup> Birthday Event, Former Chief Justice French, noted the environment was a global concern and made the following remark about climate change: *“the science, despite its difficulties, appears to have established the reality of a global warming trend. That reality will not be displaced or secured by the discourse of culture wars which informs some of the climate change debate”*. Ten years on, that science is far more certain, the prognosis far more dire. Regrettably, action on climate change has not kept pace with the

science, carrying with it the grave consequences that Justice Biscoe outlined with some prescience in *Walker*, namely that climate change is “a deadly serious issue”.

The law, the legal profession and the EDO all have critical roles in addressing the climate crisis. The coming decade is one of great consequence. With myriad challenges facing people, nature and our climate, our newly merged EDO is now better placed than it has ever been to have a positive impact on these matters, which will not only define our time, but the time of those who come after us.

1. Hogarth, Murray (2015) *Law of the Land, Rise of the Environmental Defenders*, published by EDO NSW.
2. *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council* (1994) 86 LGERA 143.
3. Byrnes and Setzer, (2020) *Global trends in climate change litigation: 2020 Snapshot*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.
4. *Walker v Minister for Planning* [2007] NSWLEC 741 at [161].
5. *Gray v The Minister for Planning and Ors* [2006] NSWLEC 720
6. See *Australian Conservation Foundation Inc v Minister for the Environment and Energy* [2017] FCAFC 134
7. *Gloucester Resources Pty Ltd v the Minister for Planning* [2019] NSWLEC 7
8. This case was ultimately withdrawn and the regulator was successful in obtaining criminal sanctions in respect of the same conduct.
9. *Jarassius v Forestry Commission of New South Wales & Ors* [1988] NSWLEC 161, *Australian Conservation Foundation v Minister for Resources & Ors* [1989] FCA 794
10. *Mackay Conservation Group v Minister for the Environment* (withdrawn) see also <https://www.theguardian.com/environment/2015/aug/17/george-brandis-vigilante-green-groups-destroying-thousands-of-mining-jobs>
11. *Bosworth v Booth* [2004] FCA 1623
12. <https://www.abc.net.au/news/2017-11-28/video-of-whaling-in-southern-ocean-released-by-sea-shepherd/9198446>
13. Judgment in that matter is currently reserved.
14. <https://www.afr.com/companies/professional-services/iba-conference-george-brandis-defends-rule-of-law-20171008-gywp05>

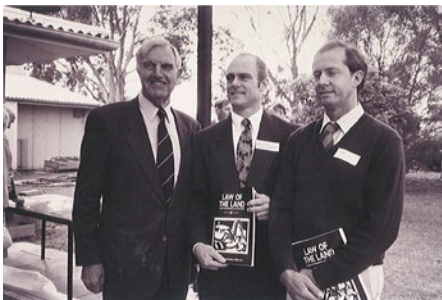


The staff of the newly merged national EDO meet for the first time in the Hunter Valley, NSW in November 2019.

**MORE PHOTOS ON NEXT PAGE >>**



The Board and staff of EDO NSW.  
Featuring The Hon Nicola Pain, Jeff Angel,  
Murray Hogarth and Andrew Chalk.



Ian Sinclair, Federal Member of Parliament  
and EDO NSW Principal Lawyer, James  
Johnson with another at the launch of  
EDO publication The Law of the Land.



Chris Jenson, Justice Pain, Bruce Woolf.



The Hon Paul Stein QC, former EDO NSW  
CEO Jeff Smith and another at EDO NSW  
Christmas drinks.



Former Principal Solicitor of EDO NSW Sue  
Higginson in action supporting protestors  
in Canberra.



Former Principal Solicitor of EDO NSW  
Kirsty Ruddock speaking at an EDO ACT  
event.



EDO NSW Outreach Solicitor Belinda  
Rayment stands with Phil Laird on his  
property in NSW.



# Tales from the trenches\*

## Grant Gleeson, admitted 1982

I have a very personal recollection of the way in which the Court shows its 'personal' face. In July 1998 Norman's Quarry (of the Bignold J 10 year discretion extension fame) was back in Court to get some more time. As the fight was between 'objectors' and Norman's, Shoalhaven Council asked me to appear as solicitor advocate on a watching brief. It meant that all of Council's position was in my head because I was the only one who was across all the material that had been filed.

The hearing was scheduled to start on the Monday 27 July. Unexpectedly, my dad died on Friday 24 July. My head was obviously not in the right place. I organised the funeral for Tuesday 28 July and turned up on the Monday in grief but ready to be given a bollocking when I told the court I couldn't be there 'tomorrow' as I hadn't made the necessary application, filed the right documents or something. In a flash, virtually before I had spurted out my situation, it was decided the view could happen on the following day and I wasn't needed. Good to go. No fight, no argument, just understanding.

I can't tell you how much I appreciated the way my circumstances (and confused head) were so compassionately understood by all in the Court. It made me realise that being a practitioner of the Court is a special thing. It has always been like that for me.

## Roslyn McCulloch, admitted 1985

In the judgment of proceedings which will remain unidentified, Moore SC, as he then was, said (by way of wild understatement):

*I had the advantage of inspecting the site (which is an old warehouse/manufacturing premises with a saw-toothed asbestos roof) in company, with the legal advisors of the parties and those advising and assisting them. It is, perhaps, unnecessary for the purposes of this decision to describe the wide, eclectic (and in one instance rather exotic) occupancies that currently inhabit the premises. It is, however, sufficient to say that contained within the building are no features of any intrinsic architectural merit, despite what might be the specialist cultural merits attaching to some of the fittings.*

The "exotic occupancy" to which Moore SC refers was discovered in the basement level of the warehouse premises. The room was locked by

a padlock and the applicant's representative did not have a key. The Senior Commissioner was most displeased and directed the applicant to locate a key to enable a complete inspection of the building.

Eventually, a key was located and much to the surprise of most of those present – including the Senior Commissioner, Jacinta Reid and Ros McCulloch (the lawyers), Andrew Darroch and Deb Laidlaw (the town planners) and Kevin Leedow and Garry Mostyn (the structural engineers), the set of rooms behind the locked door was a real life sex den, complete with an amazing variety of fantasy rooms.

There was the S&M room with lots of handcuffs, whips and other tools of torture as well as a hanging cage.

There was what appeared (on the surface) to be a fully fitted autopsy theatre. Fans of Silent Witness would recognise the stainless steel draining table, doctors' and nurses' garb and lots of dangerous looking tools.

Finally, there was the very puzzling toilet room. No cubicles, just lots of toilets – not many of which were plumbed.

When some suggest that a site inspection of a building which is to be demolished is not a necessity – think again!

## Lesley Finn, admitted 1988

In 1988 the Court was in the AMEX building.

Mr Burge, a court officer, often fell asleep during the callover list. It was alright until a document had to be handed up when the Registrar would call out loudly "Mr Burge"!

The late Doug Forrester told me that in a Class 1 Appeal, Mr Burge slept all through the morning of the first day of the hearing and the parties' representatives had to hand up the exhibits and staple the exhibit notes onto them. No one disturbed Mr Burge.

In a Woollahra Class 1 Appeal in which I was instructing Malcolm Craig for the Council, a model of the development (an elevated tennis court in Bellevue Hill) was in the Court room. Every time Malcolm walked to the model and waved his scale rule at the model to point out some gross point of impact on the surrounding neighbours he hit a piece of the fake landscaping on the model. By the time the hearing was



completed the model looked as though it has been subject to aerial bombardment.

The registrar's callover list at that time was at times so lengthy it occasionally ran until lunch time.

One morning about 11.30am somebody fainted outside in the lobby but the list went on. Warwick O'Rourke took takeaway coffee orders for those who wanted it and went down to the pigeon infested coffee shop downstairs and came back with a tray of coffees. That day, the list resumed after the lunch adjournment and I returned to my office in Bligh Street about 4pm.

I instructed the late David Officer QC for the Hawkesbury Council. The proposed development was a luxury resort on the Upper Colo River. There had been days of heavy rain and the river was in flood mode. On the last day of the hearing the parties went up to the site. The presiding assessors were Bryce O'Neil and Stafford Watts. We all met up at a bridge over the river somewhere in Upper Colo. As we were all standing there looking at the swollen river and rapidly flowing water a man from the SES came along and advised us that if we were going any further up we should be quick because the bridge would likely be under by 3pm. It was the quickest view I have ever been on. O'Neil A. virtually ran around the site, which was very rugged and steep. We almost lost David Officer as he stepped out onto one of the "floaters" that had been the subject of so much evidence and it gave way under him. Ironically, he was rescued by the Applicant whose evidence had been that the rock on the site was very stable.

In the 1990s Michael Connell was the Registrar. One morning, in a Sutherland existing use matter, John Ayling requested an adjournment until after Easter – on the basis that all those who could give evidence as to the existing use were buried at Rookwood and maybe another miracle could take place and his client might be able to interview them. I appeared for the Council and for once I had no meaningful response other than "John, you are joking?" He said "Well, it did happen once before". Poor Michael Connell looked absolutely astonished and must have wondered what he had taken on.

When Angus Talbot was appointed to the Court, his Friday list was the best entertainment in Sydney.

---

## Anonymous, admitted 2012

One of the first matters I was involved with as a graduate was assisting in a Class 1 appeal against the City of Sydney's refusal of a DA to expand an existing brothel on Parramatta Rd, opposite Sydney Uni, into what would be the largest brothel in the southern hemisphere.

During a pre-hearing site view with the applicant's senior counsel and experts, my primary role was to carry around box of (documentary material) and take notes.

I left the office, jumped into a cab and, with large cardboard box in tow, asked the cabbie to take me to the brothel. To my surprise, he needed no further instruction or directions.

I jumped out of the cab, said hello to a local resident walking their dog, and entered the establishment. I wonder what they must have thought about a young man carrying a large box into the brothel. Perhaps it was not so out of the ordinary!

After viewing the facilities, we gathered in the only room large enough to hold the applicant's team – the Presidential Suite - equipped with a strip pole, two king-size beds, mirrors on the ceiling and some very interesting artwork on the walls.

There wasn't enough room for me to join senior counsel and the experts who gathered to discuss the matter on the circular couch around the strip pole dancing the stage as a table, so I sat on one of the very comfortable king beds with the Madam of the brothel and took notes.

This was certainly a story to tell my mates from law school and much more interesting than the M&A or finance deals they were working on!

---

## Anonymous, admitted 2006

Every now and then, some of the judges of the LEC, while, of course, being very serious about their role, take the time to share some of the more amusing aspects of their job with us. One of my favourite judgments is the decision of *Wollongong City Council v Dr Masood Falamaki* [2010] NSWLEC 66. Dr Falamaki was represented by an agent who described himself as a plenipotentiary judge from Milwaukee Wisconsin in the United States.

The proceedings involved a notice of motion to re-open a civil enforcement case brought 11 years prior. Craig J took the time to carefully set out excerpts of the transcript to explain the arguments that were being made before him. It served the dual purpose of also being very amusing:

*"HIS HONOUR: At 2 o'clock tomorrow the arguments will conclude, the hearing will conclude within that two hours and can I respectfully remind you that your focus would and should be upon the particular rule that authorises or rather provides to me a discretion to set aside perfected orders. There are a large number of decided cases that relate to that.*

*MILLER: Conclusionary law not based on now time jurisdiction under rules of evidence are void for one thing. Two, I'll give you a little secret. Every word that starts in the English language with a vowel, a, e, i, o and u and followed by two consonants is a word that means no contract. If you're arguing a condition, a negative condition which can't be proved under a seal which says syntax would be used in its correct format then the technology of writing will be syntaxed accordingly. The words will be identified for their true syntax and the value of that word will be brought to this court so if you have a rule our syntax can tell you exactly what it means frontwards and backwards because the order of operations of syntax are one and the same planet- wide in all five thousand languages, just like as a track multiplying and dividing for the operations of numbers. It is*

*universal communication issues. Closure has to be on the table here for everything under maritime law of commerce because a piece of paper is a vessel in a sea of space and vessels must give closure for their movement between point A and point B and I'm a past master and as a plenipotentiary judge of 75,000 hours of training and 30 years I know how to dissect all this. There hasn't been anything put in front of me in 30 years that I haven't been able to dissect to its syntax.*

Mr Miller appeared for Dr Falamaki at the resumed hearing of the matter on 15 April. He proceeded for almost one and a half hours to make submissions in terms similar to those that I have quoted in the preceding paragraph. When, after listening to his philosophical discussion as to grammar and syntax, I sought to direct him to the orders which were the subject of Dr Falamaki's application, the following exchange took place:

*"HIS HONOUR: This case is not about sentence structure and syntax. It's about orders which I'm sure Dr Falamaki can read and understand.*

*MILLER: Actually, he doesn't.*

*HIS HONOUR: I see.*

*MILLER: Because when he looks up the definition of the words, he can't find them. They don't exist and there was no closure put on the documents for the modification of language and if you don't show your closure, what the volition is of the content of the moving party under maritime law, that document is moot.*

*HIS HONOUR: We're not dealing with maritime law here.*

*MILLER: That's a maritime vessel. It's got a stamp on it. It's a vessel. All paper is a vessel in a sea of space and therefore it has to fly a vessel. It has to pay its postage to go between point A and point B. The bailiff over here is actually the letter carrier to transport the letter from myself to you. The postage has been paid on my letter, to go to you so that you could mark it as evidence. The postage has been paid for me to bring it from the street. Dr Falamaki has also signed it. To transport the vessel from the street to the port of the court. Have it filed and filed stamped. The clerk of the court file stamps the document and received the vessel into the port of the court and signs their name across the received stamp and I also cancel that stamp as well and then it goes to you for adjudication.*

*I know the procedures of how vessels flow through the court but that shortcut, everybody likes to take the shortcut and skip over those things. I don't take shortcuts, I follow all the rules and regulations that are correct to move that vessel as correct evidence into this court. You've received it as correct evidence, it was carried to you by the bailiff or a tipstaff. So the documents are delivered to you and now it's your choice to make a determination and if you have a problem with what syntax is and how it works on the back of the cover of my book we have a complete outline that took six years to research as to the accuracy*

*of how syntax functions so that the information that I bring to this court, I can back it up and you have your styles manual that Australia publishes, we have a styles manual that the United States government, that China, Russia, all the other countries of the world have their style manuals to communicate under a standard of styles and a standard of syntax and mathematical procedures otherwise we wouldn't have communications.*

*When those styles are violated and the modifications are allowed to go unchecked we have chaos and so I brought the mathematical interface on April 6 1988 when I broke the code and I was able to mathematically certify it is what has created this book to advertise how the math interface of language now functions in now time. Not only that all judges worldwide and attorneys worldwide have been asked to try and defeat this and find out if this is a lie and they've all come back to certify the fact. This is required study at Scottsdale Arizona and Reno Nevada at the judge institutes. I have been teaching there for 15 years now. Universities that teach law for lawyers are required to study this book so that they understand what syntax means. We're in a changing world. You can call my government, you can call the United States Supreme Court, your judge can call your High Court down here, you don't think they haven't contacted Washington and talked with the Supreme Court to compare notes as to what's going on and how big this things has gotten and how many cases are involved with this worldwide? I invite you to do it, take my passport number, run my passport and check the 38 pages of information, credentials I have on that as to my travels around the world to educate.*

*When I was invited to this case I looked at the paperwork and I said, this is all wrong, it's impossible for a case to run as long as it has but because that nothing has been said, I said show me the first piece of paper, the first day of trial and when that first day of trial was handed to me I said I syntaxed it and said it's in a box, it's written in adverb/verb, there's no correct sentence structure, therefore it's mute. If you build a case on a lie, it's a lie. From what I understand you've just been brought in as a judge to sit on this case after all the other judges have recused themselves because they know it's a fact. I don't know what your position is or what the politics are going on behind the scenes here but I can pretty well put the pieces together, I've been around the court system for 30 years.*

In addressing these submissions, the ever erudite Craig J simply observed: "Regrettably, I did not find the submissions helpful in addressing Dr Falamaki's claim".

---

## Chris Drury, admitted 1976

One of the first matters I ever did in the Court was before Senior Assessor Bignold (as he then was). I can't recall the name of the applicant but the principal of the company was Abe Saffron, also known as the Boss of the Cross. The company imported watches and an application had been made for a factory for the installation of batteries into the watches. The land was zoned "Industrial" but the

use was held to be “*Commercial*” and was refused. If only the rest of Mr Saffron’s enterprises were so benign.

Another story is one that was told to me: Angus Talbot was appearing before Assessor Alan Stewart and made a submission indicating that he would like to raise a point of law in the proceedings. Assessor Stewart immediately responded along the lines of “*I find against you on the point of law*”. Angus responded along the lines of “*Assessor, you can’t find against me yet: first, you haven’t heard me on the point of law and, second, I am yet to even identify the point of law!*”

I can recall stories about most of the past Assessors of the Court. One that comes to mind was Assessor Kenneth Riding, who was known for doing *ex tempore* decisions at the end of each hearing. Those were the days!

---

### Andrew Pickles SC, admitted 1990

My most memorable court appearance was a site view for a s 34 conciliation conference. The parties were in an otherwise empty paddock with Commissioner Hussey when it started pouring rain. The only shelter was a large dog kennel that was the subject of the litigation. Everyone was forced to take cover next to all the dogs!

---

### Anonymous, admitted 2006

I recall a site view that I would rather forget. It was a tour of waste facilities in western Sydney that was being conducted by bus as part of a site view for a matter. The judge, who shall remain nameless, reprimanded their tippy after said tippy had neglected to stop the judge from falling out of the bus. It was mortifying.

---

\*Many of these stories were recounted at the Land and Environment Court’s 40 Years virtual event

Follow EPLA  
on Twitter!

@epla\_nsw





## A Q&A with a Land and Environment Court Treasure: The Hon. R. N. (Angus) Talbot, Former Judge of the Land and Environment Court

**1. What were you doing in 1980?**

I was a senior partner in the Muswellbrook firm of Fitzgerald, White, Talbot & Co.

**2. What was your first connection with the Court?**

It was as a barrister reading with Peter McClellan QC, doing lots of mentions before the Registrar.

**3. What were your three top tips for practitioners who appeared before you?**

Don't be overly aggressive, keep to the point(s) and not more than 5 points.

**4. What were your most memorable cases?**

Windy Drop Down because it just won't die.

Pallas Newco because it's very rare for 5 people to agree with me, let alone Court of Appeal judges.

**5. What was your favourite site inspection?**

I don't recall the name of the case but it was for a proposed rubbish dump near Badgerys Creek. The helicopter which was used to simulate the view international tourists would have of the proposed rubbish dump as they landed was seconded mid-flight for bush fire relief and had to land to release some horses from a fenced paddock. Malcom Craig QC was very white faced. It was also memorable because we later discovered the flights had been over the wrong parcel of land.

**6. Which was your favourite EPLA conference?**

The last 6 I attended as a Judge because I was always asked to speak on recent developments in LEC cases and there was never enough time for me to speak.

**7. What is your favourite food?**

Egg jaffles (that's what he said!)

**8. When you were 15, who was your favourite band?**

Glenn Miller Band (no, not the QC).

**9. Where did you grow up?**

Some would argue I haven't but I grew up initially in Roseville then we moved to Bathurst.

**10. What was your first job?**

Working in the laboratory of the Colonial Sugar Refining Company testing sugar and mud. Although there were lots of opportunities there I realised none were for me and it was decided I would study law. That's where I met my now wife who persuaded me to stick at it.

**11. Where was your last holiday?**

To Sweden to meet my first great grandchild.

**12. What is your favourite sport?**

Rugby. Although I have recently given up playing I am proud to have reintroduced the sport to Muswellbrook in the 1960s and that competition is still going strong.

**13. What do you like doing in your spare time?**

Reading, tennis and golf.

**14. What is your favourite book?**

Anything by P.G Wodehouse.

**15. What is your favourite movie?**

Wages of Fear (you'll have to Google it – it is in black and white!) (Interviewers note: it rates 100% on Rotten Tomatoes).

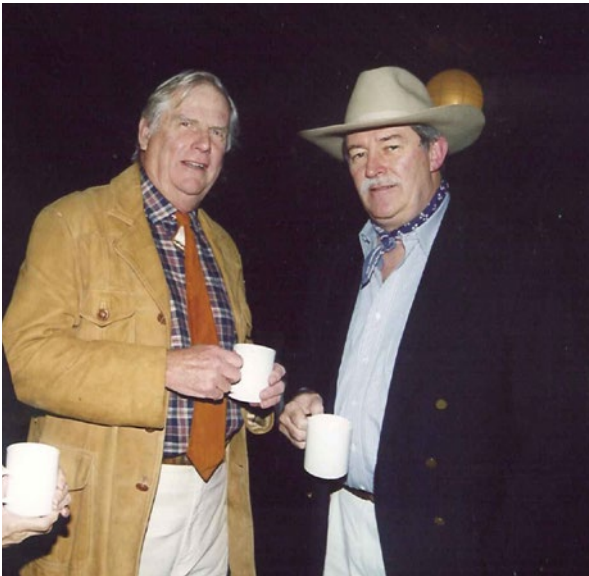
**16. What is your hidden talent?**

My charming personality.

**17. In one word, how would your friends describe you?**

A bloody nuisance (who can't count).

*And now for some personal questions...*





# Where are they now?

## *Associates, Tipstaves, Registrars and Registry Staff\**

### JUDGES

---

#### ***Bannon J***

ANNE HEMMINGS – now a barrister, Martin Place Chambers  
MADELEINE PERRIGNON – now principal solicitor at Perrignon Legal

---

#### ***Bignold J***

FOTINI AVDOULOS – now Associate to Justice Pain (having also been Associate to Biscoe J)  
CLIFFORD IRELAND – now a barrister, 13 Wentworth  
TREVOR UNWIN – now a Senior Claims Executive at DWF

---

#### ***Biscoe J***

NONI AUSTIN – now a solicitor at Earth Justice  
ASHLEIGH EGAN – now a solicitor at Project Lawyers  
NICHOLAS CHAN – now a solicitor at Clayton Utz  
ZAINA SHAHNAWAZ – now a barrister, Third Floor St James' Hall Chambers  
SAMANTHA YEUNG – now a solicitor at Corrs Chambers Westgarth

---

#### ***Cowdroy J***

ANOUSKA PERRAM - Lawyer and Legal Policy Adviser at Forest Peoples Programme, UK  
MARK SEYMOUR – now a barrister, Martin Place Chambers

---

#### ***Craig J***

PHOEBE ASHE – now at NSW EPA  
STACEY ELLA – now a solicitor at Crown Solicitor's Office  
SALLY GUTH – now retired as an Associate  
CLARA KLEMINSKI-EDWARDS – now a solicitor at Holding Redlich  
MICHELLE MACDONALD – now a solicitor at Legal Aid NSW  
MELINDA NORQUAY – now a solicitor at Maddocks

---

#### ***Cripps CJ***

JOSEPHINE KELLY – now a Senior Member of the Administrative Appeals Tribunal  
ROBERT HARPER – now Judge of the Family Court of Australia  
IAN ENRIGHT – now Adjunct Professor of Law at UTS  
HARRY CRIPPS – now a movie producer in Los Angeles

---

#### ***Hemmings J***

IAN HEMMINGS – now Senior Counsel, Martin Place Chambers

---

#### ***Jagot J***

YVETTE CARR – now a planner at Ethos Urban  
ESTHER NELSON – now a solicitor at Westpac

## *Lloyd J*

BRONWEN BURFITT - International Environmental Law and Governance Consultant, Samoa

BRIDGET CORMACK – now Deputy Editor, Review Magazine, The Weekend Australian

ELIZABETH FAVALORO – now a solicitor at the Department of Communities and Justice

KATE (WATSON) HARVEY – now a solicitor at Commonwealth Department of the Environment

DAVID LLOYD – now Senior Counsel, 12 Wentworth Selborne Chambers

TOM MESSENGER – now a solicitor at Messenger & Messenger in Orange

JESSICA SIMPSON – now a solicitor at Northern Beaches Council

---

## *McClellan CJ*

ANGELA FLOCKHART – now Associate to Justice Simpson, Supreme Court

---

## *Moore J*

KAITLIN MURPHY – now Research Officer at Department of The Senate

BEN NILES – now a solicitor at Northern Aboriginal Land Council

SHANNON PETERS – now studying in New York

NICK SANDSTROM – now a solicitor at Mills Oakley

---

## *Pain J*

LINDA (GIBBONS) HANSEN - Manager, Public Law Team at Department of Premier and Cabinet (Vic)

MILLICENT MCCREATH – now a PHD candidate at UNSW

ALISON MCLENNAN – now Assistant Professor at University of Canberra

MAX NEWMAN – now solicitor at Corrs Chambers Westgarth

GEORGIA PICK – now a consultant at Energetics, a climate change related enterprise

BRIGITTE RHEINBERGER – now solicitor at Herbert Smith Freehills

SONALI SENEVIRATNE – now a solicitor at Nortons Rose Fulbright

PETER SWAN – now a solicitor at Family Law, Brisbane

RYAN VERZOSA – now a solicitor at the NSW EPA

VANESSA WALSH – now a solicitor at Dentons

ANGELA WESTCOTT – now living in Melbourne

---

## *Pearlman CJ*

NATHAN LAIRD – now a solicitor at Ausgrid

CHRIS MCELWAIN – now Senior Solicitor at EPA

ROB MOSES – now Senior Attorney at City of Atlanta

LYNN NIELSEN – now Associate to Justice Adamson, Supreme Court

CHRIS NORTON – now a barrister, Frederick Jordan Chambers

KATHY RIDGE – now a solicitor in Manly

---

## *Pepper J*

SOPHIE DUXSON – now a Social Research and Policy Officer at University of Technology, Sydney

JASMINE GEARY – now Associate to Jagot J, Federal Court

REBECCA GRIMSON – now at Department of Communities and Justice NSW

HOLLY KENDALL – now at Australian Department of Foreign Affairs and Trade

SONYA REDMAN – now solicitor at GHD

DOMINIC SMITH – now a solicitor at NSW Crown Solicitor's Office

AMELIA VAN EWIJK – now a solicitor at Chalk & Behrendt

ELLEN WOFFENDEN – now a solicitor at Crown Solicitor's Office

JOHN ZORZETTO – now Senior Legal Officer at Department of Planning, Industry and Environment

---

## *Perrignon J*

MICHELE KEARNS – now clerk at Martin Place Chambers

---

## *Preston CJ*

CARLEY BARTLETT – now a PhD candidate at UNSW

EDWINA CHAPMAN – now Associate to President Bell, NSW Court of Appeal

ANA COCULESCU – now a solicitor at Dentons Kensington Swan, New Zealand

PHILIP COUCH – now a solicitor at Royal Commission for AlUla in Riyadh, Saudi Arabia

GUY DWYER – now a solicitor at Baker McKenzie

CHARLOTTE HANSON – now a lawyer at ClientEarth, United Kingdom

BORA KAPLAN – now a barrister, Nine Wentworth Chambers

ISOBEL LEONARD – now a solicitor at Australian Government Solicitor

TRISTAN ORGILL – now a solicitor at Ashurst

SOPHIE WHITEHEAD – now a solicitor at Baker McKenzie

STEPHANIE WILLIS – now a solicitor at Norton Rose Fulbright

CLARA WILSON – now a Solar Farm Business Development Management at ITP Renewables

KYLIE WILSON – now a solicitor at Ashurst

---

## Robson J

NED HIRST – now a solicitor at Corrs Chambers Westgarth

ALISHA MATHEW – now a solicitor at Hebert Smith Freehills in New York

MARK SLAVEN – now Managing Director of Speaking Schools Australasia

GRACE STROUS – now a solicitor at King & Wood Mallesons

---

## Sheahan J

TOM BUSH – now at Department of Industry in Canberra (via Pikes & Verekers)

JAMES FAN – now a solicitor at Lindsay Taylor Lawyers

SARAH GODMAN – now a solicitor at Department of Planning, Industry and Environment

MARK HAMILTON – academic at UNSW

ANNA HUGGINS – Senior Lecturer in Law at Queensland University of Technology

NICOLA KNACKSTREDT – now Senior Research Officer, Department of The Senate

ALICE NELSON – now a solicitor at Herbert Smith Freehills in London

KATE ROBINSON – now Director Environment and Energy, Legal Services at NSW Department of Planning, Industry and Environment

DOMINIC SMITH – now a solicitor at Crown Solicitor's Office

JANNA ZEGLIS – now a solicitor at Macquarie University

## Stein J

DUNCAN MCGREGOR – now a consultant at Minter Ellison

MELINDA MURRAY – now a solicitor at NSW EPA

JAMES SMITH – now a barrister, Martin Place Chambers

---

## Talbot J

MEREDITH BURNS – now EA to Senior Counsel at Barristers Chambers

WILL DWYER – now a solicitor at Johnson Winter & Slattery

KYLIE EGGLETON – now a GP

BELINDA RAYMENT – now a solicitor at the EDO

LAUREN SIMS – now a barrister, Martin Place Chambers

## REGISTRARS

MICHAEL CONNELL – now Magistrate, NSW Local Court

SUSAN DIXON – now Senior Commissioner, Land and Environment Court

JOANNE GRAY – now Commissioner, Land and Environment Court

MEGAN GREENWOOD – now Magistrate, NSW Local Court

GRAEME HENSON – now Chief Magistrate, NSW Local Court

LEONIE WALTON – now Registrar in Equity, NSW Supreme Court

## REGISTRY STAFF

LOUISE BYRNE – now a barrister, Frederick Jordan Chambers

MICHELE KEARNS – now clerk, Martin Place Chambers

ALISTAIR KNOX – now a solicitor at Pikes & Verekers

NICK SANDERSON-GOUGH – now Manager, Court Operations & Communications, Supreme Court of NSW

ALANA WHYTE – now Manager Client Services, NCAT

BRAD WOTTON – now Manager Commissioning & Planning, Department of Communities and Justice

\* In alphabetical order. Apologies to anyone we have inadvertently omitted or were unable to track down.

# EPLA Meets a New Commissioner



**On 1 June 2020, Commissioner Elizabeth Espinosa was appointed as a Commissioner of the Land and Environment Court. Janet McKelvey, barrister at Martin Place Chambers and member of the EPLA committee, had the opportunity to interview Commissioner Espinosa about her new role and to find out a little more about her personally.**

---

**C**OMMISSIONER Espinosa is well known in the legal profession thanks to her role as President of the Law Society in 2019. Prior to her appointment to the Court, the Commissioner held the role of General Counsel, Manager Governance, Legal and Procurement at Liverpool City Council. She holds degrees in Arts and Law. She is an accredited interpreter and translator and a graduate of the Australian Institute of Company Directors.

## **Why did you want to become a Commissioner?**

Having spent years as a solicitor advocate in various jurisdictions and working in-house in local government I developed a particular interest in environmental matters. The Land and Environment Court is multidisciplinary among its commissioners which I believe is one of the Court's strengths.

## **Where did you grow up?**

Dapto, New South Wales.

## **Where was your last holiday?**

Burril Lake, South Coast NSW.

## **What was your first job?**

At a delicatessen as a ham slicer!

## **Do you speak any other languages?**

Spanish and Italian.

## **What is your favourite food?**

Cake and jamón serrano (Spanish ham).

## **Are you a dog or a cat person?**

Dog person – but I love all pets.

## **What is your favourite sport to watch or play?**

My favourite sport to watch is my teenage children's soccer games. My favourite sport to play is swimming.

## **Which 3 people in history would you invite to a dinner party?**

**Queen Isabel I of Castille** – the Spanish Queen from the 1400s who refused to relinquish power to her husband King Ferdinand II of Aragon, and determined that they would rule as equals.

**Essie Coffee, OA** (née Essieina (“flower of the honey tree”) Goodgabah) 1942-1998) – a Murawarri woman, known as the Bush Queen of Brewarrina. In the 1960s and 1970s she worked in the health and legal service fields and went on to be appointed to the NSW Lands Trust and the NSW Advisory Council. She also supervised the Community Development Employment Project in Brewarrina, was a member of the Wakamurra ATSIC Regional Council, co-founder of the Aboriginal Heritage and Culture Museum of Brewarrina, and served on the first National Council for Aboriginal Reconciliation in 1991. She was also a member and co-founder of the Western Aboriginal Legal Service.

In 1988, she presented Queen Elizabeth with a copy of her film, *My Survival as an Aboriginal*, at the opening of the new Parliament House in Canberra. The film, which was made in 1978 and won national and international recognition, documents the effect of dispossession, the chronic depression, alcoholism, deaths in custody and poverty that was so much a part of life for Aboriginal people. In 1993 a sequel followed, *My Life as I Live It*, which also received national acclaim.

**Lagertha** – Viking Earl and shield maiden (born 763 AD)

I would add in a guest of honour – my mum, Isabel Espinosa (Arana) (1932 – 2020)

## **When you were younger, what did you want to be when you grew up?**

A politician, artist or scientist

## **When you were 15, who was your favourite band?**

Pseudo Echo and Prince!

**What was the first concert you ever went to?**

Hunters and Collectors.

**What was the first album you ever bought with your own money?**

The Best of Blondie, 1981 on cassette tape!

**What is your favourite thing to do in your spare time?**

Walk on the beach.

**What are your top 3 favourite books?**

1. 1984 by George Orwell
2. Celestine Prophecy by James Redfield
3. Maze Runner by James Dashner

**What are your top 3 favourite movies?**

1. The Matrix (Trilogy)
2. Fifth Element
3. The Sapphires & Hidden Figures (equal third!)

**What is your hidden talent?**

I can play traditional Spanish castanets (castanuelas)

**In one word, how would your friends describe you?**

Genuine.

**And now for the serious question: what are your three top tips for practitioners appearing before you?**

Always behave respectfully, be your best and don't guess!



**Commissioner Elizabeth Espinosa**

## Land and Environment Court Vacation 2020-21



**Land and Environment  
Court**  
of New South Wales

**The Judges' fixed vacation begins on 21 December 2020 and the first day of term in 2021 will be Monday, 1 February 2021.**

**A Duty Judge will be available during the fixed vacation for urgent matters.**

Matters may be listed for s34 conferences, mediations and hearing before Commissioners throughout the fixed vacation period except for the public holidays and the public service holiday on Tuesday, 29 December 2020.

The final Registrar's directions hearing list for 2020 will be on Friday, 18 December 2020. The Registrar's directions hearing list will resume on Monday, 18 January 2021.

Both Online Registry and Online Court will be operating 24 hours a day as normal during the vacation period and parties are encouraged to avail themselves of these resources. Applications, appeals, notice of motion and subpoenas can continue to be filed by Online Registry. Online Court can continue to seek directions and also access orders for subpoenas and notices to produce throughout the vacation.

**Information on Registry opening hours over the Xmas break is available at [lec.justice.nsw.gov.au](http://lec.justice.nsw.gov.au)**





# epla2019

## CONFERENCE





# DESIGN+PLANNING

24-25 OCT, 2019

Whitehouse Institute of Design, 2 Short Street, Surry Hills







# epla2019 CONFERENCE

## EPLA Conference Masked Ball

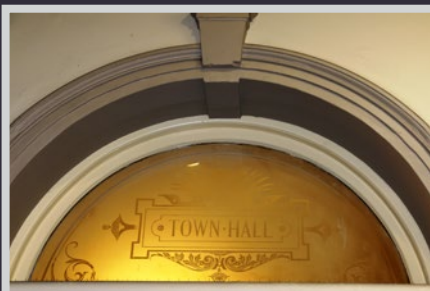




# DESIGN+PLANNING

24-25 OCT, 2019

Whitehouse Institute of Design, 2 Short Street, Surry Hills







# EPLA XMAS PARTY & AGM 2019









## The Land and Environment Court, Court Users Group – Update 2020

**EPLA again in 2020 had two representatives on the Court Users Group (CUG) – Janet McKelvey and Roslyn McCulloch. As in previous years, 2020 saw the CUG provide a useful forum for an exchange of news, ideas, complaints and solutions concerning practice and procedure in the Land and Environment Court.**

**As with most things in 2020 the activities of the CUG can be divided into Pandemic and Non-Pandemic categories.**

### The Pandemic

The pandemic generated a raft of legislative changes to adjust to the brave new world. In the planning sphere they included changes to:

- witnessing of affidavits and other documents
- the lapsing of development consents
- the time within which existing use rights might be presumed to have been abandoned
- times for filing appeals
- time for payment of contributions
- methods of evidence gathering by investigators
- procedures for Panels
- extension of construction hours.

Initially most changes were to have effect until 28 September 2020 but most have now been extended until 25 March 2021.

The Court faced a monumental task in trying to adapt its practice and procedure to a world where people rarely meet in person. Initially, many cases were vacated and listed for later in 2020, further congesting the Court list. Then the Court began utilising its existing technology to conduct matters via telephone and audio visual link, with varying degrees of success. The Court then adopted Microsoft Teams as its main audio visual platform. All of the Commissioners were provided with laptops and the audio visual facilities in the Judges' courts were upgraded to enable virtual hearings to be conducted. Of more recent times, the Court has held a limited number of face to face hearings

and site inspections, which have always been an integral part of the Court's process, have resumed where they are necessary and under strict protocols.

The CUG has proved invaluable to the practitioners and the Court alike as these significant changes have been traversed. A clear message from the Court is that many of the technologies which have been used in response to the pandemic will become permanent features of the Court subject always to the need to provide for open justice.

Another “benefit” of the pandemic has been the funding of the equivalent of two full time Commissioners via the appointment of additional part-time Acting Commissioners. It is hoped that the new recruits will be hearing matters before the end of the year and that some easing of the waiting times for hearing will occur as a result.

### Non-Pandemic Issues

Some of the more significant legislative changes in the planning world since our latest Newsletter include:

- the introduction of the *Design and Building Practitioners Act 2020* and Regulations in response to the major building defects in Opal Towers and other developments
- amendments to the *Environmental Planning and Assessment Act 1979* relating to construction certificates and deviations from development consents to address the decisions in *Trives v Hornsby Shire Council [2015] NSWCA 158* and *Burwood Council v Ralan Burwood Pty Ltd (No. 3) [2014] NSWCA 404*.
- the prohibition of the proposed Rocky Hill mine via Schedule 1 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*
- the *State Environmental Planning Policy (Koala Habitat Protection) 2019* which generated a deal of controversy at government level.

In 2020 the CUG also discussed numerous matters raised by practitioners including expert witness behaviour and reports; unilateral communications in the Online Court era; Court sitting times; informal without prejudice conferences between parties prior to s34 conciliations; the limitations of Online Court particularly for criminal matters and technology issues.

EPLA members who have a concern about any aspect of practice or procedure concerning the Land and Environment Court are welcome to contact the EPLA CUG representatives to have those concerns relayed to the Court. Contact us by email at [admin@epla.org.au](mailto:admin@epla.org.au)



# The Environmental Law Reporter

**The Environmental Law Reporter (ELR) is a fast-response legal reporter covering Australian and international courts and tribunals in areas of planning, local government and environmental law.**

**T**HE editorial team of the Environmental Law Reporter remains committed to producing a quality publication for use by practitioners.

In an anniversary year for the Land and Environment Court, it is appropriate to reflect on the longevity of the ELR and to accept that it must continue to provide a useful service for subscribers. At least we hope so.

Over many decades now the ELR has, in many ways, reflected the growth of environmental and planning law and the growth of EPLA. The gradual widening of reports to decisions of other States and Territories courts, and to Federal courts, and even those of International tribunals, reflects the manner in which environmental law has become more centrally important for the proper functioning of the planet and more day-to-day in terms of the decisions handed down.

This year has been challenging for all of us in many ways. The transition of the Land and Environment Court into virtual space only slowed, temporarily, the flow of judgments but it did not take long before that flow resumed and approached regular levels again. Reporting on the cases from this year has been similarly slowed but not stopped with several new and energetic reporters taking on the task.

The year started with promise as this group of new reporters were inducted by a face-to-face session that reinforced the needs of readers as our top priority. With some misfortune that night was amongst the last before social restrictions cut down any future opportunities for the reporting team to meet in person. In the future, I hope to host more events with the reporters, both to create an atmosphere of collegiality amongst the production team, but also to reinforce the standards of the ELR as meeting the expectations of the membership.

I once again, as I will always do, take the opportunity to thank my assistant Editors: **Janet McKelvey** and **Tom White**. I am, as always, deeply indebted to the whole group of reporters assisting in the production of every issue.

Readers of the ELN are encouraged to contact me if they are willing to report or know someone who may be suitable.

**Features of an ELR subscription are:**

- Hard copy of every edition
- Availability of current editions online
- Reports on recent cases in local government, planning and environmental law
- Annual index

Older editions of the ELR are available to EPLA members as a feature of that membership.

Follow EPLA  
on Twitter!

@epla\_nsw





# NSW Young Lawyers Environment and Planning Law Committee – Update 2020

**The NSW Young Lawyers Environment and Planning Law Committee has had a great year despite the complications caused by COVID-19. We were able to quickly pivot to holding our monthly Committee meetings via Zoom, although we were forced to cancel our March meeting as it was scheduled on the day that lockdown was announced.**

**T**HE Committee has found that although the personal connections made by physically meeting together were slightly diminished, increased attendance at and engagement in our Zoom Committee meetings have made up for that loss. We are, however looking forward to being able to meet in person again but maintaining a hybrid approach to allow our regional and otherwise indisposed Committee members to still Zoom into our monthly meetings.

Prior to COVID-19 putting a stop to physical meetings, the Committee once again hosted its annual trivia extravaganza in December 2019 with thousands of dollars going to NSW Young Lawyer's nominated charity partner, EDO. Pikes and Verekers narrowly took out the event with Martin Place Chambers snapping at their heels (likely fuelled by the metric ton of pizza generously ordered by Michele Kearns). Stay tuned as to how we are going to run the next extravaganza in a physically distanced, socially connected and outrageously entertaining manner!

The Committee also hosted its most recent (and, due to internal changes to CLE events run by the Law Society, the last) One Day CLE Event in March 2020 a few days before lockdown. The Committee extends its thanks to all speakers and panel members including the Honourable Justice Pain, Scott Nash, the Honourable former Justice Terry Sheahan, Natasha Hammond, Damien Beaufils, Elisa Tringali, Matt Floro and Ed Blakely with special thanks to the Honourable Justice Duggan who delivered an engaging keynote presentation to the attendees. The Committee intends to work with a number of other Young Lawyers committees who have successfully run 'Confidence in the Courtroom' hands-on experiences in other Courts to come up with a version of those programmes that could be run in the Land and Environment Court with the current remote hearing structure that we are now operating within.

The Committee also participated in the NSW Young Lawyers Careers Fair in June 2020 which, for the first time, was run via Zoom. Hundreds of law students participated in this event with the Committee experiencing an uptick in attendees as a result of a number of Committee members manning the virtual 'booth' for NSW Young Lawyers.

The Committee Chair, Katharine Huxley, presented as part of a collaboration with the NSW Young Lawyers Human Rights Law Committee and International Law Committee on World Environment Day in June 2020.

The Committee's representatives on the Law Society's Planning and Environment Committee and the Land and Environment Court Users Group have tirelessly presented the concerns and opinions of the Committee to those senior groups, and the Committee thanks Alistair Knox and Ben Salon for the extra time that they devote to these other groups.

As usual, the Committee has been busy preparing submissions on various departmental matters, including the *Housing Diversity State Environmental Planning Policy Explanation of Intended Effect*, the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Discussion Paper, the *Environmental Planning and Assessment Amendment (Territorial Limits) Bill* and the new *Building and Development Certifiers Regulation*.

Finally, the Committee has managed to attract a number of quality speakers who have addressed the Committee on various topics, including Ryan McPherson-Fenn (Department of Planning and Environment) regarding the *Koala State Environmental Planning Policy* and the draft *Cumberland Plain Conservation Plan*, Danielle Toase (Principal Environmental Scientist, Arcadis) regarding the latest developments concerning PFAS contamination, Jane Smith (Willoughby Council) regarding life as in house counsel in an urban Council, and Nadja Zimmerman (EDO) regarding the important KEPCO Bylong joinder decision of the Land and Environment Court.

The Committee welcomes any law student (of any age) or lawyer either within the first five years of practice or under the age of 35 to attend our Committee meetings and to get involved.

Please contact [ylgeneral@lawsociety.com.au](mailto:ylgeneral@lawsociety.com.au) with any enquiries that you may have.





# Comings and Goings: 2019/20

---



## EPLA MEMBERS & SUPPORTERS

(in random order)

**Cecilia Rose** moved to  
Wilshire Webb Staunton Beattie

**Troy Flaherty** joined the Dept of Planning  
and welcomed baby Harry

**Elizabeth Espinosa** was appointed a  
Commissioner of the Land & Environment Court

**Christina Renner** welcomed baby Ada

**James Innes** is the new Legal Director of the  
NSW Independent Planning Commission

**Buddy Stephens** has joined FM Legal

**Robert Sherrington** joined the  
Crown Solicitors Office

**Brooke Bradley** has left Conomos Legal

**Stacey Ella** has joined the  
Crown Solicitors office

**Scott Nash** was appointed as a Magistrate  
and welcomed baby lolana

**Tim Poisel** is now reading at  
Martin Place Chambers

**Damian Beaufile** has joined Black Chambers

**Jason Lazarus** was appointed Senior Counsel

**Elisa Tringali** has joined Gilbert & Tobin

**Gavin Shapiro, Rosemary Bullmore**  
and **Claire Parsons** are on parental leave

**Jeremy Farrell** welcomed Baby Ella

**Lauren Sims** is now reading at  
Martin Place Chambers

**Louise McAndrew** has joined the  
Law Society of NSW

**Melissa Mallos** has joined the  
Sydney City Council

**Anna Lindemann, Alice Lam** and **Julia Green**  
are on parental leave

**Jessica Smith** is on secondment to  
Katherine NT

Vale **Trevor Morling QC**

Congratulations to all our EPLA members and friends on their  
work and personal appointments and moves in 2020



# EPLA 2020 CONFERENCE SPONSORS





# EPLA 2020 MEMBERSHIP APPLICATION

## APPLICANT DETAILS

Last Name:	First Name:	Firm/Organisation:
Street Address:	PO Box:	DX:
City:	State:	Postcode:
Phone No.:	Facsimile No.:	Mobile No.:
Email:	Areas of Interest:	

## MEMBERSHIP FEES

Please tick (✓) boxes where applicable. All prices are GST inclusive.

### DISCOUNT FOR OUTER METROPOLITAN OR COUNTRY MEMBERS (Less 25%)

Individual	<input type="checkbox"/> \$220	Corporate Rate - Councils/Government Departments	<input type="checkbox"/> \$550
Student - Full Time Course	<input type="checkbox"/> \$55	Corporate Rate - Firms/Floors (please provide list of all names to be registered)	<input type="checkbox"/> \$770

## PAYMENT OPTIONS

☐ **CHEQUE**  
made payable to the Environment and Planning Law Association and posted with completed registration form

☐ **DIRECT DEPOSIT**      Bank: St George      Name: EPLA (NSW) Inc.      BSB: 112 879      Acc #: 487190554

☐ **CREDIT**      ☐ Visa      ☐ Mastercard      ☐ Amex

Amount paid \$ \_\_\_\_\_ Card No. \_\_\_\_\_ Expiry Date \_\_\_\_\_

Cardholder's Name \_\_\_\_\_

Cardholder's Signature \_\_\_\_\_ Phone No. \_\_\_\_\_

Please keep a copy of the form for your own records and send the completed registration form:

1. POST to Michele Kearns, EPLA c/- Martin Place Chambers 32/52 Martin Place, Sydney NSW 2000 or DX 130 Sydney including payment details, cheque or payment confirmation.
2. EMAIL form with Credit Card details or remittance advice to [kearns@mpchambers.net.au](mailto:kearns@mpchambers.net.au)