

Hot topics

Gabrielle Bashir SC
Forbes Chambers

As this issue goes to print, we have just experienced the hottest July on record for the Greater Sydney region, with mean daily maximum temperatures around 2-3 degrees above their monthly averages at most sites, the hottest July on record for Tasmania and amongst the highest mean daily maximums ever recorded in July for the States of NSW, Victoria and South Australia. July 2023 also saw scorching temperatures in southern Europe attended by wildfires in several locations. It is timely that this issue addresses what is, in the words of Bret Walker SC, 'the hottest of hot topics', and which recently retired Allsop CJ described as 'the possible catastrophe that may engulf the world and humanity'. The seriousness of the threat is one that demands attention through legislative action, national and regional policy changes and various modes of responsible litigation. This issue explores these pertinent topics.

The New South Wales Land and Environment Court is at the 'coalface' of environmental, social and governance litigation, with positive impacts from judicial review of performance of statutory duties demonstrated in the landmark decision of *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92, where the Chief Judge of that court, Justice Preston, in August 2021 ordered the NSW Environmental Protection Authority to perform its statutory duty and develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change in NSW. This edition includes articles explaining recent and emerging national and international jurisprudence in relation to delegated legislation, treaties and accountability in the exercise of executive powers and responsibilities. Regulatory and private law actions are also afoot asserting misleading and deceptive conduct in breach of s 1041H of the *Corporations Act* and relying on s 12GF(1) of the *ASIC Act*, and s 236 of the *Australian Consumer Law*.



The NSW Bar with the assistance of our Climate Change Committee and input from our Commercial Law Section made a detailed submission to federal Treasury in relation to 'Climate-related financial disclosure' outlining the significant benefits of laws aligning with current international climate reporting practices for corporations, in order to assist corporate entities and officers to both meet their disclosure obligations and minimise risk.

AI is changing the field of environmental law with leaps in data processing allowing faster results in tracking the progress and monitoring of environmental impacts. Data analytics are also being used along with audio monitors to recognize sounds linked to illegal activities such as logging and poaching. Sonar captures, coupled with AI,

are now able to filter out other known sounds in order to locate endangered species. These advances have the potential to significantly impact litigation in the near future, with the Land and Environment Court likely to be a vanguard for the beneficial uses of AI.

There are still rapidly developing spheres of AI and the publication of *Issues Arising from Use of AI language models in Legal Practice* serves as a reminder of the highlights the pitfalls and risks associated with the current evolutions of models such as Chat GPT. We must always ensure that our ethical responsibilities, including independence, competence, diligence, integrity and obligations of confidentiality and privacy, guide consideration of whether to use and any consequent use of AI language models and other AI data sets in litigation.

We have successfully completed another year of practising certificate renewals which is a monumental undertaking at the end of the financial year. The numbers of barristers remain at steady levels, with 2393 practising barristers this year. A majority of chambers have adopted the updated Model Best Practice Guidelines on Harassment, Discrimination and Bullying and we are currently compiling data from the voluntary survey sent out with practising certificate renewals, including in this area. A further round of bar examinations is also complete, with a new cohort of talented practitioners soon to commence the August/September Bar Practice Course. The end of June has also seen a changeover in the constitution of our Committees. On behalf of the Bar Council, I express our gratitude to our outgoing Chairs, Deputy Chairs and Committee members for their contributions and extend a warm welcome to our new Chairs, Deputy Chairs and Committee members.

Our Accessibility Panel and representatives from the Law Society recently co-chaired the first meeting of the Court Accessibility User Group with both Federal and State courts. The user group aims to improve access to courts and breakdown barriers to participation by court users with disability. This is one of a number of user groups in both Federal and State courts that have either been established or re-invigorated as we emerge from the pandemic. User groups are a valuable means of facilitating dialogue between the profession and the Court to assist with the smooth running of practice and procedure and discussion and implementation of proposed and necessary changes.

The Bar also contributed to the Law Council of Australia's submission on the current Parliamentary Inquiry into Australia's Human Rights Framework. The submission expressed the Association's support for a Federal Human Rights Act, and discussed

the desirability of recognition of a right to a safe, clean, healthy and sustainable environment. We have contributed feedback to the Law Council's best practice guides for legal practitioners in relation to Elder Financial Abuse and Assessing Mental Capacity. These resources have now been published on the Law Council's website and provide invaluable assistance to practitioners astute to financial abuse in relation to the execution of wills and ensuring capacity in advanced planning documents.

In June comprehensive submissions were lodged, strongly opposing the extension to barristers of the Federal government's anti-money laundering and counter-terrorism financing proposals for mandatory reporting. Extending such a regime to barristers would be a disproportionate and unnecessary response to the perceived risks the regime aims to address. It would present unacceptable conflicts in the discharge of a barrister's professional obligations. The significant administrative and financial burdens of such a regime for sole practitioners, who in the majority of cases are receiving fees from solicitors themselves subject to such a regime, would also increase costs for clients and limit access to justice. We will continue to monitor these reforms and any other proposals which threaten to water down obligations of confidentiality or impose unwarranted administrative or financial burdens on barristers.

It would be remiss not to mention the regulatory aspect of our responsibilities and the diligence of our professional conduct committees (PCCs). In the last financial year 71 complaints were received and 76 resolved. A large majority of matters were ultimately resolved with the complaints found to be lacking in substance or not requiring further investigation. Currently there are 83 open complaints. Our Professional Conduct Department regularly reviews all

matters to ensure that our processes for streamlining timelines for the resolution of complaints are being implemented. We have noticeably reduced the time to resolution for most cases. We recognise that unnecessary delays can cause increased anxiety for involved parties and will continue to endeavour to both apply procedural fairness and to deal with complaints as efficiently as is permitted by the voluntary PCC system.

It has been an exceptionally busy time, however the sunset of this term of the Bar Council promises no light pace with the silk selection process afoot again, the Sybil Morrison Lecture in honour of Acting Justice Carolyn Simpson AO KC next week, the Bathurst lecture to be delivered by Chief Justice Andrew Bell in September, the Sir Maurice Byers address to be given by Bret Walker AO SC in October, several conferences in the meantime, and the continuation of the ordinary business of policy, financials, practice development, wellbeing, education and regulatory work. BN

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