# HISTORICAL DEVELOPMENT CONSENTS IN NSW

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**Date Received:**  3 June 2024

# Submission to Committee on Environment and Planning - Inquiry into historical development consents in NSW

**Comments – Kerry Walker**                                    **3 June 2024**

I acknowledge the following Terms of Reference of the Committee:

**Terms of reference**

That the Committee on Environment and Planning inquire into and report on historical development consents in New South Wales, including:

a) The current legal framework for development consents, including the physical commencement test.
b) Impacts to the planning system, development industry and property ownership as a result of the uncertain status of lawfully commenced development consents.
c) Any barriers to addressing historical development consents using current legal provisions, and the benefits and costs to taxpayers of taking action on historical development concerns.
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.
e) Any other matters.


**I make the following submission in relation to the inquiry.**

**In relation to TOR c) and d)**

**Barriers to addressing historical development consents using current legal provisions/ possible policy and legal options to address concerns**

1. Current legal provisions are not retrospective i.e. they only apply for developments post their published effective dates. This leaves many historical development consents outside the umbrella of their requirements, for example having a nominated expiry date. The impact of this is that historical development consents have no expiry date and can remain dormant for years and decades. They can be sold and "brought back to life" without meeting current environmental requirements and standards.

2. Approval may have been gained/retained based on a very low bar of "physical commencement" that is nominal, only to retain the validity of the development consent and not substantive to the development in any way. It allows the minimal investment by the developer to enable the claim of "physical commencement" e.g. minor earthworks, fencing, signage etc.

3. Current legal provisions provide no mechanism to "pull up" an existing Development Application, if this is warranted. An over-riding protection with compensation provisions is required.

4. Current legislation does not account for changes to impacts of historical development consents due to a number of factors that involve land clearing, many of which are escalating rapidly, including but not limited to
    a. Australia's commitment under the Global Biodiversity Framework to protect 30% of our land and seas for nature by 2030 (known as 30 by 30). Currently the delays in the implementation of the federal revision of the Environment Protection and Biodiversity Conservation Act (EPBC Act) mean that there is no formal legislative support for these targets.
    b. Currency of climate science information, including increases in average global temperatures now near to the 1.5oC limit set by the Paris Agreement and in many local areas of the globe far greater than this (e.g. Arctic ~4oC). This is known to be exacerbated by land clearing which eliminates vegetation that plays a critical role in carbon dioxide greenhouse gas absorption.
    c. The absence of assessment of impacts of cumulative effects of individual developments. An example in the Hunter region of NSW is western area of Newcastle (Fletcher/Minmi see photograph below) where pockets of land are subject to individual development applications. Issues such as inability to maintain minimum allocated land areas for different land zonings/threatened species result in multiple applications of the Biodiversity Offset scheme. Individually the impact may be minimal, but together over multiple developments likely to have a much larger impact that cannot be realistically mitigated. No over-arching assessment of this is considered.



    d. Similarly, pockets of lands under historical development consents may now provide important areas of connectivity between ecosystems and areas of environmental protection, where they did not at the time of approval. An example of this is the long term Newcastle Bypass project currently under construction which has disected a valuable area of bushland in the urban area (see photographs below).
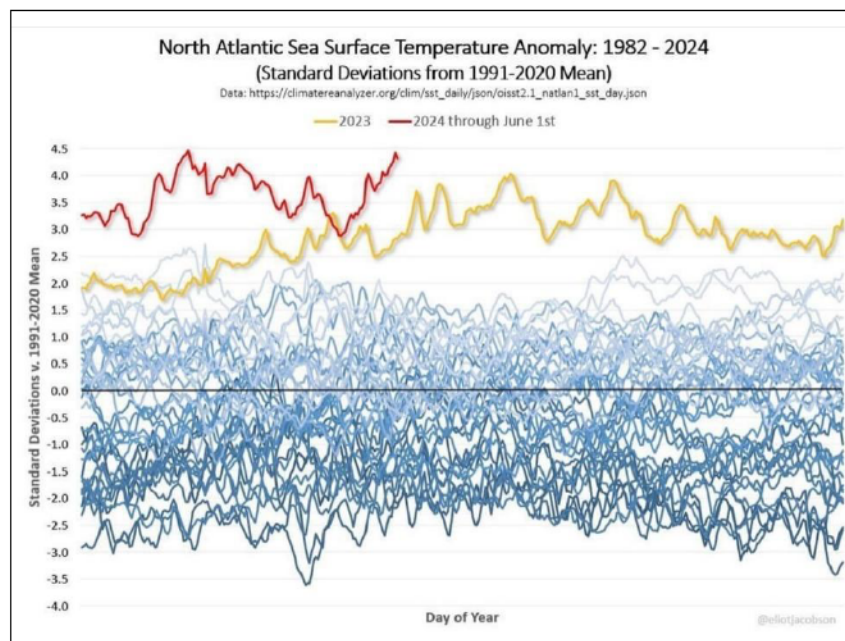
Studies such as the Barrington to Hawkesbury Climate Corridor Alliance report, which defines the refugia that will be required by threatened species in a projected warming climate, should be considered in relation to such approvals due to their criticality. (Such information should form part of any new Development Application).

    e.  The NSW Biodiversity Outlook Report recently revealed that only 50% of our threatened species in NSW are expected to survive in 100 years. The greatest threat to their survival is habitat loss.

Historical developments must be reconsidered in light of the rapidly changing environment.

5.  Changes to status in threatened species or ecological communities impacted by the development since the development consent was made are not able to be considered under current legislation.

6.  Impacts of natural disasters e.g. floods and fires that have occurred since the original historical development consent was made. Such disasters have become more intense and more frequent. The potential for such disasters and the impact of the development in their context is not re-assessed.

7.  Impacts of rising ocean temperatures which continue in uncharted territory (see current graph below), are not considered in relation to coastal consents.



North Atlantic Sea Surface Temperature Anomaly: 1982 - 2024
(Standard Deviations from 1991-2020 Mean)
Data: https://climatereanalyzer.org/clim/sst_daily/json/oisst2.1_natlan1_sst_day.json
— 2023 — 2024 through June 1st

The NSW government should declare a moratorium on coastal developments approved before 2016, for the duration of this parliamentary inquiry into Historical development consents. This includes in areas containing and adjacent to:

- Listed Endangered and Threatened Ecological Communities, including saltmarsh and other threatened coastal wetland habitats
- Habitat of species listed as critically endangered, including the swift parrot
- Habitat of species listed as endangered, including the koala and greater glider
- Habitat of species listed as vulnerable, including the glossy black cockatoo, powerful owl and wallum froglet

Immediately review the impact of projected sea level rise on coastal developments approved before 2016.

8. Currently members of the public identify and challenge historical development consents when it comes to their attention either directly or indirectly. This is an unreasonable expectation of the public, whose knowledge of the administrative and legal processes are development consents is limited.

   The onus of any resurrected historical development consent to address changes in legislative requirements that have come into effect since the consent was made e.g. whether the development now creates any matters of national environmental significance, should rest with the developer. There should be a trigger process for this, linked to the development consent and this should be proactive and ongoing.

**Benefits and costs to taxpayers of taking action on historical development concerns.**

Actions by taxpayers on historical development concerns are characterized currently by minimal benefits outweighed by significant costs under current legislation.

**Benefits include:**

- Potential protection and retention of local environment and threatened species from the historical development, where successful
- Increase in community wellbeing
- Short term employment of local workers

**Costs include:**

- Time to investigate historical development consents and understand legislation
- Direct costs of engaging legal support
- Stress and mental health from lack of understanding of the process, lack of acceptance of responsibility by multiple levels of government and no legal redress
- Breakdowns in community relationships due the conflict
- Very often ultimate loss of action taken due to lack of instruments available to effectively challenge historical development consents