

Bushwalking NSW

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17TH MARCH 2022 BNSW GENERAL MEETING MINUTES

Time & Date 7:30-9:00pm on Tuesday, 17th March, 2022

Location: Zoom videoconference

Attendees:

NAME		Club	Nominate d Club Delegate
Andrew	Stanger	NSW NORDIC SKI CLUB	Yes
Mary	Gotham	Hill View Bushwalkers	No
Charles	Street	Life Member of the Victorian National Parks Association	No
Maureen	Carter	National Parks Association, Milton Branch	No
Stephen	Poole	NSW Nordic Ski Club	No
Terrylea	Reynolds	Canberra Bushwalking Club	Yes
Zyra	McAuliffe	NSW Nordic Ski Club	Don't know
Chris	Biz	Ben Boyd - Light to Light - Community Action Group	Yes
Fiona	Campbell	Nordic Ski Club	No
David	Morrison	Newcastle Ramblers	Yes
Peter	Ford	Brindabella Bushwalking Club	No
Kristy	Rollinson	Newcastle Bushwalking Club	Yes
Kerrie	McLean	Sutherland Bushwalking Club	No
David	Bell	Sydney Bush Walkers	No
Kirsten	Mayer	Bushwalking NSW Inc	No
Deidre	Shaw	Brindabella Bushwalking Club / Canberra B'walking Club	No
Yvonne	Everett	Coffs Hikers	Don't know
Phill	Isaacs	Springwood Bushwalking Club	No
Sonya	Underdahl	Researcher- commercial tourism development in national parks	No
JAMES	MCCORMACK	Wild Magazine	No
Jennie	Minifie	N/A	No
Sue	Stanley	Southern Highlands Bushwalkers	No
Moe	Stack	Northern nsw	No
Thomas	Cordingley	Newcastle bushwalking Club	No
Robin	Baird	Bush Club	No
robyn	counsell	NORDIC SKI CLUB	Yes
colin	wood	armidale bushwalkers	Yes
Jimmy	Cordwell	Wilderness Society - Tas	No
Leonie	Bell	Sydney Christian Bushwalkers	Yes
Tim	Vollmer	SUBW	No
Annette	Cam	Blue Mountains Conservation Society	Yes
Lucy	Moore	The Bush Club	No

Quorum: 5 delegates present in person or by proxy, representing at least 3 approved organisations constitute a quorum for the transaction of business at a general meeting.

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Diane	Quinlin	Shellharbour	No
			Don't know
Therese	Nilsson	Therese Nilsson	
Karen	Huchendorf	Coffs Hikers	No
Paul	Jennings	Nordic Ski Club	No
Mrs M	Street	don't know	No
Gavin	Dale	Bushwalking Queensland Inc.	No
Samantha			
a	Newton	National Parks Association of NSW	No
Ute	Foster	CMW	Yes
Dianne	Thompson	NPA ACT	No
Karen	Withers	RCC	No
Pam	Gill	NPA Central Coast Branch	No
Bob	Vickery	NPAACT	No
John	Whittingham	Sutherland Bush Walkers	Yes
Lynne	Hosking	Armidale Branch National Parks Association NSW	Yes
Keith	Maxwell	Bush Club	Yes
Jeanette	Robertson	Blue Mountains Conservation Society	No
David	Springthorpe	Coast and Mountain Walkers of NSW (CMW)	Yes
Andy	Macqueen	Springwood	No
John	Tonitto	The Bush Club	No
Ana	vrancic	Canberra Bushwalking Club	No
Jonathan	Elcombe	No Club	No
Harwood	Lockton	Watagan Wanderers	No
			Don't know
Chris	Mein	Paddy Pallin!	
Margaret	Covi	Watagan Wanderers	Yes
Alex	Allchin	Sydney Bush Walkers	No
ALAN	SAURAN	The Bush Club	No
Jody	Whitson	None	No
Bee	LEE	Bankstown	No
Debbie	Dukes	Nordic Ski Club	No
john	baird	Walking volunteers	No
Michael	Frankel	BMCS	No
Barbara	Bryan	NPA of NSW	No
Terence	Herbert	Catholic Bushwalking Club	Yes
Paul	McCann	Armidale Bushwalking Club	Yes
grace	sovereign-song	nil	No
Christine	McColl	SBW	No
Heni	van der Hecht	Upper Blue Mountains Bushwalking Club	No
ChiChi	Bracken	UBMBC	No
Jenny	Drewitt	Armdiale	No
Merrilee	Harris	Watagan wanderers	Yes
Barbara	Webster	Armidale NPA	No
Martin	Reusch	not a member of a club	No
Ruth	Campbell	Watagan Wanderers	No
Jon	Gray	Bankstown Bushwalking Club	Yes

Chair & Quorum

The meeting commenced at 7pm with David Bell as chair.

The chair announced that a quorum was present and that the meeting was duly constituted.

Minutes

Development in National Parks

David Bell interviews Dr Christopher Birch S.C. on the legality of development in National Parks.
Watch the video here

1. **Q. What is the legal framework that governs developments in National Parks?**

There are both State laws and Federal laws. The key State law is the [National Parks and Wildlife Act](#). For anything to happen it has to be lawful under that act.

Plus, if any development is proposed then an approval is required under the Environment and Planning Act.

Federal laws also have to be considered but they are patchy. For example the commonwealth can step in if there are declared World Heritage areas.

The two key questions that always have to be asked is whether there is a source of power permitting a particular development, and secondly, if so has the power been exercised lawfully.

2. **Q. Objects of the legislation : The National Parks and Wildlife Act 1974 and other statues contains statements of objects. How important are these to determining what development is permitted in a National Park.**

A. *In the NPWA there are a statement of general objects in section 2A. There are also statements of management principles in section 30E and there are objects in regard to plans of management in 72AA.*

There principles do not operate as direct limits on power. They guide the interpretation of the Act.

The objects also are often potentially conflicting in 2A(1)(a), they include the conservation of nature, habit and biological diversity They also include fostering public appreciation, and they include the management principles for National Parks.

The management principles for National Parks include conservation of biodiversity, but also provide for sustainable visitor or tourist use, compatible with the Park's natural and cultural values.

The legislation gives little guidance on how these conflicts are to be resolved.

3. Q. What are the key provisions that limit the type of development that can take place in a National Park?

A. *Section 81(4) of the National Parks and Wildlife Act provides that no operation shall be undertaken unless in accordance with a plan of management. A plan of management is thus pivotal to what development can take place in a Park.*

In late 2021 section 81AA was inserted which gives the Minister power to approve certain conservation actions and infrastructure projects for visitor management or conservation even if inconsistent with the plan of management.

It is likely this provision will be relied upon in regard to tourist developments within in Parks. It has some safeguard within it, but they are not strong.

4. Q. How do the plans of management operate?

A. *Every National Park is supposed to have a plan of management, and all the major ones do. They are often lengthy and detailed documents. They are available on the NPWS site in regard to each relevant National Park. They regulate not only the conservation of biodiversity etc., but also developments that may benefit local communities and make provision for visitor or tourist facilities.*

They initially require a 90 day public exhibition of a draft. The Minister, however, can amend plans of management with only a 45 day period of exhibition of the draft. The amendments can be dramatic. They can essentially rewrite the entire plan of management.

Q. To what extent do the plans of management restrict development?

A. *A plan may presently be highly restrictive, but the Minister can amend it. The amendment must be recommended by a responsible authority, but that is the Chief Executive who is in turn subject to the control and direction of the Minister. They can, in any event, now be overridden by section 81AA.*

A determined minister can easily have a plan of management amended to permit greater development than in the original plan.

Q. Can we discuss the Light to Light track upgrade? How did that come about?

A. *Firstly, the plan of management was amended to alter the type of tourist facilities that would be included in the Ben Boyd National Park to permit the construction of lodges offering a fairly high grade of accommodation. This work is to be undertaken by NPWS itself, and so it required two things.*

Firstly, to ensure the development was compatible with the plan of management, and secondly to obtain approval under the Environmental Planning and Assessment Act I will discuss that aspect later.

Q. What restrictions are there on commercial operations in National Parks?

A. The Minister can grant a lease or licence of land within a National Park to enable activities of a recreational, educational or cultural nature, and to provide accommodation for visitors and tourists, or retail outlets or facilities to enable the hosting of conferences and functions, and together with restaurants, cafés etc. It is a very wide range of purposes.

The leases or licences must be compatible with the plan of management. Section 151B provides that the Minister must be satisfied that the purpose of the lease or licence is compatible with the natural and cultural values of the National Park.

Q. In addition to the restrictions under the National Parks and Wildlife Act, what other planning permission is required?

A. Developments by a Government body in a National Park are not development for the purposes of the Environment or Planning and Assessment Act, but they do need approval under Part 5 of the Environmental Planning and Assessment Act.

This involves two things. Firstly if the activity is likely to significantly affect the environment then an environmental impact statement must be obtained, and secondly, the authority charged with determining whether to approve the development has the duty “to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity”.

This, however, is a procedural safeguard. The determining authority must undertake the appropriate examination and take into account to the fullest extent (reasonably) possible all matters. However, the legislation does not ultimately dictate how the authority must resolve the determination once it has undertaken the examination and considered all matters to the fullest extent.

Q. In the Light to Light track upgrade was this process followed?

A. Yes it was. A review of environmental factors was prepared and published in draft for public comment. This was quite a lengthy document of 250 pages considering a wide range of potential environmental impacts of the track upgrade, and the proposed accommodation facilities.

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It was critically reviewed in a submission by the National Parks Association. It appears that the relevant authority, the Department of Planning Industry and Environment, have now determined to give approval to NPWS's proposed developments.

Q. What Commonwealth laws affect developments in National Parks and how do they operate?

A. The key Commonwealth law is the Environment Protection and Biodiversity Conservation Act (1999). It is a very complex piece of legislation and I cannot cover all of its areas. Importantly, for National Parks in New South Wales there are protections in regard to world heritage areas and national heritage properties.

The Greater Blue Mountains area is a declared world heritage area. It is an offence for anyone to undertake an activity in such an area that would result in a significant impact on the world heritage values of the property. However:-

- (i) An offence will not be committed if the action has been authorised by the relevant Minister; and*
- (ii) The action must be in regard to the world heritage values of the property.*

In regard to the Blue Mountains the world heritage values for which it was inscribed are biodiversity in regard to its eucalypt forests. It is not a general protection of all the environmental values that this area could have.

Further, only a very limited number of National Parks in New South Wales are world heritage areas. The Snowy Mountains is not.

Q. What can concerned citizens do who wish to challenge decisions about developments in National Parks?

A. Any person has standing to bring an action in the Land and Environment Court for an injunction to restrain a breach of the National Parks and Wildlife Act, or of the Environmental Planning and Assessment Act.

However, this right of challenge is in effect restricted to conduct which is a breach of the Act. It does not extend to asking the Court to redetermine the merits of the original decision.

Q. So what is a breach of the Act in regard to these sorts of developments?

A. Government agencies and Ministers embarking on developments may be obliged to act in compliance with the Act and pursue its objectives. However, this often involves an evaluative judgment. There is often no bright line marking out the boundaries of what is lawful. A Minister may be satisfied that a lease or licence, for instance, is

“compatible with the natural and cultural values of the National Park”, but there could be much debate about just what will and will not satisfy that test.

Some examples will illustrate this:-

- In Palm Beach Group Incorporated v Northern Beaches Council the citizens action group succeeded in restraining Council from permitting dogs on beaches. The Council had not appreciated that it needed approval under s.5.5 of the EP&A Act, and never turned its mind to that issue. It clearly, therefore, failed to engage in a proper examination.*
- On the other hand in Friends of Gardiner Park v Bayside Council [2022] NSWLEC 22 the Friends failed to restrain Council from substantially restoring a local recreation ground when they argued that the Council only had regard to some potential impacts and not the overall impact of the proposed activities. The Court concluded that they had sufficient regard to all the relevant impacts.*
- In Blue Mountains Conservation Society Inc v Director-General of National Parks [2004] NSWLEC 196 (29 April 2004 Lloyd J) an injunction was granted to restrain filming in the Grosse Valley wilderness. Although the Minister had purported to authorise the activity, the activity was being undertaken in a declared wilderness area. Section 153A of the NPWA prohibited the Minister from granting a lease or licence in a wilderness area.*

Wilderness areas do have quite high levels of protection. Their real vulnerability lies in the ability of the Minister to vary a declaration of an area of land subject to wilderness protection, although the declaration cannot be fully revoked without an Act of Parliament.

Q. What does the future hold?

A. Outside of wilderness areas there is considerable scope for the Government to place substantial tourist developments in National Parks.

The framework governing them is complex, but if Governments purport to have given due consideration to all the environmental impacts and have formed a view that they can be managed compatibly with the other conservation principles, it is unlikely a Court will disturb those evaluative judgments.

Of course, where the procedures have not been followed, or where the developments are particularly outrageous, challenges may be successful.

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Wilderness areas are far more strongly protected than the general areas of National Parks.

Q. Is there a pre-emptive strategy?

A. *Many plans of management are extremely restrictive and may remain so right up to the moment at which the Government decides to amend them, and permit some major development.*

The Blue Mountains plan of management takes a highly restricted view of walking tracks in the Park, and does not envisage the creation of any new major walks within the Park.

Perhaps the bushwalking movement should review plans of management now and recommend updating and change before developments are proposed.

Q. Ought the bushwalking movement be prepared to countenance the creation of some new multi-day walk routes with minimal facilities (similar to say the Larapinta Trail)? Will such advocacy head off demands for other types of activity or encourage it?

A. *This is a matter that we should debate.*

Q. Does social license carry any weight in a legal sense?

A. No

Q. Should the impact of the bushfires be taken into account?

A. Yes. It would have to be significant difference

Q. Is the NSW NPW Act different to Tasmania NPW Act where there is a lot of development happening in Tasmania?

A. Yes every state has its own act

Conclusion

The bushwalking movement could:

- identify 'sacred' areas that we want to retain as untouched so we could be prepared to defend them
- proactively review Plans of Management in areas that we wish to see preserved
- check out all new draft Plans of Management for changes allowing development

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Next Meeting

The next Bushwalking NSW General Meeting shall be held at:

7:30-9:00pm on Tuesday, 16th August, 2022

Via Zoom

Meeting ended at: 8:46pm