Submission No 82

HISTORICAL DEVELOPMENT CONSENTS IN NSW

Name: Ms Jan Barham

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Jan Barham

[redacted]

Byron Shire Councillor 1999-2012, Byron Shire popularly elected mayor 2004-2012

Member of Legislative Council (MLC) 2011 -2017 (The Greens)

June 2024

"the last vestiges of traditional planning and genuine public participation have been largely abandoned ….. ad hoc decision making, often at the behest of individual entrepreneurs who court State or local government politicians"

Justice Paul Stein 1997

SUBMISSION - Inquiry into historical development consents in NSW

Thank you for the opportunity to comment on this planning matter. I appreciate the granting of an extension to submit and regret not having focussed on this earlier.

After more than three decades of engaging with the NSW planning system I'm increasingly concerned about the failure of the ever changing planning system to deliver for the community, the environment and the future.

I remain hopeful that an informed review of the planning issues associated with historical consents will encourage committee members to identify and recommend addressing the mistakes of the past by proposing actions to avoid foreseeable destruction of irreplaceable values and avoid risks to public safety.

The current focus of community concerns with zombie developments is primarily due the potential for significant environmental impacts that will result from the implementation of flawed and outdated past approvals.

There are also risks associated with approvals granted on flood prone land which require fill and will undoubtedly present future public safety concerns and impacts. There are also previous approvals that may have approved development in fire prone areas.

An acceptance of the problems associated with historical amendments to planning laws is essential. Many of the changes were met with criticism and characterised as *"a departure from the principles that the community would expect to find in a good decision-making process: that is, consistency, transparency, accountability and certainty."*[1]

In fact there is a general analysis that over the last two decades in NSW, successive governments have ranked development ahead of the outcomes for the environment and community and has not adhered to the principles of Ecologically Sustainable Development

[1] NSW EDO – Technocratic Decision Making and the loss of Community Participation Rights: Part 3A of the EP&A Act – dated 2007 – Address to Law Society

(ESD) to which it has a stated commitment and has enshrined in legislation but rarely observes.

My perspective is that there are key issues that have eroded the capacity of the planning system and given rise to current concerns about historical approval implementation

- a failure to adhere to a legislated commitment to Ecologically Sustainable Development (ESD) and importantly the Precautionary Principle
- the removal of development approval authority from local government and the accountability that is derived from having elected representatives as decision makers alongside genuine community consultation and participation in the decision making process
- limited capacity for community participation and a lack of recognition of input, local knowledge and in many cases expertise beyond that of the applicant's consultants or public servants, particularly in relation to ecological issues by the State appointed decision makers
- a reduction in appeal rights for the community
- A lack of commitment to biodiversity protection and comprehensive assessment of a site's current values and attributes and rigorous review of the information provided by applicants
- Disregard for the input from agencies, particularly environmental concerns
- A lack of certainty with the definition of works that are required to determine substantial physical commencement rights for an historical approval being one that is not yet commenced construction or fulfilled pre construction conditions
- A failure to provide clarity about the implementation process for historical approvals in relation to contemporary knowledge and assessment processes including ecological, cultural and climate change
- A lack of transparency in the processes of application approval and ongoing implementation of the consent, in the case of Wallum, a lack of transparency in the approval of the Clause 34A Certification for the 2021 DA for staged development of the Concept Plan and the misrepresentation with the processes of a staged development

To address the potential for significant impact from the historical approvals, I believe there are options to be explored, including

- Government Buy back of significant sites
- Government negotiation with applicants to secure redesign of developments to mitigate destructive impacts on matters of ecological and cultural significance (see 2022 Flood Inquiry recommendation 23)
- Review approvals and determine those that may be negotiated as Enforceable Undertakings for prior damage or disturbance or to explore the potential for protection or regeneration as part of the implementation of consents
- Develop clear guidelines for the implementation of historical approvals including clarity on the ecological assessment processes for staged development applications and how current knowledge is assessed for threatened and endangered species
- Determine if the NSW Government has power to refer to the Commonwealth under the EPBC any prior approvals that may pose a threat to EPBC listed species

- Expand opportunities for public participation in the ongoing processes, particularly in the criteria for ecological and climate change assessment regarding the potential for risk and harm and to ensure that the Department creates an open process for the determination of Clause 34 Certification

Background

Despite Ecologically Sustainable Development being recognised in 1992 and legislation in NSW since 1991, the principles have not guided new legislation and amendments to existing legislation and the processes for development assessment and determination. Conversely the courts have upheld ESD in many precedent judgements and have identified the need for legislators to more clearly define and enshrine these principles in law and practice. Many judgements have relied on the precautionary principle.

"The statutes also provide no guidance as to any outcome, such as to implement the principles of sustainable development. Stein calls for the legislature to provide guidance on these questions."[2]

A key principle contained in ESD is the Precautionary Principle,

New South Wales passed the Protection of the Environment Administration Act in December 1991. That Act set objectives for the Environment Protection Authority including "to protect, restore and enhance the quality of the environment in NSW giving regard to the need to maintain ecologically sustainable development". The concept of ecologically sustainable development was defined in s 6(2). This formulation has become the touchstone for all subsequent statutes in NSW referring to ecologically sustainable development. It contains the four, familiar principles of the precautionary principle; inter-generational equity; conservation of biological diversity and ecological integrity; and improved valuation pricing and incentive mechanisms. [3]

Previous review of NSW Planning

I hope the committee will familiarise itself with previous planning inquiries that documented concerns by local government, community groups and professional associations.

The Legislative Council Standing Committee on State Development undertook an extensive inquiry and in 2009 released *New South Wales Planning Framework* [4] and in the introduction stated the need for major independent review. The criticism of the recommendations was the failure to recognise the already evident failures and address them with legislative amendments.

Motivation for Governments to erode the planning process

What become too familiar in the communication about planning processes was a need to 'cut red tape' , 'fast-track approvals', the need for 'one-stop-shop' , 'streamline processes' and 'cut green tape' . All of these were seen as removing councils' and communities involvement in the assessment process and producing a reduction in transparency in the decision process and a motivation by government to make the planning process more simple

[2] Stein – 1993 – Justice Preston paper - 2009
[3] Preston 2009
[4] NSW LC Report – NSW Planning System 2009

for development. In doing so, there was an over-arching reduction in the focus on the quality of environmental assessments.

The first major legislative change in 1997 with the changes known as Integrated Development Assessment, that removed councils as the approval authority for certain categories of development and allowed private entities, paid for by the developer to approve development. This is known as private certification and has plagued society and continues to do so today. How often do we hear the stories of buildings that cannot gain habitation certificates or where people are removed due to the unsafe standards. This was the wrong approach, there was another way more timely and accountable decisions could be made. The alternative option was for councils to be supported in expanding and strengthening in building certification authority and ensure an appropriate level of accountability.

Note – I raise this issue as it is clear that the ramifications of these changes continues to impact today. Many people's lives have been significantly affected and the problem is clearly due to a failure to ensure consistent and accountable approval processes for the construction of developments.

In **2002** the introduction of SEPP 71, Coastal Protection, which required all development in the coastal zone to be approved by the State. This was a flawed process that was amended soon after it was adopted when it was revealed that it captured all development including minor development such as garages and single dwellings .

What was implemented was a process of state approvals that often disregarded community and council input and often resulted in poorly written conditions of consent that created uncertainty and required local government to expend resources to oversee outcomes when implementation was commenced.

When the NSW ALP introduced the **2005** – Environmental Planning & Assessment (Infrastructure and Other Planning Reform) Act, it was stated it was a reform of the planning process. It aimed to "*reform land-use planning and the development assessment and approval system under that Act, particularly in respect of State infrastructure or other significant projects and land-use planning instruments*.[5]

The Second Reading speech by Minister Knowles stated

> *The wellbeing of our economy depends on business being able to work with certainty, a minimum of risk, low transaction costs, and appropriate levels of regulation. This bill demonstrates the Government's determination to take decisive action to achieve these objectives. By establishing greater certainty in the assessment of projects of State significance and major infrastructure projects, the bill further assists in the Government's desire to afford opportunities for the private sector to participate in the delivery of our infrastructure programs. There is no doubt this bill dramatically improves the climate in which to do business in this State.*

These statements were about the economy and more likely about the pressure on the Government from the development industry that seemed to avert their focus from their role to ensure protection of the environment, heritage and communities. There was little mention of the environment, cultural heritage or climate change, in fact it created a streamlined

[5] Explanatory note EP&A (Infrastructure and Other Planning Reform) Bill 2005

process that avoided comprehensive assessment of ecological issues, particularly with the broad Concept and Master Plan options that provided reduced assessment of cumulative impacts.

The amendment was a major attack on the rights and responsibilities of local government. It created the **Part 3A provisions** that took the power for determining approvals away from councils and the community, reduced appeal rights and put the decision with government appointed panels.

The creation of new categories of development including Master Plans and Concept Plans and the categories of scale of development by size and monetary value that determined the status of regional, state significant, major projects created the shifting power as determining authority to state appointed panels.

There was significant outcry from councils and community and Part 3A became a major issue in the 2007 and 2011 elections.

There was also the potential for applicants to propose developments that met the criteria for state based approvals to remove them from the scrutiny of local councils and communities. This was relevant in the Byron Shire as it has a long history of informed community engagement and often refusal or modification of applications.

The provisions allowing the approval of Concept Plans have been disastrous. They provided the applicants with a bankable approval but one that often was then sold on or land banked. What was missed was thorough investigation of the impacts of the proposal. In relation to the potential land banking is the contentious issue of determining the ability for the approval to retain the right to remain active. The inquiry will be reviewing the physical commencement test that precludes an approval from lapsing and there needs to be certainty as to what works constitute physical commencement. I recall a judgement that accepted that the act of surveying a site was sufficient (Tweed).

Successive Governments' have continued to erode the planning system and create provisions that evade the rigorous and comprehensive assessments required to determine the impacts of development and the risks posed.

There's also been a trend to use state wide planning processes such as State Environmental Planning Policies (SEPPS) and the Standard Instrument (SI) LEP that have negated the essential considerations of local circumstances and conditions that may be affected by the imposition of development in areas of significance or risk.

With over three decades of experience of reviewing, making submissions and determining development applications in my role on council, I can say that the processes for assessing applications by panels have been of a lesser standard than those undertaken by council and informed by the community. I have seen scant attention paid to ecological issues, cultural heritage and climate change and a failure to look at cumulative impacts of development.

How to address current problems with historical approvals

In terms of resolving the current problems with these applications I believe there are some ways to address the problem of historical approvals to attempt to avoid the potential for harm, damage and destruction of environmental values, cultural heritage and risk of climate change impacts.

These prior approvals are a product of amendments to the planning system that resulted in a lack of comprehensive assessment of key issues of environmental and cultural heritage impacts and climate change but provided applicants with a right to develop.

The changes also reduced the input and relevant expertise and interests of community by restricting the level of public participation and too often accepting the information provided by applicants as superior to local knowledge.

In some cases the outcry is about the lack of scrutiny and legislative recognition for the importance of key ecological attributes. Many historical applications were approved prior to now recognised ecological significance of both flora and fauna species and ecological communities.

In some cases it may be appropriate for Government to consider the consequences of the impact and whether some are worthy of negotiation and buy back as it's clear that the processes for decision making were not rigorous and focussed on economic growth.

In summary I propose a few ways in which zombie approvals could be addressed

- Government Buy back of significant sites
- Government negotiation with applicants to secure redesign of developments to mitigate destructive impacts on matters of ecological and cultural significance
- Review approvals and determine those that may be negotiated as Enforceable Undertakings for prior damage or disturbance or to explore the potential for protection or regeneration as part of the implementation of consents
- Develop clear guidelines for the implementation of historical approvals including clarity on the ecological assessment processes for staged development applications and how current knowledge is assessed for threatened and endangered species
- Determine if the NSW Government has power to refer to the Commonwealth under the EPBC any prior approvals that may pose a threat to EPBC listed species
- Expand opportunities for public participation in the ongoing processes, particularly in the criteria for ecological and climate assessment regarding the potential for risk and harm and to ensure that the Department creates an open process for the determination of Clause 34 Certification

As an example, the Independent Flood Inquiry undertaken after the significant 2022 floods reported to Government in July 2022 and delivered 28 recommendations, after extensive consultation and expert input and co-lead by Mary O'Kane and Michael Fuller.

One of the recommendations explores the options for dealing with past approvals that now pose risk and a method for the government to investigate dealing with them by way of negotiation.

Recommendation 23 - Housing and Development Funding Options (extract)[6]

- *investigate whether trading mechanisms for development rights, renegotiation with developers with existing rights, or uplift value capture to fund buy-outs*

[6] NSW Flood Inquiry 2022

This method may be one the committee could investigate but it would rely on substantial work being undertaken to determine the prior approvals that now pose risks to environmental and or cultural values or public safety that were not comprehensively assessed at the time of approval.

This outcome could be undertaken by a state wide review of approvals and identification of current values to determine those which are likely to disturb, destroy or negatively impact and seek to negotiate changes to the design of the approved development.

Confusion with contemporary approvals for staged development and assessment

In some circumstances such as one I'm familiar with, Wallum in Brunswick Heads I believe there has been confusion as to the staged development implementation and how applications are being assessed, particularly in relation to ecological assessment.

I also note that there has been an historical failure to consider submissions from local government, scientists, government agencies and community groups. I provide some of these points in the case study notes below.

WALLUM CASE STUDY

Bayside Brunswick Residential Subdivision, Bayside Way, Brunswick Heads (Concept Plan) (05_0091) approved 2013

My recent involvement in the Brunswick Heads development known as Wallum provides some observations based on my review of that process including the history of the site's approvals. I will not re-examine the ecological values in detail but focus on what I believe are inconsistencies in the planning process.

The location is a significant 30ha coastal site featuring Endangered Ecological Communities, including EPBC listings. Recognised Wallum vegetation is present across most of the site with the potential for up to 13ha to be destroyed. A total of 19 Threatened fauna species listed in NSW and another two species are likely to be present. These include the Wallum Froglet, South-eastern Glossy Black-cockatoo and the Koala as well as recent evidence of the EPBC listed Sedge Frog. Impacts on an additional ten species may also be significant but insufficient investigation was provided to inform assessments. There are species present that haven't been adequately assessed including those listed as Serious and Irreversible Impact (SAII).[7]

The recent approval highlighted flaws in all the assessment processes, specifically the lack of thorough and comprehensive environmental assessments and what appears to be a misinterpretation regarding the interpretation of the approved Clause 34A Certification by the DPE dated 30.3.2023.

Background

2013 Concept Plan for 162 residential lots & one medium density lot, MP05_0091 approved 11.7.2013 with conditions by the NRPP.

On review it's clear the decision by the Planning Panel did not take into account environmental concerns presented by Byron Shire Council, many submissions from local community and organisations, including professional environmental scientists. Also, significant concerns raised by OEH weren't incorporated in the determination

2016 DA 10.2016.337.1, Stage 1 approval for 12 lots, issued by Byron Shire Council in 2017

Stage 1 for 12 lots & the creation of one lot (remaining land) approved by BSC on the 22.9.2017 that required in Condition 9. Vegetation Management Plan for consideration of EPBC matters.

2021 DA 10.2021.575.1 / PPSNTH-134 approval by the NRPP on 16.5.23 – subdivision for 131 lots

NRPP Briefing Notes indicate the need to clarify environmental concerns and the applicant proceeded to apply for Clause 34 Certification, despite having prepared a Biodiversity Development Assessment Report (BDAR) which was abandoned after certification approval.

[7] David Milledge – 2024 submission to BSC – local ecologist with over 40 years experience

Environmental Assessment

Since the assessment and approval of the Concept Plan in 2013 there have been significant changes in the categorisation of species and ecological communities. The recognition of the extinction crisis has highlighted the impacts of loss of habitat and the destruction of key wildlife corridors that enable fauna species to traverse landscapes, often in search of feed.

Clause 34 Certification -BCA Regulation 2017– the issuing of the certification in March 2023 by the department defined that the proposal is required to be assessed under the repealed Section 5A (7 Part Test) of EP&A Act rather than the Biodiversity Conservation Act 2016. The 7 part test is the process for determining if a SIS is required.

The assessment by the council and by the NRPP highlights confusion as to how the proposal was assessed. It appears there was confusion as to whether further ecological assessment was required or whether the certification allowed for the acceptance that the prior (2011 to 2013) assessment as per the Concept Plan were sufficient.

The BSC Assessment Report for the NRPP dated April 2023, stated

> The app cant sought Cert f cat on from the NSW Department of P ann ng and Env ronment (DPE) under C ause 34A(3) of the *Biodiversity Conservation (Savings & Transitional) Regulation 2017* to conf rm that the b od vers ty mpacts of the deve opment were sat sfactor y addressed n the CPA.

This extract identifies the confusion associated with the Clause 34A (3) certification. The council report interprets that the prior assessment for the 2013 approval are satisfactory. This indicates that no contemporary assessment is required.

However, the website info states

https://www.env ronment.nsw.gov.au/top cs/an ma s-and-p ants/b od vers ty-offsets-scheme/about-the-b od vers ty-offsets-scheme/trans t ona -arrangements/c ause-34a-cert f cat on

Applying for clause 34A certification

The application process, eligibility and documentation required

Eligibility criteria

To obtain certification under clause 34A an applicant must clearly show that the proposed development:

- *is the subject of a development application, or that will be the subject of pending or future development applications*
- *is part of a concept plan approval or relevant planning arrangement*

and that

- *the biodiversity impacts of the proposed development have already been satisfactorily assessed before the commencement of the BC Act as part of the concept plan approval or relevant planning arrangement*
- *have conservation measures that have been secured into the future by a planning agreement, a land reservation or otherwise*
- *the conservation measures offset the residual impact of the proposed development after the measures required to be taken to avoid or minimise those impacts.*

There are a number of issues that raise uncertainty as to whether the application meets the criteria for the granting of certification and a number of them are crucial to the approval Clause 34 Certification granted for Wallum in March 2023 prior to the NRPP approval in May.

Effect of Clause 34A Certification – see extracts below

The Biodiversity Offsets Scheme (BOS) under Part 7 of the BC Act does not apply to proposed developments certified under clause 34A.

Non-biodiversity impacts will be assessed under section 4.15 of the (EP&A Act).

If a clause 34A certification has been granted, the biodiversity impacts of development are assessed as they would have been before the introduction of the BC Act. This includes considering whether there is likely to be a significant impact on threatened species, populations or ecological communities or their habitats in accordance with the now repealed section 5A of the EP&A Act (7-part test).

What is a satisfactory assessment of biodiversity impacts?

A satisfactory assessment of biodiversity impacts means that residual impacts for proposed development have been adequately assessed and are consistent with the relevant planning arrangements and the conservation measures that offset impacts.

How should planning authorities assess proposed development under s5a of the ep&a act after a clause 34a certification has been issued?

Where a clause 34A certification has been issued, planning authorities will assess the biodiversity impacts of a proposed development ***as they would have prior to the introduction of Part 7 of the BC Act.*** *This includes considering whether there is likely to be a significant impact on threatened species, populations or ecological communities or their habitat in accordance with the now repealed section 5A of the EP&A Act (7-part test). Where a significant impact is determined by the planning authority, an SIS will be required and the proponent will request the environmental assessment requirements from the Department.* ***The Department will consider previous offsets on a case by case basis when preparing the environmental assessment requirements for the SIS.***

It needs to be recognised that the assessment of biodiversity issues is always complex. The applicants seek to downplay the ecological significance of a site due to the potential to limit their development options. The community, who in my area have significant expertise and long term knowledge of the environment will often be the reviewers who are able to recognise flaws and omissions in applications and apply the Precautionary Principle and expect a high standard of investigation and assessment.

Clarification required re application assessment– to what standard do staged development have to meet contemporary environmental standards and how does an assessment for a current DA need to be presented for consideration. This is a major issue that requires clarification and a vital issue in ensuring that ecological values are not ignored.

In the case of Wallum, there has been confusion created by various versions of environmental assessment produced, some contain mistakes eg. the naming of species but all versions appear to fail the test of producing comprehensive survey and investigation of the likelihood of the presence and therefore the impact.

A number of experienced local ecologists have been critical of the environmental assessments and claim that if more comprehensive investigations were required and considered, then a Species Impact Statement would've been required and a referral to the Commonwealth in light of EPBC species being present on or near the site.

In relation to this particular site, the presence of frogs species, including the EPBC listed Sedge Frog and the potential for the EPBC listed Mitchells Rainforest Snail have very distinct requirements for survey to assess the likelihood of their presence. Despite numerous revisions of the Vegetation Management Plan, there are flaws in the document and appears that there was a failure by council and the NRPP to require further information from the applicant.

Confusion regarding the impact of Clause 34A Certification

In this case it appears that there was confusion about the process and the application of Threatened Species Act as per the Clause 34A Certification and the operation of the Biodiversity Conservation Act. The Council assessment report and the NRPP determination include references to the BCA 2016, when it is clear it doesn't apply.

When an applicant prepares a DA for a stage of a previously approved consent, the question must be considered if appropriate response by councils and government agencies is to ensure a thorough environmental report, this includes a review and assessment of whether the standard meets with survey requirements and a fulsome review of the likelihood of species to exist and or be impacted.

Species Impact Statement (SIS) – it appears in this circumstance due consideration was not given to the assessment process and the likelihood of significant impact on threatened species, populations or ecological communities. If a focus on the current ecological attributes of the site had been considered a SIS should've been required.

But this wasn't required and with recognition of key threatened species it is the opinion of many that a trigger for referral under the EPBC should also have been made by DECCW.

What is unclear is if that referral is still possible, despite the approval being granted but with the knowledge that there is a likelihood of threatened species and communities impact.

The other option for addressing the lack of comprehensive prior assessment would be the application of the process of "**Enforceable Undertaking"** under Section 9.5 of the Environmental Planning and Assessment Act 1979.

This action may be initiated by the Department Secretary and provides for an agreement to be reached for undertakings for rehabilitation if there has been a case for consideration of breaching of approval or acts. In the case of Wallum, contrary to the 2021 approval, slashing of the land took place.

This process may not be applicable in the case of Wallum but may be in the case of other developments that haven't yet received a Clause 34 A Certification issued by the Secretary, if there are concerns regarding works and the impact of those works.

Offsets

The guidelines for Certification approval also require consideration of appropriate offsets for the impact of the development on the environment.

The proposed offsets for the Wallum development DO NOT meet the standard set out for NSW.

The lands proposed to be transferred to the BSC are areas that are already protected by the zoning. The transfer of the land is therefore a burden transferred to the council for the ongoing management of the lands without sufficient funds for the ongoing management.

In fact in this process there hasn't been a clear definition of the impacts of the development and the requirement for offsets. In the Concept Plan assessment it was identified by both council and the OEH that the offsets were insufficient, but it appears the JRPP approval failed to take on the advice.

BSC submission – Concept Plan 7 November 2011

> The urban development of the site (including removal of regenerating wallum heath and existing vegetation stands including old growth trees, extensive in-filling, occupational impacts including impacts from stormwater and human occupation of the site and provision of insufficient buffers between the areas of high conservation value vegetation and the proposed development) will generally tend to the degrading of these values. A number of elements of the proposed development are unreasonably and significantly detrimental to these ecological values and are not justified by the merits of the circumstance.

AND

> Loss of wallum froglet habitat
> The existing N-S drainage pattern/vegetation running down the middle of site should be retained 'as is' and significant buffers provided for improved water quality and riparian outcomes. It is not evident from the application that Wallum Froglet habitat is secured. The high nitrogen loads (post-development) modelled in Appendix 'L' are incompatible with the retention (or creation) of froglet habitat along any part of this stormwater drainage corridor and Council has concerns that there is a potential for the development, including from proposed cut and fill and the relocation of an existing drainage swale through the site, to impact on the Wallum Froglet habitat.
> It is not evident how lots 118-122 can be created consistent with the establishment of an adequate wetland area that serves as both a stormwater treatment area and viable Wallum Froglet habitat.

OEH dated 28 October 2011

There are numerous concerns raised in the document and it appears that many of these were overlooked or not fully considered.

The later report prepared by DPI for the determination by the JRPP, titled *Director General's Environmental Assessment Report dated July 2013* identifies agency input and issues raised by council.

It includes statements such as

> *Bayside Brunswick, Brunswick Heads* *Director-General's Environmental Assessment Report*
>
> The OEH advised that if impacts cannot be avoided, they should be offset in accordance with the Biobanking Assessment methodology (BBAM). The BBAM requires habitat offset ratios of around 2.2 to 1 for Wallum Froglet, meaning impacts of 12.29 ha would require an offset of around 27 ha. In this sense, the compensatory package is inadequate. There is also no provision of what to do if the creation of habitat does not lead to presence of Wallum Froglet.

The advice clarifies the inadequacy of the offsets proposed for the Wallum Froglet. The approved consent allows for the establishment of an experimental system of creating frog ponds on land was already identified habitat for the species. The applicants own expert identified the risk of failure for the experimental model to deliver the outcomes sought, that being to expand habitat.

The Wallum Froglet Compensatory Package involves the recreation of habitat in the central drainage channel (see Figure 8 below) and the protection and management of habitat in the P1 Reserve. Figure 8 also shows the extent of excavation of the central drainage channel. Habitat re-creation was to involve the establishment of 'melon holes' which are depressions that intercept the groundwater table and therefore hold water. The surrounding area would be vegetated with suitable vegetation. In terms of likelihood of success, the proponent engaged Dr Arthur White of Biosphere Environmental Consultants to review the compensatory package. Dr White's assessment concluded that whilst the package is not an unreasonable proposition, it is essentially experimental and vulnerable to poor water quality from the residential areas. Dr White advised that the likelihood of success was high for area 1 (contained within one of the 'lifestyle lots'), moderate for area 3 (within lot P1) and a lower chance of success for area 2 which is the central drainage line.

The approval of the CP and the 2021 DA indicate the failure to apply the Precautionary Principle that is defined by a position of do no harm.

Again, the L&E has continued to define the application of ESD principles and Talbot J noted that

"in the application of the precautionary principle, public and private decisions should be guided by:

> *(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and*
>
> *(ii) an assessment of the risk-weighted consequences of various options."*[8]

This is what the community expects, that when potential for harm is identified, the first position should be to avoid damage, then consideration of alternatives and lastly the application of offsets.

However, offsets must be genuine in relation to a commitment to enhance the environment.

The offsets approved for tree removal were 2:1, when BSC had a defined offset position of 10:1 in planning documents. The application also failed to present essential information, no whole of site plans that indicate tree removal and retention and where offset plantings were proposed were included in the application. It's of importance to note that on this site, the removal of trees includes some that are up to 60m tall, they are proposed for replacement with 300mm seedlings and no clear guidance as to the ongoing maintenance.

Also the offset plantings proposed for the Scribbly Gums and Swamp Mahogany for Koala and Black cockatoos are a token gesture as the ability for those trees to become habitat and feed trees for the species is a long term outcome. The seedlings will take at least ten years to provide the substantial attributes required to offset the impact of the removal of significant trees that may be 200 to 400 years old.

The issues raised by council and the OEH were not adequately incorporated into the decision and subsequent consent issued represents a gross failure to properly offset the destruction of the development on this critical coastal site.

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[8] (1994) 84 LGERA 397.

BCA Regulation 2017, Clause 34 Certification Process

The certification process has confused the assessment of the 2021 DA.

I query the Regulation clause and its operation as a legitimate aspect of the regulation. It was not referred to in the Biodiversity Conservation Bill readings and as explained below is not an open and transparent available to the public and able to be considered.

Having reviewed the Second Reading speech by Minister for the Environment, Mr Speakman I could find no reference to the creation of the 'Get out of contemporary environmental assessment' clause.

Further the speech refers to the new standard of transparency that would exist under the new Act including a higher standard of information being made available by means of registers to record all decisions in relation to approvals.

The Government is committed to making environmental data available and discoverable.
Division 2 of part 9 of the Biodiversity Conservation Bill 2016 obliges the Government to create and maintain online public registers. This includes, but is not limited to, public registers of biodiversity conservation licences, declared areas of outstanding biodiversity value, private land conservation agreements, holders of biodiversity credits, accredited assessors, remediation orders, and conservation strategies for threatened species and ecological communities. Those registers will allow the public to find information on actions the Government is taking to conserve biodiversity and ecological integrity.

A search on the website failed to reveal any register for Clause 34 Certification applications so I sought advice from the department. In response to my request I was informed that there was

- no public notification of the application for Clause 34 Certification
- no public submissions were able to made
- no information provided for the consideration of certification by the applicants are publicly available.

On behalf of the Save Wallum group I made a GIPA application to request access to the information submitted by the application and was informed that it was not available due to having been lodged under Legal Privilege.

So much for transparency and accountability. The community is unable to review and assess the process due to failure to provide an open and transparent process.

What is necessary for any future applications is an assurance that the process of issuing certification, and whatever benefit that provides to the applicant, it should be an open process. The community should have the right to review the information provided and present submissions prior to the department approving.

What we do know is that further information provided by the applicant after a resolution of council and fulfillment of the conditions of consent that required updated Vegetation Management Plan and Wallum Froglet Management Plan there was recognition of the EPBC listed Wallum Sedge Frog.

This should've been the trigger to require a more detailed and comprehensive survey and investigation and a referral by the state to the Commonwealth for consideration of impact under the EPBC Act.

The site also contains other species that should've received further investigation under the TSA but didn't in this determination process.

This example has highlighted

- confusion about what standard of assessment should be taken by council and the agencies assessing the application
- a belief by some that no additional information was required to be submitted or considered as a result of the Clause 34 Certification.

Potential action for Wallum

As highlighted above there are some actions that could be taken in relation to this site

- Enforceable Undertaking – due to unlawful slashing that was in breach of the 2021 consent in October and November 2023 and reported to council it would be reasonable for the Department to pursue an undertaking for remediation works on the site
- EPBC referral – the presence of EPBC listed species should have been reported to the Commonwealth by the state agency and there needs to be consideration of this being pursued, despite the 2023 approval failing to consider these matters

Conclusion

In compiling this submission in haste, I have excluded extensive information about many applications that I believe fail the test of delivering planning outcomes that meet community expectations for providing protection for the environmental and cultural values of the state, assessing the risks associated with inappropriate locations where climate change will pose future uncertainty, foreseeable risks that require careful and respectful consideration for future public safety and importantly the role of community to engage with the planning system and provide local knowledge and expertise to assist decision makers.

I hope the committee is able to consider the history and recognise the mistakes of the past and propose actions that in some address those failures.

It's a major task to try and wind back the wrongs of the past but at present we are increasingly aware of the biodiversity extinction crisis, the risks of climate change and a desire from the community to be given a respectful role in decision making.

If any further information is required please do not hesitate to make contact.

Regards

Jan Barham