



# Blue Mountains Conservation Society Inc

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**Nature Conservation Saves for Tomorrow**

4 August 2019

Director and Chair,  
NSW Legislative Council Public Accountability Committee

By email to: [public.accountability@parliament.nsw.gov.au](mailto:public.accountability@parliament.nsw.gov.au)

## **Submission to Inquiry into the regulation of building standards, building quality and building disputes**

Please note that the Blue Mountains Conservation Society (the Society) was granted permission for an extension of the submission lodgement date to **4 August 2019**.

The Blue Mountains Conservation Society is a community-based volunteer organisation with over 800 members. Founded in 1961, the Society is the oldest continuing conservation organisation in the Blue Mountains. Its mission is to help conserve the natural environment of the Greater Blue Mountains, and to increase awareness of the natural environment in general.

The Society's submission addresses Terms of Reference 1 (a): The role of private certification in protecting building standards. We wish to draw the Committee's attention to a little-recognised aspect of the problems with the NSW private certification system which is being overlooked in the current crisis of confidence in building safety and standards.

Our issue involves a serious recent land clearing incident in the Blue Mountains which raises concerns about:

- How a private certifier could issue a Construction Certificate for 'land clearing only', apparently in contravention of the *Environmental Planning and Assessment Act 1979* (EPA Act) and *Environmental Planning and Assessment Regulation 2000* (EPA Regulation), and receive a Penalty Infringement Notice of only \$1,500 for an undisclosed infringement.
- The lack of transparency in the Building Professionals Board's investigations of complaints against private certifiers, and the lack of full disclosure of investigation findings to complainants, further eroding public confidence in the certification system and its enforcement.

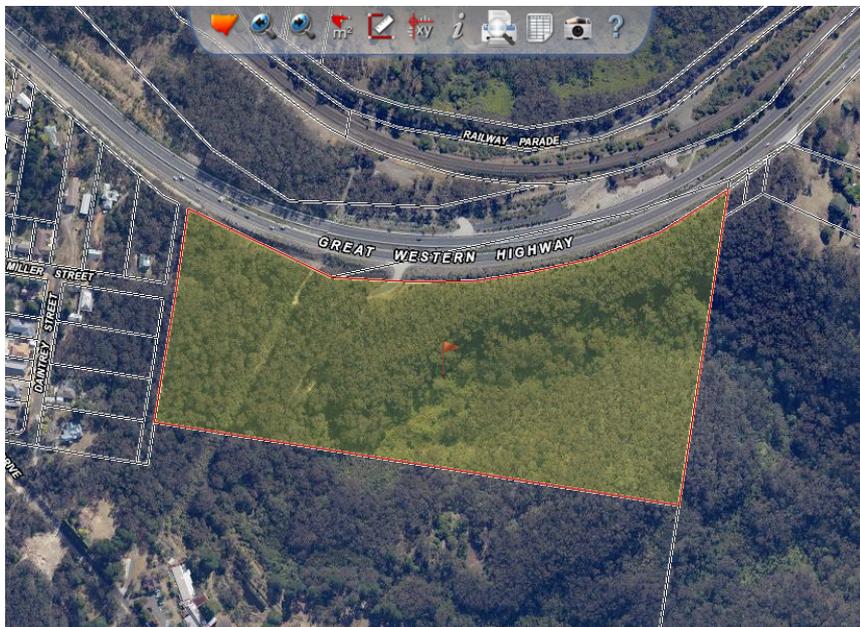
Because of the state-wide implications of this particular case, the Society is concurrently writing to the Premier and relevant ministers, calling on them to:

- 1) Initiate further reform of the private certification system and strengthen legislation; specifically, as this case demonstrates, to:
  - a. Further separate the certifier from the developer/owner through creating a system of independent certification to remove conflict of interest.
  - b. Strengthen accountability and disciplinary action, and increase penalties to create a general deterrence for potential wrong-doing.
  - c. Amend the EPA Act and/or Regulation to state specifically that a construction certificate cannot be issued for site/vegetation clearing only, and apply strong penalties and orders for site rehabilitation.
  - d. Institute better processes for complaints against private certifiers to the Building Professionals Board, including greater transparency and full disclosure of investigation findings to complainants.

### **Serious land clearing incident in the Blue Mountains – early May 2019**

On 22 November 2018 a private certifier issued the owner of the site with a construction certificate for “site clearing only” at Lot 4 DP 1158047, 10 Great Western Highway, Wentworth Falls. (See current Six Maps image of site below).

The site has the benefit of a development consent (DA 8162) for a Flora and Fauna Park, granted by the Blue Mountains City Council (BMCC) on 21 November 1989.



*Six Maps image of subject site, 10 Great Western Highway Wentworth Falls, before a fifth to a quarter of the land was cleared of all vegetation.*

The issue of the construction certificate by the private certifier was based on legal advice provided by the land owner’s law firm. The construction certificate was identified as *Type*: “Building Work”. Description of development: “CC1 – Site clearing removal of vegetation

only, for preparation of the approved Flora and Fauna Wildlife Park”. The Construction Certificate explicitly excluded “any external ancillary services, structures or civil works required by relevant authorities”.

The clearing under this construction certificate of an area of approximately 2.5 hectares to 4 hectares (exact size of area cleared unverified) occurred from an unknown time – the clearing began in an area not visible from the Great Western Highway – up to and including 8 May 2019.

The Society alleges that some of the clearing took place in the area zoned for environmental protection in the enabling LEP (LEP 79) and in the current LEP 2015, including clearing of all vegetation adjacent to and surrounding the entrance to the wildlife tunnel under the Great Western Highway. From the highway entrance to the site on 9 May 2019 no sediment controls could be seen, raising concerns about a major pollution event into the swamp and creeks downstream following heavy rain.

Regarding compliance with the development approval, the Society notes that this case also raises issues relating to public access to development consents granted 30 years ago and secured through ‘commencement’. Development approvals that are this old are not readily available to the public, unlike more recent approvals that are available online through council or other planning authorities’ websites. In these circumstances – where it is difficult to access old development consents – the community is totally reliant on the professionalism and integrity of the certifier to issue the certificate consistent with the original development conditions. However, in this particular case, serious questions have been raised as to whether the clearing was undertaken consistent with the original consent conditions. This is yet to be determined.



Right: clearing around the entrance to wildlife tunnel under the highway.

Photographs courtesy of the *Blue Mountains Gazette*:

<https://www.bluemountainsgazette.com.au/story/6158189/zombie-croc-park-plan-is-back/#slide=2>

### **Significance of the site**

The site is particularly significant. It is of high scenic value, being designated as a 'Land Between Towns' area in Blue Mountains LEPs 1991 and 2015, which provides for a vegetated buffer between the towns of Bullaburra and Wentworth Falls. Bodington Hill, on which the site is located, was listed as a local heritage item in LEP 1991. Bodington Hill is a mountains icon, marking the transition from the lower to the upper mountains in terms of vegetation and climate.

The site is also of high environmental value, containing protected areas (slope constraint, protected vegetation) and LEP listed scheduled communities including a threatened ecological community under the NSW *Biodiversity Conservation Act 2016* (*Blue Mountains Swamp in Sydney Basin Bioregion*). It is possible (though as yet unverified) that clearing may have intruded into the swamp on the site. Certainly, removal of the protected woodland could have considerable edge effects on the swamp vegetation (drying out, changed hydrology and weed invasion). From the fence on the highway it appears that no erosion controls were put in place during or immediately after the vegetation clearing to protect the downhill swamp and creeks from silt runoff in the next heavy rain event.

Most of the clearing has been conducted in *Eucalyptus sieberi/Corymbia gummifera* Open Forest and Woodland that supported a number of federally-listed threatened species of plants and animals. It occurred furthermore immediately upslope of the listed Threatened Ecological Community of Temperate Highland Peat Swamps on Sandstone that itself has been damaged in part by the process.

Damage has occurred to the *Eucalyptus sieberi/Corymbia gummifera* Open Forest and Woodland habitat of the following EPBC listed threatened species of plants and animals known from the site:

- Koala (*Phascolarctos cinereus*) – Vulnerable
- Spotted-tail Quoll (*Dasyurus maculatus*) – Endangered
- *Persoonia acerosa* (a Geebung) – Vulnerable
- *Pultenaea glabra* (Smooth Bush-pea) – Vulnerable

Damage has also occurred to the headwater tributaries of Bedford Creek that (used to) feed directly into the TEC Temperate Highland Peat Swamps. The swamp hydrology has been seriously threatened by the slashing and bulldozing that has occurred; upland streams have been bulldozed flat, the natural surface permeability changed and the balance between direct runoff and infiltration (that maintained regular seepage to the swamp vegetation) have all been altered.

***For all the reasons stated above, this is a particularly egregious instance of possibly unlawful land clearing in terms of the extent of the area clear-felled, the environmental values impacted, the particular visual significance of this site and, potentially, in breach of the conditions of development consent granted in 1989.***

#### **Actions taken by the Blue Mountains Conservation Society**

When the BMCS became aware of the land clearing (on 9 May 2019), it took the following actions:

- Wrote to the Blue Mountains City Council on 17 May 2019 reporting the clearing and raising a number of issues of concern relating to the issuing of a Construction Certificate for vegetation clearing only apparently in breach of the EPA Act, potential breaches of other legislation and the conditions of development consent, apparent clearing in environmentally protected (7e and E2 zone) land in the enabling and current LEP, apparent lack of any sediment controls in place on the steeply sloping site and the potential for significant silt pollution of the swamp and Bedford Creek downstream in the event of heavy rain. The Society is still awaiting a detailed response from the Council to our letter.
- Wrote to Federal Department of Environment and Energy on 21 June 2019 enquiring if the developer should have sought approval from the Department prior to slashing of the Threatened Species and Ecological Community on the site. Society is still

awaiting a response from the Department to our letter.

- Lodged a complaint against the private certifier to the Building Professional Board on 24 May 2019. The Society received notification of the outcome of the BPB's investigation on 19 July 2019.

### **Society complaint to Building Professionals Board (BPB)**

On 24 May 2019 the Society lodged a complaint to the Building Professional Board against the private certifier. There were three key complaints (with many detailed points of concern under each) with regard to the issue of the construction certificate. In summary, these three key complaints were:

1. Issue of a construction certificate for "site clearing only". This appeared to be in breach of the *Environmental Planning and Assessment Act 1979* (EPA Act) and *Environmental Planning and Assessment Regulation 2000* (EPA Regulation). The Society contended that a construction certificate cannot be issued for "site clearing only" under the EPA Act and EPA Regulation, and cited a previous case in support of our claim which appeared in BPB's publication: *Summary of Selected Complaints & Investigations dated 6 September 2012 (p.5), Case study 4: Pre-conditions to the issue of a construction certificate*. The complaint subject to the disciplinary action as stated in this publication is summarised as: ***An accredited certifier issued a CC for the clearing of vegetation, contrary to the requirements of the EP&A Act, which requires the issue of a CC for building work or subdivision work only.***
2. The construction certificate and the documentation and plan it relied on do not appear to relate to the original development consent 8162 dated 21 November 1989 (which a member of the Society still had a copy of). They also appeared to be in breach of many of the development consent conditions, also a breach of the EPA Act and Regulation.
3. The process by which the construction certificate was issued, and the clearing work begun, appeared to be in breach of the requirements under the EPA Act and EPA Regulation.

On 19 July 2019, the Society received an email response to our complaint from the BPB, notifying us that the certifier had been issued a penalty infringement notice (PIN) totalling \$1,500.

On further enquiries to the BPB, we were told that no further information would be disclosed and that the reasons for the PIN would not be posted online on the BPB's 'Register of Disciplinary Actions'. We are therefore not able to ascertain whether our complaint was upheld or if the PIN related to the certifier not complying with a direction or requirement of the Board made in relation to the investigation of our complaint. This is unsatisfactory.

***This lack of transparency and non-disclosure of the findings of the BPB's investigation to the complainant is not in the public interest and further erodes public confidence in the certification system and its enforcement.***

***Further, whatever the certifier was fined for, the outcome of this case has state-wide implications. If a \$1,500 fine for any infraction related to the issue of this Construction Certificate for 'land clearing only', in apparent contravention of the EPA Act, is all that a certifier receives, a new avenue is opened to unscrupulous developers across the state to clear environmentally sensitive land with apparent impunity.***

The BMCS hopes that, as a result of its Inquiry, the Public Accountability Committee will recommend full implementation of the various recent reports into the building industry and much stronger disciplinary action and accountability by certifiers.

We think you will agree that this case has state-wide significance because of the implications for land clearing authorized by a Construction Certificate of questionable legality. The BMCS believes that the Committee should therefore also take a close look at this neglected but important problem in the NSW private certification system and recommend relevant reform of legislation and disciplinary action.

The Society can supply more detailed information if this helps in the Committee's Inquiry.

Yours sincerely



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