environmentallaw News
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2023 EPLA Conference

Thursday 9th & Friday 10th November 2023

Venue: Sydney Zoo

Address: 700 Great Western Highway, Bungarribee

...was GREAT!

The EPLA Conference will be a hybrid event; in person and over Zoom.

Keynote speaker:

Sue Higginson

MLC, NSW Parliament,
Member of the Greens

Dinner speaker:

The Hon. Justice Debra Mortimer

Chief Justice,
Federal Court of Australia

President's drinks:

Thursday 9th November, Sydney Zoo

700 Great Western Highway,
Bungarribee

Conference Dinner:

Friday 10th November, Beta, Sydney

238 Castlereagh St, Sydney

Milton, Mollymook, Ulladulla and Lake Conjola offer a wide variety of accommodation options from the 5-star Rick Stein establishments, to the renovated retro Motel Molly and Milton Hotel and Brewery, great B&B's from the quaint, spectacular and scenic, fabulous beachside cabins at the many Big4's and Council caravan parks, or a rural retreat and farmstay.

This fabulous part of the South Coast has accommodation for everyone. The Destination NSW website will help you find the perfect place, or any of the usual search sites for Milton/Mollymook NSW.

With amazing restaurants, beaches, shops and walks, delegates should stay on to enjoy the weekend on the fabulous South Coast, making time to return via some of the smaller towns and restaurants along this fabulous coast.

REGISTER YOUR INTEREST TODAY!

Please email your interest to:

kearns@mpchambers.net.au

CONTENTS

2 **Editor's Note**
Anne Hemmings

3 **President's Report**
Paul Crennan

3 **Renewable Energy Zone Update**
Jennifer Hughes & Tim Allen

7 **Greenwashing**
Hasti Kalarostaghi, Jessica Baldwin & Adam Kennedy-Hunt

10 **Pictorial**
2023 EPLA Conference

12 **Navigating a Path to Sustainability: A Closer Look at the Sustainable Buildings SEPP 2022**
Samantha Daly, Angus Hannam, Nethmi Amarasekera & Heather Pym

15 **SHOW ME THE MONEY! Making development applications on the Planning Portal**
Danielle Le Breton & Louise McAndrew

17 **Breezeways and Floor Space Ratio**
Jisella Corradini-Bird

21 **Recent consideration of 'design excellence' provisions by the Land and Environment Court**
Hamish McIvor

23 **The Duty Lawyer Scheme – *Update 2023***
Roslyn McCulloch

24 **The Land and Environment Court, Court Users Group – *Update 2023***
Roslyn McCulloch & Janet McKelvey

25 **NSW Young Lawyers, Environment & Planning Law Sub-Committee**
Amelia Cook & Jessica Lighton

27 **Comings and Goings: 2023**

ANNE HEMMINGS
Editor

Editor's Note

Welcome to the Autumn Edition of the Environmental Law New for 2024, which is published after the 2023 EPLA Conference in Dubbo.

WELCOME to the Autumn Edition of the Environmental Law New for 2024, which is published after the 2023 EPLA Conference in Dubbo.

There has been a number of developments in state policy and legislative changes relating to climate change over the past 12 months. Jennifer Hughes and Timothy Allen provide an update on Renewable Energy Zones and the implications for development assessment of renewable energy projects. The new wave of climate change litigation and compliance action with respect to "*Greenwashing*" is addressed by the team at Hunt & Hunt. Then the team at Johnson Winter Slattery guide us through the new *State Environmental Planning Policy (Sustainable Buildings) 2022* and the implications for residential and non-residential development.

This edition also brings together a collection of articles addressing current issues in planning law and recent decisions in the NSW Land and Environment Court and NSW Court of Appeal. Danielle Le Breton & Louise McAndrew address the question as to when a development application is "*made*" under the *Environmental Planning and Assessment Act 1979* and its regulations, having regard to the legislative changes to the form and manner in which a development application is now made on the NSW Planning Portal. The issue as to when "*breezeways*" should be included in the calculation of floor space ratio is then explored by Jisella Corradini-Bird having regard to recent decisions. Then Hamish McIvor from Georges River Council considers the vexing question as to whether a development exhibits "*design excellence*" and recent consideration by the Court.

The regular features of the ELN are again included. Ros McCulloch provides an update on the Duty Lawyer Scheme, which is a program to assist unrepresented litigants in the Land and Environment Court supported by more than 20 very experienced solicitor and barrister volunteers. The Land and Environment Court – Court Users Group update is provided by the EPLA representatives and the Young Lawyers Environment and Planning Law Committee provide an outline of their 2023 activities together with photos from key events. We then round off this edition with Comings and Goings.

I am grateful for the assistance of Ryan Coffey, the new Deputy Editor of the ELN. Ryan has been key in encouraging the contribution of articles from our members for this edition.

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

I look forward to seeing you at this year's EPLA events.

—

Anne Hemmings
Editor

PAUL CRENNAN
President

President's Report

I HAVE the pleasure to report on a busy and diverse year for EPLA in 2023 and to look forward to an active 2024.

In 2023 EPLA held 6 Twilight Seminars covering a broad range of topics and partnered with other bodies to deliver seminars including the 11th Mahla Pearlman Oration.

EPLA and the Law Council of Australia produced the Mahla Pearlman Oration entitled "The Rock, the Gorge and the Voice: protecting places and spaces" delivered by Tony McAvoy SC. It was a passionate and thought-provoking presentation.

Together with the Australian Institute of Administrative Law (AIAL) EPLA presented a joint seminar which examined laws for the protection of aboriginal cultural heritage. Anthropologist Dr Mary-Jean Sutton joined a panel of lawyers and aboriginal elders Laurie Perry and Uncle Jimmy Wilson-Miller in a stimulating and challenging session.

These seminars have been able to reach a large audience of members by the use of audio-visual means and in a number of cases have included an in-person component. The return to face-to-face events reminds us of the benefits that social contact with like-minded professionals can bring.

A written submission was lodged on the NSW Climate Change (Net Zero Future) Bill 2023 followed by evidence in person to the NSW Parliamentary Upper House Inquiry into the Bill. The Bill, when it was later passed included changes which reflected suggestions made in the EPLA submission.

The Annual Conference returned to Sydney in 2023 and was held at the Sydney Zoo Great Western Highway Bungarribee, acknowledging that Western Sydney is one of the major growth areas of Sydney.

As it was being established, Sydney Zoo found its way into the Land and Environment Court on several occasions in different Classes of the Court's jurisdiction. It seemed fitting for EPLA to take environment and planning law onto the grounds of Sydney Zoo.

The Conference focused on housing. Sessions included planning and affordable housing; flood plain restrictions; the development of the western Sydney growth area; connectivity and transport.

Senior officers of the Office of the NSW Building Commissioner covered topics including defects; the model for fixing combustible cladding; the planning portal and its use for compliance, certifiers, and monitoring. They also introduced delegates to the NSW Building Commission which is now in place to oversee and regulate the construction industry in NSW.

The Hon. Sue Higginson Member of the Legislative Council, member of The Greens and a long-time friend of EPLA provided the Keynote Address. Sue launched the conference with a dose of reality but also positivity to strive for better environmental outcomes.

The customary feature of cases from the Court of Appeal and from the Land and Environment Court were provided respectively by Justice Julie Ward, President of the NSW Court of Appeal and Justice Sarah Pritchard of the Land and Environment Court of NSW (LEC).

EPLA continues to participate in the Planning and Professional Peaks forum convened by the Department of Planning and Environment. The forum is conducted as a series of information sessions which provides an opportunity to share an understanding of issues across the broader city planning, design and assessment sector, and for the Department to access advice on how to support this sector.

As 2024 arrived EPLA delivered a packed program of 5 Twilight Seminars through March. All were well patronised. The 'Guided Architectural Walk Around Sydney' involving Commissioners of the Court had rave reviews with eyes out for what might be seen in 2025.

The EPLA/AIAL Seminar on The State of Democracy with John Schmidt (former NSW Electoral Commissioner), the Hon Keith Mason AC KC and Prof Anne Twomey AO is to be held on 3 May at the State Library. This seminar promises an enlightening insight from uniquely qualified speakers.

The 12th Mahla Pearlman Oration will be delivered by on 22 August by the Hon James Allsop AC. I encourage you to put a place card in your diary for this event.

The 2024 EPLA Annual Conference is heading to the beautiful South Coast of NSW. Cupitt's Estate at Milton is the venue for Thursday 7 and Friday 8 November. Pre-conference drinks on the evening of 6 November are to encourage early arrival. Planning of the Conference program is well advanced involving topics of the impact of climate change on planning in coastal areas, coping with waste and controversy surrounding management of waterways. The President of the Court of Appeal will address the Conference. The usual case update from the LEC will be enhanced with more this year.

EPLA will soon report to the LEC on its consideration of the scarcity of experts prepared to give evidence in court. With the assistance of the Planning Institute of Australia and the Australian Property Institute, planners and valuers were surveyed and the results of that survey are being analysed. Thanks go to those organisations and their members for their willing co-operation in this task. Already EPLA has responded with the organisation of education sessions on the giving of expert evidence and there will be more initiatives to follow in support of the professions.

The committee of EPLA works hard to deliver interesting presentations for members and to support the professional interests of members. I am grateful to the members of the committee who willingly give of their time and skills for the benefit of the association and its members.

I thank Michele Kearns for her ongoing contribution. Michele's knowledge of this area and its people is astounding and her support is invaluable.

I look forward to seeing you at the various EPLA organised functions throughout the year.

—

Paul Crennan
President

JENNIFER HUGHES & TIM ALLEN
Beatty Hughes & Associates

Renewable Energy Zone Update

The rollout of Renewable Energy Zones ("REZs") in NSW remains ongoing, with a range of large-scale public and private projects in the planning and development pipeline in those zones. This is having increasing impacts on affected landowners on whose land the projects are proposed – both positive and negative, depending on whether the landowner is a willing participant in a private project or the dispossessed owner in a compulsory acquisition process. The REZ space can also be a difficult (and at times unclear) one to navigate from a planning perspective.

THE NSW government has published an extensive series of publications, explanatory notes, websites and other resources that explain the purpose of REZs and the conceptual approach to their realisation. However, a number of important parts of their makeup remain the subject of ongoing refinement, including the consequences for affected landowners and the way in which they are to be assessed under the NSW planning system.

This article provides an update on REZs in NSW, discusses how they are regulated and managed, and addresses some of the uncertainties raised above.

Status and context

REZs are generally mapped and selected based on an area's propensity to provide the environmental inputs required for renewable energy generation. Suitable areas are then proposed to contribute to the shoring up of the State's energy provision and support its emission reduction strategy.

REZs are "declared" under Part 4 of the *Electricity Infrastructure Investment Act 2020* (**EII Act**). Five zones have already been so declared:

- Central West Orana (**CWO**), which is generally centred around Dubbo and Dunedoo;
- New England, which is generally centred around Armidale;
- South West, which is generally centred around Hay and extends West to Mildura;
- Hunter-Central Coast, which is generally centred around Newcastle, Maitland and Muswellbrook; and
- Illawarra, which generally extends from Wollongong to Shellharbour, and inland past Dapto.

The South West, Hunter-Central Coast and Illawarra REZs are in a relatively early stage of their planning and consultation processes. The latter two REZs both have the potential to incorporate offshore wind elements, either within the State's waters or in conjunction with Commonwealth offshore wind zones (such as that already identified in the Hunter).

The New England REZ is similarly early in development, but already has funding attached to it (in respect of the Oven Mountain Pumped Hydro project). The New England REZ is unique in that it has a recognised capacity for pumped hydro development.

The CWO REZ is by far the furthest progressed in the planning and development process and was the first to be declared under the EII Act in November 2021; a Network Operator has been appointed, land acquisitions for the establishment of transmission infrastructure are underway, and a number renewable energy projects have already been approved, as outlined below.

REZs (or versions of them) are also proposed and are in various stage of planning and development in other Australian states.

Projects

To date, a mix of public and private projects have entered the REZ pipeline. With respect to government projects:

- An Environmental Impact Statement was placed on exhibition until 26 October 2023 for the CWO Transmission Project. Acquisitions of interests in land from affected landowners have been commenced to facilitate the construction and operation of transmission infrastructure as part of that project.
- A New England Transmission Project is in the planning and consultation process, with community information sessions conducted in 2023.
- A Hunter Transmission Project is in development.
- The Waratah Super Battery Project is proposed in Colongra near Lake Tuggerah to augment energy capacity.

As the most progressed, the CWO REZ already includes private projects that are either under assessment or have been determined – 38 total at the date of writing are either approved or under assessment, comprising solar, wind and battery storage projects (though a small number pre-date the REZ). These projects range in scale from as small as 5 mW in solar energy production to over 1000 mW in battery storage. This includes the Stubbo Solar Farm and Liverpool Range Wind Farm, which are proposed to be serviced directly to the CWO Transmission Project.

This is in addition to development applications that have been refused, on which publicly-available information is limited.

Legislative and regulatory regime

While rooted in strategic planning, the REZs draw on a series of instruments to give them their form. The statutory component of this series is the EII Act, which provides for the administration and declaration of REZs. It is then augmented by the Regulations that sit under it.

The State government has also development the 'Electricity Infrastructure Roadmap' to give the REZs (and related energy initiatives) more structure. The Roadmap consists of a number of documents:

- A Policy Paper for the Electricity Infrastructure Fund (**EIF**). The Fund is established under pt 7 of the EII Act to support and manage network and infrastructure financing.
- A paper outlining exemptions to certain EIF requirements for certain businesses.
- A policy paper providing for Transmission Efficiency Testing regulation.
- Draft contributions guidelines and draft network authorisation guidelines.

The items listed above deal primarily with administration, financial management and logistics. While some additional supporting material like the State's Large-Scale Solar Energy Guidelines (which provide for the ways in which solar energy projects are to be designed and assessed, but which is not specific to REZs) are available, the project planning and assessment regime is, arguably, not as thoroughly developed.

Acquisitions of land

In the case of private projects, it is, if course, open to landowners to negotiate such occupation agreements with renewable energy businesses as they deem acceptable. Options, leases, licenses and the like are all on the table, with a generally reliable stream of income available as result, usually as a useful diversification of that landowner's (often otherwise rural-based or agricultural) income.

Conversely, for those landowners in the CWO REZ whose land is required for the publicly-owned poles and wires required to support the generation infrastructure, the compulsory land acquisition process has already commenced. The requisite interests in the land owned by these landowners can become vested in the State whether the landowner is content with the terms or not.

Elements of the CWO Transmission Project – for example, land nearby to the Liverpool Range Wind Farm, which will be serviced by the CWO Transmission Project – will require interests in large stretches of land to be acquired by the State government. Landowners outside Dunedoo have already been approached to commence negotiations.

It is open to the State government to pursue such interests and arrangements as it considers necessary to accommodate the public purpose – freehold acquisitions for transmission towers, access leases and licenses to carry out works, easements for long-term aerial occupation and maintenance, and options to acquire such interests in the future when projects have more certainty (the CWO Transmission Project is not yet the subject of a development consent). It is, for better or worse, generally irrelevant whether those landowners want to accommodate the Project on their land. They usually must instead turn their minds to procuring acceptable contractual terms and recovering adequate compensation.

At a time when rural resumptions for linear infrastructure is abundant (the abovementioned Transmission Projects, HumeLink and the Commonwealth Inland Rail project are all examples of public purposes for which land is currently being acquired), the compensation piece remains complicated. This is a result of, amongst other factors, the diverse physical nature of the land being acquired, the uses to which that land is put, and the highest and best uses of that land. This is before the human element is even broached; that is, how landowners will respond to or extract compensation for acquisitions on land that, in some cases, has been in their family for generations and which they proposed to retain and use for the rest of their lives.

Agricultural properties, in particular, are managed and used in ways that often clash with public infrastructure proposals in ways that are difficult to quantify or reconcile with the language in the *Land Acquisition (Just Terms Compensation) Act 1991*. For example, aerially sprayed crop treatments can be difficult to apply when there is a transmission line across a property, which gives rise to analyses of how that treatment will be conducted in future, whether it will result in an extra cost, and how that cost could be compensated. A similar question arises in relation to other large crop management equipment and vehicles which must ultimately manoeuvre around transmission poles and beneath transmission lines, if they can.

These issues will continue to arise as the abovementioned projects and others like them are developed. This may produce more case law on this area of the Land and Environment Court's jurisdiction.

Planning and development assessment

The strategic planning nature of REZs has generally not been supplemented with detailed planning and assessment guidance.

References to REZs in environmental planning instruments remain limited; the designation of the CWO Transmission Project, Hunter Transmission Project and Waratah Super Battery as critical State Significant Infrastructure under *State Environmental Planning Policy (Planning Systems) 2021* are among the only references made in NSW.

This gives rise to questions of how REZs are to be treated in the assessment process. That is, what bearing does it have on a decision-makers consideration of a renewable energy development application that the development is proposed in a REZ? Is it merely a consideration for the purpose of s 4.15, or is there a more specific contribution to be made to the assessment process?

Some obstacles for proponents are already evident, including standard considerations under s 4.15 of the *Environmental Planning and Assessment Act 1979*. This also includes more specific restrictions such as those provided in the visual impact provisions relating to mapped Regional Cities under the *Statement Environmental Planning Policy (Transport and Infrastructure) 2021*. However, more bespoke, REZ-focused guidance is sparse.

Intuitively, it may be gleaned that the fact that a renewable energy project is proposed within a REZ would mean that that consent is more likely than it would have been were it not for the presence of the REZ, or that the REZ is intended to be a facilitative mechanism. However, this is not provided for in the EII Act or a planning instrument.

At the date of writing, a development application in a NSW REZ has not been the subject of judicial consideration (though at least one has been the subject of proceedings that have not yet been determined). Only cursory comments have been made in other jurisdictions (e.g. in *Bookaar Renewables Pty Ltd v Corangamite Shire Council* (2019) VCAT 1244). As such, no further guidance has been provided by the Courts as to how the NSW REZs are to be treated from a planning and assessment perspective.

It could assist proponents and decision-makers if REZs had a stronger, clearer presence in SEPPs and LEPs. This could guide the design and siting of those projects by proponents and create greater transparency in how they are to be assessed.

A step in this direction was recently proposed, with the State government's exhibition of its draft energy policy framework. The framework would provide additional and updated guidelines for the assessment of renewable projects (focusing on landscape and visual impact assessment), as well as some administrative and facilitative matters like a template landowner agreement and community benefit guidelines. While REZs are referred to, additional prescription for the assessment of proposals in those areas specifically is not yet included. Exhibition of the draft framework closes on 18 December 2023.

As touched on above, renewable development applications are still being lodged in REZs. However, until further legislative clarification is provided, this uncertainty, as well the risk of reliance on future case law, remains an issue for renewable energy projects in REZs.

A quick look forward

Renewable energy supply and output continues to rise and REZ-related projects, both private and State-owned, are proceeding on a large scale.

Uncertainties remain, though, both in respect of the impact that those projects will have on landowners (and the compensation payable for those impacts) and how those projects ought to be assessed in light of their potential roles within the REZs. This may be addressed as the REZs mature, more regulation is developed and more case law generated.

HASTI KALAROSTAGHI, JESSICA BALDWIN & ADAM KENNEDY-HUNT
Hunt & Hunt Lawyers

Greenwashing

A new wave of climate change litigation and compliance action is emerging in Australia and around the world.

Previously, public and regulatory pressure for greenwashing has concentrated on the fashion and food industries. The fast fashion retailer, Shein, came under further scrutiny by global media in June 2023 after an influencer led PR campaign was criticised for greenwashing and misleading followers. Similarly H&M is the subject of a class-action lawsuit filed on 22 July 2023 that alleges that despite H&M's position as a fast-fashion giant, H&M is deceptively capitalising on the growing segment of conscious consumers by creating an extensive marketing scheme to greenwash its products and present them as environmentally friendly when they are not. H&M is being sued for false and misleading sustainability marketing.

On 29 July 2023, UK watchdog, Competition and Markets Authority (CMA) announced that it would investigate ASOS, Boohoo and other fashion brands over claims about the sustainable nature of their products. The clear international message is that all fast fashion and fashion companies should take note and look at their practices to make sure that they are in line with the law.

In Australia, the focus on greenwashing is expanding to the superannuation, insurance and energy sectors. Corporate regulators have identified greenwashing as a key area of concern, with an intention to prioritise companies that hang themselves out as "*green*" but can't back it up. Companies must ensure they understand what greenwashing is and how to avoid making misleading and deceptive claims, unintentionally or otherwise, about their goods and services to avoid financial costs and legal liabilities.

What is greenwashing?

"*Greenwashing*" refers to the process of misleading consumers and the public by carrying out that a product or service is green, sustainable, eco-friendly or otherwise ethical and socially conscious when it is not, or where there is insufficient evidence.

Greenwashing might involve companies making a variety of claims about their products or services, or the company itself, without evidence to substantiate them, including by:

- making vague, meaningless or unqualified statements, such as describing products as "*green*", "*eco-friendly*", "*responsible*" or "*sustainable*";
- using labels or claiming certifications that mislead consumers into thinking suggest products are environmentally friendly;
- making exaggerated or absolute claims, such as that a product is "*100% sustainable*";
- claiming that products are better or more environmentally friendly than competing products without giving details of the comparisons involved; and
- exaggerating sustainability benefits or omitting negative information that might be relevant to a consumer's choice, such as the use of harmful chemicals.

ASIC enforcement action

Over the past year, the Australian Securities and Investments Commission (ASIC) has taken steps to hold companies accountable for their greenwashing claims, after announcing greenwashing as one if its 2023 Enforcement Priorities.

Infringement notices

Since October 2022, ASIC has issued over $140,000 in infringement notices against four companies regarding alleged corporate greenwashing. These companies are:

- **Tlou Energy Limited** in relation to ASX announcements claiming that electricity Tlou produced would be carbon neutral, Tlou had environmental approval and capability to generate certain quantities of solar electricity, Tlou's gas-to-power project would be 'low emissions', and Tlou was equally concerned with producing 'clean energy' through the use of renewable sources as developing its gas-to-power project.
- **Black Mountain Energy** in relation to ASX announcements made claiming that projects would have net-zero emissions. In both cases, ASIC was concerned the companies did not have reasonable bases to make these representations, or that they were factually incorrect.
- **Vanguard Investments Australia** and **Diversa Trustees Limited** in relation to claims that products excluded investments in companies involved in, respectively, significant tobacco sales, and 'polluting and carbon intensive activities' or 'financing or support of activities which cause environmental and social harm'. ASIC was concerned that the statements were overstated or too broad, and may have been liable to mislead the public.

Court action

Mercer Superannuation (Australia) Limited

In February 2023, ASIC commenced its first court action regarding alleged greenwashing conduct, launching civil proceedings in the Federal Court of Australia against Mercer Superannuation (Australia) Limited (**Mercer**).

The action relates to seven of Mercer's '*Sustainable Plus*' investment options, marketed as excluding investments in companies involved in carbon intensive fossil fuels and other sectors, including gambling and alcohol. ASIC claims that Mercer made misleading statements and engaged in conduct that could mislead the public about the sustainable nature and characteristics of these options. It is alleged the options included investments in companies supposedly excluded, such as 15 companies involved in the extraction or sale of carbon intensive fossil fuels, including AGL Energy, BHP Group Ltd, Glencore and Whitehaven Coal.

ASIC is seeking several remedies, including declarations, pecuniary penalties and injunctions to prevent Mercer from making any further misleading statements. Additionally, orders requiring Mercer to publicise any contraventions found by the Court are also being sought. The matter has been listed for hearing on 7 December 2023.

Vanguard Investments Australia Limited

In June 2023, ASIC lodged civil penalty proceedings in the Federal Court against Vanguard Investments Australia Limited (**Vanguard**).

The action concerns Vanguard's Ethically Conscious Global Aggregate Bond Index Fund (**Fund**) which was marketed to investors seeking an ethically conscious screen. ASIC claims that ESG research was not conducted over a significant proportion of the issuers of bonds and exposed investor funds to investments which had ties to fossil fuels. ASIC commenced proceedings alleging that Vanguard's Product Disclosure Statement constituted conduct liable to mislead the public as to the Funds nature, characteristics and suitability for purpose. Additionally, ASIC alleged that statements on Vanguards website, to Finance News Network and in a media release were false or misleading in representing the Fund as of a particular standard, quality or grade or had certain performance characteristics or benefits. ASIC is seeking declarations, pecuniary penalties and adverse publicity orders against Vanguard. These proceedings follow Vanguard having self-reported one breach to the regulator and taken steps to update disclosures for the Fund in 2021.

LGSS Pty Limited (Active Super)

In August 2023 ASIC commenced its third greenwashing civil penalty proceedings, alleging Active Supers' claims to be an ethical and responsible superannuation fund amounted to misleading conduct and misrepresentation to the market. Active Super represented on their website, disclosure documents and social media pages that they eliminated investments that posed too great a risk to the environment and the community. ASIC alleges that Active Super had 28 holdings which exposed members to investments it claimed to restrict or eliminate, including gambling, tobacco, Russian entitles, oil tar sands and coal mining. ASIC is seeking declarations, pecuniary penalties, adverse publicity orders and an injunction against Active Super from the Court.

ACCC focus

In recent years, the Australian Competition and Consumer Commission (**ACCC**) has been paying particular attention to greenwashing.

Survey of companies

In March 2023, ACCC released results of its survey of 247 businesses and brands in relation to greenwashing, finding that 57% had promoted "*concerning claims about their environmental credentials*". Of the sectors surveyed, cosmetic, clothing and footwear, and food and drink industries had the highest proportion of concerning claims.

ACCC has announced it will crackdown on greenwashing claims in the wake of its findings. It says it has several active investigations underway across the packaging, consumer goods, food manufacturing and medical devices sectors for alleged misleading environmental claims, which may grow as it continues to conduct more targeted assessments.

Complaint under the Competition and Consumer Act

In March 2023, the Environmental Defenders Office, on behalf of not-for-profit group Flight Free Australia (**FFA**), lodged a complaint against Etihad Airways to the ACCC. The complaint concerns statements like "*Flying shouldn't cost the earth*" and "*Net zero emissions by 2050*" displayed alongside the Etihad logo on a billboard during a soccer game in 2022. The FFA claims these implied that flying with Etihad does not have a significant environmental impact and Etihad intends or reasonably expects to achieve net zero emissions by 2050.

The FFA alleges that Etihad may have breached the *Competition and Consumer Act 2010* (Cth) by making these statements. It claims that there is no evidence to support these assertions as Etihad "*has no credible path to net zero in place*", with initiatives that are "*not technologically, practically or economically feasible*". The FFA is asking the ACCC to investigate whether Etihad engaged in misleading or deceptive conduct in the commissioning of the advertisements.

Draft guidance for business on environmental and sustainability claims

In July 2023, the ACCC published draft guidance to assist businesses making environmental and sustainability claims. The draft guidance comes as part of the ACCC sustained focus on greenwashing and coincides with the ACCC's submission to the Senate Environment and Communications Reference Committee Inquiry into greenwashing. The ACCC looks to improve business integrity through truthful and accurate claims made about the environmental benefits of products or services to consumers. The draft guidance sets out "*eight principles for trustworthy environmental and sustainability claims*":

Principle 1: Make accurate and truthful claims

Principle 2: Have evidence to back up your claims

Principle 3: Don't leave out or hide important information

Principle 4: Explain any conditions or qualifications on your claims

Principle 5: Avoid broad and unqualified claims

Principle 6: Use clear and easy-to-understand language

Principle 7: Visual elements should not give the wrong impression

Principle 8: Be direct and open about your sustainability transition

The ACCC claims that businesses who follow these principles "*are less likely to mislead consumers and contravene the law*". It is unlawful under Australian Consumer Law to make false or misleading claims about specific aspects of goods or services. The ACCC when considering enforcement action will look to the effort and steps taken by businesses to verify the accuracy of any information that they relied on. The draft guidance principles provide clear steps for businesses seeking to make a genuine effort to verify the accuracy of information used to make environmental and sustainability claims.

Risks for companies

Both ASIC and ACCC have expressed clear intentions to crack down on corporate greenwashing. Companies have been put on notice that investigations and compliance actions, including potential Court actions, are set to continue.

Further, an inquiry into greenwashing is currently being conducted by the Senate Standing Committee on Environment and Communications and is due to report back to Parliament by mid-2024. This inquiry is likely to bring even greater attention to how businesses are acting on their environmental and sustainability claims.

Greenwashing claims can harm companies financially and legally, but can also impact public perception, with consumers increasingly making purchasing decisions on environmental grounds and demanding greater transparency and accountability for climate-related risks.

To avoid claims of greenwashing, companies seeking to promote ethical products, green practices, and net zero or sustainability targets must ensure that their statements are accurate and able to be substantiated. We refer companies to ASIC's *Information Sheet 271*, which provides information on how to avoid greenwashing when making sustainability-related claims and promoting sustainability-related products. It is essential that companies stay up to date with developments in this area to ensure they are not liable for greenwashing when promoting their products and policies.

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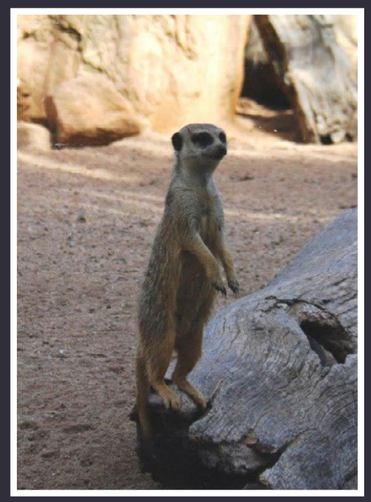
Sydney Zoo
700 Great Western Highway, Bungarribee



SAMANTHA DALY, ANGUS HANNAM,
NETHMI AMARASEKERA & HEATHER PYM
Johnson Winter Slattery

Navigating a Path to Sustainability: A Closer Look at the Sustainable Buildings SEPP 2022

THE State Environmental Planning Policy (*Sustainable Buildings*) 2022 (**Sustainable Buildings SEPP**) was made in August 2022 and came into effect on 1 October 2023, following an almost one year transitional period.

By implementing the Sustainable Buildings SEPP, the NSW Government have shown their commitment to delivery of the NSW Net Zero Plan: Stage 1, with a goal to bring NSW closer to net zero emissions by 2050. The Sustainable Buildings SEPP aims to encourage more sustainable construction of buildings across NSW and simplify and co-ordinate the way buildings are planned for with respect to sustainability. It is expected that with the implementation of the Sustainable Buildings SEPP, around 2.6 million tonnes of greenhouse gas emissions will be avoided over the next 10 years to 2032. Both residential and non-residential buildings are covered by the Policy.

This article will discuss the key requirements under the Policy for residential and non-residential developments and key considerations for developers and industry.

Residential Development

BASIX standards

The NSW Building Sustainability Index (**BASIX**) was introduced in 2004 as a sustainability assessment tool to reduce the environmental impact of new residential development by prescribing minimum standards for water, energy efficiency and thermal performance. It also aimed to report on construction materials being used so their embodied energy could be calculated.

From 1 October 2023, updated BASIX standards began applying to all new residential development in NSW through development application (**DA**) and complying development certificate (**CDC**) pathways, with the exception of alterations and additions less than $50,000, and homes in North Coast climate zones and apartment buildings up to 5 storeys. The changes require new residential development to operate against higher energy and thermal performance standards. The standards now require a thermal performance standard of 7 stars on the Nationwide House Energy Rating Scheme (**NatHERS**), from an average of 5.5–6 stars, and a reduction in greenhouse gas emissions by 7-11% depending on the location and type of residential development proposed.

Planning circular PS 23-001, which advises councils, statutory planners and private certifiers on how to assess the sustainable performance of buildings where the Sustainable Buildings SEPP applies, explains how the transitional provisions operate to ensure that developments already in progress are not impacted by the policy change:

- The Policy applies only to DAs and applications for CDCs submitted on the NSW Planning Portal on or after 1 October 2023.
- Modifications to a DA submitted prior to 1 October 2023 are not impacted by the Policy.
- A DA or application for a CDC lodged after 1 October 2023 is permitted to use a BASIX certificate created before 1 October 2023, if it is within the 3-month validity period, and to meet the standards in effect at the time the certificate was issued.
- Additional transitional arrangements apply to building contracts for new single dwellings or dual occupancies entered into prior to 1 October 2023.

Embodied emissions

In addition to the higher thermal performance and energy efficiency standards, all new residential development both under DA and CDC pathways will be required to report on embodied emissions. Before granting development consent, the consent authority must be satisfied that the embodied emissions attributable to the development – ie the greenhouse gas emissions resulting from the materials used to construct a building that forms part of the development – have been quantified.

From 1 October 2023, BASIX includes a new Materials Index to calculate and report on the embodied emissions of construction materials in new residential development. The index requires applicants to enter data on the size of the development and select what materials the floors, walls, ceiling, roof and glazing are to be constructed from. Only the residential parts of the building are measured for embodied emissions. The BASIX calculator will then determine the volume of each material and its associated emissions. Total embodied emissions are divided by the 'assumed number of occupants' (calculated by correlating occupancy data to floor area from the NatHERS whole-of-home calculations) and this per capita value is compared with the average emissions, specific to different development types, to produce a score showing the percentage reduction of emissions compared to the average.

At present, there is no limit or standard on the embodied emissions of a residential building, however guidance released by the NSW Department of Planning and Environment (**DPE**) indicates that this may be considered in the future. The certifying authority will check the emissions reporting and commitments from the Materials Index on a BASIX certificate at the DA, construction certificate and occupation certificate stages.

Non-Residential Development

Application of Chapter 3 of the Sustainable Buildings SEPP

Chapter 3 of the Sustainable Buildings SEPP contains the standards for non-residential development, which apply to:

a) The erection of a new building, if the development has a capital investment value of $5M or more, or

b) Alterations, enlargements or extension of an existing building, if the development has a capital investment value of $10M or more.

Certain kinds of non-residential development are exempted from the standards, depending on the zoning of the land and the purpose of the development, among other things. Additional requirements apply to 'large commercial development' and certain State significant development, as discussed in further details below.

Standards for non-residential development

In deciding whether to grant development consent to non-residential development, the consent authority must consider whether the development is designed to enable the following:

- the minimisation of waste from associated demolition and construction, including by the choice and reuse of building materials,
- a reduction in peak demand for electricity, including through the use of energy efficient technology,
- a reduction in the reliance on artificial lighting and mechanical heating and cooling through passive design,
- the generation and storage of renewable energy,
- the metering and monitoring of energy consumption,
- the minimisation of the consumption of potable water.
- the consent authority is satisfied that the embodied emissions attributable to the development have been quantified.

Before granting development consent, the consent authority must also be satisfied that the embodied emissions attributable to the development have been quantified. The reporting format for non-residential development is at present the NABERS Embodied Emissions Material Form. Once the NABERS framework is released in mid-2024, the NABERS Embodied Emissions Tool will become the required format.

We note that the interim form does not provide a quantification of the embodied emissions of developments, but until mid-2024 it will nonetheless be considered satisfactory for meeting the relevant regulatory requirements. It requires the applicant to enter an itemised and certified list of building materials. Materials quantities are calculated at both the DA stage and again at construction certificate stage. Once the NABERS Embodied Emissions Tool is released, building components and key construction materials will be itemised the tool and will automatically be converted into embodied emissions factors derived from Environmental Product Declarations.

In addition to the reporting form, applicants for non-residential development will also be required to answer questions on the NSW Planning Portal about any low-emission construction technology used in the development when applying for a DA. Examples include modular construction systems, robotic fabrication to reduce product waste and carbon neutral manufacturing practices or materials.

Additional considerations applying to certain non-residential development

In deciding whether to grant development consent to 'large commercial development' or certain State significant development, the consent authority must consider whether the development will minimise the use of on-site fossil fuels, as part of the goal of achieving net zero emissions in NSW by 2050. DPE's further technical guidance released via Webinar on 19 September 2022, Webinar on 23 August 2023, Webinar on 22 September 2023,DPE's Sustainable Buildings SEPP Overview Document at Sections C.4 Net Zero Provisions and the Net Zero Statement Technical Note states in order for this requirement to be met, the applicant is required to demonstrate that the development will:

- Not use fossil fuels onsite; and
- Incorporate the infrastructure, or space for the infrastructure, necessary for the development not to use fossil fuels onsite after 1 January 2035; and
- In order to have the DA approved, the design will have demonstrated that it is all electric or that it is capable of converting to fossil fuel free operation by 2035; and
- The statement must be prepared by a qualified member of the design team (architect, designer, engineer etc) however must be certified by a mechanical or electrical engineer; and
- The development will need to purchase offsets for any on site fossil fuel use, excluding back up generation.

DPE's Net Zero Statement Technical Note provides a Net Zero Statement checklist at the end of the document which is useful to developers in ensuring they have provided and demonstrated all the required information.

The consent authority must not grant consent to large commercial development unless they are satisfied that specified ratings for water and energy usage can be achieved. The star ratings have been developed to align with the National Construction Code 2022. For water usage a 3 star NABERS water rating must be achieved. For energy usage the ratings are as follows:

- For prescribed office premises - 5.5 star NABERS energy rating; and
- For prescribed hotel, motel accommodation or serviced apartments is a 4 star NABERS energy rating.

DPE's Sustainable Buildings SEPP Overview Document at Sections C.4 Energy Standards and C.5 Water Standards provides that for the Energy Usage Standards applicants will need to identify the preferred Section J energy reporting pathway and submit a NABERS Energy Commitment Agreement with the DA. For the Water Usage standards applicants should consider reducing potable water use and submit a NABERS Water Commitment Agreement with the DA.

At the construction certificate stage, in order to meet the Energy Usage Standards developers must submit a Section J Report and any independent review or performance based solutions. At construction certificate stage to meet the Water Usage Standards, developers must submit a progress report in the form of annotated drawings or written statement.

The Policy also requires that developers provide verification of the actual energy and water use 24 months after the occupation certificate is obtained. DPE did note that there would be amendments made where a 1 year extension would be granted where reasonable to verify the ratings in their Webinar on 22 September 2023.

With reference to DPE's Sustainable Buildings SEPP Overview document Section C.4, where the Energy Usage standard is not achieved and there is a performance gap, the development must procure offsets for their residual emissions calculated for a minimum 5 year period. DPE has released a performance gap calculator which can be downloaded from the DPE website. The offset type must be Large-scale Energy Generation certificates, Australian Carbon Credits Units or Carbon Neutral Standard Certification. A NSW Energy Performance Gap Report must also be submitted.

Key takeaways

The Sustainable Buildings SEPP is a positive step in addressing the hidden emissions associated with building and construction, and improving reporting to assist the NSW Government to meet net zero emissions.

Forward-thinking residential property developers who signed building contracts and sought to obtain BASIX certificates prior to 30 September 2023 should note the cut-off dates for transitional arrangements and the three month expiry of their existing BASIX certificates. For the residential property construction market at large, the new requirements spell savings for homebuyers, who are expected to save up to $1000 annually in energy bills with the new standards, and an increase in demand for designers and suppliers of energy efficient construction materials.

Developers and new homebuyers should expect further development of sustainability reforms in the property development industry as embodied emissions data is collected and considered in the context of NSW's proposed emissions reduction targets, currently before Parliament.

DPE have already incorporated most of the requirements into the NSW Planning Portal, in the form of prompts, questions and templates and it should be noted that compliance with the Sustainable Buildings SEPP is required for any DAs lodged after 1 October 2023.

The Sustainable Buildings SEPP solidifies the pathway towards net zero emissions, putting in sustainability requirements for certain non-residential buildings. It is expected that the net of non-residential developments captured by the Sustainable Buildings will be cast wider with future reviews of the Policy, with the first one being in 2025.

It will be interesting to see how the emissions data being captured will be used by DPE to project, enforce and promote reduction of carbon emissions and further implement changes to the Policy in future reviews.

DANIELLE LE BRETON & LOUISE MCANDREW
HWL Ebsworth Lawyers

SHOW ME THE MONEY! Making development applications on the Planning Portal

The Court of Appeal recently considered the question of when a development application is "*made*" under the *Environmental Planning and Assessment Act 1979* (EPA Act). The answer is often critical in determining whether a new or amended environmental planning instrument applies to proposed development – in this case, *State Environmental Planning Policy (Housing) 2021* (SEPP Housing).

The decision in *Hinkler Ave 1 Pty Limited v Sutherland Shire Council* [2022] NSWLEC 150, handed down on 2 November 2023, is the first time the question has been considered by the Court of Appeal since the statutory scheme for making development applications was changed, and the requirement for documents to be electronically uploaded to the NSW Planning Portal.

Background

THE applicant, seeking development consent from Sutherland Shire Council for a mixed use development, submitted a development application form and a number of documents through the NSW Planning Portal (**Portal**) on 22 October 2021.

Council made requests for additional information from the applicant and, after the applicant's responses were received, issued an invoice on 2 December 2021 for the development application fee - all via the Portal. The applicant paid the fee on 9 December 2021. On 13 December 2021, notice was given to the applicant via the Portal that the development application had been lodged.

The SEPP Housing commenced on 26 November 2021 and included the savings provision that it did not apply to a development application "*made, but not yet determined*" on or before its commencement date. The question of when the development was "*made*" was therefore determinative of whether the new SEPP Housing applied, or the less onerous provisions of the former instrument (*State Environment Planning Policy (Affordable Rental Housing) 2009)* - was it "*made*" when documents were uploaded to the Portal on 22 October 2021, when the additional information was provided by the applicant, or sometime after?

Decision of Moore J at first instance

At first instance[i], Moore J of the Land and Environment Court considered the issue as a separate question of law in a class 1 merit appeal against Council's deemed refusal of the development application. His Honour determined that as at the SEPP Housing's commencement date, the development application had not been made because the council was not satisfied that the necessary plans had been provided under the Environmental Planning and Assessment Regulation 2000[ii], nor had the development application fee been paid.

Adopting the reasoning of Pain J in Commitment Pty Ltd v Georges River Council (No 2) [2022] NSWLEC 94, his Honour concluded that the development application was made on 9 December 2021, the date the fee was paid. The development application was, therefore, subject to the new SEPP Housing.

Decision

On appeal, the Court of Appeal confirmed that the development application was not made as at 26 November 2021 and dismissed the appeal.

The Court agreed that the provision of information and documents prescribed under the regulations, and lodgement (following the payment of the development application fee), are essential conditions for the making of a development application. The longstanding position, reflected in *Botany Bay City Council v Remath Investments No 6 Pty Ltd* (2000) 50 NSWLR 31, remains unchanged despite the legislative changes to the form and manner in which development applications are made (via the Portal).

While it was not necessary to determine the date the development application *had* been made, Basten AJA (with whom Gleeson JA agreed)

expressed the view that it was on 13 December 2021, when council gave the required notice to the applicant via the Portal that the development application had been lodged[iii].

Preston CJ, however, appeared to hold the same view as the court below, that the development application was made on 9 December 2021 when the fee was paid[iv].

Concluding comments

This case confirms that a development application must substantially comply with the requirements of the EPA Act and its regulations, which includes payment of the development application fee after the consent authority has determined the amount and notified the applicant.

Whilst the Court acknowledged that the time which elapses between the applicant providing the requisite information for a development application and being notified of the fee by the consent authority may prejudice an applicant, it noted that where there is delay in notifying an applicant of the fee payable, it is for an applicant to take matters into their own hands and seek an appropriate order from the Court that the consent authority determine and notify the fee payable to the applicant if necessary.

Similarly, there could be delay in a consent authority actioning a notification of lodgement on the Portal after the payment of the fee. If there is support for the view expressed by Basten AJA and Gleeson JA that an application is not complete until such notification, the potential prejudice to an applicant is even greater.

The question of when a development application is made or lodged is a significant one. It can be critical in determining the applicability of legislation and planning instruments (and the permissibility or viability of proposed development). The lodgement date is also critical in determining when an appeal can be commenced against a consent authority's deemed refusal of a development application. It is questionable that the legislature intended that these matters would ultimately turn on when a consent authority actions a Portal notification confirming lodgement, at some unspecified time after all necessary information has been submitted to allow the development application to be determined, and the fee has been paid. If this was not its intention, it's a matter worthy of clarification in the legislation given its potential significance.

i. Hinkler Ave 1 Pty Limited v Sutherland Shire Council [2022] NSWLEC 150

ii. cl 50(1)(c) and Sch 1, cl 2(1)(d) of the Environmental Planning and Assessment Regulation 2000

iii. cl 50(8) of the 2000 Regulation; s24(4) Environmental Planning and Assessment Regulation 2021

iv. At [160]-[161]

JISELLA CORRADINI-BIRD
Marsdens Law Group

Breezeways and Floor Space Ratio

The design of some development incorporates open corridors, sometimes referred to as "breezeways". Whether or not these areas are to be included in the calculation of floor space ratio can become an important consideration when a development is close to exceeding the maximum floor space ratio development standard. Whilst there is no definitive answer as to when breezeways should be included in the calculation of floor space ratio, this article explores some of the commentary made by the Land and Environment Court in a number of recent cases.

Definitions

Clause 4.5 of the Standard Instrument – Principal Local Environmental Plan sets out the requirements for calculating floor space ratio, and states:

> (2) **Definition of "floor space ratio"** The ***floor space ratio*** of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.

The definition of "gross floor area" as found in the Standard Instrument – Principal Local Environmental Plan states:

> ***gross floor area*** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—
>
> (a) the area of a mezzanine, and
>
> (b) habitable rooms in a basement or an attic, and
>
> (c) any shop, auditorium, cinema, and the like, in a basement or attic,
>
> but excludes—
>
> (d) any area for common vertical circulation, such as lifts and stairs, and
>
> (e) any basement—
>
> (i) storage, and
>
> (ii) vehicular access, loading areas, garbage and services, and
>
> (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
>
> (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
>
> (h) any space used for the loading or unloading of goods (including access to it), and
>
> (i) terraces and balconies with outer walls less than 1.4 metres high, and
>
> (j) voids above a floor at the level of a storey or storey above.

When considering breezeways, there are two critical aspects of the definition of "*gross floor area*" which have been the focus of decisions in the Land and Environment Court. Firstly, the meaning of the words "*internal face of external walls*" and secondly, how the height of 1.4 metres impacts whether an area should be included or excluded.

GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney [2015] NSWLEC 1521 ("GGD Danks")

In the case of *GGD Danks*, Commissioner O'Neill formed the view that the corridor of the building in question did not form part of the gross floor area as it was contained on either side by the external walls of the units on either side of the corridor.

The Commissioner determined that the external face of the wall cannot be characterised as an internal face because an external wall has a specific function that distinguishes it, that being, weatherproofing. It was said that the definition of gross floor area must refer to the interior surface of the wall that forms the facade or exterior of a dwelling, being the wall that weatherproofs the interior space, and cannot refer to the exterior surface of the outer wall.

In circumstances where the corridor would be subject to rain along the gap, the walls containing the corridor were considered by the Commissioner in *GGD Danks* to be external walls, and therefore not included as internal floor space for the purpose of gross floor area and the calculation of the floor space ratio.

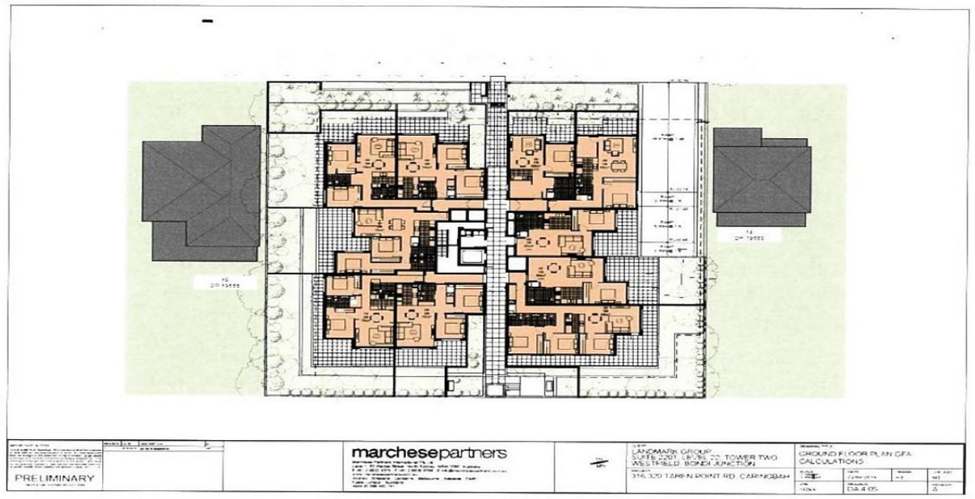


Figure 1: Applicant's calculation of gross floor area identified in brown tone

Landmark Group Australia Pty Ltd v Sutherland Shire Council [2016] NSWLEC 1577 ("Landmark")

In Landmark the Danks case was referred to but it was argued by the Council's planning expert that the "floor" of the building in the plan was the whole of the floor enclosed by the external face of the building, that being the face that surrounds the building footprint and which, notwithstanding articulation, recessing and the like within it, is generally that which presents to the street frontage and to the side and rear boundaries.

Commissioner Morris summarised the arguments of the experts at paragraphs 35 and 36 as follows:

> *"35. Ms Laidlaw says that although two ends of the breezeway are open above a height of 1000mm (at each floor above ground level) these openings are proportionally insignificant in the context of the total area of the external walls of the building and are properly characterised as an architectural detail of the building, rather than a fundamental element of the building's composition. She says that for breezeways not to be considered as floor area they would be open to the elements by having one full side or two full sides, enclosed by a standard balustrade and topped only by a roof that is sufficient to cover the breezeway itself. She differentiates the proposal as one where both sides are enclosed by walls exceeding 1400mm in height and only the narrow ends of the breezeway open above 1000mm."*

Commissioner Morris accepted the argument of the Council that the breezeways were part of the gross floor area and said:

> *"57. I do however recognise that individual circumstances in each case can lead to different outcomes. In Danks Street it would appear that different circumstances applied and that in particular the Commissioner had regard to the fact that the corridor would be wet during inclement weather with rain blown along the gap and the walls containing the corridor functioning as external walls….*
>
> *59. I do not consider the same circumstances apply in this case. I agree with the evidence of Ms Laidlaw that the calculation of GFA required the floor area to be measured from the internal face of external walls and that in this case the external walls accord to the red line detailed in the diagram included at [34]. Whether the area at ground level between the 2m high gates at either end of the building is categorised as a breezeway or corridor is irrelevant to my consideration. The fact of the matter in this case is that the area between these gates is within the internal face of the external walls of the building."*

Ceerose Pty Ltd v Inner West Council [2017] NSWLEC 1289 ("Ceerose")

In Ceerose, Commissioner Dickson took a similar approach to Commissioner Morris in the Landmark case. The Commissioner said at paragraph 60 of the judgment:

> *"60. As detailed in Danks v City of Sydney [31] the definition of gross floor area requires the floor area at each level of the building to be measured at the internal face of the external walls. In the specific design considered by O'Neil, C in the above case, the corridor in question was not enclosed by a wall that acted to weatherproof the building, or that formed a part of the buildings façade. On this basis, and the practical fact that the corridor would be wet during inclement weather, she found it was appropriate to exclude the floor area of the corridor, as it could not be characterised as internal floor space. This is not the case in the current development application where, on the evidence of Mr Darroch, the louvered openings in the end walls of the corridor are proportionally insignificant (Exhibit 2). I concur with the evidence of Mr Darroch and find that the corridors as proposed are properly characterised as internal floor space, and should be included in the calculation of gross floor area."*

HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243 ("HPG Mosman")

In HPG Mosman, Commissioner O'Neil was again tasked with determining whether the internal corridors on two floors of the building identified on the Applicant's plans as "breezeways" should be included as gross floor area. Commissioner O'Neill described the corridors at paragraph [30] of her judgment:

> *"The corridors are long, each with an opening on one side less than half the length of the corridor, which includes a planter 1m high as a barrier. The same opening on Level 3 is enclosed with a window. If the openings on Levels 1 and 2 were enclosed with windows, the corridors would be internal spaces and the area of the corridors, measured from the internal face of the external walls, would contribute to the GFA."*

Commissioner O'Neil ultimately found that the corridors should be excluded from the calculation of gross floor area and provided the following explanation:

> *"36. For the same reason as the explanation given in GGD Danks Street at [31], the walls of the corridors on Levels 1 and 2 of the proposal are external walls. The breezeways, or corridors, are external spaces because they function in the same way as an inset balcony and the opening has an outer wall less than 1.4m high. An inset balcony requires the three enclosing façades of the balcony to be external walls, to create an internal or habitable space internally. The extent of the roof overhangs over the planters may keep the corridors dry during inclement weather but they do not render the corridors internal spaces. The communal corridors on Levels 1 and 2 are external spaces and the walls lining the corridors will have to be external walls in order to make the units adjoining the corridor habitable space, unless a window is added to the openings on Levels 1 and 2. For this reason, it is my view that the walls of the corridors are external walls and the area of the corridors therefore does not contribute to the GFA."*

Commissioner O'Neil included in her judgment the following commentary on the Landmark case:

> *"37. I respectfully disagree with the finding in Landmark Group because the corridor was unenclosed and was an external space. The test is not the "prospect of rain entering the breezeway" or whether the external space is identified as a breezeway or a corridor (at [36]). For the units adjoining the corridor to each be a dwelling, they must be enclosed on all sides by external walls or common walls. As the corridor was open at each end, the side walls of the corridor had to be external walls to the units on either side of the corridor."*

Australex Group Pty Ltd v Fairfield City Council [2022] NSWLEC 1685 ("Australex")

In the case of *Australex*, Commissioner Walsh recognised that different approaches had been taken by Commissioners of the Court in regard to the legal interpretation of the gross floor area definition's phrasing "*measured from the internal face of external walls*" and what constitutes external walls as a factor in the interpretation of gross floor area, specifically in regard to partially open corridors or similar configurations.

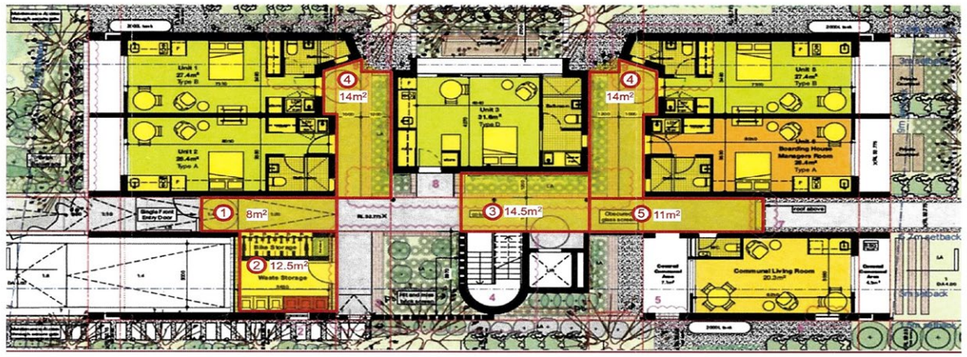
The main issue in *Australex* related to whether certain corridors or breezeways, with a significant degree of enclosure, should count as gross floor area. The areas in dispute are shown in Figure 2 opposite.

Commissioner Walsh preferred the approach in the Landmark decision rather than the Danks decision. He said:

> *"29. In my opinion, in a structural sense, the definition can be understood to have four parts. The first and second parts are within the chapeau to the definition. The third and fourth parts are at pars (a)-(c) and (d)-(j) of the definition, respectively.*
>
> *30. The first part of the definition, in its clear expression, establishes that GFA means the sum of the floor area of each floor of a building. The second part describes from where measurement is to be undertaken (reference, relevantly, the definition's phrasing "measured from the internal face of external walls" and "measured at a height of 1.4 metres above the floor"). The third part clarifies areas of inclusion. The fourth part clarifies areas of exclusion.*
>
> *31. I see the first part as the primary element of the GFA definition. The points of central attention when determining GFA are first in understanding the building, and then the area of floor within the building at each level. The second part of the definition seems to me to be simply concerned with how to measure, nothing grander would be taken from a plain reading. It indicates that in determining floor area, you measure from the internal face of external walls of the building. This is a practical point and makes clear for example that it is wrong to measure from say skirtings, which usually partially cover the area of floor, or the external wall, which might be a particular point of argument in some building configurations, particularly given that building bulk (see below in regard to my second point of reasoning) would generally be perceived on the basis of the external wall form. Measuring at a height of 1.4 metres above the floor is of a similar vein, relating directly to the contextual objective of understanding building bulk as perceived (again see below in regard to my second point of reasoning)."*

At paragraphs 36 and 37 the Commissioner concluded:

> *"36. The confines of a building (or structure) for this purpose can be understood as the built structure generally within roof and the outer walls of the building, albeit that there may be articulation here and there that need to be taken into account. While I acknowledge Danks takes a different view, windows and openings to horizontal communal corridors (louvred or*



Ground Floor Plan

First Floor Plan

Figure 2: Applicant's calculation of gross floor area shown in yellow, areas in dispute outlined in red.

otherwise, and whether or not associated internal corridors require waterproofing or otherwise) would both be seen the same way in my construction. Neither should be seen as obstructing (or thwarting) the interpretation of the confines of the building, generally defined by the line of outer walls. At the primary level, the floor area for each level is established by the confines of the building itself. Then this primary understanding is translated into a measurable factor by the second part of FLEP's GFA definition. There are some points of clarity in regard to inclusions and exclusions in what I call the third and fourth parts of the definition. Clearly, there is no accounting for proportionately small openings in otherwise enclosed communal corridors in either the third and fourth parts of the definition, nor is there any consideration of (internal v external) wall construction particulars specified in the definition. In my view, the issue of how the walls function, also, does not relate to the underlying contextual question of the interpretation of building confines or building density or bulk.

37. In turn, I conclude that it would be at odds with the GFA definition, read in whole and in context, to exclude lengths of internal communal corridors which happened to have openings, at one or both ends, to the otherwise generally perceived building (and thus floor area) confines. I am more aligned with the views expressed in Landmark and, again respectfully, disagree with Danks and those judgments following it on this point."

Key takeaways

It is clear from the above cases that there have been different approaches taken by Commissioners of the Court when considering whether breezeways should be included in the calculation of floor space ratio (and acknowledging that the cases summarised above are not an exhaustive list).

Whilst there have been a number of Commissioner decisions on the subject, these have not been subject to judicial consideration and are, therefore, not binding as legal precedent.

Given the uncertainty in the correct approach, Applicants seeking to rely on breezeways as a means of keeping below the maximum floor space ratio development standard will frequently also lodge a written request seeking to vary the development standard, should the Court find that the breezeway is to be included in the calculation of floor space ratio.

HAMISH MCIVOR
Georges River Council

Recent consideration of 'design excellence' provisions by the Land and Environment Court

The importance of exhibiting 'design excellence' by a proposed development, as a jurisdictional precondition to granting development consent, was again highlighted by the recent decision of *Chau v Georges River Council* [2023] NSWSLEC 1619. In the context of a proposed multi-storey development in a town centre, the Land and Environment Court assessed whether design excellence was exhibited against an extensive variety of design related matters as prescribed under the Georges River Local Environmental Plan 2021.

'DESIGN excellence' is a broad concept notably prescribed under many Environmental Planning Instruments (EPIs). In the case of the *Georges River Local Environmental Plan 2021* (**GRLEP**), design excellence refers to a host of matters intended to deliver '*the highest standard of sustainable architecture and urban design*' for certain new developments.[i] Such matters that need to be considered by the consent authority in determining whether a proposed development exhibits design excellence includes how the development addresses: heritage and streetscape constraints; the relationships of the development with other nearby developments in terms of separation, setbacks, amenity and urban form; and bulk, massing and modulation of buildings.[ii]

The recent decision of *Chau v Georges River Council* [2023] NSWLEC 1619, highlighted how the Land and Environment Court applied the relevant design excellence provisions within the context of a proposed seven-storey mixed use boarding house development in Hurstville, on a site adjacent to several low-rise buildings and heritage buildings within the same streetscape. In this case, design excellence provisions were triggered under the GRLEP as result of the development's proposed height exceeding three storeys, and location being within a *'Mixed Use'* zone.[iii]

In following *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117, the Court in *Chau* noted that each matter set out under cl 6.10 of the GRLEP must be considered as part of a framework, which cumulatively makes up design excellence. Nonetheless, in noting the majority of design excellence matters were in dispute, the Court grouped the determinative evidence under the categories of '*massing and street wall*', '*massing and amenity*' and '*public domain and ground floor interface*' in being assessed against the relevant prescribed matters.[iv]

With respect to whether the proposed development's '*massing and street wall*' (as illustrated by the below photo from the planners' report) exhibited design excellence, the Court found that the development's massing did not adequately address the existing streetscape context of 1-3 storeys and heritage items, with large blank side elevations of the proposed seven-storey building not reflecting '*a high standard of architectural design or detailing and would detract from the streetscape*', and that the street wall should have been *'further expressed with reference to the streetscape and heritage items'*.[v]

With respect to the '*massing and amenity*', the Court considered that while the subject site was '*constrained by its size, frontage, unique subdivision pattern and surrounding context*', the design of the development needed to '*respond to a site's opportunities and constraints through consideration of appropriate massing and likely environmental impacts on both the proposed development and neighbouring sites*' with the Court finding that:[vi]

- a proposed rear setback within a small sized site did ‘*not adequately consider its relationship with neighbouring sites*’ including foreseeable future adjoining buildings that would likely result in adverse amenity impacts on the proposed development;
- an adjoining site would ‘*be inequitably burdened with sharing visual privacy separation within their site*’; and
- the proposed development would have ‘*overall inadequate amenity through poor outlook*’ and limited sunlight outcomes for lower-level boarding rooms.

And finally, with respect to ‘*public domain and ground floor interface*’, the Court noted that the Hurstville Development Control plan ‘*seeks street activation*’ on the adjacent street to the proposed development. The Court regarded despite being a consequence of the site’s small frontage and site area, ‘*a residential lobby whilst a form of activation, in this instance was considered the lowest form of activation that is not reasonably anticipated in this location as the main activator’*. Amongst the dominance of services at the building interface (basement access, fire stairs, lifts and fire hydrants), this was considered to contribute to ‘*predominantly inactive frontage and inadequate ground level interface with the public domain within a town centre location*’.[vii]

As design excellence is a jurisdictional precondition to granting development consent under the GRLEP, the Court exercising the functions of the consent authority, needed to be satisfied design excellence was exhibited by the proposed development in order to enliven the power to grant consent.[viii] In the case of *Chau*, as design excellence was found not to be exhibited, development consent could not be granted and was instead refused on this basis.

The decision reinforces the imperative of carefully considering how a proposed development responds to each of the matters prescribed by the design excellence provisions contained within any applicable EPIs, such as the GRLEP in the case of *Chau*. While the Court found multiple shortcomings by the proposed development in *Chau* with respect to design excellence, the case again illustrated that the Court may be obliged to refuse consent based on a proposed development only failing to meet some of the prescribed matters relevant to design excellence. With the Court finding other contentions in favour of the applicant, a failure to exhibit design excellence was ultimately the fatal flaw to the development application being successful.

i. Georges River Local Environmental Plan 2021 (NSW) cl 6.10(1).

ii. Georges River Local Environmental Plan 2021 cl 6.10(5).

iii. Georges River Local Environmental Plan 2021 cl 6.10(3)(b)(v).

iv. Chau v Georges River Council [2023] NSWSLEC 1619, [86]-[90].

v. Chau v Georges River Council [2023] NSWSLEC 1619, [98]-[99].

vi. Chau v Georges River Council [2023] NSWSLEC 1619, [107]-[111].

vii. Chau v Georges River Council [2023] NSWSLEC 1619, [114]-[120].

viii. Georges River Local Environmental Plan 2021 (NSW) cl 6.10(4).

ROSLYN McCULLOCH
EPLA representative on the Duty Lawyer Scheme Committee

The Duty Lawyer Scheme *– Update 2023*

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.

Post-pandemic the scheme has reverted to a part in-person and part telephone service.

In 2022-23, the scheme benefitted greatly by more than 20 very experienced solicitors and barristers volunteering their time to assist the self-represented litigants.

This year in particular has seen a big uptick in self-represented litigants seeking the assistance of duty lawyers. 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. In October 2023 the waiting time for duty lawyer appointments had extended to several weeks and it became necessary to double the roster for the final months of the current Court term.

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 2023*

In 2022-23 EPLA again had two representatives on the Court Users Group (CUG) - Janet McKelvey and Roslyn McCulloch. The CUG continues to provide a useful forum for an exchange of news, ideas, complaints and solutions concerning practice and procedure in the Land and Environment Court.

Here are a few of the "highlights" over the past two years:

- issues regarding modification of development and modification applications before the Court arose and were subsequently resolved via legislative change.
- the transition from entirely virtual to in-person and hybrid Court hearings and the resumption of in-person directions hearings.
- a working group was established to discuss changes to the Class 3 practice note – revisions to the practice note are expected shortly.
- the need for, and content of, jurisdictional statements to assist Commissioners dealing with s34 agreements in Class 1 appeals.
- procedural questions related to concurrent hearings, correcting errors in judgments, the provision of reasons for the grant of a consent in a s34 agreement context and directions for expert evidence in Class 4 proceedings.
- the introduction of the large file uploader to assist with electronic filing of documents larger than 5MB in size.
- ongoing adoption of and adaptation to new technologies in Court hearings and conciliations.

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**

AMELIA COOK & JESSICA LIGHTON
NSW Young Lawyers Environment & Planning Law Sub-Committee

NSW Young Lawyers, Environment & Planning Law Sub-Committee – *Update 2023*

2023 was a successful year for the NSW Young Lawyers Environment and Planning Law Sub-Committee with the return of the Trivia Night Extravaganza. The year also saw the Sub-Committee continue its track record of quality submissions on environment and planning related policies and legislation, and a range of diverse guest speakers presenting at our monthly meetings on issues such as space junk and the risks of it falling to Earth, native title and cultural heritage laws, public interest climate and environmental litigation, and the various differences between private practice and in-house work.

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

In October, the Sub-Committee was able to host its traditional Trivia Night Extravaganza to raise funds for the Young Lawyers 2023 Charity - Women's Housing Company. The Women's Housing Company has been operating for over 40 years in NSW to empower and support women to improve their lives through the provision of affordable housing. The in-person event was incredibly well-attended by Sub-Committee members and other attendees from the legal community. The competition went down to the wire, with a tie-breaker determining Martin Place Chambers the victors over the team from Mills Oakley. For those keen to show off their trivia skills, the extravaganza will return in 2024.

The Sub-Committee's representatives on the Law Society's Environment, Planning and Development Committee and the Land and Environment Court Users Group remain engaged in those groups for the benefit of the Sub-Committee, both to pass up comments and feedback and to keep the Sub-Committee abreast of key issues and activities arising within those groups. 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 NSW statutory review of the Biodiversity Conservation Act 2016, and the Senate inquiry into Greenwashing by the Senate Standing Committees on Environment and Communications. The Sub-Committee thanks its submissions co-coordinators, Phoebe Saxon and Andrew Mahler, for their tireless work in seeing these submissions through to lodgement and, of course, extends its thanks to the many members who contributed to submissions throughout the year.

Finally, the Sub-Committee has continued its track record of top-notch guest speakers presenting on a variety of engaging topics related to Environment and Planning law. Highlights from the year included: Dr Philippa Ryan of the Australian National University, discussing space junk, how it may fall to Earth, and the Kessler Syndrome; Ashleigh Persian, a heritage consultant with Urbis, presenting on the role of heritage consultants, her work with developers, and the heritage regulatory landscape in NSW; Harrison Grace, a barrister at 7 Wentworth Selborne, speaking about his experiences at the Bar and tips for junior lawyers; James Fan, General Counsel at Georges River Council, discussing his experiences and the differences between working in private practice and in-house; Ross Mackay from Mackay Legal, presenting on native title and cultural heritage law; and Grace Huang, a solicitor at the Environmental Defenders Office, discussing her work with the EDO and the differences between private practice and public interest litigation.

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 36 to attend our monthly Sub-Committee meetings and to get involved in our various activities and initiatives.

Please contact **envirolawexec@gmail.com** with any enquiries that you may have regarding the Sub-Committee.

Trivia Night Extravaganza, with trivia host Nick testing attendees on their music knowledge.

Representatives of the winning table from Martin Place Chambers, Chris Koikas & Ryan Coffey, accepting the trophy.

The Hunt & Hunt table.

Chair, Amelia Cook, and Secretary, Stephanie Miller, of the Sub-Committee.

Chair of the Sub-Committee, Amelia Cook, welcoming everyone to the Trivia Extravaganza

Comings and Goings: 2023

EPLA members & supporters (in random order)

CONGRATULATIONS AND WELCOME

- Joanne Ling and Alistair Knox on the arrival of baby Jude
- Mark Seymour SC and Nick Eastman SC of Martin Place Chambers on being appointed Senior Counsel
- Jonathon Ede on the arrival of baby Hudson
- Blair Jackson, formerly of Pikes & Verekers is now at the NSW Bar and joined Frederick Jordan Chambers
- Tom Messenger on the arrival of baby Samuel
- Bianca Galifuoco, formerly at the Department, has come to the NSW Bar and joined Level 22 Chambers
- Martin Place Chambers has welcomed Lauren Sims and Chris Koikas as members of Chambers
- Nicola Targett and Louise Byrnes on being appointed Acting Commissioners of the Land and Environment Court

DESPATCHES AND FAREWELL

- Vale Peter Jensen, Glenn Miller SC, Dick Smyth and Ellen Talbot
- Farewell to the Hon Justice Timothy Moore who has retired from the Land and Environment Court

MOVES

- Matthew Thornton -Dibb has joined Norton Rose Fulbright
- Kara Mezinic has joined McCulloch Robertson
- Sophie Hale and Suzy Whitty have joined Hones Lawyers
- Teagan Woods has moved to Maddocks
- John Cole has merged with Tom Messenger and now Messenger Cole
- Michael Themis has joined the Commonwealth Department of Climate Change, Energy, the Environment and Water.
- Emily Ryan has joined the Central Land Council in the Northern Territory
- Emili Fox has started a new role at Architectus
- Beth Clarke has joined Mills Oakley
- Justin Koprivniak has joined Dentons
- Carlo Zoppo has moved to Sparke Helmore
- Louise McAndrew has joined HWL Ebsworth
- Emma Whitney has gone in-house at General Counsel at Meriton
- Layth Zumout has joined Allens
- Tim Poisel has moved to University Chambers
- Thuy Pham, Adrian Talevski, Fayette Vermeer and Bianca Crapis have joined Lindsay Tayor Lawyers
- Noni Shannon has left Norton Rose Fulbright and is now a partner at Deloitte Climate & Sustainability
- Luke Salem, Kirstie Richards and Alec Kibblewhite joined Pinsent Masons
- Matt Floro has joined the office of the NSW Minister for Climate Change, Energy, the Environment and Heritage
- Adrian Guy has moved to Sparke Helmore
- Tom White and Alex Beale have moved to Lander & Rogers

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EPLA MEMBERSHIP APPLICATION

APPLICANT DETAILS

Last Name:	First Name:	Firm/Organisation:
Street Address:	PO Box:	DX:
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Email:	Areas of Interest:	

MEMBERSHIP FEES

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

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

Individual	☐ $220	Corporate Rate - Councils/Government Departments	☐ $550
Student - Full Time Course	☐ $55	Corporate Rate - Firms/Floors (please provide list of names to be registered, max. 20)	☐ $770

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made payable to the Environment and Planning Law Association and posted with completed appplication form

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

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Please keep a copy of the form for your records and send the completed registration form including payment details to Michele Kearns, EPLA Secretary by:

POST: 32/52 Martin Place, Sydney NSW 2000
EMAIL: kearns@mpchambers.net.au