Submission No 32

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Organisation: Tweed Shire Council

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Parliament of NSW
Legislative Assembly Committee and Planning and Environment
SYDNEY NSW 2000

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Dear Sir/Madam

Tweed Shire Council Submission on the Inquiry into Historical Development Consents in NSW

Structure of Submission

This submission responds to the Inquiry into Historical Development Consents in NSW's Terms of Reference.

From the outset, the discussion around historical development consents must be framed with a clear distinction between:

1. development consents that are already approved and that now do not (or may not in the future) reflect current planning standards and expectations; and
2. development consents that are yet to be approved.

The distinction is relevant as legislative action is unlikely to be retrospective in order to address the former.

This limits options addressing the former to existing legislation, policy and procedure.

Each of the Terms of Reference section is split up into sections addressing a key topic within that Term of Reference.

The topics are aggregated and summarised as follows:

(a) The current legal framework for development consents, including the physical commencement test.

The current legal framework requires an impact assessment in accordance with the objects and requirements of the *Environmental Planning and Assessment Act 1979* (the "**Act**") prior to granting a consent.

Consents do not expire if they are commenced and for developments approved before 15 May 2020 it is too easy to prove commencement under the Act. This allows a consent approved decades ago and therefore assessed against decades old conditions to remain valid today.

As site conditions change and scientific knowledge advances, the impact assessments for these consents fall further apart from reality. As long as consents can continue to sit on land without expiration, the Act's objects are impossible to meet.

(b) Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.

In failing to meet the Act's objects, historical development consents fail to achieve ecological sustainable development or consider climate change. The current legal framework requires authorities to explain to the community how such developments are legally allowed to proceed (subject to procedural requirements) even while causing environmental damage that would be highly unlikely to be approved today. The balance between protecting private interests against confidence in the public planning system and protection of the environment falls squarely in favour of the former.

Our understanding of disaster risk has improved through experience and is now considered with each assessment. Lacking this assessment in the past, historical development consents can place people and property at risk.

The extent of historic development consents that exist is unknown. Even recent development consents may become historical development consents in the future as site conditions and scientific knowledge change.

Local councils and communities are often unaware of a historical development consent in their backyard until a developer seeks to recommence that consent. Current register searches and prescribed documents for the conveyance of land do not allow for communities to factor potential developments into their purchase. In addition, whether a consent is a danger of recommencing is often beyond the knowledge of even the local council.

Approvals-based reporting faces the same concerns. The ability to effectively land-bank and delay indefinitely results in reporting mechanisms being unable to adequately predict or rely on housing and development delivery by virtue of existing approvals.

(c) Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action of historical development concerns.

The barriers to addressing historical development consents and preventing new historical development consents lie primarily with a lack of funding, a lack of legal mechanisms that exist in other jurisdictions and a lack of certainty in the effect of existing legal provisions.

The Act contains a power to revoke a development consent in return for compensation. No funding exists for this power and having never been tested, the extent of compensation owed is uncertain. Local councils can also acquire land. A similar lack of funding applies here by way of opportunity loss.

It may be possible to challenge a consent on grounds that it was not commenced. However, before 15 May 2020, works as minor as inserting survey pegs into the ground were sufficient to show commencement. Accordingly, it is unlikely such a challenge would be successful.

Local councils can require developers comply with existing conditions of consent. Conditions framed to the effect of "to Council's satisfaction" may be of assistance in barring consents from proceeding. Similarly, local councils can notify relevant authorities of developments that require additional approvals subject to savings provisions.

Local councils may be able to utilise the power under the Act to impose conditions on new consents to limit the period that consent may be carried out. This power's reach has not been tested in Court and may not extend to effectively imposing a quasi-completion date for construction and subdivision consents.

The Federal Government has the ability to require an approval for developments if they would harm certain threatened species. It does so by imposing an offence for proceeding without an approval. This requires action on behalf of the Federal

Government and only applies to a selection of species set out in the *Environment Protection and Biodiversity Act 1999* (Cth) (the "**EPBC Act**").

Zoning of land can be reviewed to ensure land is correctly zoned for development. Insufficient resources are available to regularly undertake such reviews with sufficient depth and frequency.

(d) Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support including from other jurisdictions.

Implementing a scheme to fund the power to revoke under the Act (or alternatively acquire relevant land) ought to be the priority option. Proper funding would allow the existing revocation power to be used and would allow a local council and Planning Secretary to take action against developments that represent an evidenced risk of harm.

Completion dates are missing from the Act despite existing in Victoria, South Australia, the Australian Capital Territory, the Northern Territory and (to a different extent) Queensland. Completion dates would not address existing historical development consents but would prevent this issue of historical development consents recurring for new consents. Proper investigation into supporting mechanisms and any ancillary issues arising from introducing completion dates (such as mechanisms and standards for assessing extensions) would be required.

The physical commencement bar was raised from 15 May 2020 in New South Wales but is still relatively low compared to some other jurisdictions' requirement of substantial commencement. Additionally, the deadline to commence is 5 years in New South Wales relative to other jurisdictions' deadline of 2 years. Proper investigation into the benefits and drawbacks of increasing the bar and reducing the timeframe for commencement should be undertaken.

Implementing a scheme to fund more regular zoning reviews with sufficient depth and frequency to consider changing site conditions would also assist to prevent this problem continuing with new consents.

The existing offences and approval system under the EPBC Act should be utilised by the Federal Government to its fullest extent where historic development consents involve evidenced threats to threatened species.

(e) Any other matters.

An extensive audit into existing development consents would be required to determine the extent of the problem. Without understanding the extent of the problem, it is difficult to determine which (if any) solutions are best suited factoring in costs to taxpayers and to the environment.

New historical development consents (being those approved under more recent legislation) and not yet identified as a concern should also be considered. Changing site conditions and climate change are still capable of turning these consents into the more problematic historical development consents even if they do not currently present as such.

Other States and Territories undertake differing approaches. However, it is clear that the concept of completion is relevant to at least Victoria, South Australia, Queensland, the Australian Capital Territory and the Northern Territory. Investigation into other State and Territory approaches is recommended.

Terms of Reference

(a) The current legal framework for development consents, including the physical commencement test.

1. Current legal framework for development consents – Evaluation before consent

The starting point for evaluation of any development consent is Section 4.15 of the Act. Section 4.15 states that a consent authority must take into consideration such of the matters in Section 4.15 as are of relevance to the development the subject of the development application.

This includes (among other things):

(a) any environmental planning instrument (including a State Environmental Planning Policy and Local Environmental Plan) (Section 4.15(1)(a));

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality (Section 4.15(1)(b));

(c) the suitability of the site for the development (Section 4.15(1)(c)); and

(d) the public interest (Section 4.15(1)(e)).

These matters reflect the objects of the Act set out in Section 1.3 of the Act.

The objects include (among other things):

(e) facilitating ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment (Section 1.3(b));

(f) protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats (Section 1.3(e));

(g) promoting the sustainable management of built and cultural heritage (including Aboriginal cultural heritage) (Section 1.3(f)); and

(h) providing increased opportunity for community participation in environmental planning and assessment (Section 1.3(j)).

The Act is also subject to Part 7 of the *Biodiversity Conservation Act 2016* and Part 7A of the *Fisheries Management Act 1994* in relation to terrestrial and aquatic environments (Section 1.7 of the Act).

The result of the above is a legal framework that (among other things) requires a development to be rigorously and appropriately evaluated against known matters and predicted consequences *before approval is granted*.

This may be an example of the nature of the planning beast. Planning should look forward but can never anticipate every change. Doing so would be very difficult for any historical developments let alone those approved within the first years of commencement of the current planning system on 1 September 1980.

Nevertheless, it gives rise to the first problem under the current legal framework; development consents are frozen in time.

2. Current legal framework for development consents – No further evaluation after consent

Once a development has been evaluated and development consent approved, Council is heavily limited in any further evaluation of that same development.

Relevant to changes in environmental planning instruments, Section 4.70 of the Act makes it clear that:

'nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.'

The consequences of this lack of further evaluation grow as time passes because while development consents are frozen in time, the world continues to advance.

Environments, localities and scientific understanding all change. As these factors change, the development's impacts and/or our knowledge of a development's impacts change. Given enough time, this can lead to a development's impacts barely reflecting those which were taken into account at the original assessment. Alternatively, our acceptance of an impact we did initially consider (such as clearing of vegetation) can change substantially.

If a modification is applied for, Section 4.55(3) of the Act allows a consent authority to revisit some of the planning matters in Section 4.15(1) but only those that *are relevant to the development the subject of the* [modification] *application*. This severely limits the impacts a consent authority can reconsider.

New conditions can be imposed on a development consent during a modification. However, the conditions must be valid. They must relate to the same planning matter as the portion of the development proposed to be modified (see *1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685 at [50]-[53] for further discussion in this regard).

If a consent authority includes conditions that aim to address impacts that were a symptom of the initial development, such conditions may be declared invalid on appeal.

Numerous examples of developments that need further evaluation have been reported in the media. Such developments generally cause impacts considered acceptable in past decades but which are no longer acceptable now or were never a problem in the initial assessment (for example, in the case of a revegetated site).

The need for a reassessment of impacts would not exist (or be substantially lessened) if a development consent is completed or expired.

The leads to the second problem under the current legal framework; development consents (if they have commenced) do not expire.

3. Physical commencement test – Once commenced, development consents do not expire

On commencement on 1 September 1980, the Act introduced a lapsing date for development consents. Initially and until 1993, all development consents would lapse 2 years after the date the consent commenced operation. Since 1993, the lapsing date has been extended to 5 years (Section 4.53(1) of the Act).

Section 4.15(4) qualifies the 5 year lapsing date as follows (emphasis added):

'(4) Development consent for—

(a) the erection of a building, or

(b) the subdivision of land, or

(c) the carrying out of a work,

does not lapse if building, engineering or construction work relating to the building, subdivision or work is ***physically commenced*** *on the land to which the consent applies before the date on which the consent would otherwise lapse under this section.'*

The concept of physical commencement has also changed over time. Prior to 1 September 1980, the test used to require substantial commencement.

As of 15 May 2020, the current legal framework excludes certain minor actions from satisfying physical commencement in Section 96 of the *Environmental Planning and Assessment Regulation 2021* (the "**Regulations**") (emphasis added):

> '***96 When work is physically commenced—the Act, s 4.53(7)***
>
> *(1) Work is not taken to have been physically commenced merely by the doing of 1 or more of the following—*
>
> *(a) creating a bore hole for soil testing,*
>
> *(b) removing water or soil for testing,*
>
> *(c) carrying out survey work, including the placing of pegs or other survey equipment,*
>
> *(d) acoustic testing,*
>
> *(e) removing vegetation as an ancillary activity,*
>
> *(f) marking the ground to indicate how land will be developed.*'
>
> *(2) This section does not apply to a development consent granted before 15 May 2020.*

Before 15 May 2020, if a development consent could show one of these minor actions (e.g. survey pegging, acoustic testing or removing shrubs), then (subject to that work being lawful in accordance with the consent) that development consent could be considered *physically commenced* for the purposes of Section 4.15(4) of the Act (see for example *Cando Management and Maintenance Pty Ltd v Cumberland Council* [2019] NSWCA 26 in relation to shrub removal and *JMS Capital Pty Limited v Tweed Shire Council* [2006] NSWLEC 535 in relation to reinstating survey pegs knocked out by trespassers).

After 15 May 2020, the above minor preparatory works no longer satisfy the physical commencement test.

However, this does not solve the underlying problem.

Once '*physically commenced*' (by minor preparatory works or otherwise), a development consent will continue to sit with the land until a developer decides to 'resurrect' it and proceed with the development. The cause of delay may include (among other reasons) lack of funds, speculative applications, unexpected impediments (business or land based) and profitability decisions (e.g. land banking).

Recent examples in the media discuss developments that are over 40 years old representing an analysis of conditions and knowledge that existed 40 years ago. If *physically commenced*, such a 40 year old development consent will be available for any developer to take up and re-commence works.

It cannot be said that such developments were evaluated on current understandings of ecologically sustainable development, relevant economic, environmental and social considerations, environmental and heritage protection expectations or community views.

For these developments, the Act's objectives are impossible to meet.

(b) Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.

1. Historical development consents rarely achieve ecologically sustainable development

The planning system has undergone numerous amendments since commencement in 1980. Not least of these reforms, is the introduction of the concept of ecological sustainable development.

Ecologically sustainable development aims to achieve a level of balance between the needs of the present without compromising the ability of future generations to meet their own needs. It requires the effective integration of social, economic and environmental considerations in decision-making processes (Section 6(2) of the *Protection of the Environment Administration Act 1991*).

Section 6(2)(c) goes on to state (emphasis added):

> '*that conservation of biological diversity and ecological integrity should be a* ***fundamental*** *consideration*.'

Our position on what is an acceptable impact to the environment has (literally) undergone a fundamental shift. The position has strengthened following the acknowledgement of climate change concerns (see for example, the recent inquiry into the planning system and the impacts of climate change on the environment and communities).

The resulting regime presents a drastic difference between how our current legal framework treats development approved in the past and how it treats those proposed in the future. If proposed in the future substantial environmental impacts are unlikely to be approved.

If proposed before our understanding of the importance of environmental impacts (or before such an impact becomes relevant due to changing conditions), we are legally required (by absence of power) to just let those impacts proceed to occur.

These historical developments have arisen as a known concern primarily because of their disregard (or minimal regard) to today's environmental considerations. Old subdivision approvals, broad scale clearing, impacts to endangered species, removal of native species, minimal (or nil) replacement planting and risk to critical wetlands are just some of the various issues recently raised in the media which a decision-maker would look at far more critically under current standards.

An example of such a development in the Tweed is a tourist resort development in Wooyung on the coastal floodplain. The development was approved in 1988 and was commenced by way of survey work with little to no other physical work undertaken since. The development will (among other things) extract 1.3 million cubic metres of material, create a 15 hectare artificial lake, create 3 artificial islands and construct 40,000 square metres of accommodation and facilities.

Today's environmental standards now recognise the site contains threatened entities including threatened ecological communities and fauna and flora species under contemporary legislation such as the *Biodiversity Conservation Act 2016* (the "**BC Act**") and EPBC Act.

Additionally, Acid Sulfate Soils are now recognised as being capable of causing significant harm to waterways and aquatic life when disturbed. Acid Sulfate Soils are a significant constraint for the coastal floodplain site. The development's extraction of 1.3 million cubic metres of material is likely to cause significant harm if not managed at a contemporary standard.

It is a legally correct excuse to say such developments were approved in the past and therefore do not need to comply with today's environmental concerns (subject to limited exceptions). It may be legally correct to say a historical development would not be so approved today.

Practically, these excuses are of little help to the community or environment. Regardless of why, these historical developments fail to meet the fundamental goal of ecological sustainable development.

In reality, property ownership and certainty in the development industry are prioritised at the risk of incurring a claim for compensation, or political disfavour.

2. Natural disaster risk to personal and property safety

Natural disaster risk to people and property has been pushed into the spotlight following important bushfire and flood events. Tweed Shire Council has personal experience of these events and understands the importance of correct siting and mitigation measures.

Similar to environmental concerns, the recognition of danger has strengthened following acknowledgement of climate change's role in worsening such extreme events.

Allowing historical development consents that never considered these impacts properly to proceed directly contradicts recent efforts to promote disaster resilience and reduce natural disaster exposure.

3. Community social and economic impacts

A common trend of historical developments in the media is that the community is often unaware of them until they proceed. Sometimes the development is far away, other times it is right next door.

Section 4 of the *Conveyancing (Sale of Land Regulation) 2022* prescribes certain documents to be attached to a contract for sale of land.

These do not include development consents for neighbouring or nearby sites.

When such developments proceed, the community is subjected to various unplanned impacts including but not limited to visual amenity, acoustic amenity, utility demands, noise and vibration, neighbourhood changes and economic loss (due to loss of property value).

Even if additional searches were to be prescribed, due to the nature of historical developments even local councils may not be aware of a 'historical development risk' until it tries to re-commence. For example, a site may benefit from an old development consent but a local council may not be aware whether that consent had been commenced and therefore whether the consent has the potential to recommence one day.

4. Uncertain definition of 'historical' developments

In defining 'historical' developments, the Legislative Assembly's media release for this inquiry dated 19 March 2024 states:

> '*Zombie developments reflect the law at* [the] *time the development consent was initially granted. Planning and environmental standards have changed since some of these older consents were issued and the community's expectations have shifted too.*'

Consent authorities do not have the information or the resources to track all development consents from approval through to *physical commencement* and then to completion.

In addition, the point in time where a development no longer reflects planning and environmental standards and community expectations are impossible to know prior to a particular development coming to life or an extensive audit of every approved consent.

Active consents without delivery are therefore largely unaccounted for in reporting statistics and largely unprepared for by local councils.

Historical development consents almost certainly distort the image of development delivery and land use demand recorded in approvals-based reporting. Additionally, the current legal framework opens the door to land banking risk with its consequential problems for housing delivery and analysis in addition to political risk caused by community awareness.

5. Uncertain development and profit realisation in the development industry

Anecdotally, developers purchase land on the basis of knowledge of a development consent, its *physical commencement* (and therefore ability to recommence) and reasonably predicted profits.

Media coverage of recent historical developments and community protests against such developments show the risk of community action.

Additionally, local councils may contend that such developments have not physically commenced or alternatively require additional approvals which will not be granted. Sometimes these contentions are raised with the aim of ensuring a development does not proceed or otherwise proceeds in accordance with the law.

The result of both groups (community and council) interference is the same from the perspective of the developer. Extensive interference in and (in some cases) prevention of realisation of the development lead to potentially heavy impacts on profitability and increased investment risk.

(c) Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action of historical development concerns.

1. Consents may be revoked for unfunded compensation

Section 4.57 of the Act states (emphasis added):

> ***4.57 Revocation or modification of development consent (cf previous s 96A)***
>
> *(1) If at any time it appears to—*
>
> *(a) the Planning Secretary, having regard to the provisions of any proposed State environmental planning policy, or*
>
> *(b) a council (being the consent authority in relation to the development application referred to in this subsection), having regard to the provisions of any proposed local environmental plan,*
>
> *that any development for which consent under this Division is in force in relation to a development application should not be carried out or completed, or should not be carried out or completed except with modifications,* ***the Planning Secretary or council may, by instrument in writing, revoke or modify that consent****.*

If a local council were to propose to rezone an area to C3 Environmental Management for example, and there were historical development consents applying to land in that area for intensive urban development, the local council may wish to use the power to revoke those consents.

This provision could also apply to spot rezoning, for example, of the site the subject of such a historical development consent only, provided there are sufficient planning grounds.

This revocation power could apply to existing known historical development consents and any future realised historical development consents.

It is expressly noted that Section 4.57(1) is exercisable by both a local council and the Planning Secretary.

If a historical development consent is revoked or modified, compensation is payable (Section 4.57(7) of the Act).

Section 4.57(7) states the compensation that person is entitled to is:

> '*compensation for expenditure incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the notice* [informing the person of the intention to revoke the consent].'

It does not appear that the extent of compensation a person would be entitled to has been tested in court. For example, such compensation may include purchase costs of the land and related land costs if a person could show the land was purchased with a valid development consent and with the intention of proceeding with that development. It would not directly include costs of past rezonings or the development application itself which, in some cases, can be extensive.

Whether it is reasonably justified to cause such significant financial loss on a private citizen is a policy matter for the State.

Regardless, there are numerous dormant development approvals that occupy land in the Tweed Shire that are unlikely to meet present standards. If reconsidered, such consents would likely be rejected in part or in whole.

Currently, there is no funding mechanism to bear the costs of compensation for such developments.

Absent funding, the revocation power in Section 4.57(1) is a toothless threat.

2. Challenge physical commencement

This submission has already discussed how consents may lapse within 5 years, excluding COVID-19 extensions, unless *physically commenced*.

The exclusion of certain minor works from being sufficient to qualify as physical commencement may have led to a lesser number of problematic historic developments. This potential benefit applies solely to developments after 15 May 2020.

As already discussed, the bar to demonstrating that a consent has not lapsed is far lower for developments before 15 May 2020.

With respect to existing development consents, Parliament may introduce legislation that applies retrospectively, but it does not do so lightly. In addition, such an order may lead to compensation payable to an owner of a relevant development consent.

Again with respect to existing development consents, an authority may contend that *physical commencement* has not occurred. However, (given the substantially low bar) it would be particularly difficult to successfully challenge *physical commencement* of developments approved prior to 15 May 2020, leading to wasted time and resources.

Notably, while the minor works exclusions result in more work being undertaken to commence a development consent approved after 15 May 2020, such work may occur and then become obsolete following the passage of time leading to more sunk costs. For example, the installation of infrastructure would satisfy the

current *physical commencement* test no matter that such infrastructure may now be assessed as insufficient or severely deteriorated. In any case, a developer may still choose not to proceed with the development for whatever reason resulting in a new 'historical' development consent.

3. Existing historical development conditions may require compliance prior to proceeding

There is nothing to prevent an authority from requiring compliance with the conditions of an existing 'historical' development consent. Consideration would need to be given to whether conditions had already been complied with at some time in the past.

The terms of any conditions may require something to be done to an authority's satisfaction. If the authority had not previously indicated it was satisfied of that matter, then there may be scope to again consider that matter.

It may be that due to changing site conditions, regulations and regulatory bodies, a condition can no longer be complied with as initially written. Investigation, modifications and appeals costing authority time and resources may follow in such circumstances.

If approved after 1 July 1998, a consent may include a condition to comply with other approvals such as those now contained in Section 4.46 of the Act as approvals for integrated development.

4. Compliance with integrated approvals

Section 4.47 of the Act provides for some developments to be 'integrated' and therefore require approval from another body prior to granting of development consent. The requirement for these approvals lies in other legislation than the Act.

For example, a development consent may be for an activity that is a scheduled activity under the *Protection of the Environment Operations Act 1997* (the "POEO Act"). If a licence is not granted for that action, then the development may not proceed. The fact the consent is a historical development consent does not overcome the need for that licence unless the relevant legislation states otherwise.

For example, the POEO Act does not contain a savings provision and therefore applies to historical development consents. However, the *Rural Fires Act 1997* does contain a savings provision which states that the relevant bushfire safety authority requirement does not apply to developments before 1 August 2002.

Additionally, some developments may have already been assessed and granted such approvals. These approvals will then generally face the same problem as historical development consents due to changing site conditions and advancing standards.

For example, a development that may have been considered sufficient to obtain a bush fire safety authority under the *Rural Fires Act 1997* in the past may now be considered subject to extreme risk (for example due to revegetation or changing weather conditions).

Accordingly, the requirement for additional approvals will need to be assessed on a case-by-case basis. It is noted that the responsibility for assessment and authority to issue these ancillary approvals lies with the relevant authority and not local councils.

5. Acquiring land for public purposes

Similar to revocation of a consent, an authority may wish to acquire land for a public purpose, for example, the establishment of a biodiversity stewardship site or as a land reclamation or buy-back strategy.

The same funding concerns that apply to revocation also apply to such acquisitions of land.

6. Certain threatened species are protected under federal legislation

***Environment Protection and Biodiversity Conservation Act 1999* (Cth) – Federal authority**

Sections 18 and 18A of the EPBC Act make it an offence to (among other things) take an action that will result in a significant impact to a threatened species or ecological community.

It is a defence to such an offence if the act was approved by the relevant Commonwealth Minister (Section 19 of the EPBC Act).

Historical development consents are not excluded from the requirement to obtain approval. Failure to obtain approval can result in a historical development consent being unable to proceed without committing an offence. The operation and administration of the EPBC Act lies with the Federal Government, outside of the State Government or a local council's control.

***Biodiversity Conservation Act 2016* – State authority**

Division 1 of the BC Act makes it an offence to (among other things) pick (cut or remove from the ground (among other things)) or harm threatened or protected species.

It is a defence to such an offence if the act was necessary for the carrying out of (Section 2.8(1)(a) of the BC Act):

> '*development in accordance with a development consent within the meaning of the* [Act].'

This defence applies to new and past development consents, including historical development consents. This means an additional approval or assessment under the BC Act is not required.

This means it is not an offence under the BC Act for a historical development consent to cause harm to threatened species if the act of harm is necessary to carry out their development consent.

7. Inadequate zoning reviews

Zoning of land is often cited as the overarching strategic intention for land and hence priority should follow for development that best supports that intent.

Despite its reliance in arguments for planning and investment certainty, zoning has little regard for change. The 'certainty' that zoning provides is directly contradicted by the changing conditions that apply to the land so zoned.

Local authorities do not possess sufficient resources to sufficiently evaluate and regularly undertake zoning reviews to ensure that land reflects at the time of zoning and then at the time of review, correct strategic intention.

(d) Possible policy and legal options to address concerns regarding historical development consents, particularly the non-completion of consents that cannot lapse, and options for further regulatory support including from other jurisdictions.

In considering these options, the distinction between consents already approved and those to be approved in the future must be kept in mind.

Options that already exist in our current legal framework (addressing funding for revocation and conditions limiting the operational period of a consent) address both kinds of consents.

However, any legislative reform is unlikely to impact existing historical development consents unless the legislature makes the conscious and express decision to enact retrospective legislation (which seems unlikely for reasons relating to the protection of property ownership and political will). This applies both to imposing additional requirements that some developments must comply with (for example, additional environmental, bushfire or flooding assessments) and retrospectively applying new *commencement* and *completion* mechanisms.

1. Funding for revocation of consents

This submission has already discussed the Planning Secretary's and a council's power to revoke a development consent subject to compensation.

The lack of funding for such an endeavour effectively renders this power to revoke of no effect.

Options for funding the existing legal mechanism for revocation should be considered.

2. Completion of consents

This submission has already discussed how the current legal framework does not provide for an authority to:

(a) lapse a consent;

(b) require (by notice, condition or legal provision) completion of a consent; or

(c) seek a court order to require the above (subject to failure to commence).

Notably, it seems that in Australia the choice of whether to include such provisions in planning legislation is far from consistent.

Victoria, South Australia, Australian Capital Territory and Northern Territory

Victoria (see Section 68 of the *Planning and Environment Act 1987* (VIC), South Australia (see Section 126, 141 and 142 of the *Planning, Development and Infrastructure Act 2016* (SA) and Section 67 of the *Planning, Development and Infrastructure Regulations 2017* (SA)), the Australian Capital Territory (see Section 211 of the *Planning Act 2023* (ACT) and the Northern Territory (see Sections 58 and 59 of the *Planning Act 1999* (NT) all contain provisions (in various forms and terminology) that require completion to prevent a consent from lapsing.

Importantly, these legal frameworks (excluding the Australian Capital Territory) each draw a fundamental distinction between commencement (or starting) and completion (or ending) requiring both to occur to prevent a consent from lapsing.

Anecdotal evidence from Victoria suggests that completion provisions and their associated applications for extension have been implemented well. However, they require creation of a dedicated role within a local authority responsible for matters around this legal mechanism. Other issues such as understanding reasonable deadlines, assessment procedures for granting extensions, development standards that apply to applications for extensions and court appeal mechanisms are also relevant to the introduction and maintenance of a completion date mechanism.

Western Australia and Tasmania

Western Australia (*Planning and Development Act 2005* (WA)) and Tasmania (*Land Use Planning and Approvals Act 1993* (TAS) do not include such completion provisions. A consent simply lapses if not substantially commenced.

Queensland

Queensland provides a more balanced approach on this issue. While the *Planning Act 2016* (QLD) does not impose a mandatory completion date to standard developments, it does allow a completion condition to be imposed if the authority chooses (Section 88(1) of the *Planning Act 2016* (QLD).

In contrast, it does require a mandatory completion date be imposed for approvals that vary the local planning instrument (Section 88(2) of the *Planning Act 2016* (QLD)).

Anecdotal evidence from Queensland suggests that default completion date provisions were too difficult to support for most approvals with the Explanatory Notes for the *Planning Bill 2015* (QLD) stating (page 95):

> '*Generally there are no periods stated under the Bill for when a development approval lapses once development has started. This reflects the wide range of possible times development may take to complete. Consequently, the Bill relies on there being a development condition stating a completion period. If there is no completion condition on a development approval and development substantially starts under the approval, then there is no lapsing period for the approval.'*

Note, the Explanatory Notes go on to state that a provision for a default lapsing period is nevertheless required for variation approvals (that override local planning instruments) as it would be undesirable for such approvals to continue to have effect indefinitely. The Explanatory Notes go on to state (page 96):

> '*This ensures that a variation approval does not have indefinite effect once development under the approval substantially starts.*'

New South Wales

The current standard for New South Wales is that a development need only show *physical commencement* to prevent lapsing. No level of completion is required.

However, prior to the introduction of the *Local Government Act 1993* and commencement of the *Local Government (Consequential Provisions) Act 1993*, the Act did contain a power for the consent authority to require completion within 5 years of the consent becoming effective. If the development was not so completed (and the requirement to do so not overturned by the Court), then the consent would lapse (see Section 99 of the Act in any version prior to 1 July 1993).

It is difficult to see why development consents should continue to be approved for 'indefinite effect' when evidence is now showing the consequences of doing so.

3. Physical commencement versus substantial commencement and timing

The current bar to prevent a consent from lapsing is *physical commencement* within 5 years (subject to COVID-19 extensions).

Some States and Territories refer to *physical commencement*, others refer to *substantial commencement*. Some refer to 2 years, others refer to 5 years.

Substantial commencement is not a new concept to New South Wales. Prior to commencement of the current regime on 1 September 1980, New South Wales

also used to require *substantial commencement* under Section 315 of the then *Local Government Act 1919*.

The current legal framework (commenced 1 September 1980) has therefore been designed to significantly lower the bar from *substantial commencement* to *physical commencement* to require developers to undertake less work to maintain their consents.

Since 15 May 2020, the bar was then raised back up to (although not as far) by excluding certain minor acts from qualifying as *physical commencement*.

It is possible that increasing the bar for commencement or reducing the period for commencement may again lower the risk of historical developments arising in the future.

4. Ongoing zoning updates

Development must be directed to suitable locations, avoiding or reducing exposure to natural hazards, impact to vulnerable ecosystems and unsuitable communities.

One way to achieve this for future developments is an in-depth and more regular review of applicable zoning.

Section 3.21 of the Act requires councils to keep their local environmental plans under regular and periodic review to ensure consistency with the Act's objects (for example, facilitating ecological sustainable development). Section 3.21 goes on to state:

> '*Every 5 years following such a review… a council is to determine whether relevant local environmental plans should be updated*.'

In undertaking such a review, the current zoning template needs to be capable of catering for land with limited environmental values, but which is also affected by change risk (see for example, the Queensland planning system's limited development zone).

This submission has already addressed the lack of resources available to councils to undertake the necessary reviews.

Options for funding a systematic rezoning review should be considered.

5. Federal Government action under the EPBC Act

This submission has already discussed the EPBC Act and the requirement for approval prior to harming threatened species.

To ensure that threatened species are protected in accordance with the EPBC Act, the Federal Government should be encouraged to investigate these historical development consent sites for the presence of a relevant threatened species and proceed to enforce the EPBC Act.

In situations where the Federal Government takes action, it may be possible for local councils to negotiate with a developer to obtain a best alternative to the existing development that removes (or otherwise substantially manages in accordance with the EPBC Act) the impact to threatened species.

(e) Any other matters.

1. What is the extent of approved historical developments that need addressing?

This submission has already discussed the issue of the unknown extent of the historical development problem and how it is difficult to define what a 'historical' development is.

How far-reaching any methods need to be to address these historical developments may ultimately depend on how many historical developments need to be dealt with.

For example, it is not feasible to cost new funding schemes to fund a targeted use of the existing revocation power if the number of historical developments to be revoked is unknown.

Before enacting any option to address the problem, the extent of the problem (at least with respect to existing historical developments) needs to be better understood.

2. Are new historical developments of concern?

With respect to new developments (or developments recently decided), a short-sighted view might suggest that we are now aware of key environmental issues in 2024 and can plan around them. Accordingly, we should not be concerned with the issue of new 'historical' developments moving forward.

However, this is not a view that should be adopted.

If climate change has taught us anything it is that systems are subject to change. Putting aside changes to risk, lessons learnt in resilience and the discovery of new threats, there is still the issue of changing site conditions. An assessment against a cleared site now is irrelevant if that site later becomes vegetated.

This means that any legislative reforms (for example to introduce completion dates) should not simply be disregarded because of a desire to not apply completion dates retrospectively or a misguided belief that the problem does not apply to future consents.

3. What do other States and Territories experience?

This submission has already discussed how the States and Territories differ in their treatment of commencement and completion. This submission has not extensively or exhaustively reviewed whether other States and Territories without completion dates also experience this issue and how such issues are addressed.

Further, this submission has not extensively or exhaustively reviewed the consequences of introducing methods such as completion dates. For example, the extent of supporting policies and procedures or new problems attributable to such methods are unknown.

Any further investigation and proposed actions must identify what other States and Territories experience and the lessons learnt from their current systems.

If you have any questions regarding the above, please do not hesitate to contact Denise Galle on [redacted].

Yours faithfully

[redacted]

Denise Galle
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