

Starting your own WSUD Compliance Program

Presented by Daniel Rider
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Acknowledgment of Country

I would like to begin by acknowledging the Traditional Owners of the land we are all on today, and their continuous connection to land and sea. I would also like to pay my respects to Elders past and present.



What do we mean by private WSUD?

- On private property
- Under private management
- Legal obligation to maintain and manage (preferably!)

What do we mean by private WSUD systems?



1. Rainwater tanks



2. Biofilters



3. Biofilter street tree pits



4. Wetlands



5. Vegetated buffer strips and swales



6. On-site stormwater detention (OSD)



7. Gross pollutant traps (GPTs)



8. Filter cartridges



9. Pit inserts



10. Permeable paving



11. Temporary sediment basins

Why do we care?

- Localised flood mitigation
- Water security
- Waterway protection
- Often majority of treatment within a catchment
- Mounting evidence – low rates of maintenance and some cases of interferences (Ardren 2020)

Compliance program – an evolution

- 2012 = Implementation
- Program = inspection based, managed via Excel spreadsheet
- 2018/19 = program reviewed
 - Legal enforceability severely limited
 - Inspection based = impractical
- New program = significant changes
 - Legal foundation thoroughly reworked
 - WSUD compliance management system – track properties and systems
 - Shift from Inspection to owner-reporting model



The Situation

- ▶ WSUD Compliance Program = ensuring maintenance on private WSUD
- ▶ Currently trialling our program
 - ▶ Meaning:
 - ▶ Not properly tested yet
 - ▶ All materials for industry are not ready
- ▶ Other Councils and groups do not need to wait, there are things they can do...



Determine the organisational interest

- Start asking questions
 - Would your organisation want to do such a thing?
 - Are there other environmental compliance programs?
 - Where would it fit within the organisation?
 - What would compliance look like?
 - What is the impact of not doing this program?



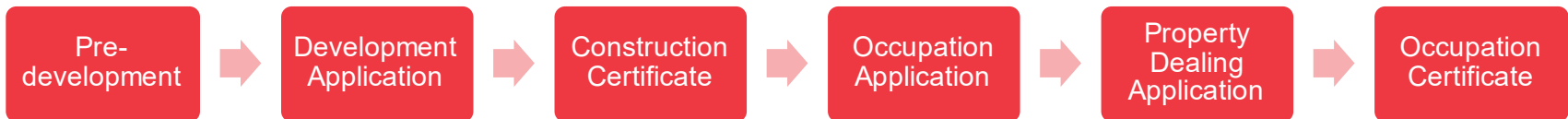
Determine the type of program

- ▶ What type of assets will it include?
- ▶ Who will be in charge of such a program?
- ▶ Will it look at historical or present developments? Or both?
- ▶ What type of properties will it look at?



Determine the development process

- ▶ A range of development documentation and information will be required, so you need to know how development happens



Collect WSUD data

- ▶ Start collecting the data
- ▶ Data could be:
 - ▶ Property addresses
 - ▶ Asset details
 - ▶ Owner details
 - ▶ Relevant conditions of consent
- ▶ Reach out to asset suppliers



Review your conditions of consent

- ▶ Understand what is currently being conditioned for
 - ▶ What existing conditions relate to stormwater or drainage?
 - ▶ Are there any conditions about protecting the environment?
 - ▶ Are there any conditions about not polluting?

14.31.1 Prior to the issue of the Occupation certificate, the applicant shall submit to Council documentation that identifies the correct locations, types, models, and model numbers of assets that form the WSUD system installed on the property. The documentation is to include the final version of the Stormwater management report and certified and signed stormwater Works-as-executed plans.

14.31.2 Prior to the issue of the Occupation certificate, the Applicant shall provide a Maintenance schedule for the WSUD system installed on the property. The Maintenance schedule is to be prepared in accordance with the Maintenance schedule template and WSUD inspection and maintenance guidelines available on Council's website. The Applicant shall submit the Maintenance schedule to Council for approval.

14.31.3 Prior to the issue of the Occupation certificate, the applicant shall provide a Positive covenant and Restriction on the use of land over the WSUD system installed on the property. The Positive covenant and Restriction on the use of land is to be in accordance with Appendix F of Council's Engineering Guide for Development. The Positive covenant and Restriction on the use of land is to be endorsed by Council and lodged with New South Wales Land Registry Services. The applicant shall submit documentary evidence of the lodgement and execution of the Positive covenant and Restriction on the use of land to Council prior to the issue of the final Occupation certificate.

17.1.36 The Applicant shall enter into a Maintenance Agreement with a maintenance contractor for the WSUD system installed on the property. The Maintenance Agreement is to be in accordance with the Maintenance schedule approved by Council. The maintenance contractor is to possess the qualifications and licences, if any, required to undertake the maintenance works in accordance with Council and New South Wales policy and legislation. The Maintenance Agreement must be maintained for the life of the development. The Applicant shall submit a copy of the executed Maintenance agreement to Council for approval. The Maintenance Agreement can be replaced with an alternative Maintenance Agreement of the same or better standard. In the event that the Applicant enters into a replacement Maintenance Agreement the Applicant must, as soon as practically possible, forward a copy to Council.

Determine your legal options

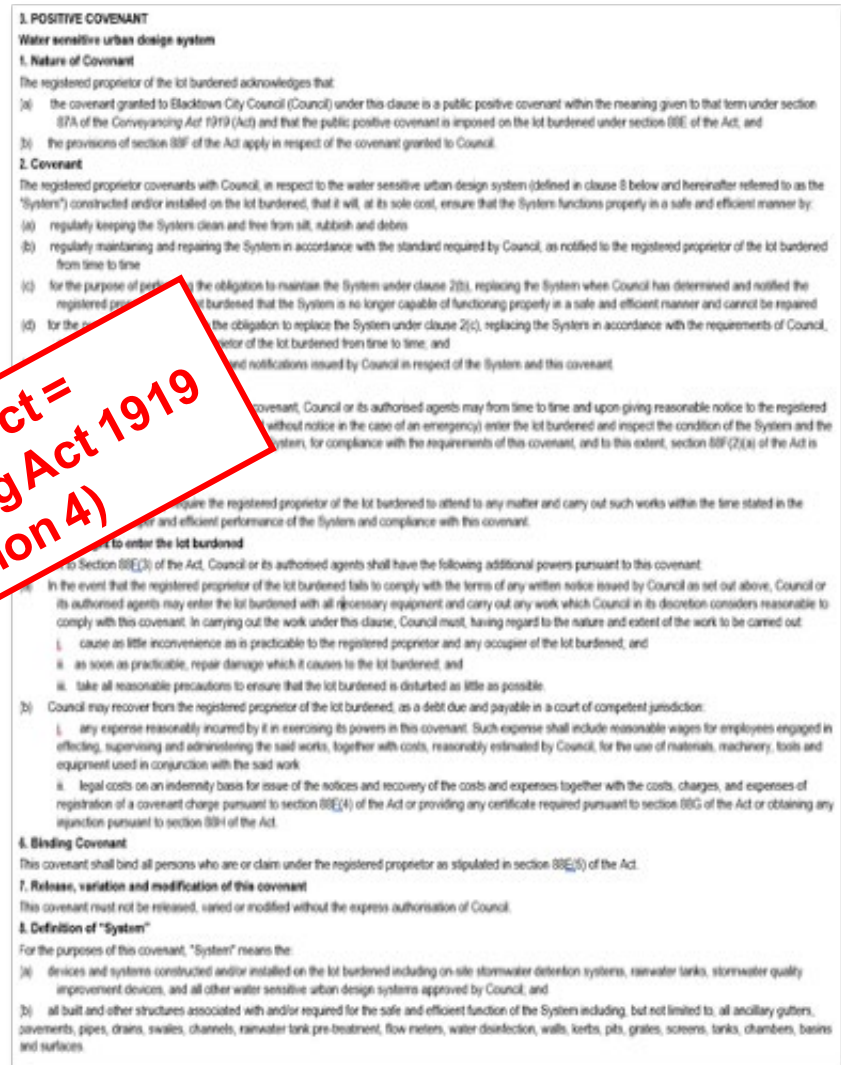
- ▶ A compliance program needs the ability to legally enforce compliance
- ▶ Could you use:
 - ▶ Covenants?
 - ▶ Acts?
 - ▶ Development Control Plans?
 - ▶ Conditions of consent?
 - ▶ Legislation?

1. POSITIVE COVENANT Water sensitive urban design system 1. Nature of Covenant The registered proprietor of the lot burdened acknowledges that: (a) the covenant granted to Blacktown City Council (Council) under this clause is a public positive covenant within the meaning given to that term under section 88A of the Conveyancing Act 1919 (Act) and that the public positive covenant is imposed on the lot burdened under section 88E of the Act, and (b) the provisions of section 88F of the Act apply in respect of the covenant granted to Council. 2. Covenant The registered proprietor covenants with Council, in respect to the water sensitive urban design system (defined in clause 8 below and hereinafter referred to as the "System") constructed and/or installed on the lot burdened, that it will, at its sole cost, ensure that the System functions properly in a safe and efficient manner by: (a) regularly keeping the System clean and free from silt, rubbish and debris (b) regularly maintaining and repairing the System in accordance with the standard required by Council, as notified to the registered proprietor of the lot burdened from time to time (c) for the purpose of performing the obligation to maintain the System under clause 2(b), replacing the System when Council has determined and notified the registered proprietor of the lot burdened that the System is no longer capable of functioning properly in a safe and efficient manner and cannot be repaired (d) for the purpose of giving effect to the obligation to replace the System under clause 2(c), replacing the System in accordance with the requirements of Council, as notified to the registered proprietor of the lot burdened from time to time, and (e) complying with all written directions and notifications issued by Council in respect of the System and this covenant. 3. Inspection For the purpose of ensuring observance of this covenant, Council or its authorised agents may from time to time and upon giving reasonable notice to the registered proprietor of the lot burdened (but at any time and without notice in the case of an emergency) enter the lot burdened and inspect the condition of the System and the state of construction, maintenance or repair of the System, for compliance with the requirements of this covenant, and to this extent, section 88F(2)(a) of the Act is hereby amended. 4. Notice for Compliance By written notice, Council may require the registered proprietor of the lot burdened to attend to any matter and carry out such works within the time stated in the notice, to ensure the proper and efficient performance of the System and compliance with this covenant. 5. Council's right to enter the lot burdened Pursuant to Section 88E(3) of the Act, Council or its authorised agents shall have the following additional powers pursuant to this covenant: (a) in the event that the registered proprietor of the lot burdened fails to comply with the terms of any written notice issued by Council as set out above, Council or its authorised agents may enter the lot burdened with all necessary equipment and carry out any work which Council in its discretion considers reasonable to comply with this covenant. In carrying out the work under this clause, Council must, having regard to the nature and extent of the work to be carried out: i. cause as little inconvenience as is practicable to the registered proprietor and any occupier of the lot burdened, and ii. as soon as practicable, repair damage which it causes to the lot burdened, and iii. take all reasonable precautions to ensure that the lot burdened is disturbed as little as possible. (b) Council may recover from the registered proprietor of the lot burdened, as a debt due and payable in a court of competent jurisdiction: i. any expense reasonably incurred by it in exercising its powers in this covenant. Such expense shall include reasonable wages for employees engaged in effecting, supervising and administering the said works, together with costs, reasonably estimated by Council, for the use of materials, machinery, tools and equipment used in conjunction with the said work ii. legal costs on an indemnity basis for issue of the notices and recovery of the costs and expenses together with the costs, charges, and expenses of registration of a covenant charge pursuant to section 88E(4) of the Act or providing any certificate required pursuant to section 88G of the Act or obtaining any injunction pursuant to section 88H of the Act. 6. Binding Covenant This covenant shall bind all persons who are or claim under the registered proprietor as stipulated in section 88E(5) of the Act. 7. Release, variation and modification of this covenant This covenant must not be released, varied or modified without the express authorisation of Council. 8. Definition of "System" For the purposes of this covenant, "System" means the: (a) devices and systems constructed and/or installed on the lot burdened including on-site stormwater detention systems, rainwater tanks, stormwater quality improvement devices, and all other water sensitive urban design systems approved by Council, and (b) all built and other structures associated with and/or required for the safe and efficient function of the System including, but not limited to, all ancillary gutters, coverments, pipes, drains, swales, channels, rainwater tank pre-treatment, flow meters, water disinfection, walls, kerbs, pits, grates, screens, tanks, chambers, basins and surfaces.

Positive Covenant

- Gives definition to a WSUD System
- Defines owner responsibilities to their WSUD System
- Requires owners to act on any written instruction from Council
- Authorises council to inspect
- Authorises council to compel
- Gives Council legal rights to recover costs
- Makes the covenant binding to *property* 'in-perpetuity'

**Legal effect =
Conveyancing Act 1919
(Division 4)**



Restriction on Use of Land

A proposed WSUD **restrictive** covenant that:

- Gives definition to a WSUD System
- Prevents owners from doing anything that will reduce the performance of the WSUD system
- Makes the covenant binding to *property* 'in-perpetuity'

2. RESTRICTION ON THE USE OF LAND

Water sensitive urban design system

1. Nature of Restriction

The registered proprietor of the lot burdened acknowledges that:

- (a) the restriction on use granted to Blacktown City Council (Council) under this clause is imposed on the lot burdened under section 88E of the *Conveyancing Act 1919 (Act)*; and
- (b) the provisions of section 88F of the Act apply in respect of the restriction granted to Council under this clause.

2. Restriction on use

The registered proprietor covenants with Council in respect of the water sensitive urban design system (defined in clause 5 and hereinafter referred to as the "System") constructed and/or installed on the lot burdened that it will not, without the prior and express written consent of Council:

- (a) do any act, matter or thing that would prevent the System from functioning properly in a safe and efficient manner
 - (b) make any alterations or additions to the System other than in strict accordance with the positive covenants of the System
- under the provisions of the *Environmental Planning and Assessment Act 1979* to encroach upon or

bind all persons who are or claim under the registered proprietor as stipulated in Section 88E(5) of the Act.

3. Variation and modification of this restriction

This restriction must not be released, varied or modified without the express authorisation of Council.

5. Definition of "System"

For the purposes of this restriction, "System" means the

- (a) devices and systems constructed and/or installed on the lot burdened including on-site stormwater detention systems, rainwater tanks, stormwater quality improvement devices, and all other water sensitive urban design systems approved by Council; and
- (b) all built and other structures associated with and/or required for the safe and efficient function of the System including, but not limited to, all ancillary gutters, pavements, pipes, drains, swales, channels, rainwater tank pre-treatment, flow meters, water disinfection, walls, kerbs, pits, grates, screens, tanks, chambers, basins and surfaces.

6. For deferred works - On-site stormwater detention (OSD)

[The following paragraphs are only to be used when construction of the OSD system is being deferred, which will only be permitted by Council in exceptional circumstances.]

The registered proprietor of the lot burdened covenants in favour of Blacktown City Council that it will not erect or suffer the erection of any dwelling house or other structure on the lot burdened unless the registered proprietor has first constructed or has made provision for the construction of the OSD system on the lot burdened, in accordance with the design, construction and/or provision requirements of, and to the satisfaction of Blacktown City Council.

The expression "OSD system" shall include all built and other structures associated with and/or required for its safe and efficient function including, but not limited to, all ancillary gutters, pipes, drains, walls, kerbs, pits, grates, tanks, chambers, basins and surfaces graded to direct stormwater to the temporary storage.]

**Given legal affect under
the Conveyancing Act**

Determine funding

- For the program to work, funding is required
 - Does a current funding option exist?
 - Would you need to request for more funding?



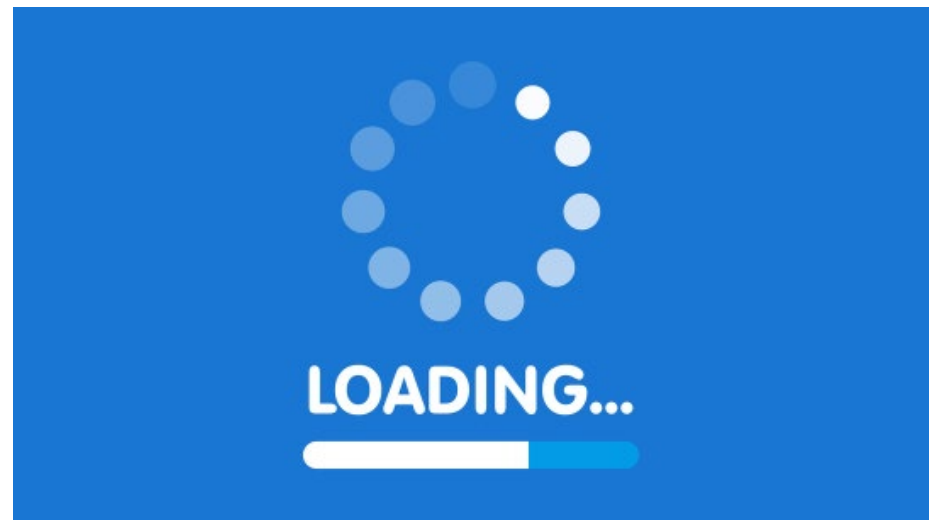
Action summary

1. Determine the organisational interest
2. Determine the type of program
3. Determine the development process
4. Collect WSUD data
5. Review your conditions of consent
6. Determine your legal options
7. Determine funding



What now

- ▶ We will:
 - ▶ do our best to give updates on our progress and experiences throughout the trial
 - ▶ work towards creating material for the industry that can help
- ▶ For all of you, start exploring these actions and see what you want to do, and get in touch if you have questions



Contact Details

▶ wsud@blacktown.nsw.gov.au

▶ Special thanks to Ben Penhallurick and Andrew Thomas, and all those who have come before me at Blacktown

NEXT TALK:

Solving Water Sensitive Urban
Design maintenance compliance

2022 AELERT Conference
November 29th – December 1st
Parramatta, Sydney