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EPLA 2022 CONFERENCE

THE COVID EDITION

"COMING TOGETHER"

WESTERN PLAINS ZOO, DUBBO

10 and 11 November 2022

PRESIDENT'S MESSAGE:

Paul CRENNAN

President,
EPLA (NSW) Inc

In 2022, after two years of COVID-19 false starts, the EPLA Annual Conference will head west to Dubbo, located on the western plains of NSW.

The Conference will be held on Thursday 10 and Friday 11 November 2022 at Taronga Western Plains Zoo, Obley Rd, Dubbo NSW.

Western Plains Zoo tells us that:

> *"spring is the perfect time of the year for a visit to Taronga Western Plains Zoo. The animals have an extra spring in their step, native wildlife are singing and sunning and a bike around the zoo in the fresh country air is exactly how to experience it all at its best."*

The Conference theme this year is "Coming Together". The theme picks up the emergence from the lockdowns of Covid-19 as we can meet again face to face. It is recovery from disaster. It is planning in the regions and for cities. It is the collaboration of science and the law. The overarching theme of coming together is reconciliation.

Conference sessions will include challenges facing regional councils; 'a dynamic response to disruptive change'; planning to achieve special activation precincts; and how the section 34 Conference really should work.

At a time when personal reserves are running at a low our wellbeing session will focus on work/life balance. What is it? Is such a thing possible and how?

The regular feature of case updates will be presented by the Chief Judge of the Court, his honour Justice Brian Preston and the President of the Court of Appeal her honour Justice of Appeal Julie Ward.

The Hon. Justice Debbie Mortimer of the Federal Court of Australia will address the topic "At what cost? Public interest litigation and accessibility in Australian courts".

We welcome Professor Megan Davis Pro Vice-Chancellor Indigenous, UNSW and Professor of Law to address reconciliation with Australia's first nations peoples with her depth of knowledge on the Uluru Statement from the Heart. The interaction and impact of the Uluru statement including the proposed Voice to Parliament, climate change, the environment, scientific research and the law, all come together in that conversation.

Thursday concludes with "President's Drinks". EPLA is very grateful to Mills Oakley for its continuing generous sponsorship of that popular event. The Conference Dinner will be held on Friday evening at the end of the conference sessions. The dinner is again presented by regular and generous EPLA sponsor Pikes & Verekers Lawyers.

The Zoo tells us that:

> *"There are three female lion cubs, the first cubs born since 2016, learning to pounce and stalk at the Lion Pride Lands and two giraffe calves are discovering the joys of racing around the paddock, before plopping down in the long grass to have a rest in the warm sun. With more babies on the way over the coming months, it is the perfect time to plan a visit to the Zoo."*

EPLA is conscious of the lure of the Zoo so the timing of the sessions will take account of opportunities that the Zoo offers.

For those who cannot get to Dubbo, AVL facilities will join you into the conference virtually.

EPLA is grateful to its generous sponsors without whose support the Conference would not be possible. Their names are dotted through the brochure and I thank them all for their continuing support.

I look forward to seeing you at the Conference on 10 and 11 November 2022 at Taronga Western Plains Zoo Dubbo.

~ Paul Crennan

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ANNE HEMMINGS
Editor

Editor's Note

Welcome to this special edition of the Environmental Law News, which we fondly refer to as the "COVID-edition". Like everything else, the ELN was impacted by COVID-19, which consequentially delayed publication. I thank all of the authors in this edition for their patience in the publication of their articles.

OUR previous edition of the ELN celebrated the 40th Anniversary of the Land and Environment Court. In this edition, we are privileged to publish an article by Terry Sheahan AO, former judge of the Land and Environment Court, which reflects on the history of the Court and its personnel over the past 40 years. This detailed historical piece has been prepared by Terry Sheahan AO in retirement after a celebrated 22 years in judicial office, and I commend this article to EPLA members old and new to gain an insight into the evolution of the Court as it moves into its fifth decade.

The Mahla Pearlman Oration celebrated its 10th Anniversary in 2021. The Mahla Pearlman Oration honours the memory of the late Honourable Mahla Pearlman AO, the former chief judge of the Land and Environment Court (1992-2003). In 2022, the 10th Mahla Pearlman Oration was delivered by Bret Walker AO SC and we are fortunate to publish the speech in this edition, as well as details of the 2022 Mahla Pearlman Australian Young Environmental Lawyer of the Year.

On 17 October 2022, the Honourable Justice Jayne Jagot was appointed to the High Court of Australia. Her Honour was an EPLA supporter and well known to many members. Andrew Pickles SC, a former colleague at the former Mallesons Stephen Jaques, provides an article celebrating her Honour's appointment and highlights her Honour's contribution to planning and environmental law in NSW.

This also edition brings together a collection of comprehensive articles addressing current issues in local government, planning and environmental law. Starting with the theme of waste, Lisa McLean, Managing Director and CEO of Circular Australia, provides an overview of the process of transition to achieve the target to develop a circular economy in Australia by 2030. The team from Beatty Hughes & Associates then provide a timely update on recent developments in waste regulation over the past 2-3 years.

The focus then shifts to environmental crime. The team from Allens Linklaters discuss the increased director liability for environmental crimes in NSW since the commencement on 4 March 2022 of the Environment Legislation Amendment Act 2022 (NSW). Then Ryan Coffey, barrister at Martin Place Chambers, provides a short refresher on the prosecutorial duty of disclosure in Class 5, 6 and 7 proceedings in the Land and Environment Court.

This edition includes a photo spread from the long awaited EPLA Conference 2022 which was held at the Western Plains Zoo, Dubbo after a two year COVID-19 hiatus.

The regular features of the ELN are again included, with updates from Managing Editor of the Environmental Law Reporter and the Secretary of the NSW Young Lawyers Environment and Planning Law Sub-Committee. EPLA's representatives on the Court Users Group and the Duty Lawyer Scheme also provide an update on activities in 2022 for the information of members.

Back by popular demand, Janet McKelvey interviews a well-known Commissioner of the Land and Environment Court. Read on to find out who wanted to become a funambulist, speaks a little Deutsch and has a hidden talent of ear piercing!

I note that the articles in this edition pre-date the appointment of the Honourable Justice Dr Sarah Pritchard SC as a judge of the Land and Environment Court. Her Honour was a leading barrister in administrative, criminal, planning and environmental, native title and human rights law and an EPLA supporter. Her Honour's appointment is an historic event, being the activation of the seventh judicial seat in the Land and Environment Court and also being the first time that the Land and Environment Court will have a majority of female judges on its bench.

I thank the contributors for their time and support for EPLA in submitting articles for this edition. I would also like to thank Timothy Allen for his considerable assistance in marshalling the papers for this edition and I note with pleasure that Timothy has recently been elected as a member of the EPLA Executive Committee for 2023/2024.

In breaking news, the EPLA Executive Committee has formally endorsed the appointment of a Deputy Editor of the ELN for 2023/2024. Ryan Coffey has accepted the appointment and with Ryan's assistance, it is aimed to produce more frequent editions of the ELN and to connect with our younger members.

Please contact me or Ryan if you would like to submit a paper for a future edition. I look forward to seeing you all in person at this year's EPLA events.

—

Anne Hemings
Editor

PAUL CRENNAN
President

President's Report

The year 2022 was a busy time for EPLA as NSW clawed its way out of restrictions imposed in response to the COVID-19 pandemic. The first 4 Twilight Seminars in 2022 were delivered by AVL to large audiences. In October EPLA held a well-attended in-person Twilight Seminar on Greenfield site development.

TWILIGHT Seminars will continue to be delivered through AVL as they conveniently serve a broad audience of practitioners. The importance of personal connection amongst the membership will ensure that we also keep a mix of in-person events into the future.

The Annual Conference was held at Taronga Western Plains Zoo in Dubbo on 10-11 November 2022. This much promised venue for 2020 and 2021 became the site of the conference which was appropriately themed "Coming Together".

The Conference theme picked up on the emergence from the lockdowns of COVID-19; it is recovery from disaster; planning in the regions and for cities; the collaboration of science and the law; and the overarching theme is reconciliation.

Conference sessions included challenges facing regional councils; dynamic response to disruptive change; regional and metropolitan housing initiatives; and how the section 34 Conference really should work.

With personal reserves running low our wellbeing session focused on work/life balance. What is it? Is such a thing possible and how?

The regular feature of case updates featured the Chief Judge of the Court, his honour Justice Brian Preston and the President of the Court of Appeal, her honour Justice of Appeal Julie Ward.

The Hon. Justice Debbie Mortimer of the Federal Court of Australia addressed the topic "At what cost? Public interest litigation and accessibility in Australian courts".

Professor Megan Davis, Pro Vice-Chancellor Indigenous Studies was programmed to attend but was required elsewhere to receive the Sydney Peace Prize.

Eddie Synot a Wamba Wamba First Nations public lawyer and researcher (Griffith University) and Professor Merlin Crossley, Pro Vice-Chancellor Academic (University of New South Wales) joined with Richard Lancaster SC to deliver a session on Coming Together: collaboration of science, law, environment and reconciliation.

All of this was presented against the backdrop of Taronga Western Plains Zoo where there are (in the language of the Zoo) 3 new female lion cubs "*learning to pounce and stalk in the lion pride lands*" and 2 giraffe calves "*discovering the joys of racing around the paddock before plopping down in the long grass to rest in the warm sun*".

I would like to acknowledge the contribution of Felicity Rourke during her tenure as President of EPLA. Felicity led a committee which responded with agility to the challenges of the pandemic. That success can be objectively verified by the rise in membership from 565 in June 2019 to 687 in June 2022. Attendances at the Conference and at Twilight Seminars also rose significantly.

For the benefit of EPLA, Felicity served as President for 3 years with a bit more, a gracious extension in the interests of the organisation. EPLA was then able to hold its Annual General Meeting in person and deliver the hospitality for which EPLA is renowned.

As ever, Michele Kearns is the backbone of EPLA. I thank Michele for extent and the quality of her ongoing contribution.

I am grateful to the members of the committee who willingly give of their time and skills for the benefit of the association. A stable committee provides a consistent culture determined to benefit members.

With the commemoration by the Land and Environment Court of NSW of its 40th anniversary, this report also celebrates the combined 40th anniversary edition of the Environmental Law News. Congratulations to all involved in the production of this special edition.

—

Paul Crennan
President

THE HON TERRY SHEAHAN AO

The Decision Makers of the Land and Environment Court

As the Land and Environment Court of NSW (LEC) moves into its fifth decade, it is appropriate to reflect on the wide range of talented people who have been part of its history.

The Chief Judge asked me to write a "personalia" piece to mark the commencement of the fifth decade, and I have been pleased to do so. I was in the NSW Parliament, and a member of the government, at the time of the passage of the monumental package of Planning and Environment legislation, which included the Environmental Planning and Assessment Act and the Land and Environment Court Act, in 1979 and I was privileged to serve later as a Judge of the Court for the second half of its first forty years.

I acknowledge the superb assistance I received in preparing this record, from Vanessa Blackmore and other staff of the Supreme Court Library.

The Wran (Labor) Government was firm in its resolve to establish the LEC as a stand-alone superior court of record, when it replaced the historic Land and Valuation Court of NSW, which had resided and functioned for many years within the Supreme Court of NSW, and the Local Government Appeals Tribunal (LGAT). The LEC later took over the jurisdiction of the Mining Warden's Court.

On establishment in 1980, there were three judges, including the Chief Judge, and nine full-time conciliation and technical assessors (as they were then called). Forty-two years later, there are six judges, including the Chief Judge, and nine full-time Commissioners (as they are now called) and 16 Acting Commissioners.

Pursuant to s 8(2) of the Court Act, the judges are to be judges of a superior court of record or lawyers of at least 7 years standing. The cabinet of the day nominated as the three foundation judges of the new Court, which commenced its operations on 1 September 1980, **James Robert McClelland** (a former solicitor, senator for NSW, and federal minister, but by then a judge of the Industrial Commission of NSW) as Chief Judge, together with **Jerrold Sydney Cripps** QC (at that time a judge of the District Court of NSW and President of the NSW Anti-Discrimination Board), and **Edmund Theodore Perrignon** (a highly respected member of the NSW bar, with particular expertise in land and valuation matters).

The inaugural Chief Judge took office on 14 April 1980, and Justices Cripps and Perrignon on 18 August 1980.

The Court also assumed the work of the Local Government Appeals Tribunal, and many of that Tribunal's members were appointed as the inaugural conciliation and technical assessors of the Court (renamed "Commissioners" from 1 January 1999).

McClelland CJ sponsored, and the government approved, the appointment of **Neal Raymond Bignold** (then a senior legal officer in the Planning and Environment Commission, later the Department of Environment and Planning, and heavily involved in the preparation of the legislative package) as the first Senior Conciliation and Technical Assessor.

In having two types of decision makers, legally qualified judges and conciliation and technical assessors, the LEC differs from other courts in NSW and elsewhere, and embodies not only a superior court of record, but also an administrative tribunal.

Persons appointed as assessors/commissioners are required by statute to possess special knowledge of, and experience in, areas of relevant expertise, specified in s 12 of the Court Act, of which the law is but one. Other criteria include local government administration; town, country or environmental planning; environmental science, protection or assessment; land valuation; architecture; engineering; surveying; building construction; natural resource management; Aboriginal land rights, or disputes involving Aboriginal people; and urban design, or heritage. Persons may be appointed as full-time or part-time Commissioners for a term of 7 years or as an Acting Commissioner.

Over the years, several lawyers, beginning with Neal Bignold, have been appointed as assessors/commissioners, and some of the non-lawyer appointees have qualified in law while serving on the Court. Two assessors/commissioners (both at the time the senior assessor or commissioner) have been elevated to the bench (Neal Bignold, and **Timothy John Moore**).

For the last twenty years, there have also been part-time appointments of commissioners (curiously called "Acting Commissioners"), who work on what may be described as a sessional basis. These Acting Commissioner have areas of expertise that are needed to deal with disputes before the Court that are not held by the full-time Commissioners, including land valuation, environmental science and arboriculture. Over

time this has expanded to include most of the areas in s 12(2) of the Court Act. Persons may also be appointed as Acting Commissioners for a term not exceeding 5 years.

Judges do not sit together on cases, but commissioners do, when so allocated by the Chief Judge, and commissioners, whether full-time or Acting, are often listed to sit to assist judges on matters in Classes 1-3, and occasionally Class 4, of the Court's jurisdiction.

Chief Judges of the Court

The Court's first Chief Judge, Jim McClelland, was nominated by the Hawke Federal Labor government to preside over what became known as the Maralinga Royal Commission, and effectively left the Court on 1 August 1984.

He returned only on 2 June 1985 to be "sworn out", on his attaining the then compulsory judicial retirement age of 70 years. He went on to complete the Royal Commission, and later became a respected journalist and columnist, dying on 16 January 1999.

In his absence from the Court from 1 August 1984, Jerrold Cripps acted as Chief Judge, and, on 3 June 1985 he became the LEC's second Chief Judge. He left the LEC on 1 April 1992 to take up an appointment as a Judge of Appeal on the NSW Court of Appeal from 2 April 1992 until 5 October 1993. He returned to private practice, but later served in several other public sector roles (including leading a working party inquiring into the merits review jurisdiction of the LEC in 2001) and as Commissioner of the NSW Independent Commission Against Corruption (ICAC) (2004 to 2009). He died on 28 December 2015.

Chief Judge Cripps was replaced by **Mahla Liane Pearlman** AO, who was appointed directly from the solicitors' branch of the profession. She had been the first female president of both the NSW Law Society and the Law Council of Australia, and served as Chief Judge of the Court from 6 April 1992 until 4 July 2003. In retirement, she acted as a Judge of Appeal for a time, served as a member of the Mental Health Review Tribunal, and conducted an inquiry into what became known as "NorthConnex". She passed away on 2 December 2011.

Justice **Peter David McClellan** QC of the NSW Supreme Court was appointed Chief Judge, to replace Pearlman CJ, on 25 August 2003, and served until 1 September 2005, when he returned to the Supreme Court as Chief Judge at Common Law. Before going to the Supreme Court in 2001, he was a leading Queens Counsel at the NSW planning and environment bar. On 11 January 2013, he was appointed to head a Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission ran for five years, and he briefly returned to the Supreme Court as a Judge of Appeal when it concluded. He retired from the Court of Appeal on 8 February 2018.

The present Chief Judge, Justice **Brian John Preston** SC, took up the office on 14 November 2005. He was a Senior Counsel and leader of the NSW planning and environment bar, and a distinguished academic on the international stage. He is already the longest serving occupant of the Chief Judge's position. Preston CJ is an additional Judge of Appeal and regularly sits on the NSW Court of Appeal and NSW Court of Criminal Appeal. His Honour has also served as an Acting Judge of the Queensland District Court and Planning and Environment Court in 2014 and Land Appeal Court of Queensland in 2021-2022. Preston CJ has been awarded a Doctor of Letters (honoris causa) from Macquarie University.

The Other Judges

Justice Perrignon, who had served in Bomber Command during World War II, served on the Court for only seven years, but with great distinction, before retiring on 11 October 1987. He then served on the Australian Administrative Appeals Tribunal (AAT) from 1988 to 1991, and died on 31 August 2001.

When Chief Judge Jim McLelland left the Court to run the Maralinga Royal Commission, and Justice Cripps acted as Acting Chief Judge, Senior Assessor Bignold was appointed as an Acting Judge. On 3 June 1985 he was appointed as a permanent judge of the Court, and he served until 16 March 2007, acting as Chief Judge in July/August 2003.

On 3 June 1985, an additional permanent judge was appointed to the Court, increasing its judicial strength to four. Judge **Paul Leon Stein** of the District Court of NSW was elevated to the LEC, and served there until 7 April 1997, when he was appointed to the Court of Appeal, on which he served until 11 April 2003. Prior to his appointment to the District Court in 1983, he had been Deputy Ombudsman of NSW (1977 to 1979) and President of the NSW Anti-Discrimination Board (1979 to 1982), and was a highly visible consumer advocate. In retirement he has chaired many planning panels and the Board of Governors of the Law and Justice Foundation.

Justice Perrignon was replaced by **Noel Alan Hemmings** QC on 12 October 1987. He was an acknowledged leader of the land and valuation bar, but served on the LEC only until 28 June 1991, when he resigned to return to private practice as a solicitor.

He was replaced on the LEC by **Charles Joseph Bannon** QC, who served from 12 August 1991 to 27 November 1996. "Joe" Bannon had been a prominent commercial and appellate silk, and Chairman of the NSW Council of Law Reporting, before becoming a deputy president of the Australian Administrative Appeals Tribunal in 1986. In retirement he served for a time on the State's Parole Board.

In 1992 the strength of the LEC bench was increased again to five, with the appointment on 22 April 1992 of **Robert Neville Talbot** (known as "Angus"). Angus Talbot came to the Court from the bar, but had earlier been a long-time solicitor in Muswellbrook (1960 to 1982). Talbot J served on the Court until 30 January 2006, and then stayed on as an Acting Judge until 29 August 2007. He acted as Chief Judge from 2 September to 13 November 2005 in the interregnum between Peter McClellan retiring as Chief Judge and Brian Preston being appointed as Chief Judge. He had long practised in the LEC, and in retirement has chaired several independent planning panels.

When Joe Bannon retired, he was replaced by **David Henry Lloyd** QC. David Lloyd had a long career in land economics and in the Court's jurisdiction, and acted as a Judge of the LEC from 31 July to 15 November 1995 (while Justice Stein conducted an inquiry into leasehold tenure in the ACT). Lloyd J took up his permanent appointment on 5 February 1997. He served until 22 January 2010, and later returned as an Acting Judge from 5 March to 10 August 2012. Like several other retired judges of the LEC, David Lloyd has been chairing independent planning panels.

I, **Terence William Sheahan** AO, was appointed to replace Justice Stein on 9 April 1997. My background was litigation practice as a solicitor and mediator, but mainly politics, including stints as Minister for Planning and

Environment, and Attorney General. I served on the Court until appointed in 2001 to conduct an Inquiry into common law aspects of workers compensation, and I was then away from the LEC from March 2002 to November 2007, serving as President of the Workers Compensation Commission of NSW.

I returned to the LEC on 5 November 2007 effectively filling the vacancy created by the retirement of Justice Talbot. I retired on 16 August 2019, and now work part-time on the NSW Civil and Administrative Tribunal (NCAT), the Mental Health Review Tribunal, and as Chairman of the Campbelltown Planning Panel.

During 1997, the workload of the Court was such that the government acceded to Chief Judge Pearlman's request for an additional Acting Judge. **Dennis Antill Cowdroy** AO QC served as an Acting Judge from 21 July to 14 November 1997, returning for another stint from 13 July 1998 to 30 June 1999. He had earlier acted as a judge of the Equity Division of the Supreme Court. Pearlman CJ persuaded the government to create a sixth permanent judicial seat on the LEC, and Cowdroy J became a permanent judge of the Court on 1 July 1999, serving until 12 March 2006, when he was appointed a judge of the Federal Court of Australia, where he served until 2014. He has held many appointments in retirement including on the AAT, NCAT, the Australian Electoral Commission, and in the Australian Navy.

My LEC "vacancy" during my workers compensation appointment was filled by Justice **Nicola Hope Margaret Pain**, who took up her appointment on 18 March 2002, and is still in office. She had headed the NSW Environmental Defender's Office, had held senior positions in both State and Federal governments, and had been awarded a doctorate (SJD) on environmental rights.

Jayne Margaret Jagot joined the Court on 1 February 2006, but served only until 2 September 2008, when she too joined the Federal Court of Australia. In October 2022, Justice Jagot was appointed the 56th Justice of the High Court of Australia. Prior to 2006, she had been a prominent practitioner in the LEC, firstly as a solicitor then later as a barrister.

Peter Meldrum Biscoe QC served as a judge of the Court from 13 March 2006 to 12 March 2016. He had been a leading commercial silk, and a consultant to the Council of Chief Justices, prior to his LEC appointment.

Another judge who came and went in the Court's fourth decade was **Malcolm Graeme Craig** QC, a leader of the NSW planning and environment bar, who served from 2 March 2010 to 5 June 2016, before returning to the bar.

Apart from the present Chief Judge, and Justice Pain, the other judges in office at the time of the 42nd anniversary celebrations are:

Rachel Ann Pepper (appointed as a judge on 1 May 2009, after practising as a barrister at the NSW bar and serving as Secretary of the NSW Bar Association). Pepper J chaired a Scientific Inquiry into hydraulic fracturing or "fracking" in the Northern Territory in 2017 to 2018;

Timothy John Moore (appointed as a Commissioner on 2 November 2002, Senior Commissioner on 11 March 2009, Acting Judge from 23 June to 18 December 2015, and Judge on 4 January 2016). Moore J was formerly Minister for the Environment in NSW, CEO of the Master Builders Association, a senior officer of the Commonwealth, and a barrister and mediator in NSW;

John Ernest Robson SC (appointed 5 July 2016, after a distinguished career as a Senior Counsel at the planning and environment bar and the wider bar in NSW);

Sandra Anne Duggan SC (appointed 10 September 2019, also after a distinguished career as a Senior Counsel practising in the Court's jurisdiction).

Acting Judges

Apart from Justices Bignold, Lloyd, Cowdroy and Moore, who, as noted above, served as Acting Judges prior to their full-time appointments, the Court has benefited from the services of several other distinguished jurists as Acting Judges.

Two of the most notable Acting Judges were **Kevin James Holland** QC (4 July to 16 December 1988) and **Thomas William Waddell** QC (1 June to 31 December 1994), who had both served with great distinction on the NSW Supreme Court for many years.

Another distinguished Acting Judge was Judge **Helen Gay Murrell** of the NSW District Court (a judge of the District Court from 13 September 1996 to 28 October 2013, Acting Judge of the Land and Environment Court from 2 December 1996 to 17 January 1997) who went on to become the first female Chief Justice of the Supreme Court of the ACT (28 October 2013 to 4 March 2022).

Peter James McEwen SC, a leading Senior Counsel at the NSW planning and environment bar, acted as a judge of the Court from 12 June to 31 August 2001, while I was conducting my Workers Compensation Inquiry.

Michael Francis Moore, a long-time judge of the Federal Court of Australia and the short-lived Industrial Relations Court of Australia (28 March 1994 to 1 August 2011), and younger brother of Justice Tim Moore, acted as a judge of the LEC from 3 October to 16 December 2011.

The longest Acting Judge appointment to the LEC was the most recent, that of Victorian silk and distinguished environmental activist **Simon Richard Molesworth** AO QC (23 January 2017 to 31 December 2018), an appointment made initially to cover the absence of Justice Pepper in the Northern Territory.

Senior Assessors/ Commissioners

The first Senior Assessor Neal Raymond Bignold (see above), was succeeded by **Francis John Hanson** (an Assessor, from 29 July 1980 to 31 July 1984, Acting Senior Assessor from 1 July 1984 to 31 July 1985, and Senior Assessor from 1 August 1985 to 24 April 1986).

Peter Rolf Jensen was Senior Assessor from 25 August 1986 to 1 January 1999, and Senior Commissioner from 1 January 1999 to January 2002. He was replaced as Senior Commissioner by Dr **John Roseth** (an assessor and commissioner from 1993), who served as Senior Commissioner from 14 February 2002 to 13 February 2009.

John Roseth was succeeded by Tim Moore (see above), who was in turn succeeded by **Rosemary Martin** from 17 October 2016 to 26 January 2018, and then by the current Senior Commissioner, **Susan Anne Dixon**, on 29 January 2018.

All of these occupants of the Senior Commissioner position brought to the role wide relevant experience: Hanson had been

Chairman of the LGAT and on leaving the Court became Director of Planning and Building at the City of Sydney (1986 to 1991); Jensen was an architect and town planner, who obtained a PhD; Roseth had a distinguished career academically and in the NSW Department of Environment and Planning, and received many awards; Martin was a lawyer, mediator, and company director; and Dixon had a distinguished record in private practice, academia, tribunals, and served as the Registrar of the Court (2004 to 2008), before becoming a commissioner on 6 July 2009.

Other full-time Assessors/ Commissioners

Other early assessors who came from the LGAT in 1980 were Trefor Davies (a valuer), Judith Fitz-Henry (a planner), and Frank O'Neil. Another distinguished Planning and Environment Commission (PEC) officer to join in 1980 but not from the Tribunal was Joan Domicelj AM. All four had been senior and distinguished officers of the PEC.

Other Tribunal members who came to the Court in 1980 or shortly after that time were Stan Chivers, Bryce O'Neile, and Ken Riding.

Distinguished recruits during the 1980s included Graham Andrews (prominent in public and private sectors), Tony Nott (a Sydney barrister who authored a 1981 text book on "Environmental Planning and Assessment NSW"), Alan Stewart (an environmental biologist and former State MP), and Stafford Watts (architect and urban designer from North Sydney Council).

Since the 1990s, the commissioner ranks have been enhanced by environmental and planning practitioners such as Trevor Bly, Bob Hussey, Kevin Hoffman, Graham Brown, Jan Murrell, Annelise Tuor, Judy Fakes, Sue Morris, Susan O'Neill, Danielle Dickson, Michael Chilcott, Jennifer Smithson, Joanne Gray, Sarah Bish, Dr Peter Walsh, Tim Horton, and Elizabeth Espinosa, as well as academics such as Catherin Bull, Mark Taylor, and Linda Pearson, most of whom served for many years, and all of whom gave great service to the Court.

At the time of Court's 42nd anniversary the Commissioners of the Court are:

Susan O'Neill appointed 30 January 2012 and reappointed on 30 January 2019;

- Danielle Dickson appointed on 18 July 2016;
- Michael Chilcott appointed 25 July 2016;
- Joanne Gray appointed 18 April 2017;
- Sarah Bish appointed 28 June 2017;
- Dr Peter Walsh appointed 29 January 2018;
- Tim Horton appointed 5 November 2018; and
- Elizabeth Espinosa appointed 1 June 2020.

At any one time, the list of commissioners has represented the range of skills and qualifications envisaged by the statutory regime.

Part-time and Acting Commissioners

Since the enactment of the Aboriginal Land Rights Act 1983, the Court has always had several part-time commissioners who were appointed specifically for the purpose of assisting judges with Aboriginal matters, mostly NSW land title claims. Not all were Indigenous, but all had to have the qualifications required by s 12(2)(g) of the Court Act. The older records of the Court do not reliably report all such appointments but include, in this category, names such as Joyce Clague, Kevin Cook, Ossie Cruise, Pearl Duncan, Barbara Flick, David Green, Maureen O'Donnell, Thomas Slocker, Jack Smith, Jim Wright, Natascha McNamara, Peter Okwechime, Michael Anderson, Wilma Moran, Aden Ridgeway, Noelene Luff, Paul Newman, and Noelene Mooney.

The Court's records of Aboriginal commissioners from 2000 onwards included Gregory Davidson, Cherie Imlah, Michael McDaniel, Julie Smith, Lloyd Clive (Mullenjaiwakka) McDermott, Larissa Behrendt, Mary Edmunds, Rhonda Jacobson, Norman Laing, Jeffrey Kildea, Tony McAvoy SC, Megan Davis and Andrew Smith.

In respect of the Court's non-indigenous, more general work, Sydney barrister Heather Irish acted as a full-time commissioner for three months in 1996.

As already noted, in more recent years the Court has established a panel of "specialist part-timers" (known as Acting Commissioners), who sit as commissioners on a sessional basis. Some either became, or had previously been, full-time commissioners but there have been many others such as planners Julie Bindon, Ed Blakely, Gary Shiels, Stuart Harding and Lynne Sheridan; arborists/arboricultural experts Peter Thyer, Judy Fakes, David Galwey, Phillip Hewitt, Lisa Durland, and John Douglas; valuers David Parker, John Sheehan, Craig Miller, Russell Cowell, Peter Kempthorne, Paul Knight and Michael Davidson; ecologists Paul Adam, David Goldney, and Stephen Phillips; environmental scientists/engineers/managers Michael Ritchie, Mark Carleton, David Johnson, and Bob Smith; engineer Ross Speers; architect Matthew Pullinger; surveyor Michael Whelan; heritage expert Sharon Sullivan AO; landscape architect Emma Washington; and mining expert John Bailey.

Most recently, the Court has been fortunate to secure the services as acting commissioners of distinguished legal practitioners prominent in the jurisdiction such as John Maston, Philip Clay SC, Maureen Peatman, Alan Bradbury, and Chris McEwen SC.

PS (1) This article was written at the time of the 40th Anniversary of the Court and book launch, and is only now able to be published, (2) with the accession of Charles III QCs are now KCs, and (3) after the 40th Anniversary celebrations, the Court commenced a new phase in its history with the activation of a seventh judicial seat, filled on 15 November 2022 by Dr Sarah Elizabeth Pritchard SC, a distinguished barrister with great experience over many years across a wide range of the Court's work, human rights, and other areas.

LISA MCLEAN
Managing Director and CEO of Circular Australia

Australia's New Circular Economy

Australia is transitioning to a circular economy by 2030, aiming to design out waste, keep products in use at their highest value, and regenerate natural systems. This shift presents a $2 trillion economic opportunity over the next 20 years, while also addressing emissions and biodiversity loss. Collaboration between stakeholders and supportive policies are key to achieving this vision.

The Australian Circular Economy Transition

The circular economy is emerging quickly as the only viable economic framework enabling countries to grow the jobs and industries of the future, drive productivity, while tackling the greatest environmental crises of our generation.

The world faces a triple planetary crisis[1]: climate change; air pollution and biodiversity loss driven by over-consumption and a linear 'take make waste' economy. If the world lived like Australians we would need 4.5 Earth's to support us. We are one of the largest material users in our region.

One of the big failings of the current linear economy is that natural capital is allowed to be degraded for free. The price of this catastrophic degradation is not included in any accounting and so the true costs of the throw-away economy are out of sight to us all. Shifting towards an economy that efficiently meets human needs without over-consumption and accurately reflects the true costs and externalities is the answer. It's also a matter of national security that we protect the resources and natural capital in our countries for future generations.

Making the transition to a circular economy will require new technologies and expertise creating business opportunities and jobs in Australia and globally. The circular economy is a systems transition, it's not just waste management rather it requires rules to design out waste and pollution, regulations to ensure anything that is made lasts, can be repaired, and stays in the economy at its highest value for as long as possible. To build a circular economy it's also essential to have repair and reuse skills and services, and importantly in Australia onshore remanufacturing infrastructure. Australian will need new finance, circular taxonomies and metrics to measure progress to a circular economy and strong investment in innovation.

[1] https://unfccc.int/blog/what-is-the-triple-planetary-crisis?gclid=EAIaIQobChMIvKbkzcij_wIV0igrCh1kqwTSEAAYASAAEgJVYfD_BwE

The circular economic framework is supported around the world from Europe to Canada, China and Japan. These countries are setting targets and working hard to achieve them, like Finland which has its sights on 100 percent circular by 2035. In Australia it is estimated we are only 4 to 5 percent circular[i]. While we have a long way to go, there is strong political leadership, with State and federal Environment Ministers committing to establish a circular economy by 2030 with the private sector, and the Hon. Tanya Plibersek, Minister for the Environment has established a Ministerial Advisory Group on circular economy to advise on the development of a roadmap and the best approaches to circularity. This new Australian target and commitment coupled with new EU and global frameworks, including trade agreements promoting zero carbon and circularity, will accelerate the new global circular economy. A new economy in which Australia is well placed to lead.

Running out of resources

By 2050 there will be 10 billion people on the planet but not enough finite resources to continue to consume in the same way we do today. Our finite resources are running out. There is now more gold and silver in a tonne of iphones than a tonne of ore from a gold or silver mine.

Globally, agriculture is the biggest user of water as irrigation claims up to 70 percent of all freshwater for human use.[ii] Resource efficiency and the efficient management of earth's shared natural resources - including designing out toxic chemicals and pollution - remain critical to us achieving our Sustainable Development Goals but also to us maintaining viable planetary biodiversity for future generations.

A new economic framework

How we achieve economic growth and sustainable development at the same time, requires a transformation in the way we produce and consume goods and resources. It requires a new economic framework

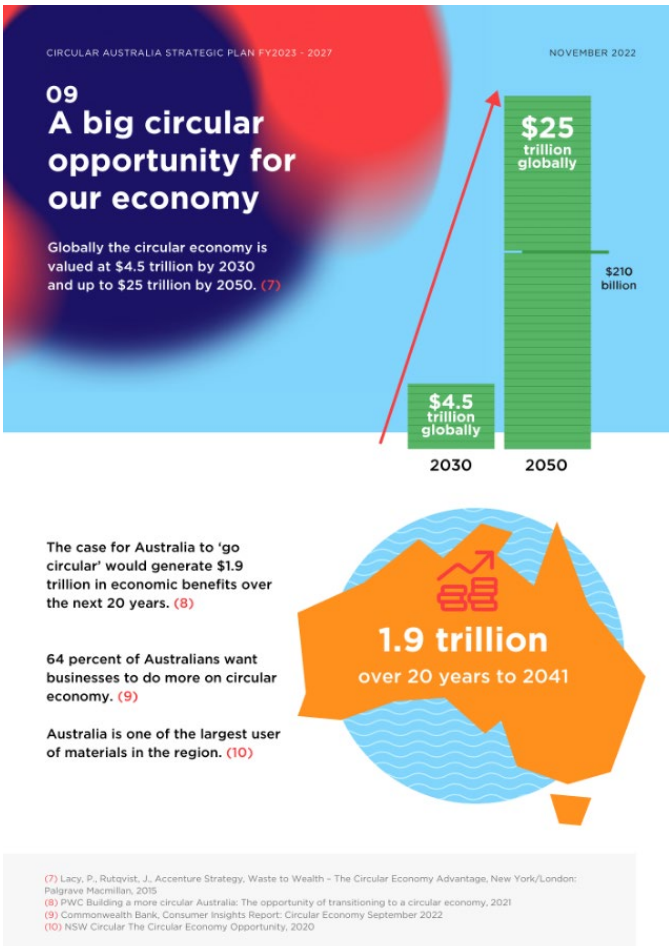
for the carbon and resources-constrained future. The circular economy is being embraced globally as the answer.

The circular economy decouples economic growth from the consumption of finite resources, designing waste out of the system. It is based on three principles:

1. Design out waste and pollution at every stage of production, use and end-of-life
2. Keep products and materials in use at their highest possible value
3. Regenerate natural systems including through recycling of water, food waste and organics.

Circular Australia also supports an Australian circular economy that matches environmental goals with social ambitions.

A big economic opportunity



The economic rewards for this transformation are substantial. The circular economic opportunity is estimated at $2 trillion over the next 20 years[iii] in Australia. Making critical changes to keep resources in the economy for as long as possible at their highest value is where the large untapped economic opportunity lies. Even a 5 percent improvement in material efficiency will deliver would add $24B to Australia's GDP.

Through design - ensuring things are made to be recycled and can be broken down at the end of their life, enabling our resources once extracted to keep going around and around, generating jobs and protecting the natural environment. That means not landfilling them, not burning them, but getting value from them and designing them to stay in the economy for as long as possible at their highest value.

Last year circular Australia spotlighted where the circular economy opportunities will come from[iv]. We identified a phenomenal opportunity much greater than the China Sword export bans. The bans catalysed new legislation in the Recycling and Waste Reduction Act 2020[v] which came into effect on 1 January 2021. They focussed on waste glass, mixed plastics, and whole used tyres, moving to mixed single resin or polymer plastics and unsorted paper and cardboard from July 2024.

Circular Australia's report highlights the export bans only scratch the surface of the Australian Circular Economic opportunity. There is an even more significant opportunity for materials recovery and emissions reductions - that is five times the size of the waste export market. We highlighted opportunities for recycling in masonry - which includes concrete, rubble, sand; in metals; and in textiles including leather and rubber. While a fraction of these waste streams is recycled - significant quantities are not, opening up new revenue streams and possibilities for new business models.

Tackling almost half of our targeted emissions

The other important thing to remember about circular economy is that it's going to solve other complex problems we are trying to resolve: It's a secret weapon in cutting carbon. While 55 percent of the emissions we need to cut will come from the energy transition and energy efficiencies, there is another 45 percent embedded in products and food[vi], the way we use and dispose of them. The circular economy will cut almost half the emissions we need to reach UN targets. It also regenerates our natural environment and natural capital and can significantly reduce biodiversity loss. By shifting our economy from linear to circular, we change the extraction processes to ones that are more regenerative. Instead of continuously degrading nature, we build natural capital - rebuilding soils and water systems not just for better productivity but to support biodiversity. Most waste materials are resources that are lost after use, depleting the land or water used to grow them.

A new political circular framework

The election of the new Albanese Labor Government will supercharge the circular agenda in Australia. We've already seen Australians' calls for action on climate change responded to with funding commitments redirected to support core carbon and waste initiatives in last month's Budget.

The new administration has a strong 'Made In Australia' agenda[vii] which will kickstart Australia's manufacturing sectors and commence things being made here on Australian soil. This is absolutely critical for Australia to start to be able to extract value from its wasted resources. Circular economy is a new way of doing things, so industry and government are looking for handholding, guidance and support as they make the transition. In a circular economy the collection, the

extraction and processing of resources requires different approaches to what we are doing now, new supply chains, new infrastructure, new business cases that value circular externalities. There are many policy and market barriers that need to be removed, as we transition to a circular economy.

New laws?

On 14 October 2020, the European Commission published its chemicals strategy[viii] for sustainability towards a toxic-free environment as part of the European Green Deal. Circular Australia anticipates greater action on **removing chemicals from the economy** as Australia plays catch up protecting human health and the environment from chemicals with hazardous properties.

Harmonisation of bins for recycling will come onto the agenda strongly as States desperately seek to manage growing waste streams and reduce carbon- starting with food and organics separation. Three percent of Australia's carbon emissions come from food waste in the red bin going to landfill.

New integrated infrastructure and manufacturing capability is also fundamental to being able to recover resources locked in waste to recycle and reuse it, and Australia has not yet done this at scale, but we will need to in order to realise the substantial economic opportunity. This will also need to include regulatory incentives for circular behaviours - at the moment our utility tariff structures favour and promote linear outcomes without valuing the positive externalities of keeping materials and resources in the economy. Reforms will be required here.

Integrated water management is an important focus. There will be no growth or food production in many cities and regional areas without more recycled water and an integrated approach to water management. Mandating recycling and embracing new recycling innovations and technologies as they come to the market will be essential to create liveable productive communities.

Businesses, organisations, councils, government agencies need incentives and entry points to participate in and grow new circular supply chains so policy targets and regulation incentivising circular approaches will be necessary. This includes legislation to promote the repair economy and ensure things are made to last, and can stay in the economy longer. The EU's Right to Repair legislation is a solid benchmark here[ix].

Finally, **sandboxing approaches with innovation and trials** are so important to prove the economic case and to scale circular solutions. Regulators need to see the waterbed effect of new approaches and industry need the chance to do things differently as regulation and standards move much slower. Sandboxing requires evidence and data and working with trusted partners across government industry and research. But it will also inform policy, legislation, regulation, standards and market reform.

An Australian Circular Economy by 2030

Australia now finally has a target to achieve circularity. In a bold and united move on 21 October 2022, Environment Ministers pledged to work together to develop a circular economy in Australia by 2030[x]: Their communique stated:

> *"In recognition of the scale and urgency of environmental challenges, ministers agreed to work with the private sector to design out waste and pollution, keep materials in use and foster markets to achieve a circular economy by 2030."*

Now begins the hard work. Not one business, company, sector or government can do it on their own. We need to work together and we need to get ready for the new circular economy and the many climate positive changes it brings - from new regulatory and legal structures, new behaviours to new opportunities and better outcomes for the environment.

About Circular Australia

Circular Australia is an independent, national body working to influence more Australians, governments and businesses to implement circular strategies. Our expertise, programs and partnerships drive change, measure impact and accelerate the circular economy transition. We work with governments and companies to lead the transformation to a zero caron circular economy.

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i. https://www.csiro.au/en/news/news-releases/2021/csiros-circular-economy-roadmap-charts-path-to-triple-job-creation

ii. UN Sustainable Development Goals https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=CjwKCAiA9qKbBhAzEiwAS4yeDZK90BNdJ-pGBPy1TZrOyE-RbIgARIzu5uxlaPYknQJaBGa6bVbA5xoCqlwQAvD_BwE#responsible-consumption-and-production

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Recent Developments in Waste

The NSW and Commonwealth governments have increased their focus on waste regulation over the past 2–3 years. These changes have made it harder to export unprocessed waste (driving local waste processing) and helped to promote the circular economy, but conversely energy from waste facilities have become even more difficult to develop in NSW.

Waste export bans keep rolling out under *Recycling and Waste Reduction Act 2020* (Cth)

At a Commonwealth level, the *Recycling and Waste Reduction Act 2020* (Cth) (**RWR Act**) commenced operation in December 2020. The RWR Act aims bans the export of certain untreated and unprocessed wastes from being sent offshore, thereby increasing the capacity of our local waste industry to process waste into new products.

Export waste ban of 'regulated waste'

The RWR Act regulates the export of 'regulated waste materials'. Waste glass, mixed plastics and whole used tyres were declared to be 'regulated waste materials' in 2021. Single resin or polymer plastics became 'regulated waste materials from 1 July 2022 and mixed and unsorted paper and cardboard will become regulated waste materials on 1 July 2024.

Specific rules are made for each 'regulated waste' under the RWR Act which set out the export controls for that waste material. The rules may require, for example, that only waste materials that meet certain specifications can be exported, that a person must hold an export licence for the material, that the exporter must be a 'fit and proper person' and/or that the exporter provides an 'export declaration' within a specified period before export.

For example, glass is only be able to be exported by a person who holds an expert licence if the glass meets a particular specification under which it must have been processed into cullet or fines of a particular standard with minimal levels of contamination.

Exemptions to the export ban may be granted by the Minister upon application in writing.

The RWR Act is enforced through a regime of civil and criminal penalties applied if 'regulated waste material' is exported in contravention of the RWR Act, or licence conditions are breached, or false or misleading claims are made about exported waste material. For an individual, the maximum penalty is imprisonment for five years or a fine of $133,000. For a company, the maximum penalty is a fine of $666,000.

Bans of single use plastics in Australia

Most states and the ACT are rolling out bans of various single use plastic items.

Unfortunately, each jurisdiction is taking its own approach, banning different items over different time frames. At attempt at co-ordination was made at an Environment Minister's Meeting in 2021, where eight 'problematic and unnecessary' plastic products were identified for national phase out by 2025. By this stage, however, most jurisdictions had already announced their phase-out plans and only one of these plastics - lightweight shopping bags – has been banned nationwide. The other seven plastic products are currently subject to actual or announced bans in only one or some of the jurisdictions across Australia.

It was further resolved at the Environment Minister's Meeting on 21 October 2022 to develop nationally harmonised definitions to support the ongoing phasing out of single use plastics and also to reform the regulation of packaging by 2025.

The following table compares the currently adopted positions in all states and territories in relation to the eight 'problematic and unnecessary' plastics as well as some other plastics regulated in some jurisdictions.

2023 Comparison of single use 'problem plastic' bans across Australia

Single use plastic item	National Waste Policy Action Plan	SA	ACT	WA	QLD	NSW	Victoria	NT	TAS
Straws	By 2025	Banned March 2021	Banned July 2021	Banned July 2022	Banned September 2021	Banned November 2022	Banned February 2023	N/A	N/A
Stirrers	By 2025	Banned March 2021	Banned July 2021	Banned July 2022	Banned September 2021	Banned November 2022	Banned February 2023	N/A	N/A
Cutlery	By 2025	Banned March 2021	Banned July 2021	Banned July 2022	Banned September 2021	Banned November 2022	Banned February 2023	N/A	N/A
Plastic bowls and plates	By 2025	N/A	N/A	Banned July 2021	Banned September 2021	Banned November 2022	Banned February 2023	N/A	N/A
Plastic cups	By 2025	N/A	N/A	Banned 2021	N/A	Review 2024	N/A	N/A	N/A
Coffee cups / lids	N/A	N/A	N/A	July 2023	N/A	N/A	N/A	N/A	N/A
Expanded polystyrene food containers	By 2025	Banned March 2022	Banned July 2021	Banned July 2022	Banned September 2021	Banned November 2022	Banned February 2023	N/A	N/A
Expanded polystyrene cups	By 2025	Banned March 2022	Banned July 2021	July 2023	Banned September 2021	N/A	Banned February 2023	N/A	N/A
Cotton buds	N/A	N/A	N/A	July 2023	September 2023	Banned November 2022	Banned February 2023	N/A	N/A
Microbeads	By 2025	N/A	July 2023	July 2023	September 2023	Banned November 2022	N/A	N/A	N/A
Oxo-degradable plastics	By 2025	Banned March 2022	Banned July 2021	Banned July 2022	September 2024	Review 2024	N/A	N/A	N/A
Fruit stickers	N/A	N/A	N/A	N/A	N/A	Review 2024	N/A	N/A	N/A
'Lighter-than-air' balloon releases	N/A	N/A	N/A	Banned July 2022	September 2023	N/A	Banned 2021	N/A	N/A
Lightweight plastic bags	By 2025	Banned 2009	Banned 2010	Banned July 2022	Banned July 2018	Banned 1 June 2022	Banned November 2019	Banned 2011	Banned 2013
Heavy weight plastic shopping bags	N/A	N/A	N/A	N/A	September 2023	N/A	N/A	N/A	N/A

Key

Currently banned	To be banned 2023	To be banned 2024

Tighter controls in NSW on development of 'Energy recovery facilities'

Three changes have been made over the past two years that have made it harder to develop an energy from waste facility in NSW.

Prior to the changes, it was already difficult to develop an energy from waste facility in NSW. All such facilities were required to comply with the NSW EPA's Energy from Waste Policy Statement. This Policy Statement contained strict technical criteria regarding plant design and operation and emissions and thermal efficiency. Any waste used as a fuel in an energy from waste facility must also have either been source separated or processed to ensure that only waste materials that are unsuitable for a higher order use are used as a fuel.

Revised NSW EPA Energy from Waste Policy Statement

The first of the three changes was made in June 2021, when the NSW EPA released a revised Energy from Waste Policy Statement. The revised Policy Statement tightened the controls around air quality for thermal waste treatment and air emissions standards, some of which now exceed world best practice. The waste industry has expressed concern that it will be technically very difficult to construct and operate a facility that meets these new standards.

'Energy recovery facilities' to be designated development

The second of the three changes was included in the *Environmental Planning and Assessment Regulation 2021* (**Regulation**) that commenced on 1 March 2022. Under the Regulation, 'energy recovery facilities' are now categorised as 'designated development'. 'Energy recovery facilities' are also now defined as a building or a place that receives waste from on site or off site and that recovers energy from waste.

Development for the purposes of an 'energy recovery facility' will be designated development if the facility:

- processes more than 200 tonnes per year of waste, other than hazardous waste, restricted solid waste, liquid waste or special waste; or
- has on site at any time more than 200 kilograms of hazardous waste, restricted solid waste, liquid waste or special waste.

The processing of contaminated soil, container reconditioning, and the recovery of gases classified in Class 2 under the ADG Code will not be designated development.

Interestingly, although the Regulatory Impact Statement for the Regulation stated that energy recovery from waste facilities will only be designated development where they also require an EPL, only

those facilities that receive general waste from offsite (not on-site) are required to hold an EPL as 'energy recovery facilities' – whereas facilities that receive such waste from both on site and off site sources are now designated development (the trigger for the need to hold an EPL for facilities that recover energy from hazardous waste, restricted solid waste, liquid waste or special waste is the storage of a specified amount of waste so the source is not relevant).

Further, under the Regulation and the *State Environmental Planning Policy (Precincts - Regional) 2021*, development for the purposes of 'thermal electricity generating works' are not designated development within the Regional Enterprise Zone. 'Thermal electricity generating works' are defined under that SEPP to mean 'electricity generating works that process waste (other than hazardous waste, restricted solid waste, liquid waste or special waste) by thermal treatment for the purposes of generating electricity'.

As a result, facilities that generate energy from waste and that:

- process more than 200 tpa of general waste from offsite will be designated development (unless in a Regional Enterprise Zone) and need an EPL;
- process more than 200 tpa of general waste from onsite will be designated development (unless in a Regional Enterprise Zone) but will not need an EPL; or
- have on site more than 200 kg of hazardous waste, restricted solid waste, liquid waste or special waste (regardless of the source of the material and location of the facility) will be designated development and will need an EPL.

NSW now also has four different definitions for the same type of facilities under different pieces of planning and environmental law and policy:

- **Energy recovery facility** under the *Protection of the Environment Operations Act 1997*.
- **Energy recovery facility** under the *Environmental Planning and Assessment Regulation 2021* – with a different definition to that adopted under the Protection of the Environment Operations Act 1997.
- **Thermal electricity generating works** under the *State Environmental Planning Policy (Precincts - Regional) 2021*.
- **Energy from waste** as defined in the NSW EPA's Energy from Waste Policy Statement.

Energy from waste facilities to be effectively banned in most of NSW

The *Protection of the Environment Operations (General) Amendment (Thermal Energy from Waste) Regulation 2022* came into force on 8 July 2022, which had the effect of prohibiting (and criminalising) the development of energy from waste facilities in NSW except under some limited circumstances.

Energy from waste facilities will now only be permitted:

- in four specified precincts, being:
  - in the West Lithgow Precinct (which included ReGroup/Energy Australia's Mount Piper Project, but this project has now been withdrawn);
  - in the Parks Special Activation Precinct;
  - in the Richmond Valley Regional Jobs Precinct (which does not include Cape Byron Power's Condong Plant);
  - in the Southern Goulburn Mulwaree Precinct (which includes Veolia's Woodlawn Advanced Energy Recovery Centre but not Jerrara Power's proposed – but now withdrawn - Energy from Waste facility at Bungonia);
- other precincts to be specified by the EPA in the future;
- at facilities lawfully thermally treating waste at the time the Regulation was made; and
- at a facility that uses waste, or waste-derived feedstock to replace less environmentally sound fuels (which do not include natural gas) to generate energy at the site, and where that energy is used to power industrial and manufacturing processes on-site.

Disappointingly, while the public exhibition of a draft regulation generated many submissions that made sensible recommendations as to how the draft regulation could be amended to ensure that the environmental impacts of energy from waste facilities would be appropriately managed, while permitting them to proceed under appropriate circumstances, no changes of any real importance were made to the draft regulation.

It is now accordingly expected that the only new energy from waste facilities that will be developed in NSW will be Veolia's proposed facility at Woodlawn and a new facility or facilities in the Parks Activation Precinct.

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Tightening the Net: Increased Director Liability for Environmental Crimes in NSW

Snapshot

The *Environment Legislation Amendment Act 2022* (NSW) (the ***Amendment Act***) commenced on 4 March 2022, and imposes additional criminal and civil liability on directors and managers of companies for breaches of environmental laws. Key changes introduced by the Amendment Act include:

- directors and managers who benefit financially from any conduct of the company that breaches the *Protection of the Environment Operations Act 1997* (the ***POEO Act***), the *Contaminated Land Management Act 1997* (NSW), the *Pesticides Act 1999* (NSW) or the *Radiation Control Act 1990* (NSW) will be guilty of an offence;
- directors and managers could be exposed to criminal prosecution or civil proceedings to recover the amount of the monetary benefit and may be liable even if they had no knowledge of or ability to control or influence the offending conduct; and
- a monetary benefits order can now be made against related companies, which limits the ability of a corporate group to rely on its corporate structure to avoid criminal liability or minimise financial penalty exposure; and
- additional offences under the POEO Act now attract potential gaol time.

Criminal liability of directors and managers prior to the Amendment Act

Prior to the introduction of the Amendment Act, the circumstances in which a director or manager could be personally criminally liable if a company breached the POEO Act included:

- where a company committed an offence that attracts *special executive liability* (eg water pollution, air pollution, land pollution or breach of a condition of an Environment Protection Licence (***EPL***)), unless the director or manager could satisfy the court that they were either not in a position to influence the conduct of the corporation in relation to its contravention or they used all due diligence to prevent the contravention;
- where a company contravened a provision that attracts *executive liability* (eg failure to comply with a clean-up or prevention notice, emission of offensive odours or noise pollution), and the director or manager was in a position to influence the conduct of the corporation in relation to the contravention and knew, or ought reasonably to have known, that the offence was being committed and failed to take all reasonable steps to prevent this; and
- any other cases where a corporation committed an offence, and the director or manager was in a position to influence the conduct of the corporation and was an accessory to the offence.

A director or manager could be prosecuted under any of these existing provisions even if the company was not prosecuted or convicted.

Criminal liability for directors and managers who receive monetary benefits

The Amendment Act has not altered any of the above circumstances in which a director or manager may be liable for an offence under the POEO Act. However, the Amendment Act has introduced a new offence into the POEO Act for any director, manager or related body corporate (or director or manager of the related body corporate) who receives, acquires or accrues a monetary benefit as a result of an offence committed by a company. Equivalent provisions have also been inserted into the *Contaminated Land Management Act 1997* (NSW), the *Pesticides Act 1999* (NSW) and the *Radiation Control Act 1990* (NSW).

'Monetary benefits' is defined as 'monetary, financial or economic benefits'. The following circumstances could potentially constitute the receipt of a monetary benefit:

- a company earning increased profits, or a company delaying or avoiding expenditure, as a result of the commission of an offence, where the director or manager's remuneration is linked to the company's financial performance;
- a director or manager receiving a dividend that a company was in a position to make because it committed an offence; or
- a director or manager receiving an incentive payment that is in some way connected to the commission of the offence.

Unlike under the pre-existing executive liability provisions, a director or manager who receives a monetary benefit as a result of an offence will be criminally liable even if they had no knowledge of the offending conduct, no capacity to control or influence the offending conduct, or took reasonable steps to prevent the commission of the offence.

Further, the regulator is not required to prove:

- the value of the monetary benefit earned (or that the amount was significant); or
- that the defendant was motivated by the potential for financial gain.

An individual or related company can only be prosecuted under the new monetary benefits provisions if the company itself has been successfully prosecuted. However, the regulator will have 12 months from the date on which a court finds the underlying offence proved in which to commence proceedings against the individual or related company.

Recovery of monetary benefits

Following the commencement of the Amendment Act, if a court convicts a corporation of an offence against the POEO Act, the *Contaminated Land Management Act 1997* (NSW), the *Pesticides Act 1999* (NSW) or the *Radiation Control Act 1990* (NSW) the regulator can seek a monetary benefits order from the court.

A monetary benefits order can require a director, a manager, a related body corporate or a director or manager of a related body corporate to pay an amount representing the amount of monetary benefit received, acquired or accrued by that person as a result of that offence.

A monetary benefits order can be made against someone even if they are not convicted of an offence. The regulator would only be required to prove, on the balance of probabilities, the actual amount of monetary benefit earned and that this monetary benefit was earned as a result of the commission of the offence.

The fact that an order can be made against a related body corporate means that a corporate group cannot rely on its corporate structure to avoid a monetary benefits penalty.

Importantly, these new provisions do not apply to offences committed under the *Environmental Planning and Assessment Act 1979 (NSW)* (***EP&A Act***). The Land and Environment Court already has the power to impose a monetary benefits penalty when sentencing a company or individual for an offence against the EP&A Act. However, a director or manager of a company that breaches the EP&A Act is not exposed to additional civil or criminal liability simply for earning a monetary benefit from an offence.

Additional offences that attract gaol time

There are a number of offences under the POEO Act that currently attract gaol time if committed by individuals. These include offences designated as 'tier 1 offences' (which attract a maximum penalty of seven years' imprisonment if committed wilfully or four years if committed negligently); knowingly supplying false or misleading information about waste (maximum 18 months' imprisonment); and repeat waste offences (maximum two years' imprisonment).

The following additional offences under the POEO Act will now also attract potential gaol time:

- knowingly making a false or misleading statement in a report required under a Clean Up Notice or Prevention Notice (maximum 18 months' imprisonment);
- knowingly giving false or misleading information to the EPA (maximum 18 months' imprisonment). This would extend to any consultant who provides information to the EPA on behalf of a company;
- knowingly providing false or misleading information to an auditor or knowingly failing to providing materially relevant information to an environmental auditor (maximum 18 months' imprisonment). An environmental auditor who knowingly includes false or misleading information in an audit report prepared under the POEO Act, or knowingly fails to include materially relevant information, will also be exposed to a maximum penalty of 18 months' imprisonment; and
- failing, without lawful excuse, to comply with a requirement of a notice to furnish information and records or a notice to attend an interview and answer questions (maximum penalty 18 months' imprisonment).

Other amendments

Other notable amendments introduced by the Amendment Act include:

- if a company fails to comply with a Clean Up Notice or Prevention Notice issued by the EPA, the EPA can issue a supplementary notice to one or more current or former directors or managers of the company, or to a related body corporate. This supplementary notice can require the recipient to take additional actions to those already required by the original notice;
- the EPA now has the power to impose restrictive covenants or public positive covenants on land for the purposes of enforcing the conditions of an EPL or the conditions of the surrender of an EPL;
- if a vehicle is used to transport waste to a place that cannot lawfully be used as a waste facility, the owner of the vehicle will be guilty of an offence (in addition to the operator of the vehicle and the owner of the waste). This could have significant implications for businesses that own fleets of waste transport vehicles; and
- when the EPA is considering whether a company is a fit and proper person to hold an EPL, it can now also consider the compliance history of any current or former directors of the corporation.

RYAN COFFEY
Martin Place Chambers

Prosecutorial Duty of Disclosure in the Land and Environment Court

A short refresher on the prosecutorial duty of disclosure in Class 5, 6 and 7 proceedings in Land and Environment Court – what is expected, whether disclosure is restricted to the statutory case management regime and what can be done to overcome non-compliance.

The prosecutorial duty of disclosure is an area of criminal proceedings that attracts significant attention. In 2022, there are 3 reported decisions of the Land and Environment Court which consider the prosecutorial duty of disclosure.

Prosecutorial disclosure in Class 5, 6 and 7 proceedings is generally managed in accordance with case management provisions of the *Criminal Procedure Act 1986* (**CPA**). However, as set out below, disclosure obligations should not be understood as being limited to what is required pursuant to Court orders. A defendant has an independent right, provided by the Common law, to compel disclosure. A remedy for non-compliance is a Stay of proceedings.

It is appropriate to look at various principles identified from the authorities which have considered the nature and scope of the duty.

Prosecutor's duty of disclosure

A duty is imposed on a prosecutor to disclose material to an accused or defendant, which, *first*, is or might be relevant to an issue in the case; *secondly*, raises a new issue, the existence of which is not apparent from the prosecution case; or, *thirdly*, holds out a real prospect of providing a lead on evidence in the first two categories.

The duty arises independently of statute.

The obligation of the prosecutor to disclose is emphasised in numerous cases including *Boucher v The Queen* where Rand J said at [26] that the Prosecutor has 'a duty to see that all available legal proof of the facts is presented ....

The prosecutor's duty to disclose should be honoured without the need for prompting by the defence. Further, the defence should not be required to 'fossick for information' of the kind it should receive from the prosecutor.

The prosecutor may not supress evidence in its possession or available to it, material to the contested issues in the trial and must ordinarily provide such evidence to the defence. Further, it is clear from the dicta in *Grey* that the prosecutor is not absolved from discharging its duty of disclosure by the circumstances that the matter could be explored by the accused in cross-examination.

The prosecutor has a duty to disclose material in its possession, or available to it, that is relevant or possibly relevant to the contested issues in the case. The duty to disclose also covers material which raises a new issue or has a real prospect of doing so. The duty covers material that might assist the defence, and it does not need to be admissible.

The duty of disclosure extends to material held either by the Prosecutor or by the investigating agency. Documents or knowledge held by the investigating agency is imputed to the prosecutor.

The obligation requires the prosecutor to take a 'broad view of relevance'. Hodgson JA said in *Reardon* at [58]:

> It was accepted for the Crown that there is no onus on the defence to demonstrate a forensic purpose in relation to material said to be subject to the Crown's duty of disclosure. This is clearly correct: the defence is simply not in a position to know what this material is. It seems to me that **the correct view is that a decision by the Crown concerning what to disclose should take a broad view of relevance and of what are the issues in the case.** The Crown has all the material available to it, and one basis of the rule about disclosure is that it is to ameliorate the inequality of resources as between the Crown and the accused. In those circumstances, it would seem inappropriate for the prosecution authorities to take a narrow view as to what the defence might be or as to what might prove useful to the defence, as to what might open up useful lines of enquiry to the defence….
>
> (emphasis added)

In *Gould v Director of Public Prosecutions (Cth),* which followed *Reardon*, Basten JA (Johnson and Adamson JJ agreeing) said at [65]:

> [T]he duty of disclosure extends to material which might open up useful lines of inquiry to the defence, without any narrow view being taken of what might be relevant.

In *Bradley* at [49], Adamson J considered the application of the prosecutor's duty of disclosure in summary offences compared with indictable offences. This case related to proceedings in the Local Court where the prosecutor was a police prosecutor.

> **There is scant basis in the authorities to distinguish between the duty of disclosure for summary offences and that applicable to indictable offences**. In *R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145, Ormiston JA (Tadgell and Charles JJA agreeing) at [67] found it necessary to decide only that, in a trial on indictment, there is a duty to disclose prior relevant convictions of a prosecution witness. The extent of disclosure in summary proceedings did not arise. His Honour referred to *Wilson v Police* [1992] 2 NZLR 533; [1991] NZCA 179 in which the New Zealand Court of Appeal (Cooke P, Casey and Hardie Boys JJ) found that there may be a distinction and considered that prior relevant convictions of prosecution witnesses ought be provided as a matter of course in trials on indictment and, if requested, for summary offences.
>
> (emphasis added)

It is a fundamental principle of criminal procedure that an accused is entitled to a fair trial. A Court has the power to control and supervise its proceedings to prevent an injustice. Further, the prosecution must act with fairness and detachment in exercising its public prosecutorial functions. An ‹inseparable part› of an accused›s right to a fair trial is the accused›s right to fair disclosure.

In *Bradley* at [68] Adamson J considered and rejected the argument advanced by the prosecutor that because the hearing could be conducted without the material, there was no obligation on the prosecutor to disclose such material. Her Honour said:

> … [T]his proposition finds no support in the authorities. The magistrate's finding that the accused could have a "fair" hearing without access to such documents was legally unreasonable (in the sense referred to in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [76] (Hayne, Kiefel and Bell JJ)) and was based on the erroneous premise engendered by the Prosecutor, which reflected the flawed approach taken by NSW Police to its duty of disclosure in the present case.

With respect to the statutory provisions associated with case management of summary criminal proceedings in higher court and the associated statutory obligations of prosecutorial disclosure, it is appropriate to consider Part 5 of Chapter 4 of the CP Act.

Practice and procedure for summary criminal proceedings in higher courts, such as the Land and Environment Court, is governed by Part 5 of Chapter 4 of the CP.

Case management of criminal matters in class 5 of the Land and Environment Court's jurisdiction is governed by Division 2A (ss 247A-247Y) of Part 5 of the CP Act: section 247A of the CP Act. Relevantly, Division 2A is entitled: 'Case management provisions and other provisions to reduce delays in proceedings'.

The purpose of Division 2A is stated in s 247B:

247B Purpose

(1) The purpose of this Division is to reduce delays in proceedings before the court in its summary jurisdiction by:

(a) requiring certain preliminary disclosures to be made by the prosecution and the defence before the proceedings are heard, and

(b) enabling the court to undertake case management where suitable in those proceedings, whether on its own motion or on application by a party to the proceedings.

(2) Case management measures that are available to the court under this Division include the ordering of preliminary hearings, preliminary conferences and further preliminary disclosure. The court has a discretion in determining which (if any) of those measures are suitable in the proceedings concerned.

In *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121, Biscoe J closely considered the operation of Division 2A. At [5]-[7] His Honour said:

> [5] The purpose and aims of Division 2A inform understanding of how its provisions should be interpreted and applied. An aim of Division 2A, in my view, is to narrow the issues to those that are genuinely in dispute. I think that is clear but, if it is not, then reference may be made to the Attorney General's Agreement in Principle speech when introducing the *Criminal Procedure Amendment (Summary Proceedings Case Management) Bill 2011* incorporating Division 2A, which confirms that that is so (emphasis added):
>
> > Used properly, the provisions of this Bill provide an opportunity to reduce hardship to parties and to witnesses, to prevent unnecessary costs and to allow parties and the court to spend their time and money on what really matters - that is, on those ***issues that are genuinely in dispute***. The bill represents the Government's commitment to a form of justice in which the *real issues in dispute* are determined without undue delay or expense.
>
> [6] To a large extent, the purpose and aims of Division 2A are comparable with the overriding purpose of civil procedure to "facilitate the just, quick and cheap resolution of the real

> issues in the proceedings": s 56 Civil Procedure Act 2005. **There is, however, the important difference that the starting point with our system of criminal justice is that it is accusatorial. The underlying principle of the accusatorial system "is that it is for the prosecution to put its case both fully and fairly before the jury, before the accused is called on to announce the course that will be followed at trial"**: R v Soma [2003] HCA 13, (2003) 212 CLR 299 at [27] per Gleeson CJ, Gummow, Kirby and Hayne JJ. This accusatorial characterisation of our system of criminal justice explains the accused's right to silence. Absent a clear legislative statement that the accusatorial system is to be abrogated, a statutory power should be read as not authorising steps to compel an accused to provide information for the purposes of the proceedings: NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCCA 252, (2008) 72 NSWLR 456 at [148]- [151], [159] per Spigelman CJ (Hidden and Latham JJ agreeing). Division 2A abrogates the defendant's right to silence to a substantial extent under ss 247F, 247K, 247O and 247V (discussed below). For example, the defendant is required under s 247K to state its objections to the prosecutor's proposed evidence and to serve a copy of any report of an expert witness whom the defendant proposes to call at the hearing.
>
> [6] Division 2A contains a prescriptive disclosure regime. It contemplates two rounds of discretionary disclosure orders, which in this case the Court made by consent, for disclosure of prescribed matters by notices between the parties:
> …
>
> (emphasis added)

Although his Honour says at [6] that "*Division 2A contains a prescriptive disclosure regime*", the use of the word "prescriptive" should not be interpreted as being exhaustive. Put differently, there is no statutory language within Division 2A that expressly, or could by necessary implication, constrain disclosure by a prosecutor to those occasions identified. With respect, to do so would offend the principle of legality.

In *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15 a plurality of the High Court noted the following:

> [437] The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights. (citations omitted)

The removal, abrogation or reduction of the rights of accused was considered by High Court in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39 (**Lee**) where Gageler and Keane JJ said at [324]:

> The notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle …"

The above passage was cited with approval by Bathurst CJ in *Hayward (a pseudonym) v R* (2018) 97 NSWLR 852; [2018] NSWCCA 104 at [68].

Further, in *Lee* at [126], Crennan J observed that:

> In some cases, a legislative object may involve a public interest which cannot be pursued without some impairment of some private right or immunity. An underlying legislative object is not necessarily to be achieved at any cost, but commonly by striking a balance between competing interests.

The argument that a prosecutor's duty of disclosure is reduced by operation of Division 2A is has been the subject of consideration in *M & S Investments (NSW) Pty Ltd v Carbone* [2022] NSWLEC 24. Her Honour Justice Duggan considered a Notice of Motion filed by a private prosecutor to strike out a Notice to Produce issued by a defendant on the basis that disclosure had not been ordered pursuant to section 247E, the Notice to Produce was an abuse of process and whether the documents sought could be relevant at the stage of the proceedings. In dismissing the Notice of Motion, Her Honour held at [10]-[11]:

> [10] The question is not whether or not the Defendant is seeking disclosure pursuant to s 247E, as no such application is made. The real question is whether it is appropriate now to require the Prosecutor to produce material that would otherwise require production if and when a s 247E disclosure order is made.
>
> [11] In the circumstances, notwithstanding the exercise of the discretion of his Honour not to make a s247 E disclosure, I consider that it is not a barrier to a Defendant seeking production of a material in the absence of a s 247E disclosure order. Therefore, it is not an abuse of process merely on the basis that Moore J had declined to make the required s 247E direction. It is not, accordingly, an abuse of process which would warrant the Notice to Produce being struck out.

This position is consistent with *Kinghorn* at [141]-[142] where the NSW Court of Criminal Appeal held that a Court may make orders to enforce compliance with pre-trial disclosure provisions of the CPA, which to a significant degree are co-extensive with the duty of disclosure.

Remedy for when breach of the duty is alleged

The prosecutor's duty of disclosure is not enforceable directly. Therefore, a defendant is not entitled to an order requiring the prosecution to produce particular documents covered by the duty or to an order for stay of the proceedings pending provision of particular documents. However, the basis for the Court's jurisdiction to order a stay is its jurisdiction to prevent an unfair trial.

The Court is empowered to grant a stay until the duty is compiled with if the substantive hearing, absent production of the documents, would likely be unfair or there is a tangible risk that it would be unfair.

Where a defendant alleges that disclosure is inadequate, they may request that a subpoena or notice to produce be issued to obtain the documents said to fall within the ambit of the duty.

Implications for practitioners in legal proceedings in the Land and Environment Court?

Practitioners acting for a client exercising the functions of a prosecutor must be cognisant that the duty of disclosure is ongoing until the proceedings are finalised, either by way of a withdrawal, acquittal, or the imposition of a sentence.

Further, it is important to take heed of the imputed knowledge on the prosecutor of what is known by an investigator and how this may impact on forensic decisions and the requirement to disclosure material.

With respect to practitioners acting for defendants, careful consideration should be given to whether additional disclosure requests should be made at particular points in time of the proceedings and what remedy might be sought for any possible non compliance.

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i. Arcadia Investment Holdings Pty Ltd v Environment Protection Authority [2022] NSWLEC 2; M & S Investments (NSW) Pty Ltd v Carbone [2022] NSWLEC 24; Secretary, Department of Planning and Environment v Namoi Valley Farms Pty Ltd [2022] NSWLEC 55

ii. Gould v Director of Public Prosecutions (Cth) (2018) 273 A Crim R 91; [2018] NSWCCA 109 at [60]-[62].

iii. R v Reardon (No 2) (2004) 60 NSWLR 454; [2004] NSWCCA 197at [46]-[54] (Hodgson JA), which was approved in R v Spiteri (2004) 61 NSWLR 369; [2004] NSWCCA 321; Bradley v Senior Constable Chilby [2020] NSWSC 145 at [46].

iv. Mallard v R [2005] HCA 68; (2005) 224 CLR 125 at [17] per Gummow, Hayne, Callinan and Heydon JJ; Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth) (2020) 102 NSWLR at [124].

v. [1955] S.C.R. 16.

vi. Grey v The Queen (2001) 75 ALJR 1708; [2001] HCA 65; Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68 (Mallard) at [16]-[17] per Gummow, Hayne, Callinan and Heydon JJ.

vii. Grey v The Queen [2001] HCA 65; (2001) 184 ALR 593 at [23] per Gleeson CJ, Gummow and Callinan JJ.

viii. Mallard v R [2005] HCA 68; (2005) 224 CLR 125 at [81] per Kirby J.

ix. Bradley v Senior Constable Chilby [2020] NSWSC 145 at [74].

x. R v Reardon (No 2) (2004) 60 NSWLR 454; [2004] NSWCCA 197 (Reardon (No 2)) per Hodsgon J at [46]-[48]; Mallard per Gummow, Hayne Callinan and Heydon JJ at [17] and per Kirby J at [77] and [81].

xi. R v Mockbel (Ruling No 1) [2005] VSC 410

xii. Above ii at [15]; R v Lipton (2011) 82 NSWLR 123; [2011] NSWCCA 247 per McColl JA at [119] citing Mallard.

xiii. R v Farquharson (2009) 26 VR 410; [2009] VSCA 307 at [212].

xiv. [2018] NSWCCA 109; (2018) 359 ALR 142.

xv. Jago v District Court of New South Wales (1989) 168 CLR 23.

xvi. ibid at 25 per Mason CJ.

xvii. Whitehorn v The Queen (1988) 152 CLR at 663-664 per Deane J.

xviii. R v Brown (Winston) [1994] 1 WLR 1599 at 1606 per Steyn LJ (cited in WA v Christie [2005] WASC 214; (2005) 30 WAR 514 at 517 per McKenchie J).

xix. Supreme Court and Work, Health & Safety matters in the District Court.

xx. Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15.

xxi. Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth) (2020) 102 NSWLR at [124].

xxii. Above ii at [60]-[62].

xxiii. Ibid at [63]-[64]. R v Lipton (2011) 82 NSWLR 123; [2011] NSWCCA 247 at [120] (McColl JA, R S Hulme and Hislop JJ agreeing)

xxiv. Dietrich v R (1992) 177 CLR 292 at 311 (Mason CJ and McHugh); [1992] HCA 57; Bradley v Senior Constable Chilby [2020] NSWSC 145 at [51].

xxv. Re K [2002] NSWCCA 374 at [9]–[10] (Beazley JA, Sully and Simpson JJ) ; Bradley v Senior Constable Chilby [2020] NSWSC 145 at [51].

xxvi. Above xxii at [14],[18]-[19]; Above ix at [52].

JANET MCKELVEY
EPLA Vice President/Treasurer

EPLA Meets Commissioner O'Neill

Commissioner Susan O'Neill is well known to all who practice is in the Land and Environment Court. Janet McKelvey, barrister at Martin Place Chambers and member of the EPLA committee, had the opportunity to interview the Commissioner about her role and to find out a little more about her personally.

COMMISSIONER O'Neill was appointed as a Commissioner of the Land and Environment Court in January 2012. The Commissioner was re-appointed in January 2019. Prior to her appointment, the Commissioner worked as an architect and heritage consultant. She holds Bachelor degrees in science and architecture, Masters degrees in environmental law, urban and regional planning, architecture, and heritage and conservation. She recently completed a Juris Doctor at the University of Sydney and is an accredited mediator.

Why did you want to become a Commissioner?

I found statutory planning interesting. I'm now curious about how we can improve strategic planning with more comprehensive and nuanced masterplanning to achieve better urban and environmental outcomes.

Where did you grow up?

Upper North Shore of Sydney.

Where was your last holiday?

A Byron Bay long weekend with my mum to celebrate her 83rd birthday, the weekend before the recent lockdown. We were so very fortunate with timing.

What was your first job?

Graduate architect at the Government Architect's Office.

Do you speak any other languages?

I was an exchange student in Aachen, Germany, so a little Deutsch.

What is your favourite food?

If I had to choose a cuisine, it would be Greek, preferably on a Greek Island during summer.

Are you a dog or a cat person?

Toto would not forgive me if I said I was a cat person. I prefer dogs for their loyalty and their home-coming greeting.

What is your favourite sport to watch or play?

I love to go to the Australian Open and sometimes I watch the Tour de France. I swim, ride a road bike and ski. I don't think my performance in any of those activities would qualify as sport.

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

Marion Mahoney Griffin, Zaha Hadid & Eileen Gray – I wonder if they'd all get on? Or I'd avoid the cooking and lunch in a Hydra taverna with Charmian Clift.

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

A funambulist. At primary school I practiced on a balance beam and a narrow stone wall.

When you were 15, who was your favourite band?

ABBA (sorry).

What was the first concert you ever went to?

I'm not sure what the first one was, maybe Simon and Garfunkel a very, very long time ago.

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

The Beatles box set.

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

Visiting World Heritage sites.

What are your top 3 favourite books?

It's impossible to keep to 3 books.

Favourite books from my childhood are Uhu by Annette Macarthur-Onslow (I always hoped for a different outcome for poor Uhu), The Happy Prince by Oscar Wilde (ditto for the swallow) and Storm Boy by Colin Thiele. My favourite children's books are Careful with that Ball, Eugene by Tohby Riddle and My Place by Nadia Wheatley.

Architectural favourites are Death and Life of Great American Cities by Jane Jacobs, Living and Partly Living by McKay/Boyd/Stretton/Mant and Brunelleschi's Dome by Ross King.

All-time favourites are Life after Life by Kate Atkinson, The Surgeon of Crowthorne by Simon Winchester, The Yield by Tara June Winch, The Boys in the Boat by Daniel James Brown, Athenais by Lisa Hilton, In My Skin: A Memoir by Kate Holden, Burial Rites by Hannah Kent, Victoria by Julia Baird, Boy Swallows Universe by Trent Dalton, and classics, Jane Eyre by Charlotte Bronte and To Kill a Mockingbird by Harper Lee. I found Just Mercy by Bryan Stevenson shocking and memorable.

Recent books I've enjoyed are Killing Sydney: The Fight for a City's Soul by Elizabeth Farrelly, Toxic by Richard Flanagan (damn, I can't eat Tassie-farmed salmon anymore), Car Crash by Lech Blaine and The Happiest Man on Earth by Eddie Jaku (Eddie, your story goes with me).

Three of my favourite Australian authors are Geraldine Brooks, Georgia Blain and Charlotte Wood.

What are your top 3 favourite movies?

The Lives of Others (2006) by Florian Henckel von Donnersmarck. His feature film debut. As he was too inexperienced to be invited to direct a film, he wrote and directed his own.

Mon Oncle by Jacques Tati (1958), the star is the modernist house.

2001: A Space Odyssey by Stanley Kubrick (1968) "open the Pod bay doors, Hal... I'm sorry Dave, I'm afraid I can't do that".

In the Name of the Father (1993) by Jim Sheridan; Daniel Day-Lewis should have won the Oscar instead of Tom Hanks.

Holding the Man (2015) by Neil Armfield (and the book by Timothy Conigrave).

What is your hidden talent?

I asked an old school friend and she reminded me one my lesser known skills is ear piercing.

In one word, how would your friends describe you?

I asked the same friend and she said dependable.

Now for some bonus lockdown questions:

What have you been watching?

I have binged The Americans (Foxtel/Binge), Ozark (Netflix) and Maid (Netflix).

Have you had any technology related bloopers during Court matters?

There has been the odd microphone inadvertently left on. Some others should not be printed!

And the practical question to end on:

What are your three top tips for practitioners appearing before you?

No dodgy architectural plans. Plans properly dimensioned and consistent. Plans printed to scale. Bonus points for good design. I think most practitioners know that by now.

Commissioner Susan O'Neill

ROSLYN McCULLOCH
EPLA representative on the Duty Lawyer Scheme Committee

The Duty Lawyer Scheme – *Update 2022*

The Duty Lawyer Scheme has been operating in the Land and Environment Court since April 2018.

The scheme is the result of a collaboration between the EPLA, the EDO, NSW Law Society Young Lawyers Environment and Planning Committee, Macquarie University Law School and practitioners from the Court Users Group.

THE SCHEME is aimed at assisting self-represented litigants who are respondents in Classes 4 (except judicial review), 5, 6 and 7 of the Court's jurisdiction.

Originally the scheme operated with a duty solicitor present on Level 4 of the Court each Friday to assist self-represented litigants who attended in person or were contacted via telephone. Following the onset of the pandemic the scheme transferred to a fully telephone based system and remained that way throughout 2021.

In 2021 and 2022 the scheme benefitted greatly by more than 20 very experienced solicitors and barristers volunteering their time to assist the self-represented litigants. Not all of the enquiries related to the types of matters the scheme is aimed at, however the lawyers on duty generally tried to provide guidance to those litigants whose matters fell outside the parameters of the scheme. From time to time the duty lawyers even assisted self-represented litigants in tree matters who were seeking assistance beyond the scope of the "Tree Help Desk".

Since September 2022 most volunteers have attended at the Court in person to assist self-represented litigants on a Friday.

Participation in the Duty Lawyer Scheme is an interesting and rewarding experience. If you are a legal practitioner with more than 3 years' experience in the range of matters which come before the Land and Environment, and you wish to volunteer for the scheme, please contact me, Ros McCulloch at rmcculloch@pvlaw.com.au .

ROSLYN MCCULLOCH & JANET MCKELVEY
EPLA delegates to the Court Users Group

The Land and Environment Court, Court Users Group – *Update*

EPLA has two representatives on the Court Users Group (CUG) – Janet McKelvey and Roslyn McCulloch. The CUG provides a useful forum for an exchange of news, ideas, complaints and solutions concerning practice and procedure in the Land and Environment Court.

DURING the Pandemic a significant part of the Group's discussions concerned laws and procedures to adapt to the changed circumstances.

The legislative changes introduced to adjust to the brave new world of COVID in the planning sphere 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.

Some of those changes, most notably the witnessing of affidavits and other documents, have remained.

The Court faced a monumental task in trying to adapt its practice and procedure to a world where people rarely met in person.

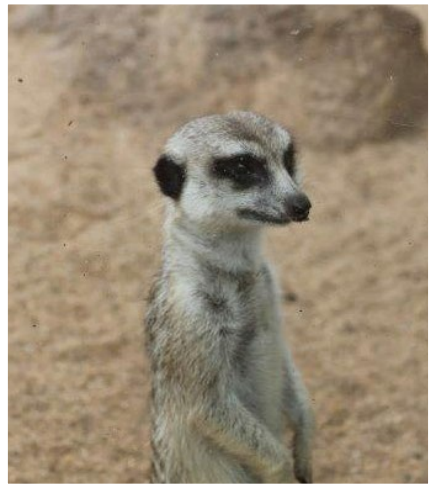
The CUG proved to be invaluable to practitioners and the Court alike as many significant changes to the way the Court operated were traversed. While, for the most part, procedural and substantive hearings are returning to face-to-face formats, the technology advances adopted during the Pandemic will allow greater flexibility for hybrids hearings to accommodate remote witnesses and the like.

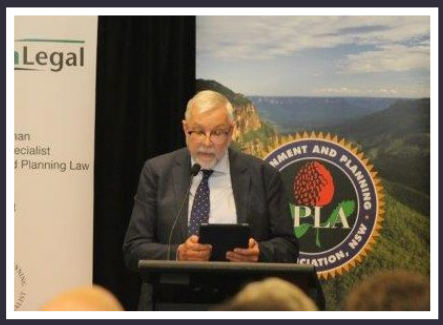
Another "*benefit*" of the Pandemic was the funding of the additional Acting Commissioners. Some easing of waiting times for hearings before Commissioners has occurred as a result.

Apart from Pandemic-related issues the Court Users Group discusses relevant legislative changes and significant cases which impact on procedural matters. The NSW Planning Portal is a regular topic of discussion and a working group of Group members and officers of the Department has been established to work through the myriad of issues which its introduction has generated.

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

epla2022 CONFERENCE

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THE ULURU STATEMENT
FROM THE HEART


CrennanLegal
Paul Crennan
Accredited Specialist
Bathurst
ZOO

JANET MCKELVEY
Managing Editor ELR

The Environmental Law Reporter – *Update*

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.

THE EDITORIAL team of the Environmental Law Reporter remains committed to producing a quality publication for use by practitioners.

We are in the process of refreshing the design of the ELR and hope to roll out the new look in early 2023. As always, any feedback in relation to the design and content of the ELR is welcome so that we can best serve subscribers. We do our best to focus on reporting decisions that have real and practical implications for our subscribers' clients (both government and private).

I would like to take this opportunity to thank the outgoing Managing Editor of the ELR, **Mark Seymour**, who has been the editor of the ELR for the past seven years. This is an extraordinary tenure in a voluntary role. Under Mark's leadership, the scope of cases that have been reported has broadened to capture those cases of interest and consequence to planning, environmental and local government law beyond those heard in the Land and Environment Court and the NSW Court of Appeal. This required a great deal of time and diligence, and Mark is to be commended for the ELR continuing to be a valuable resource for practitioners.

I would also like to thank the other editors of the ELR: **Tom White** and **David Gunter**. Tom has the unenviable task of being the Commissioning Editor. Finding willing reporters is always a challenging task but it is especially difficult when the planning and environmental law space is so busy at the moment. I am, as always, deeply indebted to the group of reporters who assist in the production of every issue. I am especially grateful for the assistance of the NSW Young Lawyers Environment and Planning Committee for offering to report and scouting and referring new reporters.

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:

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ANDREW PICKLES SC
Martin Place Chambers

The Appointment of Her Honour Justice Jayne Jagot to the High Court of Australia

EPLA congratulates the Honourable Justice Jayne Jagot on her appointment to the High Court of Australia on 17 October 2022.

HER HONOUR'S appointment to the High Court has been met with universal acclaim within the profession and the wider community. The Attorney-General, the Hon Mark Dreyfus MP KC, spoke at length at her Honour's swearing-in of the contribution her Honour has made to the Federal Court of Australia in many complex cases across the whole range of Federal Court practice areas, as did Mr Tass Liveris, President of the Law Council of Australia, Dr Matt Collins AM, KC, President of the Australian Bar Association and Ms Gabrielle Bashir, President of the NSW Bar Association. Perhaps less remarked upon, but of great note and interest to EPLA, was her Honour's contribution to planning and environmental law.

Her Honour was a former long-standing member of EPLA while being a distinguished practitioner, as a solicitor and barrister, in environmental, planning and administrative law. After completing a Bachelor of Arts at Macquarie University followed by a Bachelor of Laws at Sydney University, both degrees with First Class Honours, her Honour commenced legal practice at Mallesons Stephen Jaques in 1991 predominantly in planning and environmental law. After eleven years as a solicitor, including six as a partner, her Honour took chambers at the 11th Floor St James Hall at the Sydney Bar where she quickly established herself as a highly sought-after junior. As Mr Liveris observed, the quality of her Honour's work as a junior barrister was such that the Honourable Murray Tobias bestowed his red bag upon her when he was appointed to the Court of Appeal.

After only four years at the Bar, her Honour was appointed as a judge of the Land and Environment Court of NSW. Here again, her Honour's contribution to planning, environmental and valuation law has endured long after her appointment to the Federal Court.

During her Honour's time on the bench of the Land and Environment Court she delivered many decisions, particularly concerning judicial review of administrative action, which continue to be cited as good authority today, including *Mid Western Community Action Group Inc. v Mid-Western Regional Council & Anor* [2007] NSWLEC 411, *Corowa v Geographe Point Pty Limited & Anor* (2007) 154 LGERA 117 and *Drake-Brockman v Minister for Planning & Anor* (2007) 158 LGERA 349.

From the Land and Environment Court, only one of her Honour's decisions was the subject of a successful appeal to that Court in *Blue Mountains City Council v Laurence Browning Pty Limited* (2006) 150 LGERA 130. Yet, any reader of that decision will detect a notable tenor of regret by the judges of appeal in overturning her Honour's decision. In other decisions, such as *Cranky Rock Road Action Group Inc & Anor v Cowra Shire Council* (2006) 150 LGERA 81, her Honour's logical reasoning and concise writing style were the subject of complement by the Court of Appeal.

A common theme from her Honour's swearing-in was her trade-mark humility and the courtesy, kindness, empathy and compassion which her Honour extends to those appearing before her and, indeed, to all around her. Practitioners and members of EPLA who have had the pleasure to know her Honour will readily attest to these characteristics. EPLA wishes her Honour well in the next phase of her esteemed career.

Photo courtesy of High Court of Australia.

JESSICA LIGHTON

Secretary, NSW Young Lawyers Environment & Planning Law Sub-Committee

NSW Young Lawyers, Environment & Planning Law Sub-Committee – *Update*

2022 continued to bring with it a fair share of challenges for the NSW Young Lawyers Environment and Planning Law Sub-Committee (Sub-Committee), mainly regarding the ongoing difficulties with meeting in person. However, the Sub-Committee held a native title speakers panel with industry experts, as well as preparing a number of submissions and arranging guest speaker presentations on a broad range of environmental and planning issues, including a presentation from The Honourable Robert Stokes, Minister for Infrastructure, Cities and Active Transport on the current issues facing the NSW planning system and the recent changes to the state environmental planning policies.

THE SUB-COMMITTEE started the year with a change of the executive team, with the truly wonderful Peter Clarke stepping down as Chair of the Sub-Committee and leaving the Sub-Committee in the capable hands of Brigitte Rheinberger, stepping up from her previous role as Vice-Chair. The Sub-Committee also welcomed Amelia Cook as the new Vice-Chair and Jessica Lighton as Secretary.

Ongoing physical distancing measures and a limited number of in-person events meant that Sub-Committee meetings continued to be held via Zoom or Microsoft Teams for the first half of the year. However, the Sub-Committee was able to host hybrid meetings from August onwards, at which our guest speakers and members were able to tune in remotely while other members were finally able to meet again in person after over a year!

In October, the Sub-Committee was able to host an online native title speakers panel featuring industry experts Daniel Byers, Director of Native Title with the NSW Department of Planning and Environment, Tim Dauth, a research officer and anthropologist with NSW Crown Solicitors, and Ross Mackay, a sole practitioner specialising in native title and public interest environmental law. The panel presented a map-based tour of the native title landscape in Australia, an overview of native title law, and a discussion of emerging policy and key issues arising in the day-to-day practice. The event was incredibly well-attended by Sub-Committee members and other attendees from the legal community.

The Sub-Committee's representatives on the Law Society's Planning and Environment Committee and the Land and Environment Court Users Group remain engaged in those groups for the benefit of the Sub-Committee, both in taking our comments and feedback on board and passing them on and providing the Sub-Committee with updates from those respective groups as well. The Sub-Committee thanks Jessica Baldwin and Ben Salon for the part they play in each of those two groups respectively.

The Sub-Committee has continued its commitment to preparing quality submissions on environment and planning related policies and legislation, including submissions regarding the Proposed Infrastructure SEPP Amendments: Renewable Energy and Regional Cities, the Draft Environmental Planning and Assessment Regulation 2021, Australia's faunal extinction crisis (jointly with the NSWYL Animal Law Sub-Committee), the Environmental Protection Authority's draft Climate Change Policy and Action Plan, the NSW Government Inquiry into Water Trading in NSW, and an open letter to the Minister for Planning regarding the decision to not proceed with the State Environmental Planning Policy (Design and Place) (which received in a response from the NSW Government Architect). The Sub-Committee thanks its outgoing submissions co-coordinators, Ola Moucharrafie and Kah-Mun Wong for their tireless work in seeing these many submissions through to lodgement and, of course, extends its thanks to the many submissions contributors who are too many in number to list in this report.

Finally, the Sub-Committee has continued its track record of top-notch guest speakers presenting on a number of topics relating to this practice area of the law. Key amongst those presentations was a talk by The Honourable Robert Stokes, former Minister for Planning and current Minister for Infrastructure, Cities and Active Transport regarding the current issues facing the NSW planning system and the recent changes to the state environmental planning policies. Other guest speakers included Janet McKelvey, a barrister at Martin Place Chambers regarding key advocacy skills for young lawyers, Professor Cathy Sherry of Macquarie University on urban agriculture, Dr Emma Carmody of Restore Blue on the restoration of wetlands and blue carbon, and Laura Waterford of Pollination on environmental and social governance and nature risk.

The Sub-Committee continues to welcome all law students (of any age) or lawyers either within their first five years of practice or under the age of 35 to attend our Sub-Committee meetings and to get involved in our various activities and initiatives.

Please contact envirolawexec@gmail.com or ylgeneral@lawsociety.com.au with any enquiries that you may have regarding the Sub-Committee.

BRET WALKER SC
5th Floor St James Hall

Mahla Pearlman Oration 2022 & Award

On 27 July 2022, Bret Walker AO SC delivered the 10th Mahla Pearlman Oration. The Legal Practice Section of the Law Council of Australia and EPLA co-hosted the Oration in the Federal Court. The Mahla Pearlman Oration and Award honours the memory of the late Honourable Mahla Pearlman AO, the former Chief Judge of the Land and Environment Court of NSW (1992-2003), and former President of the Law Council of Australia (1989-90). The annual event is a tribute to Chief Judge Pearlman's achievements and inspiration to younger generations of environmental lawyers. EPLA is grateful to Mr Walker for permission to publish his speech.

Our professional impulse is that important disputes about rights and obligations, and the clash of interests, lend themselves to resolution by litigation. That is the peaceful mission of the rule of law available through the courts.

When the dispute stems from grievances about governmental or official conduct called for or regulated by statutes, it may even seem the more obvious, in a system like Australia's, that the courts will be the recourse for binding decisions. They are, after all, the boundary riders of the rule of law, where the social order allocates distinctive functions respectively to elected legislature, the responsible and accountable executive or administration and finally the impartial and therefore legalistic judiciary.

I have selected four well known cases from the growing and very various global experience of litigation about aspects of different nations' responses to the threat posed by climate change. The sample is definitely not random: they seem to me to enable a point to be made. True, I can scarcely claim to discern lessons, let alone an overall pattern, from these or the many other cases that have been decided, or are in course of being fought. It is, I think, an area where conclusions are especially elusive, and nothing like scriptural truths is realistically to be sought.

As to all of these cases, they concern in one way or another the hottest of hot topics: how to avert what Allsop CJ described in one of them (the only Australian one) as "the possible catastrophe that may engulf the world and humanity" – a threat his Honour noted was "not in dispute" in litigation against the Commonwealth Minister for the Environment.

Two of the four cases are final decisions: one because the US Supreme Court is that country's ultimate appellate tribunal, and the other because special leave to appeal from the Full Court of the Federal Court of Australia has not been sought. One of the others, the most recent decision of the four, may well go further on appeal, maybe eventually to the UK Supreme Court.

And finally, in Germany, the longest running of these cases awaits trial after an unsuccessful attempt to have it dismissed summarily. In late May, the proceedings had progressed to the stage of a view with experts – remarkably, high in the Peruvian Andes, and with drones.

My point? Not, as some may have read my title of this speech, to encourage recourse to the courts of law, to address the real grievances aroused by global governmental inadequacy of responses to climate change. That is, I think cases like these four rather clearly show the unsuitability of this topic for judicial settlement. That is not peculiar to climate change responses: most difficult and profoundly consequential differences in society, including the global community, are addressed and resolved through political action – or, alas, inaction – rather than by the wisdom of doctors of law. We don't entrust courts with the final say on the balance to be struck between taxes and welfare expenditure, the role of the state in the economy, matters of war and defence, foreign relations, or how children should be educated. Let alone such matters involving special expertise such as a response to a pandemic.

Why should it be different for responses to climate change? Perhaps because the particular provisions of legislation invite judicial determination, or conversely the general and apparently open textured nature of common-law or codified tort claims seems to be the natural province of the courts.

These four cases illustrate, I hope, the illusory nature of that misguided impulse to litigate these matters.

None is technically, a constitutional case – that is, the enforcement of rights and obligations that the legislative cannot simply, I stress simply, negate by subsequent statute. That alone suggests an extra–legal ground for concern – that is, a victory in court may serve to provoke reactionary legislation – one pace forward but two paces backwards.

And even constitutions can be amended, if only in theory. Court decisions, however final institutionally, are not the last word, in democracies any more than in despotisms.

I suggest that climate change litigation, in light of these considerations, is best justified

as one of the ways in which the body politic – the governed as well as the governors – may be shamed, nudged or even prodded into actually taking this emergency seriously enough to give us a decent prospect of decent survival.

The urgent deficiencies are numerous. One is the globally mad trope that very few individuals nations are very significant sources of global emissions. Even if that were true, its insanity in relation to a global issue is unmistakeable. Another is what we seek to tame linguistically by calling it "Scope 3" emissions – the puzzling preference to ignore that coal is mined to be burnt, especially for this country that exports its coal to be burnt elsewhere. Supposedly, it is a contribution to sustainability anxiously to scrutinize the cement and diesel consumption of an open-cut mine, but not the emissions that are deliberately the result of selling the combustible product.

But gestural or banner litigation has many drawbacks. Not least is its tenuous prospect, considering recent history, of litigation actually driving the outcomes we need. Hauling wagons with rubber bands might be an apt description.

The split decision of the US Supreme Court on 30th June, in *West Virginia v EPA*, was not surprising to those who regard the so-called conservative/liberal division on that bench as a predictable extension of partisan politics, or culture war. Maybe so, but I do not want to dip my toe in the unpleasant waters of that Court's composition, or partisan predictability. Rather, there are themes in the reasoning, on both sides, that deserve somewhat more respect than the understandable simplicity of booing or cheering according to one's political or cultural tastes.

The case has a zombie character. The Obama administration formulated its Clean Power Plan, through the EPA, by way of delegated regulation of, among many other things, existing power plants – many of which generate electricity by coal-fired steam turbines.

The statutory means governing the agency's actions required its consideration, and opinion, as to a basic premise called "the best system of emission reduction…that has been adequately demonstrated". In particular, the contested regulatory power focussed on existing plants and was available only if their emissions were not regulated under two other EPA powers to do with health limits on airborne pollution and other pollutants toxic to humans. It appears to have been accepted that CO_2 and methane – GHG – either couldn't have been or actually had not been regulated under those two other EPA powers. That statutory scheme produced an unedifying combat of the majority and the minority as to the supposedly appropriate folksy paraphrase – was the power in question a stop gap, or a backstop? So much for textualism of any stripe.

Why zombie? Because the CPP was judicially stayed immediately, and never came into operation – pending judicial review. I wonder whether our High Court would even dream of that degree of judicial constraint on executive action… As you would guess, or know, President Trump's EPA thought it should wholly re-consider the Obama CPP, and duly formulated a new Affordable Clean Energy Rule – ACE as an example of the childish American use of propaganda acronyms – that it accepted "would result in only small reductions in CO_2 emissions".

The DC Circuit Court of Appeals reinstated the CPP and discarded the ACE Rule, holding the Obama agency and not the Trump agency had been correct as to its power. But the US Supreme Court effectively stayed that reinstatement of the CPP pending its appellate considerations of the cases, in which many states participated along with other parties. So, now in the Biden administration, the Court was considering whether the Obama CPP was authorised – all without it having been in operation ever. The fact that the Biden EPA told the courts it was not intending to enforce the Obama rule and had decided to promulgate a new rule did not render the litigation moot, the majority ruled, in defensible if somewhat problematic reasoning that I will not critique.

So what was the original sin of this zombie rule so recently put to death by the Supremes? In a nutshell, the EPA had actually taken a novel approach to what it perceived as an unprecedented challenge. Of course, all justices accepted the genuineness of the problem – not a denialist among them. The majority was also at pains to emphasise that the expertise of the EPA had been deployed in ways never attempted before – supposedly, this factor weakened the plausibility of Congress having delegated such momentous matters for determination by the EPA. I can't help wondering whether long ago Congress itself should have stipulated in detail how NASA was to land men on the moon, also something experts had not attempted before being asked to do so. President Kennedy's famous view of unprecedented challenges apparently clouds over in the era of meeting the threat to the planet of climate change.

But this may be unfair to the Supreme Court majority. Because the litigation, in its bare essence, was really concerned only with the mundane question whether the general words of the relevant provisions of the Clean Air Act, under which the CPP would have the effect of requiring states to regulate their power stations in accordance with the BSER determination by the EPA, did as a matter of law – statutory interpretation – empower the EPA to proceed as it did. It is, of course, a cardinal tenet of the rule of law that administrators, however expert, do not exceed their lawful authority in exerting official power. The case therefore presented a familiar, if fraught, issue of the court ensuring that a government agency had been given by the people's elected representatives – Congress – the very large powers in question. No-one, I hope, would doubt the importance of judges scrutinising such claims. Especially when the claimed rule-making power is so obviously legislative in character, an extra pressure requires the court jealously to ensure that legislative power, in a democracy, is not excessively delegated to unelected administrators.

I don't intend to inflict a critical case-note on you all. It suffices tonight to note that the majority could not see the very broad authority in the stop gap wording, and the minority saw the back-stop intention to deal with a new and large emergency. Interestingly, the so-called *Chevron* doctrine – a contested approach that pays judicial deference to administrative interpretations of grants of power to the executive by the legislature - was not much considered by the majority, and was not officially overruled. In this country, I suspect there is no room for *Chevron* anyhow – perhaps we take more seriously, or more consistently, John Marshall's famous dictum that it is

emphatically for the judicial department to declare and enforce the law, including the limits of statutory authority.

At stake was the validity of a rule, the CPP, that would make business as usual for coal-burning power stations impossible. Politically, I stress politically, I must say that seems to be full of merit – but merits are not for courts to determine or decide in judicial review by way of interpreting statutory limits on governmental power. Thus, the majority had little doubt that the massive shift intended by the CPP to transition power generation from coal to gas and then to renewables, with huge economic and social ramifications – power bills up and coal-generation employment down – was simply not contemplated by the words enacted so generally and so long before a climate change response was on Congress's agenda.

And that may well be the better legalistic result. Although the acerbic dissent did point out the other side of the ledger, with increased investment in renewables and many jobs – and a more sustainable future – as a result that should have been considered to counter the effects of phasing out coal-fired power generation. Another jab delivered by the minority, reminding one of the zombie nature of the case, was that in any event the market, without the CPP ever having operated, was already moving against coal. Let's hope Vladimir Putin's gas squeeze does not halt that beneficial trend.

To conclude the American tale, it seems to me that much of the politically disappointing outcome in *West Virginia v EPA* stems from an approach that in this country would be an orthodox, and democratic, requirement that large powers to govern by administrative agencies require sufficiently clear language to be within statutory power. It is, in the upshot, a timely warning, as a new Australian government with a new kind of cross-bench beside it takes up the task of dealing with climate change, that the buck stops with what politics, not litigation, can achieve by way of changing the rules, because the facts have changed. The majority provocatively called in aid the repeated failure of Congress, before and after the Obama CPP, to legislate for such a transition to renewables. However irksome politically, it clinches for me that our legislation and not litigation, is the best, maybe only, way forward.

Let me be clear: litigation that enforces legislation that in turn controls governmental action is, naturally, an essential function of the judicial arm of government. We are, I hope, often going to be suing to require our Ministers and bureaucrats to observe, say, statutorily mandated sustainability requirements of due consideration. That is essential and most useful litigation – but its role in influencing responses to climate change depends utterly on Parliament having enacted appropriate regulation.

The most recent case, decided on 18th July, is the decision of the Administrative Court in the Queen's Bench Division that I will call *Friends of the Earth & ors v Secretary of State for Business, Energy and Industrial Strategy*. That's a portfolio title that bespeaks the high level and economically and socially comprehensive nature of the issues. The claim was not, as in *West Virginia*, to invalidate a governmental climate change response. Rather, the successful claim was that the government had not fully met the detailed requirements for reporting to Parliament – and thereby to the people – on the prognosis for policy settings to meet so-called zero net emissions by 2050, in order to reach treaty aims, among other things. By contrast with the American approach, the massive and profound nature of the changes to economic and other social behaviour, wide and deep, had been explicitly the basis of excellent legislation that required iterative recourse to real experts preparatory to the utlimate statement of policies and their prospects.

Again, as in *West Virginia*, the judicial review was premissed on a correct reading of the relevant provisions of the controlling legislation, in this UK case their *Climate Change Act* of 2008. Everything in the careful exposition of that foundation of the ruling that the obligations had not been fully complied with is familiar to us. Including the necessary emphasis that the merits of the policies were ultimately not the business of the judges, and so not in issue in the litigation. They are, of course, political in every good sense of that word. And, on the established pattern, unequivocal and ample statements are made to the effect that the emergency is real. If for no other reason, that was compelled by the explicit premises and purpose of the laws requiring these progress reports.

This decision may or may not be appealed, and so is final only in the sense that any first instance decision is final, until reversed by a competent appeal. I lack the boldness to predict the outcome of any appeal. I will say that the reasoning of Mr Justice Holgate is nuanced, reflecting I suspect the arguments on both sides. At its heart, believe it or not, was the scope of the obligation for the minister to "set out" various matters of specified prognostications as to the UK's progress to net zero by formally prescribed stages. Much turned on the interplay of quantitative and quantifiable assessments, triggered no doubt by the ominous statement of a 95% - not 100% - fulfilment of one of the critical measures. I won't delve into that particular debate, not only because in a world of predictions and estimates, and our new magic called modelling, the distinction is inherently uninteresting.

The case turned on sophisticated analysis of the written materials created to assist in preparing the report to be tabled in Parliament, as well as subsequent evidence from a senior bureaucrat to explain procedures and to supplement detail. Although these materials are, in themselves, of some interest given their subject-matter, my present focus is on the simplicity of the framework for the successful judicial review.

First, there is a statute, the terms of which, correctly interpreted, required explanations rather than mere conclusions in order to "set out" the crucial matters for public report. An analogy arises with our familiar pre-requisites for description of proposals when public consultation is obligatory. Second, after judicial sifting and sorting, some deficiencies remained in the full compliance with the statutory reporting obligations. Third, both the statutory interpretation and assessment of compliance were informed by the evident purpose of these statutory reporting obligations: namely, transparency (ie open exposure) of the position of the Government after proper consideration, with respect to gravely important matters of public policy, extending well beyond electoral (let alone news) cycles. Significantly, Mr Justice Holgate adopted the approach to a somewhat similar dispute in the Republic of Ireland, quoting from Chief Justice Clarke of the Supreme Court of Ireland in

Friends of the Irish Environment v Govt of Ireland decided in 2020, as follows:

"…the very fact that there must be a plan and that it must be published involves an exercise in transparency. The public are entitled to know how it is that the government of the day intends to meet the [applicable emissions standards]. The public are entitled to judge whether they think a plan is realistic or whether they think the policy ineasures adopted in a plan represent a fair balance as to where the benefits and burdens associated with meeting [those standards] are likely to fall. If the public are unhappy with a plan then, assuming that it is considered a sufficiently important issue, the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity."

Again, the fundamental need for sound legislation in order for litigation to compel compliance with beneficial social outcomes such as transparency of policy making. Perhaps we are, tonight, on the verge of some such enactment in this country. Maybe not. In any event, please may Australia – Canberra more pointedly – progress beyond disdainful invocation of Cabinet-in-confidence. The people's confidence is abused by too broad and crude extents of secrecy in making policy, literally, for generations.

The Administrative Court in *Friends of the Earth* also decided, by dismissing, a discrete claim that the Government's reporting performance concerning the so-called carbon budgets should be measured against the statutory requirements construed stringently, so as to observe the supposed effect of sec 3 of the *Human Rights Act*, which seeks to modify statutory provision found to be incompatible with the European Convention on Human Rights. This argument was pitched very high, starting with the uncontested gravity of the threat, including to human life. The bridge too far was the slide from incompatibility as the gateway to a modified interpretation, to a notion of preferring an interpretation that would be more rather than less conducive to protection of the Convention rights. In a manner I think accords with an Australian approach in the absence of such a convention-incompatibility device (at national level), the Court understandably resisted what it called "crossing the demarcation between interpreting and amending legislation".

For those interested in comparative law, stamp collectors of jurisprudence as we may be regarded, it is noteworthy that Mr Justice Holgate gained no assistance from the famous decision of the Supreme Court of the Netherlands, *Urgenda*, delivered in December 2019. One reason was the particular terms of the Dutch norm calling for adequate explanation of a governmental reduction of a carbon reduction target. Another was the basal difference, as to the governing treaty obligations, between the monist or direct effect approach in the Dutch system, and the dualist system operating in the UK and Australia. So we can't look to the treaties for the norms to litigate, except to the extent they are incorporated into our municipal law.

Litigation to enforce a transparency obligation is, by definition, as much in the public interest as is the obligation itself. But it all depends on the adequacy of the statutory obligation to consider, disclose and publish a report: and that depends on decisions made by Parliament, not the judges. Strong enacted words are needed to push over the instructive recoil of Canberra from admitting hoi polloi into the councils of state. And the panoply of frequently invoked exemptions from FOI disclosure justifies the sneer that we are actually enjoying, or suffering, freedom **from** information.

These two cases in companion common-law jurisdictions with functionally separated areas of government, like Australia's system, serve as a reminders that judicial review is not judicial policy correction. They illustrate the indispensable support for institutional legitimacy of judicial decisions that they are impartial legalistic declaration and enforcement of the law – in this context, enacted law – and thus must not become arenas for policy contests.

But responses to climate change **are** the creatures of policy contests.

Now we move from public law to private law – in a sense. The first two cases saw the judges policing legal limits, one for excess and one for deficiency. The next case, *Minister for the Environment v Sharma*, is a bit of a hybrid, reflecting the common law that was invoked.

No application for special leave to appeal to the High Court has been made against the decision of 15th March, and so this judgment of the Full Court of our Federal Court is truly final. But not, given the nature of common law tort cases involving putative duties of care, at all the definitive last word.

The duty of care alleged against the Minister was said to arise from and to regulate the exercise of her powers under the *Environment Protection and Biodiversity Conservation Act* to approve or not the extension of a coal mine. For reasons I won't explore, it was said to be owed to minors – with an "o" – being persons in Australia aged less than 18 years. The scope of the duty was argued to require reasonable care to avoid death or injury to those people, arising from CO_2 emissions into the Earth's, ie the globe's, atmosphere from burning the coal proposed to be mined from the extension.

At the outset, as I have already noted, the parties had common ground as to the nature and threat of climate change. It was also not in dispute, given well established common law principles, that the private-law tort of negligence is able to be pleaded against government authorities. In relation to their discharge of statutory functions, one way of thinking about such liability assimilates it to the odd but established category of "breach of a statutory duty of care". The duty of care is not statutory, in cases such as *Sharma*, but the potential to argue it exists does arise from the responsibility of the Minister and the correlative vulnerability of the children brought into conjunction by the consent function under the EPBC Act.

You all know the end of this story. A formidable set of self-sufficient reasons was discerned, severally, by each of the three judges, for the outcome: the claimed duty did not exist. I leave aside the very substantial questions that in my opinion also presented an obstacle to the children's success, namely of the appropriateness of declaratory relief – ie a binding judicial statement of the existence of such a duty of care, without any other relief.

The absence of that private-law duty of care should not alarm anyone who cares to distinguish between individually actionable grievances and public political causes. If there is any overlap, as sometimes could well be the case, it surely was not possible in *Sharma*. That is, if anything, the huge

import of coal combustion, as a generality, to responses to climate change rather dispelled than supported the imposition of a duty of care owed to individuals. For my part, I would add the anomalous nature of a duty apparently strengthened by its being owed to everyone – isn't the essence of the common law duty that it is owed to individuals severally, even if to everyone within an affected portion of mankind – here, I accept, all of us bar for the moribund?

I will not rehearse the imposition and details of the three judgments' dismissal of the claimed duty. It specifies to note the continued life in the admittedly problematic policy-operational dichotomy, and its related judicial self-denying ordinance that declines to adjudicate matters for political resolution. Whether our label of non-justiciability or the related American label of political question is used, one way or another it must be right in a constitutional democracy to leave such matters to non-judicial determination.

To these fundamental objections to the duty may be added other and independently operating factors. The diffuseness of the relations between the Minister and each of the children. The indeterminacy of that relation and liability said to spring from it. The incoherence of the generalized common-law duty and the Minister's role under the EPBC Act. The invidious if not impossible task of articulating the standards by which an impartial judge could adjudicate – without usurping democratic dominion over policy – whether conduct by act or omission fell short of a reasonable standard of care. These critical aspects of breach by negligence cannot be avoided, I think, in deciding the superficially anterior question of duty of care.

So *Sharma* manifest the unsuitability of tort litigation, at least under the rubric of negligence, to improve our responses to climate change. Whether the different but cognate liability in nuisance could produce any different outcome, I strongly doubt: its quite distinctive integer of proximity is probably apt to render such claims even more tenuous than negligence.

Sharma underlines the need for good statutes.

To conclude, some remarks about a case in progress, that appears to be another private law claim, ie calling in aid the same kind of legal norms – eg negligence or nuisance – that would govern day-to-day non-governmental dealings between people and legal entities. Cases like a householder suing to restrain a neighbouring factory's leaking of pollution across their boundary. The stuff of the common law, with all its retained flexibility and inventiveness.

However, this fourth case is not in a common-law jurisdiction. What the English judges made, not always wittingly it must be said, and still make – always wisely nowadays in Australia, I am tempted to say – was codified by Napoleon, and his assiduous, intellectual inheritors and emulators in Germany. So, a code, but in appropriately generalized terms, relevantly closely resembling key aspects of Australian common-law concepts of liability in negligence or in nuisance. I shouldn't suggest anything like complete analogy, but the fascinating now-you-see-it, now-you-don't resemblances between our systems are quite beyond any single speech's capacity to address.

Be that as it may, the claim by Saúl Luciano Lliuya, a Peruvian farmer, against RWE, a German globally active power and energy company with headquarters in Essen, is my selected example of a dubious – if perhaps sympathetic – resort to litigation about responses to climate change. The company – originally Reinisch-Westfälisches Elektrizitätswerk AG – has generated electricity in most of the historically employed ways, certainly thermally. Although it is now a very considerable global generator using renewables, it has long and still has a coal-fired presence.

In that guise, because of that contribution to global warming – said to be among the heaviest industrial contributors in the period 1751-2010, at 0.47% - RWE has been sued by Mr Lliuya in the District Court of Hamm, for 0.47% of the estimated costs of protecting his home town of Huarez, in the Andes, from the dangers of a melting glacier causing flooding from the effects of avalanches on Lake Palcacocha, poised above the city. From press reporting and assorted commentaries, it does not appear at all that this risk is far-fetched or fanciful – if only.

But is this claim in a German court against one selected global GHG contributor, for about €20,000 damages, in principle or in practice, a good way to address reforms to climate change? Is this kind of litigation, based entirely on German codified norms for imposing liability on wrongdoers such as we would regard tortfeasors, likely to do more than publicise very real – and well justified – grievance? Should Pacific Island communities threatened by inundation as the ice-caps melt see such litigation – ie private-law claims – as a useful way forward?

You will have gathered, I hope, that I strongly urge better value publicity than we litigators, or judges, can provide. If, as I think it should be, the case is dismissed on the merits for any number of principled reasons, malevolent forces in public opinion around the world are most unlikely to take that outcome as a cue to speed up the end of coal-fired generation. (And RWE is, already, one of the most important renewables generator, without the spur of tortious liability, it would seem.)

But if the case were to succeed, it would matter only if RWE, its shareholders and its insurers, were thereby to be informed of the risks of mounting GHG in a way or with an intensity not apparent to them beforehand. This is, I think, totally implausible.

And were the wildest dreams of Mr Lliuya's supporters to be realised, and a win against RWE were seen to produce a financially loaded thunderclap against RWE and its coal-generating ilk, do we really think the various legislatures around the world will leave that as a position to be bargained or fought as individual or even class actions in tort? Legislation of some kind, recognizing the long and lawful business of coal-fired power generation, seems very likely to nip such claims in the bud. We will see.

As so I finish by suggesting, notwithstanding my admiration and gratitude for the litigators whose work I have discussed, that we must first of all have the enacted laws – statutes – that enable courts impartially and without improper trespass on policy matters that must remain democratically rooted, to order governmental authorities to exercise within these limits and as required by such enacted laws, their duties, powers and functions so plainly in need of exercise, by way of our responses to climate change.

Why not litigate? Only if we first legislate. Well. What to do? Read what is happening, discuss, persuade, and vote.

The Mahla Pearlman Award for the Australian Young Environmental Lawyer of the Year is awarded to a young lawyer who has made a significant contribution to environmental law and to the legal and wider community. Each recipient has carried out extra work giving back to the legal community as well as to the community at large. The Award is conducted annually by the Australian Environment and Planning Law Group of the Law Council's Legal Practice Section.

AT the 10th Mahla Pearlman Oration, the Law Council of Australia announced that the 2022 Mahla Pearlman Australian Young Environmental Lawyer of the Year has been awarded to Matt Floro.

Mr Floro is a Special Counsel advising on environmental, planning, climate change and administrative law at the Environmental Defenders Office. He has conducted litigation in the High Court, Federal Court, NSW Court of Appeal, NSW Land and Environment Court, Queensland Planning and Environment Court, and South Australian Supreme Court.

Law Council of Australia President, Mr Tass Liveris said Mr Floro demonstrates the impact lawyers can have.

"Mr Floro has been involved in a series of leading-edge climate law cases. These include the Bushfire Survivors for Climate Action v NSW Environment Protection Authority, where the court required the EPA to develop policies to protect the environment from climate change, and KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance, in which he defended the Independent Planning Commission's refusal to allow the Bylong Valley coal mine to proceed."

Passionate about community, Mr Floro has led Out for Australia Victoria, the Australian Law Students' Association and his university law society. He currently serves as President of the National Environmental Law Association and National Vice-President of the Asian Australian Lawyers Association.

"He has also made a significant contribution to the legal profession through his commitment to educating younger lawyers and mentors volunteers at the EDO," Mr Liveris said.

With a record field of nominees in 2022, Chair of the Law Council's Australian Environment and Planning Law Group, Ms Robyn Glindemann said this year's Award highlighted the difference young lawyers across the country are making.

"It was an outstanding and inspiring field," Ms Glindemann said. "Nominees came from around Australia and are focusing their work on important issues such as climate change, Indigenous rights, strengthening the protection of significant natural areas and examining the impact of natural disasters on animals."

The Mahla Pearlman Award is named in honour of the former Chief Judge of the Land and Environment Court of New South Wales, and former President of the Law Council of Australia, the late honourable Mahla Pearlman AO.

EPLA congratulates Matt Floro on being awarded the 2022 Mahla Pearlman Australian Young Environmental Lawyer of the Year.

Acting Commissioner Maureen Peatman, Bret Walker AO SC, Matt Floro, the Honourable Justice Rachel Pepper and Robyn Glindemann.

11th Mahla Pearlman Oration

The Legal Practice Section of the Law Council of Australia and EPLA will co-host the 11th Mahla Pearlman Oration on 20 July 2023 in Sydney and online. This year's featured speaker – Dr Tony McAvoy SC – who will give a speech entitled "The Rock, the Gorge and the Voice: protecting places and spaces".

Event Details

Date:	Thursday, 20 July 2023
Time:	5.00pm - 7.00pm
Cost:	Free
Location:	Federal Court of Australia, Level 21, 184 Phillip St, Sydney NSW 2000

Dinner Details

Date:	Thursday, 20 July 2023
Time:	7.30pm - 9.30pm
Cost:	$150.00
Location:	Verandah Bar, 55/65 Elizabeth St, Sydney NSW 2000

REGISTER: https://lawcouncil.eventsair.com/2023-mahla-pearlman-oration/registrations/Site/Register

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

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