

**Submission
No 47**

**INQUIRY INTO PLANNING SYSTEM AND THE IMPACTS
OF CLIMATE CHANGE ON THE ENVIRONMENT AND
COMMUNITIES**

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Current NSW planning legislation is failing to protect human communities and our increasingly threatened and vulnerable natural environment.

It is no secret that Australia and NSW in particular is facing an extinction crisis with 1,918 species now listed as endangered or threatened and even more expected by 2032 (State of the Environment Report 2021). Despite aspirational government statements regarding the need to increase the number of threatened species secure in the wild (NSW Save Our Species-NSW Dept of Planning & Environment Sept 2022), biodiversity extinction is accelerating with failures across all government levels. Habitat destruction is a primary driver of this extinction crisis with the current NSW Biodiversity Conservation Act of 2016 receiving a scathing report from the August 2023 Statutory Review of the Biodiversity Conservation Act paneled by Dr. Ken Henry , Mr Mike Mrdak AO, Dr John Keniry AM and Distinguished Professor Michelle Leishman. The summary statement was that the Act was “not meeting its primary purpose of maintaining a healthy, productive and resilient environment and is never likely to”. Dr Henry specifically named ‘Legacy development consents that were granted before the BC Act commenced and can proceed with no biodiversity assessment or offsetting because these requirements did not exist when they were approved’ as contributing to to the current failure to protect threatened and endangered species (Independent Review of the Biodiversity Conservation Act 2016, NSW Parliament, 2023) with a recommendation that “To ensure development proceeds in line with current social, cultural and environmental standards, the Review Panel suggests the government should consider whether a periodic refresh of approvals or expiry on new development applications should be required”.

A more common term for these Legacy Development Consents is ‘Zombie DAs’ with one journalist, Phillip Coorey of the Financial Review, summarizing the issue as “All the zombie developments stretch back decades. In most cases, locals had no idea that what was pristine forest or coastal wetland, rich with marsupials, birds, snakes and monotremes, was approved for development years ago – until a fence and a sign suddenly appeared. Under NSW law, once approved, always approved. Local councils don’t have the money to challenge approvals in court and the former Liberal government and the current Minns Labor government

don't want to know. They say it's a matter for the councils." He further added "This is not about NIMBYism.,,, there is no way in the world such land would be approved for housing or anything else under current environmental laws. You wouldn't get to stage one."

Many of these Zombie DAs are sited in threatened and endangered ecological communities that are found only on the East Coast of Australia, for example, Endangered Coastal Swamp Oak Forests, Endangered Coastal Swamp Sclerophyll Forests, Critically Endangered Littoral Rainforests, Critically Endangered Lowland Rainforests, Endangered Freshwater wetlands and Vulnerable Coastal Saltmarshes (Australian Government: Dept of Climate Change, Energy, the Environment and Water). Many are also sited in areas of high risk of bushfire, flooding, coastal erosion and storm surge with single road egress thus placing growing communities at increased risk of catastrophic disasters.

These Zombie DAs contribute substantially to habitat fragmentation, something the Wentworth Group of Concerned Scientists (Preventing Death by a Thousand Cuts; October 2020) comment on in their statement of Cumulative Impacts of "nature suffering death by a thousand cuts" arguing for urgent reforms to "regulate the cumulative environmental impacts of new developments". They note further that "Around the world almost two-thirds of national environmental laws require a decision-maker to consider cumulative impacts" and that "without attention to cumulative impacts, policy commitments to repair nature or be nature positive can't work", making the analogy that "it's like trying to fill a bucket while gaping holes at the bottom are draining it". They also note that the federal environment department's own advice is that even small areas of habitat loss as little as one hectare can have significant impacts on the keystone endangered species of the koala.

Climate Change is another major impact on the extinction crisis, and, of course, on human communities.

The Adapt NSW website notes that NSW is warming faster than the global average "with heatwaves, droughts, bushfires and floods all predicted to become more frequent, more severe and more dangerous" resulting in thousands of properties at risk of climate changed induced disasters (Adapt NSW 2022) and many more thousands uninsurable (Australia's Climate Change

Risks are Making Home Insurance Unaffordable, Bloomberg, August 13 2023). Adapt NSW also notes “considerable development along the NSW coast is at risk from inundation and erosion as a result of sea level rise”. However, climate change data is a rapidly changing field with increasingly dire modelling prompting warnings from scientists that human induced climate change is accelerating beyond previous predictions, for example, glacier data in both West and East Antarctica was identified in October, 2023 as melting at a rate faster than previously reported and is not included in current modelling with predictions ‘not only bad, but even worse than previously thought’ (Rachel Rameriz ‘A Hidden Feedback Loop Under Antarctica’s Glaciers could Accelerate Sea Level Rise , 27 October 2023). Despite this NSW planning continues to allow Developments targeting vulnerable populations such as aged care facilities and dense over 55 ‘life-style’ communities in high risk areas.

In short, despite the wealth of irrefutable scientific evidence, current NSW planning legislation continues to prove ineffective in meeting both human and biodiversity needs by failing to incorporate up-to-date data modelling regarding climate change threats, biodiversity, and cumulative impact assessments. In particular, the process of review and amendments of DAs, including ‘Zombie’ DAs, as pointed out by Dr Henry and others, is a major failing.

361 Blackhead Rd Hallidays Point is a case in point. Heavily vegetated, this 10.63 hectare coastal site is identified koala habitat in the 1999 Hallidays Point Biodiversity Study and a critical remnant corridor linking Darawank and Khappinghat Nature Reserves.

It is highly bushfire prone and subject to local flooding with a single road egress that becomes impassable during significant weather events and bushfires. It is remote from all essential services such as ambulance, full-time medical services, hospitals and public transport.

Despite this, a DA was approved in 2004 for an aged care nursing home, but with recognition that: “*the proposal has the potential to impact on threatened species recorded throughout the area*” and a requirement that “*significant tracts of vegetation will be retained on site*”. Acknowledged, however, was that this might not be enough to sustain threatened species.

Due to lapse in October 2009, the DA was 'preserved' in the last 48 hours by the removal of some small saplings to establish 'physical commencement'. Notably, the receipt for the work was dated a month post the lapse date. Council relied on a statement of an environmental advisor to developers with two previous convictions for the destruction koala habitat (which resulted in the loss of 30 breeding females), that 'physical commencement' had occurred before the lapse date.

Updated Physical Commencement Legislation has since eliminated this type of developer 'light loophole'.

In May 2020 the DA was again before Council with an amendment from bricks and mortar to manufactured off-site dwellings and now slated as a dense over 55's life-style community with a 4th stage development of an aged care nursing home. As an amendment, no up-to-date biodiversity impact or community consultation was enacted. However, the DA was now subject to upgraded Bushfire Risk Assessment Legislation requiring the whole site be managed 'in perpetuity' as an internal Asset Protection Zone necessitating the clearing of nearly all vegetation and the installation instead of non-flammable surfaces of concrete and short mown grass.

Clearing of this corridor will impact all of Hallidays Point biodiversity, the critical remaining corridor between two important conservation areas, and accelerate the local extinction of several threatened species including koala, brush-tailed phascogales, glossy black cockatoos, squirrel gliders, microbats and spotted tail quolls.

This example highlights the need for NSW Planning Legislation to:

1. Provide Primacy to the Biodiversity Conservation Act, (including the recommendations of the 2023 Statutory Review), to Planning Legislation, particularly the cumulative impacts on vulnerable and endangered ecological communities and species (*Terms of Reference a(iii) & b(ii)*).
2. Regional Planning needs to incorporate 'nature positive' protections and enhancement of vulnerable and threatened ecosystems, including corridor connections and also include future risk modelling on the basis of increased climate change impact (*Terms of Reference a (iii), b (I & iii)*);

3. Ensure Environmental Impact Assessment for any proposed residential development be transparent and include the most recent climate change modelling/data including increased frequency and severity of bushfire, coastal inundation, flood and storm surge predictions over time as well as strategies to manage risk such as infrastructure to manage evacuation, emergency services access and refuges (*Terms of Reference a(i) &(ii)*);
4. Zombie or Legacy DAs, given the often decades time lapse since initial approval, have the potential to put communities at risk as well as severely impact endangered ecologies and species, as such a new process should be included in the NSW Environment Planning and Assessment Legislation that requires incorporation of up-to-date and transparent Environmental Impact Assessments as well as strategies to manage risk over time (*Terms of Reference a(i), (ii) & (iii)*).
5. The Environment Planning and Assessment Act (Sn4.53) should be amended to require all Developmental Consents to be subjected to attached conditions and terms that require immediacy of substantial commencement within a 5 year period to prevent the accumulation of Zombie DAs that subvert planned community growth and development and carry the implicit potential risks of climate change disasters and inadequate infrastructure (*Terms of Reference (b(i, ii & iii))*);
6. Planning legislation needs to be strengthened to specifically address the issue of developments for vulnerable peoples, (e.g. aged care facilities), in light of predictions of increasingly severe bushfire, flood, sea rise and other severe climate change events (*Terms of Reference b (i), (ii),& (iii)*);
7. There is a case for legal changes to be made to the nature & time frame of property rights attributed to Developmental Consents under the NSW Environmental Planning and Assessment Act to allow significant changes

including transparency, priorities, and potentially revocation based on up-to-date science, climate threat modelling and cumulative biodiversity impact on existing DA consents, particularly 'zombie' DAs (*Terms of Reference b((i),(ii), (iii))*);

8. A process of community consultation requirement should be developed in regard to significant amendments, with clear & specific descriptions, to previously approved Development Consents (*Terms of Reference b (iii)*);
9. Given the heavy reliance of Councils on reports from Independent Certifiers and Environmental Consultants, a regulatory system of review and ongoing certification with required professional development should be introduced for individuals and businesses licenses to ensure up-to-date competency with appropriate penalties for significant failures and breaches of the Environment and Protection Act (*Terms of Reference e*);

Source Documents:

Australian Government: Dept of Climate Change, Energy, the Environment and Water

Australian Financial Review – Phillip Coorey 31 August 2023

CNN - Rachel Rameriz October 28 2023

Independent Review of the Biodiversity Conservation Act 2016, NSW Parliament, 2023

Nature Conservation Council of NSW

NSW Dept of Planning & Environment Biodiversity Conservation Act 2016 Review

NSW Adapt Climate Change Impacts on Sea Level Rise

NSW Save Our Species

Wentworth Group of Concerned Scientists (2020)

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