environmentallaw News

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Wednesday 5 - Friday 7 November 2025

North Sydney, Milsons Point & Waverton

5 NOVEMBER, WEDNESDAY

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North Sydney Mystery Venue

6 NOVEMBER, THURSDAY

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7 NOVEMBER, FRIDAY

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ANNE HEMMINGS
Editor

Editor's Note

WELCOME to the Autumn Edition of the Environmental Law News for 2025. This edition reports on the activities of EPLA in 2024, shares photos of the 2024 EPLA Conference and brings together articles of relevance to our members.

Law reform on biodiversity conservation is underway, globally, nationally and in NSW. The team from Maddocks provide an update on biodiversity law reform and explain the new "nature positive" approach to biodiversity conservation.

This edition brings together a collection of articles addressing important decisions in the NSW Land and Environment Court, the Northern Territory Supreme Court and the High Court. The team from Corrs outline and discuss the implications of the recent decision of Preston CJ in Goldcoral Pty Ltd (Receiver and Manager Appointed) v Richmond Valley Council [2024] NSWLEC 77 in which the infamous "Iron Gates" site at Evans Head obtained development consent after 30 years of litigation traversing the Land and Environment Court, Court of Appeal and the High Court. Then, the team from Allens shine a light on the obligations of landlords in the context of residential tenancies in remote Aboriginal communities in the Northern Territory.

There is a growing recognition of the crucial role of self-care for professionals as a necessary component of a long, enjoyable and healthy career and this edition brings together some well-being articles. In this edition, Natasha Hammond shares insights on self-care techniques. Then, Peter Strain celebrates 20 years of the Australasian Lawyers Surfing Association, whose first patron was Craig Leggat SC.

The regular features of the ELN are again included to provide an update of EPLA activities in 2024. A wrap up is provided of the activities in 2024 of the Land and Environment Court – Court Users Group, the Young Lawyers Environment and Planning Law Committee and the team for the Environmental Law Reporter. We celebrate the Mahla Pearlman Oration in 2024, congratulate the recipient of the 2024 Mahla Pearlman Award and announce the 2025 Mahla Pearlman Oration speaker and event details.

Janet McKelvey interviews Commissioner Porter for EPLA and discovers the Commissioner's hidden talent! A photo spread is provided of the successful 2024 EPLA Conference which was held on the NSW South Coast. As always, we round off this edition with Comings and Goings in 2024.

I am grateful for the assistance of Ryan Coffey, Deputy Editor, in scouting out articles for this edition. Also, I am delighted to announce that Willem van Wyk has recently been appointed as a Deputy Editor of the ELN. Willem is an enthusiastic member of the EPLA Committee and is a town planner with a Masters of Environmental Law. With Willem's planning background and experience as an editor of other academic publications, Willem is a welcome addition to the ELN editorial team.

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

Finally, I note the passing of former friends and members of EPLA since the 2024 Autumn Edition of the ELN: The Hon Paul Stein AM KC, The Hon Neal Bignold, Philip Clay SC, John Maston, Andrew Darroch and Alan Nicol. We remember them and their contribution to planning and environmental law in NSW, which continues in the judgments in which they were involved, and in our collective memories of them in the court room and, importantly, informally at EPLA events.

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

—

Anne Hemmings
Editor

PAUL CRENNAN
President

President's Report

I am pleased to report that the Environment and Planning Law Association (NSW) remained busy delivering high quality presentations on issues relating to the various Planning Law disciplines during 2024. The 2025 year has commenced with 4 Twilight Seminars in March, and I foreshadow a continuation of interesting events through the remainder of the year.

Twilight Seminars in 2024 were conducted in-person and (almost all) incorporated audio-visual technology. A Guided Architectural Walk through the Sydney CBD was held in March 2024 (without AVL). This was the second year of such a walk, and it is looking to be a permanent fixture on the EPLA calendar. There is so much on offer that it does not need to re-trace previously covered ground.

Topics for the Twilight Seminars addressed development issues as they arose during 2024. We also finally achieved a long-held determination to conduct a session exploring the NSW Planning Portal. The intellectual challenge of the "State of Democracy" was pursued with high level academic and practitioner presentations. The emerging Land and Environment Court Class 3 Practice Direction was made plain with the participation of members of the Court.

The Mahla Pearlman Oration was delivered by the Hon James Allsop AC to an appreciative audience both in-person and online. The existence of International Treaty obligations and human rights obligations are bound to give rise to more and more inventive litigation on the impacts of climate change.

EPLA mourns the passing in 2024 of a number of friends: The Hon Paul Stein AM KC, The Hon Neal Bignold, Philip Clay SC (Past President), John Maston, Andrew Darroch and Alan Nicol. Each in their own way had a positive impact on the organisation for which we are grateful.

The EPLA Annual Conference was held on the beautiful NSW South Coast in 2024 at Cupitt's Estate, Milton.

The Conference was held on Thursday 7 and Friday 8 November 2024.

The informal drinks on the evening of Wednesday 6 November, to encourage delegates to head to the South Coast early to be prepared for the start of the Conference, were well attended.

The keynote address in opening the Conference was delivered by Monica Mudge who is a resident of the South Coast, a recipient of a number of community awards and the founder and president of Treading Lightly, an organisation dedicated to environmental care.

The plenary sessions of the Conference on Thursday morning commenced with presentations from the Land and Environment Court including the Justice John Robson and the Registrar of the Court, Sarah Froh. EPLA remains grateful to the Court for the participation of its officers. I particularly acknowledge the assistance of the Chief Judge Brian Preston for his contribution in identifying topics of importance to practitioners and for encouraging the participation of members of the Court.

We are pleased to have again welcomed the President of the NSW Court of Appeal, Justice Julie Ward who gave an update on cases relevant to environment and planning law.

Senior representatives from the Department of Planning provided an update on an active planning year in 2024.

A session on the change to laws on environment protection and penalties was delivered by the Chief Executive Officer of the Environment Protection Authority accompanied by professional practitioner analysis of the law in operation.

To utilise our proximity to the coast, the venue for the Friday afternoon session was the Mollymook Surf Club overlooking the beach. There was challenging content exploring the state of urban waterways followed by serious education lightened up by Mike Staunton as an environmental law trivia competition.

In keeping with being on the coast, Professor Bruce Thom addressed coastal land use planning and coastal management, using Mollymook Beach as the backdrop.

With successful hybrid conferences in the previous two years, EPLA returned to a fully-fledged regional conference in person (supported by audio-visual facilities). Delegates rekindled the benefits of networking with fellow professionals while focusing on professional development over two days.

As a fitting opportunity for the active delegates, Robert White lead a coastal walk on the Saturday morning from Pretty Beach to Pebbly Beach. The walk provided a delightful postscript to the Conference and walks of this kind are likely to be repeated to align with future EPLA Conferences.

Once again, we are grateful to our Conference sponsors for their generosity and support. Pikes and Verekers sponsored the President's Drinks. Mills Oakley sponsored the Conference Dinner, at Cupitt's Estate on the final night. Both firms have long been great supporters of EPLA for which we thank them.

EPLA appreciates the support of all sponsors. You will recognise them from the logos which appear on the Conference brochure and on other materials.

I look forward to seeing you at one of the many Twilight Seminars, education sessions, social functions or at the Annual Conference on 6 and 7 November 2025 which returns to Sydney, at Luna Park.

—

Paul Crennan
President

LOUISE CAMENZULI & MAX NEWMAN
Corrs Chambers Westgarth

Dispersing the Shadow: Unlocking the "Iron Gates"

A recent Court approval will facilitate the development of the notoriously fraught "Iron Gates" site, which has been the subject of numerous proceedings over several decades. It has also established a number of important precedents on the interpretation of savings provisions, subdivision as a form of development, koalas, the relevance of prior unlawful works and council responsibilities as the owners and managers of public assets.

Background

A developer, Goldcoral, sought approval for a residential subdivision in Evans Head, New South Wales, on a site with a long history of failed and stalled development attempts. Since 1988, various applications had been lodged and vigorously resisted by the local community, including in earlier proceedings in the NSW Land and Environment Court (**LEC**), NSW Court of Appeal and High Court. The site has mixed residential and conservation zoning. Various areas have been cleared and partly developed by previous landowners, with roads, stormwater and sewage infrastructure installed. Some of those works were undertaken unlawfully.

The development application (**DA**) the subject of the proceedings was lodged in 2014. After several amendments, it was refused by the Northern Regional Planning Panel in 2022. Goldcoral appealed. The DA was a concept DA under s 4.22 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), with a detailed proposal for subdivision works in stage one of the development.

The Class 1 appeal was heard by Preston CJ. Development consent was opposed by the Richmond Valley Council (**Council**) and Ms Barker, a Bandjalang woman who was joined as a respondent. The Bandjalang people enjoy native title rights over lands and waters near the site.

The Council raised two contentions on matters of law:

1. the proposal is designated development under s 2.7 of State Environmental Planning Policy (Resilience and Hazards) 2021 (R&H SEPP) and the DA was not accompanied by an environmental impact statement (EIS); and
2. development consent cannot be granted for unauthorised works that are already constructed and will not be removed under the new DA.

The Council also raised merits contentions including that the proposed development did not adequately mitigate environmental impacts on threatened species and was inconsistent with the desired future of the locality. Contentions relating to bushfire and flood risk, stormwater, groundwater, services, earthworks and mosquitos were resolved prior to the hearing.

Ms Barker contended that the development would have an unacceptable impact on the exercise and enjoyment of native title rights near the site and Aboriginal cultural values of the site and surrounds.

Dispersing the Shadow

Preston CJ upheld the appeal and granted development consent in *Goldcoral Pty Ltd (Receiver and Manager Appointed) v Richmond Valley Council* [2024] NSWLEC 77 (**Judgment**).

The case is a useful reminder that, in contentious public interest matters, public impressions and historical factors should not distract a consent authority from its fundamental task under s 4.15(1) EP&A Act, which is to carefully assess matters "as are of relevance to" the development before it.

Clearly, the long history of attempts to develop the site, past unlawful works, persistent community opposition and an originally poorly-conceived DA in 2014 heavily influenced impressions of the proposal and contentions raised in the proceedings. Preston CJ noted:

> *The idea of the development is founded and framed by the excessive and allegedly unlawful developments carried out on the land by the previous land owners, as well as the more extensive and less environmentally sensitive development originally proposed by Goldcoral in the development application first lodged in 2014. Those developments, and their perceived unacceptable environmental impacts, are seared in the memory of the Council, Ms Barker and the community.*

In making this observation, Preston CJ also invoked T.S. Eliot's poem *The Hollow Men*. Responding to Eliot's sombre notion that "between the idea and the reality… falls the Shadow", Preston CJ held: "[t]he shadow may be dispersed by shining a light to illuminate the reality of the development, the environment and the law". This is the consent authority's task; to shine a light on the proposal without being unduly distracted by past events or preconceived impressions.

Calculated amendments made to the proposal during the proceedings and an "illumination of the reality of the development, the environment and the law", as set out in the Judgment, ensured that the DA as finally amended was approvable.

In delivering the Judgment, his Honour made several findings on issues that are common to many developments and may have precedential application in further contexts.

Accrued rights arising from savings provisions

Before the Council could prove its argument that the proposal was designated development, it needed to establish that the R&H SEPP applied to the DA. Goldcoral argued that S*tate Environmental Planning Policy No 14 – Coastal Wetlands* (**SEPP 14**) and *State Environmental Planning Policy No 71 – Coastal Protection* (**SEPP 71**) continued to apply to the DA.

SEPP 14 and SEPP 71 were repealed and replaced by *State Environmental Planning Policy (Coastal Management) 2018* (**Coastal SEPP**), which included a savings provision for DAs "not finally determined". The Coastal SEPP was largely transferred into the R&H SEPP on 1 March 2022, without the relevant savings provision.

Nevertheless, Preston CJ held that the savings provision in the Coastal SEPP conferred an "accrued right" that was protected by the operation of ss 5(6) and 30(2)(b) and (d) of the *Interpretation Act 1987*, with the consequence that the provision continued to have effect to the DA. Therefore, SEPP 14 and SEPP 71 continued to apply.

The relevant right is that of the applicant for development consent to have the DA determined under the former planning provisions of SEPP 14 and SEPP 71. The right did not arise at lodgement of the DA but upon the repeal of SEPP 14 and SEPP 71, and is unaffected by the subsequent repeal of the Coastal SEPP.

This interpretation does not disturb the common understanding that a DA is to be determined on the basis of the law that is applicable at the time of determination. The law includes the operation and effect of s 30(2) of the *Interpretation Act 1987*. It is also consistent with established jurisprudence from the Court of Appeal in *Dubler*, which often appears to be overlooked or misinterpreted by consent authorities.

Few undetermined DAs are likely to continue to engage SEPP 14 and SEPP 71. However, the reasoning in the Judgment on this issue will be relevant to DAs that may be affected by a "dual repeal" of environmental planning instruments (where an instrument that applies at the time a DA is made is replaced, then replaced again before the DA is finally determined), of which there are several examples following the consolidation of SEPPs in 2021. This is especially prescient in the context of koalas, which was also at issue in the proceedings (see below).

Mere subdivision does not trigger designated development requirements

Part of the site is mapped "coastal wetlands" under the R&H SEPP. No physical works were proposed on this part of the site, which was to form part of a residue conservation lot.

The Council argued that the subdivision of the site constituted "any other development on land" for purpose of s 2.7(1)(d) R&H SEPP, the consequence being that the development was therefore designated and an EIS was required. This was because a subdivision of land is "development" under the EP&A Act.

In rejecting this argument, Preston CJ held that given no part of the mapped coastal wetlands would be subdivided into two or more lots (rather it would sit on a single residue lot), there was in fact no subdivision of the wetlands. Further, mere subdivision without any physical works is not the carrying out of development "on land". The registration of a plan of subdivision might involve the subdivision of land, which is development, but "to carry out development on land involves doing something on the land".

Although the Judgment is specific to s 2.7 R&H SEPP, there are other instruments that contain similar references to development "on land" that may now be interpreted in light of this reasoning.

Determining whether development affects core koala habitat

The koala issue raised both a legal and a factual question. The legal question concerned whether *State Environmental Planning Policy No 44 – Koala Habitat Protection* (**SEPP 44**) applied to the DA, as contended by Goldcoral, or *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (**Biodiversity SEPP**), as contended by the Council. Preston CJ held that SEPP 44 continued to apply, for largely the same reasons that determined the continued application of SEPP 14 and SEPP 71.

The factual question concerned *how* SEPP 44 applied to the development. The evidence indicated that part of the site contained an area of native vegetation that might be "potential koala habitat". At issue was whether this meant that the site as a whole therefore became potential koala habitat, such that the consent authority needed to determine whether this land was "core koala habitat" under the SEPP. A koala plan of management (**KPoM**) is required before development consent can be granted in respect of land that is core koala habitat.

Preston CJ held that as no physical works were proposed on that part of the site that was considered "potential koala habitat", there was no requirement to consider whether the land is core koala habitat, stating:

> *… the requirement to be satisfied as to whether or not the land is a core koala habitat is only engaged if the development application seeks consent "to carry out development on land… that it is satisfied is a potential koala habitat" (cl 8(1)). That is to say, the development application must seek consent to carry out development in the area of native vegetation on the land that the consent authority is satisfied is a potential koala habitat.*

Although SEPP 44 is unlikely to continue to apply to many DAs, the concepts of "potential" and "core" koala habitat, and the circumstances in which a KPoM is required as a precondition to development consent, endure in Chapter 3 of the Biodiversity SEPP. The reasoning in the Judgment on this issue will have precedential effect to DAs where only part of a development site contains koala feed trees.

The relevance of prior unlawful works

Much of the existing development on the site had been undertaken unlawfully. The DA proposed the removal of most, but not all, of these works. A drainage channel that now serves an important hydrological and ecological function on the site was proposed to be retained.

The Council argued that Goldcoral was seeking to "gain advantage" from unlawful works, which is impermissible per *Ralph Lauren*. Preston CJ dismissed this, explaining:

> *There is no legal principle that development consent cannot be sought to carry out development to erect a building (which includes a structure) or to carry out works that would amend a building or works that are unlawful, and then to use in the future the new or amended building or works.*

The DA was to be assessed on its own merits. A finding that the existing works it was adopting was lawful was not required. Moreover, Goldcoral was not gaining an advantage from having established an unlawful use. The works were constructed by previous landowners and Goldcoral had acquired the land with the works in place.

This is a useful clarification of the circumstances in which *Ralph Lauren* is to be applied. It is not the case that all past unlawful works, if retained and incorporated into a proposed development, constitute an "advantage" that was found to be impermissible in *Ralph Lauren*.

Councils, not community associations, should own public assets

There is a growing trend for local councils to resist the dedication of traditionally public assets such as roads, parks and stormwater infrastructure, where they consider that the costs of maintaining such assets can be borne by a build-to-hold developer or strata/community association.

In the proceedings, the Council opposed the proposed dedication of internal roads, drainage and stormwater facilities and a local park. Its opposition was in part due to the Council's lack of experience with and the perceived higher maintenance costs of the stormwater infrastructure, which included bioswales, and the resources required to manage another park.

In respect of the stormwater facilities, Preston CJ noted that the Council is better placed to manage these compared to a community association, and that this would serve the function of "better ensuring the protection in the public interest of environmentally sensitive lands and waters".

Regarding the park, his Honour went further:

> *The management of local public parks is a fundamental responsibility of local government. If the Council is not coping with the management of existing public parks, it needs to improve its performance. Discriminating against the residents of one neighbourhood – the residents of the proposed residential estate on the land – by not accepting and managing a local park for those residents is not equitable.*

In respect of the roads, Preston CJ described the Council's position as "opportunistic", noting that it had been willing to accept the roads when the proposal was originally conceived as a Torrens title subdivision and had changed its position after the subdivision was amended to a community scheme.

The Judgment provides useful commentary on the inherent advantages of councils in managing public assets over individual, private landowners, and the duties of councils to take on such responsibilities.

NATASHA HAMMOND
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Selfcare for Professionals

Selfcare is essential for our health and wellbeing, our enjoyment of life and our productivity at work. In recent years there has been an increase in awareness of the importance of selfcare and wellness, and an increase in information and support for lawyers and other professionals. It is now recognised that people who work long hours in high stress environments may suffer disproportionately from physical and mental health impacts. The nature of legal and other professional work can make it challenging to achieve a healthy work-life balance, which is necessary to maintain a healthy body and mind.

Sleep to restore the mind and body

QUALITY sleep is as vital as diet and exercise, yet it is often neglected. Sleep may be considered to be the number one pillar of health, as a poor nights' sleep makes it so much harder to make good nutritional choices and to have the energy to exercise and perform well at work the next day.

Australian adults commonly report sleep problems. Yet sleep plays a critical role in healing and repair of the body. Getting too much or too little sleep is associated with an increased risk of several health conditions, including type 2 diabetes, heart disease, and stroke, and also poor mental health. Conversely, getting enough sleep can help with regulating appetite, metabolism and mood, as well as immune, hormonal and cardiovascular functioning. For most people, 7 to 9 hours of uninterrupted sleep is recommended.

Consistently getting less sleep than we need leaves us feeling depleted and more reliant on stimulants and sugar to get through the day. Unfortunately for the coffee lovers, those who consume higher amounts of caffeine are more likely to report sleep problems than those with lower caffeine consumption.

Switching off from work at least two hours before bed time helps to calm the mind and facilitate a restful sleep. Avoid taking work calls or checking email during this wind-down window. We can facilitate this by switching off email notifications and/or putting devices into "sleep" or "do not disturb" mode.

Going to bed and waking up at the same time every day helps regulate the body's internal clock. A quiet, dark, and cool environment can help promote sound sleep. Limiting screen time before bed is also crucial. If devices are used at night, blue light blockers can be used so that the light doesn't affect our circadian rhythm. A meditation practice before bed can be very helpful to reduce the heart the rate and calm the mind, setting one up for a great nights' sleep.

Wearable devices, such as smart watches and fitness bands provide estimates of sleep time and quality, which is helpful information that can be used to adjust our lifestyle to improve the quality and length of sleep.

Eat – nutrition to fuel the body

Nutrition is the cornerstone of good health. The intake of foods that provide the essential nutrients, including carbohydrates, proteins, fats, vitamins, and minerals are vital for the body's growth, energy, and repair.

Numerous studies indicate that optimum wellness is achieved when we eat a diet of mostly unprocessed foods, lots of vegetables and fruits, legumes and wholegrains, healthy fats like avocado, nuts, olive oil and fish, some diary and a more limited intake of meat and processed foods. Eating fresh foods, sharing meals with family and friends, eating mindfully and limiting alcohol consumption are also recommended.

This reflects the "Mediterranean diet" which is advocated for optimum health benefits – and what's not to love about the Mediterranean!

Move your body

It is widely recommended that we engage in physical activity that elevates the heart rate for 30 minutes or more at least 5 days a week. This has significant benefits for our physical and mental health.

Regular exercise has a positive effect on brain development, bone strength, muscle control, balance and coordination and maintaining a healthy weight. Being physically active improves mental health, reduces blood pressure, and lowers cholesterol levels, among many other health benefits.

Brisk walking, cycling, swimming, tennis, strength training, vinyasa yoga, or surfing are just some of the ways that we can get our heart pumping and boost our endorphin levels to improve mood and energy levels. The best exercise is of course the activities that we enjoy the most, and even better shared with a friend.

Simple changes like taking the stairs, walking or cycling to work, and standing desks can also significantly change how we feel and add to our overall daily movement.

Reduce stress with meditation, breathing techniques and time in nature

Mental health encompasses our emotional, psychological, and social well-being, affecting how we think, feel, and act.

Techniques such as mindfulness meditation, or a moving mediation such as hatha yoga or yin yoga help to calm the mind and reduce unwanted stress reactions. Yin yoga, also known as restorative yoga, involves slow, deep, diaphragmatic breathing while holding poses for at least 3 minutes.

Diaphragmatic breathing (also known as "belly breathing") is a helpful technique that increases the amount of oxygen entering the blood from the lungs with each breath, reducing the body's stress response (the "fight or flight" response), activating the parasympathetic nervous system. This has been shown to decrease the stress hormones in our body, reducing symptoms of anxiety, depression and stress.

A similar technique is box breathing, which involves breathing in for a count of four; hold for a count of four; breath out for a count of four; and hold again for a count of four.

A daily meditation practice for just 10 minutes can significantly improve wellbeing, particularly during stressful periods at work. Just a few minutes of belly breathing or box breathing can be highly effective to lower the heart rate and relieve stress symptoms during a busy day, providing an almost immediate sense of calm.

Walking in nature is also known to improve mental health – try "forest bathing" – the Japanese have known for years that spending mindful time in nature is beneficial for body and soul.

Social connection and hobbies

Humans are social creatures, and our relationships and interactions with others have a profound impact on our mental and physical health. Strong, healthy relationships can provide emotional support, reduce stress, and promote a sense of belonging.

Developing interests and hobbies shared with family and friends is a great way to switch off from work and relax. This also helps to break the relentless cycle of work-eat-sleep-repeat that one can get caught up in during busy periods.

Having hobbies and interests outside of our careers enhances work-life balance, boosts our creativity, reduces stress levels and provides a sense of wellbeing. This often results in us being more productivity and energised at work. A sense of connection and belonging is also one of the key indicators of longevity.

Effective work practices – "Deep Work"

Many tasks undertaken by lawyers and other professionals involves "deep work", a term coined by Cal Newport to describe professional activities performed in a state of distraction-free concentration that pushes cognitive capabilities to their limit. This state is also widely referred to as being "in the zone". This level of concentration is necessary when we are engaging in tasks that require complete focus without distraction, such as conducting research, preparing reports or written advice, or legal submissions.

It is challenging in modern work contexts to achieve this state of complete focus when one is constantly distracted by telephone calls, emails and text messages, or meetings scheduled at inconvenient times. Distracting behaviours are often encouraged in the now ubiquitous culture of connectivity where one is expected to read and respond to emails quickly, including outside office hours. This is true for many lawyers and other professionals.

It is helpful to schedule our work days and include a chunk (or several chunks) of time to complete "deep work" tasks. During those periods, email and mobile telephones are switched off and other distractions removed, to allow maximum focus for that period of time. To make the most out of our deep work sessions, we can deploy rituals that help to go deep more quickly and to stay in that state for longer. This will be personal to different people. Examples might be to work in a specific location, to start with a cup of coffee or tea, to play certain music while we work, and to choose a time of day when we feel our most productive.

Scheduling our work days and setting aside time to focus on important tasks is an incredibly helpful tool to maximise our productivity and reduce stress.

Don't forget to schedule in a lunch break, physical activity, hobbies and time with friends and family!

Conclusion

Selfcare is essential to all busy professional people. It is important to prioritise our health and wellbeing. Having a balanced life is the key to a long, safe and enjoyable career and life. The key take-aways are to prioritise sleep, healthy eating habits and physical exercise each day. Scheduling time for "deep work" can help with productivity. Mediation and diaphragmatic breathing are great tools to reduce stress and anxiety during challenging times. Connecting with friends and family is also vital for our mental health and longevity.

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i. Australian Institute of Health and Welfare, "Sleep problems as a risk factor for chronic conditions" (November 2021), pp 1-2, 9.

ii. Ibid at p 7.

iii. Australian Institute of Health and Welfare, Physical activity - Australian Institute of Health and Welfare.

iv. Newport, Cal, "Deep Work" (US, 2016) at p 3.

v. Newport at pp 56-57.

vi. Newport at p 221ff.

vii. Newport at pp 119-121

REBECCA PLEMING & KIRBY PEARSON
Allens

A Tale of Two Communities – Uranium in drinking water, the absence of screen doors, and the issue of habitability

Two recent decisions – one of the Northern Territory Supreme Court and the other of the High Court of Australia – shine a light on the obligations of landlords in the context of residential tenancies in remote Aboriginal communities in the Northern Territory.

This article provides an overview of the decision in Pepperill and Anor v Chief Executive Officer (Housing) [2023] NTSC 90 which concerned the quality of drinking water, and the decision in Young v Chief Executive Officer (Housing) [2023] HCA 31 which concerned the provision of screen doors to residential tenancies.

Pepperill and Anor v Chief Executive Officer (Housing) [2023] NTSC 90

Background

LARAMBA is a remote town located approximately 200km north-west of Alice Springs and has a population of approximately 300 people. Laramba is an Aboriginal Community Living Area, and is leased to the Chief Executive Officer (Housing) (***CEO Housing***) who then sublets to individual tenants. As such, the CEO Housing acts as landlord for the residential tenancies within Laramba. This arrangement has been in place since 2014.

In 2019, twenty-four separate applications were commenced in the Northern Territory Civil and Administrative Tribunal (***Tribunal***) by residents of Laramba alleging, in part, that the concentration of uranium in drinking water supplied to their leased premises was significantly higher (about three times higher) than the maximum level set out in the Australian Drinking Water Guidelines. The Applicants claimed that the landlord had infringed section 48(1) of the *Residential Tenancies Act 1999* (NT) (the ***Tenancy Act***) by providing housing which was not habitable, and/or did not meet health and safety requirements. Whether, in fact, the uranium levels posed a threat to the health or safety of the Applicants was disputed and not tested in the proceedings.

Of these applications, it was agreed between the parties that three would proceed to hearing as test cases.

Habitability in the Tenancy Act

Section 48(1) of the Tenancy Act provides:

(1) It is a term of a tenancy agreement that the landlord must ensure that the premises and ancillary property to which the agreement relates:

(a) are habitable;

(b) meet all health and safety requirements specified under an Act that apply to residential premises or ancillary property; and

(c) are reasonably clean when the tenant enters into occupation of the premises.

The Tribunal's findings at First Instance

The first instance decision was delivered by the Tribunal on 1 July 2020 by President O'Reilly in *Various Applicants from Laramba v Chief Executive Officer (Housing)* [2020] NTCAT 22 (the ***First Instance Decision***).

The First Instance Decision determined as a preliminary question of law whether the level of uranium in the water at the relevant premises constituted a breach of section 48(1) of the Tenancy Act. Due to the COVID-19 pandemic, this question was determined on the papers.

President O'Reilly considered that the issue raised by the Applicants in relation to the extent of uranium in the drinking water involved not only a question of what is meant by 'habitable' but also a question of the extent of a landlord's responsibility to ensure habitability under the Tenancy Act

in circumstances where the water is supplied from outside the premises by a third party (namely, by Power and Water Corporation via a wholly owned subsidiary company).

The Tribunal considered that the nature of the claims could have the effect of imposing statutory responsibility for the quality and safety of drinking water on all landlords under the residential tenancy agreements through the concept of 'habitability' of premises, and that it was therefore particularly important to determine how far a landlord's obligation for habitability extends under the Tenancy Act.

The Tribunal ultimately determined that, with respect to the level of uranium in the water, there was no breach of section 48 of the Tenancy Act. In particular, President O'Reilly considered that:

(a) the landlord's responsibility to ensure that the premises are habitable under section 48 of the Tenancy Act is limited to the premises themselves, and does not necessarily encompass regulating water quality because in the Laramba cases the water itself does not form part of the premises; and

(b) because the Respondent did not control the supply of water, and the issues associated with the quality of water arose wholly outside the premises, the Respondent did not have a responsibility for the quality of the water under the Tenancy Act.

However, the Tribunal noted that if the issue of water quality arose due to corroded pipes within the premises, then the landlord may be responsible for or have liability for those issues under the Tenancy Act.

The Tribunal's findings on Review

The First Instance Decision was the subject of a review by the Tribunal in *Various Applicants from Laramba v Chief Executive Officer (Housing)* [2022] NTCAT 3 (the ***Review Decision***).

The Tribunal did not decide the merits of the dispute, but confined itself to reconsidering the question decided by President O'Reilly whether the concept of 'habitability' in section 48(1) of the Tenancy Act required the landlord to ensure a certain standard of water quality in circumstances where water was provided by an external provider.

Members Perry and Levy on review affirmed the First Instance Decision, finding that the habitability requirement in section 48(1)(a) of the Tenancy Act do not ordinarily require a landlord to ensure the potability of externally supplied water. The Tribunal found that the Respondent had no statutory function to supply water with the entity responsible for the provision of housing and the entity for the provision of water having a 'discrete and separate function'.

In support of this proposition, the Tribunal pointed to section 117 of the Tenancy Act, which states:

> *A landlord must not require a tenant to pay for charges, levies, rates or taxes, other than a charge payable by the owner or occupier of premises for electricity, gas or water supplied to the premises.*

The Tribunal reasoned that this section 'reflects the fact that utilities are ordinarily supplied by external entities', and not the landlord. The tenants of Laramba claimed that the exact source from which the habitability issue emanates is not relevant to the determination of whether or not a residence is habitable. The Tribunal disagreed with this proposition, citing the recent Northern Territory Court of Appeal decision in *Chief Executive Officer (Housing) v Young*, which imported a standard of reasonableness when considering liability for habitability issues, whereby it is necessary to consider all of the circumstances and context.

The Supreme Court's findings

The Review Decision was then the subject of an appeal to the Northern Territory Supreme Court. On 2 October 2023, Barr J delivered his decision in *Pepperill and Anor v CEO Housing* [2023] NTSC 90 which allowed the appeal and set aside the Tribunal's decision on account of errors of law (the ***Supreme Court Decision***).

In particular, his Honour upheld the appeal on the basis that the Tribunal failed to apply a correct understanding of section 48(1)(a) of the Tenancy Act by concluding that there is no breach of that obligation if the cause of there being a risk of injury to health in the premises emanates from a third party or external provider.

His Honour did not consider it relevant that the water was provided by an external provider. In particular, Justice Barr considered that the existence of intragovernmental arrangements whereunder the Respondent had no responsibility in providing water to Laramba did not absolve the Respondent of the duties under section 48(1) of the Tenancy Act. Notably, his Honour stated:

> *In circumstances where the respondent is required to ensure that the applicants' residence is habitable, and that includes ensuring that water is supplied to their residence, it would make no sense if the respondent were not required to ensure that the water supplied is safe to drink. It is a matter of 'health and safety' as it bears on habitability.*

Justice Barr considered that in the circumstances of the proceedings, the quality of the water which the Respondent permitted to be supplied to the premises was a habitability issue and a matter of health and safety, and that the Tribunal erred in finding to the contrary. Some of the circumstances which informed the Court's decision were that:

(c) there was no contract between the Applicants and the Respondent, or between the Applicants and any other entity, for the supply of water to their residences;

(d) the Applicants were not charged for the supply of water to their residences; and

(e) water is supplied to the Applicants' residence with the consent, express or implied, of the Respondent.

Young v Chief Executive Officer (Housing) [2023] HCA 31

In separate proceedings, on 1 November 2023 the High Court of Australia delivered its decision in *Young v Chief Executive Officer (Housing)* [2023] HCA 31.

These proceedings concerned the Santa Teresa Aboriginal community, which is approximately 100km west of Laramba.

Ultimately, the question before the High Court was whether the Tribunal was empowered by section 122(1) of the Tenancy Act to order that the landlord compensate Ms Young (a tenant of Santa Teresa) for distress or disappointment suffered as a reaction to a failure of the landlord (CEO Housing) to comply with the terms of a residential tenancy agreement – namely, the requirement to take reasonable steps to provide and maintain security devices that are necessary to ensure the premises are reasonably secure.

Ms Young had not been provided with a back door to her premises for a period of 68 months, and claimed compensation for loss or damage by way of distress and disappointment due to the insecurity she felt because of the landlord's failure to provide a back door. Ms Young described the absence of a back door as a significant impairment of security in circumstances where roaming wild horses may have bent a fence around the property, and where a snake may have entered the house.

The majority of the High Court ultimately determined that the Court of Appeal erred in construing section 122 of the Tenancy Act to import common law principles of remoteness, on the basis that statutory compensation under section 122 is an alternative remedy to common law damages for breach of a tenancy agreement. The Tribunal was therefore not confined to an assessment of damages only under a common law action for breach of contract.

Kiefel CJ, Gageler J and Gleeson J relevantly observed at [24] and [25]:

> *It is consonant with the legislative objective of ensuring that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements to recognise that s 122 leaves such remedies as may be available to landlords and tenants at common law or in equity untouched and provides an additional mechanism by which landlords and tenants can obtain from the Tribunal statutory compensation the measure of which is provided by the Act itself. …*
>
> *…the task of the Tribunal in each case is to arrive at a measure of compensation which conforms to the purposes of the Act and to the justice and equity of the case, having regard to the nature and purpose of the particular obligation with which there has been failure to comply and taking into account each of the mandatory considerations specified in s 122(3).*

In upholding the appeal, the majority of the High Court relevantly found as follows:

> *The evident purpose of the obligation specified by s 49(1) of the Act to be a term of a tenancy agreement, with which the CEO as landlord failed to comply, is ensuring that premises occupied by a tenant for the purpose of residency are reasonably secure. For a tenant to be secure in the occupation of premises is for the tenant to reside there free from threat of harm or unwanted access. The feeling of insecurity which Ms Young experienced because of the landlord's failure to provide the residential premises with a back door was the obverse of the security which it was the purpose of that obligation to secure. The connection between the landlord's breach and the distress and disappointment suffered by Ms Young readily satisfied the causal connection required by the word "because" in s 122(1).*

Future implications

Although the decisions relate to specific tenancies in remote Aboriginal communities where the landlord had statutory functions in relation to public housing, the concept of 'habitability' is not unique to the Northern Territory residential tenancy regime.

Accordingly, these decisions have the potential to inform the meaning of, and jurisprudence surrounding, 'habitability' under residential tenancy agreements more broadly and particularly in the context of social housing.

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i. Within the definition of the Pastoral Land Act 1992 (NT) Pt 8.

ii. See generally Various Applicants From Laramba v Chief Executive Officer (Housing) [2022] NTCAT 3 at [3] fn 2 for a discussion of the history of the Laramba township and how it became an Aboriginal Community Living Area.

iii. Various Applicants from Laramba v Chief Executive Officer (Housing) [2020] NTCAT 22, [47].

iv. Ibid, [50].

v. Ibid [55].

vi. Various Applicants from Laramba v Chief Executive Officer (Housing) [2020] NTCAT 22, [43].

vii. Ibid, [44].

viii. Various Applicants From Laramba v Chief Executive Officer (Housing) [2022] NTCAT 3.

ix. Ibid, [44].

x. Ibid, [57].

xi. Ibid, [52].

xii. Chief Executive Officer (Housing) v Young [2022] NTCA 1.

xiii. Ibid, [50].

xiv. Pepperill and Stafford v Chief Executive Officer (Housing) [2023] NTSC 90.

xv. Ibid [41]-[43].

xvi. Ibid, [45].

xvii. Ibid, [42].

xviii. [2023] HCA 31.

xix. Ibid, [41].

xx. Ibid, [23].

PETER STRAIN
Bondi Chambers

Australasian Lawyers Surfing Association (ALSA) Celebrates 20 Years – *Is that really a thing???*

The most credible account, according to tradition, is that ALSA was conceived under a pandanus tree at Spooky Beach, way up the North Coast of NSW in 2004. Numerous false starts were patiently endured by the early group of founders until we lucked into the boyish enthusiasm of Leggat SC and challenged a break away splitter by the name of Warburton. Peace was declared and ALSA was born and now she is turning 20. Where has the time gone?

WELL, I can tell you where some of the time has gone. For the past 20 years members of ALSA, also known as Surfing Lawyers, have tripped around the world on an annual conference mostly to Indonesia and more recently up to Crescent Head when COVID knocked us out of the skies. Commonwealth Law Reports have been studiously flicked through at venues such as The Telo Islands, Sumba, Roti, Bali (many times) and Lombok – just to name a few. In September this year we are off to Fiji for the first time. Can't wait to see the High Court!

The conferences have always been a laugh with anywhere from 20-30 people from all across Australia taking part. We've even had a few Kiwi's and some Americans join us to colour up the mix. We are a broad church and regularly some non-lawyers, who are surprisingly very interesting, find their way to the conferences. Typically, unlike most legal conferences, ours are predicated upon the tides, the winds and the swell. And after a big day at the books and a few well-earned waves its back to the resort to shamelessly watch photos of yourself on the big screen and take the edge off the day with a Bintang or two. Now that's my kinda conference.

No organisation is worth its salt without a guiding arm and some decent high-profile patrons. Craig Leggat SC from the Sydney bar was generous enough to come on as our first patron and has remained faithful and enthusiastic about ALSA ever since. Christopher Wren KC from Melbourne quickly came to represent the Great Southern Ocean and then a bevy of world surfing champions including Rabbit Bartholomew, Shaun Thompson, Nat Young, Felipe Pomar from Peru and Shane Horan from Bondi Beach all joined Leggat and Wren as Patrons affording them free legal advice for the rest of their lives.

Over the years however, ALSA has developed more as an Australia wide friendship group boasting over 400 members nationally making it the largest boardriders club in the world (I have no evidence for this but who needs facts). Whilst the numbers across the country continued to grow the conferences were, shall we say, rather male dominated. All that changed when an over enthusiastic female lawyer from Bondi by the name of Jess De Simone joined ALSA and changed its face forever. Jess and a few of her female friends very quickly formed a splitters group, not unlike the Peoples Front of Judah, known as WALSA (Women's ALSA). WALSA attend yearly conferences run by World Champion and pioneer of women's surfing Pam Burridge and have monthly Sydney surf meet ups. WALSA advocates to increase female participation at all stages of the sport. They supported Lucy Small in the petition for Equal Pay for Equal Play in women's sport. The number of surfing women at our ALSA conferences is now regularly 50% and that number continues to grow. Thank God for the splitters. Libba Ranken, who many of you will remember from Pikes and EPLA, is a regular at the conferences, leading the paddle outs and leading the singing at night time.

Apart from an annual conference or two we have also built up our charitable arm. For nearly 20 years ALSA has supported the East Bali Poverty Project (**www.eastbalipovertyproject.org**) and over the years members have visited that project on a number of occasions. We also have a food program based at Kerobakan prison in Bali where we send money each month to the Australians in prison there to supplement their food intake. When in Bali a few members will always visit the Aussies in prison. ALSA has also been very closely associated with Surfaid (**www.surfaid.org**). For nearly 20 years ALSA has competed in over a dozen Surfaid Cups, even winning on one occasion (That was a fluke)! And the best day of the year is always the annual surf day with Jarjum Aboriginal College, an Aboriginal Primary School based in Redfern.

Where to from here? Well, as ALSA celebrates its 20th anniversary and reflects upon the last two decades, all I can say is this, let's just hope for more of the same. Anyone wanting to be part of the fun (whether beginner or world champ, lawyer or non-lawyer), join us FOR FREE at **www.surfinglawyers.com.au** and share the stoke.

Photo courtresy of Swilly.

The singing of "Edelweiss' the ALSA Theme Song, with Libba Ranken, Pete Strain, Joe Fahey and Craig Leggat. *Photo courtresy of Swilly.*

Libba Ranken, Pete Strain and Craig Leggat. *Photo courtresy of Swilly.*

BREELLEN WARRY & SAMANTHA MURPHY
Maddocks Lawyers

The Turning Tide of Nature

Biodiversity law reform is underway at all levels of Australian government and internationally, driven by a recognition that existing laws, focusing on conservation and mitigating biodiversity loss, are failing. Reforms underway within Australia at State and Federal levels adopt a new 'nature positive' approach, reflecting a global shift in how we approach biodiversity conservation.

Biodiversity conservation and the need for change

THE conservation of biological diversity internationally and nationally was born out of an understanding that Earth's natural resources are finite and must be sustainably managed in order to ensure that they continue to provide for future generations. This saw the focus of biodiversity management to be on conservation, sustainable use and minimising harm to the environment caused by human endeavour.

Conservation and sustainable use were the focus of the 1992 Convention on Biological Diversity (**CBD**) and continue to feature in domestic biodiversity legislation, including the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**). However, despite comprehensive laws designed to protect threatened species and ecological communities, biodiversity continues to decline.

Australia has one of the worst extinction rates in the world and both the NSW and Commonwealth 2021 State of the Environment Reports found that the status of biodiversity within NSW and Australia continues to worsen. Internationally, the 2020 Global Biodiversity Outlook found that:

- none of the targets set in the Strategic Plan for Biodiversity under the CBD for the years 2011-2020 (the 'Aichi Biodiversity Targets') had been fully met on a global scale; and
- continuing on the current trajectory would see biodiversity continuing to decline across the world.

As a result, we are now seeing a shift in focus within Australia and internationally, which moves beyond seeking to maintain, protect or conserve nature, to actively restoring it. The goal of halting biodiversity loss and restoring nature back to resilient levels has become known as 'nature positive'.

Kunming-Montreal Global Biodiversity Framework

In December 2022, at the 15th meeting of the Conference of the Parties to the CBD (**COP 15**), the parties adopted the Kunming-Montreal Global Biodiversity Framework (**GBF**). The GBF provides a revised strategic plan for implementation of the CBD up to 2030, and 'is built around a theory of change', aiming to 'bring about a transformation in our societies' relationship with biodiversity by 2030'.

The GBF sets 23 global targets to be achieved by 2030, with a 2030 'mission' to halt and reverse biodiversity loss and put nature on the path to recovery. These targets include:

- restoration of 30% of all degraded ecosystems (Target 2);
- conservation of 30% of all land, waters and seas (Target 3); and
- urgent management action to halt human induced extinctions (Target 4).

Four global goals for 2050 are set in the GBF, including:

- enhancing and restoring the integrity, connectivity and resilience of all ecosystems, substantially increasing the area of natural ecosystems by 2050; and
- halting human extinction of known threatened species and increasing the abundance of native wild species to healthy and resilient levels.

These goals and targets all work towards the 'vision' of the GBF, for humans to live in harmony with nature by 2050.

Australia was one of the parties to adopt the GBF at COP 15. Australia has also hosted the world's first Global Nature Positive Summit (**Summit**), which was held in Sydney from 8-10 October 2024. The aim of the Summit was for leaders to explore effective ways to realise global commitments under the GBF and to build consensus on the economic settings needed to increase private investment in nature.

Commonwealth Law Reform

The EPBC Act is the principal Commonwealth legislation regulating the protection of nationally listed threatened species and ecological communities. An independent review of the EPBC Act, carried out in 2019-2020 by Professor Graeme Samuel AC, found that the EPBC Act is 'dated, ineffective and inefficient' and that 'broad restoration is required to address past loss, build resilience and reverse the current trajectory of environmental decline.'

In December 2022, the Commonwealth Government published its Nature Positive Plan in response to Professor Samuel's review. The Nature Positive Plan commits to 'the most comprehensive remaking of national environmental law since the EPBC Act was first introduced', including the introduction of National Environmental Standards to drive nature positive outcomes.

Implementation of these reforms has progressed in three stages:

- **Stage one** – The *Nature Repair Act 2023* (**the Act**) came into effect on 15 December 2023 establishing the framework for the Nature Repair Market, a national biodiversity market enabling individuals and organisations to generate income from registered biodiversity projects. Participants undertaking eligible projects to repair, restore or protect the environment will be able to apply for biodiversity certificates which can then be traded on the market. Consultation was recently carried out on the rules and methods that will apply to the market, with the market planned to be up and running in 2025.
- **Stage two** – This comprised three bills introduced into Parliament during 2024:
  - The *Nature Positive (Environment Protection Australia) Bill 2024*, which proposes the establishment of a statutory entity to be known as Environment Protection Australia (**EPA**) with an independent CEO to be appointed by the Governor-General. The EPA would operate as an independent regulator, with functions under a number of Commonwealth environmental laws, including the EPBC Act.
  - The *Nature Positive (Environment Information Australia) Bill 2024*, which proposes to establish a statutory Head of Environment Information Australia, which would be responsible for the Environment Information Australia division of the Department of Climate Change, Energy, the Environment and Water. The Head's functions would include reporting on the State of the Environment and developing a framework for monitoring and reporting on progress towards nature positive.
  - The Nature Positive (Environmental Law Amendments and Transitional Provisions) Bill 2024, which includes amendments to various environmental legislation to confer functions on the EPA and proposes some amendments to the EPBC Act, including expanding certain audit and compliance tools and increasing penalties for some civil and criminal offences.
- **Stage three** – The Government is continuing to consult with interest holders to deliver the third stage of the reforms outlined in the Nature Positive Plan. The timing for delivery of this stage is not currently clear.

New South Wales Law Reform

Within NSW, species and ecological communities listed as threatened at a State level are protected under the relatively recent BC Act, which provided a methodology for calculating the impact of a development on biodiversity values and established a market for trading credits which could be applied to offset these impacts (called the biodiversity offset scheme).

In 2023, the BC Act underwent its first statutory review by a panel of experts led by Dr Ken Henry (**the Henry Review**). In their final report, the panel concluded that the objects of the BC Act, despite having only come into force during the last decade, were already obsolete, with the focus on the principles of ecologically sustainable development no longer fit for purpose.

Referring to developments internationally and at the Commonwealth level, the Henry Review found that NSW must now also adopt a nature positive approach:

> [t]he natural environment is now so damaged that we must commit to "nature positive" if we are to have any confidence that future generations will have the opportunity to be as well off as we are.

In July 2024, the NSW Government released the *NSW Plan for Nature* in response, agreeing that the nature positive goal must be embraced and, in August 2024, the *Biodiversity Conservation Amendment (Biodiversity Offset Scheme) Bill 2024* was introduced into parliament.

Amendments to the BC Act proposed by the bill include:

- requiring the Minister to, as soon as possible, develop a strategy to transition the biodiversity offsets scheme under the BC Act to deliver 'net positive' biodiversity outcomes. The strategy would be required to specify the actions required and include targets and time-frames for the transition;
- inserting a definition of the 'avoid, minimise and offset hierarchy' and requiring biodiversity development assessment reports and biodiversity certification assessment reports prepared under the Act to assess 'genuine measures' that a proponent has taken, or proposes to take, to avoid and minimise the impact of a proposed development;
- enabling the regulations to set out circumstances in which payment into the Biodiversity Conservation Fund, in lieu of an obligation to retire biodiversity credits, will not be accepted (for example, where like-for-like credits are readily available); and
- expansions to the public register maintained under the BC Act to include:
  - decisions to exempt certain development from the biodiversity offsets scheme;
  - decisions on certain development that is likely to have serious and irreversible impacts;

— approval conditions requiring biodiversity conservation measures (for example, the retirement of credits); and

— the 'genuine measures' taken to avoid and minimise the impact of a development (identified in a biodiversity development assessment report or imposed as a condition of consent).

Conclusion

The rate of biodiversity loss over the past 30 years has been alarming and there are currently few signs of a shift in this decline. Despite numerous and detailed laws and concerted international efforts, there is now a clear consensus that these previous efforts have not been effective in preventing the further decline of biodiversity.

In her keynote address to the Summit, Minister Plibersek stated:

> *Until our businesses and economic decision makers are factoring the value of nature into our economic decision-making – until our economic settings change – nature will continue to go backwards.*

What was also emphasised by a number of delegates at the Summit is that (among other things):

- nature is in crisis and there is an urgent need for action, rather than words;
- there is a growing demand for investment in nature. The establishment of the Nature Repair Market will provide a mechanism for this to occur at a national level. However, it will be only one of a number of tools that will be required if we are to achieve the GBF targets;
- co-operation between and the involvement of all stakeholders is required, including business, Government and Indigenous groups, whose knowledge and leadership are critical;
- it is critical that there be an alignment in terms of global and domestic environmental governance and policy; and
- there is a need to shift economic settings and innovate, but with this comes significant opportunities, including for business.

Reforms underway both at State and Federal levels embrace the new concept of 'nature positive', stemming from the global goals committed to under the GBF of restoring and enhancing ecosystems. There is also a clear signal from businesses, which was made clear at the Summit, that nature is beginning to factor into economic decision making and planning. This is not surprising, given that the World Economic Forum projects that by 2030, fully embracing nature positive transitions across three key socio-economic systems could unlock $10.1 trillion in business opportunities.

The establishment of the Nature Repair Market is a positive step in incentivising investment in nature positive outcomes. At the time of writing, the NSW and Stage 2 Commonwealth bills remain before Parliament. Stage 3 of the Commonwealth reforms, and any strategies and regulations implemented under the NSW bill (if passed) also remain to be seen. Accordingly, there is still a long way to go in these reforms before we will fully understand the impacts of the reforms to the development assessment process and whether they will result in positive changes for nature. In Australia at least, what is clear though is that biodiversity regulation is going through a significant period of transformation, driven by a clear alignment at all levels of government and business that fundamental change is required.

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i. NSW Environment Protection Authority, NSW State of the Environment 2021 (Report, 2021); Dr Ian Cresswell et al, Australia State of the Environment 2021 (Report, 2021) <soe.dcceew.gov.au>.

ii. Secretariat of the Convention on Biological Diversity, Global Biodiversity Outlook 5 (Montreal, 2020).

iii. Professor Graeme Samuel AC, Independent Review of the EPBCC Act (Final Report, October 2020).

iv. Commonwealth Department of Climate Change, Energy, the Environment and Water, Nature Positive Plan: better for the environment, better for business (December, 2022).

v. Dr Ken Henry AC et al, Independent Review of the Biodiversity Conservation Act 2016 (Final Report, 2023).

vi. NSW Department of Climate Change, Energy, the Environment and Water, NSW Plan for Nature: NSW Government response to the reviews of the Biodiversity Conservation Act 2016 and the native vegetation provisions of the Local Land Services Act 2013 (16 July 2024).

vii. World Economic Forum, How to unlick $10.1 trillion from the nature-positive transition (15 July 2024) <https://www.weforum.org/agenda/2024/07/theres-10-1-trillion-in-nature-positive-transition-heres-how-we-unlock-it/>.

JANET MCKELVEY
Martin Place Chambers

EPLA Interviews Commissioner Porter

On 7 August 2023, Commissioner Shona Porter was appointed as a Commissioner of the Land and Environment Court.

Janet McKelvey, barrister at Martin Place Chambers and member of the EPLA committee, had the opportunity to interview Commissioner Porter about her role and to find out a little more about her personally. Fun fact: Commissioner Porter and Commissioner Espinosa both had the same first job!

COMMISSIONER PORTER is well known to practitioners in the Land and Environment Court thanks to her role as an Acting Commissioner in February 2023 and her prior planning roles at Cumberland, Canterbury Bankstown, Strathfield and Randwick Councils and Hill PDA. Commissioner Porter holds a Masters degree in Urban and Regional Planning as well as a Diploma in Music. She is also a nationally accredited mediator.

Why did you want to become a Commissioner?

I enjoyed my previous planning roles and rising to the challenge of giving evidence in the Land and Environment Court. I really like the completely objective role that I now have and the incredibly diverse issues that we see across NSW.

Where did you grow up?

Callala Bay on the south coast of NSW.

Where was your last holiday?

Kirra Beach, Queensland.

What was your first job?

I applied for a job as soon as I was old enough and landed at a supermarket deli. My favourite deli meat back then was champagne ham, but my charcuterie board tastes have developed since then into a preference for prosciutto.

Commissioner Shona Porter of the Land and Environment Court of NSW.

Do you speak any other languages?

No…though my Nanna is French, so I wish I had learnt from her.

What is your favourite food?

Anything Italian! Preferably a pasta with prawns or margherita pizza.

Are you a dog or a cat person?

I'm a dog person – but I love animals. The family pets when I was growing up included an adopted stray cat and dobermans. I now have a Cavamalt (King Charles Cavalier cross Maltese) named Bella and a Spoodle (Cocker Spaniel cross Poodle) named Bailey.

What is your favourite sport to watch or play?

My favourite sport to watch and play is netball. My knees and ankles don't let me play it anymore though.

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

Famous American urban designer and planner, Jane Jacobs; author Margaret Atwood; and comedian Amy Poehler.

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

At first a marine biologist, then Prime Minister (until I realised how much small talk would be involved and I'm a bit introverted).

When you were 15, who was your favourite band?

This was the bubble gum pop era, so the Spice Girls, N*Sync and the Backstreet Boys.

What was the first concert you ever went to?

It was one of the Day on the Green events. My favourite festival was the Falls Festival.

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

The CD single of 'Kiss from a Rose' by Seal.

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

I love taking my dogs to the beach and swimming, and going to the theatre. My first qualification was in Musical Theatre.

What are your top 3 current favourite books?

Lisa Jewell's books 'None of this is True' and 'Then She Was Gone'.

Valley of the Dolls by Jacqueline Sussan

Stolen Focus by Johan Hari

What are your top 3 favourite movies?

I'm more of a TV series or documentary watcher. My recent favourites have been 'Dear Bobby' (which is out on Netflix at the moment and is wild); 'Schitt's Creek', 'Line of Duty' and 'The People vs OJ Simpson'.

What is your hidden talent?

I am a tier 1 Googler. I can find anything on the internet.

In one word, how would your friends describe you?

Easy-going.

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

I think my advice is probably for the experts appearing rather than the lawyers:

1. Be the most prepared in the room.
2. A friendly reminder for new experts, your evidence is your professional opinion and not your employer or client. Take a breath and tell the Court your professional view.
3. Double check any documents to make sure the application is as consistent as possible.

12th Mahla Pearlman Oration

The Legal Practice Section of the Law Council of Australia and EPLA will co-host the 12th Mahla Pearlman Oration on 19 June 2025, both in Sydney and online. **The Honourable Justice Kristen Walker** of the Victorian Court of Appeal, will be presenting on the topic of "Standing".

EVENT DETAILS

Date: Thursday, 19 June 2025
Time: 5.00pm - 7.00pm
Cost: Free, however registrations are essential
Venue: Federal Court of Australia, Court 18C, 184 Phillip St, Sydney NSW 2000

DINNER DETAILS

Date: Thursday, 19 June 2025
Time: 7.30pm - 9.30pm
Cost: $120.00
Venue: Mordeo Bistro & Bar, 126 Phillip Street, Sydney

REGISTRATIONS CLOSE 5PM 16 JUNE 2025
https://lawcouncil.eventsair.com/2025-mahla-pearlman-oration/registrations/Site/Register

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JANET MCKELVEY
Martin Place Chambers

Environmental Law Reporter

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

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

I would like to take this opportunity to thank Tom White (partner, Lander & Rogers) who recently stepped down as a Commissioning Editor of the ELR. Tom had been in this voluntary role for a number of years and was especially effective in finding willing reporters – a mammoth task given how busy the planning and environmental law space continues to be. Tom had been ably assisted in the role of Commissioning Editor by David Gunter (senior associate, Sparke Helmore). I am very grateful for David's continued enthusiasm and efficiency in this role. I would also like to thank Angus Hannam (barrister, Martin Place Chambers) for taking over from Tom in the role of Commissioning Editor while also in the process of building a busy practice at the NSW Bar.

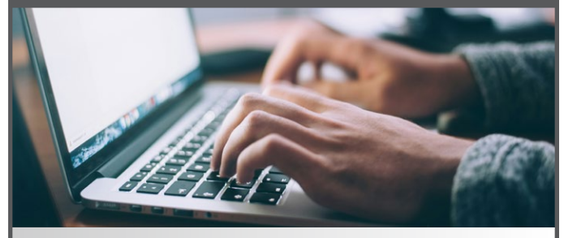
I am, as always, deeply indebted to the group of reporters who assist in the production of every issue. I am especially grateful for the assistance of the NSW Young Lawyers Environment and Planning Committee for offering to report and scouting and referring new reporters.

Readers of the ELN are encouraged to contact me if they are willing to report or know someone who may be suitable or if they would like to subscribe. Features of an ELR subscription are:

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

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

ELR REPORTERS WANTED



Are you interested in writing for the ELR ?

The **Environmental Law Reporter** (ELR), published by the Environment and Planning Law Association NSW, is a newsletter that provides brief case notes for practitioners (usually only one typed page or so).

We pay $50 for each case note
($55 if you need to remit GST).

This publication is read by most in the environment and planning law field. It is a great way to build a profile, looks good on a CV, and it keeps you up to date with the latest cases.

Turn around time for drafts is generally 2 weeks; one report sent to you a month – more if you want— and you can opt in and out, if away or in a busy patch.

For a style guide and invoice pro forma, contact:
kearns@mpchambers.net.au

For further information, contact:
mckelvey@mpchambers.net.au

2024 EPLA Conference

Cupitt's Estate, Milton

6-7 November 2024




















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

The Land and Environment Court, Court Users Group – *Update 2024*

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

EACH month the Chief Judge provides a useful summary of legislative changes and any formal practice and procedure updates.

In the April 2024 meeting, Registrar Froh foreshadowed the introduction of multi-factor authentication for Online Registry and Online Court which has since been implemented, apparently without too much fuss.

In the June 2024 meeting the Chief Judge announced the permanent appointment of acting Commissioners Targett and Washington and the appointment of seven new acting commissioners:

- **Ms Laurenne Coetzee** (environmental scientist)
- **Dr Peter Moore** (natural resources, fire, forest and land management)
- **Dr Peter Nichols** (environmental scientist and arborist)
- **Mr Michael Young** (environmental scientist)
- **Mr Neil Macken** (architect)
- **Ms Helena Miller** (town planning)
- **Dr Amelia Thorpe** (planning lawyer)

At that meeting the vexed issue of filming/recording at site inspections was also discussed, as well as some clarification of the then relatively new Class 3 Practice Note for Valuation Objections.

In the September 2024 meeting, the implications of artificial intelligence (AI) for Court procedure were considered when Registrar Froh discussed an unauthorised recording by an AI "bot" of part of a resumed s34 conference. The AI bot had been installed on Council-issued computers to assist in recording and summarising of Teams meetings. The solicitor involved in the s34 conference was unaware of the existence of the AI bot.

The Registrar urged all CUG representatives to pass on to members of their organisations the need to be aware of the type of programs installed on their devices to ensure that they, as officers of the Court will be able to comply with the Court's requirements. This incident was also a salient reminder that Teams invitations from the Court should not be forwarded to other persons but rather a fresh invitation sought directly from the Court.

The November 2024 meeting discussed the practice of the Court in development appeals in which hearing dates have been allocated, to require Councils to inform objectors that the parties have reached agreement before listing a matter for a s34 conference to seek orders in accordance with that agreement. The Chief Judge explained that the practice ensures that objectors are fully informed about a change in the parties' position and allows them an opportunity to seek to make further representations.

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**.

STEPHANIE MILLER
NSW Young Lawyers Environment & Planning Law Sub-Committee

NSW Young Lawyers, Environment & Planning Law Sub-Committee – *Update 2024*

On Friday 30 August 2024, a cohort of over 100 people attended the NSW Young Lawyers Environment & Planning Law Sub-Committee's Trivia Fundraiser Extravaganza, hosted by the NSW Law Society.

ONE hundred percent of the proceeds raised on the night was donated to the 2024 Young Lawyers Charity, The Mirabel Foundation. Mirabel help vulnerable children and carers who are the forgotten victims of drugs. By supporting both the children and their carers, they strengthen families to thrive during their difficult journey. The Sub-Committee was grateful to be joined at the event by Youth Support Worker Jackson Fitzpatrick, who shared an incredibly impactful video that highlighted the importance of the work of Mirabel and which captured the attention of the room. By the end of the evening, a staggering nearly $5,000 was raised in total.

The large turnout included lawyers from both Environment and Planning law firms and other areas of law, as well as Justice Sandra Duggan and Registrar Sarah Froh from the Land Environment Court. However, - no one was shown any mercy when it came to having to get the answers correct to get the point.

The Chase's Smiling Assassin, and fellow solicitor, Mara Lejins, was the Trivia Master for the night and had the punters puzzled on many tricky questions. Round 3 saw the traditional Environment & Planning Law round. The Sub-Committee's 2023 questions had even some of the profession's most senior members scratching their heads, so this year they took it a little easier on us, with fewer tricky legal questions and more questions generally on the topic of the 'environment'. Based on the scores, however, the round still had most teams stumped and was the least successful round for all teams. Did you know South Australia was the first Australian state to implement a ban on single use plastics in 2021, or that China has the most offshore wind farms of any country in the world?

One method by which funds were raised for The Mirabel Foundation on the night was selling hints to the answers to the trivia questions. This of course meant plenty of bribes were accepted in exchange for hints, which kept the Executive of the Sub-Committee happy as they saw the dollars to be donated tallying up quickly. The competition was particularly fierce on that front between reigning champions Martin Place Chambers and past winners Mills Oakley.

The competition was a hard-fought battle to the end by all. However, there could only be one winner, and this year it was Mills Oakley taking out the top gong, and along with it, the coveted Trivia Extravaganza Trophy. Martin Place Chambers were runners up, but as usual, graciously donated their second-place prize to the team in third place, the Regulatory & Environment team from the NSW Crown Solicitor's Office.

There were prizes showering attendees all night, including for individual winners of the Bonus Rounds, which included some beautiful hampers, bottles of wine and gift bags, all made possible by the event's wonderful sponsors – Martin Place Chambers, Sparke Helmore Lawyers and Clayton Utz. The Sub-Committee are very grateful for the generous support.

Congratulations to the NSW Young Lawyers Environment & Planning Law Sub-Committee for putting on a fantastic event. We can't wait for 2025!

ANNE HEMMINGS
Martin Place Chambers | Editor

Mahla Pearlman Oration & Award

The Mahla Pearlman Oration and Award honours the memory of the late Honourable Mahla Pearlman AO, the former Chief Judge of the Land and Environment Court of NSW (1992-2003), and former President of the Law Council of Australia (1989-90). The annual event is a tribute to Chief Judge Pearlman's achievements and inspiration to younger generations of environmental lawyers.

2024 Mahla Pearlman Oration

ON 22 August 2024, the Honourable Justice James Allsopp AC was the keynote speaker at the 12th Mahla Pearlman Oration. The Legal Practice Section of the Law Council of Australia and EPLA co-hosted the Oration in the Federal Court and online.

The Honourable James Allsop AC was Chief Justice of the Federal Court of Australia from 1 March 2013 to 6 April 2023; President of the New South Wales Court of Appeal from 2 June 2008 to 28 February 2013; and a Judge of the Federal Court of Australia from 7 May 2001 to 1 June 2008. His Honour was made a Companion of the Order of Australia (AC) in 2023 for eminent service to the judiciary and to the law, to organisational and technological reform, to legal education, and to insolvency law. He was appointed an Officer of the Order of Australia (AO) in 2013 and was appointed as an International Judge of the Singapore International Commercial Court in 2024.

His Honour spoke on the development of climate change litigation in Australia and around the world. Amongst a number of cases in Europe he referenced the Australian case of Minister for the Environment v Sharma [2022] FCAFC 35 and the New Zealand case of Smith v Fonterra Co-operative Group Ltd [2021] NZCA 552. Commentary was made as to attempts to use private litigation to impact a change in public policy about climate change.

A couple of take away thoughts about the important protective power of the Courts include His Honour's observations that the law is not static, but it is stable; and that, a legitimate sense of injustice should NOT be the product of the rule of law. The latter was expressed in the use of judicial technique not to allow tortfeasors to claim that their wrong conduct is indistinguishable from the wrong conduct of others and thereby to allow all to escape individual liability for their actions.

It was a thought-provoking address.

The Honourable Justice James Allsopp AC

2025 Mahla Pearlman Oration

The Legal Practice Section of the Law Council of Australia and EPLA will co-host the 13th Mahla Pearlman Oration on 19 June 2025 in Sydney and online. The Honourable Justice Kristen Walker of the Victorian Court of Appeal, will be presenting on the topic of "Standing". The event is free but registrations are essential. Registrations close 5pm, 16 June 2025. Further information is available here on the Law Council of Australia website.

Robyn Glindemann, the Honourable James Allsop AC, David Hertzberg, the Honourable Justice Rachel Pepper and Paul Crennan

2024 Award Recipient

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

At the 2024 Mahla Pearlman Oration, the Law Council of Australia announced that the 2024 Mahla Pearlman Australian Young Environmental Lawyer of the Year was awarded to Mr David Hertzberg.

Mr Hertzberg is a Principal Lawyer at Equity Generation Lawyers, an Australian law firm specialising in climate change law.

He is a litigator who has had carriage of a number of high profile matters which have developed the field of climate litigation in Australia. These include a High Court challenge to Victoria's electric vehicle tax, a greenwashing claim against EnergyAustralia regarding its "carbon neutral" marketing, and a class action against the Commonwealth Government regarding disclosure of climate risks to the value of sovereign bonds.

David is also a trusted advisor to environmental NGOs and community groups. His advice is critical to empowering these groups to conduct their impactful work.

EPLA congratulates Mr Hertzberg on being awarded the 2024 Mahla Pearlman Australian Young Environmental Lawyer of the Year.

Nominations for 2025 Award

The 2025 round for nominations is now open. Nominations are to be submitted by **COB 23 May 2025** to Chelsea De Silva via email, chelsea.desilva@lawcouncil.au.

To be eligible for the award, a nominee must be:

- engaged in practice in any Australian jurisdiction (including in private practice, a government law firm, as in-house counsel or in an NGO) or be an academic teaching or researching in the field of environmental law or related area at an Australian university; and
- under 35 years of age as at 30 April 2025.

The key criteria for the award are:

- outstanding contribution to the field of environmental law in Australia or internationally, and
- voluntary contribution to the community, including through environmental non-government organisations (NGOs) or teaching roles.

Further details are available on the EPLA website:
https://epla.org.au/2025/05/16/2025-mahla-pearlman-oration

Comings and Goings:
2024

EPLA MEMBERS & SUPPORTERS
(in random order)

Zaid Hamdan El Madi, left Addisons and opened Hamdan El Madi

Andrew Lauglin has gone to Department of Communities and Justice

Shirley Leung has moved from Dentons to Sydney Water

Ben Frasco has joined Meccone

Willem Van Wyk has opened WVW Planning

Chris Campbell moved from Sparke Helmore to join Parramatta Council

Jacinta Studdert has left Clyde & Co

Caitlin Cleary has left G&T and joined Mills Oakley

Alex Kingsbury has left M&O and joined Gilbert & Tobin

Angela Penklis is at Clayton Utz

Huw Calford has left NRF, joining Australian Communications & Media Authority

Layth Zumot left Maddocks and joined Allens

Daniel Webster is at Bick & Steele

Suzy Whitty moved from Addisons to Hones Lawyers

Alyce Kleis has moved from Shaw Reynolds and opened Urban Legal

Alec Kibblewhite and ***Luke Salem*** left Pinsent Mason and joined KWM

Stephanie Willis has moved from NRF to Maddocks

Karen White has left WWSB and joined Minter Ellison

Sophie Whealy has moved to Hones Lawyers from Madison Marcus

Rebecca Stokes has joined South Pole Environmental Consultants

Nick Ferguson is now at Sparke Helmore

Angus Hannam left JWS and joined the NSW Bar, he is at MPC

Laura Waterford left NRF and now at Pollination

Tony Pickup is now Pickup Legal

Kara Mezenic has joined McCullough Robertson

Jennifer Degotardi has moved to Hall & Wilcox

Marc Allas is Forestry NSW

Noni Shannon left NRF and has gone to Deloitte Legal

Ana Dalitz has left McPhee Kelshaw and now at the NSW EPA

Congratulations ***Rob Ranken*** on 12 Selborne, appointed Senior Counsel

Louise McAndrew and ***Jen Smith*** have joined HWL Ebsworth

Ben Salon is at ZBA Lawyers

Felicity Douglas has moved from McCullough Robertson to Water NSW

Patrick Holland is at Gadens

Bianca Fernandes has left NRF and at NSW NRAR

ENVIRONMENT AND PLANNING LAW ASSOCIATION (NSW) INC.

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President, EPLA:
Paul Crennan, Crennan Legal
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Tel: 6331 2121
paul@crennanlegal.com.au

MEMBERSHIP APPLICATION & RENEWAL FORM 2025/2026

ABN 54 158 326 831 & TAX INVOICE & RECEIPT

Surname

Name

Title

Organisation

Address

Telephone Mobile

Email

If renewing a corporate membership please attach a list of the names and emails of persons to be included (limit 20 per membership)

MEMBERSHIP FEES	**Fees are inclusive of GST**
Individual	$220.00
Student – Full-time: Course	$66.00
Corporate rate Firms/Floors (please list all names to be registered)	$770.00
Corporate rate Councils & Government Departments	$660.00
Discount outer metropolitan, regional country & interstate members	Less 25%

Enclosed cheque for $_____ payable to EPLA (NSW) Inc; or Credit card details

Name on Card:_____ Exp _ _ / _ _

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Pay by eftpos to EPLA BUSINESS ACCOUNT BSB: 112 879 ACCT: 4226 72608
Please email eftpos payment details to **kearns@mpchambers.net.au** Ref: M'ship2025

Please return to: Michele Kearns, The Secretary, EPLA (NSW) Inc
32/52 Martin Place, Sydney NSW 2000 **kearns@mpchambers.net.au**

www.epla.org.au

Mahla Pearlman Oration

19 June 2025 | Sydney

The Legal Practice Section of the Law Council of Australia and the Environment and Planning Law Association of New South Wales will co-host the 13th Mahla Pearlman Oration on 19 June 2025 in Sydney and online.

The Mahla Pearlman Oration honours the memory of the late Honourable Mahla Pearlman AO, the former Chief Judge of the Land and Environment Court of New South Wales (1992–2003), and former President of the Law Council of Australia (1989–90). The annual event is a tribute to Chief Judge Pearlman's achievements and inspiration to younger generations of environmental lawyers.

We are delighted to announce this year's keynote speaker: **The Honourable Justice Kristen Walker** of the Victorian Court of Appeal, who will be presenting on the topic of "Standing."

The Honourable Justice Kristen Walker is a Judge at the Victorian Court of Appeal, appointed in 2021. She brings to the bench an exceptional breadth of experience across public law, constitutional law, and human rights.

Prior to her judicial appointment, Justice Walker served as Solicitor-General for Victoria from 2017 to 2021. In that role, she was the state's chief legal adviser and advocate, representing Victoria in the High Court of Australia and other superior courts in significant constitutional and public law matters.

Event details

Date: Thursday, 19 June 2025
Time: 5.00pm - 7.00pm (AEST)
Venue: Federal Court of Australia, 184 Phillip Street, Sydney NSW 2000
Cost: Free, however registrations are essential.

Dinner Details

Date: Thursday, 19 June 2025
Time: 7.30pm - 9.00pm (AEST)
Venue: Mordeo Bistro & Bar, 126 Phillip Street, Sydney
Cost: $120.00

Register Here

Contact

Chelsea De Silva, Executive Officer, Legal Practice Section, Law Council of Australia
E: Chelsea.desilva@lawcouncil.au | P: 02 6246 3722