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Wednesday 4 – Friday 6 November 2026

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ANNE HEMMINGS
Editor



Editor's Note

Welcome to the Environmental Law News for 2026. This edition reports on the activities of EPLA and provides on overview of events, recent developments and key issues in environment and planning law in NSW.

THE edition opens with an article by Mark Syemour SC on behalf of EPLA marking the 20th anniversary of the Honourable Brian Preston AO FRSN SC's appointment as Chief Judge of the Land and Environment Court, celebrating his enduring legacy to environmental planning law.

This year, EPLA again partnered with the Australian Institute of Administrative Law, NSW Chapter (AIAL) to present a seminar on coal approvals in NSW in the wake of the ICJ Advisory Opinion on Climate Change. The seminar saw record attendance, and we are grateful to publish the paper presented by the Hon John Basten AO KC and commentary by Noel Hutley SC.

This edition includes articles on a range of topics: Judges Bartley and Nash provide guidance on environmental offence sentencing in the Local Court; Ryan Coffey discusses appeals in the Land and Environment Court regarding remediation orders under the *Biodiversity Conservation Act 2016 (NSW)*; and Willem van Wyk examines the Mid-Rise Pattern Book reforms and related planning pathways.

We introduce Jo Shulman, the new CEO of the Environmental Defenders office (EDO) and include Peter Williams' review of the Environmental Law Handbook, 7th Edition.

The regular features provide updates on EPLA activities, including the activities of the Land and Environment Court – Court Users Group and the Young Lawyers Environment and Planning Law Committee. We celebrate the Mahla Pearlman Oration in 2025 and 2026, congratulate the recipients of the Mahla Pearlman Award and announce the 2027 Mahla Pearlman Oration speaker and event details.

We acknowledge the passing of former friends and members of EPLA: former Land and Environment Court judge, the Hon Neal Bignold, former Acting Commissioners Louise Byrne and Paul Rappoport and former solicitor, academic and local government identity, Bill Henningham. We remember them and recognise their significant contribution to the field and to the EPLA community.

We feature a photo spread from the successful 2025 EPLA Conference at Luna Park, Milsons Point, and share details of the upcoming 2026 Conference on the NSW Central Coast in November 2026. As always, we include updates on our members' Comings and Goings.

Thank you to all contributors and to our deputy editors, Ryan Coffey, Willem van Wyk, and Timothy Allen. Please contact us if you wish to submit a paper for a future edition

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

—

Anne Hemmings
Editor

JANET MCKELVEY
President



President's Report

I am very pleased to report that the Environment and Planning Law Association (NSW) has had a busy 2025/2026 year.

EPLA has been proud to host Twilight Seminars on a diverse range of topics, from enforceable undertakings in criminal matters through to methods of business valuation, and a presentation by sitting Magistrates (as they then were) of the Local Court. These seminars have been incredibly well attended, with well over 100 members engaging in each session either in person or via audio-visual link. The architectural walk around Wunderlich Lane and Surry Hills Village and a discussion of its exciting redevelopment was a standout EPLA event.

Twilight Seminars will continue throughout the rest of the 2026 and beyond to address emerging issues of law, policy, practice and procedure. As EPLA is an agile organisation, this allows it to promptly respond to changes in the environment and planning landscape and to convene events on short notice. The continued support of various law firms (notably Thomson Geer most recently) and Martin Place Chambers also enables Twilight Seminars to be professionally presented and cost-effectively produced for the benefit of members.

EPLA also continues to proudly partner with the Law Council of Australia to present the Mahla Pearlman Oration each year. The 2025 orator was Justice Kristen Walker AM KC of the Victorian Court of Appeal. Her Honour presented an interesting discussion on the issue of standing in the environmental law context, the issue having arisen in the High Court's decision in *Forestry Corporation of NSW v South East Forest Rescue Inc.* [2025] HCA 15; (2025) 422 ALR 358. The 2026 orator was Justice Brian Preston AO FRSN SC, Chief Judge of the Land and Environment Court of New South Wales. His Honour presented a paper entitled "Paradise Lost? Putting the environment back into environmental impact assessment", which outlined the myriad ways the concept of the 'environment' may be considered.

Both orations were incredibly well attended both in person and via AVL. EPLA is always grateful to members of the judiciary and others at the top of their fields for their insight and generosity when it comes to presenting this important annual event in honour of the late former Chief Judge, Mahla Pearlman AO.

This past year has brought reasons for the EPLA community to come together to celebrate. In November 2025, the Chief Judge, Justice Preston, celebrated the twenty-year anniversary of his appointment as Chief Judge of the Land and Environment Court. In March 2026, Justice Pain was awarded the Eminent Environmental Lawyer Award for Excellence by the Law Council of Australia for her contribution to environmental and planning law jurisprudence. Her Honour presented a paper titled "Should Environmental Law in Australia (and Beyond) be Considered Through a Gender Lens?", which examined the disproportionate effects of climate change on women worldwide. Both events were well attended by EPLA members.

Members and friends of EPLA have been celebrated in the wider community too for their service to planning, law and their local communities. EPLA congratulates Justice Brian Preston, Paul Crennan, Judge Scott Nash and Mary-Lynne Taylor for recognition in the Australia Day and King's Birthday Honours.

Regrettably, this past year has also brought reasons for EPLA to mourn together. EPLA commemorates the passing of Acting Commissioner Louise Byrnes, the Hon Neal Bignold, former Acting Commissioner Paul Rappaport and legendary town planner, Terry Byrnes. These members, each in their own way, had a positive impact on EPLA as an organisation, for which we are grateful.

Over the past year, EPLA has also continued to play its important advocacy role with members of the EPLA committee (and other seconded members) writing submissions, giving evidence to Parliamentary Inquiries, meeting with the Attorney General and the Minister for Planning and Public Spaces, attending Department Stakeholder forums, participating in the Court Users Group, and engaging with like-minded, complementary organisations. On behalf of EPLA, I thank the many members who provide support in these engagement and advocacy tasks (among many other things!) and continue to volunteer when something is required to be done. I also thank the various reporters, editors and sub-committees who work hard on EPLA publications such as this one and the Environmental Law Reporter.

The annual EPLA Conference was again a highlight of the calendar this past year. The 2025 conference was held at historic Luna Park on Sydney Harbour. The Big Top was transformed for two days as delegates heard from First Nations people, the Mayor of North Sydney, pre-eminent architects, Commissioners of the Land and Environment Court and, an EPLA Conference first, the Minister for Planning and Public Spaces, the Hon. Paul Scully MP. The President of the Court of Appeal, Justice Julie Ward, and the Chief Judge, Justice Preston, delivered a round-up of the year in cases. The keynote address was delivered by Professor Richard Mackay AM and involved an excursion through parts of Luna Park – another EPLA Conference first. As has become tradition, the EPLA Conference was closed out with "The Quiz" hosted by Mike Staunton and followed by a fabulous dinner at the Waverton Coal Loader. Some of those who took it easy at the Conference dinner enjoyed the Spit Bridge to Manly walk on the Saturday morning after the Conference, ably led by EPLA Vice President, Rob White.

As always, EPLA is grateful for the continued support of our Conference sponsors. Sparke Helmore sponsored the President's Drinks (which I am sure had nothing at all to do with my brother, Alan, being a partner there…) and Pikes and Verekers sponsored the Conference dinner. Both firms have been long-standing sponsors along with Mills Oakley, Wilshire Webb Staunton Beattie, Conomos Legal, Hunt & Hunt, Martin Place Chambers, SJB, GSA Planning, Design Collaborative, Urbis and GLN Planning. EPLA thanks each sponsor for their support.

I look forward to seeing you at one of the many upcoming Twilight Seminars, social functions and this year's annual EPLA Conference which is to be held on 5 and 6 November 2026 at the Pullman Magenta Shores on the beautiful NSW Central Coast. It promises to be an informative and enjoyable conference as always. I encourage delegates to attend the Conference in person, if possible, as the benefits of networking and building collegiality among Land and Environment Court practitioners are immeasurable. It also allows us all to let our hair down and have some fun together.

Janet McKelvey
President

MARK SEYMOUR SC
Martin Place Chambers



EPLA Celebrates 20 years of the Hon Justice Preston as Chief Judge of the Land and Environment Court

The Honourable Brian Preston AO FRSN SC was appointed to the position of Chief Judge of the Land and Environment Court on 14 November 2005. It is appropriate to mark this achievement of 20 years of dedicated service from the Chief Judge. On behalf of all members of EPLA, I hope to do justice to recording this achievement in what follows.

Legacy

THE Chief Judge must be recognised not just for the collection of impressive decisions handed down but for the shaping of the intellectual foundation of most of what is recognised as planning or environmental law in New South Wales (indeed, in Australia and beyond). It is in recognition of this deep influence that the Chief Judge was made an Officer of the Order of Australia in February 2025 and promoted as Fellow of the Royal Society of NSW in 2018. Such is this legacy that it will undoubtedly influence environmental and planning law for generations.

The work is a testament that environmental law is not a niche or secondary field but a sophisticated discipline grounded in fundamental and common legal principles and driven by the rigorous intellectual effort that is statutory interpretation.

Climate Change

Others have identified the Chief Judge's significant influence on climate change law.[i] The Chief Judge was among the first judges in Australia—and internationally—to engage seriously and systematically with climate change *as a legal issue*. This is not confined to his Honour's judgments but extends to papers concerning the role of the professionals acting with climate consciousness.[ii] The role of a climate conscious lawyer, his Honour has advised, means:

> *[p]roviding clients with sound advice to solve a legal problem or dispute … addressing not merely the legal issues but also the financial, the emotional and psychological, the relational and social, the environmental, and the ethical consequences of different courses of action. Clients can thereby understand the consequences, costs and uncertainties associated with alternative courses of action and make an informed choice. This holistic advice is given by lawyers to clients in many areas of the law on a daily basis. Adding the climate change consequences as a consideration is a natural extension of this everyday practice.*

His Honour's judgments have articulated how climate science could and should inform decision-making[iii], how statutory objects relating to sustainability and environmental protection should be interpreted[iv], and how principles such as the precautionary principle and ecologically sustainable development should operate in practice[v]. In doing so, these decisions have provided a clear framework for addressing one of the defining challenges of our time, without straying beyond the proper role of the courts.

Open Justice and public education

Equally important was the dedication to open justice and public legal education. Chief Judge Preston has consistently emphasised that the work of the Court should be understandable and accessible to the community it serves.[vi] He has written and spoke extensively—both domestically and internationally—on environmental law, judicial practice, and the role of courts in environmental governance.[vii] No doubt this practice will continue. More recently his Honour has delivered a series of papers and speeches on the practical content of a constitutional right to a healthy environment.[viii]

Human activity

Importantly, Chief Judge Preston has never lost sight of the human dimension of the Court's work. Planning and environmental disputes often involve communities, livelihoods, and deeply held values. His approach to decision-making has always recognised that while courts must decide cases according to law, they do so in a social context where trust, legitimacy, and fairness matter. His judgments and public

remarks consistently reflect empathy and an awareness of the real-world consequences of litigation.

International law

Of important significance in a time of tempestuous activity, it is particularly timely to reflect on, and appreciate, how the Chief Judge regularly demonstrates a firm engagement with, and commitment to use, sources of international law both as a body of important normative force and as a source material for the development of municipal principle.

In many of his Honour's celebrated decisions, *Telstra Corporation* and *Bushfire Survivors*, the influence of international science and international law is patent and significant.

In *Telstra Corporation*, for example, the Chief Judge recognised the importance of the principles of economically sustainable development in being spurs to action. At [120] his Honour said the principles should, *if adequately realised*, promote:

> *paradigm shift from a world in which the development of the environment takes place without regard to environmental consequences, to one where a culture of sustainability extends to institutions, private development interests, communities and individuals*

The key point is that this is an ongoing process—a movement, a shift in thinking—and we are still far from its full realisation. Yet we are equally far from the world in which development occurs "without regard to environmental consequences". The Chief Judge's work continues to inspire and foster optimism in this regard.

Sometimes, important explanations of international law principles, and how these inform and give life to the objectives of municipal instruments, lay like gleaming jewels within the waters of merits assessment waiting to be salvaged. In *Stannards Marine Pty Ltd v North Sydney Council*[ix] his Honour said (at [187]-[190]):

> *The concept of the public trust is related to the principle of intergenerational equity, one of the principles of ecologically sustainable development. The principle of intergenerational equity is that "the present generation should ensure the health, diversity and productivity of the environment are maintained or enhanced for future generations".... The relationship between the concept of the public trust and the principle of intergenerational equity is that the public trust had been described as "the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users"...*
>
> *Intergenerational equity is based on three principles: ... First, the "conservation of options" principle requires each generation to conserve the diversity of the natural and cultural resources base in order to ensure that options are available to future generations for solving their problems and satisfying their needs... Second, the "conservation of quality" principle requires each generation to maintain the quality of the earth such that it is passed on in no worse condition than it was received... Third, the "conservation of access" principle requires each generation to give its members "equitable rights of access to the legacy of past generations and should conserve this access for future generations"....*
>
> *From the three principles are derived five duties on the present generation: the duty to conserve resources; the duty to ensure equitable use; the duty to avoid adverse impacts; the duty to prevent disasters, minimize damage and provide emergency assistance; and the duty to compensate for environmental harm...*
>
> *Chapter 10 of the Biodiversity and Conservation SEPP recognises the need to afford intergenerational equity. An essential aim is to ensure the catchment, foreshores, waterways and islands of Sydney Harbour are "protected, enhanced and maintained" not only as "an outstanding natural asset" but also as "a public asset of national and heritage significance", "for existing and future generations" (cl 10.1(1)(a)(ii)). The language of this aim accords with the premise of intergenerational equity that the present generation is to ensure the health, diversity and productivity of the environment is maintained or enhanced for future generations. That the beneficiary of the action required includes future generations is expressly stated at the end of the paragraph. But it is also implied by the language in which the action required is described. As I have earlier explained, the identification of Sydney Harbour as a "public asset" with "national and heritage significance" recognises its status as a community asset available to be used and enjoyed by all of the people of Australia but also that it is inherited as a legacy from previous generations and is to be transmitted from the existing generation to future generations. To protect, maintain and enhance Sydney Harbour as an outstanding natural asset and as a public asset of national and heritage significance is to implement each of the principles of conservation of options, conservation of quality and conservation of access for the benefit of future generations.*

Other subtle examples are worth the time to explore. The Chief Judge's sentencing decision in *Bently v BGP Properties Pty Ltd*[x] is enlightening for establishing a framework for environmental criminal law that is grounded in the principles of ecologically sustainable development. That framework can give depth to the sentencing exercise which might be lost in any frameless "instinctive synthesis". As explained by his Honour (at [65]-[71]) this framework provides a substantial basis for the requirements to punish a person or corporation for an environmental offence even in the absence of specific environmental harm:

> *The statutory requirements for prior environmental impact assessment and approval before carrying out any action likely to damage threatened species, populations or ecological communities are important linchpins of the statutory scheme for conservation of threatened species, populations and ecological communities...*

> *Requiring prior environmental impact assessment and approval is a key means of achieving ecologically sustainable development. It facilitates achievement of the principle of integration … If environmental considerations are to be an integral part of decision-making processes, it is necessary to assess the environmental impacts and risks associated with proposed activities. Environmental impact assessment is widely applied to predict the impacts of proposed activities on the environment.*
>
> *Prior environmental impact assessment and approval are important components in a precautionary approach. The precautionary principle is intended to promote actions that avoid serious or irreversible damage in advance of scientific certainty of such damage. …*
>
> *The requirement for prior environmental impact assessment and approval enables the present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations.*
>
> *Finally, prior environmental impact and assessment and approval can facilitate the internalisation of external environmental costs by including environmental factors in the valuation and costs of assets and services (such as in the price of allotments created by subdivision and development), by implementing the user pays or polluter pays principle (those who cause harm to the environment should bear the cost of containment, avoidance or abatement) and by ensuring that users of goods and services should pay prices used on the full life cycle costs of providing goods and services including the use of natural resources and assets (such as the full life cycle costs of maintaining reserved, existing habitat and of establishing and maintaining compensatory habitat of threatened species, populations and ecological communities).*
>
> *Failure to comply with requirements for prior environmental impact assessment and approval results in the loss of opportunity to achieve these four pillars of ecologically sustainable development (being the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and the internalisation of external environmental costs).*

The Chief Judge there explains that it is the loss of these *opportunities* -caused by the offending- that amounts, in itself, to a distinct harm to the community.

Practice and procedure and the shape of environmental law

As noted above, at least one of the greatest achievements of the Chief Judge is in providing an intellectual basis for most of the day-to-day operations of the Court. Some principles articulated by the Chief Judge have become so embedded in practice as to be foundational texts. Recitation of these cases becomes something akin to ritual - but a return to them, and the clear expression of reason in them, is always invaluable.

No assessment of a development application, for example, is possible without a proper understanding of the task of characterisation explained in *Chamwell v Pty Limited v Strathfield Council*.[xi] Similarly, the everyday work of construction of a land use table is unthinkable without reference to *Botany Bay Council v Pet Carriers International Pty Limited*.[xii]

No variation to a development standard would be considered without reflection on the reasons in *Wehbe v Pittwater Council*.[xiii] And there are other powerful analytical tools provided in *Wehbe* that, again, make practise in this field unthinkable without their use. As His Honour said (at [43]):

> *development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved*

This is a reminder that the task of environmental assessment – and of statutory construction that sits alongside it – is inherently pragmatic in nature.

Similarly, the important reminder, in *Jonah Pty Ltd v Pittwater Council*[xiv], that the task of development assessment is predictive, such that past activity by a proponent is largely (though not entirely) irrelevant, ensures proper focus on things that matter.

For anyone who struggles with the concept of an appeal against a decision on a question of law – the framework set out in *Canterbury-Bankstown Council v Realise Architecture Pty Ltd*[xv] is invaluable (and yet, remarkably, freely available!).

Appeals

The work of the Chief Judge is not contained to the Land and Environment Court. As a Head of jurisdiction, his Honour regularly sits on the Court of Appeal and has participated in a wide spectrum of cases.

The Chief Judge's contribution to environmental and planning law from this position are, unfortunately, beyond the scope of this paper.

However, what I would like to record is His Honour's evident depth of commitment to the intellectual task of statutory

construction, on display, for example, in *Norrie v NSW Registrar of Births, Deaths and Marriages*[xvi] in which his Honour joined with Beazley ACJ and Sackville AJA to find that the Registrar of the Register of Births, Deaths and Marriages was empowered to record a person's "sex" as something other than "male" or "female". Similarly, in *Field v Dettman*[xvii], His Honour found that the legislative scheme of the *Home Building Act 1989* precluded recovery of money paid for uninsured residential building work.

> *Such contributions are not limited to the task of statutory construction. In* ***Western Districts Developments Pty Ltd v Baulkham Hills Shire Council***[xviii] *His Honour weighed into the difficult seas of the common law and found that a local council owed a duty of care to prevent economic loss to a purchaser of a recipient of a subdivision certificate when that loss occurred due to the Councils issue of the certificate contrary to the requirements of the* ***Environmental Planning and Assessment Act 1979****.*

Congratulations

On behalf of all the members of EPLA, we congratulate the Chief Judge on a momentous term of service and thank him for this commitment to public service which we appreciate will continue into the future.

Endnotes

i J. Peel, "*Interpretation and application of the precautionary principle: Australia's contribution*" (2009) 18(1) *Review of European Community & International Environmental Law* 11-25, L.A. Omuko "*Applying the Precautionary Principle to address the "Proof Problem" in Climate Change Litigation"* (2016) 27(1) *Tilburg Law Review* 52-71, L. Schuijers "*Responding to ecological uncertainty in the context of climate change: Thirty years of the precautionary principle in Australia"* (2023) 45 *Sydney Law Rev* 249, J. M. Angstadt "*Revisiting Precaution in Domestic Climate Change Litigation"* (2025) 55(1) *Environmental Law* 95-138; Compare, with scepticism, A. Patrick "*Brian Preston: The activist judge shaking the climate change world*" *Australian Financial Review* (15 February 2019)

ii Preston, "*Implementing a Climate Conscious Approach in Daily Practice*", paper based on a speech to the Australian and New Zealand Legal Ethics Colloquium 4 December 2015

iii *Glouster Resources Limited v Minister for Planning* [2019] NSWLEC 7

iv *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; *Bushfire Survivors for Climate Action Incorporated v Environmental Protection Authority* [2021] NSWLEC 92

v *Telstra Corporation*

vi Preston, "*The role of environmental courts and tribunals in promoting the rule of law and ensuring equal access to justice for all*", Speech to the International Symposium on Environmental Adjudication in the 21st Century, 11 Paril 2017

vii Are you kidding? I am not going to attempt to catalogue his Honour's writings – as if such a thing were possible.

viii Preston, "*The right to a clean, healthy and sustainable environment: how to make it operational and effective*" Talk to United Nations Ambassadors at the Permanent Mission of France to the United Nations, 27 October 2022; Preston, "*The right to a clean, healthy and sustainable environment: Nature, Content and Realisation*", 2023 Blackshield Lecture, Macquarie Law School; Preston, "*Beyond Recognition: Realisation of the Right to a Healthy Environment*" (2024) 18 *UNSW Law Society Court of Conscience* 41

ix [2022] NSWLEC 99

x (2006) 145 LGERA 234

xi (2007) 151 LGERA 400

xii [2013] NSWLEC 147

xiii (2007) 156 LGERA 446

xiv [2006] NSWLEC 99

xv [2024] NSWLEC 31 at [8]-[11]

xvi [2013] NSWCA 145

xvii [2013] NSWCA 147

xviii (2009) 75 NSWLR 706

JUDGE BARTLEY and JUDGE NASH
Local Court of NSW



Sentencing Environmental Offenders in the Local Court: Evidence, Practice and Procedure

1. Introduction

THE focus of this paper is environmental offence sentencing proceedings in the Local Court of New South Wales. The paper discusses why evidence in such proceedings should be prepared properly and how that can be done. Appropriate and effective procedures also are suggested. As we hope becomes apparent from this paper, although the fundamentals of good advocacy apply equally when appearing in the Local Court as in the Land and Environment Court, there are some distinct aspects of appearing in the Local Court of which practitioners should be aware.

The great majority of environmental prosecutions instituted in the Local Court (as in the Land and Environment Court) ultimately become pleas of guilty, albeit that many pleas of guilty are entered only on the day set down for a defended hearing.

A major reason for this is that most environmental offences are offences of strict liability and there is reduced scope for defending prosecutions successfully. For example, the most commonly prosecuted offence in the Local Court is development without consent, that is, development not authorised at all or development extending beyond the limits of the development consent.

Such unauthorised activities include:

- Clearing trees or other vegetation
- Building extra rooms
- Building extra or extended balconies
- Constructing swimming pools
- Excavating additional sub-floor basement area approved for storage only and constructing an additional (basement) residential floor
- Use of premises for purposes not permitted by the development consent
- Breaches of conditions for constructing approved buildings, including blocking footpaths and roads, and inadequate sediment control
- In areas with rivers and bays: filling in natural shorelines and constructing flat linear terraces for outdoor dining, all without any authority.

Too often, preparation of an offender's case in mitigation of penalty is inadequate and the conduct of the offender's case is too perfunctory. That is not in an offender's interests and is counter-productive financially. We wish to focus on practical, courtroom-ready guidance – what actually assists the court to impose orders that are fair, proportionate and properly reflect the purposes of environmental sentencing.

Unlike many other areas of criminal work, environmental offences usually sit inside dense, highly technical statutory schemes – the Protection of the Environment Operations Act 1997, the Environmental Planning and Assessment Act 1979, the Water Management Act 2000, and others. Good advocates understand those Acts. Great advocates bring the relevant provisions to life: (1) identifying available penalties accurately and early; (2) noting mandatory considerations such as environmental harm, foreseeability and culpability; (3) assisting the court by explaining how the sentencing scheme is structured, for example, the relationship between Tier 1, Tier 2 and Tier 3 offences.

The Local Court deals with heavy lists and broad jurisdictions (see generally Magistrate Glenn Bartley, "Effective Advocacy in the Local Court", 4 September 2024 [google 'localcourtjudicialspeeches']). In environmental offence sentencing proceedings, the quickest way to help the bench is to give a roadmap through the relevant legislation. Clear, concise statutory navigation is advocacy gold.

Two main areas of improvement are needed in the conduct of environmental offence sentencing proceedings in the Local Court:

- Prosecutors' statements of agreed facts need to be prepared and considered carefully by both sides and be taken more seriously by both sides. Prosecutors should deploy legal practitioners to draft, or at least thoroughly and accurately settle, proposed statements of agreed facts.
- An offender's evidence on sentence needs to be in writing and separate from submissions to be made on behalf of the offender.

A rolled-up address from the bar table with bare assertions of fact intermingled with submissions is no longer tenable or acceptable. Assertions of fact from the bar table are not evidence. Submissions must be based on written, and any subsequent oral, evidence. An offender's case should be prepared thoroughly and with particularity.

Both the NSW and Commonwealth parliaments have passed legislation changing the title of NSW Local Court magistrates to Local Court judges. The change of title was proclaimed to commence on 28 March 2026. Therefore, we have referred to the judicial officers of the Local Court as Local Court judges.

For brevity, this paper is expressed in the imperative. However, feedback sent to the authors via the Local Court Executive Office (formerly the Chief Magistrate's Office), the addresses of which are at the end of this paper, would be most welcome.

2. The Appeal System

Appeals against severity of sentences for environmental offences imposed by the Local Court cannot be made to the District Court. Instead, such appeals go directly to the Land and Environment Court of NSW.

A quick, ramshackle skirmish in the Local Court followed by a partly or wholly underprepared fumble in the District Court is not an option.

Essentially, the avenue of appeal from the Local Court is straight to the Land and Environment Court.

As you well know, the Land and Environment Court is a specialist superior court with commensurate standards. A severity appeal is not a hearing de novo but by way of rehearing. It is a rehearing on both:

- The evidence admitted in the Local Court.
- Any additional evidence adduced on appeal.

The Land and Environment Court needs to be able to identify what was the evidence that was admitted in the Local Court. It needs to distinguish such evidence from:

- Evidence that was tendered but rejected.
- Submissions to the Local Court.

The evidence admitted at first instance in the Local Court has an armchair ride into evidence in the appeal because, in the legislation, the starting point for evidence in the appeal is the evidence admitted below.

If an offender's legal representative is not thorough at first instance and has to attempt to supplement the evidence on appeal, the offender may have greater admissibility hurdles to clear. Standards and sharpness of scrutiny of that extra evidence on appeal by the prosecution probably will be higher. Examination by the Land and Environment Court of the evidence sought to be adduced for the first time on appeal is likely to be more exacting and expert than by the Local Court (a generalist court) and, for that reason, such additional evidence has a greater risk of being rejected.

Most evidence adduced on behalf of an appellant offender is admitted because usually it is adduced to fill a gap in the evidence before the Local Court, for example, financial evidence in relation to an offender's capacity to pay a fine. However, the Land and Environment is unlikely to be impressed with attempts to adduce fresh evidence on appeal to effect a wholesale change in the version adduced by the offender in the Local Court.

3. Maximum Penalty

The next consideration is the maximum penalty. In environmental matters, they are comparatively very high. The most common offence that is prosecuted in the Local Court is development not in accordance with consent: Tier 2, s.9.53, Environmental Planning and Assessment Act 1979. The maximum monetary penalty for such an offence is $2 million for a company and $500,000 for an individual. Of course the maximum penalty (and the offences being strict liability) are indicators of the public expression by Parliament of the seriousness and gravity of the offences as perceived by the community (Midcoast Council v Palm Lake Works Pty Ltd [2025] NSWLEC 147 [41]).

Consistency of sentencing is important but the more appropriate yardstick is the maximum penalty (EPA v Ditchfield [2018] NSWLEC 90 [72]; EPA v Cadia [2025] NSWLEC 27 [195]).

The Local Court scales down from the maximum of $2 million / $500,000, which is reserved for a worst possible case. The Local Court's limit of jurisdiction of $110,000 is merely a cut-off. For example, if the appropriate penalty in a sentencing proceeding was determined to be $150,000 then the Local Court would impose $110,000. The Local Court does not begin scaling down from $110,000. See Park v The Queen [2021] HCA 37.

Practitioners should refrain from beginning their submissions, or answering a question from the bench about the maximum penalty for an offence, by mentioning the jurisdictional limit of $110,000. We might say, tongue-in-cheek, that if a practitioner mentions the jurisdictional limit, that they are concerned the court may be considering imposing a sentence in or about that sum. It is common for Local Court fines to be well into five figures (but below, not at, $110,000), and so the jurisdictional limit in many cases will be irrelevant. To emphasise: it is only relevant if the court was otherwise considering imposing a penalty for an offence in a sum greater than the jurisdictional limit.

Over the past quarter century, the statutory maximum monetary penalties generally have been increasing and the Land and Environment Court sentencing levels have been increasing (of course, in accordance with consistency in sentencing principles).

In our view, even during the period of a particular maximum monetary penalty, the general pattern of sentencing of the Land and Environment Court has comprised an upward trend. (See the paper presented by Justice Pepper of the Land and Environment Court cited in the attached References, paras 104 and 110.)

It should be appreciated that the older the case cited on behalf of an offender as a "comparable" sentence, the more likely it is to be discounted as "dated". Contemporary standards require historical sentencing patterns to be reconsidered. Provision needs to be made to account for views changing over time about the sentence that should be imposed in particular cases: Burwood Council v Abdul-Rahman (No 2) [2017] NSWLEC177 [70]-[71]; CE, OEH v Turnbull [2017] NSWLEC 140 [240].

So the environmental offender for whom you are appearing in the Local Court is in the big league financially in most cases, that is, at risk of fines greater than the usual range of a few hundred to a few thousand dollars for traffic, assault, domestic and dishonesty offences. A key role of an offender's legal representative is damage control. How that can be achieved effectively, efficiently and ethically is outlined in this paper.

When small-scale developers come to the Local Court unrepresented and underprepared, often they are fixated on the "outrageousness" of a penalty infringement notice amount – up to $6,000. They have not paid it and it is too late to do so. They cannot back out and reverse the process. In most cases, they are facing a much bigger total of fine and costs in court. However, if you are consulted by a developer before the deadline for paying the penalty infringement notice has expired, you should urgently consider whether to advise that it be paid.

The great majority of developers who do not pay the penalty infringement notice, and instead court elect, end up paying much more when one adds up the amount of the fine, prosecution costs and your professional costs of acting and appearing. The fine alone is likely to be more than the penalty infringement notice amount. Furthermore, s.10 dismissals are rare (see below). Even if the fine is less than the penalty infringement notice amount, and even if the offender is a first offender, it is most probable that the offender will get a conviction and therefore a criminal record.

If you have a developer as a regular client, warn the developer about the above, including the deadline for paying a penalty infringement notice. Advise the developer to consult you immediately he/she/it gets an infringement notice. Generally, it is cheaper simply to pay the penalty infringement notice.

However, if you find yourself in court appearing for an environmental offender to mitigate sentence, you will need to embark on a process of managing his/her/its expectations by explaining the realities outlined in this paper. Often that is a slow process, and results in the prosecution not proceeding expeditiously, the ultimate utilitarian discount declining and the recoverable prosecution costs increasing.

4. General Deterrence

Environmental prosecutions and sentencing proceedings are not the 'bread and butter' work of the Local Court. However Local Court judges are generally aware of the prevalence of environmental offences and the particularly strong need for general deterrence on the basis that inadequate or lenient sentences will not work sufficiently to reduce the likelihood of developers, owner/occupiers and others carrying out conduct antithetical to the purposes of environmental legislation such as the Environmental Planning and Assessment Act 1979.

For environmental offences, the purpose of sentencing of general deterrence is of central importance: Preston CJ of LEC, Pittwater Council v Scahill (2009) 165 LGERA 289 [42] – [46]; Pepper J, Thomson v Hawkesbury City Council [2009] NSWLEC 151 [63].

As stated by Preston CJ of LEC in Chief Executive, Office of Environment and Heritage v Clarence Valley Council [2018] NSWLEC 205; (2018) 236 LGERA 291 at [98]-[99]: "…the sentence of the Court needs to be of such magnitude as to change the economic calculus of persons in determining whether to comply with or to contravene environmental laws. It should not be cheaper to offend than to prevent the commission of the offence. Environmental crime will remain profitable until the financial cost to offenders outweighs the likely gains by offending…The amount of the monetary penalty must be substantial enough so as not to appear as a mere licence fee for illegal activity." These ideas are generally well-known within the Local Court bench.

General deterrence can be achieved not only by publication orders. Metropolitan and regional news outlets regularly find newsworthiness in environmental sentencing outcomes. The effect of "word of mouth" also should not be underestimated.

5. Ascertain the Law

As Duggan J said in Port Macquarie-Hastings Council v David Peter Waite (No 2) [2020] NSWLEC 60 [65], a lack of awareness of a requirement to obtain consent or permission to carry out development does not absolve a person of their obligation to ensure that all necessary consents are obtained prior to carrying out the development; it is not the relevant local council's responsibility to provide advice on the consents that are required. It is the responsibility of every person, whether they are a developer or otherwise to ensure, for themselves, that they have obtained all necessary consents. The fact that environmental offences are commonly strict liability emphasises the legislative intent that the responsibility rests on the person proposing to carry out the development. A lack of understanding or necessary investigation is not sufficient to reduce culpability.

A strict liability offence that is committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally: EPA v Cadia Holdings Pty Limited [2025] NSWLEC 27 [122].

Local Court judges regularly deal with matters involving the defence of honest and reasonable mistake of fact (particularly

in the context of strict liability driving-related offences) which, if fairly raised, must be negatived beyond reasonable doubt by the prosecutor. In many cases, a person may have made an honest mistake, but the mistake may not be a reasonable one. A guilty plea means that the defendant/offender has accepted that a mistake was, at least, not reasonable. Practitioners should be careful about making submissions on penalty that might be seen to traverse the plea, but Local Court judges will be keen to hear an explanation for the offending and to give that explanation the appropriate weight on sentence.

In other words, although sentencing courts judge the environmental consequences, they also judge the conduct. The difference between an honest but careless mistake and a deliberate cost-saving manoeuvre can be enormous when manifested in the penalty imposed. Best practice advocacy (including evidence adduced) answers questions such as:

- Was the breach momentary or systemic?
- Were staff properly trained?
- Did the offender have a compliance culture?
- Was the breach self-reported or concealed?
- What did the offender do the moment they realised what had gone wrong?

You are at your most persuasive when you provide granular detail about operational practices, rather than generalised statements about 'good character' or 'commitment to the environment'.

6. Contrition

Although evidence of the acceptance of responsibility for offending conduct and an acknowledgment of the harm by an offender is an important sentencing consideration, actions rather than smooth apologies will go further in demonstrating genuine contrition and remorse. Preston CJ's observations in EPA v Waste Recycling and Processing Corporation [2006] NSWLEC 419 at [203] – [214] are an important guide:

- The speed and efficiency of action to remedy and prevent harm is the clearest indication of contrition and remorse.
- Voluntary reporting of the offence and any associated environmental harm indicates a genuine desire to act responsibly.
- Taking action to address the causes of the offence also indicates genuine desire to act responsibly.
- The personal appearance of corporate executives in court and their personal evidence outlining the company's regret and stating future plans to avoid repetition of such offences is an indication of genuine corporate contrition.

The absence of corporate executives at sentencing hearings will not be to the company's detriment as such, but their announced presence and any evidence which the court accepts from such individuals can be to their advantage.

Although each application will be assessed on its own individual merits, an offender may wish to consider seeking an adjournment of sentencing proceedings to enable remedial works to be carried out. Obviously the Court cannot allow matters to languish for months on end, but a judge may entertain a reasonable adjournment request that will serve an appropriate purpose.

In summary, and we cannot emphasise this enough: nothing is more compelling in environmental sentencing than demonstrated remediation. Not promises. Not vague commitments. Actual, physical, completed rectification. When counsel can hand up or tender receipts, photographs of restored sites, invoices for specialist contractors, monitoring results, updated environmental management plans, staff training materials and proof of systemic improvements, the sentencing exercise becomes significantly clearer. Remediation shows responsibility. Systems improvements show insight and learning. Together, they show the Court that the offender has moved from breach to behavioural reform.

7. Section 10, Crimes (Sentencing Procedure) Act 1999

Without proceeding to conviction, a court that finds a person guilty of an offence may make an order directing that the relevant charge be dismissed outright, or conditionally: s.10, Crimes (Sentencing Procedure) Act 1999. However:

- It will be a rare case when such dismissal is seen as appropriate to an environmental offence: Hunter Water Board v SRA of NSW (No. 2) (1992) 75 LGRA 22 at 23. On appeal, the Court of Criminal Appeal said that there is no error in that approach to penalty: SRA of NSW v Hunter Water Board (1992) 28 NSWLR 721 at 726G; Thorneloe v Filipowski (2001) 52 NSWLR 60 [166], [170], [201]
- A court should not start from any presumption that it will be a rare case in which s.10 will be applied to an environmental offence. Rather, the court ought to look primarily at the considerations which arise in the particular case, including the nature of the offence as defined in the statute creating it and the penalty provided together with the perceived object of the relevant statutory provision. Consideration of such matters in each case may have the consequence that there ends up being few cases in which s.10(1) is applied for environmental offences: EPA v Coe Drilling Australia Pty Ltd [2005] NSWLEC 719 [125]; Campbelltown City Council v Craig Stephen Woolley [2018] NSWLEC 82 [122].
- In Active Tree Services Pty Limited v Ku-ring-gai Municipal Council [2005] NSWLEC 431 [48], Pain J said:

> *"Several cases have made it clear that s.10 of the Crimes (Sentencing Procedure) Act (and its predecessor s.556A of the Crimes Act 1900) is rarely applied in environmental cases. In Environment Protection Authority v Attard [2000] NSWCCA 242, Sperling J (with whom Mason P and Smart AJ agreed)*

stated at [5] that s.556A would only be applied in exceptional circumstances. That case was a prosecution under the Clean Waters Act 1970…"

- In Blue Mountains City Council v Carlon [2008] NSWLEC 296 [70], Biscoe J said:

  "It is unusual in the case of strict liability offences for a defendant to receive the benefit of s.10, even if the defendant genuinely believed that it was lawfully entitled to undertake the prohibited activity. The reason for imposing a penalty even where such a belief is held has been expressed in various ways to similar effect: to invoke the deterrent purpose of educating the offender and the community in the law's proscriptions so that the law will come to be known and obeyed; to ensure that persons take proper steps to ascertain the lawfulness of their proposed conduct; to give effect to the system of planning controls."

- When declining to apply s.10 in Pittwater v Scahill [2009] NSWLEC 12, Preston CJ said [109]:

  "…[T]he objective gravity of the offence makes the exercise of such a discretion inappropriate. Having regard to the purposes of sentencing, there is a need to impose a conviction and a penalty which is a public denouncement of the conduct of the defendant and which acts to prevent future crime by deterring other persons involved in the arboriculture and landscaping industries from cutting down or removal of trees and other vegetation without first obtaining and then complying with all necessary approvals. Whilst I accept that the defendant may be unlikely to re-offend, nevertheless, a conviction and a penalty holds him accountable for his conduct and reinforces the obligation on him…"

- When refraining from making an order under s.10 in North Sydney Council v Perini (No 2) [2013] NSWLEC 91, Pepper J said [202]:

  "In arriving at this conclusion I have had regard to Mr Perini's advanced age, his reliance on [the advice of another person], the extremely limited likelihood of him re-offending in the future and his otherwise impeccable character. But although these factors militate in favour of making an order under s.10, on balance, a conviction is nevertheless necessary to hold him accountable for his conduct…"

- In NRAR v Kimber [2023] NSWLEC 101, Pain J dismissed the charge under s 10(1)(a) because the offender was a 74 year old farmer with no prior convictions [97], there was no actual or likely environmental harm, only a small amount of water was taken in breach of a licence condition and the offences were of very low objective seriousness [90].

- In R v Cahill [2015] NSWCCA 53 Lemming JA said:

  " [7] In the multitude of matters that come before sentencing judges, there will be a small number which can properly be described as "wholly exceptional". If the circumstances are wholly exceptional, they may justify a sentence which is lenient to a wholly exceptional degree…

  [8] Any sentencing judge … will be attuned to the possibility that a particular case is wholly exceptional (as well as to the possibility that it is merely claimed to be, but is not in fact, exceptional)."

- In R v McNaughton (2006) 66 NSWLR 566, Spigelman CJ, with whom the other four judges of a five judge bench of the Court of Criminal Appeal agreed, said [15]:

  "[T]he proportionality principle is also held to apply so that a sentence should not be less than the objective gravity of the offence requires."

- The objective gravity or seriousness of crimes fixes both the upper and lower limits of proportionate punishment. It fixes the lower limit because allowance for the subjective factors of the case, particularly of the offender, cannot produce a sentence which fails to reflect the objective gravity or seriousness of the offence: Gittany Constructions Pty Limited v Sutherland Shire Council [2006] NSWLEC 242 [109] per Preston CJ.

- In most cases, the "lower limit" militates against the application of s.10.

- Consequently, the application of s.10 in sentencing for environmental offences is exceptional, and rare in practice. In addition to any submissions by practitioners appearing for offenders on sentence seeking s.10 orders, it would be prudent to be ready with well prepared fallback submissions. However, it is important to also recognise that the case law does not permit a prosecutor to simply make a submission that an order under s.10 is inappropriate in all circumstances involving environmental offending.

8. Professional Costs

Essentially, an offender must pay the prosecutor's costs in regulatory prosecutions, including in sentencing proceedings, including environmental sentencing proceedings.

Costs are compensatory, not punitive. Generally, in such prosecutions, actual costs are awarded.

Generally, the amount of the fine may be reduced to a degree having regard to the amount of costs to be ordered against the offender (although it is difficult to reconcile all of the case law on this subject). However, costs cannot be mitigated by reference to the factors relevant to mitigation of penalty. The ability of an offender to pay costs generally is not a relevant consideration in quantifying costs to be ordered against the offender.

Prosecutors should walk into court with an itemised and quantified schedule of costs or, better, send it in advance to their opponent. An offender is entitled to notice of the amount of costs claimed and how such costs are calculated, in order that the claim can be considered properly. If a costs claim is served on an offender at a late stage in sentencing proceedings, then an avoidable adjournment may result.

The court must consider hourly and daily rates of charge and "whether the extent of the work undertaken and the time taken were necessary so that the claims could be said to be reasonable": Ly v Jenkins [2001] FCA 1640 [164]. When assessing rates of charge the Court may have regard to the current state of the market for legal services: NSW Crime Commission v Fleming and Heal (1991) 24 NSWLR 116 [127E], [128A], [136G] and [140E-F].

If a sentencing proceeding goes for longer than expected and allowed for in the schedule of costs, then the prosecutor can serve an updated schedule, especially if, as commonly occurs, the offender is disorganised and needs additional time to prepare evidence after an avoidably late plea of guilty.

A court can award the costs of costs proceedings: Secretary, DPE v Goodman Property Services (Aust) Pty Ltd (No. 3) [2022] NSWLEC 89 [75].

From our own cases, and having consulted experienced practitioners, the main ranges of prosecutors' costs of and incidental to sentencing proceedings (where a defended hearing did not commence) appear to be approximately:

- In the Local Court: $3,000 - $25,000.
- In the Land and Environment Court: $18,000 - $120,000, but usually in the $40,000 - $60,000 range.

Much of course depends on the duration of a sentencing hearing, the extent to which issues are contested and hence the extent of evidence marshalled for the hearing and the level of legal representation (solicitor advocate, junior and/or senior counsel appearing at the hearing).

9. Statements of Agreed Facts

Generally, in environmental offence sentencing proceedings, there are more disputes about facts for sentence, including on central issues, than in assault, traffic, dishonesty or domestic offence sentencing proceedings. Generally, in environmental offence sentencing proceedings, there is more additional offender's evidence.

Service of a prosecution brief of evidence, or even a preliminary brief, is not compulsory under the Criminal Procedure Act 1986 or Criminal Procedure Regulation 2017. However, that should be done voluntarily by the prosecuting authority at an early stage. Doing so helps concentrate the minds of the accused and his/her/its legal representative. It enables the proceedings to be conducted efficiently.

The Local Court is likely to be sympathetic to an adjournment application by an accused pleading guilty who says that he/she/it cannot respond adequately to the prosecution evidence that has been served on the day of appearing in court. When matters are adjourned, and particularly if they are to be fixed for sentence on the next occasion, please ensure accurate time estimates for the likely disposition of the matter are given so that the court can arrange its diary accordingly. Much will depend on the complexity of the matter, the extent of any cross-examination of witnesses, the extent of documentary evidence, and the like. Prior written submissions on sentence will assist greatly, because in many cases, if filed with the court, the Local Court judge will have the chance to review these documents before coming on the bench, rather than pick up the court file cold.

The prosecutor should have a draft statement of agreed facts ready for negotiation with the offender. It should be served on the first mention day, or preferably be emailed or posted in advance of that day.

A statement of agreed facts should have the following features:

- Although it should be as concise as possible, it should be comprehensive by stating all of the relevant facts for sentence. The facts should be stated precisely.
- The statement of agreed facts should be as self-sufficient as possible, and rely as little as possible on supporting material. The evidence in what otherwise would be supporting material should be distilled into the statement of agreed facts as much as possible.
- However, supporting material would reasonably include photos, videos, plans and any trail of notices and correspondence that an offender has disregarded.
- There should not be evidence of aggravating facts in the supporting material, for example, in a statement of a neighbour, who has complained about a development consent being exceeded, that is not in the statement of agreed facts. Aggravating evidence should be distilled into the statement of agreed facts.
- Actual or potential harm to the environment or other public interests should be precisely but fully stated in the statement of agreed facts.
- Unless relevant to explain a chain of events, the statement of agreed facts should not baldly recite the terms of complaints by neighbours or other members of the public. It should state those complaints as facts. The case law is to the effect that complaints as such attract no weight as facts for sentence.
- It is essential in environmental offence sentencing proceedings that statements of agreed facts be drafted, or at least thoroughly and precisely settled, by a skilled legal practitioner. Too often compliance officers or other Council officers draft such statements and the council solicitor does not thoroughly overhaul and augment them. Council compliance officers and inspectors do not have sufficient legal knowledge or skills to be solely responsible for a statement of agreed facts.

It is common for offenders to agree to a draft statement of agreed facts, with or without negotiations, and whether or not they are represented, and then later in their own evidence attempt to contradict or qualify the statement of agreed facts. That can become messy legally and factually, time-consuming,

and can imperil the integrity and viability of the plea of guilty and, potentially, sentence.

So at the earliest stage possible, the prosecutor should apply to the Court to order that the law of evidence applies to the sentencing proceeding. That is because, in a sentencing proceeding, the rules of evidence do not apply unless they are ordered to apply.

The effect of the rules of evidence being ordered to apply is prescribed in sections 4, 191 and 192 of the Evidence Act 1995. The effect is that the statement of agreed facts cannot be contradicted or qualified without an application to do so by the Court and without subsequent leave of the court being granted.

In Environment Protection Authority v Ramsey Food Processing Pty Ltd [2009] NSWLEC 152 [16] Biscoe J said:

> *"The onus is on the party seeking leave to contradict or qualify agreed facts to make out a case for leave including as to the circumstances in which they came to agree the facts. An application to contradict or qualify agreed facts after considered negotiation and legal advice, particularly when made as late as the hearing, challenges the integrity of the agreed facts procedure and should be approached with caution. There has to be an incentive for parties to agree facts. To allow a party to back out of such an agreement easily does not encourage agreement in the first place. In a general sense, there is prejudice in denying to a party the right to rely on something that they reasonably thought was agreed."*

Those considerations were applied in EPA v Mouawad (No.4) [2023] NSWLEC 76 [43]-[46]. They usually preclude later attempts in an offender's case to undermine or chip away at the statement of agreed facts.

In the Local Court, offenders and sometimes their legal representatives can be disorganised, underprepared and have no clear strategy. They are more likely to consent to an application that the law of evidence applies if the application is made early. If the application is made at a later stage and in the middle of a dispute about facts for sentence, then it is likely that the application will be opposed opportunistically and the sentencing proceeding is at risk of becoming complicated and protracted, and at risk of imploding.

There may be forensic advantage gained by an offender in having the law of evidence apply as, for example, it may make the prosecutor's task of proving (beyond reasonable doubt) an allegedly high level of environmental harm more difficult: see e.g., Environment Protection Authority v Forestry Corporation of New South Wales (No 3) [2026] NSWLEC 25 [4], [149], [152].

An order by the Court at an early stage that the laws of evidence apply provides the ground rules for a sentencing proceeding from the outset. Such an order enables the sentencing proceeding to progress efficiently and economically.

It follows from the above that it is critical for an offender's legal representative to negotiate a statement of agreed facts with the prosecutor very carefully. Where the rules of evidence have been applied, a court will give no weight to later evidence of an offender that contradicts or qualifies the contents of the statement of agreed facts.

Intermittently, police prosecutors find that among their files in a list are court attendance notices containing allegations by local councils of environmental offences. Often the CANs are accompanied by little or no indications of the facts. Thus it may be necessary to seek an adjournment for a few weeks. If that occurs, the police prosecutor should advise the prosecuting council of the adjourned date, that the council should be represented on the adjourned date, the nature of any issues that have emerged and the need for a draft statement of agreed facts to be prepared and served. However, it is much better practice for councils to ascertain the first return date of CANs issued by them and appear from the beginning.

10. Offender's Evidence

The prosecution has the burden of proving incriminating and aggravating facts beyond reasonable doubt.

However, an offender has the burden of proving favourable matters on the balance of probabilities (R v Olbrich (1999) 199 CLR 270). That requires cogent evidence. The brevity and informality that may properly apply to an assault or traffic plea is inappropriate and financially dangerous in an environmental offence sentencing proceeding.

A central requirement of a Local Court sentencing proceeding for an environmental offence is that the evidence and submissions not only of the prosecutor, but also of the offender, must be separated.

An offender should give evidence initially by written statement or affidavit. It may also be appropriate to adduce corroborating photographs, plans and, if relevant, any material correspondence or financial records. Of course, the offender will be liable to be cross-examined on that evidence.

11. The Sentencing Hearing

When preparing for a past EPLA Conference, an experienced Justice of the Land and Environment Court provided valuable insight and advice. The judge recounted that in a severity appeal, one of the predominant items that the Land and Environment Court often received from the Local Court was a huge bulldog clip. Within it was a photocopy of the court attendance notices and a "melange of material", with no or no adequate indication of what was admitted evidence, rejected evidence or submissions. The judge observed that, when scrutinising the transcript, a rolled up conglomerate spiel from the bar table often cannot properly be dissected into evidence and submissions. The judge said that it was particularly difficult

isolating what evidence was admitted in the Local Court when different legal representatives are appearing in the severity appeal in the Land and Environment Court.

Subsequently, the conduct of environmental offence sentencing proceedings in the Local Court has improved and the difficulties outlined above have abated.

Thus in the Local Court documentary evidence should be marked as exhibits. The statement of agreed facts, photographs, plans, notices and correspondence and the offender's statement or affidavit should be marked as exhibits. Where practicable, legal representatives should encourage the Court to give the documents separate exhibit numbers for ease of reference, efficiency and precision in submissions and the eventual judgment. In particular, such an orderly process should be encouraged by prosecutors.

The Land and Environment Court case law enunciating principles for sentencing environmental offenders by now is vast. Furthermore, there are innumerable allegedly comparable cases for most of the main kinds of offences. So bring to court three highlighted copies of the main authorities that you rely on – one for yourself, one for your opponent and one for the Court. Local Court judges do not have associates and have little time to do electronic legal research. They should be given a whole authority rather than simply a brief oral reference to the asserted parts of a case relied upon. Bring along a complete hard copy of the whole case. Local Court judges are experienced lawyers and will want to satisfy themselves about various aspects of a case that is cited.

The caseload in the Local Court is such that generally speaking the amount of time available for pleas in mitigation in the Land and Environment Court is simply not the same as in the Local Court. This also means that you should avoid citing, whether in written or oral submissions, multiple case authorities for a single proposition: identify the most authoritative case for a proposition, and leave it at that.

Procedurally speaking, unlike in the Land and Environment Court, if a plea of guilty is entered in the Local Court, the general presumption is that the matter will proceed to sentence immediately. We appreciate, however, that this will not be appropriate in many cases, such as where the final facts are not agreed, expert evidence needs to be served or where the matter is particularly complicated and may need to be set down in the court's diary with a longer than normal estimate. If the matter is reasonably straight forward, the facts are agreed and no adjournment is required to obtain additional documents or material, the court may simply wish to finalise the matter forthwith (both the sentencing hearing and the delivery of judgment).

Local Court judges are particularly skilled in the delivery of immediate, ex tempore judgments and will do whatever they reasonably can to avoid reserving a decision.

12. Unrepresented Offenders

Unrepresented accused often appear in the Local Court living in the past and aggrieved by the amount of the penalty notice. They have little or no idea of their much greater financial exposure in a prosecution. Often they do not appreciate that there may be a big financial freight train hurtling towards them.

Prosecutors opposed by an unrepresented offender should give to the presiding Local Court judge a copy of Hudson v Director-General, DECCW [2012] NSW CCA 92 [94]-

[98] and the title page. In Hudson, the Court of Criminal Appeal held that the LEC judge should have told a self-represented offender of:

- His exposure to significant financial penalties.
- His right to adduce evidence and make submissions in mitigation of penalty, including evidence giving rise to a belief that he was entitled to clear the land in that case.

In a prosecutor's cross- examination of an unrepresented offender, the prosecutor may wish to ask non-leading questions on arguable aspects of mitigation before commencing traditional cross-examination on them. No one wants an avoidable appeal.

13. Sentencing Principles

The principles to be applied on sentence for the commission of an environmental offence is a very large and diverse subject. A small selection are cited in this paper.

In an environmental offence sentencing proceeding, whether in the Land and Environment Court or in the Local Court, evidence needs to be prepared and a party's case needs to be conducted in the light of applicable sentencing principles, and informed by the matters prescribed under the Crimes (Sentencing Procedure) Act 1999 including s 21A aggravating and mitigating factors.

For a thorough exposition of sentencing principles, see Gittany Constructions Pty Ltd v Sutherland Shire Council [2006] NSWLEC 242.

For a recent, concise collection of commonly applied sentencing principles see EPA v Tumut Waste Pty Ltd [2026] NSWLEC 18.

The primary factor to be considered in sentencing is the objective seriousness of the offences. Objective gravity is judged by two principal components: the precise acts or omissions of the offender and the consequences of those acts or omissions: Secretary, DCCEEW v Vassallo [2026] NSWLEC 30 [71] – [72].

In NRAR v Thompson [2022] NSWLEC 48 [91] – [94] and EPA v Tumut Waste Pty Ltd [2026] NSWLEC 18 [74] – [77] the Land and Environment Court provided the following guidance for the application of the principle expounded in R v De Simoni [1981] HCA 31:

- A strict liability offence that is committed intentionally, negligently or recklessly is objectively more serious than one that is committed inadvertently.
- A sentencing court cannot take into account circumstances of aggravation which would warrant conviction for a more serious offence than that of which the offender had been convicted.
- If the circumstances of the offence for which the person is to be sentenced are such that the offender could have been found guilty of a more serious offence, the facts constituting such a finding cannot be relied upon in sentencing.
- Similarly, if the circumstances of the offence for which the person has been convicted are such that the offender could have been found guilty of a discrete aggravated form of that offence, then those facts cannot be relied upon when sentencing the offender.
- Nevertheless, a court is not precluded from taking into account an offender's state of mind in determining the objective seriousness of the offences.

In Plath v Rawson [2009] NSWLEC 178 [148], Preston CJ of LEC said: "Environmental offences are another illustration of a class of offences committed by persons who, typically, are of prior good character. They very rarely have previously engaged in other criminal conduct and mostly do not have any prior convictions for environmental offences. The prevalence of the commission of environmental offences by persons of otherwise good character and the importance of the sentence for environmental offences achieving the purpose of general deterrence, makes the fact that the offender is of otherwise good character of less relevance than it might be in sentencing for other types of offences".

Environmental harm – a factor central to the sentencing exercise - is often misunderstood. It is not limited to dead fish, oily feathers or poisoned waterways. It includes risk of harm, harm that is slow-moving or invisible, harm that manifests cumulatively, and harm that is ecological rather than immediately visual. If you are appearing for the prosecution, provide expert reports, sampling results, photographs, regulatory notices, and timelines showing cause and effect. Avoid exaggeration. Environmental harm speaks for itself when properly documented. For the defence, where harm is minimal or contained, demonstrate that through credible technical evidence, prompt remediation efforts and expert opinion. The Court responds well to grounded, honest assessments rather than broad assertions that the harm was 'minor'.

Another word of advice: many environmental offences involve no human victim, but where there are affected landowners, neighbours, community groups or councils, the court is assisted by concise victim impact material (where admissible), clearly articulated financial loss, any compensation already paid, and evidence of co-operation with affected stakeholders. Equally important is acknowledging the public interest victim – the environment. Good advocacy recognises that harm to water, soil, air, flora, fauna and ecosystems is not abstract. It is real, and the court treats it as such.

14. Other commonly asked questions in an environmental sentencing context

1. **Which recent cases do you consider could have achieved a more just, quick and cheap outcome if they had been approached in a more procedurally efficient manner, and what suggestions do you have for practitioners in the light of those cases?**

Response – Pesic v Sutherland Shire Council [2019] NSWLEC 38 [13](k)], [37]-[38]. There was a significant delay in pleading guilty and then an unsuccessful application to change the plea during the sentencing hearing. Subsequently, the proceedings were unproductively complicated and unduly protracted by the offender. The Local Court reduced the utilitarian discount from the maximum available of 25% for a plea of guilty at the earliest opportunity to 5%. Such reduction to 5% was not challenged in an (unsuccessful) severity appeal to the Land and environment Court. Preston CJ said:

> *"Although at the low end of the range, I find that, in all the circumstances, a utilitarian discount of 5% is maintainable. Mr Pesic's plea of guilty had very little utilitarian value for the criminal justice system. There was very little saving of time or expense by Mr Pesic pleading guilty, rather than not guilty, and indeed he changed his plea once and applied to change it a second time although he was unsuccessful. Time and cost was expended in dealing with this unsuccessful application to reverse his plea of guilty."*

Furthermore, the statement of agreed facts simply asserted complaints. Thus the prosecutor did not prove harm to the environment. Preston CJ agreed [25]. In consequence, the Local Court reduced the costs claimed by the council by 10% [17](n)]. The costs figure was not altered on appeal.

Relevant suggestions for practitioners are made in this paper.

2. **How would you like to see environmental prosecution proceedings run in your respective courts and what are the main things you would discourage?**

Response – The most effective sentencing submissions – prosecution and defence – usually approximately follow this sequence:

- The statutory maximums and sentencing purposes
- The objective seriousness of the offence(s)
- The harm and culpability
- Mitigating and aggravating factors

- Remediation and systems change
- Comparable sentences or guideline cases
- Related orders such as publication or remediation (with competing versions, if no agreement) (see e.g. s 9.56(1)(a) EPA Act, but note the carve out at the conclusion of s 9.56(1), preventing the Local Court from making orders under subcl (c), (d), (e) and (h))

As to the circumstances to which a court may have regard in measuring the objective seriousness of offences, see EPA v Cadia Holdings [111].

When counsel assist the court with this structured logic, it reduces uncertainty, speeds the process and leads to better reasoned outcomes. We encourage parties to talk to each other before a sentencing hearing so that as much agreement about the relevant facts can be achieved as possible, but also to try and identity what issues may be in contest. In the context of a busy Local Court list, although full agreement on the background facts is the ideal, Local Court judges understand this may not always be possible. In these circumstances, if the parties appear and say, e.g. "the facts are agreed, with the exception that the only issue for the court's determination is whether environmental harm was caused", or "the facts are fully agreed, and the only issue is whether the court should make a publication order", this will show that the parties have spoken and narrowed the issues, giving the court comfort that efforts at discussion and negotiation have been exhausted. It will be a rare case where, having pleaded guilty, an offender will enjoy appreciable forensic advantage in remaining silent or not assisting to resolve issues, despite having broad legal rights in this respect. Just be mindful of counter-productive advocacy.

Environmental penalties can be significant – and rightly so – but they must still be proportionate. Good advocates avoid downplaying the seriousness of environmental offences, avoid inflating culpability beyond the evidence, and present penalty ranges that are anchored in the facts, not emotion.

If a defence advocate wishes to highlight impecuniosity, adduce cogent evidence. For example, in Nguyen v Canterbury City Council [2010] NSWLEC 55 [73] – [75], Pepper J found that financial hardship had not been proved because of unclear evidence. There had been vague assertions of debt which her Honour found to be exaggerated. Her Honour said ([74]): "[The offender] did not furnish the Court with any objective proof or confirmatory material to enable it to properly ascertain his current financial position. For example, no bank account statements or quarterly BAS statements were presented to the Court. And as discussed above, the remaining credit card statements were sufficiently out of date that very little weight could be placed upon them. There was also scant detail about the applicant's laundry business and even less information about the work undertaken in Queensland, reference to the latter of which was absent from the applicant's most recent income tax return. The applicant is the owner of two residential premises (one of which was bought ten years ago) and yet the current value of each is unknown".

Sentencing environmental crime is not just punishment. As we have outlined, it is for general deterrence, specific deterrence, accountability, protection of ecosystems, repair of harm and promotion of lawful compliance across industries. When you appear in these matters, you are not only representing your client, you are helping the court give meaning to the protective purpose of our environmental laws. The best advocates – and we've seen many – are those who:

- are candid
- are technically informed
- are proportionate
- come prepared
- never bluff the science, and
- respect the complexity of environmental harm

That level of advocacy not only serves your client, but also the integrity of the jurisdiction itself.

Some concluding advice, on 'objective seriousness': advocates can sometimes get carried away arguing about the proper characterisation of an offence. We have all heard the labels: low range, low-mid range, mid range, high range, etc. Although it can be tempting to find comfort in applying or arguing for a label to be assigned to the offence, from the court's perspective, often these labels mean little. Decision-makers are more interested in understanding, and ultimately making findings about, the factors that inform the objective seriousness of the offence(s): the degree of harm, the state of mind/culpability of the offender, aggravating and mitigating factors and the like. If the court is assisted to make findings where these matters are contested, that is all it mainly expects. Do not worry about the final label to be applied. In this respect, see for example R v Eaton [2023] NSWCCA 125 [57]. To summarise, what is important is to fully identify the 'facts, matters and circumstances' which bear on the assessment of the gravity of the crimes (see also FL v R [2020] NSWCCA 114 [60]).

3. Have the statutory disclosure provisions in section [247A ff] of the Criminal Procedure Act helped or hindered environmental prosecutions?

Response – in the Local Court, an accused environmental offender has no statutory obligation to disclose evidence in advance of the trial. However, if the prosecution is "ambushed" at the trial, or even in a sentencing proceeding, for example by expert evidence, it may have good prospects of obtaining an adjournment, which in turn may increase the costs ordered against the offender if there is an eventual sentence. The legal representative of an accused/offender facing sentence should give consideration to serving evidence in advance. That would provide the prosecuting authority with time to consider and give instructions about such evidence, thereby avoiding delay and

additional costs. If an offender's evidence is filed in advance the presiding Local Court judge may have the opportunity to read it before the matter is called over.

4. **What scope is there for Local Court judges to assist in smaller scale environmental prosecutions that are commenced in the Land and Environment Court when they could have been commenced in the Local Court?**

Response – Most environmental offences attract fines of less than $110,000. Therefore, most environmental offence prosecutions could be considered for commencement in the Local Court. However, the proceedings should be prepared and conducted thoroughly. That is addressed in this paper.

5. **What do you think the future of environmental prosecutions is going to look like? Do you see this as an area that will be growing?**

Response – In the Local Court, a preferred future for the conduct of environmental offence prosecutions is outlined in this paper. As to the volume of prosecutions, the extent to which many local councils are enforcing the law against development without or beyond consent depends on compliance and enforcement priorities.

Environmental crime sits at the intersection of law, science and public trust. It requires advocates who can translate complexity into clarity, who can present harm with honesty and who can balance strong representation with professional realism. If you can do those things – consistently, carefully and with respect for the Court's task – your advocacy will not only be effective, but we anticipate it will be exemplary!

Feedback

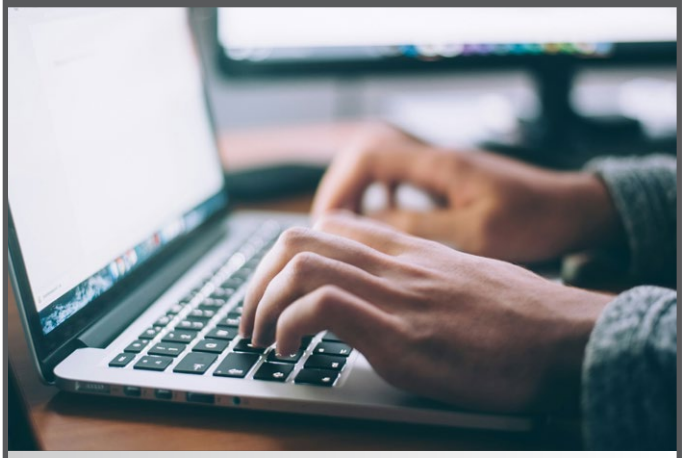
Feedback would be appreciated. Please send it to Judge Glenn Bartley and/or Judge Scott Nash, care of one of the following addresses of the Local Court Executive Office (new email address particulars hopefully to be available soon):

cmo@justice.nsw.gov.au or

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HON JOHN BASTEN AO KC
Formerly a Judge of the Court of Appeal, Supreme Court of NSW



Coal Mining Proposals in New South Wales

Paper presented at NSW AIAL/EPLA seminar – Sydney – 11 August 2026

I acknowledge many debts to the Gadigal people of the Eora nation, whose ancestors were dispossessed of the land on which we meet without compensation or due process of law.

I also note that this paper is a development of work undertaken with the Australian Climate Accountability Project, Australian Human Rights Institute, at UNSW Sydney.

In order to protect earth's climate from a hugely destructive rise in temperature, all countries must phase out the extraction and use of fossil fuels. In NSW that means phasing out existing coal extraction for export (which is about 85% of current production) and not extending or issuing new approvals. How does this simple factual proposition play out for the determination of planning proposals for expansion of coal mines in NSW?

So stated, the question appears to admit of only one answer, namely that there should be no more approvals of expanded coal extraction. However, neither the NSW Government nor the Commonwealth Government has legislated to require that outcome: the legal framework in NSW effectively requires that individual proposals for expansion of coal mines be evaluated by the Independent Planning Commission (IPC). It is necessary, accordingly, to address the legal framework to see if it either permits or requires the question to be answered as the facts seem to demand.

Some further contextual elucidation of the problem may be helpful.

First, why is the 2015 Paris Agreement goal of limiting temperature rise to "well below 2ºC", and preferably 1.5ºC, so significant? We encounter a daily temperature differential ten times that rise. As some in the UK argue, 'just get used to a Mediterranean climate'. As so often happens, the response is glib; the truth is complex. In a nutshell, an apparently quite small rise in temperature causes havoc in the global weather system: the northern hemisphere is now witnessing a combination of drought, heat and heavy rainfall with severe consequences, including crop failures, extensive wildfires, major flooding and thousands of additional human heat-related deaths. However, there are several more sophisticated points within the obvious. One, is that it is accepted science that temperature rise has a near-linear relationship with greenhouse gas emissions. This allows predictions as to the consequences of burning the coal from particular mine proposals. Specific consequences can be attributed to very small rises in average temperatures: examples include coral deaths on the Great Barrier Reef and hospital emergency department admissions.

A second point of elucidation about the current temperature rise: the climate system only needs to move just a few degrees to produce an entirely different planet. The difference between our world and the lowest temperature of the last ice age is only about 6ºC. Currently, we are heading for around 3ºC warming. You won't remember the last time the planet reached that temperature because it was about 3 million years ago, during the mid-Piacenzian (or mid-Pliocene) Warm period: no humans were around. Sea-levels were up to 25m higher than today.

My third point of elucidation: As the former President of the Queensland Land Court, Fleur Kingham, has correctly noted, a proponent has no legal right to assert: it is seeking an affirmative decision granting it a licence to extract a public resource for its own profit. On one view, the NSW government accepts that use of thermal coal for overseas power generation (the bulk of NSW coal) will be largely phased out over the next 24 years. The issue for the IPC is how this affects its present individual determinations. The decision for the IPC is not purely binary. It can approve a proposal, reject it, or approve it subject to conditions. The last option appears only to have been used once in relation to the export of coal.[1] And what has not been noted is the need for the phasing out to be quantified, so that its effects are fed into the estimates of the financial viability of the proposal. The IPC should insist on that information.

My fourth point of elucidation: In March 2026, the NSW Government announced it would "prohibit future greenfield coal development", through amendments to the Resources and

Energy SEPP and the Mining Act. It hasn't yet done so, but it hardly matters: the announced policy is that "coal mining cannot occur on a site that is not adjacent to, and not related to, an existing coal mining authorisation".[2] One might question the impact of this policy: is there any new economically viable source of coal in NSW waiting to be exploited?

Legal framework

Now let me turn to the legal framework. My thesis is this: while the planning laws have not changed significantly in recent years, scientific knowledge, government policy and the broader legal framework have. The question is how these feed into decision-making. Let me start with the planning laws, which you probably know, because it is within this framework that I argue the other significant changes can be (and must be) accommodated.

Starting with the *Environmental Planning and Assessment Act 1979* (NSW) (Planning Act): s 1.3, identifying the objectives of the Act, includes the following:

> **1.3 Objects of Act**
>
> The objects of this Act are as follows—
>
> …
>
> (d) to protect the environment, including the conservation of threatened species of native animals and plants and ecological communities and their habitats,
>
> (e) to promote resilience to climate change and natural disasters through adaptation, mitigation, preparedness and prevention,
>
> …
>
> (h) to provide opportunities for participation in environmental planning and assessment,
>
> (i) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
>
> (j) to promote a proportionate and risk-based approach to environmental planning and assessment,
>
> ….

Two initial observations may be made about these objects: first, par (e) refers to "resilience to climate change" which is to be promoted through "adaptation, mitigation, preparedness and prevention". In this context "mitigation" pairs with "prevention", and "adaptation" with "preparedness". (I have reversed the order to reflect a logical progression.) Refusing a coal mining proposal is an action in "mitigation". Secondly, the use in par (i) of the term "ecologically sustainable development" is important but I won't stay to discuss the detail; suffice it to say the definition picks up such matters as "the precautionary principle" and "inter-generational equity". The Planning Act picks up that definition from s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) (Administration Act), s 6(1) of which sets out the objects of the Environmental Planning Authority (EPA). I want to note these because I will return to the role of the EPA – they include:

> **6 Objectives of the Authority**
>
> (1) The objectives of the Authority are—
>
> (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development, and
>
> (b) to reduce the risks to human health and prevent the degradation of the environment, by means such as the following—
>
> …
>
> • taking action in relation to climate change,
>
> …
>
> (2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. …

These provisions are important for two reasons: first, any assessment of a coal mining proposal should apply these principles; and, secondly, the EPA must apply them in carrying out its functions. One of those functions is to set "protection of the environment policies",[3] which may be for "managing the cumulative impact on that environment of existing and future human activities".[4] Policies set by the EPA are important, as will be noted shortly.

Returning to the Planning Act, the factors to be considered by a consent authority are set out in s 4.15(1), the relevant paragraphs of which read as follows:

> **4.15 Evaluation**
> **Matters for consideration—general**
>
> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application –
>
> (a) the provisions of –
>
> (i) any environmental planning instrument, …
>
> …
>
> that apply to the land to which the development application relates,
>
> (b) the significant likely impacts of that development, including environmental impacts on both the natural

and built environments, and social and economic impacts in the locality,

…

(e) the public interest.

The effect of par (a), picking up any applicable "environmental planning instrument", will be, in relation to a proposed coal mine, to pick up the State Environmental Planning Policy (Resources and Energy) 2021(NSW), to which I will return.

Paragraph (b) in s 4.15 speaks in very general terms of "the significant likely impacts of that development", which appears to require a predictive exercise of a factual nature, but that view misses a critical point. As Fleur Kingham has explained, there is a normative judgment to be made about what is being assessed, an exercise which is usually eschewed, the assumptions not identified, and the result not justified. Is significance (or substantiality in the Cth EPBC Act) to be measured against (i) total global emissions over some past period, (ii) current rates of global emissions, (iii) the so-called global carbon budget intended to keep us "well below" the 2ºC Paris goal, or (iv) the effect of the total emissions from the project on the climate system, on human health or on an identified protected part of the environment?

At present the debate tends to be dominated by labels and metaphors. Are the predicted effects from this project mere "drops in an ocean", or are they additions to a bucket which is about to overflow or is already overflowing? The criterion, expressed as "likely significant impacts", involves choices as to what is to be measured as well as the standard to be applied. Ultimately, the choice should depend on the legal framework within which the assessment is being made – and that will include the whole range of domestic and international law commitments and obligations: these must be identified before they can be applied.

The phrase also raises quite specific issues of statutory interpretation, such as the geographical scope of the relevant likely impacts. That issue deserves some explication because it seems to have caused confusion for policy-makers in the Government. Some forms of pollution will not be confined to the local area of the mine, and may not be confined to the State in which the mining occurs: however, it is hardly conceivable that the State legislature intended that a mine should be approved near Lake Victoria in far south-west NSW, where the River Murray enters South Australia, without taking account of the dire consequences in that State of a possible overflow from a tailings dam. But must the assessable effects be confined to Australia? Even if that were so, attribution science can assess the likely impacts in Australia of combustion of the exported coal.

The third criterion in s 4.15, par (e), is "the public interest". The phrase is singular, which may be significant, but it surely encompasses the outcome of an exercise of weighing various public interests which are in tension. This exercise requires that proper weight be given to each relevant factor. This is not like sentencing where the outcome is calibrated within a range; subject to the possibility of a conditional approval, the outcome is binary – approval or refusal of the proposal. Nor are we talking about apples and oranges (which are both fruit), but often employment and flow-on benefits in a small community, or government revenue, against a known global temperature rise carrying with it an increased risk of extreme weather events, or, if you want to keep the exercise focused on human effects, the predictable impacts on human health and mortality rates. These effects have real costs for government and the community. I refer to a "known global temperature rise" because science has established a near-immediate and near-linear relationship between tonnes of CO_2 released into the atmosphere and temperature rise. The health material (as well as other impact assessments) is available in different forms: for example, the Australian Climate Service last year produced a *National Climate Risk Assessment*, supported by a range of technical reports, including the *Health and Wellbeing Technical Report*.

As Noel Hutley SC points out in his comment on this paper, statutes should be construed, where possible, to conform to international law.[5] The criteria in the Planning Act should reflect that principle, so that compliance with obligations under customary international law must guide Australia's public (and national) interest; noncompliance would amount to a disregard of an important, perhaps a legally controlling, aspect of the public interest.

Turning to the NSW Resources SEPP,[6] we find equally large issues expressed in equally terse language:

2.20 Natural resource management and environmental management

(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following—

…

(c) that greenhouse gas emissions are minimised to the greatest extent practicable.

(2) Without limiting subsection (1), in determining a development application for development for the purposes of mining, … the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.

Thus, cl 2.20(2) obliges the consent authority to "consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions". I only wish to pick up the second limb of this statement of obligation, to ask 'How is the authority to identify applicable State and national policies and guidelines?' Even when the relevant documents have been identified there will be a question as to whether they correctly reflect the law; which takes me to the wider legal framework.

In 2023 the NSW Parliament passed the *Climate Change (Net Zero Future) Act 2023* (NSW). It is vitally important legislation, but in the context of proposals to extend coal mining, its significance seems not to be fully appreciated within some government agencies and departments and, perhaps parts of the legal profession. It commences with a definition: "***climate change*** means a change of climate that is – (a) directly or indirectly attributable to human activity that alters the composition of the atmosphere, and (b) in addition to natural climate variability over comparable time periods."

In an age of complex legislation, this Act is a model of simplicity, which is not, of course, to suggest that it does not raise questions of interpretation. However, it establishes and confers functions on a new body, the Net Zero Commission, and sets out guiding principles, targets and objectives, all in 27 sections and a couple of schedules. The purpose of the Act is set out in s 3, which does a little more than set out a singular purpose:

3 Purpose of Act

(1) The purpose of this Act is to give effect to the international commitment established through the 2015 Paris Agreement to—
  (a) hold the increase in the global average temperature to well below 2°C above pre-industrial levels, and
  (b) pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, and
  (c) increase the ability to adapt to the adverse impacts of climate change.

(2) The Parliament of New South Wales, in enacting this Act, recognises—
  (a) there is a scientific consensus that human activity is causing abnormal changes to the climate, and
  (b) action is urgently required to reduce greenhouse gas emissions and to address the adverse impacts of climate change.

(3) The Parliament of New South Wales, in enacting this Act, is committed to effective action on climate change to ensure a sustainable and fair future for the people, economy and environment of New South Wales.

The Act establishes "guiding principles" in the following terms:

8 Guiding principles

(1) For this Act, the guiding principles are the principles set out in this section.

(2) There is a critical need to act to address climate change, which is a serious threat to the social, economic and environmental wellbeing of New South Wales.

(3) Action to address climate change should be taken as early as possible to minimise the cost and adverse impacts of climate change.

…

(5) Action to address climate change should be consistent with the right to a clean, healthy and sustainable environment.

(6) Action to address climate change should be consistent with the principles of ecologically sustainable development described in the Protection of the Environment Administration Act 1991, section 6(2).

…

(8) Action to address climate change should take into account the following—
  (a) the knowledge and perspectives of Aboriginal communities,
  (b) the best available science,

…

…

(10) The Government of New South Wales is responsible for—
  (a) urgently developing and implementing strategies, policies and programs to address climate change, and
  (b) ensuring the Government of New South Wales pursues best practice in addressing climate change.

Three points may be observed in relation to this provision. First, as is clear from the purposes (confirmed by the objects clause), action is to be directed, in the first instance, to mitigate climate change, that is to reduce emissions, as well as to adaptation. Secondly, putting aside subs (1) and (10), every subsection refers to "action to address climate change" (or the "need to act", in subs (2)). That phrase is defined:

5 Definitions

In this Act—

action to address climate change includes—

action to mitigate climate change by reducing—

(i) greenhouse gas emissions, and

(ii) greenhouse gases in the atmosphere, for example, through sequestration or sinks, and action to adapt to a changing climate and to address the effects of climate change.

So, feeding the definition into the first guiding principle, there is a critical need to mitigate climate change by reducing greenhouse gas emissions. There is of course the localising principle in s 12 of the *Interpretation Act 1987* (NSW), but there is a good argument, based in part on the express reference to the global nature of a changing climate in s 3, s 5(b) and elsewhere, that the definition includes any action *in NSW* in relation to control of fossil fuel extraction, which may include action required under international law, to be noted shortly. NSW does not "reduce" greenhouse gas emissions by exporting them, when it will import the consequences wherever the gases are released.

Thirdly, s 8(10), referring to the responsibilities of the Government of New South Wales, must be understood as encompassing, distributively, the responsibilities of the separate departments and agencies. Thus, the principles should be understood to apply to the EPA and the Department of Planning, which have statutory obligations to develop "strategies, policies and programs to address climate change".

Finally, in this brief overview, which is by no means comprehensive, reference should be made to s 7, which provides that "[t]his Act prevails to the extent of an inconsistency with another Act or law". The Operations Act contains a similar provision, but with a degree of ambiguity not repeated in the Climate Change Act.[7]

That is the local statutory framework; some steps taken pursuant to it should be noted.

In December 2025, the Net Zero Commission published a Spotlight Report, which found that "[c]ontinued extensions or expansions to coal mining in NSW are not consistent with the emissions reduction targets in the [NSW Climate Change Act[8]] or the Paris Agreement temperature goals it gives effect to".[9] The Commission's Report identified the legal basis for the conclusion that NSW cannot, in compliance with domestic law and Australia's international legal obligations, approve any new coal mines or extensions of existing mines.

By way of contrast, in January 2025 (that is before the Net Zero Commission's Spotlight Report) the NSW Environment Protection Authority (EPA) published a *Guide for Large Emitters*, which stated that "[t]he geographic scope of the EPA's obligations is the state of NSW". The Guide eschewed consideration of coal mined for export, even though its burning will produce risks of significant environmental harm in NSW.

In March 2026, the Government published a document titled *NSW Coal Industry 2026-50*, which stated that "the local impacts of Scope 3 emissions will continue to be considered in the assessment of coal proposals through the planning framework". Also in March 2026, the EPA published a "Greenhouse Gas Mitigation Guide for NSW Coal Mines". The discussion of scope 3 emissions was brief, reading as if the EPA were yet to be persuaded they were any part of its business:

"The EPA acknowledges combustion of fossil fuels anywhere in the world impacts the climate system in NSW. …

The topic of scope 3 emissions is therefore very large and complex, and for mining companies, emissions are generally beyond their control. …

… It is difficult for coal mining companies to reduce scope 3 emissions from the downstream use of coal as the end result is always combustion.

This hand-wringing reasoning completely missed the point: the question is not what the proponent could do to lessen the emissions which it is the sole intention of the proposal to produce; the question is why the consent authority should grant an approval without which the emissions will not materialise?

The EPA also made what can only be described as a few anodyne suggestions:

However, there are opportunities such as:

- selling coal to buyers who have lower emissions intensities (i.e. buyers that are investing in carbon capture and storage and high-efficiency combustion)
- selling coal to buyers in countries that have strong climate policies and emissions reduction targets (e.g. countries that are signatories to the Paris Agreement).

Agreements with end users of coal (and intermediates), such as:

…

– helping international customers to reduce their emissions

– requiring the handling and storage of coal to be conducted according to best practice.

The Executive Summary ended with the broad statement that:

This guide supports implementation of recommendations of the Net Zero Commission and the NSW Parliament's Joint Standing Committee on Net Zero.

Only in one footnote was there reference to the Net Zero Commission Spotlight Report, released three months earlier; the

EPA's chapter 6 (partly set out above) dealt with downstream scope 3 emissions in less than a page; the document as a whole made no attempt anywhere to come to grips with the terms of the Paris Agreement (the sole reference was in the opportunity to sell to buyers in countries which are party to the Paris Agreement); it even failed to include the Advisory Opinion of the ICJ in the list of references, let alone discuss the Court's findings. There were two footnotes referring to recent IPCC reports – in discussing scope 1 emissions. I leave it for you to consider whether the EPA is reasonably complying with its statutory functions. But we can take it a step further and ask what the EPA could have done (and should still do).

First, the EPA could address the elephant in the room: namely, was the Net Zero Commission wrong to state:[10]

> Continued extensions or expansions to coal mining in NSW are not consistent with the emissions reduction targets in the Climate Change Act or the Paris Agreement temperature goals it gives effect to.

That finding, it should be said, was neither novel nor unsupported by scientific opinion. It echoed the reasoning of Preston CJ of LEC six years earlier in 2019 in *Gloucester Resources Limited v Minister for Planning*.[11]

In 2021, the International Energy Agency (IEA) (of which Australia is a member) stated that to achieve the goal of net zero by 2050 there would be no scope for new fossil fuel extraction developments.[12] In 2023 the IEA revisited its earlier report and confirmed that under a net zero pathway coal demand declines precipitously, with no new coal mines or extensions.[13]

In 2023, the International Panel on Climate Change (IPCC) stated:[14]

> Limiting global temperature increase to a specific level requires limiting cumulative net CO_2 emissions to within a finite carbon budget, along with strong reductions in other GHGs. For every 1000 $GtCO_2$ emitted by human activity, global mean temperature rises by likely 0.27°C to 0.63°C (best estimate of 0.45°C). This relationship implies that there is a finite carbon budget that cannot be exceeded in order to limit warming to any given level.

The IPCC Report continued:[15]

> The best estimates of the remaining carbon budget (RCB) from the beginning of 2020 for limiting warming to 1.5°C with a 50% likelihood is estimated to be 500 $GtCO_2$; for 2°C (67% likelihood) this is 1150 $GtCO_2$.

As the Net Zero Commission stated in its December 2025 Spotlight report:

> The United Nations Environment Programme estimates that emissions from fossil fuel extraction, production and combustion accounted for 73% of total global greenhouse gas emissions in 2024 …. In 2023, the IPCC found that without additional abatement, the future CO_2 emissions from existing fossil fuel infrastructure already exceed the remaining carbon budget that would provide a 50% chance of limiting warming to 1.5°C.[16]

The Commission also stated:

> A substantial body of academic literature supports the view that a rapid phase out of fossil fuel extraction and combustion including coal mining is needed globally and that countries with advanced economies like Australia are best placed to move first …. Welsby et al. (2021) found that 95% of coal reserves in the 'Australia and other OECD Pacific region'—in which Australia is the only major coal producer—must remain unburned to limit warming to 1.5°C. McGlade and Ekins (2015) had already established that this proportion must remain unburned to limit warming to 2°C.

Further, since 2025 attribution science has provided modelling by which the near-linear and near-immediate relationship between the production of greenhouse gases and temperature rise (known as the TCRE) has permitted detailed assessment of the likely additional effects of fractional increases in temperature which can be attributed to individual projects.

The inference is clear: NSW, which (with Queensland) provides 99% of Australia's export coal,[17] cannot, in compliance with Australia's international law obligations, approve any new coal mines or extensions of existing mines.

Secondly, in its Guide the EPA should have explained how any new or extended coal production could be accommodated within Australia's international law obligations as stated by the ICJ last July. In a nutshell, the ICJ unanimously held:[18]

(i) All countries must take progressive steps to reduce fossil fuel emissions, both those released within their own boundaries and through other activities within their control. For a major fossil fuel exporter such as Australia, those obligations include phasing out fossil fuel extraction and exporting.[19]

(ii) All countries have a duty under customary international law to prevent significant harm to the environment.[20] That duty was expressed in terms of "due diligence", recognising that the standard of due diligence in this context is stringent and that each country is to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".[21]

(iii) That duty is qualified by the "the principle of common but differentiated responsibilities and respective capabilities", meaning that "the degree of care expected of a State with a well-developed economy and highly evolved systems and structures of governance is different from States which are not so well placed".[22] Self-evidently, this qualification cuts no slack to a wealthy, stable and economically developed country such as Australia.

Thirdly, in relation to the action required of the EPA, some will recall that only six years ago the EPA was taken to the Land and

Environment Court by Bushfire Survivors for Climate Action over its failure "to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change". It was ordered to remedy the omission.[23] Following the judgment, Parliament chipped in by adding to the second objective of the EPA (set out above), to reduce the risks to human health and prevent the degradation of the environment, by means such as (the additional clause) "taking action in relation to climate change".

Either the EPA or some other responsible Government authority should explain how the approval of extended or expanded coal mines is consistent with the Government's entirely rational prediction that demand for coal will fall over the next 20 years. Absent that explanation, the IPC cannot reasonably ignore the problem and blithely approve new proposals. Claims as to the future economic benefits of proposals should be rejected unless a phasing out of production has been accounted for.

If further mine extensions are to be approved, they should be subject to two basic conditions. First, that the proponent provide a financially sound transition plan and, secondly and critically, that it waive any foreign investor claims under bilateral investment treaties in the event that a change in government mitigation policy requires it to forego part or all of its extraction and export entitlements under the approval. (Such claims for compensation can arise where government action removes or diminishes an expectation of return on investment.)

Conclusions

The state planning laws are formulated in broad terms which can accommodate changing circumstances. (It should be noted that the effects of climate change are widely relevant to planning decisions, not merely in relation to coal mining.) However, the legal framework has changed in a number of respects, particular with the strong statements in the *Climate Change (Net Zero Future) Act 2023* and the ICJ's statement of Australia's international law obligations as a coal-producing country. These, together with policy statements issued by Government agencies, such as the Net Zero Commission, are setting new parameters for consent authorities, including the IPC. The EPA is playing catch up, but to the extent it is failing to respect the "guiding principles" in the *Climate Change Act*, the latter will prevail.

Of fundamental importance in relation to coal mine proposals is the mindset of departmental officers and the IPC. As Fleur Kingham says, a proponent has no legal right to an approval, conditional or otherwise; a rejection does not diminish its rights. If there has been an expectation in the past that most proposals would be approved, that expectation is no longer legitimate and should rather operate in reverse.

Endnotes

1. See Claire Smith and Joy Cheng "Analysis of recent IPC decisions on coal mining in NSW"(2021) 36(1) Environmental Law Review (LexisNexis), p 18.
2. NSW Government, *NSW Coal Industry 2026-2050*, p 14.
3. *Protection of the Environment Operations Act 1997* (NSW) (Operations Act), s 9, **policy**.
4. Operations Act, s 10(b).
5. See Herzfeld and Prince, *Statutory Interpretation* (3rd ed, Thomson Reuters, 2024) at [9.350].
6. State Environmental Planning Policy (Resources and Energy) 2021 (NSW) ("Mining SEPP"), Ch 2, "Mining, petroleum production and extractive industries"; Its predecessor, State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), cl 14, was in the same terms.
7. Operations Act, s 7(2).
8. *Climate Change (Net Zero Future) Act 2023* (NSW).
9. New South Wales Net Zero Commission, *Coal Mining Emissions Spotlight Report* (December 2025), Finding 4, p 46.
10. Net Zero Commission, *Spotlight Report on Coal mining*, finding 4.
11. [2019] NSWLEC 7 at [525]-[527].
12. IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector (2021)*, p 21.
13. IEA, *Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach – 2023 Update*, p 14.
14. IPCC, *Climate 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, p 83 (references omitted).
15. Ibid, p 82, par 3.3.1.
16. IPCC, 2023a, pp. 20, Figure 3.5.
17. NZC Spotlight Report, p 48.
18. International Court of Justice, *Obligations of States in respect of Climate Change*, Advisory Opinion (23 July 2025)
19. Advisory Opinion, at [94], [427].
20. ICJ, *Advisory Opinion on Climate Change*, at [132], [276]-[279].
21. ICJ, *Advisory Opinion on Climate Change*, at [138], [281].
22. ICJ, *Advisory Opinion on Climate Change*, at [291].
23. *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2021] NSWLEC 92; 250 LGERA 1 (Preston CJ).

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Coal Mining Proposals in NSW

Commentator on paper presented by the Hon John Basten AO KC Coal Mining Proposals in NSW at NSW AIAL/EPLA seminar – Sydney – 11 August 2026

I state my respect for the Gadigal People of the Eora Nation.

How does international law interact with domestic legal frameworks?

1. The causes and effects of climate change do not respect sovereign borders. Catastrophic as the risks and effects of climate change may be, unfortunately, our existing legal systems have displayed that they are not well placed to address the unique challenges posed by climate change.

2. It is submitted that the manner in which international law *presently* interacts with Australian domestic law falls short of being able to address the unique challenges posed by climate change.

Introducing the Paper

3. This brings me to the paper of the Honourable John Basten AO KC ("Basten") paper "Coal Mining Proposals in New South Wales." At the heart of this paper is the proposition that whilst legislation has not formally prohibited the approval of expanded coal extraction, scientific knowledge, government policy and broader legal frameworks have changed significantly in recent years so as to accommodate a more diligent response to the dangers posed by the expansion of coal mines to climate change. And in so doing the paper in an important aspect poses an interesting question – to what extent can phrases within the existing domestic legislative framework such as "likely significant impacts" accommodate recently shifting international law commitments and obligations? It is to that aspect of John's paper that I propose to direct my remarks

4. Ultimately, it is a question of what role Australia's international law obligations play in influencing the operation of statutory obligations.

5. To better understand this and to appreciate the thesis at the heart of this paper, it helps to begin at the international level before working our way into the domestic legislative scheme.

International Law and Domestic Law in Australia

6. The Australian legal system, much like that of the United Kingdom's exhibits "dualist characteristics." Better described as a spectrum than a binary category, this has traditionally been interpreted by the High Court of Australia to suggest that the implementation of international law within the domestic legal system requires an act of 'transformation.' That is, an act at the domestic level is required prior to a rule of international law taking direct effect in that state, such that domestic and international law form two discrete legal systems. The Act may be legislative or judicial.

7. It is thus important to spell out the Australian domestic status of international law in the contexts of treaty, customary international law and in relation to the interpretation of statutes, and the common law.

8. As to treaties, it is trite to state that the rule of transformation provides that although the executive may bind the state by treaty in international law, until such time as the treaty is implemented by legislation passed by the Parliament, that treaty will have no effect in domestic law and would not be enforceable at the hands of a private individual.

9. Yet in a series of cases the High Court has held that the common law of Australia presumes that legislation is to be construed so as to avoid a conflict with international law.

10. In *Jumbunna Coal*, O'Connor J referred to the existence of a general presumption that "every statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."

11. What does it mean for the common law to include the rules of international law? And do those established rules of international law which inform statutory interpretation

include the rules of customary international law, something which may be notoriously difficult for a domestic court to establish on its own?

12. As to the influence of international law on the common law, Sir Gerrard Brennan *Mabo (No 2)* famously held that "the common law does not necessarily conform with international law but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights." His Honour substantially predicated his refusal to maintain the Australian common law doctrine of terra nullius on the basis of changed conceptions of international law.

13. The better view is that international law may act to influence the content of the common law, but there is no inviolable rule

14. For the purposes of these remarks we can pass over the issue as to the difficulties of identifying the principles of customary international law because of the terms of the Advisory Opinion of July 2025. However, there remains some uncertainty as to the legal status of customary international law as a source, or part of, Australian domestic law. The issue faced by an Australian court dealing with the domestic application of a rule of customary international law has been perceived to be as one of a hierarchy of laws - the foundation for which rests in English common law. Various statements made by members of the High Court in cases from the mid 1980s suggests that the doctrine established in *Polites and Chow Hung Ching* continues, that there is no distinction between customary international law and treaty law when stating that international law is one of the sources but not automatically part of domestic law.

ICJ Advisory Opinion

15. The Advisory Opinion answered questions referred to it by the UN General Assembly as to certain international law principles in relation to climate change. The unanimous conclusions of the 15 member court were that 1) each state owes a customary international law duty to use all means at its disposal to prevent significant harm to the climate system and 2) the right to a clean, health and sustainable environment is inherent in the enjoyment of other human rights and arguably, also a norm of international law.

16. Accepting the nutshell encapsulations, as Basten expressed them, it should be remembered that the Court's advisory opinion, though declarative of the content of the rules of international law, is not in of itself binding on states parties. The Opinion on its own is a non-binding statement of states international law obligations in respect of climate change with no immediate domestic effect.

17. Such an obligation binds Australia, for it is Australia that must "ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions." How this translates to regulatory action in Australia is to be found in the development approval processes which operate primarily at the state and territory levels. The critical questions are thus what matters are required to be considered and how should the assessment process work? As Basten notes in an earlier article, the policies and guidance in contemporary documents do not meet the standards now espoused in the Advisory Opinion.

18. In their recent legal opinion on the implications of the Advisory Opinion on the obligations of states in respect of climate change for directors' duties in relation to climate-related risks, Higgins, Bush and Robinson concluded that the standard of care expected of directors of corporations that are/will soon be subject to sustainability reporting obligations under 180(1) of the *Corporations Act 2001* (Cth) will increase. They argue that the Advisory Opinion is likely to inform legal and regulatory developments that amplify the climate-related risks to which some Australian corporations, particularly the high emitting sectors, are exposed and so too will the standard of care expected of directors of those corporations rise. It can inform legal and regulatory developments that create or amplify climate-related transition risks to which some Australian corporations, particularly those that derive revenue from fossil fuels or other emissions-intensive activities, are exposed. As the magnitude of those risks or the probability of their occurrence rises, so too may the standard of care expected of directors of those corporations.

19. In that sense, it can be argued there will be an indirect link between the international obligations of a sovereign state and an entity operating on the domestic sphere.

Returning to the Paper

20. Having set out the structural architecture of international law and Australian domestic law, I now return to Basten's paper on Coal Mining Proposals in NSW. The paper focuses in on the determination of planning proposals for expansion of coal mines as the manner in which the state of NSW can directly contribute to the broader aim of phasing out the extraction and use of fossil fuels to protect earth's climate from a destructive rise in temperatures.

21. In circumstances where neither state nor federal parliament has legislated to require that outcome, first what role if any can the principles and obligations espoused in the ICJ Advisory Opinion lead to that outcome?

22. The paper focuses on the existing legal framework, beginning with the *Environmental Planning and Assessment Act 1979* (NSW) the broad objectives of which Basten argues should direct any assessment of a coal mining proposal and be applied by an environmental planning authority when carrying out its functions. Critically, he focuses on the criterion in s 4.15(1) of the NSW Planning Act.

23. Basten identifies on the language of the criterion, expressed generally ("likely significant impacts") as providing a

constructional choice as to what is to be measured as well as the standard to be applied. As he argues, "ultimately the choice should depend on the legal framework within which the assessment is being made" and that "will include the whole range of domestic and international law commitments and obligations." Thus, he sees a state's international obligations as to climate change as directly informing the assessment to be made by a local actor as to the approval of a coal mining proposal.

24. Secondly the paper further directs its attention to the *Climate Change (Net Zero Future) Act 2023* (NSW) which he argues, in making express reference to the global nature of climate change in s 3 and elsewhere, imports obligations under international law as to mitigation of the effects of climate change.

25. The Act, whilst in the relative sense is a model of simplicity, will give rise to numerous questions as to its true construction and import. The guiding principles in section 8 comprise of 10 numbered paragraphs, 3 of which have a number of subparagraphs which includes concepts such as fiscal responsibility, promotion of sustainable economic growth and the like which can of course lead to complex debates about weighing benefits and detriments. It's noteworthy that the obligation under s 11 to achieve net zero by 30 June 2050 clearly sets aside scope 3 emissions.

26. In s3(1) of the Act reference is made to 2015 Paris Agreement and its global temperature commitment but the approach of countries to that commitment is to say the least neither Simple nor clear. Of course, Australia's Nationally Determined Contributions called for under the Agreement do not extend to Scope 3 emissions. How all this will play out in debates in the executive or the courts is hard to predict beyond the fact that the debate will arise, and probably about coal mines.

27. The paper points to a key inference: that NSW, which alongside QLD, provides 99% of Australia's export coal cannot in compliance with Australia's international law obligations, approve any new coal mines or extensions of existing mines. It directly imports an obligation on the sovereign Commonwealth to the states themselves. It finds that the EPA needs to explain how any new or extended coal production could be accommodated within Australia's international law obligations as stated in the Advisory Opinion.

28. It seeks to deploy the broad language chosen by state planning laws to accommodate changing circumstances and developing obligations as to the emerging threat of climate change. In short, it argues that the legal framework, by virtue of *Climate Change (Net Zero Future) Act 2023* and the statement of Australia's international law obligations as a coal producing country by the International Court of Justice, together with policy statements issued by Government agencies such as the Net Zero Commission have collectively formed to establish a new parameter for consent authorities.

29. Whilst Basten is persuasive in suggesting that the obligations as defined by the Advisory Opinion can have an influence or indirect effect on shaping the obligations of domestic actors one thing is clear; the relationship between Australian law and Public International Law as it still exists today has not fused to create a direct binding relationship between the obligations and duties of a sovereign actor on the international field and domestic actors operating within a state of a federal polity.

30. Further and whilst undoubtedly a potential source of the development of the common law and arguably assisting in constructional choices of legislative instruments it is to the science that Courts and administrators should be faithful in assessing the wisdom of the relevant approvals sought. Clear and frank evaluation of that science must ever be upper most in those exercises, and attempts to over rely on norms established by foreign judicial bodies risk the debate moving to potentially unfruitful contests about the status of those norms in Australian law and for domestic policy.

31. This is further supported by the undoubled fact that as the science evolves, there is certainly no good news for those who adhere to the "drill baby drill" view of the world and that knowledge will at the end of the exercise be accepted and acted upon or not due to its cogency, and not I suspect the Advisory Opinions of international bodies.

32. I would like to express my gratitude for the assistance of Ms Raihana Haidary of my chambers in the preparation of these notes.

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Remediation Orders on Appeal: Practical Experience Under the *Biodiversity Conservation Act*

Remediation orders under s 11.15 of the Biodiversity Conservation Act 2016 (NSW) (**BC Act**) can impose significant and long-running obligations on landholders. The remediation orders that have proceeded to appeal in the Land and Environment Court (**LEC**) provide practical examples of their operation, ranging from protecting natural regeneration to extensive revegetation, ecological monitoring and performance-based restoration regimes.

The remediation order power

Part 11, Div 4 of the *BC Act* provides for remediation orders where specified biodiversity values have been damaged in or as a result of the commission of an offence against the BC Act or its regulations, or Pt 5A of the *Local Land Services Act 2013* (NSW).

Under s 11.15, the Environment Agency Head may require specified remediation work or a specified remediation outcome. The available requirements are broad and include measures to control or mitigate damage, restore affected biodiversity values, prepare and implement restoration plans, restrict activities or uses of land, and protect land from further disturbance.

A remediation order may be given to the persons specified in s 11.17, including an owner or occupier of the affected land. The significance of this is considered below.

Section 11.23 permits a person given a remediation order to appeal against the order, or any of its terms, to the LEC.

The published appeals

The published appeals provide only a partial view of s 11.15 in practice. They concern only remediation orders that have proceeded to appeal and have all resolved by agreement following s 34 conciliation. The final varied orders generally do not identify what changed on appeal, but provide useful practical examples of the remediation regimes ultimately agreed.

Who receives a remediation order?

Section 11.17 permits an order to be given to an owner or occupier of the affected land, as well as a person reasonably suspected of having caused or contributed to the damage. The recipient therefore need not have personally caused the harm.

The published appeals do not always reveal whether the recipient was given the order because of their ownership or occupation of the land, their alleged involvement in the damage, or both.

In the appeals of *Gajdosik*[i] and *Kazmouz*[ii] the remediation orders made by the LEC identify the damaging activities but do not identify who carried them out.

The *AGM Holdings*[iii] appeal provides a clearer example of the distinction. The order was given to the corporate landowner. The Vegetation Management Plan incorporated into the varied order records that the landowner engaged contractors in late 2023 to undertake weed management and remediate a minor landslip. The Department separately alleged that damage during that period involved mechanical clearing and the introduction of cattle.

From harm to remediation order: how long does it take?

A remediation order may be made years after the alleged harm. In *Gajdosik*, clearing in December 2019 was followed by an order in December 2021. In *Kazmouz*, alleged conduct between

September 2019 and October 2020 was followed by an order in September 2023. In *Emery*,[iv] periods of alleged damage extended from 2018 to March 2023, with the order issued in February 2025.

The passage of time can affect the appropriate remediation response because the ecological condition of the land may change. In *Emery,* the parties' experts considered regeneration occurring since 2022, and the final VMP adopted assisted natural regeneration in areas already showing strong recovery, with more active intervention where required.

Timing may also affect the effective duration of remediation. The minimum period was calculated from the last alleged picking event in March 2023, rather than from the making or variation of the order.

How much land must be remediated?

The remediation area need not correspond precisely with the area of identified harm. In *Waterhouse*,[v] the Department identified 37.22 ha of unlawful clearing, while the varied order requires remediation of 38.46 ha across five separate areas.

Different parts of the remediation area may also require different treatment. In *Kazmouz*, approximately 5.94 ha is managed principally for natural regeneration, 4.79 ha for shrub and canopy revegetation, and smaller, more heavily disturbed areas for revegetation of all strata. Similarly, *AGM Holdings* divides its 4.67 ha VMP area according to vegetation condition and the level of intervention required.

In *Love*,[vi] the approximately 3.47 ha remediation area is divided into two management zones according to vegetation condition and regenerative capacity, with greater active restoration contemplated in the more disturbed southern zone.

The practical issue is therefore not simply the area subject to an order, but which land is included and the remediation required within it.

How long does remediation last?

The final orders vary substantially in duration. *Gajdosik* imposes a fixed seven-year term, *Waterhouse* operates for 20 years, and *Kazmouz* for 25 years, comprising an eight-year establishment phase followed by 17 years of maintenance.

Emery and *AGM Holdings* instead link duration partly to ecological performance. In Emery, the minimum five-year period runs from the last alleged picking event in March 2023, but may continue until March 2033 if the VMP criteria remain unmet. *AGM Holdings* provides for an initial five years from the varied order, extendable for up to a further five years if its performance criteria are incomplete.

The recent decision in *Love* provides another five-year model, with annual monitoring and performance criteria directed to vegetation condition and habitat.

The final orders therefore range from five to 25 years and include both fixed and performance-based regimes. Duration must also be considered alongside the nature of the remediation required: long-term protection and monitoring of natural regeneration is different from intensive restoration works. The published material does not, however, generally reveal whether duration itself was altered through the appeal.

What does remediation actually involve?

The final orders range from protecting natural regeneration to active revegetation and habitat restoration.

Gajdosik principally requires stock exclusion and weed control. *Waterhouse* similarly relies on natural regeneration, combined with restrictions on disturbance, weed and pest control and managed stock access. *Kazmouz* involves more active intervention, with different management zones requiring natural regeneration, shrub and canopy revegetation or revegetation of all strata. Its indicative calculations allow for up to 55,971 plants.

Emery and *AGM Holdings* combine assisted natural regeneration with active intervention where recovery proves insufficient, including planting and, in *AGM Holdings*, ecological burning. *Love* similarly combines natural regeneration and revegetation, but also includes habitat-specific measures such as Swift Parrot feed trees and nest boxes or augmented hollows.

The orders therefore illustrate a spectrum from protecting natural recovery to active reconstruction of vegetation communities and habitat, with the level of intervention capable of varying across the same remediation area.

How is successful remediation measured?

The final orders range from prescribed activities to measurable ecological outcomes.

Gajdosik principally requires specified works and annual compliance reporting. By contrast, *Emery* uses baseline monitoring, annual targets and end-point criteria, while *AGM Holdings* measures matters including weeds, threatened species, revegetation and progress against BAM benchmarks.

Love provides a detailed outcome-based example, with criteria addressing weed cover, species richness and native vegetation cover, fallen logs and litter, stem density, Swift Parrot feed trees and ten suitable nest boxes or augmented hollows.

Monitoring may also determine whether further intervention is required. In *Emery*, adaptive management permits altered weed control or supplementary revegetation where existing measures are not achieving the required outcomes.

The practical distinction is between performing prescribed work and achieving an ecological outcome. Under an outcome-

based regime, completing the required works may not be sufficient if the performance criteria remain unmet; successful natural regeneration may, conversely, avoid more intensive intervention.

When does the remediation obligation end?

For the performance-based orders, expiry of the minimum period does not necessarily end the remediation obligation. In Emery, the VMP continues beyond the minimum period if its success criteria remain unmet.

AGM Holdings provides a more detailed completion mechanism. The remediator may notify the Department that the performance criteria have been met. If that is disputed, the parties jointly appoint an accredited person to determine whether there has been substantial completion and, if not, what further work is required. A determination of substantial completion requires the Department to revoke the order.

The orders may also accommodate events affecting remediation. In *Emery*, bushfire, flood or other natural disasters may provide a basis for seeking variation of the VMP. For performance-based orders, the endpoint may therefore depend not simply on the passage of time, but on whether the required ecological outcomes have been achieved and sustained.

What does a remediation order mean for the continuing use of the land?

A remediation order may substantially constrain the use of affected land. In *Gajdosik*, stock, imported mulch and structures are prohibited. *Waterhouse* prohibits clearing, removal of fallen timber, cultivation, construction and aerial spraying, while allowing limited grazing in three remediation areas under an ecologist-supervised regime. Some continuing land management may nevertheless be accommodated.

In *AGM Holdings*, existing access tracks may be maintained and fallen timber moved from tracks, subject to controls protecting vegetation and habitat.

Long-term orders may also affect dealings with the land. *Waterhouse* and *Emery*, for example, require disclosure to prospective purchasers and notification of specified changes in ownership or occupancy.

The practical effect can therefore extend well beyond restoration work, affecting agricultural and development activities, ongoing land management and future dealings with the property.

What can be learned from the appeals?

The published appeals illustrate the breadth of remediation regimes that may arise under s 11.15, from protecting natural regeneration to active revegetation and habitat restoration, and from relatively straightforward fixed-term obligations to long-term, performance-based regimes.

They also demonstrate the importance of the condition of the land when remediation occurs. Subsequent regeneration, weeds and other threats, and differences in ecological condition may influence both the type and intensity of remediation required. The more detailed orders use management zones, ecological performance criteria, monitoring and adaptive management to respond to those differences.

Their value is practical: they illustrate the potentially significant and long-term consequences of a remediation order for the restoration, management and use of affected land.

Endnotes

i. *Gajdosik v Department of Planning Industry and Environment* [2022] NSWLEC 1150.

ii. *Kazmouz v Department of Planning and Environment* [2024] NSWLEC 1126.

iii. *AGM Holdings Pty Ltd v Secretary, Department of Climate Change, Energy, the Environment and Water* [2026] NSWLEC 1183.

iv. *Emery v Secretary, Department of Climate Change, Energy, the Environment and Water* [2025] NSWLEC 1863.

v. *Waterhouse v Department of Climate Change, Energy, the Environment and Water* [2025] NSWLEC 1584

vi. *Love v Secretary, Department of Climate Change, Energy, the Environment and Water* [2026] NSWLEC 1500.



Willem van Wyk, interviewing:

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Mid-Rise Pattern Book Reform

What is the mid-rise pattern book reform and how has it been given legislative effect?

THE NSW Housing Pattern Book now includes nine mid-rise architectural designs that provide a streamlined pathway to deliver well-designed residential flat buildings and shop-top housing. These designs use pre-endorsed architectural patterns, meaning projects can move through the planning system faster and with greater certainty.

The mid-rise designs form the second stage of the NSW Housing Pattern Book, following the low-rise designs introduced in mid-2025, and have been produced by leading architects to suit a variety of sites, locations and household needs.

The planning pathway for using these designs has legislative effect through:

1. A new Chapter 7 of the *State Environmental Planning Policy (Housing) 2021* (Housing SEPP), which establishes the planning pathway for development using mid-rise pattern book designs;
2. Amendments to the *Environmental Planning and Assessment Regulation 2021*, which outlines the procedural and technical requirements for accessing this pathway; and
3. The *Environmental Planning and Assessment Amendment (Planning System Reforms) Act 2025*, which aims to deliver faster, fairer, modern planning system including new targeted assessment pathways which are intended to be available to mid-rise patterns in future.

Creating pattern books to support growing communities is a long-established approach to democratising design in Australia. Patterns have shaped our built environment since pattern books arrived in Sydney in the 1800s.

Mid-rise apartments are part of NSW's housing story - from the 1920s art deco apartment buildings to today's urban renewal projects. They continue to play a crucial role in delivering affordable, energy-efficient homes in well-located areas.

The pattern book builds on the Transport Oriented Development Program (TOD) and Low and Mid-Rise Housing Policy (LMR), with the Government Architect NSW engaging leading architects from across Australia and New Zealand to deliver high quality, innovative and affordable low and mid-rise designs. It offers a diverse, flexible collection to suit many sites, providing access to award-winning architect designs, a fast-tracked pathway and technical details to help get project teams started.

What are the similarities and differences in the approval pathway for the mid-rise pattern book compared to the low-rise designs adopted earlier in 2025?

Both the low-rise and mid-rise pattern book pathways rely on pre-endorsed architectural designs to streamline assessment and improve certainty. The pre-endorsed patterns for both pathways contain development standards, location requirements, technical drawing sets and technical information. Additionally, the *Environmental Planning and Assessment Regulation 2021* requires that any proposal using a low or mid-rise pattern must be accompanied by a Design Verification Statement (DVS), confirming the proposal aligns with the relevant pattern. In both cases, development can only occur where the land use is already permitted under local planning controls.

The key differences relate to the development types covered and the planning pathways that apply. The mid-rise pathway, introduced into the Housing SEPP in November 2025, simplifies the development application (DA) process for mid-rise housing pattern book proposals and applies to residential flat buildings and shop-top housing.

By contrast, the low-rise pathway, introduced in July 2025 as Part 3BA of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, creates a complying development pathway for projects using one of the eight low-rise patterns. It applies to multi-dwelling housing, terraces, dual occupancies and manor houses.

Together, these pathways use consistent, pre-endorsed designs and documentation to simplify assessment, improve certainty and strengthen design quality, while tailoring the approval route – DA for mid-rise, complying development for low-rise – to the scale and complexity of the residential development types.

Are there likely to be further reforms in this space over the next year?

Mid-rise patterns will be prioritised for a targeted assessment pathway – part of the landmark planning reforms passed through Parliament last year. The Department will carefully monitor the roll out and uptake of the mid-rise patterns and will consider further opportunities for reform if required.

Higher density development carries with it the risk of greater environmental impact. How will the mid-rise designs in the pattern book consider the amenity of surrounding development?

The mid rise designs in the NSW Housing Pattern Book were developed by leading architects and informed by the Apartment Design Guide. This ensures they respond sensitively to solar access, building orientation, privacy, overshadowing and neighbourhood character.

The NSW Housing Pattern Book offers practical and sustainable designs that can be adapted to suit many neighbourhoods, positively contributing to the character of a street. The designs cater for different types of sites, including compact mid-block lots and corner or infill locations, with options for efficient layouts.

The small and corner lot mid-rise patterns can be used on land where TOD and LMR policies apply, and where the land use type is permitted. The three large-lot patterns apply across the state wherever residential flat buildings of this size are permitted. Height controls in local planning instruments also still apply, ensuring development fits the intended scale of each area.

The Housing SEPP sets out locations where these designs cannot be used, including state and local heritage items, heritage conservation areas and land affected by key hazards, so projects only occur in suitable locations.

While the pattern book provides building designs, applicants must demonstrate compliance with all relevant planning, environmental performance and site-suitability requirements – including landscaping and sustainability measures – when preparing a DA. The NSW Housing Pattern Book Landscape Design Guide supports applicants in meeting these requirements.

What do you see as the main benefits of a pattern-style approach for mid-rise development compared to a standard DA pathway?

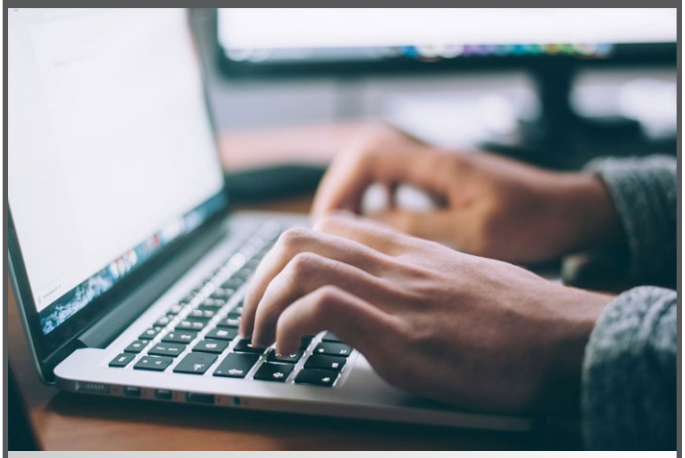
A key advantage is the use of pre-endorsed designs, which reduces assessment time and increases certainty for applicants, councils and communities.

Patterns already incorporate many standard planning and design requirements which means they can be eligible for a streamlined pathway, reducing assessment times by consent authorities and allowing construction to start sooner.

For example, the pathway may reduce the need for pre-DA meetings, minimise lodgement checks, and lessen referrals, including to design review panels, because the design work has already been undertaken by the NSW Government Architect. Fewer requests for additional information are expected due to the DVS and comprehensive pattern packs.

Overall, the mid-rise patterns are well-designed, cost-effective and focused on locations with good access to amenity, services and public transport, supporting the faster delivery of high-quality housing in the right places.

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JO SHULMAN
CEO of the Environmental Defenders Office



Introducing Jo Shulman, Incoming CEO of the Environmental Defenders Office

At a time when nature faces unprecedented pressure, the Environmental Defenders Office's (EDO) mission has never been more vital.

AS the largest environmental legal centre in the Australia-Pacific region, EDO stands at the forefront of the fight for environmental justice. Our mission is clear: to provide access to justice and empower communities to drive the change that nature needs to thrive.

Driving our work is a dedicated team of lawyers, scientists and policy experts committed to protecting the environment we all depend on.

What excites me the most about my new role as EDO's Chief Executive is being part of such a strong sector and a community that is working together for better outcomes for people and the environment.

For more than 25 years, I have worked at the intersection of law, justice and community. I trained as a human rights lawyer and have worked across multiple causes championing First Nations justice, health equity, gender equality, housing and homelessness, and disability.

In my executive leadership roles, including terms as chief executive of the Moriarty Foundation, Redfern Legal Centre and the Australian Centre for Disability Law, I learned about the power of collaborative leadership to drive change.

The communities that EDO serve face enormous challenges as they fight to keep the climate safe and to protect the places, the Country and cultures they love.

I've had the privilege of working alongside First Nations Communities across Australia, and in particular in the Top End. I've seen (and been responsible for) the evacuation of many local First Nations staff due to floods and other climate disasters, disconnecting sometimes permanently, communities from Country and culture. We are yet to fully understand the long-term impacts on health, safety, livelihoods, and the passing down of traditional knowledge – but we do know that the trajectory of these communities is being reshaped by climate change in ways we cannot ignore.

With our 40th anniversary taking place last year, EDO has a long and proud history of using the law to protect people and nature, and I'm excited to build on that legacy through working with our clients and partners to deepen our impact. I'd like to acknowledge David Morris for his enormous contribution to EDO after five years leading the team as CEO, and more than a decade with the organisation.

For 40 years EDO has stood up - through the law - for nature, for communities and for justice. For 40 years, we've shown that when integrity, evidence and courage come together, the law holds decision makers to account, protects precious places and species, and ensures that communities are not only heard but influence decisions that shape their futures.

In legal years, turning 40 means we are just hitting our stride. The milestone is a testament to the team's endurance, impact, and principle. Four decades of defending the environment, setting precedents, backing communities, and holding power to account have shaped who we are.

This legacy isn't just written in judgments or statutes. It lives in the communities we've supported, the landscapes and waters we've helped defend, and the ordinary people who have achieved extraordinary outcomes with the law on their side. We are confident in our purpose, humble enough to keep learning, but still utterly convinced that the law is a force for good, and with the climate and nature crises accelerating, our most important chapters are still to be written. Over 40 years, we have been bold in taking on the big issues, and we are continuing to do so.

Looking Ahead: Turning Law into Lasting Change

Our legal team is excited about the challenges ahead, with a number of significant cases underway.

This year we will learn the outcome of some key legal challenges in defence of nature and communities, including a landmark challenge to the largest proposed new coal mine in Australia.

We represented the Australian Conservation Foundation and the Mackay Conversation Group in challenging the approval of the Winchester South mine in QLD - the biggest new coal mine in Australia, with annual emissions predicted to be greater than Australia's total annual emissions in 2022. This case is the first to consider the implications of the International Court of Justice advisory opinion in Australian law.

We will also continue work to ensure Australia's new nature laws are fit for purpose. In late 2025, Australia took a significant step forward with the passage of new nature laws that will give our struggling environment and communities a much-needed lifeline. Our expert law reform team worked tirelessly for years to help shape these reforms, right up until just days before the vote, when we appeared at a Senate Inquiry in Canberra to spell out EDO's solutions to strengthen these bills to protect nature and actually deliver outcomes for nature, climate and community.

But the truth is, we must measure our successes - not by a single judgement or outcome - but in the way the system itself evolves to protect our planet.

The real legacy of EDO lies not only in the cases we've won but in the change that follows. It is seen when communities understand their rights and are empowered to assert them, when decision-makers apply more rigorous reasoning, when industries adapt their conduct in anticipation of scrutiny, and when the public has confidence that environmental decisions are made with integrity and proper consideration. We are all stronger for these legacies. That is the quiet power of public interest environmental law done well.

EDO doesn't do this alone. We are part of a collective project. One that depends on partnerships that connect law and science; philanthropy and corporate responsibility; cultural knowledge and Western legal systems.

To tackle the climate and extinction crises before us, we have to work across sectors, across geographies, and across generations.

We will win the fight for the environment not just by defending landscapes and species.

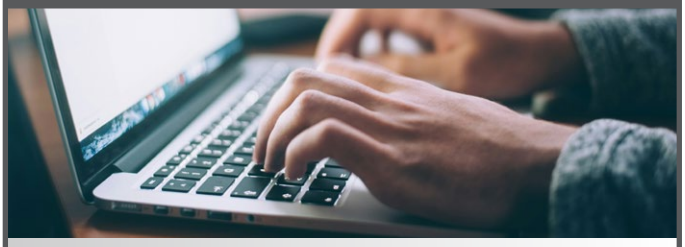
We need to work more expansively to ensure that environmental justice and sustainability are embedded in everything we do as a society.

We need to make these values, not the exception but the norm. And we need to do it together.

So, what will the next 40 years bring? We will trailblaze and innovate in addressing the hard issues, taking bold and creative approaches to the challenges ahead. We will not only enforce existing systems and legal standards but work to change and strengthen them. We will place First Nations laws and voices at the centre of how we protect Country, recognising their enduring knowledge and leadership. And we will continue to advocate for the fundamental right to a safe, clean and healthy environment for all.

And we will ensure that young people inherit not only court precedents, but a living and thriving planet. Thank you to all at EPLA for your partnership and for your belief in EDO, and the future we know to be possible.

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PETER WILLIAMS
Former Commissioner, Independent Planning Commission of NSW



Book Review: Environmental Law Handbook, 7th Edition

The Environmental Law Handbook: Legislation, Case Law and Policy in NSW. Seventh Edition.

Editor: Peter Williams, Sydney Law School, The University of Notre Dame, Australia.

Publisher: Thomson Reuters Australia, 2024.

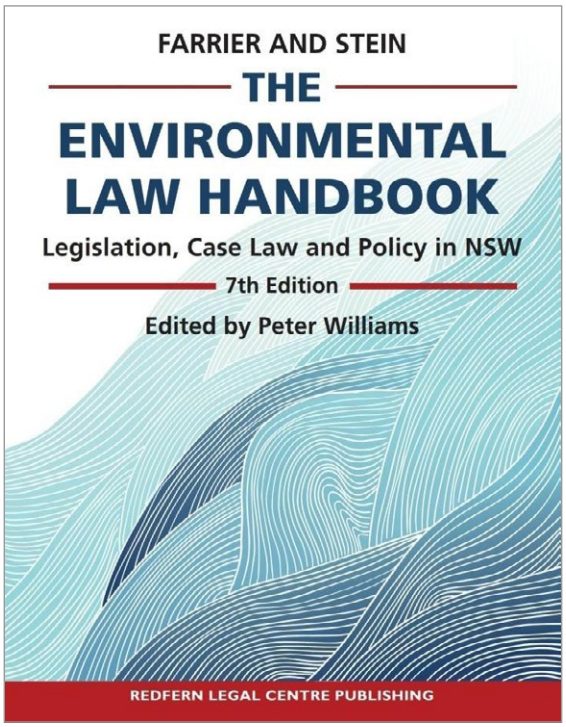
THE seventh (and latest) edition of the long-running text *The Environmental Law Handbook* was published in late 2024 by Thomson Reuters. First appearing in 1988 when single-handedly written by David Farrier, Emeritus Professor of Law at the University of Wollongong, the book has enjoyed a remarkable longevity. This is largely thanks to the commitment of an expanding list of authors drawn from both practice and academia who have contributed to produce a comprehensive text that has sought to keep abreast with the continuous change and progression of New South Wales environmental and planning law.

As this body of law has become increasingly complex with a growing number of judicial decisions elaborating on the bare bones of legislation and policy, successive editions of the book have required more extensive collaboration in their compilation. The latest edition continues to draw on specialist skills, assigning the revision and writing of specific chapters to authors with particular expertise. This has been essential as the book has expanded to include much fuller coverage of particular areas and new chapters. Twenty-four specialists in environmental law shared in the writing of the 20 chapters of the latest edition, building on the work of previous editions.

Those familiar with earlier editions will find that the book has been heavily reorganised and rewritten, and redesigned for easier location and use of content. Substantial changes have occurred in environmental law since release of the 6th edition of the book in 2016. New content includes:

- All topic areas covered in the book's 20 chapters have been updated.
- Extensive revision of pollution law with inclusion of significant new and updated material following a range of statutory amendments and new case law.
- Extensively revised discussion on forestry and plantations, agriculture, water supply and Crown land and protected areas.
- Major rework of treatment of land use planning, development, NSW and Commonwealth environmental assessment and biodiversity.
- Thorough updating for judicial interpretation and legislative change.

Environmental law in NSW is far more complicated than it needs to be. This 7th edition of *The Environment Law Handbook* seeks to continue to be a valuable jumping-off point for practising lawyers and law students. The careful balance of clarification and detail also makes the text more widely useful. Planners, engineers and environmental scientists, as well as those involved in environmental or community causes and who seek a good grasp of the legal responsibilities of those overseeing a complex network of rights and regulations, will find *The Environmental Law Handbook* a valuable resource.



ROSLYN MCCULLOCH
EPLA representative on the Duty Lawyer Scheme Committee



The Duty Lawyer Scheme – *Update 2026*

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

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

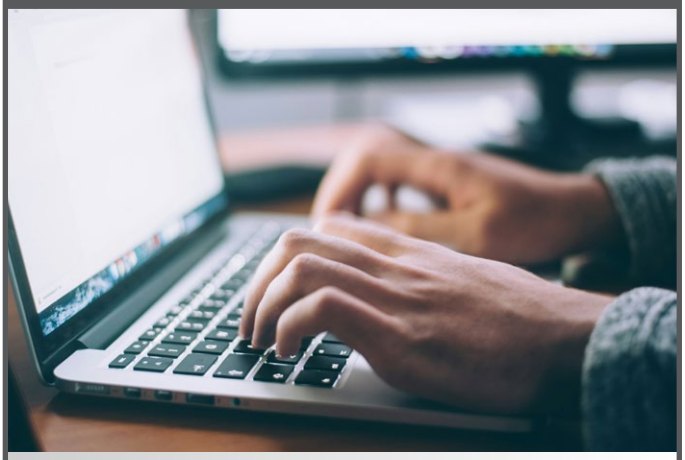
The scheme is aimed at assisting self-represented litigants who are respondents in Classes 4 (except judicial review), 5, 6 and 7 of the Court's jurisdiction.

Originally the scheme operated with a single duty solicitor present on Level 4 of the Court each Friday to assist self-represented litigants who attended in person or were contacted via telephone. During COVID the scheme transferred to a fully telephone based system. Due to the demand for the service it now operates with two duty lawyers each Friday, one of whom is usually present in person.

The scheme benefits greatly from the experience more than 20 solicitors and barristers, including many senior practitioners, who volunteer their time to assist self-represented litigants. Not all of the enquiries related to the types of matters the scheme is aimed at, however the lawyers on duty generally tried to provide guidance to those litigants whose matters fell outside the parameters of the scheme, including tree matters.

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@pavlaw.com.au.

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2025 EPLA Conference

Luna Park, Milsons Point

Wednesday 5 - Friday 7 November 2025






























EMERGENCY EXIT
PLEASE KEEP THIS AREA CLEAR AT ALL TIMES.








GENTLEMEN


LUNA PARK
ENVIRONMENT AND PLANNING
EPLA



ROSLYN MCCULLOCH and RYAN COFFEY
EPLA delegates to the Court Users Group



The Land and Environment Court, Court Users Group – *Update 2025-2026*

With the election of Janet McKelvey as EPLA President, Ryan Coffey has joined Roslyn McCulloch as an EPLA representative on the Court Users Group (**CUG**). 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 March 2025 meeting the imminent swearing-in ceremony of Justice Beasley was on the agenda, with good advice not to be late (as it was a packed house). Registrar Froh also discussed yet more water damage to the Court, this time caused by a burst water pipe on Level 12 which flooded Levels 12, 11 and 10. Thereafter began the merry-go-round of Court rooms at Wentworth Chambers, Hospital Road and 50 Phillip Street. The March meeting also discussed the reluctance of the Court to schedule site/comparable property inspections at the start of hearings in Class 3 compensation matters. The Generative AI Practice Note was also a hot topic and remained on the agenda throughout the year.

In the June 2025 meeting the Chief Judge commiserated with the Chief Magistrate and the Chief Judge of the District Court when he discussed flooding experienced at the "Drowning" Centre. Issues relating to objectors in appeals from Orders and appearances by the Crown were also discussed.

The September 2025 meeting was initially dominated by the swathes of proposed legislative changes, including the low and mid-rise housing provisions and the Pattern Book Development Code for complying development. A new class of Land and Environment Court jurisdiction was also foreshadowed in relation to Councillor Conduct. A revised version of the Annotated Trees Act was made available via the Court's website.

In November 2025 CUG meeting the Chief Judge provided a progress report on the various bills discussed at the September meeting and provided a useful summary of the key changes to the *Environmental Planning and Assessment Act* 1979 which received assent on 24 November 2025, including the Housing Delivery Authority, targeted development assessment, changes to the objects of the Act and the matters for consideration for development applications and model conditions for various SEPPs. Registrar Froh informed the meeting about changes to the Registry location, Registry hours during the Court vacation and other Court room changes, including utilising Local Court. The Court has a pilot program to list s34 conferences and hearings in far north NSW matters in McLean Courthouse in the first week of each month and is seeking feedback from practitioners about the new system.

In March 2026 meeting the Chief Judge provided an update on recent and proposed legislative changes, including amendments concerning energy legislation, the repeal of the *Kosciuszko Wild Horse Heritage Act* and proposed changes to the treatment of good character in sentencing, including for environmental offences. Registrar Froh provided a further update on repairs following the Court's two 2025 flood events, with courtrooms gradually returning to service (although the Court's relationship with water appears to remain complicated). The meeting also discussed differing approaches to mediation by Commissioners, a number of practical issues arising in Class 3 compensation proceedings, case management of s 34AA matters and the logistical challenges associated with the Court's new regional listings at Maclean Local Court.

In June 2026 the meeting again began with a substantial legislative update, including proposed Class 9 jurisdiction for councillor conduct matters, the *Building Approvals and Practitioners Bill 2026*, amendments to the *Water Management Act* and proposed UCPR changes requiring a Summons to Appeal to clearly identify the questions of law raised. Generative AI returned to the agenda, this time focusing on its use by councils in assessing development applications and drafting conditions of consent, with the Court indicating that the issue will remain under review. Regional listings were again discussed, with the Court exploring alternatives to Maclean and a more circuit-based approach. Other topics included the establishment of the Court's pro bono panel, access to transcripts in Classes 1–3 and the Registrar's powers to amend development applications and modification applications. The meeting concluded with the welcome news that Anita Chang and Kim Khong had been appointed Senior Deputy Registrars.

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.

Postscript: The Court experienced yet another flood event in December 2025 and has now been fast-tracked for inclusion in a CBD flood prone land map!

JESSICA LIGHTON
Chair of NSW Young Lawyers Environment & Planning Law Sub-Committee



NSW Young Lawyers Environment and Planning Law Committee Update 2026

2025 was another successful year for the NSW Young Lawyers Environment and Planning Law Sub-Committee with the Trivia Night Extravaganza now an annual calendar fixture. The year also saw the Sub-Committee continue its track record of a range of diverse guest speakers presenting at our monthly meetings on issues such as biodiversity considerations for energy transition projects, sustainability asset optimisation, and what planning lawyers should know about town planning, 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 Amelia Cook stepping down as Chair and leaving the Sub-Committee in the capable hands of Jessica Lighton, stepping up from her previous role as Vice-Chair. The Sub-Committee also welcomed Stephanie Miller as the new Vice-Chair and Georgie Cooper as Secretary.

In August, the Sub-Committee was able to host its traditional trivia night extravaganza to raise funds for the Young Lawyers 2025 Charity – Project Youth. Project Youth has been operating since 1992 to support young people aged 12-24 across the Sutherland Shire, Georges River and Bayside areas by offering programs that enable young people to be connected, safe, achieving and healthy. 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 the final round scores determining the Crown Solicitors Office victors over the teams from Mills Oakley and Martin Place Chambers. The Sub-Committee thanks its sponsors for the event: Martin Place Chambers and Sparke Helmore. For those keen to show off their trivia skills, the extravaganza will return in 2026.

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

Finally, the Sub-Committee has continued its track record of top-notch guest speakers presenting on a number of topics relating to this practice area of the law. Highlights from the year included: Willem van Wyk, a town planner at WvW Planning, and Harry Hughes, planning academic at the University of New South Wales on what planning lawyers should know about town planning and town planners; Daniel Hartin, a co-ordinator for asset optimisation at Lake Macquarie City Council on recent Council sustainability projects and environmental impact-reduction policies for existing assets; Brigitte Rheinberger, a senior associate at Herbert Smith Freehills Kramer on biodiversity considerations for energy transition projects; and, Chris Koikas, a barrister at Martin Place Chambers regarding his experiences at the Bar and tips for junior lawyers.

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

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

TOM WHITE & WILLIAM HADWEN
Lander & Rogers



Mahla Pearlman Oration & Award – 2025 and 2026

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.

2025 Mahla Pearlman Oration

ON 19 June 2025, the Honourable Justice Kristen Walker KC was the keynote speaker at the 13th 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. Janet McKelvey, the President of EPLA, opened the event with her reflections of Mahla Pearlman from her time as a mediator early in Janet's career, which can be summarised as: firm but fair, endlessly curious, incredibly practical and a delightful, calming presence.

The Honourable Justice Rachel Pepper of the LEC then introduced the keynote speaker. The Honourable Justice Kristen Walker KC is a judge in the Court of Appeal of Victoria, appointed on 3 May 2021. Her Honour was formerly the Solicitor-General of 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 in significant constitutional and public law matters. Prior to this, her Honour practiced as a barrister, being admitted to the Bar in 2004 and appointed as Queen's Counsel in 2014. Her Honour is also a Principal Fellow at the University of Melbourne, where she teaches Constitutional Law and Constitutional Litigation.

The oration was focused on the development and changes to the law of standing in environmental litigation. The oration commenced with a discussion of the origins of standing, establishing the "special interest" concept for parties to be involved in proceedings. Amongst several cases discussed, her Honour drew attention to the development of standing in the recent High Court decision of *Forestry Corporation of New South Wales v South East Forest Rescue Incorporated* [2025] HCA 15. The question before the High Court was whether, in the absence of a clear and unmistakable statutory intention to the contrary, proceedings could only be commenced by a person (or party) with private rights, or if proceedings could be brought by parties with a "special interest" in the subject matter. The case considered s 69ZA of the *Forestry Act 2012 (NSW)* and whether parliament was intending to exclude the "open standing" of parties. The High Court found that general law standing could continue. Her Honour reiterated the importance of the High Court's willingness to read a broader interpretation of standing, affirming that the general law continues as an available pathway and serves the purpose of strengthening government accountability.

A couple of take-away ideas provided by Her Hour about the continued importance of standing included the necessity of the legislature to use specific and clear wording to override the general law position of standing to challenge executive decisions; and the increased willingness of the judiciary to recognise environmental groups in litigation as a mechanism to temper government. Following the oration, discussion was focused on how the High Court would react if the question of standing were raised today, which her Honour suggested that there would be the adoption of a multifactorial test.

It was a sophisticated and thought-provoking oration.

2025 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 2025 Mahla Pearlman Oration, the Law Council of Australia announced that the 2025 Mahla Pearlman Australian Young Environmental Lawyer of the Year was awarded to Mr Thomas Wright.

Mr Wright is a Senior Associate at Chalk & Behrendt Lawyers & Consultants. He is a generalist; with commercial, property,



2025 Mahla Pearlman Oration: Thomas Wright, Janet McKelvey, The Hon Justice Kristen Walker KC, The Hon Justice Rachel Pepper and Robyn Glindemann.

planning, governance, land rights, and litigation experience. He is a trusted adviser to Indigenous people, communities and organisations of all kinds, with a particular focus in NSW.

He has advised multiple Aboriginal organisations on pipelines of development sites and projects; advised on Indigenous planning and biodiversity reform and the preparation and implementation of NSW's first Aboriginal Land Council Development Delivery Plans; obtained rate exemptions for multiple Aboriginal organisations; and acted on NSW's first 'blanket Aboriginal land claim'.

Thomas has published in Indigenous planning, presents seminars on Indigenous legal issues, and is involved in academic research in this field. At university he completed his honours thesis on the legal and social interaction of the Native Title Act 1993 (Cth) and the Aboriginal Land Rights Act 1983 (NSW).

EPLA congratulates Mr Wright on being awarded the 2025 Mahla Pearlman Australian Young Environmental Lawyer of the Year.

RYAN COFFEY
Martin Place Chambers



2026 Mahla Pearlman Oration & Award

THE Legal Practice Section of the Law Council of Australia and EPLA co-hosted the 2026 Mahla Pearlman Oration on 18 June 2026 in Sydney. The annual Oration honours the legacy of the late Honourable Mahla Pearlman AO, former Chief Judge of the Land and Environment Court of New South Wales and former President of the Law Council of Australia, whose leadership helped shape modern environmental law in Australia.

This year's keynote address was delivered by the Honourable Justice Brian J Preston AO FRSN SC, Chief Judge of the Land and Environment Court of New South Wales. His Honour's oration, Paradise Lost? Putting the Environment Back into Environmental Impact Assessment, examined one of the foundations of planning and environmental law: how environmental impact assessment (EIA) identifies and describes the environment that is proposed to be affected by development.

Justice Preston observed that environmental impact assessment sits at the heart of planning and environmental law. As EIA has become increasingly embedded within statutory planning systems, however, descriptions of the environment have often become narrower, focusing predominantly on scientific and technical forms of knowledge. Whilst these remain indispensable, his Honour suggested they do not always capture the full range of ways in which people understand and experience the environment, with EIA at times becoming unable to "see the forest for the trees".

A central theme of the oration was that environmental impact assessment should seek to provide a fuller description of the environment by drawing not only on scientific knowledge, but also on aesthetic, perceptual and cultural understandings of landscape. Justice Preston suggested that these broader perspectives may assist decision-makers to better understand the environments affected by development.

Drawing on the work of landscape geographer Donald Meinig, Justice Preston explored ten different ways of seeing the environment, including as Nature, Habitat, Artefact, System, Problem, Wealth, Ideology, History, Place and Aesthetic. Throughout the oration, these concepts were illustrated through works by Australian artists, photographers and landscape painters, demonstrating how landscapes may be understood through historical, cultural, aesthetic and sensory experiences alongside more traditional scientific descriptions.

Justice Preston also emphasised that broadening the description of the environment does not diminish the importance of scientific analysis. Rather, scientific knowledge can be complemented by other ways of understanding landscape, place and ecological relationships.

Justice Preston concluded that there is no single way of understanding the environment. Recognising multiple perspectives can assist environmental impact assessment to provide a more complete description of the environments affected by development and, in doing so, better fulfil its purpose.

It was an engaging and thought-provoking oration which encouraged practitioners to reflect on how the environment is identified, described and assessed in planning and environmental decision-making.

2026 Mahla Pearlman Award Recipient

This year's recipient of the Marla Pearlman Award is **Zoe Bush** from Banco Chambers in Sydney.

Since being called to the Bar in September 2024, Zoe has quickly established a significant practice in climate change and environmental law. She has acted in important climate-related litigation in the High Court, Federal Court and NSW Supreme Court, including matters concerning coal mine approvals, greenwashing, offshore oil and gas decommissioning liabilities, and environmental contamination.



Zoe Bush, 2026 Mahla Pearlman Award recipient



The Hon Justice Brian Preston AO FRSN SC delivering the address at the 2026 Mahla Pearlman Oration.

Zoe also co-authored an opinion with Ruth Higgins SC and Jennifer Robinson examining the implications of the International Court of Justice's Advisory Opinion on the Obligations of States in respect of Climate Change for directors' duties in relation to climate-related risks.

Beyond her practice, Zoe also contributes extensively to the profession through her work with the NSW Bar Association's Climate Change Committee, law reform and professional education, and regularly presents on climate change and environmental law to industry, government, regulators and university students.

EPLA warmly congratulates Zoe on receiving this year's Marla Pearlman Award and on her significant contribution to environmental and climate change law.

Nominations for the Award

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

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 Law Council of Australia website:

lawcouncil.au/legal-practice/mahla-pearlman-award

2027 Mahla Pearlman Oration

The Australian Environment and Planning Law Group is delighted to announce that the 2027 Mahla Pearlman Oration will be held at the Federal Court of Australia in Sydney with the Honourable Chief Justice Debra Mortimer, Federal Court of Australia delivering the keynote address.

INGRID KING
Tenth Floor St James Hall Chambers

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Vale: Louise Margaret Byrne



LOUISE Margaret Byrne died on 5 August 2025, aged 70, after becoming unwell while presiding as an acting commissioner of the Land and Environment Court of New South Wales.

Louise was called to the Bar in 1998 and had been a member of Frederick Jordan Chambers for 27 years, having started there in a shared room with Tom Howard SC. As a member of Frederick Jordan Chambers, Louise was famously friendly and supportive. For much of her time in chambers she occupied a lovely wood-panelled room on level two.

Louise practised primarily in environmental planning, local government, construction and real property law. She was appointed an acting commissioner of the Land and Environment Court in February 2023. Louise had a thriving practice and was especially popular with very loyal country firms who briefed her repeatedly over her years at the Bar.

Louise grew up on the lower north shore of Sydney and attended North Sydney Girls High School. She held a Bachelor of Laws and Bachelor of Science (with honours in biochemistry) from the University of New South Wales (1992). Louise had a first career as a research biochemist and then studied law at UNSW while raising two small children.

Following the completion of her law degree, Louise worked as a policy officer with the, then newly created, NSW Environment Protection Authority. This was a pivotal time in the evolution of environmental law in New South Wales, when important, historic new laws were enacted. Louise was involved in the implementation of those laws.

Prior to coming to the Bar, Louise also worked for the Australia Law Reform Commission, the Hon Mahla Pearlman AO of the Land and Environment Court, and the Hon Justices Mahoney AO QC and Mason AC KC, presidents of the New South Wales Court of Appeal.

Louise received several appointments to planning panels, was a board member for the Environmental Defenders Office and was a member of the Environmental Reference Group for North Sydney Council.

While at the Bar, Louise appeared in the High Court in the leading case of *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* [2004] HCA 59 (‘***Hillpalm***’) led by TF Robertson SC. In that case, a majority held that a breach of the original terms of a subdivisional approval was not enforceable against a subsequent purchaser of the land. *Hillpalm* involved the intersection of many areas in which Louise practised, and she was very happy to explain the principle behind it to many young barristers.

Louise frequently acted pro bono for community groups who were seeking to protect the environment and also generously supported other members of the Bar who were acting pro bono.

Louise was a dedicated member of the Women Lawyers Association of NSW (WLANSW) and was its president in 2005–2006. She was awarded a life membership in 2020 for her service to the association and women lawyers. In her role with WLANSW, Louise met with the Commonwealth Attorney-General to discuss the appointment of women as judges. Louise also organised the first Australian Women Lawyers National Conference.

Louise was also actively involved in a number of NSW Bar Association committees, and was a founding member of the Bar Knitting Group. Louise was also appointed to committees of the Law Council of Australia.

In addition to Louise's formal roles with Bar Association committees and WLANSW, she practised informal mentorship for many women who came to the Bar, with extra words of wisdom for those of us with children. She gave me, and many others, practical advice and support about the challenges of balancing a practice with parenting. She was also an unfailing supporter of newcomers to the Bar and was very generous with her recommendations of junior barristers for briefs.

A commemorative service celebrating Louise's life and achievements was held at the Mosman Uniting Church on 12 August 2025. The crowd in the church spilled out the front door because there was no standing room left inside.

The variety of people present demonstrated the wide affection and respect held for Louise. In attendance were the Hon Mary Gaudron KC; the Hon John Basten; the Chief Judge of the Land and Environment Court, Justice Brian Preston AO; and numerous judges of the Supreme Court, Land and Environment Court and District Court of New South Wales. They were joined by Louise's friends and family from other walks of life.

Louise is survived by her two children, four grandchildren and her partner Bruce Kerridge. She will be missed.

CLIFFORD IRELAND
13 Wentworth Chambers

Vale: The Hon. Neal Raymond Bignold 1946-2025

THE Honourable Neal Raymond Bignold, former judge of the Land and Environment Court passed away on 3 April 2025, aged 78 years.

Born in Sydney in 1946, as the eldest of four children, he was raised by his mother and then following her death, his grandmother. His childhood in the southern suburbs of Sydney was far from privileged; the family was poor, moving frequently, his father mostly absent. It was lightened by playing and watching sport.

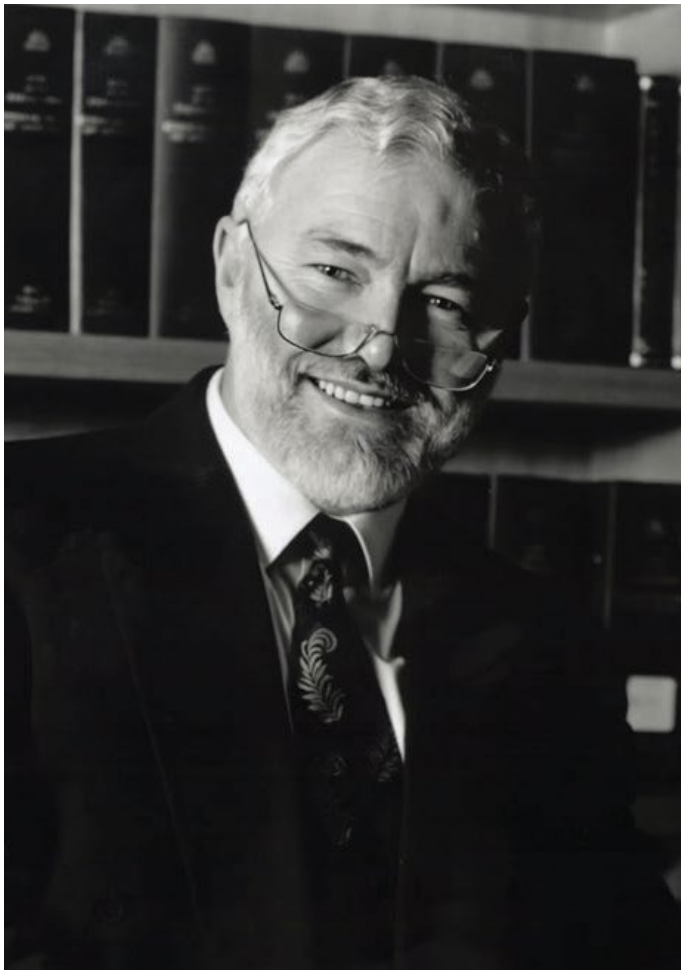
By the time of his graduation in 1969 with a LLB from the University of Sydney, he had worked for the Maritime Services Board as a junior clerk, articled clerk and legal officer. Between 1975-1980 as senior legal officer in the State Planning Authority, seconded to the office of the Minister for Planning and Environment as special legal adviser on planning and environmental law reform, John Whitehouse and he were the principal authors of the groundbreaking EP & A Act and the LEC Act.

He served as the Court's inaugural Senior Conciliation and Technical Assessor from 1 September 1980, an acting judge for 18 months, and from 4 June 1985, a permanent judge of the Court, retiring on 13 March 2007. He was appointed by the then Attorney-General, and later fellow judge of the Court, the Hon Terry Sheahan.

In these roles he made a significant contribution to environmental and planning law. His judgments demonstrated his encyclopaedic knowledge of planning and environmental law. They were comprehensive, detailed and closely reasoned. His judicial method emphasised the search for the just outcome and recognition of the human factor. His judgments were known for adopting a thorough approach to the review of common law precedent, from both Australia and beyond; he had an intimate knowledge of UK planning law and caselaw.

Unfailingly generous with his time to all, affable and ready to converse, he embodied the Australian tradition of treating all on the basis of merit, not station.

His intelligence and zest for life was reflected in his eclectic passions - opera and classical music; rugby league and horse racing. He enjoyed both golf and tennis and kept himself formidably fit.



In his private life, he was a committed Christian. He approached his faith with the same love of learning and erudition as he approached the law, giving his services as a lay preacher in his retirement and sharing his extensive library.

As Preston CJ of LEC observed on the occasion of the ceremonial sitting of the Court to mark Justice Bignold's retirement, his contribution through his more than 26 years of service was a critical factor in the success of the Court and of the planning and environmental law system enjoyed today in New South Wales. While his retirement marked the passing of an era, his legacy will live on and will continue to benefit us all.

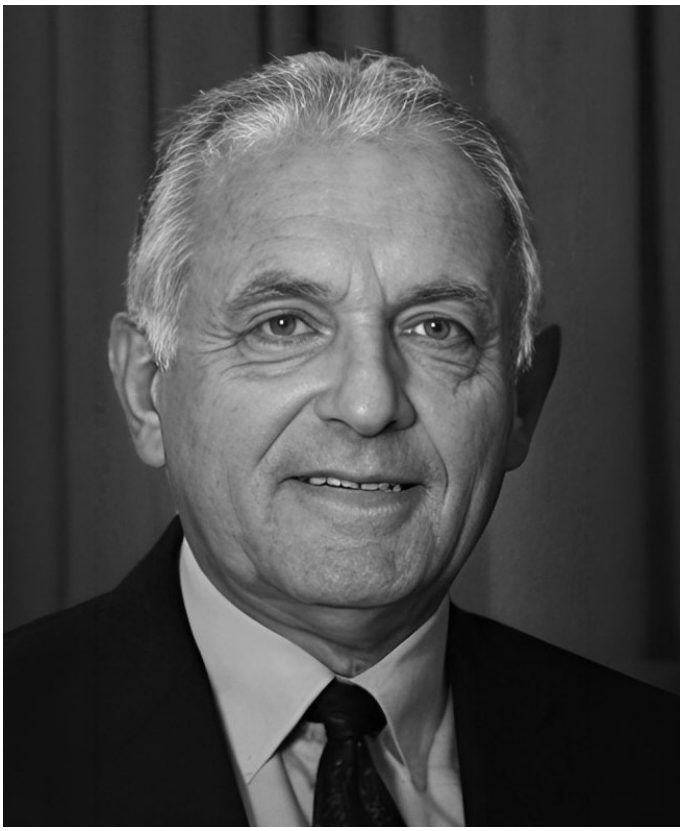
He was a great judge, but foremost a man of principle and kindness, with an irrepressible and irreverent sense of humour, who will be missed by those who knew him.

DR IAN ELLIS-JONES
Academic and Retired Solicitor

Vale: Bill Henningham

"Local government is the sphere of government best able to provide for the wellbeing of its residents, but for the dead hand of state government."

—**Bill Henningham**.



WILLIAM Arthur (Bill) Henningham PSM LLB, solicitor and mediator, died at Lane Cove on 12 August 2025 after a long illness, aged 88.

Bill was born in Greenwich, on Sydney's Lower North Shore, on 26 August 1936. He worked as a cadet journalist with The Sydney Morning Herald from 1954 to 1956 before embarking upon a law degree at the University of Sydney. He was admitted as a solicitor of the Supreme Court of NSW on 9 February 1962. He worked at Dibbs Crowther & Osborne [now Teneo Corporate Lawyers] before teaming up with Roger Parker in 1963 as Parker & Henningham where he partnered for 20 years. From 1980 to 1983 Bill was a member of the executive committee of the Local Government Association of NSW. Between 1983 and 1990 he was the full-time secretary and principal solicitor of the Local Government and Shires Associations of NSW (LGSA) where he fought hard for local government. He also cared greatly for the environment and became increasingly politically progressive over the years. In 1990 Bill became a consultant to Sly and Weigall [now Norton Rose Fulbright]. We worked together in the Local Government and Development Division of that firm until September 1992.

Shortly thereafter, Bill approached me about joining forces. I agreed, and in November 1992 we formed the boutique law firm Henningham & Ellis-Jones. Within a short time of its formation, Henningham & Ellis-Jones had secured as clients several NSW local councils. Even after our law partnership was amicably dissolved, so that I could pursue other activities including full-time lecturing at UTS, I continued to work as a consultant to Henningham & Ellis-Jones, and later to Bill's own firm Henningham Law, for many more years. In all, we worked together in private practice for over 13 years.

Bill served as a member of Lane Cove Council from 1976 to 1983, including four terms (1977-1981) as mayor. As mayor, Bill was a strong advocate of open government and public participation in decision-making processes. During his four-year tenure as mayor, he served on a wide range of local and regional community associations and committees. Throughout the decades Bill maintained his wide involvement in community activities, including serving as president or chairperson of no less than five local community organisations. He was the facilitator of Lane Cove Community Alliance and the president of Riverview Community Association. He was awarded the Australian Public Service Medal (PSM) in the 1990 Australia Day Honours List, and in 2009 he received the Lane Cove Citizen of the Year Award. For many years he was a foundation member of the Environmental Planning and Development Law Committee of the Law Society of NSW and was a part-time lecturer and examiner in the subjects of Local Government and Planning Law and Conveyancing in the Legal Profession Admission Board/ University of Sydney Law Extension Committee Diploma in Law Course. He was the author or co-author of book chapters, monographs and other published articles on local government law and practice, environmental planning, and alternative dispute resolution. Bill was a qualified and highly experienced mediator and also served as a commissioner of public inquiries under the NSW Local Government Act.

Bill was a great friend and mentor to me and was the most decent and honourable person I ever had the pleasure and honour to work with. He is survived by Wendy, his wife of 60 years, his three children Lisa, Paul and Steve and their respective partners Tracy, Edwina and Nancy, and his five grandchildren Jamie, Georgia, Angus, Zoe and Gilbert.

ALIN ALMASAN
Sydney Anglican Property

Vale: Paul Anton Rappoport

PAUL Rappoport was a conservation architect and former Acting Commissioner of the NSW Land and Environment Court whose working life was dedicated to the careful, practical stewardship of significant places and to helping the planning system better recognise the real-world costs and responsibilities of conserving heritage.

Paul held a Bachelor of Architecture from the University of Cape Town (1984) and a Master of Urban and Regional Planning (Hons) from the University of Sydney (2008), pairing architectural expertise with a comprehensive understanding of planning approvals and processes.

Before establishing Heritage 21, Paul spent two years with the NSW Department of Public Works, where he developed a practical grounding in the repair and conservation of sandstone buildings. In 1994 he founded Heritage 21 and led the practice for more than three decades. He became widely known for a methodical approach to conservation work grounded in close observation of fabric; and a practical sense of how buildings can be repaired, adapted and maintained over the long term. It was during this time that I had the privilege of working with, and learning from, him.

Paul's professional style was defined by a straightforward principle: heritage outcomes must be anchored in an honest understanding of buildings as-built and as-found. He emphasised condition assessment, clear scopes aligned to budget, and the disciplined recording of advice and decision-making. This was to ensure that conservation intent translated reliably into site practice and, ultimately, durable outcomes.





Paul also brought his expertise to the NSW Land and Environment Court. He was frequently briefed as an expert witness and had an ability to explain heritage impact, and conservation pathways in a way that was rigorous, intelligible, and fair. After many years serving as an expert witness, in 2020 he was appointed an Acting Commissioner of the Court.

A consistent theme in Paul's professional writing and public commentary was the need to make conservation more achievable for owners without diluting heritage values. He argued for the more confident use of incentive mechanisms, particularly clause 5.10(10) of the Standard Instrument LEP, to facilitate conservation outcomes that might otherwise be difficult to deliver. He contributed regularly to broader policy discussions about pressures facing the heritage sector through articles in planning and heritage journals, as well as professional forums.

Beyond his professional contributions, Paul was also known as a personable colleague with a good sense of humour. He found joy at the piano, composing and sharing music as a creative counterpoint to the rigour of practice. He is survived by his wife, three children and one grandson.

Comings and Goings: *2025/2026*

EPLA MEMBERS & SUPPORTERS

(in random order)

Kalinda Doyle is back at *Mills Oakley*

Emma Ryan has started at *Urban Legal*

Peter Clarke is a consultant at *Keystone Lawyers*

Harshane Kahagalle moved from *Addisons* to *Thomsons*

Montana Linkio has welcomed *baby Aspen*

Anthony Whealy and **Sophie Hale** have welcomed *baby Mia*

Nina Whatmough, **Ivana Hayman** and **Isabella Elisha** have joined *Hones Lawyers*

Clare Collett and **Bianca Collingwood** have joined *Martin Place Chambers*

Belinda Charlton now in-house at *Hobart City Council*

Peta Hudson has gone in-house at *Campbelltown Council*

Adriana Kleiss has joined *Lindsay Taylor Lawyers*

The following have started their readership at the Bar:

Cecilia Rose, *University Chambers*

Alessandro Cowley, *Level 22 Chambers*

Shay Riley-Lewis, *Martin Place Chambers*

Danielle Dickson has joined *Mills Oakley*

Rachel Daniel has moved to *Sydney Water*

Mark Cottom is now in-house at *Northern Beaches Council*

Lauren Sims has returned to the *NSW EDO*

Lucina Morphett has moved to the *NSW Department of Planning, Housing & Infrastructure*

Leigh Simpson has returned to New Zealand

Polida Sek has joined *Marsdens*

Lily Whiting has started as *Associate to Justice Slattery of the Supreme Court*

Vicki McGrath is now in-house at *North Sydney Council*

Joe Strati opened *P&D Legal*

Following a merge;
WWSB now **Finn Roache Lawyers** incorporating **Wilshire Webb Staunton Beattie**

Kristy Ruddock has gone to *Slater & Gordon*

Rebecca Davie has joined *Clifford Chance*

Tarquin Nesbitt-Forster has joined the *QLD Bar*

Tom Bush has gone to the *ACT Bar*

Kate Garnock has joined *Aeria Management Group* (Bankstown Airport)

Jonathon Ede has joined *Pikes & Verekers*

Jenni Ware has opened *GAL Advisory*

Heather Pym is heading overseas to join *Fieldfisher, Dublin* in their E&P section

Alyse Kliese has opened *Urban Legal*

Arielle Mayer has moved to *The NSW Department of Climate Change, Energy, the Environment and Water*

ENVIRONMENT AND PLANNING LAW ASSOCIATION (NSW) INC.

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kearns@mpchambers.net.au

President, EPLA:
Janet McKelvey, Martin Place Chambers
Level 32/52 Martin Place, Sydney NSW 2000
Tel: 02 8227 9600
mckelvey@mpchambers.net.au

MEMBERSHIP APPLICATION & RENEWAL FORM 2026/2027

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 corporate membership)

MEMBERSHIP FEES Fees are inclusive of GST

Individual	$275.00
Student – Full-time: Course	$66.00
Corporate rate Firms/Floors (please list all names to be registered)	$880.00
Corporate rate Councils & Government Departments	$770.00
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 _ _ / _ _

Mastercard/Visa/AMEX _____/_____/_____/_____ $_____

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'ship2026

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

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