

In the Zone

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QUARTERLY



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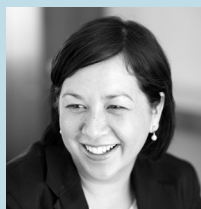
PARTNER
WELCOME

INTRODUCTION

Welcome to our latest edition of **In the Zone**.

Welcome to this edition of *In the Zone*, where we examine the latest legal, regulatory and policy developments shaping the environmental and planning law landscape. This quarter has seen a number of significant court decisions, including decisions on the characterisation of moveable dwellings and structures, the protection of sensitive environmental information through suppression orders, the precision required in contempt proceedings, and the scope of consent authorities' discretionary powers in modification applications.

We also consider a significant Federal Court decision, in which we successfully acted for a respondent to resist an application brought under the *Cth Environment Protection and Biodiversity Conservation Act 1999* seeking to restrain the carrying out of development. The edition further explores important legislative and regulatory reforms, alongside key industry developments, from the commencement of the first National Environmental Standards to proposed governance reforms and ongoing discussions about the future of environmental assessment. Together, these developments provide valuable insight into the evolving challenges and opportunities facing practitioners, proponents, regulators and decision-makers across the sector.



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Recent Decisions

1.1 NSW Land and Environment Court (LEC)

LEC upholds development control order and requires applicant to demolish and remove structure within 28 days

Hoang v Fairfield City Council [2026]
NSWLEC 1473 by Sherry AC
(4 August 2026)

Read the full decision [here](#)

Background

In *Hoang v Fairfield City Council* [2026] NSWLEC 1473, the applicant purchased an 'expandable caravan' which was supplied as a container. The container and trailer had been craned over the applicant's house and placed into the rear yard before unfolding into a two-bedroom dwelling that was connected to sewer, water, and electricity, and fitted with cabinetry and benches. It remained attached to the trailer but rested on brick piers constructed on site.

The Council issued a development control order (**DCO**) requiring the applicant to demolish and remove the structure, alleging that the structure was an unauthorised secondary dwelling requiring development consent under the *Environmental Planning and Assessment Act 1979* (**EPA Act**).

The key issue for determination was whether the structure was a 'building' with the meaning of the EPA Act for which development consent was required, or instead a 'caravan' and therefore a 'moveable dwelling' governed by the *Local Government Act 1993* (NSW) (**LG Act**).



The parties' submissions



The applicant submitted that the structure met the elements of the regulatory definition of 'caravan': it was moveable (could be disconnected from services, folded up and craned away); it was designed to be capable of being registered as a trailer; and it was a dwelling used for human habitation. On that basis, the applicant submitted that the structure should be excluded from the EPA Act's definition of 'building' with the consequence that the DCO was not valid.



The respondent Council submitted that the structure lacked the necessary quality of portability to be a 'caravan or other van or other portable device', in that it could only be moved by crane, was fixed on brick piers, was connected to services to a degree inconsistent with portability and was intended for indefinite occupation. The Council further submitted that on the ordinary meaning of 'caravan', the structure could not simultaneously function as a vehicle and habitat, but only sequentially as one or the other, and so could not be properly described as a caravan.

Decision



The Court accepted that the structure appeared to be a caravan however found (at [62]) that case authority required that the structure be 'readily and frequently moveable'. Although the structure could be relocated, doing so would require the removal of fitted cabinetry, disconnection of sewer and water services, removal of ceiling ridge capping and rivets, the folding and reconfiguration of the structure, and the craning it over the applicant's house. The structure was accordingly not a 'moveable dwelling', was not excluded from the EPA Act definition of 'building' and thus required development consent.



The Court therefore upheld the DCO which required to applicant to demolish and remove the structure within 28 days.



LEC grants suppression order to protect the location of the nesting and breeding trees of Powerful Owls from being disclosed

Fred Caterson Champions Inc v The Hills Shire Council (No 6) [2026] NSWLEC 89
by Pepper J (24 July 2026)

Read the full decision [here](#)

Background

In part-heard judicial review proceedings challenging the Council's approval of a sports complex at the Fred Caterson Reserve, the parties jointly sought a suppression order in respect of evidence identifying the location of Powerful Owl (**Owl/s**) nesting and breeding trees in the Reserve.

The parties' submissions and evidence

The parties led evidence from a Birdlife Australia project officer who gave evidence of the detrimental behaviour that is known to occur if the locations of the Owl's nest sites are made public. The officer deposed that the Owl is a very popular target for birders, wildlife photographers and social media influencers focused on wildlife and that in recent years, photos of the owls roosting in trees at the Reserve had led to over-visitation, habitat disturbance, damage to nest trees and breeding failures. The applicant's solicitor also gave evidence that Birdlife Australia's *Sensitive Bird Data Policy* was to withhold such location data from public release where it is necessary to protect rare, threatened or endemic species that are highly sensitive to human activities, and that Birdlife Australia had specifically requested the location of the nest sites in the Reserve not be made public as a result of the proceedings. It was submitted that the order was necessary either to prevent prejudice to the proper administration of justice or otherwise in the public interest under ss 8(1)(a) and 8(1)(e) of the *Court Suppression and Non-publication Orders Act 2010* (the **Suppression Act**).

Legal principles

The grounds for making a suppression order are set out in section 8(1) of the **Suppression Act**.

The Court summarised the legal principles relevant to the exercise of the Court's discretion, stating at [10]:

“...each of the exceptions to the basal principle of open justice set out in s 8(1) of the **Suppression Act** is grounded in the notion of necessity. The cases make it tolerably clear that suppression and non-publication orders require significant justification and should only be made in exceptional circumstances.



Decision and reasons

The Court made the suppression order sought. Her Honour was satisfied that publication of the nest locations carried a real risk of harm to the Owls and to public safety (noting that owls were known to swoop when disturbed by people and/or lights) and that the Owls were sensitive and necessarily subject to the Sensitive Bird Data Policy. Her Honour also considered whether some other regime could be implemented to protect the location of the nesting sites however could not conceive of an alternative form of order, given the location evidence was already before the Court.

Given the proceedings were themselves brought to protect the owls and their habitat, the Court held that permitting disclosure would subvert the litigation's purpose and prejudice the proper administration of justice. Alternatively, the public interest in protection significantly outweighed the public interest in open justice. Orders were made suppressing the relevant evidence for five years throughout the Commonwealth.



Contempt proceedings – precision of charges and amendments

Burwood Council v Wu Long Dai (No 2)
[2026] NSWLEC 77 by Pepper J
(24 June 2026)

Read the full decision [here](#)

Background

In May 2025, the Court made orders requiring Mr Dai to demolish an unlawful two-storey structure at his Burwood property (**Property**) within specified timeframes, following findings that the structure breached a development control order and posed a safety risk.

The Council later brought contempt proceedings alleging non-compliance with the Court's orders.

The Council received Mr Dai's submissions the day before the hearing and applied instantly to amend its notice of motion and statement of charge to press non-compliance with one of the orders and abandoning the five (5) other allegations (conceding that the time for compliance with two of the orders had not yet arisen, among other things).

The Court was required to determine whether leave to amend the notice of motion and statement of charge should be granted; in particular, whether the proposed amendment was a permissible minor correction or an impermissible substantial recasting of the charge causing prejudice to the respondent.

The parties' submissions and legal principles

The Council submitted that the amendment simplified the charge by removing the aggregated and ambiguous elements, and that no particulars were strictly required given the nature of the omissions alleged.

Mr Dai opposed the amendment on two (2) grounds, including that:

- a. the amendments were not minor and sought to correct defects in the statement of charge, causing real prejudice insofar as they would deny him the opportunity of setting aside the notice of motion and statement of charge; and
- b. the statement of charge was defective because it lacked particulars and therefore was of no practical value to grant leave to amend it and the motion.



Decision and reasons

In considering the parties' submissions, Justice Pepper emphasised that, given the serious consequences of contempt, a respondent must be given sufficient notice of the precise conduct alleged to constitute the contempt and a proper opportunity to answer the allegation. While a contempt charge does not need to comply with the technical rules applicable to a criminal indictment, it must identify with sufficient clarity the order said to have been breached and the conduct constituting the breach.

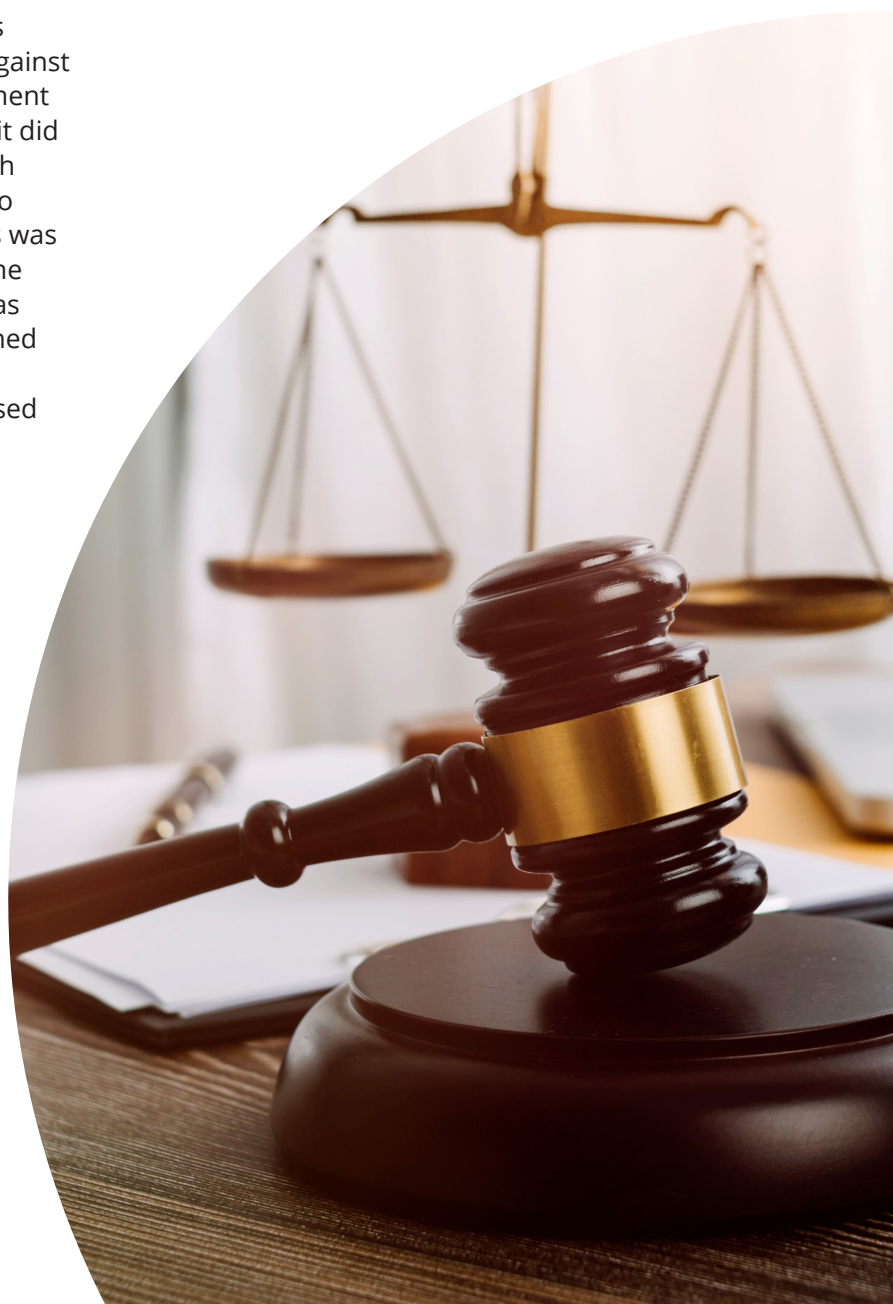
Her Honour held that a charge may be fundamentally defective where it aggregates multiple alleged breaches without adequately identifying the particular conduct relied upon. Her Honour observed that the Court will not ordinarily allow a substantial amendment to a fundamentally defective contempt charge where the respondent has already made forensic decisions based on the original charge and would suffer prejudice from the amendment.

The Court ultimately dismissed the Council's application to amend, with costs awarded against the Council. Justice Pepper found the statement of charge fundamentally defective because it did not distinctly state a discrete charge to which Mr Dai could plead and was ambiguous as to whether the contempt of the Court's Orders was founded on failure to comply with all or some of the orders. The proposed amendment was determined 'substantial' because it abandoned five (5) out of six (6) alleged breaches. It was also determined that permitting that proposed amendment at that late stage would cause Mr Dai genuine prejudice.



Key takeaway

The decision reinforces the need for a Council, when bringing contempt proceedings, to formulate its case with sufficient precision at the outset. The Court will not usually permit an applicant in contempt proceedings to amend a statement of charge which substantially recasts its case after the respondent has conducted its case on the original allegations.



1.2 Court of Appeal

LEC decision to refuse partially acceptable modification application upheld

Etherington v North Sydney Council
[2026] NSWCA 137 by Leeming JA,
Free JA, and Preston CJ (20 July 2026)

Read the full decision [here](#)

Background

The applicants, Mr and Mrs Etherington, held a development consent for the demolition and replacement of a dwelling on the waterfront in Cammeray. They subsequently applied under s 4.55(2) of the Environmental Planning and Assessment Act 1979 (EPA Act) to modify the consent in several respects, including enclosing an existing car parking area to create a garage, constructing pergolas, and raising the height of a swimming pool. The Council approved the modification application in part, allowing only the erection of a pergola (awning) over the small terrace on the lower level of the dwelling. The applicants appealed to the LEC under s 8.9 of the EPA Act. On that appeal, the Commissioner found that some of the proposed modifications were acceptable but nevertheless dismissed the modification application in its entirety. The issue on appeal was whether, having found that some modifications were acceptable, the Commissioner was required to approve those modifications in part.

Decision and reasons

The Court of Appeal (Preston CJ of LEC, Leeming JA and Free JA agreeing) held that the power under s 4.55(2) is discretionary, rejecting the argument that the Commissioner was duty-bound to approve the modification application in part. Once the statutory preconditions to the exercise of the power are satisfied, the consent authority has 'decisional freedom' as to whether and how to exercise the power.¹ This includes the discretion to refuse a modification application in its entirety, even where individual modifications might be considered acceptable or are not opposed by the consent authority. There is therefore no obligation to approve an application in part merely because some of the proposed modifications are acceptable on their merits. The exercise of that discretion is constrained principally by the ordinary principles of legality, including that the decision must not be legally unreasonable.

The Court also rejected the applicants' argument that refusing the acceptable modifications was legally unreasonable. In circumstances where other proposed modifications were considered unacceptable and those modifications represented the more significant impacts of the application, it was open to the Commissioner to consider the application as a whole and refuse it rather than severing and approving individual components.

The applicants were ordered to pay the Council's costs of proceedings.

¹*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [28].

1.3 Federal Court

Federal Court rejects application for permanent injunction over residential subdivision approved under State planning laws

Save Wallum Incorporation v Clarence Property Corporation Ltd (No 5) [2026] FCA 1315

Read the full decision [here](#)

Background

Clarence Property Corporation Limited (**respondent**) owns a 30-hectare site in Brunswick Heads (**Land**). Development consent was granted under the EPA Act to carry out a residential subdivision of the Land (**Development**). On 7 September 2026 the Federal Court of Australia dismissed an application by Save Wallum Incorporation (**applicant**) for a permanent injunction under s 475(2) of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), which sought to restrain the Development without an approval by the Commonwealth Minister for the Environment under Pt 9 of the EPBC Act. In the alternative, the applicant sought to restrain the respondents from carrying out slashing on the Land (**Slashing Works**), which had been conducted on certain parts of the Land over several decades.

The applicant submitted that the development was likely to have a significant impact on several threatened species (the Wallum Sedge Frog, Mitchells Rainforest Snail, Long-nosed Potoroo, South-Eastern Glossy Back Cockatoo, and Koala) in contravention of s 18 of the EPBC Act. It was not in contention that the Development had not been referred for assessment under the EPBC Act.

The central question was whether the development and continued slashing of native vegetation would or was likely to have a significant impact on the five listed species.

Decision

The Court found that the applicant failed to establish that the Development was likely, in the sense of a real and not remote possibility, to have a significant impact on any of the relevant threatened species. Because the Development Works would involve the clearing of native vegetation within the same area as where the Slashing Works were carried out, the applicant accepted that it was only necessary to deal with the Slashing Works if the Development Works were restrained (at [1044]).

The proceedings were complex, involving lengthy and detailed consideration of the impacts on each of the listed species. The Court considered a voluminous amount of expert evidence and was required to make several findings of fact in relation to each threatened species. We do not go into those findings in this summary; however, we set out some of the key legal issues that arose in the decision.

The applicable test

The Court held that applicant did not properly employ the significant impact test in its challenge to the Development, erroneously approaching its evidence and cross-examination by proceeding as if it was sufficient to establish that there was a real and not remote chance of the factual integers underpinning its significant impact claim existing (at [95] – [97]).

Instead of holistically evaluating the impact to determine its significance, the applicant sought to use evidence of separate factual integers taken in combination to amount to

“ *the level of a real chance or possibility, which are compounded, added together and asserted by the applicant to ... support an overall outcome that there's a real chance of significant impact.* ”

The Court held that this approach distorted the statutory test, which requires a single evaluative judgement to be made in respect of each species (as set out in *Save Our Strathbogie Forest Inc v Secretary to Department of Energy, Environment and Climate Action* [2024] FCA 317; 306 FCR 316).

Other findings

The Court found that:

“ *[t]he applicant repeatedly reverses the onus of proof, effectively requiring the respondents to prove that there will be no significant impact on the listed threatened species if particular steps are not taken.* ”

The Court also found the applicant adopted a ‘snapshot’ approach, focusing on the proposed development as if it were a rigid proposal. This approach meant the applicant failed to assess the significant impact on any of the listed threatened species holistically and with regard to the suite of obligations imposed under the applicable conditions of development consent and management plans. The Court accepted that these created a detailed and enforceable management regime with compliance requirements, remedial obligations and performance indicators for each stage of the Development.

Expert evidence

To an extent, the Court’s decision turned on assessment of the weight to be given to the respective expert witnesses called by the parties and the usefulness of their evidence.

The Court placed ‘*little weight*’ on the evidence of the witness for the applicant in circumstance where he had not disclosed ‘*his long history of advocating against the Development*’ and where he had accepted in cross-examination that he saw his expert evidence as ‘*another opportunity to put forward an explanation as to why the development should not go ahead*’ (at [787]). The Court held it could not be satisfied that the witness for the applicant had approached his assessment of diggings impartially and

“ *free from a subconscious desire to validate his longstanding belief in the presence of the LN Potoroo on the Site.* ”

The Court also approached the evidence provided by a second witness for the applicant ‘*with caution*’ on the basis of (undisclosed) indications of a lack of impartiality, and a rigid scepticism of experts engaged by the developer (at [671]). Finally, the Court found that the largely theoretical approach taken by the applicant’s key expert witness, did not assist the Court where there was no data or information on the theory’s application to the circumstances in issue before the Court (at [598]) saying

“ *whether and how the theory might apply here, if at all, is based on pure speculation.* ”



Key takeaway

This decision is a reminder that the onus of proof in seeking a permanent injunction under the EPBC Act lies with the applicant. This contrasts with an application for development consent under the EPA Act (or Class 1 merits appeal) where the onus lies with the applicant to satisfy the Court that the various jurisdictional requirements have been met and the merits of the proposed development warrant its approval.

 **Note:** Sparke Helmore acted for Clarence Property Corporation Ltd in this matter.

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Legislative Amendments

Commonwealth Land (Affordable Housing) Bill 2026

ACT Independent Senator David Pocock introduced the *Commonwealth Land (Affordable Housing) Bill 2026* in the Senate on 2 July 2026, with the second reading speech moved on 2 July 2026. The Bill would make it mandatory for affordable housing to be included in any residential development on Commonwealth land that is sold or leased to private entities. The Bill sets a default level of 30% affordable housing for federal government land sold or leased for residential development but allows another proportion to be prescribed by regulations affording some flexibility to respond to different site types and market conditions.

Read more [here](#).

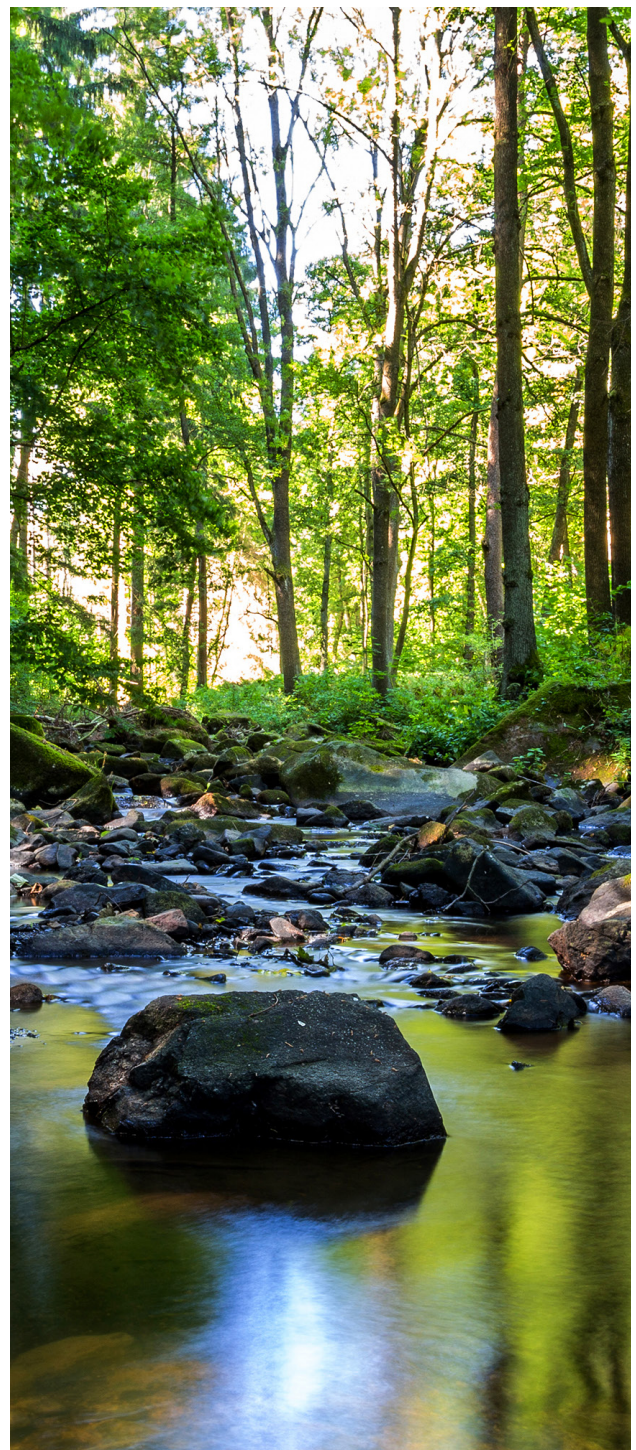


Draft Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Regulation 2026

The NSW Government is developing amendments to the *Biodiversity Conservation Regulation 2017* to improve the Biodiversity Offsets Scheme in line with the NSW Plan for Nature. A consultation paper has been released explaining the proposed amendments which include measures to, among others, strengthen avoidance and minimisation of impacts to biodiversity values and reduce reliance on the Biodiversity Conservation Fund.

Public consultation closed on 17 July 2026.

Read more [here](#).



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Other Industry News

**Yindjibarndi Ngurra
Aboriginal Corporation
lodges appeal in native title
compensation claim**



Yindjibarndi Aboriginal Corporation is appealing the Federal Court's native title compensation ruling, arguing the \$150 million cultural loss award and economic compensation did not adequately reflect the impact of mining on Yindjibarndi Country.

The appeal challenges how economic loss was calculated and seeks compensation for cultural loss linked to social division caused by the mine.

Read more [here](#).



Australia's first National Environmental Standards now in force

Two National Environmental Standards (**NES**) commenced on 21 August 2026 relating to matters of national environmental significance, including data and information. A further two NES commenced on 22 August 2026 relating to environmental offsets and community engagement. The NES are now in place for the making of bilateral agreements with the States, however they will not apply to the assessment and approval of individual projects until additional aspects of the *Environment Protection Reform Act 2025* commence (by 1 December 2026, unless proclaimed earlier).

Read more [here](#).



Chief Justice Preston advocates for broader environmental impact assessments

In his Honour's 2026 Mahla Pearlman Oration paper, Chief Justice Preston reflects on the future of environmental impact and provides an encouraging contribution to the conversation about how we can create more holistic and meaningful environmental decision-making.

His Honour recommends ten approaches of seeing the environment that challenge and change how the environment is perceived, including for environmental impact assessment

to have recourse to non-cognitive knowledges, such as aesthetic and perceptual knowledges.

Read more [here](#).



Building (Approvals and Practitioners) Bill Passed

On 4 August 2026, the *Building (Approvals and Practitioners) Bill* passed both houses of Parliament. The NSW Government characterises the reforms as streamlining project approvals and supporting the uptake of modern methods of construction.

Read more [here](#).



Proposed New Councillor Conduct Framework



In 2025, the NSW Government proposed amendments to the LG Act by way of the *Local Government and Other Legislation Amendment (Councillor Conduct) Bill 2025 (Conduct Bill)*, which proposed the escalation of some Code of Conduct matters to the Land and Environment Court. Although not yet passed by either House of Parliament, it is expected that the changes to the LG Act proposed by the Conduct Bill will commence later this year. Further reform has also recently been released for comment comprising a new policy statement and draft Councillor Code of Conduct.

Read more [here](#).



Statewide Community Participation Plan

The NSW Department of Planning Housing and Infrastructure's new Statewide Community Participation Plan came into force on 1 September 2026, replacing each local council's existing unique community participation plan.

Read more [here](#).



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