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Welcome to the May/June edition of elaw.

This month we look forward to the annual conference on the 'Interaction between Energy and Environmental Law' kicking off in Edinburgh on 20 June. The conference promises to be both informative and entertaining with a packed programme of plenary sessions worth 7.5 CPD points, keynote speakers, and social events. If you've never experienced a Ceilidh before, now is your chance!

Angus Middleton highlights the excitement of this Scottish dance in his account '[Ceilidh: a whirling of the kilts and a flashing of the sashes!](#) If you haven't booked already there are still a limited number of conference places available, but you will need to act quickly before bookings close. For more information, [see the events section](#).

This edition we have articles contributed by David Elvin QC on the new planning court, and Alec Samuels on nuisance. We also have a feature article by Nicky Chambers on what is required to create a circular economy, ie a restorative economy that reuses material rather than disposes of it as waste. Nicky covers the progress that has been made so far and the role that policy and law have to play in establishing a truly circular economy. See Nicky's article '[Creating a circular economy](#)'.

What can we do to promote a circular economy? Angus Middleton highlights a fantastic opportunity for UKELA members to get involved with forward-thinking multinationals, academics and NGOs to work towards developing a new economic system. UKELA's role will be to investigate how legislation, statutory guidance and policy instruments help or hinder the OE. If you are interested in being part of this new working group, please contact Angus. For more information, see Angus' article '[The brave new circular economy: Your UKELA needs you!](#)'.

If you're interested in waste related matters please read this month's [spotlight on the waste working party](#) led by Angus Evers and Peter Harvey. It really is one of the most engaging and active working parties, and they're always keen for new members.

Best wishes,

*Hayley Tam*

Hayley Tam  
[elaw@ukela.org](mailto:elaw@ukela.org)

## Words from the Chair

This edition of e-law provides you with a number of opportunities. It points to your right to vote for members of UKELA's Council. It points to the last couple of spaces at the Annual Conference in Edinburgh, which will itself be full of opportunities. It also points to the changing approaches in managing those environmental cases which find their way to the Planning Court (see David Elvin QC's article '[Briefing on the new Planning Court](#)').



During the second half of 2014, UKELA will be working on two particular areas of its operation to provide more opportunities. Firstly, it will be updating the way that members and the organisation interact via the various media which we have to hand. We aim to make the 'content' which is sometimes hidden away within one part of UKELA or another more easily accessible and available more widely. Secondly, and with similar thoughts in mind, the working parties will be looking at how their considerable expertise and know-how can be spread more widely. If you have thoughts about either or both of those two topics, please do mention them to Linda Farrow, to me or to any member of Council. If that is over a single malt in Edinburgh, all the better.

Richard Kimblin

*Richard Kimblin*

UKELA Chair

# News

## AGM 2014

The Annual General Meeting of the Association will be held at the UKELA Annual Conference at Edinburgh University at 5.30pm on Friday 20 June 2014. All members have been sent the agenda and minutes of the AGM 2013, but if you have not received this please contact [Alison Boyd](#).

## Council Elections 2014

Please look out for your opportunity to vote in this year's Council elections. You should by now have received details of how to vote in the Council elections for 2014. There are four candidates this year – John Jolliffe, Kenneth Ross, Ben Stansfield and Ned Westaway. Voting is conducted on UKELA's behalf by an independent organisation, Electoral Reform Services, and they have sent all voting members an email with a link to the voting site. Please do take a moment to cast your vote as your views are important to us. The results of this year's election will be announced at the AGM in Edinburgh and in the next edition of e-law.

## Recyclists 2014

The intrepid band of Recyclists – made up of barristers, solicitors, consultants and students from within UKELA's ranks – is cycling from Morpeth to Edinburgh over two days (120 miles) to arrive in time for the Friday start of the Annual Conference. Please sponsor them on [mydonate](#) – all proceeds to UKELA. Thank you!

# Working party news

## Working Party Star Member

We are delighted to award Star Member status for April/May to Elizabeth Tainsh of the Scottish Law Working Group.

Elizabeth is a Planning and Environmental solicitor and is a member of the Renewable Energy, Environment, and Planning Teams at Tods Murray. She previously worked as a corporate solicitor at the Scottish Environment Protection Agency (SEPA) with a focus on flooding matters and was heavily involved in working towards the publication of SEPA's new flood hazard maps, as well as liaising with other public sector and commercial bodies to achieve successful collaboration and results. Elizabeth also advised on the Environmental Information (Scotland) Regulations 2004 and data protection requirements. Prior to working for SEPA, Elizabeth worked in private practice focusing mainly on planning and environmental law.



Elizabeth has been awarded Star Member for stepping forward to write a very thoughtful and comprehensive response to the recent consultation on a Scottish Regulators' Strategic Code of Practice, and pushing to get as much input from members as she could. You can find out more about the Scottish Law working party and read the response on the [group's web page](#).

## Spotlight on the Waste Working Party

**Peter Harvey and Angus Evers**



The Waste Working Party is co-convened by Angus Evers of King & Wood Mallesons SJ Berwin and Peter Harvey of Practical Law. We are one of the most active Working Parties with 47 members and are particularly pleased that we have strong representation from industry regulators, in-house lawyers and scientific experts. This helps greatly in guiding us through this technical subject.

The remit of the Waste Working Party is to monitor, understand and influence the creation of waste management law, as well as being UKELA's mouthpiece on waste management law matters. Increasingly, this also includes resource efficiency issues. We regularly respond to consultations relating to waste, as well as cross-working party subjects, such as the Sentencing Council guidelines for environmental offences (many of which relate to waste).

We have at least four meetings a year, which include seminars on topical subjects and updates on case law, new regulations and consultations. To give you a flavour of some meetings:

- Jenny Scott of the EA spoke on the definition of waste and her work with the End of Waste panel, which considers when any particular waste has been turned into a useful product.
- We began one of our meetings with a site visit to a waste transfer station using barges to transport waste out of the City of London.
- Gordon Wignall of No.5 Chambers gave a practical talk on waste enforcement under the Environmental Permitting Regulations and issues relating to waste exemptions.
- At our last meeting, we discussed subjects as varied as the EA's migration to the GOV.UK website, problems of permitting under the Industrial Emissions Directive, as well as the latest waste case law and regulations.

If you would like to join the working party, do please get in touch with Angus or Peter. The Working Party is always keen for new members to get involved, come to meetings and share their views on consultation proposals and developments in this field. At the UKELA Conference in Edinburgh on 21 June there will be a great opportunity to attend our session on applying the Sentencing Council guidelines to waste offences, and transfrontier waste shipments.

More information on the working party is available on the [Waste Working Party's webpage](#).



# UKELA events

## Environmental Law webinar series: Contamination – 6 June

The next in a series of environmental law webinars jointly hosted by UKELA and LexisNexis is on Contamination. Each webinar will be broadcast live from 15.30-16.30, and will then be available to purchase on demand for 12 months after this date. The speakers for contamination are Paul Davies (Macfarlanes), Jamie Mills (ENVIRON), Alana Lampitt (A&O) and Stephen Tromans QC (39 Essex Street). For more information, visit our [website](#).

## Young UKELA seminar on International Wildlife Crime and Protection – 10 June

We are delighted to invite you to this topical early evening seminar organised by Young UKELA and run in conjunction with UKELA's Nature Conservation Working Party and the Sumatran Orangutan Society on the subject of international wildlife crime and protection both in the UK and overseas. Speakers from Defra, the Wildlife Crime Unit and the Environmental Investigation Agency will update on recent developments. For more information, visit our [website](#).

## Annual Conference: The Interaction between Energy and Environmental Law – 20-22 June

Bookings are still open for the annual conference, which this year takes place at Edinburgh University in June, but will close shortly. We have a packed programme of plenary sessions and social events lined up including a keynote speech from Euan McVicar, General Counsel of the Green Investment Bank and an after dinner address from Lord Hope of Craighead, former Deputy President of the Supreme Court of the UK. Please note that up to 7.5 CPD points are available. For more information, visit our [website](#).

## Environmental Law webinar series: Permitting and Enforcement – 26 June

The next in a series of environmental law webinars jointly hosted by UKELA and Lexis Nexis is on Permitting and Enforcement. Each webinar will be broadcast live from 15.30-16.30, and will then be available to purchase on demand for 12 months after this date. For more information, visit our [website](#).

## UKELA/GLS/BIICL joint seminar on The Polar Environment: policy, legal and scientific perspectives – 23 July

We are pleased to team up with the Government Legal Services Environment Group and the British Institute of International and Comparative Law to present this seminar on the polar region on 23 July at 6pm-7.30pm. Jane Rumble, Head of the UK Polar Regions Unit, FCO, Jill Barrett, Senior Research Fellow in Public International Law, BIICL, and Jennifer Jackson, British Antarctic Survey will be speaking at the event. Attendance is free however to reserve your place please email [eleonor.fletcher@defra.gsi.gov.uk](mailto:eleonor.fletcher@defra.gsi.gov.uk). Places will be allocated on a first come first served basis. More information will be available on our website shortly.



## Diary dates & Non-UKELA events

Water Working Party seminar on Flooding – 29 September

Details for this half day event will be available soon.

Castle debate on Planning Law Reform on 17 June.

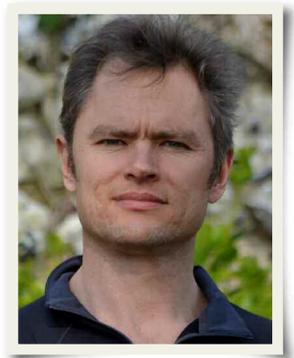
For more information, see the [Castle Debates website](#).



## Ceilidh: a whirling of the kilts and a flashing of the sashes!

Angus Middleton

*“There’s nae sight to mak ye hyte, than a ceilidh fantoush, wi’ the lassies bonnie and the lairds a’ sproush”*  
Entirely apocryphal Highland saying



There are moments at every UKELA conference when it is beholden upon us to be serious and behave sensibly, but fortunately the ceilidh is not one of them. This is a time for high spirits, high jinks and even high kicks! And if you don’t know a Scottish dance from a dervish’s whirl, well don’t worry as you’ll be in good company. It is almost guaranteed that the only person in the room who knows all the steps will be the caller – hopefully, at least – and the measure of your moves will not be their accuracy but in the gusto with which you try them.

Life is made even easier because it is not all about stripping willows, Gordons being gay and white sergeants dashing around. Oh no. There is many a polka, waltz, reel, jig and even masquerade to be had, so something for everyone!

Ceilidhs are rightly famous for their fun and lack of restraint. Once over your initial nervousness, you will find that the music picks you up and dashes you irresistibly into the dance, to twirl and fly across the floor with old friends and new faces. You get lost in the energy of the moment, laughter bursting from you at the joy of fluid movement, the nonsense of disastrous mistakes. Toes are stepped on and hands fail to clasp, but occasionally the whole floor moves in perfect choreography and the achievement is immense. It’s a high that lasts a long time. Afterwards, you will find it hard not to smile at the great many people whom you joined at the exuberant revels.

The ceilidh will be THE event of the weekend, the talk of the conference and possibly even the gathering of the year. Well, possibly.

So, come clad in kilt, skirt, trews or nae tartan at all, but come to the ceilidh and have a ball!



# 60 second interview

## James Maurici QC



### What is your current role?

I am a barrister at Landmark Chambers. I was called to the Bar of England & Wales in 1996 and the Bar of Northern Ireland in 2009. I was appointed Queen's Counsel in 2013. I practice in planning; environmental law; and public law. I was a member of the Attorney-General's London Panels of Junior Counsel to the Crown from 1999-2013.

In June 2008 I was elected to the Council of UKELA. I am also on the Executive Committee of UKELA with special responsibility for links with PEBA, the Garner Lecture, and UKELA development in Northern Ireland. I have chaired the organising committee for the UKELA annual conference in 2012 and 2013; and will be chairing it again for 2015 (Liverpool).

### How did you get into environmental law?

By complete accident; I came to the Bar with the intention of practising in public law. I was lucky enough to get a tenancy at 4 Bream's Buildings (which later became Landmark Chambers) and so inevitably started doing planning work, which I found I really enjoyed. One day, quite early on in my career, I was instructed by Defra on an end-of-waste case and my environmental practice built from there.

### What are the main challenges in your work?

I think it is probably the sheer volume of modern environmental law: legislation, guidance and case-law. My particular bugbear still being (despite recent efforts to deal with this) the proliferation and length of guidance documents in the environmental field. Often the mere printing out of such documents is (or should be) a crime against the environment.

### What environmental issue keeps you awake at night?

How we can feed sustainably the world's growing population without seriously damaging the environment.

### What's your UKELA working party of choice and why?

Environmental litigation; it raises the issues that impact most on my practice and the discussions are always engaging and interesting as the working party attracts a wide variety of (often conflicting) interests. Also the issue of costs in environmental law litigation has been at the heart of my practice for years now and the Environmental Litigation working group has tracked closely these issues.

### What's the biggest benefit to you of UKELA membership?

The networking – the chance to meet and discuss issues with like-minded people; also the very wide range of excellent lectures and seminars. And, of course, the annual conference.

# Contributed articles

## Creating a circular economy

Nicky Chambers



### At a glance

- Minerals and other raw materials are becoming ever more expensive as they become harder to extract.
- Using waste as a resource for further production would improve profit and reduce risk to UK PLC.
- This circular approach to materials – reuse rather than disposal – is being championed by progressive companies, but is still in its infancy.
- The circular economy can only be achieved by widespread collaboration and this can only occur with changes to policy and regulation.
- UKELA is ideally placed to identify and champion the policy changes that are needed to take the circular economy into widespread adoption.

*“It is today that we must create the world of the future” – Eleanor Roosevelt.*

There is much debate in the world of sustainability about the relatively newly coined ‘Circular Economy’, also often referred to as the closed loop economy. Waste and recycling policy has traditionally been driven by a shortage of landfill space and concerns about pollution. More recently, we have realised we live in a resource constrained world and that we need to move from a linear approach to materials (mine, consume, dispose) to a circular one (re-use, refurbish, remanufacture, re-cycle).

My very first professional job interview was with the National Association of Waste Disposal Contractors in 1989. The job was for an environmental policy officer. Fresh faced from two environmental degrees, I went in heavy on the opportunities for the waste industry around moving from waste to materials and from disposal to recycling. My interviewer, ‘tsk’ed at me and assured me that recycling was a waste of time because in 30 years’ time ‘we’ll be mining the landfill sites and the more stuff in there the better’. He retired shortly after. I didn’t get the job and he’ll probably have the last laugh. I still feel vaguely compelled to slip something valuable into the waste container labelled ‘for landfill’ for someone to mine later.

Over the years, in a policy framework that has attempted to minimise pollution, a great deal of effort has gone into pinning down definitions for waste. When is a waste a waste and when is it a resource? There is now a definite change in sentiment that we need to treat all waste as a resource. As they say, ‘waste should always be used as a verb rather than a noun’ and that materials have, often considerable and increasing, value.

Enter the terminology ‘Circular Economy’. There is much debate in the sustainability community and more progressive elements of society about a closed loop economy, circular economy, recycling, upcycling, collaborative consumption, etc etc. But how far are these concepts being implemented and operationalised?

## Businesses closing the loop

Some sectors have been closing the loop for years, either for direct commercial reasons or in an attempt to secure control over their supply chain. The aluminium industry has been promoting a closed loop system for decades and is starting to reap the marketing benefits of high recycled content with, for example, the Novellis Evercan. The steel industry has also been successful in raising recycled content of everyday steel to between 50 and 60% – depending on which numbers you believe. Coca-Cola’s joint venture with ECOPlastics to collect and recycle PET into food grade rPET is a newer example of a similar concept and has not only won Coke greenie points but has also gone some way to securing its supply of packaging raw material.

Now, more unexpected businesses are starting to take note and indeed take action and



# Contributed articles

are experimenting with how this might affect their operations and business models. M&S have launched 'Schwopping' encouraging consumers to take unwanted clothes to be re-homed via Oxfam. H&M have perhaps gone further with a garment collection initiative promising to reuse, repurpose or recycle the garments, and a 'Conscious' range of clothes, some of which contain recycled fibre.

Businesses in sectors as diverse as white goods and light commercial vehicles are increasingly adopting innovative business models, such as asset life extension through refurbishment or remanufacturing. ZipCar and Air BnB (last month valued at \$10bn after only 6 years in business!) are bringing the concept of collaborative consumption or 'the sharing economy' to life. While these aren't strictly examples of closing the loop they illustrate the role of business in the move towards getting more from less.

## How far are we along the path to a circular economy?

In contrast to the growing list of individual corporate initiatives, an enlightening study from Resource Revolution 'Making the Circular Relevant – a business blueprint' has shown how wide the disconnect still is between experts and mainstream business and between leaders and the rest of the pack. Most businesses surveyed for the report felt that their understanding of circular economy principles was high whereas the experts surveyed rated business understanding as low.

The report also identifies differences in understanding between experts and practitioners on barriers to making the concept a reality. Business felt the challenges include:

- lack of time and resources
- accessing data on resource flows/risks within the supply chain
- engagement within the supply chain, and
- implementation of more effective procurement strategies

While practitioners thought that Board level buy in and creativity to deliver the vision were least challenging.

In addition to those issues identified in the research, our experience of working with progressive clients is that many of the barriers can't be solved by a single player in the market. There is a need for systemic change as well as individual aspiration. A single buyer in a long and complex supply chain is never going to radically change that supply chain through voluntary action. Pre-competitive action and voluntary approaches can go some way to cooperating for systemic change and initiatives such as WRAP's Product Sustainability Forum aim to facilitate this. But more is needed if the 'Resource Revolution' is going to happen.

## The role of policy and law

Policy initiatives in this area have been sorely and noticeably missing. While practitioners focus on the day to day there is strong consensus amongst experts that there is a need for a consistent policy framework that provides structure, direction and incentives to organisations that will actually deliver the circular economy. We need policy instruments which make it easier and more worthwhile to refurbish or remanufacture something than to send it to landfill or to export it.

Making better use of the materials in the economy is becoming a competitive issue where the winners will be those extracting the maximum value from the minimum resource base. The cost of commodities has almost tripled in the last 10 years (Ellen Macarthur Foundation Project Mainstream) making the £3.8 billion worth of resources sent to landfill each year (The Green Alliance) a prize worth having in its own right. But there will be a need for transitional investment in new systems and processes to get the economy in shape for the circular economy.

We don't yet have the remanufacturing and refurbishment capacity to make the transition to a circular economy and this will require investment in a new system – reprocessing infrastructure, collection systems, quality assurance controls. For investors to have the confidence to invest we need that cohesive policy framework. We have seen how uncertainty around UK energy policy has hampered investment in renewables infrastructure. It would be a similarly missed opportunity if the same were to befall the transition to a circular economy.



## What might be included in that policy framework?

The Circular Economy Task Force under the stewardship of the Green Alliance sets out a range of actions and government interventions in their Resource Resilient UK report. A number of interventions are proposed to overcome the three key barriers to a circular economy – mispricing of risk, split incentives and lack of recovery infrastructure. They range from a landfill ban, to preventing products and materials from going to waste, right through to legislation on product design.

What is perhaps striking about the Task Force's report is that little of it is wildly radical or new, with many of the proposed interventions being tried and tested in other countries. Landfill bans, for example, have already been successfully introduced in countries such as Sweden, Germany, the Netherlands and Scotland. Environmental Product Declarations (EPDs) are already used by business to communicate product credentials.

## Overcoming barriers to progress

What then, are the barriers to progress and how might they be overcome? While political will (or the lack of it) is an essential ingredient, I think two other elements are missing.

Firstly, it is very difficult to envisage the future, especially when it might be radically different. Without a clear vision of 'what good looks like' it is hard to know which direction to go in order to get there. While those working on projects such as 'The Great Recovery' supported by the RSA and Technology Strategy Board are doing really great work, there is still much to be done. Nevertheless I'm delighted that increasing numbers of imagineers are emerging within Anthesis' clients and are enthusiastically joining the journey.

Secondly, as yet we have no relevant metrics on the performance of the UK economy when it comes to resource productivity. This serves both as a reminder that the issue has lacked the attention it deserves and as a barrier to progress – you can't manage what you don't measure. We don't currently have the right dials on the dashboard. We need better metrics and indicators not only to ensure that we are heading in the right direction but also to help us decide what is the most efficient pathway to get us there. We need productivity metrics to help us make decisions about where best to invest to get the best return on that investment as well as the quickest journey to the desired destination.

The recent 'Sweating our Assets' report from the Conservative Party sustainability group 2020C has a refreshing approach. It looks at the resource productivity issue from the mainstream view of economic efficiency and what needs to be taken into account as we redesign the economy that will take us out of recession. As well as revisiting the dangers of relying on the 'rather old fashioned' indicator of GDP, Laura Sandys one of the authors of the report is 'intrigued that there is more interest in labour productivity than resource productivity'. The report calls for, among other initiatives, the establishment of resource productivity and efficiency metrics and points out that the UK Government has previously acknowledged that they are lacking. As a resource metrics person, I couldn't agree more!

The key word in the last paragraph is 'mainstream'. If we are to transition our economy and society to one that is really fit for the 21<sup>st</sup> century, the key success factor will be how well we mainstream issues that have previously been seen solely as the domain of 'environmentalists' or sustainability experts. It is time that our reliance on natural resources is recognised as fundamental to UK prosperity, quality of life and wellbeing. Legal and policymaking professionals have a key role to play in that transition and UKELA has a vital role in bringing together the different disciplines of environment and law. The roundtable on circular economy seems like the perfect vehicle for the journey.

*Nicky Chambers Co-founded the well-known sustainability consultancy Best Foot Forward which is now part of Anthesis Consulting Group where she is now Strategy Advisor. Nicky co-founded and was CEO of Best Foot Forward, one of Europe's leading sustainability consultancies, from 1997 until it was acquired by Anthesis in 2013. She has played a leading role in theoretical, policy and practical advances in sustainability for over 25 years and has a particular passion for new business models. She helped future proof numerous blue chips and brands and is most frequently heard to ask 'What does good look like?'*



# Contributed articles

## The brave new circular economy: Your UKELA needs you!

Angus Middleton



### At a glance

- There is a golden opportunity for UKELA to become a guiding member in forging a new economic system, one that is likely to become the norm within ten years.
- We can join with forward-thinking multinational corporations, academics and NGOs to drive forward the circular economy (OE), changing the very concept of waste and revolutionising the way materials are sourced and products are manufactured.
- This could offer huge benefits to UKELA and exciting opportunities to its members. But we need your help to make this happen.

### Background

There has been growing interest over the last few years in changing the traditional economic process of make-use-discard into a circular approach, whereby waste is reused as resource. The main driver is economic prudence: increasing profits, reducing business risk and decoupling growth from primary resource consumption.

Currently, less than 3% of the 600m tonnes of material pumped into the UK production chain each year remains as 'stock' after six months. Much of the rest remains in use as product for some time, but a very large minority is discarded as waste within this timeframe. Simple resource efficiency would save UK business an estimated £20 billion annually.

The World Economic Forum states that fundamental economic change is necessary and "relying on efficiency gains alone will not be enough to meet global demand: the context calls for systemic changes, and in that respect the switch from a linear to a regenerative circular economy provides credible and quantified perspectives. The potential for innovation, job creation and economic development is huge: estimates indicate a trillion dollar opportunity, and numerous global trends suggest the time is ripe for this sea change".

### Circular Economy Landscape

Several organisations have been researching the OE over the last couple of years, including:

- The Green Alliance, under the title of Circular Economy Taskforce, who have published research such as the Resource Resilient UK of July 2013.
- The Ellen MacArthur Foundation, who are entirely focused on the OE. They carry out research, assist with education programs, and have publications such as Design for Remanufacture of November 2013.
- The Aldersgate Group, who are new entrants in the OE arena. They focus their energies into a campaign called 'An Economy That Works'.
- The manufacturers' association EEF, who have been looking into practical aspects of OE, with a focus on improving business for their members.
- The RSA, who is active in the OE with their Great Recovery project, which has been running for 18 months and has just launched Phase II. They are closely involved with the Technology Strategy Board.

# Contributed articles

All of the above have undertaken stakeholder enquiry and evidence gathering, so are to varying degrees based on practical experience and real-life scenarios. The EEF and RSA appear to be more concerned with practical application than the other three. They all focus on economic, social and mechanistic aspirations, with varying degrees of discussion about application for manufacturers, retailers and other businesses. There is little comment on legislation and its impact on the OE, other than obvious issues such as waste.

## UKELA and the OE

All of the organisations above have expressed interest in UKELA investigating how wider legislation, statutory guidance and policy instruments help or hinder the OE. This could be used to identify the most efficient ways to engender the OE: the least amount of change necessary and areas of least inertia.

It is envisaged that this process would commence with a round-table discussion between some of the above parties, apart from the Ellen MacArthur Foundation as they do not have available resource to participate. The discussion would focus on creating a route-map for promoting the OE, so that UKELA can identify and focus effort at relevant milestones. The research will be reported back to the round-table group periodically and the process repeated iteratively. The Science and Technology Select Committee is interested in the OE and Lord Krebs has suggested we open discussions with them once we are actively underway.

The disciplines involved with our research will go far beyond environmental law and so will require broader collaborations. The exploration has yet to start in earnest, but it seems likely hot topics will include taxation, definition of waste, certification of reuse and remanufacture, producer responsibility, packaging regulations, intellectual property, competition rules and guidance to government departments (such as procurement).

This will be the first such discussion between the parties and the first creation of an overarching route-map to the OE. UKELA has the opportunity to take a central place in creating the new economic framework, with all the benefits to reputation and reach that this brings.

We need members and external collaborators to get involved with UKELA's pivotal role in making the OE a reality. If you or someone you know is interested in being a part of this important and fundamental shift in our economy, please email [angus.middleton@landmark.co.uk](mailto:angus.middleton@landmark.co.uk). We will then hold an inaugural meeting to apportion roles within the working group and understand the degree of commitment each person can offer. Once we have structured the working group, we will contact the organisations mentioned above and schedule the round-table discussion at which we can agree a detailed plan of action.

If we get this right, almost nothing we use at work, rest or play will ever be thrown away again: it will just come around as part of something new. Without wishing to be melodramatic, this really is about changing the world in which we live. I look forward to hearing from you!

*Angus Middleton is a director at Landmark Information Group, which specialises in environmental and geographical analysis. He studied Geology and Geophysics at Durham then Engineering Geology at Leeds, more recently becoming a Chartered Environmentalist. He has been an environmental consultant for over 20 years, with a brief sabbatical in the City applying his expertise on risk.*



# Contributed articles

## Briefing on the new Planning Court

David Elvin QC



### At a glance

- The new planning court came into existence on 6 April 2014.
- It aims to deliver faster hearings with experienced judges.
- There will be tighter timetables for 'significant cases'.

### Background to the new court

The MOJ opted to create a new planning court as a specialist list in the Administrative Court following its *Judicial Review: proposals for further reform* paper (6 September 2013, Cm 8703), in which it suggested enlarging the Lands Chamber in the Upper Tribunal to make a new planning and land court, with the object of speeding up planning and related cases. This builds on the "planning fast track" set up in mid 2013 with the objective of speeding up the resolution of planning cases.

The new court was announced in the 2014 Budget Speech with the publication of new rules and a practice direction speedily following. From 6 April 2014, planning-related judicial reviews and statutory challenges are dealt with in a specialist list within the Queen's Bench Division.

The new rules are not lengthy and are contained in the new CPR Part 54 Part II, comprising:

- Part 54.21 to 54.24 by the Civil Procedure (Amendment No.3) Rules 2014 (SI 2014 No. 610) (brought out so speedily that the published rule 54.21(2)(a)(ix) was incomplete), and
- a new Part 54E Practice Direction.

The new Court is under the direction of the Planning Liaison Judge appointed under Part 54.22.2, which is Lindblom J. who was the judge with responsibility for the earlier fast track.

### Jurisdiction

Although named the Planning Court, the new court has a wide responsibility for planning, local government and environmental challenges. Under Part 54.21(2)(a) a wide spectrum of cases is to be included within the jurisdiction of the new Court including:

- planning and enforcement issues, other development consents, and the enforcement of other statutory schemes;
- applications under the Transport and Works Act 1992;
- wayleaves;
- highways and other rights of way;
- compulsory purchase orders;
- village greens;
- European Union environmental legislation and domestic transpositions, including assessments for development consents, habitats, waste and pollution control;
- national, regional or other planning policy documents, statutory or otherwise; or
- any other matter the judge appointed under rule 54.22(2) considers appropriate.

The new [court website](#) contains further useful information.

The new CPR Part 54 Part II is part of the general judicial review rules so it appears that the procedure will generally be that followed in the Administrative Court except to the extent modified by Part II and the Part 54E PD. The new rules apply from 6 April. The website notes:



# Contributed articles

“Any claim lodged in the Administrative Court before 6 April 2014 and yet to be determined will be transferred to the Planning Court after that date. The amended Civil Procedure Rules will then apply to the claim from the date of transfer.”

## Resolving planning cases quickly

The objective of the new court is that cases heard by it will be dealt with more quickly and by judges with appropriate experience. This is to be welcomed since all of the transferred areas of law are complex and have their own terminology. Considerable time can be taken at a hearing explaining matters which will be known to judges with the appropriate experience.

The Planning Court website states:

“Planning court cases will be listed separately within in [sic] the Administrative Court cause list, and will be heard by judges with planning expertise.”

In view of the reasons for its creation, and the objective of speeding up the resolution of transferred cases, it is important to note that the Planning Court will operate to a tighter timetable than in the general Administrative Court list. This will be the case particularly for those matters designated as “significant” by the Planning Liaison Judge under PD54E paras. 3.1-3.3, the designation of which may be subject to representations made by any party.

“Significant” cases are determined in accordance with PD52E by the importance or difficulty of their subject matter. A ‘significant’ claim includes claims which:

- relate to commercial, residential or other developments which have a significant economic impact either at a local level or beyond their immediate locality;
- raise important points of law;
- generate significant public interest; or
- by virtue of the volume or nature of technical material, are best dealt with by judges with significant experience of handling such matters.

However, it does not follow that because a case is regarded as “significant” that it should be granted permission (where applicable) as opposed to being dealt with speedily.

In this context it should be noted that, in clause 59 of the Criminal Justice and Courts Bill (currently at the Report Stage), a new requirement is proposed for permission to bring a challenge under s. 288 of the Town and Country Planning Act 1990.

## Procedural timetable

PD54E para. 3.4 specifies the general procedural timetable for the Court (subject to the interests of justice) in significant cases:

- a) applications for permission to apply for judicial review are to be determined within three weeks of the expiry of the time limit for filing of the acknowledgment of service;
- b) oral renewals of applications for permission to apply for judicial review are to be heard within one month of receipt of request for renewal;
- c) applications for permission under section 289 of the Town and Country Planning Act 1990 are to be determined within one month of issue;
- d) substantive statutory applications, including applications under section 288 of the Town and Country Planning Act 1990, are to be heard within six months of issue; and
- e) judicial reviews are to be heard within ten weeks of the expiry of the period for the submission of detailed grounds by the defendant or any other party as provided in Rule 54.14.

To speed up the determination of cases, matters will be heard by judges with planning expertise (rather than those sitting generally in the Administrative Court).



# Contributed articles

Importantly, listing will not always be at the convenience of counsel or the parties as the Planning Court website makes clear:

“Listing changes will mean that parties will not be consulted over the listing of renewal applications; specific requests for a change to the given date will be considered but will have to respect the general timetable target.

Parties will be consulted before listing substantive hearings.

Listing will respect the general timetable target; this may well mean that dates are imposed. Counsel’s availability will not be a reason for hearing a case significantly outside the target timetable.”

Experience to date suggests that a stricter approach was already being taken with regard to listing even under the former fast track. The days of a more relaxed listing of cases at all the parties’ convenience have gone (the author has experience of even expedited cases taking more than 6 months to be listed in the past) and the use of proceedings to cause delay will be scrutinised carefully.

It is worth noting the remarks by Lindblom J. when considering an adjournment of an expedited fast track case in *London & Henley (Middle Brook Street) Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 4207 (Admin):

“12. In the light of those submissions... I am now prepared to grant the adjournment sought. I do so recognizing that in the circumstances this is both a realistic and a just decision to make.

13. There are, however, two points that must be made very firmly.

14. First, the effect of this adjournment will be that the court’s time on 14 and 15 November 2013 cannot be used to enable any other planning case to be heard, at what would now be extremely short notice. Thus the adjournment will be damaging to some degree both to the interests of claimants, defendants and interested parties in other proceedings having access to the court as soon as they would wish, and on the effective use of the court’s resources.

15. Secondly, the court must regard this case as effectively settled. That is the only proper basis on which the adjournment can be granted. The inevitable consequence, however, is that the case will now have no priority over any others. It will be dealt with according to the timetable now in place for the handling of planning cases in the Administrative Court, and as if the proceedings were being issued today. This will mean, again inevitably, that if there is any unforeseen difficulty in effecting the settlement Mr Elvin has told me about it will be at least several months before this case can come back into the list. Parties must understand that there are consequences, not only for other proceedings but also for their own, if the court is given at the last minute, or virtually at the last minute, no sensible choice but to grant an application to adjourn.

16. Having said those two things, which I think are important, I am prepared, in the truly exceptional circumstances of this case, to grant the adjournment sought.

17. Finally, I take this opportunity to remind parties in proceedings such as these of the new targets for planning cases in the Administrative Court, which have been published on its website, and in particular the guidance given on listing. The guidance makes it clear that parties will be consulted before substantive hearings are listed, but – and this is important for parties to note – listing will respect the general timetable and targets. Dates may be imposed and counsel’s availability will not be a reason for hearing a case significantly outside the target timetable.”

*David Elvin QC is a member of Landmark Chambers and was called to the Bar in 1983 (Northern Ireland, 2008) and took silk in 2000. He is a Recorder, Deputy High Court Judge and a member of the Boundary Commission for England.*



## Reflections on the law of nuisance<sup>1</sup>

Alec Samuels

### At a glance

- The common law of nuisance, which protects private rights of property, is healthy and active.
- Planning permission is not a defence to a claim in nuisance, nor is it a defence that the claimant 'came to the nuisance'.
- However, a defendant may be able to prove he has established a prescriptive right to commit what would otherwise be a nuisance by noise.
- While an injunction remains the prima facie remedy, the Supreme Court suggests a more flexible approach is required and has opened up the possibility of damages being awarded instead.

Exactly what in practical terms has emerged from the Supreme Court review in *Lawrence v Fen Tigers* or *Coventry v Lawrence* [2014] UKSC 13, [2014] 2 WLR 433? The basic potential clash of interests lies between the protection and enhancement of private property by the law of nuisance, and the protection and enhancement of the public interest by way of the planning system and the other forms of regulatory control. There has to be a balance of competing interests. We live in a crowded island, and mostly in urban or semi-urban areas. Manufacturing and industry and business are vital to the economy. At the same time most of us want a degree of tranquillity at home, especially during the night and at weekends. The problem often arises as a result of noise or odour or fumes or smoke or other form of pollution.

### Nuisance

Nuisance is a state of affairs which is usually readily recognisable but often difficult to define, especially as the situation will be very fact-specific. Acknowledged features are the interference with the peaceful enjoyment of land or property, something which offends the sensitivities of the occupier, something which despite the social concept of give and take the occupier ought not to be expected to tolerate. The test is what is reasonable. It is an objective not subjective test.

Before taking private action in respect of the nuisance, the owner/occupier will normally seek to persuade the local authority to take appropriate action under planning and environmental law, such as an enforcement notice or noise abatement notice or whatever.

### The character of the area

The character of the area will have grown up over the years. Long-established uses and development under planning permissions and the lawful activities of the people will all have contributed to that character. Those who live and work in the area understand and accept (possibly grudgingly in some cases) the situation.

The defendant may rely on his activities as constituting part of the character of the locality, but only to the extent that those activities do not constitute a nuisance.

### The effect of planning permission

Planning permission cannot and does not authorise or legalise a nuisance. Planning permission is no defence as such to a nuisance. The responsible planning authority will apply the local plan and the presumption in favour of granting planning permission. They will take into account all material considerations, but at the same time in the public interest seek to preserve the character of the area and its social and environmental amenity, and the legitimate concerns of the neighbours.

# Contributed articles

A polluting or potentially polluting application will be either refused or, more commonly, granted subject to numerous conditions designed to protect the neighbours whilst at the same time not too severely restricting the proposed activity by the applicant, such as noise levels, working hours, protective equipment. The restraints imposed by nuisance and the planning and regulatory systems have often led to the invention and application of new technology.

## No defence that the claimant came to the nuisance

It is no defence that the claimant came to the nuisance, ie where the defendant was already there committing the nuisance when the claimant arrived. The defendant will not be able to argue that he has an established use or planning permission, he has been there a long time, the area is industrial in character, nobody has ever complained before, or that he is engaged in economically useful activity. If the activity is a nuisance then he is liable.

The claimant comes from afar, buys a big house, and moves in. The defendant nearby runs a lawful business, which emits some noise but not so as to amount to a nuisance. With planning permission the claimant converts his house into a nursing home for the elderly and ill. They find the noise intolerable; it has become a nuisance. In this case, the defendant has a valid defence. It is the action of the claimant that converted the noise from a non-nuisance into a nuisance. The claimant cannot by post-acquisition activity make unlawful that which was lawful.

## Prescription

The principle of prescription may be relevant. Just as a right of way may emerge from a long trespass, so a 20 year period of open and uninterrupted nuisance may become an easement of noise or whatever. The user need not be 24-7-365, for example it may not take place at night or weekends or holidays when the factory is closed, but otherwise is fairly constant during working hours. The noise might be intermittent and a nuisance.

If a nuisance was really bad, one would expect some action to be taken within a 20 year period. Yet in *Lawrence* a noisy stadium had been operating with planning permission for 30 years, in open country. The one nearby house had been occupied for over 20 years by a couple without complaint. When a new couple moved in they almost immediately began complaining. The moral is that a nuisance-maker should keep careful records, so as to be able to prove his easement if challenged; and any disturbed owner/occupier would do well to take prompt action for nuisance.

## The public interest prevails over the private interest

In a democratic society the public interest may prevail over the private interest and the private right. The local authority may exercise the power of compulsory purchase in order to eliminate a nuisance emanating from the property; or even to eliminate the complaint by acquiring the complaining property.

When it comes to national projects which carry the inherent or inevitable risk of nuisance, e.g. a new airport or runway or new railway line, the Government by statute authorises the nuisance, forbids action for nuisance, and either compulsorily acquires the land or compensates property owners within a prescribed distance of the project.

## Remedy

The normal remedy for nuisance should be an injunction, to stop the nuisance. The legal burden of resisting the injunction lies upon the defendant. However, the judge has an open discretion, there are no rigid rules – flexibility and pragmatism is now the recommended approach.

The nuisance may perhaps be comparatively trivial, and an injunction would be too heavy a sanction. Damages may be a very appropriate remedy. The interests of third



# Contributed articles

parties may be relevant. The creator of the nuisance may have planning permission, may be working very much in the public interest, and may be making strenuous efforts to minimise the nuisance. The judge may feel inhibited in making an injunction which would effectively stop the implementation of planning permission when damages would be an adequate remedy for the claimant. The judge may wish to suspend the injunction to give time for rectification.

The practice of the law may have become too biased in favour of polluting developers and businesses. The environmental impact assessment may have to pay more attention to nuisance and potential nuisance.

## Conclusion

The common law of nuisance protecting private rights of property is healthy and active. The owner/occupier, frustrated by the grant of planning permission, with inadequate conditions, to his nuisance creating neighbour, may be able to stop the nuisance by private action. The neighbour objecting to the planning application, and having no right of appeal against a grant, is no longer at the mercy of the local planning authority and the inspector promulgating their idea of the public interest. The planning process will need to accommodate the private property rights of neighbours more effectively than in the recent past.

*Alec Samuels is a Barrister, BA (Cantab), formerly Reader in Law in the University of Southampton.*

## Endnotes

- 1 Reflections stimulated by a UKELA seminar addressed by Dr Eloise Scotford, University of London, Dr Ben Pontin, University of West England, and William Upton, counsel in the case. Copies of the slides are available from UKELA. Five judgments (giving differing reasons), 50 cases considered, 54 pages and 249 paragraphs are not readily assimilated and applied by working lawyers.

# Top Ten environmental songs

Kirsty Schneeberger

This elaw edition's 'Top Ten' looks at how artists have used songs to convey environmental messages and generate wider public awareness about some of the more serious issues we face. Using techniques ranging from comedy to straight talking about the problems the following artists have brought the environmental and social issues of our age to life. Included are the youtube links for reference – hope you enjoy!



## 1 Bob Dylan – A Hard Rain's A-Gonna Fall

(released 1964)

The lyrical master of the 60s turned his attention to environmental and social injustices picking up on themes from environmental degradation ('I've stepped in the middle of seven sad forests/I've been out in front of a dozen dead oceans') to the worst consequences of war (I saw guns and sharp swords in the hands of young children). Singing about the warnings that are not being heeded, Dylan hammers home the message that unless we check our actions and activities we are going to bear witness to disastrous consequences. [Watch the video on Dailymotion.](#)

## 2 Joni Mitchell – Big Yellow Taxi

(released 1970)

Using her delicately lilting tones Joni Mitchell gives us this powerful tune with a strong campaign message behind it: 'farmer farmer, put away your DDT. I don't care about spots on my apples, just leave me the birds and the bees.' Covered by the Counting Crows more recently but originally released in 1970, it complemented and amplified the messages contained in Rachel Carson's Silent Spring and her critique on the use of pesticides in farming. [Watch the video on YouTube.](#)

## 3 REM – It's the end of the world as we know it (And I feel Fine)

(released 1987)

Possibly fed up with environmental songs that sound downbeat, REM produced this jaunty, upbeat song, dealing with the threat of the end of the world. The video to the song is a collection of clips from Hollywood disaster movies perhaps amplifying how we have managed to sensationalise the issue to the point where perhaps we are now anaesthetised to the real threats of environmental and industrialised disasters. A wake up call or mocking taunt at our 'head in the sand' mentality? [Watch the video on YouTube.](#)

## 4 Radiohead – Fake Plastic Trees

(released 1995)

Thom Yorke is well-known for his environmental activism and this song beautifully focuses on hyper-consumerism and our constant drive to attain 'perfection' at whatever cost. With opening lyrics like: 'her green plastic watering can/For her fake Chinese rubber plant/In the fake plastic earth/that she bought...to get rid of herself' the song taps into the idea that our drive for consuming plastic things in a plastic world is largely borne out of a loneliness and insatiable desire to be what others want us to be. [Watch the video on YouTube.](#)

# Top Ten environmental songs

## 5 Michael Jackson – Earthsong

(released 1995)

Who can forget the classic video of MJ himself singing his heart out on the plains of Africa with elephant bones surrounding him, hair streaming in the wind, as he implored people to ‘stop to notice the crying earth, its weeping shore.’ Originally produced for release in the late 80s, but not released until the mid-90s the song hit our radios hard with its clear message about environmental destruction at our own hands. An environmental anthem, if ever there was one, sung by the King of Pop himself. [Watch the video on YouTube.](#)

## 6 Coldplay – Don’t panic

(released 2000)

A controversial choice perhaps given that some seem to see this completely unrelated to environmental issues, but with phrases such as ‘we live in a beautiful world, yea we do, yea we do’ who could resist Chris Martin’s charming appeal to think about the beauty around us. The opening track on their debut album ‘Parachutes’ this song offers a poignantly melodic reminder of how fragile our beautiful world really is. [Watch the video on YouTube.](#)

## 7 Pulp – The Trees

(released 2001)

The quintessential Brit-Pop band, led by the one and only Jarvis Cocker, released this jaunty hit about, well, trees. Offering an interesting twist in the lyrics (perhaps a bit of reverse psychology) Cocker sings ‘yeah, the trees, those useless trees produce the air that I am breathing’. It is arguably more of a love song about broken love and carving sweet nothings into trees; nonetheless the song places those magnificent and more than invaluable trees square in the middle of a classic Brit-Pop tune. [Watch the video on YouTube.](#)

## 8 Jack Johnson – The 3Rs

(released 2006)

With the classic lines ‘we’ve got to reduce, reuse, recycle’, Jack Johnson used his status as the cooler-than-cool surfing champion to strum his guitar and advocate for a more environmental approach to living. A chilled out tune produced for a ‘Sing-a-Long’ song album from the film ‘Curious George’ that packs a punch and offers some practical advice about what we can do in our lives to make a difference. [Watch the video on YouTube.](#)

## 9 Joe Cornish – The Global Warming Song

(released 2007)

One of the many songs produced as part of the ‘Adam and Joe’ show battle of the songs, this comic take on the environmental crisis we face with cameo references to the likes of Al Gore and a hyperbolic take on the matter, this will have you chuckling away whilst at the same time realising that there is a deeper message hidden between the gags. [Watch the video on YouTube.](#)

## 10 Orbital – Impact (the Earth Is Burning)

(released, 2009)

Released in 2009 this catchy dance tune, in true Orbital style, is light on the lyrics on the whole, but when they come words are not minced. Breaking the synth and back-beat with a few eerie recitations of ‘it’s like, it’s like... a cry for survival... survival of you and me’ we are reminded of the need for and constant challenge of how to survive. [Watch the video on YouTube.](#)



# Book review

## "The World We Made", Jonathon Porritt

Phaidon press, ISBN 978-0-7148-6361-0

Jonathon Porritt's latest uses an interesting device to give us a fresh perspective on a much-debated topic – how human beings can achieve a good quality of life for all, within the earth's carrying capacity. His device? To use the narrator, Alex McKay – a 50 year old history teacher writing in 2050 – to tell the story of the decisions and changes made over the previous 30 years to arrive at, in his words, "a better world for all those who come after us."

Using his students as research assistants, Alex and the team look at 50 topics – one a week for a year – to create a composite picture from a series of snapshots. Covering everything from "The Houston Concord on Climate Change", signed in 2020, to the way in which the circular economy has evolved a different attitude to resource use and turned the tables on consumption, he addresses the politics, economics, science, technology and psychology of the transition.

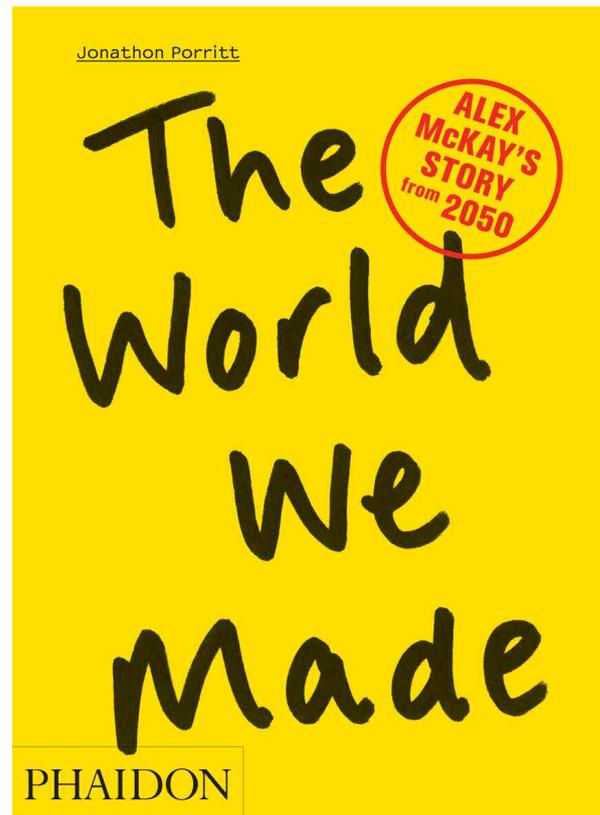
Its 50 topics and weekly "bite-sized" chunks make it, for me, more a book to "dip into" at random, rather than to read from cover to cover. Or, you might prefer to read the weekly entries relating to each of ten themes – such as agriculture, biodiversity and travel – in a single sitting.

Either way, writing from an historic perspective gives a much-needed – if at times slightly clunky – "systems" view of the things we can do more of, less of and should change altogether. A pragmatically optimistic read, it describes an emerging process, with mistakes, blind alleys and great leaps all as part of the learning journey.

Bill Gates is quoted as saying "Most people overestimate what they can do in **one year** and underestimate what they can do in **ten**."

Alex McKay gives us thirty-five years and a challenging but achievable route map. Happy dipping!

**Linda Farrow**  
UKELA Executive Director



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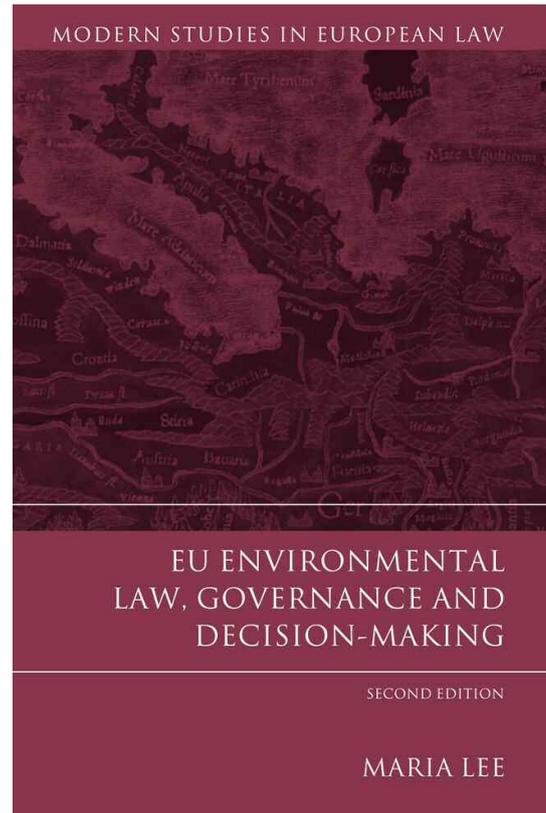
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Maria Lee is Professor of Law at University College London where she teaches and researches EU Environmental Law.

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## e-law

The editorial team is looking for quality articles, news and views for the next edition due out in July/August 2014. If you would like to make a contribution, please email [elaw@ukela.org](mailto:elaw@ukela.org) by 2 July 2014.

Letters to the editor will be published, space permitting.

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