



Environment &  
Heritage Portfolio

## Enforceable undertaking

Undertaking given under Section 13.27 of the *Biodiversity Conservation Act 2016*  
to the Environment Agency Head,  
**Office of Environment and Heritage**

by

Port Macquarie-Hastings Council

ABN 11 236 901 601

## BC Act undertaking

### Purpose

The purpose of this undertaking is to document undertakings given to the Office of Environment and Heritage pursuant to section 13.27 of the *Biodiversity Conservation Act 2016 (BC Act)* in connection with a matter in relation to which the Environment Agency Head has a function under the BC Act.

### Section A - general information

#### 1. Details of the company or individual proposing the undertaking

Name of company or individual	Port Macquarie-Hastings Council	
Registered address	PO Box 84, Port Macquarie NSW 2444	
Mailing address (if different from above)	N/A	
Telephone	(02) 6581 8111	Mobile: N/A
Email address	council@pmhc.nsw.gov.au	
ABN	11 236 901 601	
Type of business	Local Government Entity	
Comments	Nil	

#### 2. Details of the alleged contravention

It is alleged by the Office of Environment and Heritage (OEH) that between or about 17 May to 8 June 2016, Port Macquarie-Hastings Council (Council) contravened s117 of the *National Parks and Wildlife Act 1974 (NPW Act)* (as it was at the time of the incident) in that it picked protected native plants.

#### 3. Details of the events surrounding the alleged contravention, e.g. incident details

Council undertook clearing works as part of the Houston Mitchell Drive (HMD) upgrade which resulted in damage to the adjoining Queens Lake State Conservation Area (QLSCA) involving the picking of protected native plants within the QLSCA.

#### 4. An acknowledgement that the Office of Environment and Heritage has alleged a contravention of the NPW Act (as it then was).

It is acknowledged that OEH has alleged that Council contravened the then s117 of the NPW Act. Section 117 of the NPW Act has been repealed and from August 2017 the equivalent provision contained within Part 2 of the BC Act.

Clause 58 of the *Biodiversity Conservation (Savings and Transitional) Regulation 2017 (BC Savings Reg)* has the effect that the repeal of the former s117 of the NPW Act does not affect any offence against that provision, and clause 59A of the BC Savings Reg enables an undertaking to be accepted under s13.27 of the BC Act in relation to the alleged commission of an offence under a former Act or provision.

#### 5. Details of any environmental damage that arose from the alleged contravention

Damage to up to 1.9 hectares of vegetation in the QLSCA occurred and the vegetation is thought to have included at least 3 protected native plants within the meaning of the NPW Act as it was at the time of the incident, being *Adiantum* spp. (Maldenhair fern), *Persoonia* spp. (Geebung) and plants in the family *Orchidaceae*.

BC Act undertaking

6. Details of any enforcement notices issued that relate to the alleged contravention

Notices received:

Yes (provide details)  No

Date issued	Notice type	Notice number	Contravention	Action taken to respond to notice
03/01/2017	Notice to Provide Information and/or Records	Not numbered	s156A(1) of the NPW Act	Information and/or records provided in accordance with the Notice. Notice satisfied.
25/09/2017	Notice to Provide Information and/or Records	Not numbered	s156A(1) of the NPW Act	Information and/or records provided in accordance with the Notice. Notice satisfied.

7. A statement of assurance by the applicant to cease all behaviours or actions leading to environmental harm

Council is committed to complying with its obligations under relevant environmental legislation, and will take all reasonable and practicable steps to ensure that its future operations do not lead to environmental harm.

8. Details of the support provided, and proposed to be provided as restitution, to offer benefit to the environment and the community:

Start Date	Finish Date	Description of support	Comment
31 December 2018	31 December 2023	Contribution of funds, to be paid into the National Parks and Wildlife Fund to be applied to works within the QLSCA to address the following issues by the respective finish dates listed:	
2018	31 December 2018	(i) existing and exacerbated weed issues along the QLSCA interface with the HMD corridor,	\$48,000 (to be paid as a lump sum by 31 December 2018 or \$8,000 per annum with first payment by 31 December 2018)
2018	31 December 2020	(ii) habitat loss, and in particular the loss of hollow bearing trees as roost and nest sites for wildlife, and replacement planting of suitable koala food tree species if/as required, and	\$17,000 one-off contribution
		(iii) compensatory habitat	\$130,000 (to be paid as a lump sum by 31 December 2018 or instalments with final payment to be made by 31 December 2020)
To be installed within the construction	To be installed within the construction	Works to be carried out, being no more than 3 sets of glide poles along HMD road alignment under	Location of sets of glide poles to be determined following completion of

BC Act undertaking

<p>period for Council's Southern Arm Trunk Main</p>	<p>period for Council's Southern Arm Trunk Main</p>	<p>the direction of a suitably qualified wildlife ecologist with experience in arboreal crossings for linear infrastructure to reinstate arboreal connectivity</p> <p>The above undertaking does not affect any requirement for rope bridges under a determination under Division 5.1 of the <i>Environmental Planning &amp; Assessment Act 1979 (EPA Act)</i> in respect of the carrying out the Southern Arm Trunk Main project by Council, provided that the assessment of the Southern Arm Trunk Main project has regard to the provision of any glide poles under this undertaking</p>	<p>surveys for Council's Southern Arm Trunk Main</p>
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9. Details of any existing environmental management systems at the workplace including the level of auditing currently undertaken

Council's environmental management systems are embedded in its key organisational systems.

Corporate, Divisional and Project risk registers identify risks, including environmental risks.

The risks in the Corporate register are reviewed and reported to the Audit, Risk and Improvement Committee (**Committee**) quarterly. Divisional risk registers are reviewed on a quarterly basis. Both Corporate and Divisional risk registers are reported to the Risk Management Working Group on a quarterly basis.

Risk identification and risk management are integral components of the Council Project Management Framework. Risks are identified by the Project Manager for each project Council undertakes, as well as the mitigation actions (and controls) that are to be put in place to manage these risks. The risks are reviewed and managed through the lifecycle of the project.

Council has a Legislative register, which requires relevant sections of Council to report on licences or approvals Council holds under legislation (including environmental legislation). Any actions that are completed are reported to the Committee, who then reviews and reports in regards to the register to Council.

Major non-compliances (including environmental) that are required to be externally reported under legislation are reported to the Committee.

In respect of Council's construction projects, Council's environmental management systems include the following elements:

- completing a Reviews of Environmental Factors (REF) and implementing the mitigation measures that were identified in a REF, which may include onsite auditing,
- Council conducts project risk assessment and managing risk mitigation actions, as identified during project risk management planning, and
- when tendering for contractors, Council specifies selection criteria to require that the contractor has certified environmental systems in place.

As detailed at paragraph 11 below, following the incident, Council has amended its environmental approval processes and employed an Environmental Assessment Officer to oversee and provide advice on all environmental assessments for infrastructure delivery (major construction) projects, including from planning through to post construction.

Council internally refers environmental pathway decisions through its Development and Environment Division (Planning) staff for concurrence or advice for infrastructure delivery projects.

All REF's for Infrastructure Delivery projects are formally reviewed at completion and require formal endorsement from the Environmental Assessment Officer as a mandatory prerequisite to the Council officer (under delegation) making any determination regarding the relevant activity.

BC Act undertaking

Key organisational processes (which include key environmental processes, such as waste management, environmental regulation and compliance) are audited as per the Strategic Audit Plan. The Strategic Audit Plan was developed through a process of interviewing Senior Leadership team members (including the Executive). It was then reviewed by the Executive and adopted by the Committee.

10. A statement of regret that the incident occurred (i.e. not an admission of guilt)

Council regrets that the incident between or about 17 May to 8 June 2016 occurred and that environmental damage was caused as a result of the incident.

11. Any rectifications made as a result of the contravention

Following the alleged incident, Council convened a cross-divisional working party to investigate the assessment and approval processes of Council, and has undertaken or committed to undertake the following actions included in the table below.

	Description	Amount
(i)	<p>The creation of the position of Environmental Assessment Officer, which is responsible for the following:</p> <ul style="list-style-type: none"> <li>provide support, and co-ordinate information gathering from internal and external stakeholders involved in the assessment of activities and determinations under Division 5.1 of the EPA Act for Council's infrastructure projects, and</li> <li>review and improve the environmental assessment process undertaken by Council officers, including providing workshops and training to Council staff responsible for determinations under Division 5.1 of the EPA Act.</li> </ul>	Council has made an ongoing commitment to fund this position for \$132,979 per annum for up to three (3) years
(ii)	To date, the Environmental Assessment Officer has held a series of workshops with the Group Managers and Senior staff from Council's operational divisions that are responsible for delivery infrastructure projects, including Infrastructure Delivery, Water and Sewer, Roads, and Environmental Services. The workshops are designed to improve the environmental assessment process and strengthen the officers' understanding and expertise in the environmental assessment and determination process under Division 5.1 of the EPA Act.	\$8,172
(iii)	The Environmental Assessment Officer has held a workshop with Council's Senior Leadership Team, including the A/General Manager, and the Directors and Group Managers from all of Council's divisions to improve and strengthen their understanding of the process under Division 5.1 of the EPA Act.	\$886.84
(iv)	A legal workshop was provided to key members of the Infrastructure Delivery section to improve their understanding of the process under Division 5.1 of the EPA Act.	\$325.34
(v)	<p>Council will apply to the OEH to correct the historical alignment discrepancy between the HMD road corridor and road reserve, and have the road reserve readjusted so it aligns with the QLSCA boundary. Council will use all best and reasonable endeavours to assist the OEH in its assessment and approval of Council's application.</p> <p>The monetary payments provided by Council to the OEH under paragraph 8 of this undertaking will also be taken by the OEH to satisfy any compensation that may be required as part of the boundary readjustment process.</p>	

BC Act undertaking

(vi)	<p>Council has an existing registered easement for the Southern Arm Trunk Main. This easement is located partly within the QLSCA.</p> <p>The Southern Arm Trunk Main is a critical piece of planned infrastructure that will support water supply within the region and also provide redundancy elements to the water supply system.</p> <p>Prior to construction, Council will consider whether it is appropriate and feasible to locate the Southern Arm Trunk Main along the HMD in order to minimise the environmental impacts to the QLSCA.</p>	

Total amount spent on rectifications to date      \$86,955

12. An acknowledgement that this undertaking may be published and publicised

Council acknowledges that the undertaking may be published on the OEH internet site, and/or referenced in OEH material.

Council acknowledges that the undertaking may be publicised in newspapers or other publications (where applicable, as specified in Section B – enforceable terms).

13. A statement of ability to comply with the terms of the undertaking

Council has the financial ability to comply with the terms of this undertaking.

14. A statement regarding relationships with beneficiaries

Council has no previous personal or business dealings with a beneficiary of this undertaking and no conflicts of interest will arise from the execution of this undertaking.

15. Intellectual property licence

Council grants the Office of Environment and Heritage a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence to use, reproduce, publish, distribute, electronically transmit, electronically distribute, adapt and modify any materials developed as a result of this undertaking.

16. A commitment to participate constructively in all compliance monitoring activities of the undertaking

Council acknowledges that responsibility for demonstrating compliance with this undertaking rests with the person who has given this undertaking. Evidence to demonstrate compliance with the terms will be provided to the OEH by the due date for the term.

Council acknowledges that OEH may undertake other compliance monitoring activities to verify the evidence that is provided and compliance with the relevant terms of this undertaking. The evidence provided to demonstrate compliance with the undertaking will be retained by the person who has given this undertaking until advised by OEH that the undertaking has been completely discharged.

Council acknowledges that OEH may initiate additional compliance monitoring activities of compliance with the terms of the undertaking, such as inspections, as considered necessary at OEH's expense.

17. A commitment that the behaviour that led to the alleged contravention has ceased and will not reoccur

Council commits that it has reviewed its internal processes that led to the alleged contravention and has taken appropriate steps to prevent such incidents from re-occurring, including the changes it has made to its processes relating to infrastructure delivery projects (as outlined at paragraph 9 above), and its changes to its environmental assessment process, including the engagement of an Environmental Assessment Officer (as outlined at paragraph 11 above).

## BC Act undertaking

### 18. A commitment to the ongoing effective management of risks to the environment

Council commits to the ongoing effective management of risks to the environment that may arise by reason of activities it undertakes. Again, the management of these risks will be achieved through the changes Council has made to its processes relating to infrastructure delivery projects (as outlined at paragraph 9 above), and its changes to its environmental assessment process, including the engagement of an Environmental Assessment Officer (as outlined at paragraph 11 above).

## Section B – enforceable terms

Council must comply with the following commitments, which are enforceable against Council:

1. A commitment to disseminate information about the undertaking to workers, and other relevant parties, and in the annual report (if applicable)

Within four (4) weeks of the date of acceptance of this undertaking, Council will cause:

- the General Manager to inform staff members about the undertaking in a targeted email to those involved in environmental assessment, and
- a public notice to be published in the *Port Macquarie News* using the script provided in Annexure 1.

2. A commitment to reimburse the department's agreed costs associated with the investigation of the contravention and any monitoring of the enforceable undertaking

Where OEH considers appropriate in the circumstances:

Agreement is given to paying the regulators costs associated with the undertaking, as itemised below, and acknowledgment that payment is due **30 days** after receipt of the regulator's invoice:

<input checked="" type="checkbox"/> Investigative, legal and administrative costs	\$50,000
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3. A commitment to the matters in paragraphs 8 and 11 of this undertaking

Council agrees to make the contributions and carry out the works set out in paragraph 8 and undertake the actions set out in paragraph 11.

4. Timeframe for delivery

Subject to the below, this undertaking will be delivered on or before the dates noted in Section A and paragraphs 1 and 2 of Section B in respect of each element of the undertaking.

In respect of the boundary readjustment application that Council undertakes to make in accordance with paragraph 11(v) above, Council commits to commence the process for the boundary adjustment within 12 months of the date of acceptance of this undertaking.



**Section C - Offer of undertaking**

As a duly authorised delegate of Council, I offer this undertaking and commit Council to the terms herein.

Signed:  .....

Name: Craig Swift McNair .....

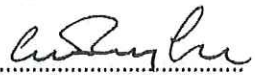
Position: General Manager.....

Dated at Port Macquarie this

5<sup>th</sup> day of September, 2018

**Section D – NSW Office of Environment and Heritage acceptance of undertaking**

I accept this undertaking as an enforceable undertaking under section 13.27 of the *Biodiversity Conservation Act 2016*.

Signed:  .....

Position: CHIEF EXECUTIVE Environment Agency Head,  
Office of Environment and Heritage

Dated at SYDNEY this 6<sup>th</sup> day of September, 2018



