



Blue Mountains Conservation Society Inc

ABN 38 686 119 087

PO Box 29 Wentworth Falls NSW 2782

Phone: (02) 4757 1872

E-Mail: bmcs@bluemountains.org.au Web Site: www.bluemountains.org.au

Nature Conservation Saves for Tomorrow

11 August 2019

The Hon. Rob Stokes MP
Minister for Planning and Public Spaces
Parliament House
Macquarie Street
Sydney NSW 2000

Problems with the NSW private certification system: Serious land clearing incident in the Blue Mountains approved by a private certifier in apparent contravention of the EPA Act.

The Blue Mountains Conservation Society (BMCS) is a community-based volunteer organisation with over 800 members. Founded in 1961, the BMCS 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 BMCS wishes to draw to your attention a recent serious land clearing incident in the Blue Mountains. It highlights 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.

This land clearing incident and its aftermath raises concerns about:

- How a private certifier can issue a Construction Certificate for 'land clearing only', seemingly in contravention of the *Environmental Planning and Assessment Act 1979* (EPA Act) and *Environmental Planning and Assessment Regulation 2000* (EPA Regulation), and receive a fine 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.
- How a development consent can still be valid 30 years after being granted in this case, without obligation for review against contemporary environmental protection standards and community expectations.

We call on the Minister to:

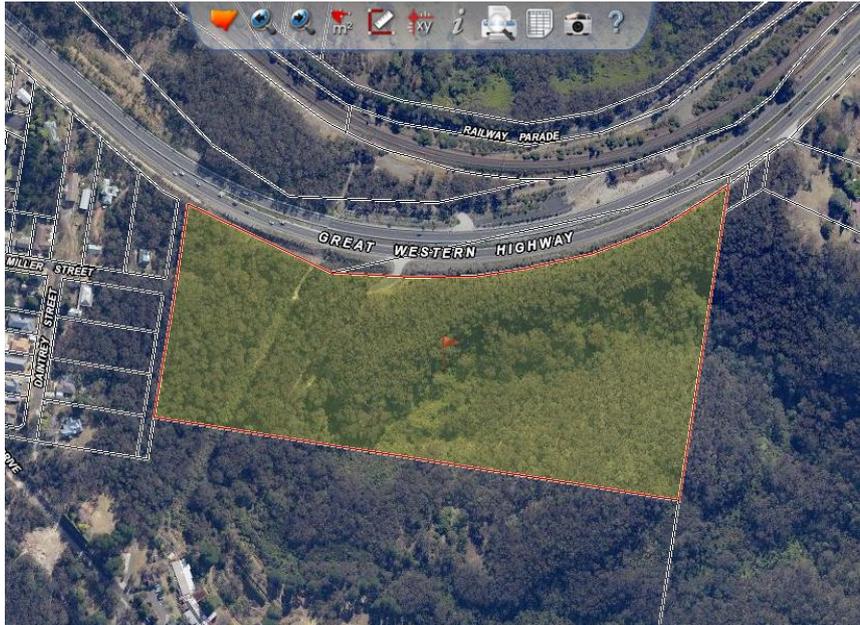
- 1) Initiate further reform of the private certification system and strengthen legislation; specifically, as this case demonstrates, to:
 - a. Further separate the certifier from the developer/owner through creating a system of independent certification to remove conflict of interest.
 - b. Strengthen 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 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.
- 2) Initiate reform of the EPA Act to provide for a sunset provision or the like on development consents to avoid unreasonable delays on implementation, or at least require a review of the development approval against contemporary environmental protection standards and community expectations after a certain period of time. The BMCS supports the Blue Mountains City Council's letter to the Minister for Planning and Public Spaces, Rob Stokes, dated 11 June 2019 (attached) requesting such a reform and citing the same land clearing incident.

1) CONTINUING PROBLEMS WITH THE PRIVATE CERTIFICATION SYSTEM IN NSW

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

On 22 November 2018 private certifier Mr David Blackett of Blackett Maguire and Goldsmith, approved 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 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 Construction Certificate number CC-18191, 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 Construction Certificate was issued to Mr Farshad Amirbeaggi of Aesthete No 14 Pty Ltd (owner of the site) as the "approval" that has enabled clearing of part of the approximately 10 hectare site of all vegetation (trees, understory and ground cover).

The issue of the Construction Certificate was based on legal advice provided by Yates Beaggi Lawyers of whom the founder and director is Mr Farshad Amirbeaggi (the applicant and owner of the site). It is not known what that legal advice stated, but it is listed on the Construction Certificate under "Documentation Relied On".

The area of clearing approved by the Construction Certificate was based on an "Approved Plan" ('survey plan') which was a survey by Matthew Freeburn surveyors, showing the "Proposed Location of the CC site Clearance" in green hatching. This survey was undertaken for Yates Beaggi Lawyers on 15 March 2018 as shown on the plan. It is yet to be determined if the actual clearing conformed with the Freeburn survey and area shown to be cleared.

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 BMCS 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. Whether or not the land clearing breached the conditions of development consent 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. 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 rains.

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 BMCS 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. BMCS 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 (full complaint attached). The BMCS received notification of the outcome of the BPB's investigation on 19 July 2019 (attached).

BMCS complaint to Building Professionals Board (BPB)

On 24 May 2019 the BMCS lodged a complaint to the Building Professionals Board against the private certifier, Mr David Blackett of Blackett Maguire and Goldsmith. The **complaint number** allocated by the BPB was **88/19 – 10 Great Western Highway, Wentworth Falls (Mr David Blackett)**.

There were three key complaints (with many detailed points of concern under each) with regard to the issue of the Construction Certificate by Mr David Blackett to Mr Farshad Amirbeaggi. 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 BMCS 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 EPA 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. 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 BMCS received an email response to our complaint from the BPB, notifying us that the certifier had been issued a penalty infringement notice (PIN) totaling \$1,500.

On further enquiries to the BPB, we were told that no further information would be disclosed to us 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.

Private Certifier - Mr David Blackett

From information currently publicly available on the internet, Mr David Blackett is a Director of Blackett Maguire + Goldsmith, and is listed as a member of the Board of Directors of the NSW Association of Accredited Certifiers (AAC). On the AAC's website it states "David has extensive experience in building approvals and certification, together with interpretation and application of the Building Code of Australia and related Standards, Planning Codes and Policies and local and State Planning Instruments".

David Blackett is also a prominent public industry figure, most recently in late 2018 as a vocal critic of attempts by the NSW government to strengthen the system regulating private certification following the recommendations of the Lambert Inquiry (2015). Along with other certifiers and developers at the time, Blackett slammed Minister Matt Kean's "crackdown on conflicts of interest between building certifiers and developers" through a proposed system of independent certification. He criticised the government's lack of consultation with the industry and stated that the reforms had "zero relation to [his company's] business model". Blackett saw the reforms as an over-reaction to the "minimum number of people who are doing the wrong thing" and stated that educating errant certifiers and introducing tougher penalties was better than slapping on more regulations (*Australian Financial Review* 2 October 2018 <https://www.afr.com/real-estate/certifier-regulations-are-senseless-and-dangerous-20181002-h1641q>).

It appears that industry pressure against major reform of the building industry and the certification system prevailed. When the *Building and Development Certifiers Act 2018* was passed last October (but yet to commence), a system of appointment of independent certifiers was not included and new disciplinary measures were not detailed. This new Act is generally regarded as weak, with Michael Lambert – author of the Lambert Report – condemning the NSW government for failing to reform building rules in line with his recommendations (<https://www.theguardian.com/australia-news/2019/jan/11/former-official-condemns-nsw-government-for-failure-to-reform-building-rules>).

In view of this, and in the context of ongoing issues in the building industry and the lesser-recognised problems with the private certification system as outlined in this letter, the BMCS believes further reform is warranted.

The BMCS has also made a submission on this subject to the NSW Legislative Council Public Accountability Committee's current Inquiry into the regulation of building standards, building quality and building disputes.

2. UNACCEPTABLE 'IN PERPETUITY' DEVELOPMENT APPROVALS

The land clearing on Bodington Hill Wentworth Falls was approved through a Construction Certificate issued for "CC1. Site clearing: removal of vegetation only, for preparation of the approved Flora and Fauna Wildlife Park".

The controversial Flora and Fauna Park was granted development approval with 49 conditions on 21 November 1989 in the face of a long community campaign in opposition. Soon after, a local environmental group, the Coalition of Residents for the Environment, applied to the Land and Environment Court for orders declaring the consent unlawful. The application was dismissed.

In November 1992, just before the development consent was due to lapse, the then developer undertook works on the site in what was generally perceived as an attempt to

save the development approval. The Blue Mountains City Council commenced proceedings against the developer in the Land and Environment court, claiming amongst other things that the development consent had lapsed because the works which were carried out on the site were not a physical commencement due to the works being unlawful (carried out in breach of the conditions of development consent). The judge found in the Council's favour, concluding that development had not commenced and that the consent had lapsed (BMCC v Cariste Pty Ltd and Peter Roach, Justice Pearlman 19 April 1993).

The developer then appealed to the NSW Supreme Court, which on 18 November 1996 allowed the appeal and set aside Justice Pearlman's orders (Cariste Pty Ltd v BMCC 18 November 1996, Judges Clarke, Beazley, Simos). It was on this basis that the development was deemed to have commenced even though the development did not proceed. Since 1992 the site has changed hands several times and remained undisturbed until the land clearing incident in May 2019.

That the development approval granted in 1989 has remained valid for 30 years raises several concerns:

- Since 1989, environmental protection standards have generally been strengthened, particularly in the environmental assessments required for developments located in environmentally sensitive areas such as this site. Note that the plans accompanying the original Development Application (particularly the site plan) were inaccurate because a proper survey of the site had never been done. This would be unacceptable practice by contemporary development application documentation standards. It is questionable that the development can ever be built given the underestimated size and extent of the swamp in the original unsurveyed site plan. Any attempt to build the development as per the approved plans would inevitably lead to the destruction of the now-protected swamp on the site.
- Since 1989, improvements in environmental mapping and more sophisticated environmental knowledge have informed the development controls now applying to this site in Blue Mountains LEP 2015. It is doubtful that this development would be approved under the current planning regime.
- Regarding contemporary community expectations, the Blue Mountains community now demands quality tourist developments and facilities, particularly following the declaration of the Greater Blue Mountains World Heritage Area in 2000. The Flora and Fauna Park was initially explicitly conceived as a 'morning tea' stop for passing tourists and coach tours. The main attraction of the park was to be a display of penned or otherwise confined native fauna including reptiles, koalas, wallabies and emus. This kind of display of captive native wildlife is anathema to contemporary community expectations and animal welfare standards. It is possible that the park as originally conceived and approved may not now gain the required licences from the relevant zoological authorities.

The Flora and Fauna Park's original concept and design is anachronistic by today's environmental, animal welfare and community standards. The BMCS strongly urges the NSW government to immediately review the EPA Act to impose a time limit on development consents, or at least require a review of development consents against contemporary environmental protection standards and community expectations after a certain period of time. In this we support the Blue Mountains City Council's recent letter to Planning Minister Rob Stokes.

Note that the site of another old development approval granted 20 years ago for a 120-room hotel recently featured in an article in the *Blue Mountains Gazette* 24 July 2019 (p.5). Expressions of Interest are currently being sought for the sale of the site with its development approval intact because of 'commencement'. The potential of a hotel being built to specifications and environmental standards in a 20 year old approval prompted Blue Mountains City Councillors to again raise concerns about 'in perpetuity' development approvals.

The BMCS would like to meet with you to discuss what I'm sure you recognise are important issues being overlooked in the current context of concern over the private certification system and crisis of confidence in building safety and standards.

The BMCS looks forward to receiving a response from you on this matter in the near future.

Yours sincerely



Lachlan Garland
President
Blue Mountains Conservation Society
mobile 0415 317 078 or email president@bluemountains.org.au

Copies to:

The Hon. Matthew Kean, Minister for Energy and Environment
The Hon. Kevin Anderson, Minister for Better Regulation and Innovation
Trish Doyle, Member of Parliament for Blue Mountains
General Manager of Blue Mountains City Council, Dr Rosemary Dillon
Mayor of the Blue Mountains City Council, Mark Greenhill

ATTACHMENTS (FOLLOWING)

Letter from Blue Mountains City Council to Minister Rob Stokes dated 11 June 2019, headed 'Historical approvals not meeting community expectation'

BMCS letter of complaint to Building Professionals Board dated 24 May 2019

Email notification from Building Professional Board on the outcome of their investigation of BMCS complaint dated 19 July 2019

Attachment 12 - CEO ltr to Stokes MP - Delayed implementation of Development Consents



11 June 2019

Office of the Chief Executive Officer

Reference File: 19/131444 (A71923-H)

The Hon. Rob Stokes MP
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

SUBJECT Historical approvals not meeting community expectations

On 28 May 2019, the elected Council of the City of the Blue Mountains formally carried a Notice of Motion regarding the delayed implementation of development consents. The full notice of motion is as follows:

That the Council writes to the Minister for Planning, the Hon. Robert Stokes, to seek regulatory reform of the NSW planning system to address the delayed implementation of development consents, which presently permit development some 30 or more years after the consent was secured, without obligation to review against contemporary planning and environmental standards or the views of the present community.

[Minute No. 167]

By way of background, the Blue Mountains community has been concerned to observe extensive clearing associated with a Flora and Fauna Park at 10 Great Western Highway, Wentworth Falls, on the basis of a development consent issued in 1989 and secured with physical commencement in 1992. No development of the site had occurred since that time and it had been understood that the development would not proceed. Under NSW planning legislation, however, once a development consent has been secured it can be implemented at any time in the future.

Where there are undue delays, in this case some 30 years, development should be required to adhere to present planning standards and the community's expectation for sustainable development. There is a need to provide for a sunset provision or the like on consents to avoid unreasonable delays in implementation of development consents and development not reasonably meeting contemporary environmental standards.

I strongly urge you to consider regulatory reform in this space so as to promote sustainable development and the community's confidence in the planning and development system.

2 Civic Place/ Locked Bag1005/ Katoomba NSW 2780 / T 02 4780 5000 / F 02 4780 5555
E council@bmcc.nsw.gov.au / www.bmcc.nsw.gov.au ABN 62 699 520 223

The city within
a world heritage
national park

If you or your office would like further details regarding the development given focus above, please contact Alex Williams, Executive Principal – Planning, on 02 4780 5772.

Yours faithfully



ROSEMARY DILLON
Chief Executive Officer

Subject: FW: Complaint No. 88/19 - 10 Great Western Highway, Wentworth Falls (Mr David Blackett)

From: bpb-investigations <bpb-investigations@bpb.nsw.gov.au>
Subject: Complaint No. 88/19 - 10 Great Western Highway, Wentworth Falls (Mr David Blackett)
Date: 19 July 2019 at 09:15:14 AEST
To: "president@bluemountains.org.au" <president@bluemountains.org.au>

Attention: Mr Lachlan Garland, President
Blue Mountains Conservation Society

Dear Mr Garland

Complaint No. 88/19 - 10 Great Western Highway, Wentworth Falls (Mr David Blackett)

Reference is made to your complaint under the *Building Professionals Act 2005* (BP Act) against the abovementioned accreditation holder (certifier) concerning their professional conduct.

In this particular instance it has been decided under s.22 of the BP Act to take no further action in relation to the complaint as:

1. The accreditation holder has not previously been the subject of any complaints under the BP Act.
2. Under the disciplinary penalty guidelines and legislation, specified matters found can be dealt with by issuing penalty infringement notice/s (PIN). In this instance, the certifier has been issued a PIN totalling \$1,500.
3. The certifier has been notified that the details of the complaint have been recorded, and further action may be taken against them if their conduct comes under adverse notice in the future.
4. Having regard to the above, it is not considered that the issues raised by the complaint warrant any further action at this time.

Accordingly, this complaint is now closed.

The issues raised by complaints are utilised to inform future certifier compliance and audit programs, targeting specific conduct that has been identified through previous complaints and other sources.

Thank you for bringing these matters to our attention.

Kind Regards,

Investigations Team
Building Professionals Board, Building Services
NSW Fair Trading | Department of Customer Service
p 02 8522 7800 | e bpb-investigations@bpb.nsw.gov.au