

Anthony Shaw, Brenda Tehrani, Rhys Madgwick, Jamie Lee McDonald, Anna Darroch-Dobbie, Francis Miles-Wilmshurst, Jamie Staddon, Shamaa Ali, Carla Bunyi, Benjamin Jones, Kristina Tomas

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POOL TO POND PROJECT

Ku-ring-gai Council

Macquarie University

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Introduction

The pool to pond program is an initiative offered by Ku-ring-gai Council that enables residents to convert unwanted swimming pools into eco-friendly, cost efficient ponds. It has been successfully running for the past 7 years and currently has approximately fifty participants. The Council assists residents in their conversion by supplying native fish, aquatic plants and technical advice. Thanks to the environmentally friendly nature of the program and the assistance from Ku-ring-gai Council, participants have experienced high levels of satisfaction with their otherwise unused pools.

Whilst the program has proved to be successful in its initial seven years, its new and innovative nature means that it is currently in a state of legal ambiguity. Ku-ring-gai Council approached Macquarie University to seek assistance in determining the legal status of ponds that have been converted from pools. The Council also wanted to produce a brief FAQ sheet to distribute to residents who are considering joining the program.

Literature Review

As this is a novel area, there are no journal articles or scholarly materials covering this field. This was a limitation to our research as we had to solely rely on statute and our own interpretation of the relevant provisions. Our literature is therefore comprised of the relevant pool, wildlife and government legislation.

Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBCA)

The *EPBCA* was comprehensive in that it addressed many of the issues that could affect the pools to pond program, such as the repercussions for interfering with the endangered or migratory species. Whilst the *EPBCA* was helpful in answering some questions it failed to address the issue of the removal of an endangered species. The Act seemed more concerned with conservation of a species rather than assisting residents to remove these species from their land.

National Parks and Wildlife Act (No 80) 1974 (NSW)

This Act provided advice on many of the legal requirements and issues regarding the protection and removal of wildlife from ponds that were situated on resident's land. The information provided by this Act was both comprehensive and informative and was one of the more effective pieces of legislation used to compile this report. The Act however failed to provide a list of what species of fauna and flora are protect under its jurisdiction.

Protection of Environmental Operations Act 1997 (NSW)

The *Protection of Environmental Operations Act 1997* (NSW) outlines the actions that are available to Councils in particular environmental situations. Importantly for this report however, this act fails to go into any detail on dealing with noise that is created by non-companion animals. This is vital as it is likely that any inhabiting animals in a pond will be non-companion in nature. Due to this, any information that can be obtained from this act can only be informative in nature instead of being definitive.

***Environmental Planning and Assessment Act 1979* (NSW)**

This legislation outlines the necessary precautions that must be taken into account before any development can start. This includes any potential threats to flora and fauna, which helps to make known the legal obligations of a pool-to-pond participant. This act is thorough and conclusive in the information that it conveys as it sets out exactly what can be done and what must be done when commencing a development.

***Swimming Pools Act 1992* (NSW)**

This Act provided a detailed outline of all the requirements for a swimming pool, including safety and maintenance regulation. As a pool that has been converted into a pond is likely to be subject to these regulations, it provided all of the necessary information to inform the interested parties of their legal obligations. Whilst this act did give an insight into the legal requirements that pond owners would need to comply with, the act failed to directly address the legality of ponds. Due to this it only gives possible answers to the questions presented in this report, not definitive answers.

***Local Government Act 1993* (NSW) and *Land and Environment Court Act 1979* (NSW)**

These two acts are the main guidelines for any possible legal proceedings for residents who have been found in breach of the requirements of their local council. The *Local Government Act* allows residents to challenge council decisions in the Land and Environment Court. The *Land and Environment Court Act* allows the Land and Environment Court to hear matters of this nature. These acts clearly and sufficiently outline the procedure for challenging council decisions and rely on statutory authority to allow for this process.

METHODOLOGY

In our initial consultation with Peter Clarke, our group was given a set of eleven questions to answer, which would then be placed on an FAQ sheet to provide to residents. The group then decided that the most efficient way to research was to distribute the questions evenly amongst members. We also decided to group the questions into three specific fields (legal, wildlife and council) so that groups could help each other if needed. The team leader also set a timeline for the completion of tasks to ensure the project would be finished on time.

Whilst many of these tasks involved legislative research, some members also conducted primary research. For example, one group member conducted a survey to determine which type of contract would be easiest to understand.

Once having collected the necessary data and information, the group once again collaborated and decided that splitting up formatting tasks was the most efficient way to put the report together. Even though these tasks were assigned to individual members, assistance and guidance was still given by the team leader to ensure a professional level of consistency and that tasks were completed in a timely manner.

STATEMENT OF FINDINGS

LEGAL QUESTIONS

WHAT ARE THE LEGAL REQUIREMENTS OF A POOL TO POND PARTICIPANT?

There are a variety of legal requirements for a pool to pond participant. Participants must comply with the *Swimming Pools Act 1992* (NSW) which includes regulations regarding signage, fences and latches. Participants must also abide by various wildlife legislations which will be discussed in depth below. Furthermore, participants must honour any contracts they enter into with their council in accordance with Australian contract law.

CURRENTLY THE POOL TO POND PROGRAM PARTICIPANTS HAVE TO SIGN A DOCUMENT INDICATING THAT THEIR POOL IS COMPLIANT. IS THIS DOCUMENT SATISFACTORY?

The current document adheres to basic contractual principles however the insertion of a direct clause detailing forbearance to sue would be beneficial.[1] This would reiterate the duty of care that participants need to comply with. The current document's language could also be improved to avoid incorrect assumptions of the duty of care undertaken by the council,[2] and to ensure that residents completely understand the legally-binding document.[3]

In order to find a more satisfactory and comprehensible document, our group surveyed 100 people who live in the Ku-ring-gai local government area. Our survey found that one of the potential documents was favoured over the other two options.[4] Participants claimed that this was the most understandable version. Consequently, this should be used moving forward to allow for easier understanding.

IS THERE ANY CASE LAW REGARDING POOLS CONVERTED TO PONDS AND WHAT, IF ANY, LEGAL PRECEDENT HAS BEEN ESTABLISHED?

As the pools to pond program is a relatively unique and innovative concept, there is a distinct lack of relevant case law or precedent in regards to the legality of a pool which has been converted into a pond in Australia. There is also no case law from other Commonwealth jurisdictions.

DO COUNCILS HAVE ANY POWER IN REGARD TO FROG NOISE?

In regards to frog noise, there are a number of actions that a council may undertake. However, an initial complaint must first be lodged by an individual such as a neighbour before the Council has any power.^[5] If an individual does complain, the council must initially perform an offensive noise test to determine if the noise is actually offensive, as defined in the *Protection of Environmental Operations Act 1997* (NSW).^[6] If the noise is found to be offensive, according to the *Noise Guide for Local Governments 2013*, there are two key actions which a council can undertake.^[7] These are either a noise abatement direction or noise abatement order.

Therefore, councils cannot prevent an individual from converting a pool into a pond on the grounds of offensive noise, but if a complaint is received after conversion; then councils may have access to some regulatory powers.

WHEN IS A SWIMMING POOL NOT A SWIMMING POOL?

A swimming pool means an excavation, structure or vessel, that is capable of being filled with water to a depth greater than 30 centimeters and is solely or principally used for human aquatic activity.^[8] Therefore, when a residential swimming pool does not comply with these specific standards, it can no longer be considered a swimming pool. Another indication of the actuality of a swimming pool is whether or not the pool is recognized on the swimming pools register. However, as ponds will still satisfy the definition of a swimming pool, they will therefore still need to abide by swimming pool laws and regulations.

WHAT ARE THE LEGAL OBLIGATIONS OF BUILDING A POND AS OPPOSED TO CONVERTING A POOL INTO A POND AND IS IT NECESSARY TO INSTALL A FENCE IF THE WATER IS DEEPER THAN 30CM?

As far as we are aware, a pond is still classified as a pool, as it can still technically be used for human recreational activity. Therefore the legal obligations of building a pond would be the same as building a pool.

However, if the pond were to be less than 30cm, it would not meet the definition of a swimming pool as per the *Swimming Pools Act 1992* (NSW) and would therefore not be required to install a fence, as there is no legislation requiring this.

WILDLIFE QUESTIONS

What powers do council have to remove native wildlife that colonizes a pond?

All native animals and amphibian species are protected in NSW under the *National Parks and Wildlife Act 1974* (NSW) and therefore if a resident wants to remove wildlife they must seek approval and obtain a license from the Office of Environment and Heritage if fauna will be harmed.[9]

Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), listed threatened species are matters of nationwide environmental importance. Any act that may or will have an effect on a species or ecological community that is listed in the endangered category, is not permitted, and if an individual would like to do so they must first seek out approval from the Environmental Minister.[10]

Any action that may cause harm is required to undergo an environmental evaluation and consent procedure. A person is able to seek out information to whether an action is likely to have a 'significant' impact on a listed threatened species by looking at the EPBC Act Policy Statements.[11]

DO THE LEGAL PROTECTIONS OFFERED TO WILDLIFE SUPERSEDE OTHER LEGAL OBLIGATIONS?

No, there are other legal obligations that must be considered before assessing the impacts on wildlife. The most important legal obligation for a Pool to Pond participant is that they first consider any potential threats to human safety. Under the *Swimming Pools Act 1992* (NSW), any body of water that is deeper than 30cm requires a fenced perimeter. A pool that has been converted into a pond will still have to meet these safety requirements. Once these obligations have been met, the potential impacts on wildlife must then also be considered. Attempting to remove or harm protected wildlife without the permission or instruction of the Office of Environment and Heritage will result in the penalties outlined in the *National Parks and Wildlife Act 1974* (NSW). Therefore, the legal protections offered to wildlife do not supersede all other legal obligations, but nevertheless must still be taken into account.

IF THERE IS THE POSSIBILITY OF A POND BEING USED BY AN ENDANGERED MIGRATORY SPECIES, WHAT EFFECT WOULD THIS HAVE ON COUNCIL ORDERING A RESIDENT TO REMOVE THE POND?

Under the EPBC Act, any actions taken that will have an impact on, or that are likely to have an impact on, a listed threatened species included in the endangered category, or a listed threatened ecological community included in the endangered category, cannot occur unless they are first approved by the Minister for the Environment.[12]

Similarly, a person is guilty of an offence if they do anything that may result in the injury or death of a migratory species.[13] A person will also be guilty of an offence if they take, trade, keep or move a member of a migratory species.[14] Furthermore, a person cannot undertake an action that will have an impact, or is likely to have an impact, on a migratory species.[15] To do any of the above actions, a person again must first seek Ministerial approval.[16] These obligations are also reiterated pursuant to the *Environmental Protection and Biodiversity Regulations 2000*: regulations 9.03 – 9.03A.

This means that before Council orders a member to remove a pond which may contain an endangered species, Council will very likely have to refer this action to the Minister for approval first. If Council is unsure on whether this action needs to be referred, they can schedule a pre-referral meeting and discuss key aspects of the proposed action with Departmental officers to decide whether a referral and assessment to the Minister is needed. If the matter needs to be referred, the Council will be informed and will need to do so according to the instructions as set out on the Australian Government Department of Environment website. The Minister will then either approve or reject the action or proposal.[17]

Note: there are some exemptions to Ministerial approval that may apply; the person wishing to do the action is advised to consult the EPBC act before doing so.[18]

CAN A CONSERVATION AGREEMENT OR WILDLIFE PROTECTION AREA BE CREATED AROUND A POND?

Conservation agreements issued by the Office of Environment and Heritage (OEH) of New South Wales allow a pond to be protected and maintained. The OEH administers conservation agreements in NSW under the *National Parks and Wildlife Act (No 80) 1974* (NSW). The things that are considered to be protected under the conservation include; native fauna, aquatic animals and flora. Consequently, if these were found in a pond it can be deduced that a conservation agreement could be created.

A pond can also be protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 285 which specifically outlines the management of wildlife conservation plans of species. This further allows the preservation of endangered species and wildlife that may be within the pond.

DOES A POOL CONVERTED INTO A POND REQUIRE A DEVELOPMENT APPLICATION?

According to the *Swimming Pools Act 1992* (NSW),[19] the legal definition of a swimming pool states that a pool can be used for “any human aquatic activity”.[20] This means that a pond can still be regarded as a swimming pool if it can still be used for human aquatic activity. Thus, in converting a pool into a pond, if all the requirements of the original development application are being met, then a new application is not needed, as consent has already been given by the local council according to their initial guidelines.

DOES A COUNCIL HAVE TO PROVE THAT A POND IS UNHEALTHY OR DOES THE ONUS OF PROOF LIE WITH THE RESIDENT?

Traditionally in law, when an action is brought against an individual the onus of proof is placed upon the party bringing forth the action. However in council related matters, the onus of proof is reversed due to section 671 of the *Local Government Act*. [21] This section states that if a Council finds a breach and issues an order to a resident, it is the resident’s responsibility to show that they had a reasonable excuse for acting in the matter which was responsible for the issuing of that order.

If a resident decides to challenge a Council's order in the Land and Environment Court, the placement of the onus of proof is less clear. Whilst it is clearly stipulated that the resident must prove to council that their conduct was reasonable, there is no such stipulation in either of the acts, or any comparable cases, to determine where the onus lies once the matter reaches the judicial stage. Due to this, it is likely that the traditional notions of the onus of proof falling on the plaintiff would prevail and because of this, it is likely that the onus of proof is continuously on the resident to prove that their pond is healthy.

Bibliography

Articles/Books/Reports

Environmental Protection Authority, *Noise Guide for Local Governments*, (2013) vol 1.

Australian Government Department of the Environment: significant impact guidelines 1.1, *Matters of National Environmental Significance*, (2013) vol 1.

Cases

Associated Newspapers v Banks (1951) 83 CLR 322.

Hercules Motors Pty Ltd v Schubert (1953) 53 SR 301.

Life Insurance Co of Australia v Phillips (1925) 36 CLR 60.

Legislation

Environmental Planning and Assessment Act 1979 (NSW).

Environmental Protection and Biodiversity Conservation Act 1999 (Cth).

Land and Environment Court Act 1979 (NSW).

Local Government Act 1993 (NSW).

National Parks and Wildlife Act (No 80) 1974 (NSW).

Protection of Environmental Operations Act 1997 (NSW).

Swimming Pools Act 1992 (No 49) (NSW).

Other

Australian Government Department of the Environment, *Environment Assessment and Approval Process*, <<https://www.environment.gov.au/protection/environment-assessments/assessment-and-approval-process>>.

APPENDIX

1. FAQ

WHAT ARE THE LEGAL REQUIREMENTS OF A POOL TO POND PARTICIPANT?

There are a variety of legal requirements for a pool to pond participant. Participants must comply with the *Swimming Pools Act (1992)* NSW which includes regulations regarding signage, fences and latches. Participants must also abide by various wildlife law which will be discussed in depth below. Furthermore, participants must honour any contracts they enter into with their council.

DOES A POOL CONVERTED INTO A POND REQUIRE A DEVELOPMENT APPLICATION?

According to the Department of Planning and Environment, an approved Development Application means consent has already been given by the council. Therefore, if the conversion of a pool to a pond still meets the requirements of the original development application, then a new application is not needed.

DOES A COUNCIL HAVE TO PROVE THAT A POND IS UNHEALTHY OR IS THE ONUS OF PROOF LIE WITH THE RESIDENT?

In regards to the health standards of ponds, the position of the onus is not entirely clear due to the relatively new nature of this issue. However section 671 of the *Land and Environment Act* states that if a council were to find that the pond breached health regulations, it would be up to the resident to prove that this was not the case.

If the resident is unsuccessful in its dealings with their local council, they may challenge the decision in the Land and Environment Court. However traditional notions of the onus of proof would mean that it would be up to the resident to prove that the pool was of a healthy standard.

IS THERE ANY CASE LAW REGARDING POOLS CONVERTED TO PONDS AND WHAT, IF ANY, LEGAL PRECEDENT HAS BEEN ESTABLISHED?

There is currently no relevant case law in Australia (or any other Commonwealth nation) that relates to ponds.

DO COUNCILS HAVE ANY POWER IN REGARD TO FROG NOISE?

Council only has regulatory powers over frog noise, if the noise of the frogs has been both reported by an individual as offensive, and determined to be offensive through the assessment of an appropriate regulatory official.

Councils cannot prevent an individual from converting their pool to a pond on the grounds of frog noise. However, after the conversion is completed, if frogs do inhabit the pond and a neighbor reports that the noise is offensive, then can local authorities carry out offensive noise tests, and courts can issue noise abatement orders.

WHEN IS A SWIMMING POOL NOT A SWIMMING POOL?

A swimming pool is not considered a swimming pool until it has been completely removed and deleted from the NSW pool register. The removal of a pool may require council permission therefore; it is best to contact your local council before carrying out the process. The removal of an in-ground and an above ground pool requires different procedures however, both require the site to be filled and restored to its natural level and grade. Finally the pool must be deleted and your information updated on the NSW pool register.

WHAT POWERS DO COUNCIL HAVE TO REMOVE NATIVE WILDLIFE THAT COLONISE A POND?

There is limited action that council is able to take in the forceful removal of native wildlife that has colonized in a pond. All native amphibian and animal species are protected under the *National Parks and Wildlife Act (No 80) 1974*. Due to this, a person is not able to remove native wildlife that has colonized within their pond without Ministerial approval. Council aims to provide a resolution to unwanted wildlife interactions using non-destructive approaches when possible.

Environmental Protection and Biodiversity Conservation Act restricts any act that will have an effect on, or that has a possibility of effecting a species that is listed in the endangered species category, or a noted

threatened ecological community is not permitted, and if an individual would like to do so they must first seek out approval from the minister for the environment.

DO THE LEGAL PROTECTIONS OFFERED TO WILDLIFE SUPERSEDE OTHER LEGAL OBLIGATIONS?

According to the Environmental Planning and Assessment Act 1979, the effects or potential effects on the environment *must* always be considered when planning any development. This means that if you plan on reverting your converted pond back in to a pool, you must request an officer from the Office of Environment and Heritage (OEH) to come and remove any wildlife that inhabit your pond. Attempting to remove or harm protected wildlife without the permission or instruction of the OEH will result in the penalties outlined in the National Parks and Wildlife Act 1974, section 98(2).

IF THERE IS THE POSSIBILITY OF A POND BEING USED BY ENDANGERED MIGRATORY SPECIES, WHAT EFFECT WOULD THIS HAVE ON COUNCIL ORDERING A RESIDENT TO REMOVE THE POND?

A person cannot remove a pond which falls under the category of an endangered or migratory species, or both, subject to restrictions in the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the *Environmental Protection and Biodiversity Regulations 2000*. Both categories of species have different qualifications which must be satisfied in order for them to be removed. For endangered species, a permit must be sought by the person who is wishing to take the action that will have an impact on, or is likely to have an impact on the species, pursuant to section 18 of the EPBC Act. Similarly, a permit must also be sought to take an action that will have an impact on, or is likely to have an impact on, a migratory species, pursuant to sections s211B(1), 20(1) and 216(3) of the EPBC Act. Some exemptions apply to the permit requirement for both species, and the person wishing to take the affecting action should consult section 12 of the EPBC Act to see first if they can do so without a permit.

If Council or a person is *unsure* of whether an action that they propose to take will have an impact on a member of the species in the categories mentioned above, they should consult the Australian Government Department of Environment website, to see whether they need to refer that action to the Minister for approval. If they are unsure, they can schedule a pre-referral meeting with Departmental officers, who will assess the proposed action, and decide whether or not the action needs to be referred to the Minister for approval.

CAN A CONSERVATION AGREEMENT OR WILDLIFE PROTECTION AREA BE CREATED AROUND A POND?

A conservation agreement and a wildlife protection area can be created around a pond depending on what components make up the pond. This being said, the aim and purpose of the pond must be to preserve and manage native wildlife. Such things that can be conserved and protected by an agreement include; native

fauna, aquatic animals and flora which are recognized by the Office of Environment and Heritage of New South Wales.

[1] *Hercules Motors Pty Ltd v Schubert* (1953) 53 SR 301.

[2] *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60.

[3] *Associated Newspapers v Banks* (1951) 83 CLR 322.

[4] See appendix 1.1.

[5] Environmental Protection Authority, *Noise Guide for Local Governments*, (2013) vol 1.

[6] *Protection of Environmental Operations Act 1997* (NSW) s 268-274, 275-279, 327.

[7] Environmental Protection Authority, *Noise Guide for Local Governments*, (2013) vol 1.

[8] *Swimming Pools Act (No 49) 1992* (NSW).

[9] *National Parks and Wildlife Act (No 80) 1974* (NSW).

[10] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 18.

[11] Australian Government Department of the Environment: significant impact guidelines 1.1, *Matters of National Environmental Significance*, (2013) vol 1.

[12] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 18.

[13] *Ibid*, s 211(1).

[14] *Ibid*, s 211B(1).

[15] *Ibid*, s 20(1).

[16] *Ibid*, s 216(3).

[17] See; Australian Government Department of the Environment, *Environment Assessment and Approval Process* <<https://www.environment.gov.au/protection/environment-assessments/assessment-and-approval-process>>.

[18] *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 212.

[19] *Swimming Pools Act 1992 (No 49) (NSW) s 3.*

[20] Under the *Swimming Pools Act 1992*, a swimming pool is “an excavation, structure or vessel:

(a) that is capable of being filled with water to a depth of 300 millimetres or more, and

(b) that is solely or principally used, or that is designed, manufactured or adapted to be solely or principally used, for the purpose of swimming, wading, paddling or any other human aquatic activity, and includes a spa pool, but does not include a spa bath, anything that is situated within a bathroom or anything declared by the regulations not to be a swimming pool for the purposes of this Act”

[21] *Local Government Act 1993 (NSW) s 671.*