Sydney Coastal Councils Group Inc.

Activities in relation to the NSW Coastal Management Reforms, 2010

This document collates the SCCG activities and advocacy as part of the consultation phases for the NSW Coastal Management Reforms, 2010.

January 2011

SYDNEY COASTAL COUNCILS GROUP

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SYDNEY COASTAL
COUNCILS GROUP

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     Re: NSW Coastal Reform

   - 27 October 2010 - Ms Lisa Corbyn, Director General, Department of Energy Climate Change and Water
     Re: NSW Coastal Erosion Reform Package

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Presentations attached

- **Overview: Reforms to coastal management in NSW** Mr Mike Sharpin - NSW Department of Environment Climate Change and Water
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- **Engineering, management and implementation considerations - Guidelines for the preparation of Coastal Zone Management Plan** Mr Doug Lord - Coastal Environment Pty Ltd
- **Legal Considerations -** ***Coastal Protection and other Legislation Amendment Bill -*** Ms Kirston Gerathy- HWL Ebsworth Lawyers

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1. FOREWORD

The manner in which councils are able to manage existing erosion concerns and meaningfully integrate climate change considerations into their strategic planning and development assessment activities will play a significant role in creating resilience in coastal communities to the impacts of climate change. In response to the release of the elements of the Government's coastal reform agenda including the Coastal Protection and Other Legislation Amendment Bill 2010 (the Bill) the Sydney Coastal Councils Group (SCCG) and its member councils, in consultation with other experts, have contributed to the various consultation phases of the reforms within the limits of available resources and the associated time frames.

The SCCG is committed to assisting in ensuring appropriate and workable outcomes of the Government's reforms to coastal erosion and coastal management more generally for NSW. The SCCG has strongly advocated that these reforms must build on and improve the necessary strategic partnerships between Local and State Government and their communities to ensure the sustainable, equitable and strategic management of the NSW coastal zone.

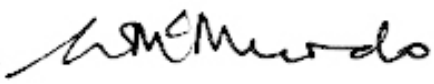
In response to the Bill and associated guidelines the SCCG has undertaken a number of activities. The aim of each of these has been to represent the views and interests of our Member Councils as well as keep them informed on the progress of the reforms. The activities include:

- Meetings with the NSW Minister for Climate Change and the Environment on the issues and needs of councils in relation to the Bill.
- In partnership with the NSW Local Government and Shires Association engaged Kirston Gerathy (HWL Ebsworth) to provide a legal advice to coastal councils throughout NSW on the Bill.
- Producing a number of submissions and correspondence on the Bill and associated guidelines.
- Facilitating forums and workshops with agency representatives, key stakeholders, member councils and other interested individuals and experts to consider the various elements of the reforms.

The information contained in this package demonstrates the SCCG commitment to attempting to ensure successful outcomes to the reforms to Coastal Management legislation and practice in NSW. It also further demonstrates the Group's commitment to increasing the capacity of its Member Councils to understand and participate in integrated coastal zone management in NSW.

I commend this information to you and on behalf of the SCCG would like to thank all who have contributed. . For more information including additional related activities, please see SCCG web site www.sydneycoastalcouncils.com.au or contact the SCCG Secretariat directly on +61 2 9246 7791.

Yours sincerely,



Clr. Wendy McMurdo
Chairperson
SYDNEY COASTAL COUNCILS GROUP INC.

2. INTRODUCTION

Please note: The below text has been taken directly from the NSW Department of Environment, Climate Change and Water web site (28 January 2011): http://www.environment.nsw.gov.au/coasts/coastalerosionmgmt.htm

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Reforms to coastal erosion management in NSW

Introduction

Coastal communities and local councils are facing difficult issues associated with coastal erosion along the NSW coastline. The NSW Government has designed a new coastal erosion reform package that focuses on appropriate actions and provides a broader toolkit for both councils and communities when they are adapting to these challenging circumstances.

This issue is not new - there are records of coastal properties being affected by coastal erosion dating back to the 1940s. However the projections for sea level rise and increased storm activity, and the desire of ever more people to live and build close to the coast, has the potential to increase this risk considerably.

Erosion at Collaroy

NSW has an established framework for managing coastal erosion risks, through the NSW Coastal Policy and the Coastal Protection Act. This sees local councils, with financial and technical support from the State, undertaking coastal hazard studies and developing coastal zone management plans which then inform land-use planning, development controls and coastal activities.

These plans and the related planning schemes should contain a range of suitable management strategies to inform the community about how coastal erosion will be dealt with in their communities and how individual landowners of properties at risk can and should respond.

The NSW Government has developed a coastal erosion reform package to better equip the State and local councils with the tools needed to deal with the challenges of coastal erosion. The reforms include amendments to legislation, new guidelines, and additional support for councils to re-energise their planning processes.

Key elements of the reforms

Sea level rise policy

The NSW Government released its Sea Level Rise Policy Statement in November 2009. This policy is supported by new guidelines that explain how the policy's sea level rise benchmarks are to be applied in coastal and flood hazard assessments and in land-use planning.

Legislative amendments

The Coastal Protection and Other Legislation Amendment Act 2010 was passed by the NSW Parliament on 21 October 2010 and largely commenced on 1 January 2011. This Act amended the Coastal Protection, Local Government and Environmental Planning and Assessment Acts, and three regulations.

The primary objective of the Act is to improve the arrangements for managing coastal erosion risks. It provides additional tools and options for councils and landowners, as well as reinforcing coastal zone

management planning as the way local solutions can be developed for local erosion problems. It is framework legislation and does not seek to solve erosion problems at individual locations. The Minister's speech on the Coastal Protection and Other Legislation Amendment Bill 2010 (No 2) is available on the NSW Parliament website.

A particular challenge for erosion protection works on the coast is that if they are not properly implemented they can merely transfer erosion to other locations or impact on beaches. On the other hand, prohibiting any action may lead to losses of homes and infrastructure. The Act aims to achieve an appropriate balance between private property protection and the protection of our beaches.

Key provisions of the Act include:

- Allowing landowners in specific locations to place sand or sandbags on the beach under strict conditions as emergency coastal protection works to reduce the impact of coastal erosion on their property. If the bags cause erosion they are to be removed.
- Requiring consent authorities assessing development applications for long term coastal protection works such as seawalls to be satisfied that appropriate arrangements are in place to restore beaches if they are eroded by the works.
- Allowing councils to levy a coastal protection service charge on land where the current or past landowners have voluntarily constructed coastal protection works. This charge covers council's costs of maintaining the works and restoring the beach if the works cause erosion.
- Establishing a NSW Coastal Panel to provide expert advice to the Minister and councils on coastal management issues. Under proposed amendments to the Infrastructure State Environmental Planning Policy (SEPP), the Panel will also be the consent authority for long term coastal protection works where the council does not have a coastal zone management plan in place.
- Improving arrangements for coastal zone management planning, including coastal climate change adaptation.
- Strengthening the powers of authorised officer and order powers relating to illegal dumping on beaches, and increasing penalties.
- Enhancing statutory exemptions from liability for councils and State agencies when their coastal management activities are carried out in good faith.

The Act will be supported by a series of statutory and non-statutory guidelines.

Further information is available in frequently asked questions and clarification on what the Act does and does not do.

Coastal zone management plans and emergency action subplans

To expedite the planning process, the Minister will issue directions to those councils that have not yet completed overall coastal zone management plans (where the council area includes one or more of the State's identified 'hot spots'). The plans will need to be completed within 12 months or as otherwise agreed.

These councils will also be required to prepare coastal erosion emergency action subplans by mid 2011. These will set out how landowners, agencies and councils will respond in the event of storm driven erosion. The Government will provide funding to help councils prepare their plans.

Implementation

While the immediate risks of coastal erosion have serious implications in some local communities, the large scale of the long term challenges caused by sea level rise is significant for the whole State. Potentially large numbers of buildings, infrastructure, iconic public recreation spaces and the natural environment face future risks. The issues are complex and there will be much to be learned in the years ahead. The Government and its agencies will work closely together with local councils and communities to implement the reform package. For further information and future updates please view this site or contact the Director Waters, Wetlands and Coast, NSW Department of Environment, Climate Change and Water via coast.flood@environment.nsw.gov.au.

Page last updated: 04 January 2011

3. HISTORY OF COASTAL MANAGEMENT IN NSW

Prepared by
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Geoff Withycombe
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Dear Geoff,

As requested, please find a brief background to coastal management in NSW, based largely on my experience in and involvement with the process since the mid 1970s. This summary is not intended to be exhaustive, but rather to highlight the key issues and changes in strategy/funding over that period. It also incorporates information from recent conference publications by others and from Government web sites on particular dates. More details on specific matters raised could be provided if required.

1. Background to Coastal Management in NSW since 1970

Following a period of coastal erosion in the late 1960s and the damage caused by the May-June 1974 storms, the NSW Government at the time recognised the need to increase the understanding within Government of the cause of the problems so that such events, resulting in severe damage to private property and public assets could be minimised in the future. A Coastal Engineering Branch was formed within the then Department of Public Works and substantial resources including staffing and training were allocated. For the first time a Coastal Protection Act was passed in 1979 which included, amongst other things, the formation of a NSW Coastal Council to advise the Minister of Planning. A Beach Improvement Program (BIP) was established which provided 100% funding to local government for beach improvement projects that satisfied the program criteria, fundamentally for the rehabilitation, development of recreational amenity and protection of beaches. This program was administered through the PWD Coastal Branch.

By the mid 1980s, the need for more technical guidance to direct planning and development approval was recognised, to avoid proliferation of development in areas deemed at risk, and to assist those property owners that were at risk in poorly sited locations. This was addressed through the Coastal Hazard Policy adopted by the NSW Government in 1988, which underpinned the subsequent Coastal and Estuary Management Programs. It had long been recognised that there were difficulties with the 100% funding model of the BIP and in particular it did not result in sufficient ownership of the works by Local Government. While the initial projects were 100% grant funded, the ongoing maintenance became the responsibility of Local Government who were struggling to maintain works not seen as key funding priorities.

A new funding strategy based on a dollar for dollar Local Government Grant program was established with Government contributions set at about $3M per year for the Coastal Program and slightly less for the Estuary Program. These programs were seen as a partnership between the State and Local Government to better manage the NSW coast. It paralleled the already established Floodplain Management Program but did not attract the additional commonwealth funding enjoyed by that program. To guide the coastal and estuary works, the preparation of coastal and estuary management plans were introduced as a means of providing Councils with the technical framework to determine development applications and to assess coastal management decisions. The

Government prepared and gazetted The NSW "Coastline Management Manual" (1990) and "Draft Estuary Management Manual" (1991). These manuals were whole of government publications, not linked to any single department. The Coastal Protection Act (1979) and Local Government Act were amended to provide Local Government with exculpation from liability, provided they prepared and acted in accordance with coastal and estuary management plans that accorded with the gazetted manuals. The process was supported strongly by the government who provided technical expertise to assist the Councils and the committees formed and continued data collection (including coastal process data, photogrammetric monitoring of the whole coast and hydrographic survey support) at no charge to the Councils.

In 1997 the new NSW Coastal Policy was adopted, effectively enshrining the concepts of sustainable coastal development for the NSW coast. For the first time, the rights of the community to access to the coast were clearly stated, and the recreational and ecological values of the coast and estuaries recognised in balance with the individual property rights. This created some conflict with the Coastal Hazard Policy which was seen as predominantly aimed at protection of private assets and public infrastructure.

Since 2000, there have been continuing "legislative and policy reforms" for coastal NSW. In early 2000 the Coastal Council review into Management of NSW Beaches and MHWM boundary redetermination processes was released. Following on from this in June 2001, the State Government announced a Coastal Protection Package (CPP) valued at some $11.7 million. The government explained the CPP was necessitated by the extensive development pressures facing the coastal zone and in response to the scale of future population growth projections. A range of measures introduced within the CPP including the Coastal Protection SEPP 71, amendments to the *Coastal Protection Act 1979* and the Comprehensive Coastal Assessment (CCA) were designed to better inform long-term decision making processes and provide mechanisms for immediate protection to sensitive coastal areas, beaches and public access to them. A key element of the package was the commitment by the government to release a new Coastal Zone Management Manual which would combine the coastal and estuary management processes into a single integrated plan, effectively recognising the importance of Integrated Coastal Zone Management as the direction forward for the NSW coast. The interdependence between the coast and the estuaries was recognised and the sustainability objectives of the NSW Coastal Policy 1997 were to be recognised. The issue of climate change which was already incorporated into the 1990 manual, was to be updated and given a higher priority in forward planning.

In particular the $8.6M Comprehensive Coastal Assessment (CCA) program was a key element of the package and extended over 3 years from June 2002. The CCA was designed to assess the environmental, social and economic values of the NSW coast, to standardise and integrate existing data sets and to identify and fill significant data/information gaps to underpin decisions about coastal development and conservation. The Coastal Protection Amendment Bill 2002 significantly amended the Coastal Protection Act 1979, including extending the 'coastal zone' to include the Greater Metropolitan Region of Sydney (except Sydney Harbour and Botany Bay), enabling the Minister for Natural Resources to direct Councils to prepare and gazette coastal zone management plans and modifying the doctrine of erosion and accretion. The legislation incorporated new requirements for coastal zone management plans before they could be gazetted, including emergency management provisions. These requirements were to be addressed through the new coastal zone management manual which the government advised would be released shortly. This new manual has not been released, and Council was left to try and interpret the new requirements leading to plan gazettal.

The Introduction of the Coastal Protection SEPP 71, in 2002 provided specific strategic planning guidance for development within "sensitive" coastal locations. In May 2003 the Premier announced the establishment of the Department of Infrastructure, Planning and Natural Resources (DIPNR) as a new "super ministry" to integrate and improve land use, infrastructure and transport planning, and natural resource management in NSW, bringing together for the first time the coastal planning and coastal process expertise within one Department.

The Natural Resources Commission Bill 2003, Native Vegetation Bill 2003 and Catchment Management Authority Bill 2003 emanated directly from the recommendations of the Native Vegetation Reform Implementation Group (NVRIG). These Acts were passed at the end of 2003, and fulfilled an historic watershed for natural resource management in NSW which would now be delivered through Catchment Management Authorities in conjunction with the Natural Resources Commission and Natural Resources Advisory Council. The establishment of this Natural Resource Advisory Council led to the abolition by the NSW Government of some 11 advisory committees and Councils, including the Healthy Rivers Commission and the NSW Coastal Council. The Coastal Protection Act 1979 was further amended to formally remove the provisions for establishment and maintenance of the Coastal Council such that it could not be readily re-constituted.

On 1 September 2004, the Coastal Protection Regulation was re-introduced through the legislature to provide the Minister administering the Coastal Protection Act 1979 with a concurrence role over development occurring within the offshore marine waters of the state and in August 2005 Part 3A Environmental Planning & Assessment Act 1979 was introduced to streamline approval processes for Major Significant Developments.

On 26 August 2005 DIPNR was formally abolished after only 2 years and replaced with separate Departments of Natural Resources and Planning, once again separating the coastal process and coastal planning expertise. In this redistribution, the management of the coast was further divided with the removal of the responsibility for minor ports, the river entrances program and recreational boating programs to the Department of Lands. Following the 2007 state election, the Department of Natural Resources was abolished and the coast, estuary and floodplain management functions were subsumed by the NSW EPA which was ultimately reformed as the Department of Environment, Climate Change and Water.

2. The NSW Coastal Reform Package

In January 2008, the DECCW advised they had decided not to issue the revised Coastal Zone Management Manual, but rather to undertake a further review of the state-wide coastal and estuary management functions. This resulted in the announcement of a coastal erosion reform package in October 2009. This new round of coastal reforms, which include the amendments to the Coastal Protection Act, restructuring of the delivery of the coastal and estuary programs and replacement of the existing manuals with a series of guidelines, was presented to the 2009 NSW Coastal Conference.

The NSW Sea Level Rise policy statement was published in October 2009 and also released at the NSW Coastal Conference in November.

The "Coastal Protection and other Acts Amendment Bill 2010" was introduced to the NSW Parliament on 11th June 2010. The agreed in principle speech accompanying the tabling of the bill was delivered by Ms Angela D'Amore on behalf of The Minister, Frank Sartor. In this speech, as justification of the need for the review, it is stated that "*New South Wales has an established framework for managing coastal erosion risks under the Coastal Protection Act. This sees local councils, with Government support, prepare coastal zone management plans which inform land-use planning, development controls and coastal activities. However, councils' progress on completing the plans, has been slow, with only two plans for estuaries and no plans for broader coastal areas yet completed.*" While this may be the true number of gazetted plans at the time, the requirement and opportunity for Councils to have their plans gazetted was only adopted in the legislative amendments introduced in late 2002. The requirements for preparing a plan suitable for gazettal were to be outlined in the revised "NSW Government Coastal Zone Management Manual" which has never been released. The number of plans completed (not gazetted) are listed in the DECCW annual report for 2008-2009 which on page 31 states that "*Three new estuary management plans, and one new costal management plan, were completed in 2008–09, bringing the cumulative total to 81 coastal zone management plans completed by councils in partnership with the NSW Government.*" The reality is that estuary management plans were completed for 75% of the State's estuaries (as cited in the DECCW annual report) and coastal plans are in place or being completed for most of the coastline under the control of local government (not including National Parks). To only count gazetted plans was not presenting the true picture of

the progress in coastal zone management in NSW over the past 20 years. Plans prepared before the 2002 amendments or in the process of being prepared at that time, needed to be reworked to incorporate the new legislative requirements from 2002, allowing them to then be approved by the Minister before being gazetted. Additionally, following the commencement of the coastal management review by DECCW in January 2008, DECCW staff were instructed to advise Councils not to submit completed plans for gazettal until such time as the review was completed, as the Minister would be unlikely to approve them. A narrow window of less than five years existed within which plans could have been forwarded to the Minister for approval and then gazetted and it is not surprising that few plans are gazetted. However, completed plans that had not been gazetted could have been readily modified to satisfy the legislative requirements at that time for gazettal. Subsequently, Councils have also been advised by DECCW that previously completed plans, in the main will be accepted for certification by the Minister with only minor modification post January 2011.

This speech in June also advised that "*The Coastal Protection and Other Legislation Amendment Bill is the main legislative component of the Government's coastal erosion reforms. It amends the Coastal Protection Act to allow landowners to place large sandbags or sand in specific and limited circumstances as emergency coastal protection works.*" However the detail of the procedure to be followed and the works that would be approved were to be defined in the Ministerial requirements and guidelines to be gazetted once the legislation has been passed.

The speech also advised that "*A New South Wales coastal panel will also be established under this bill to provide the Minister with expert advice and to act as a consent authority for some long-term coastal protection works permissible under proposed amendments to the Infrastructure State Environmental Planning Policy*."

The Bill was passed by the Parliament on 21st October 2010 and largely commenced on 1st January 2011. While some guidelines have been completed and are published on the DECCW website a further 26 Guide Notes are identified and listed that will be developed and published by DECCW during 2011.

3. Funding Coastal Zone Management

A key issue to be addressed in coastal zone management is the need for funding to address those long standing issues where existing development is at risk of loss or damage through being originally subdivided and developed in good faith in locations that are too close to the active beach system, (so called "hotspots") Many of these original planning decisions were made as long as one hundred years ago. These high hazard locations have been identified and the level of risk quantified many years ago. In most instances, as has been revealed in the recent Queensland and Victorian floods, while the solutions to addressing these hazards are expensive, the cost of not addressing them can be even greater.

When the coastal and estuary management programs were first implemented in 1990 the Government contribution to the coast and estuary programs was approximately $6M per annum, with an additional (approximately) $12M allocated to the floodplain management program. While the amount of the treasury allocation has varied slightly from year to year, the average amount allocated over the intervening 20 years has not changed. Thus with allowance for increases in CPI (at 5% per annum) over the intervening 20 years the real value of the programs now is about one third of the 1990 value. Property prices have increased in coastal locations at a rate that far exceeds the CPI. When the program was introduced in 1990, the price for a typical beachfront property outside of Sydney was well under $200,000. Today similar properties sell for prices well over a million dollars and in high profile locations for several million dollars. Importantly, the treasury funding allocated to coastal and estuary management since 1990 was ear marked specifically for the local government grants programs (coast, estuary and flood) and 100% of the treasury allocation was directed to Councils for studies or the implementation of management strategies or on ground works. Perusal of the 2009/10 Budget Estimates (on the NSW Treasury web site, page 3-10) shows an allocation to DECCW for local government grants programs of *"$19.1 million to support local councils undertaking estuary, coastal and flood plain management activities, with a new focus on preparing for sea level rise*". This allocation is approximately the same dollar value as the average annual allocations since 1990. However, review of the 2010/11 local government grants offered by DECCW as shown on the DECCW web site

(16/9/2010) shows at that time the total allocation to local government for coast, estuary and floodplain management grants total $8.8M. The approvals for coastal management projects is $820,000 (out of the estimated $3M allocated by treasury) and the total allocation for coast and estuaries combined is approximately $3M (out of the estimated $6M allocated by Treasury) for these programs. Not only has the value of the program decreased by two thirds in real terms, but only half of the remaining treasury allocation currently appears to be provided directly to Local Government as grants. None of the coastal grants listed are for implementing coastal management solutions or protection strategies. Both the coastal management and estuary management programs have traditionally been oversubscribed with the grant allocations received by the Government from Councils well in excess of the available annual funding. It is not stated on the web site or in the treasury papers whether the grant applications have significantly reduced in recent years (signalling the dissatisfaction of local government with the continued changes and lack of certainty in the coastal and estuary management process) or whether the allocations from Treasury are now being used for purposes other than grants directly to local government for producing plans and implementing strategies.. Without adequate funding, local Government will continue to struggle to implement coastal zone management strategies in areas of high hazard.

One positive aspect of the recently implemented Coastal Protection and other Legislation Amendment Bill is the intention to open a further funding stream to be accessed by Local Government in addressing coastal hazards and the impact of sea level rise. It will remain to be seen just how effective this is as a tool for limiting the further increase of development in identified hazard areas or in implementing sustainable strategies to protect existing development in those areas.

As advised this background summary is brief and by no means complete. I would be pleased to prepare additional information on any of the issues raised or to provide further discussion should you see that as being appropriate.

Kind Regards,

Douglas Lord BE, MEngSc, MBA, MIE Aust
Director, Coastal Environment Pty Ltd
25th January 2011

4. SCCG CORRESPONDENCE TO THE NSW GOVERNMENT

- 23 April 2010 - The Honourable Frank Sartor MP, Minister for Climate Change **Re: Reforms to NSW Coastal Management – Coastal Protection**

- 9 August 2010 - The Honourable Frank Sartor MP, Minister for Climate Change **Re: NSW Coastal Reform**

- 27 October 2010 - Ms Lisa Corbyn, Director General, Department of Energy Climate Change and Water **Re: NSW Coastal Erosion Reform Package**

- 21 December (SCCG Email) – Mr Mike Sharpin (DECCW) and Santina Camroux (DoP) **Re: Proclamation of the Coastal Protection Bill and Infrastructure SEPP (amendment) on 1 January 2011.**

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23 April 2010

GW012-10

The Hon. Frank Sartor MP
Minister for Climate Change and the Environment &
Minister Assisting the Minister for Health (Cancer)
Level 35, Governor Macquarie Tower
1 Farrer Place, SYDNEY NSW 2000

Re: Reforms to NSW Coastal Management – Coastal Protection

As resolved at the SCCG Technical Committee meeting held on 22 April 2010 and now endorsed by the SCCG Executive Committee, the SCCG formally requests your urgent attention to providing further time for consultation in relation to the "*Coastal Protection and other Legislation Amendment Bill 2010";* and the associated "*Minister's requirements for Temporary Coastal Protection Works";* and the *"Guide to the Statutory Requirements for Temporary Coastal Protection Works".*

In particular, the very limited timeframe available for comment on the current Government proposals is completely inadequate given the legislative amendments amount to the most significant and controversial changes to NSW Government Coastal Zone Management Policy in several decades.

Although local government authorities are appreciative of new "tools" to address the management of coastal hazards threatening beachfront development, these "tools" appear extremely limited to short-term fixes and protection options **only**. It is disappointing that the Draft Bill, Minister's Requirements and the supplementary guidelines provide no new planning and management initiatives to assist Councils to deal with the longer term strategic planning conundrums surrounding how to best deal with existing development in areas subject to coastline hazards and the more considerable threat posed by sea level rise.

The current "new" initiatives announced by the NSW Government do little other than to coerce councils and/or threatened beachfront property owners to attempt to implement protective 'solutions'. They replace a 20 year old coastal management process that is well respected and developed a real partnership approach between State Government and Councils in managing and protecting the coast for all NSW residents. The proposed approach will ultimately pit councils against ratepayers and ratepayers against ratepayers, to fund prohibitively expensive engineer-designed solutions. This includes the associated (and in most cases unquantifiable) cost of managing the considerable known adverse environmental consequences of such works. In the view of the SCCG Executive Committee, this is a dangerously unsustainable long-term outcome.

The direction that the NSW Government appears to be taking is considerably at odds with all other States, the Commonwealth and indeed jurisdictions internationally. Other jurisdictions are looking at longer term, strategic initiatives designed to maximise the use of vulnerable coastal lands whilst it is safe and appropriate to do so and ultimately retreating from such threats over time. The SCCG is extremely concerned about:

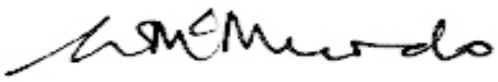
- Outcomes of the amendment to the Coastal Protection Act (and indeed the Infrastructure SEPP) will irreversibly and significantly change the dynamics, functionality and appearance of the NSW coastal zone;

- Promoting negative asset-protection strategies at the expense of properly considered hazard management alternatives. This can only result in the preferred strategy being for residents to seek to fortify themselves in known vulnerable locations at an ever increasing cost (due to sea level rise);
- The Draft Bill is proposing a significant NSW Government policy shift which is in conflict with the NSW Coastal Policy and the objectives of the existing *NSW Coastal Protection Act, 1979;*
- The major deviation away from the successful long term partnership between Local and State Governments to achieve consistent strategic planning and management outcomes within the NSW coastal zone, and
- The significant implementation, compliance and enforcement issues together with the enormous resource and liability implications to be faced by Councils, their communities and ultimately the NSW State Government that will inevitability result from such short sighted legislation.

We ask you take immediate action to extend the time frame for meaningful consultation and input into this significant process. The SCCG also formally requests that the longer term options for coastal protection and strategic management of the NSW coast be referred to a Parliamentary Inquiry with at very least the establishment of a Parliamentary Committee. Terms of Reference of such a body would be to investigate the many alternative options and potential solutions for State and Local Governments in partnerships with their communities to address these significant challenges for the NSW coast now and into the future.

We look forward to being engaged in addressing these extremely important issues and the SCCG anticipates your timely response to our formal requests. For more information please contact me directly on 0438777518 or the SCCG Executive Officer, Geoff Withycombe on 9246 7791 or geoff@sydneycoastalcouncils.com.au

Yours sincerely,



Clr. Wendy McMurdo
Chairperson

Cc. The Hon. Tony Kelly MP - NSW Minister for Planning, Infrastructure and Lands.

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9 August 2010 GW028-10

The Hon. Frank Sartor MP
Minister for Climate Change and the Environment &
Minister Assisting the Minister for Health (Cancer)
Level 35, Governor Macquarie Tower
1 Farrer Place,
SYDNEY NSW 2000

Cc: Cr. Genia McCaffery, President, NSW Local Government Association

Re: NSW Coastal Reform

Dear Frank,
The Sydney Coastal Councils Group (SCCG) appreciates the decision to hold back *Coastal Protection and Other Legislation Amendment Bill 2010* to provide the opportunity for informed consultation with our members. We further acknowledge the support from DECCW to councils throughout NSW through the series of workshops around NSW on the NSW Coastal Reform package.

At the workshop held in Sydney on 19 July there was a robust discussion around both the perceived advantages, issues relating to the amendments, and how they might operate. We appreciate the assurances from your staff that the legislative amendments are only one part of a suite of changes aimed at streamlining and improving coastal management for NSW, and in this regard I can assure you we are all working towards the same objective. We were reassured by your representative that coastal zone management in NSW will continue to be a 'Whole-of-Government' approach and that the current reform package is intended build upon and strengthen the coastal management and estuary management programs.

One area of concern amongst the Councils present was that much of the operational information relating to the changes in the legislation will be included in a series of eight guidelines currently being prepared by DECCW, and further guidelines and policy changes being prepared concurrently by the Department of Planning. Without these guidelines Councils are not able to fully evaluate the likely impacts of the legislative changes proposed. We further note that following the last reforms considered by the Government under the Comprehensive Coastal Assessment Package in 2004 the pivotal documentation supporting the legislative changes at that time (Coastal Protection Amendment Act 2002) was never released (the revised NSW Coastal Zone Management Manual), resulting in much of the present confusion with the Act now being addressed.

While we appreciate that these guidelines will not be finalised until the legislation is passed the drafts of most of the guidelines have now been withdrawn from the DECCW website. We welcome assurances from your representatives at the workshop that guidelines will be provided in time for Councils to fully consider their impacts prior to the legislative changes being debated in the Parliament. We now seek your assurance that this will be the case.

It was suggested at the workshop, and agreed by your representatives, that the DECCW website would be updated to incorporate a table outlining the various Guidelines being prepared and including a timeframe for the release of the various drafts for consultation and

comment. The web site would then be regularly updated to make those drafts available for consideration by our members. Our members believe this would be a great help in programming their resources to review and comment on the guidelines so that input may be incorporated in debate on the legislation.

The DECCW guidelines and final release dates outlined on the DECCW website at present are as follows:

1. **Documents scheduled to be released in July**

- *Coastal Risk Management Guide: Incorporating sea level rise benchmarks in coastal risk assessments*

2. **Documents scheduled to be released before commencement of the amendments to the Coastal Protection Act (following passage of the Coastal Protection and Other Legislation Amendment Bill 2010)**

- *Minister's Requirements under the Coastal Protection Act 1979*
- *A Guide to the Statutory Requirements for Temporary Coastal Protection Works*
- *A guide for authorised officers under the Coastal Protection Act*
- *Guidelines for preparing coastal erosion emergency subplans*
- *Guidelines for assessing and managing the impacts of seawalls*

3. **Guidelines scheduled to be finalised by November 2010**

- *Coastal Protection Service Charge Guidelines*
- *Guidelines for preparing coastal zone management plans*

In addition, there is also a draft Planning Guideline that has been available on the Department of Planning website since November 2009 and which we were told will be issued in final format including amendments shortly. The LGSA is very aware of the importance of the policies and guidelines coming from the Department of Environment Climate Change and Water, the Department of Planning and the Department of Local Government, and working together to ensure a consistent outcome for coastal management across Government and along the NSW coast.

The SCCG welcomes the opportunity for full consultation on the NSW Coastal reform package and we look forward to the additional information outlined above being made available to our members.

I trust that the information provided in this letter will receive the appropriate attention. If you wish to clarify any matter in the letter or require further information, please contact me directly or the Group's Executive Officer, Geoff Withycombe on 9246 7791 or geoff@sydneycoastalcouncils.com.au

Yours sincerely,

Cr. Wendy McMurdo
Chairperson

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27 October 2010 CM054-10

Ms Lisa Corbyn
Director General
Department of Energy Climate Change and Water
PO Box A290
Sydney South NSW 1232

Re: NSW Coastal Erosion Reform Package

At the October Sydney Coastal Councils Group (SCCG) Technical Committee Meeting it was unanimously resolved that the Group write to the Department of Environment Climate Change and Water (DECCW) noting that the consultation process for the NSW Coastal Reform Package was inappropriate and does not allow for meaningful contribution from Councils. In light of this resolution the SCCG recommends:

Recommendation:

1. The complete set of statutory and non statutory documents underpinning the NSW coastal erosion package be made available for further review and comment to all stakeholders.
2. The DECCW engage independent technical experts and the NSW Coastal Panel to review the technical and implementation aspects of the statutory and non statutory documents underpinning the NSW coastal erosion package once all the documents have been completed.
3. The NSW Government undertake a second round of consultation on the complete set of statutory and non statutory documents underpinning the NSW coastal erosion package with Local Government once they have been independently reviewed.

The stated aim of the NSW coastal erosion reform package is to provide the State Government and Councils with guidelines and tools to deal with the challenges of coastal erosion. The key elements of this reform include the *Coastal Protection and Other Legislation Amendment Bill 2010* (the Bill) and a series of seven supporting documents.

Now that the Bill has been accented the SCCG understands that the NSW Government will gazette the supporting documents prior to the legislative changes to the Bill commencing. Correspondence in relation to the Bill sent by the Hon. Frank Sartor on 8 October states that the changes to the Acts and Regulations will commence in approximately two months. The SCCG believes this time frame is inappropriate an unachievable due the complexity of changes and need for further stakeholder consultation.

The seven statutory and non-statutory documents, to be finalised before proclamation of the amendments to the Coastal Protection Act, are listed on the DECCW website. The SCCG's primary concern relates to the content, consultation period, legal weight and implementation of the series of supporting documents underpinning the *Coastal Protection and Other Legislation Amendment Bill 2010.*

Further confusing this matter are recent statements made by the Minister that some guidelines may only be in place until September 2011. The SCCG requests that DECCW clarify the intent of the following statement made by the Hon. Frank Sartor in the Parliament on 21 October 2010

"Then they will be gazetted and I will commence the process of preparing a regulation that will replace the ministerial requirements, but will hopefully be the same as the finalised form of the requirements"

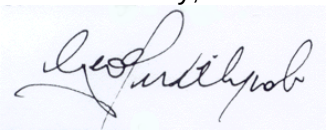
Currently five of these documents can be found on the DECCW website for consultation (*The Minister's Requirements under the Coastal Protection Act 1979, A Guide to the Statutory Requirements for Emergency Coastal Protection Works, A guide for authorised officers under the Coastal Protection Act, Guidelines for preparing coastal zone management plans and Coastal Protection Service Charge Guidelines*). The formal exhibition period for three of these documents has already been completed (*A Guide to the Statutory Requirements for Emergency Coastal Protection Works, A guide for authorised officers under the Coastal Protection Act, Guidelines for preparing coastal zone management plans)*. Further complicating this matter is that *Guidelines for assessing and managing the impacts of seawalls* are yet be produced and the *Guideline for the Preparation of Emergency Sub Plans* for identified 'hot spots' has been removed from the DECCW website.

The SCCG understands that DECCW has received limited comment from Local Government on the supporting documents for which formal exhibition has been completed. It is important that DECCW recognise that a lack of comment from Councils on these documents is not an endorsement of their content. Rather, it is a reflection of the limited period for comment afforded to Councils and the significant resources required to review and understand the large number of complex documents DECCW are currently seeking comment on.

Combined with the limited time for comment, SCCG Member Councils have had some difficulty in assessing how the coastal erosion package will be implemented, given that a number of the key supporting guidelines are not available for consideration. It is the SCCG's continuing position that the proposed coastal reform package and legislative amendments should be presented for consultation and comment as a single package rather than in steps as is currently occurring.

I trust that the information provided in this letter will receive appropriate attention and we look forward to your response. If you wish to discuss its content or require further information, please contact SCCG Senior Coastal Project Officer, Craig Morrison, on (02) 9246 7702 or craig@sydneycoastalcouncils.com.au

Yours sincerely,



Geoff Withycombe
Executive Officer

Cc. Hon. Frank Sartor, Minister for Climate Change and the Environment
Cc. Cr Wendy McMurdo, Chairperson, Sydney Coastal Councils Group Inc.
Cc. Ms Jane Gibbs, Manager, Coast and Flood Policy, DECCW
Cc. Mr Mike Sharpin, Manager Urban and Coastal Water Strategy, DECCW

Dear Santina and Mike,

c.c. Clr Wendy McMurdo (SCCG Chairperson)
Ms Jane Gibbs (Manager Coasts and Flood Policy DECCW)
Mr Bob Verhey (Strategy Manager (Environment) – LGSA)

Re: Proclamation of the Coastal Protection Bill and Infrastructure SEPP (amendment) on 1 January 2011.

The Sydney Coastal Councils Group requests that you clarify certain processes for implementing the Coastal Protection and other Legislation Bill 2010 and Infrastructure SEPP on 1 January 2011 in relation to the following issues:

Please note that these inquiries came via the related discussions at the recent SCCG Technical Committee held on 9 December.

- How should an SCCG Member Council proceed when and if they receive a Development Application for a 'permanent' sea wall on 2 January 2011. Specifically:
    - Which NSW Government Department should they forward the application on to (and who within that Department)?
    - What information should they give the proponent in relation to length of time for the processing of the application and appeals?
    - What information should Council be providing to their general community and also those adjoining property owners potentially affected by the proposal?
- What assistance will DECCW be providing to councils in the granting of certificates for emergency protection works ? and will DECCW provide some form of template form for certificates that identifies all the conditions that must be complied with as per the various guidelines.
- As no coastal council in NSW currently have authorised officers will DECCW be responsible for granting emergency protection works certificates ?
- When does DECCW envisage that the necessary 'authorised officer' training will be commencing
- How will DECCW be informing councils of requests and granting of emergency protection works certificates? How will then monitoring of certificated works and the issuing of orders in respect of unlawful works in the absence of a council Authorised Officer, both in the short and longer term be facilitated and recorded by DECCW. For example some of our members coastal councils have indicated that they may choose not to delegate an Authorised Officer, will DECCW have the capacity to administer the other regulatory functions of the Act until those coastal councils put in place the requisite planning mechanisms?
- What education and guidance materials have DECCW and the NSW Department of Planning prepared that councils that can very shortly be disseminate to residents in relation to the implementation of the Coastal Protection and other Legislation Bill 2010 and Infrastructure SEPP?
- Can DECCW and NSW Planning please clarify what councils are in 'coastal areas' / 'coastal zone' and are directly affected by both the Bill and the SEPP. Can we please also act on our request that our member councils be provided with a map (or similar) that defines 'lands adjoining tidal waters'? Specifically this request comes from our estuarine councils in the Hawkesbury (ie Hornsby) and also those in Sydney Harbour including tributary areas of Middle Harbour, Lane Cove River etc..

Thanks you for your timing advice on these matters. Our Councils would appreciate a response as soon as possible, please send your response to info@sydneycoastalcouncils.com.au

Please let me know of I need to put these information requests in some more formal correspondence

Thanks again – been a big year in NSW coastal management, I hope you both have a great break and Christmas..

Regards,
Geoff

5. SCCG SUBMISSIONS

- Draft Minister's Requirements under the Coastal Protection Act 1974
- Draft Guidelines for preparing Coastal Zone Management Plans;
- Draft Guide for Authorised officers under the Coastal Protection Act 1979; and
- Draft Guide to the statutory requirements for emergency coastal protection works.

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10 September 2010

GW043-10

Executive Officer
Waters, Wetlands and Coast Division
DECCW
PO Box A290
Sydney South NSW 1232

Dear Executive Officer,

Re: *SCCG Submission: Draft Minister's Requirements under the Coastal Protection Act 1979*

INTRODUCTION

The Sydney Coastal Councils Group (SCCG) would like to take this opportunity to provide initial comment on the *Draft Minister's Requirements under the Coastal Protection Act 1979* posted on the Department of Climate Change and Water (DECCW) web site. We thank the Minister for the opportunity to comment on these guidelines prior to the re-introduction of the amendments to the Coastal Protection Act in the NSW Parliament and understand that such comment is requested by 10 September 2010. We further thank the Executive officer for agreeing to accept our slightly late submission.

We understand that the NSW Government intention is to gazette these guidelines following the "Coastal Protection and Other Legislation Amendment Bill 2010" passing the parliament. These will then provide the basis for emergency management works on NSW beaches, superseding the old emergency management plan requirements, as incorporated into the amendments to the Act and passed with bipartisan support from the Parliament in 2004.

In reviewing the Draft Ministers Requirements, we have had some difficulty in assessing how the overall process may work, given that key supporting guidelines are not finalised and available for our consideration (and some remain to be prepared as drafts). It is our continuing position that the proposed coastal reform package and legislative amendments, of which the guidelines and Minister's requirements form an integral part, would have been better presented for consultation and comment as a single package rather than in steps as is currently occurring.

In the preparation of this submission the SCCG has engaged an experienced coastal engineering expert and has also sought advice, comment and input from SCCG Member Councils. We are also currently finalising legal advice on the Draft Bill in partnership with the Local Government and Shires Associations and this will also be provided to the Department and the Minister as part of the overall submission process being developed by the SCCG.

Specific comments and recommendations have also been made by SCCG Member Councils in submissions to the Department of Environment and Climate Change and Water (DECCW). The SCCG supports the comments and recommendations made by Member Councils however these will not be specifically addressed in this submission.

We are also aware of the issues of concern raised at the presentation of the guideline(s) to the LGSA member Councils in Sydney on 19 July and those regional workshops undertaken by the LGSA. These have been reflected in the draft response to the legislation subsequently provided by the LGSA to DECCW. We support and reiterate those identified concerns.

SPECIFIC COMMENTS

Section 1.1

(a) While it is agreed that "beach erosion is imminent or likely to be imminent when the distance…….is less than 10 metres", this is not the only measure of potential hazard as:

- Movements of the erosion escarpment of up to 25 metres in a single event are documented in the literature at locations along the NSW coast (based on measurements made by DECCW) and it is therefore possible that a dwelling located more than 10 metres from the escarpment could be lost during a single storm event without the opportunity to implement emergency protection measures.
- The measurement of the distance from the escarpment to the front wall of a dwelling is considered not appropriate. The critical building element is the foundation supporting the structure. It is possible (and quite common) to construct building elements (including the seaward wall) supported on a cantilevered support to foundations located many metres further landward.
- Damage to dwellings usually occurs as a result of foundation failure and the defined zone of reduced foundation capacity may extend tens of metres landward of the erosion escarpment (depending on local conditions and foundation design). Dwellings well beyond the proposed ten metre trigger may already be at risk or experiencing damage as a result of foundation failure.

The more realistic trigger would be a certificate provided by a suitably qualified engineer certifying that the dwelling could be at risk from the next storm event or series of storm events. Given the small number of homes that the Government believes to be affected and the restriction of the application to recognised "hotspots" (ie ~200 properties), it may be easier and more effective for the Government to simply identify those properties/areas to which the emergency management provisions apply.

The requirement to obtain an engineering certificate from a professional engineer that any existing works "*provide a lower degree of erosion protection than emergency coastal protection works*" is unrealistic. In most cases for illegal works (and in some cases legal works), no design drawings or records exist relating to their construction. They are usually buried and cannot be examined without extensive excavation/investigation. In many cases they would consist of rock, rubble or other durable materials, more likely to survive a storm event than the lightweight sand filled units currently proposed for protection works, and therefore (in most cases) a certificate could not be provided. For approved protection works, these would have been (in most cases) designed to an engineering standard to provide protection. Again, our advice is that such structures would provide significantly more protection than the temporary works proposed under this guideline. This requirement therefore presumably negates the applicability of the emergency works at most identified hotspot locations along the NSW coast.

The requirement that prior to the implementation of emergency measures during a period of erosion, approval must be obtained from both a senior police officer as to the safety of the site and certification by a professional engineer that the escarpment has a low likelihood of failure is in our opinion not workable. Our advice from our engineering consultant is that an erosion escarpment which is formed by wave erosion and is standing at an angle steeper than the natural angle of repose for the material, is inherently unstable, having a factor of safety less than one. It would not be prudent for an appropriately qualified and experienced engineer to provide such a certificate in most cases.

Therefore, further consideration is required to provide a more flexible approach to set the rangers of distances (as defined for immediate risk) and these be further considered and specifically defined in Councils' "Emergency Sub-Plan and any associated temporary works certificate(s)".

There is also clearly more consideration and consultation required regarding the roles and responsibilities of the NSW Police Service which may be at odds with the proposed requirements and also with other Crown Lands and Local Government Plans of Management and other land use controls and associated restrictions.

Section 1.2

Our engineering consultant advises that, while the materials specified in section 1.2 may be used to design works appropriate for coastal erosion protection, the conditions and limitations incorporated in the draft Ministerial Requirements will ensure that the emergency works proposed provide little or no protection to properties at risk from wave action, and in fact may result in damage to adjacent properties (including the beach) which Local Government, Land and Property Management Authority (LPMA) or DECCW (as Coastal Authorities) will then have to address.

While beach nourishment is a well-used and effective beach management option, it is not generally practical during an erosion event where placement by trucks and heavy earth moving equipment will be required.

Section 1.3

In general, the selection of sand for beach nourishment is based on the properties of the existing material. It is usual to specify similar colour and composition to the native sand, noting that colour may vary from pure white to orange and composition may vary from 100% quartz to almost 100% shell (e.g. north coast NSW beaches c.f. Sydney northern beaches). Similarly the grading is usually selected to match the existing grading or to be slightly coarser. The AS 2758 series is published in a number of parts and specifies aggregates, (including sand) for a range of construction purposes. Better specification as to which part of AS 2758 is to be used would assist.

The potential for contaminated sand to be used in either sand bagging or nourishment activities is not addressed in the Ministerial Requirements or Guidelines.

To rectify this it is recommended that:

- All materials used for sand bagging or nourishment be waste *Virgin Excavated* Natural *Material* (VENM) as identified in Schedule 1 of the Protection of the Environment and Operations Act 1997; and
- Suppliers of sand to residents or coastal authorities also be required to demonstrate a "chain of custody" that complies with an associated Australian Standard (similar to the Forestry Chain of Custody - AS 4707) that verifies the origin of the sand, its appropriateness for placement on a beach environment and its quality (ie not being contaminated).

Section 1.4

The safety requirements outlined would be difficult to meet if an erosion escarpment is actively eroding during the placement. Specifically, the issue of an engineering certificate in a situation where a 2 metre high escarpment has partially collapsed to the effect that "there is a low likelihood of failure of the escarpment" is problematic (see previous comment in section 1.1).

The construction requirements for the type 1, 2 and 3 works apparently do not follow sound engineering practice. In designing a structure to protect an erosion escarpment from wave attack it is common engineering practice in NSW to design for scour of the toe of the structure to at least -1m AHD and for wave run up at the crest of in excess of +6m AHD (depending on wave exposure). Our engineering consultant advises us that the protection works proposed at a maximum height of 1.5m using lightweight materials are designed to fail. They will be undercut and overtopped, the two most common causes of failure. The use of lightweight units also increases the likelihood of the units being dislodged and moved away from the initial placement location causing offsite impacts and nuisance to other areas along the beach and within the surf zone. We believe there is little value in allowing construction to proceed for a structure that has little or no chance of protecting a property against wave attack and that in all probability will result in construction material being distributed along the beach as the structure collapses, with Local Government required to organise its removal after the event. The SCCG also questions the logic of DECCW in giving an expectation to the community of asset protection when this is very unlikely to occur with the protection options being proposed.

While the sand nourishment option may provide some protection of the escarpment, the requirement for construction from the beach face makes use of this option during an emergency unlikely. Placement of the material would need to be undertaken before the erosion event and at low tide. No guidance is provided as to the amount of sand placement that would be appropriate. We are advised by our engineering consultant that a severe storm event is capable of eroding 250 cubic metres of sand per metre of beach above mean sea level.

Section 1.5

We note the constraints included that are designed to limit the use of and damage to public land. However, the situation remains that when the works are undertaken, Council is not required to be advised in advance but at the first possible opportunity. Any damage to public land or inappropriate placement/use of structures or materials/equipment may only be identified after the event. In that case it remains the responsibility of the Local Government Authority or another Coastal Authority to initiate measures to rectify the situation.

SCCG member councils have highlighted the use of public lands as one of the most concerning and problematic elements of the erosion reforms and have continuously reiterated that use of public lands for these purposes as inappropriate.

Of overarching concern to delegates is that the construction or placement of temporary protection works on public land could potentially expose councils to increased liability in the following areas:

- **Injury to members of the public**: Once the materials used for the temporary protection works are placed on public land councils have a duty of care to ensure members of the public using the public land for recreation are not injured in the vicinity of the works or by the tools used to construct the works.
- **Damage to other properties**: Once a council has consented to access onto or through public land for the purpose of construction of temporary protection works a council could be exposed to liability for any damage done to surrounding property as well as public assets and utilities as a result of the works.
- **Maintenance of temporary works:** As councils are responsible for ensuring compliance with the guidelines for the maintenance of temporary structures, councils could be exposed to liability if compliance with the guidelines was not enforced.

Additional to the increased exposure to liability, Member Councils also question the legality of councils allowing private use of public lands classified as “Community land”. Overall, it is felt that issues associated with increased exposure to liability of councils could be removed if all activities required for the construction and placement of temporary protection works were to be undertaken on private property via an appropriate compliance process.

Combined with an increased exposure to liability and the legality of using public land classified as Community land for private use a number of other issues arise from the use of public land for the construction or placement of temporary protection work. These are:

- **The need for multiple approvals and licences:** Within the coastal zone a number of public authorities are responsible for managing land as well as providing approvals and licences for access and use. Such agencies include but are not limited to councils, the National Parks and Wildlife Service, Marine Parks Authority, the NSW LPMA and in Sydney for example Sydney Water. Therefore a resident wishing to get access through or place temporary works on public land may potentially require licences or approvals from a number of authorities.
- **Damage to public infrastructure:** Residents or their agents driving trucks or heavy earth moving equipment through or onto public land are likely to cause damage to public infrastructure above or below the ground (including sewer and stormwater assets).
- **Potential impacts on Marine Parks, Aquatic Reserves and Intertidal Protected Areas:** The potential for temporary works to have an impact on the ecological function of Marine Parks, Aquatic Reserves and Intertidal Protected areas should be considered within the Ministerial Requirements and associated Guidelines.
- **Clearing of dune vegetation, endangered ecological communities and threatened species:** Additional to the licences required for access to public land the potential for clearing or damage to dune vegetation, endangered ecological communities and threatened species to occur is high.

Section 1.6

Again, we note the conditions that are proposed to limit the extent of the works and their impact to the subject property, or immediately seaward of it. However, again it becomes the responsibility of the Local Government Authority (or Coastal Authority) to initiate measures to rectify the situation should it arise. This is significantly problematic due to the existing resource constraints of Local Government and the lack of and inconsistent enforcement provisions contained in the current Draft Bill (further commentary on these enforcement issues will be provided with the SCCG / LGSA legal advice).

Section 2

The intent of this section is to ensure that the structures are adequately maintained and if damaged or posing a risk, are removed. Our advice is that the design and materials specified are unlikely to remain intact when exposed to wave attack, suffering either damage to the units and or their removal from the initial placement location. In each instance the responsibility again falls to the Local Government Authority to initiate measures to rectify the situation.

Section 3

We note the requirement that where removal is required in accordance with the Act, this includes all geotextile containers and sandbags. It is likely that when the structure fails, individual bags will bury themselves on the beach (down to the limit of scour) or will be moved along the beach and/or offshore. Complete removal of these containers and the fabric from which they were constructed is not likely to be achieved, particularly in the absence of any

excavation. Again the responsibility falls to the Local Government Authority to initiate measures to rectify the situation, which may extend well into the future as the containers are re-exposed. It is suggested that DECCW consider including pre existing site audits to ensure that pre existing environment and amenity conditions are defined so that affected areas can indeed be rehabilitated. The ability for Local Government to require rehabilitation bonds needs also to be considered.

Section 4

This section relates to the unlawful placement of emergency works providing for rehabilitation of the environment to its original condition within 30 days and is supported. Again the responsibility falls to the Local Governments to initiate measures to rectify these situations. In addition to comments in the above section, further consideration and requirement are needed to address the necessary maintenance provisions and any remediation works. Further consideration and details are also required regarding other site conditions as contained within Councils' Coastal Plans of Management, Community Lands Plans of Management and any other site specific restrictions or necessary Crown land licence considerations.

Section 5

This section extends the requirements in the Act for unlawful placement of material or structures to include inappropriate placement of emergency protection works and is supported.

Schedule 1

This schedule lists those areas regarded as "hotspots" where emergency works can be undertaken and includes three beaches within the Sydney Coastal Councils Group area, namely Basin Beach Mona Vale, Narrabeen/Collaroy Beach and Bilgola Beach. A total of twelve locations have been identified state-wide and advice from DECCW staff is that this may now apply to as few as six locations. We also note that the NSW Government may alter this list at any time by revising the schedule and re-gazetting the guideline. We seek clarification from DECCW regarding how Councils will be consulted on any changes to Schedule 1 including consideration of any site specific conditions and restrictions to these new sites.

ADDITIONAL ISSUES

- **The "Coastal Zone"**

The SCCG seeks clarity in regards to the area of applications for the various NSW definitions for the 'coastal zone' with the proposed amendments to the Coastal Protection Act, the Sea Level Rise Policy, the NSW Coastal Policy and also SEPP71.

This confusion is well articulated from issues raised by Hornsby Shire Council as noted below:

"It appears to be the 'intent' of State government to apply it where the Coastal Protection Act is applied but with priority given to hot spot areas. Whilst the hotspot areas are defined, Council planners advise there is still uncertainty as where the Coastal Protection Act applies. The uncertainty exists because of the use of the definitions of "Coastal Zone" in both Section 117 Direction 2.2 Coastal Protection and SEPP No. 71 and "coastal areas" in the Sea Level guideline. Hornsby Shire is not located in the Coastal Zone as declared by notice in the Government Gazette. Hornsby Shire is also not identified in the Schedule for which SEPP No. 71 applies. However, the "Coastal Zone - Greater Metropolitan Region" maps on the DOP website indicate that Dangar Island and Milson Island, both within Hornsby Shire, are within the Coastal Zone. Further, the Lower Hawkesbury River and its tributaries would be defined as a

“coastal area” under the Sea level rise guideline (August, 2010). *Within the* Sea level rise guideline (August, 2010) *Coastal areas of NSW include* " Sydney Harbour, Botany Bay, the Hawkesbury River and their tidal tributaries".

- **Communications**

The issue of communicating the existence and intent of the Ministerial Requirements and Guidelines to residents and business affected by coastal erosion is a major area of concern to our Member Councils. The potential for miss-information (shared between residents') and misunderstanding (residents' miss-interpreting the Requirements and Guidelines) are very high.

This could result in residents believing they were allowed to undertake a number of actions that did not comply with the Ministerial Requirements and Guidelines.

Such actions include:

- Undertaking emergency coastal protection works outside the approved locations, circumstances and triggers;
- Placing materials other than sand or geotextile bags on the beach;
- Taking sand off the beach for works; and
- Not maintaining the integrity of the works.

To address this, and prevent councils having to explain the Ministerial Requirements and Guidelines on a resident by resident basis, it is strongly recommended that the DECCW work with coastal councils on the production of the necessary standard and constituent educational materials to ensure that the Ministerial Requirements, the Guidelines and the numerous other reforms to coastal management in NSW is communicated consistently and appropriately.

Such materials would include:

- Fact sheets,
- Frequently asked questions and answers of staff on council inquiry counters,
- Consultancy briefs for design of emergency works,
- Materials of specific community forums and individual liaisons etc.

CONCLUSIONS

The Ministerial guidelines are designed to restrict emergency works to identified hotspot locations where they may be permitted, until such time as a coastal zone management plan is completed and gazetted. The conditions imposed are such that even at these locations the majority of the property owners may not be able to consider implementing emergency works (e.g. not within ten metres of existing escarpment or existing (including unapproved) works are in place etc.). For example at Narrabeen/Collaroy Beach, Warringah Shire Council advises that as few as two properties may currently have no form of existing protection. We are further advised that even if works can be undertaken, they are likely to be ineffective in protecting property. More probably the permitted emergency works would fail and Council would then be required to oversee and / or undertake their removal and then attempt to rehabilitate affected areas.

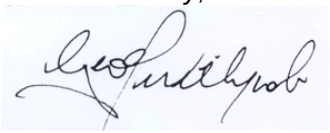
We do not see the advantage in putting forward a process where the outcome, at considerable effort and expense, is likely to be of little or no benefit either to individual property owners or the wider community. We recognise that the measures outlined are temporary measures that are only intended to be available until such time as a coastal zone management plan is developed and gazetted. We note the advice of DECCW to the NSW Coastal Conference in 2009 that they

would be giving Councils with identified hotspots a period of 12 months to develop and gazette coastal zone management plans for their hotspot areas. It is unfortunate that after 12 months we are still developing and reviewing the interim emergency provisions and it is the opinion of the SCCG that effort and resources would better be put towards developing and implementing the necessary strategic long term coastal zone management plans for the immediate areas of concern and then for the entire NSW coastal zone.

The SCCG remains committed to assisting ensure appropriate and workable outcomes of the DECCW reforms to coastal erosion and coastal management more generally for NSW. These proposed reforms must build on and improve the necessary strategic partnerships between local and state government and their communities to ensure the sustainable, equitable and strategic management of the NSW coastal zone.

If you wish to clarify any matter in this correspondence or require further information, please me directly on (02) 9246 7791 or geoff@sydneycoastalcouncils.com.au.

Yours sincerely,



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Executive Officer

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25 October 2010

GW049-10

Executive Officer
Waters, Wetlands and Coast Division
DECCW
PO Box A290
Sydney South NSW 1232

Dear Executive Officer,

Re: SCCG Submission:

- **"Draft Guidelines for preparing Coastal Zone Management Plans",**
- **"Draft Guide for Authorised officers under the Coastal Protection Act 1979" and**
- **"Draft Guide to the statutory requirements for emergency coastal protection works"**

INTRODUCTION

The Sydney Coastal Councils Group (SCCG) would like to take this opportunity to provide initial comment on the:

- "Draft Guidelines for preparing Coastal Zone Management Plans",
- "Draft Guide for Authorised officers under the Coastal Protection Act 1979" and
- "Draft Guide to the statutory requirements for emergency coastal protection works"

The SCCG thanks the Minister for the opportunity to comment on these guidelines. We further thank the Executive Officer for agreeing to accept our late submissions.

In reviewing the Draft guidelines the SCCG continues to have some difficulty in assessing how the overall reform process may work; given the complexity of the issues; the less than desirable consultation process; the fluid nature of the reforms generally and the fact that key supporting guidelines are not finalised and available for our consideration (and some remain to be prepared as drafts). It is our continuing position that the proposed coastal reform package and legislative amendments, of which the guidelines form an integral part, would have been better presented for consultation and comment as a single package rather than in steps as is currently occurring.

Please also note that at the SCCG Technical Committee held on 14 October it was unanimously resolved that 'the Group write to the Department of Environment and Climate Change and Water DECCW noting that the consultation process for the NSW Coastal Reforms was inappropriate and not allowing meaningful contribution from Councils. Please find attached a letter recently forwarded to the Director General outlining these concerns.

In the preparation of this submission the SCCG has engaged an experienced coastal engineering expert and has also sought advice, comment and input from SCCG Member Councils. As part of the SCCG response to the coastal reform process the SCCG in partnership with the LGSA has also sought legal advice on the Draft Bill. Please note this has now been provided to the Minister, the Department, all SCCG Member Councils and all members of the NSW Parliament for consideration.

Specific comments and recommendations have also been made by SCCG Member Councils in submissions to the (DECCW). The SCCG supports the comments and recommendations made by Member Councils however these will not be specifically addressed in this submission.

In addressing the three documents, the SCCG initially commenced writing a detailed review. However, this resulted in attempting to rewrite the documents and is considered counterproductive. Alternatively, the SCCG has now provided general comments on each document and then specifically addressed the questions raised by DECCW for comment in the boxed sections of their draft addressing key concerns. We acknowledge that there was no consultation questions contained within the "Draft Guide to the statutory requirements for emergency coastal protection works".

The SCCG notes that the three documents together total approximately 170 pages, much of the content of which is technical and needs to be cross checked against the existing and new legislation and manuals. Further, the supporting guidelines which appear on the DECCW web site are removed and/or amended without notice, making the ongoing review difficult and extremely resource intensive.

1. Draft Guidelines for preparing Coastal Zone Management Plans

1.1 General Comments

The NSW Government proposes to replace the existing Coastline Management Manual and Estuary Management Manual with this single guideline. This proposal will replace a 20 year old coastal management process that is well respected and has developed a real partnership approach between State Government and Councils in managing and protecting the coast for all NSW residents.

The existing manual was well thought out and presented a clear, logical and well understood process leading to the preparation of a coastal or estuary management plan (now Coastal Zone Management Plan). The fundamental principle underpinning those manuals was the need for understanding of the behaviour of the natural system, prior to implementing management measures. This risk based methodology has been recognised and adopted by other jurisdictions within Australia and internationally. The longevity of the documents is testimony to their acceptance by the community and by Local Government, resulting in the preparation of coastal zone management plans covering most of the open coast of NSW and the adjacent estuaries. **N.B.** DECCW Annual Report 08-09 – 'total 81 Coastal Zone Management Plans completed by Councils in partnership with State Government'.

The SCCG recognises the need to update these documents and in particular to provide a cohesive single manual that coordinates the management of coasts and estuaries through comprehensive coastal zone management plans that accord with the currently recognised principles of Integrated Coastal Zone Management. Changes in coastal understanding, previous revisions of the legislation and redefinition of the extent of the coastal zone to incorporate the Sydney metropolitan coast and now the foreshores of Botany Bay, Sydney Harbour and Broken Bay, warrant significant revision of those manuals. That revision has been eagerly anticipated by Local Government and promised by the NSW Government for many years.

The draft guideline as prepared for comment is in need of significant further work before it could fulfill those objectives and replace the current manuals.

The draft document is restricted in its focus with the primary stated objectives "to document practical actions …. to address risks from coastal hazards and risks to the health of estuaries". This represents a significant narrowing of the focus of coastal management in NSW that is of concern to our Member Councils. No longer is the NSW Government position one of balancing the ecological value, recreational amenity and private occupation and commercial reality of coastal areas. Under the new

guideline, recreational and ecological issues relating to the coastal areas are not even considered, other than in the context of hazard reduction. Similarly, ecological health is the only issue to be addressed within the estuaries. This is surprising and significantly limits the usefulness of the proposed draft guideline. It is generally recognized internationally that existing development and services concentrated along estuary foreshores face one of the greatest potential threats from climate change and sea level rise.

Amendments to the Coastal Protection Act (CPAct) introduced in 2004 and consistent with the NSW Comprehensive Coastal Assessment undertaken at that time reinforced recognition of the beach and the right of the community to access and use of the NSW coastal foreshores. The SCCG notes that the draft guideline now recognises coastal access and amenity, including both estuary and ocean foreshores as a "secondary consideration". This is at direct odds with the NSW Coastal Policy (1997) which states "The objective of the policy is to protect and conserve the coast for future generations." We also note objective 7 of that Coastal Policy which is "To provide for appropriate public access and use". Winding back the scope of coastal zone management plans so that they mainly address coastal hazards and estuarine health (rather than the ecologically sustainable development of the coastal zone) is of significant concern and inconsistent with other jurisdictions nationally and internationally. It is seen by the SCCG as a retrograde step for coastal zone management in NSW.

While we appreciate the current guide is a draft, it is clearly disjointed and would appear to have been hastily assembled by a range of authors. The document is in need of a thorough technical review to improve its readability and to bring some consistency to the various sections. It contains inconsistencies and errors. As it stands it does not provide a clear and coherent pathway for Local Government to follow in developing and implementing coastal zone management across NSW.

Recommendation:

The SCCG strongly recommends that in addition to the present consultation process that DECCW commission an independent technical review of these guidelines particularly the "Draft Guidelines for preparing Coastal Zone Management Plans". This should also be supported by an independent review being undertaken by the Coastal Panel (to be established via the recently passed Coastal Protection and other Legislation Amendment Bill).

1.2 Directed Questions for the consultation draft

Section 1.6 Coastal management principles. Page 14. *"These principles are intended to both guide coastal zone management planning and decision-making as well as enhance the statutory exemptions from liability under s.733 of the Local Government Act 1993. Are these principles appropriate for these purposes? If not, what changes should be made?"*

The question put in the draft document relates to the appropriateness of the four management principles identified. The principles set out are appropriate as they comprise a set of ideals/objectives/outcomes assembled with good intent, however, effective implementation of these principles is the key.

They broadly reflect the objectives incorporated in the current CPAct, the NSW Coastal Policy and the integrated, risk based approach included in the current manuals. However, the subsections rephrasing these principles to reflect coastal hazard management in coastal areas only and estuarine health issues in estuaries only, significantly narrows the focus and emphasis in the current draft.

The principles are also broadly consistent with those defined in the recently adopted SCCG Strategic Plan 2010 – 2014 *(with the key exception of SCCG principle (iv):*

i. Protection of the environment and cultural values.
ii. Integrated planning and decision making.
iii. Sustainable use of natural coastal resources.
iv. Appropriate and meaningful public participation.

see: http://www.sydneycoastalcouncils.com.au/documents/SCCGSTRATEGICPLAN2010-2014.pdf

There is little recognition in these draft principles of the connection between the catchment, foreshore and near shore processes and activities which are strongly interlinked. This is the fundamental principle, underpinning Integrated Coastal Zone Management. For example the issues relating to biodiversity in open coast areas, habitat and dune rehabilitation, public access and beach amenity are no longer priorities.

The SCCG also notes concern that the principles provide no recognition of the necessity for appropriate and inclusive consultation and engagement processes in the preparation then implementation of any Coastal Zone Management Plans. Provision of relevant risk information although very important will simply be inadequate if the State in partnership with Councils wish to identify and then implement suitable local and regional solutions to the many pressures and opportunities facing the coastal zone of NSW (see comments below in 2.1 for more information).

Recommended that:
1) Issues relating to biodiversity in open coast area, habitat and dune rehabilitation, public access and beach amenity be incorporated as key priorities under the new NSW coastal management principles.
2) Inclusive and comprehensive community consultation and engagement be included as a key priority under the new NSW coastal management principles.

Questions relating to foreshore protection, and oceanic inundation, navigation and usage are also not mentioned. Presumably, it is assumed that these issues will be addressed elsewhere (through floodplain management plans, catchment action plans or crown plans of management for public reserves). This has not been the case to date. These issues represent some of the most pressing aspects of climate change adaptation for coastal NSW and pose significant risks and liabilities if not addressed.

The draft guide lacks specificity and provides limited guidance to Councils as to how they can be applied to enhance statutory exemption from liabilities. For example, to state that “decisions should be made in good faith and be reasonable” is completely inadequate. Similarly that “Planning processes should be transparent and inclusive” is open to subjective interpretation and of limited assistance. Similar comments apply to each of the principles as currently presented.

Section 2.1 Minimum Requirements for CZM Plans (preparing Plans) Page 14. *“These minimum requirements are intended to define the minimum requirements to be met in preparing a coastal zone management plan and general requirements for all plans. Are these requirements appropriate for these purposes? If not, what changes should be made?”*

The question for consideration relates to the appropriateness of the minimum requirements for preparation of coastal zone management plans. These considerations are appropriate and supported and they broadly encompass the stages in the current coastal zone management planning process in NSW. However the level of detail provided as to how each of these steps is to be undertaken is inadequate.

For example “proposed monitoring and reporting on plan implementation and a timetable for the plan’s review” is broad and almost meaningless. It is not clear whether the monitoring relates to the plan effectiveness or merely progress with its implementation. There is no discussion of KPIs to evaluate the plan against objectives. The timetable for review is largely irrelevant as it is already mandated that the plans must be reviewed every ten years. Such sweeping direction is of little assistance to Councils. Similar comment applies to each of the other dot points listed.

The language used is non-specific and provides little assurance to Council or the consultants engaged in the planning process (eg. “as soon as practical”, “take all reasonable steps”, “to a level of detail necessary” etc.). It is further recommended that DECCW provide councils with a series of model consultant tender briefs for the provision of coastal / estuarine process and hazard definition studies, coastal zone management plan preparations and their associated emergency management plans.

The SCCG is further concerned regarding the section 2.2.2 of the guideline. The SCCG believe that the consultation and engagement processes for the preparation of the Coastal Zone Management plans is the key factor in determining any potential implementation success of resultant actions and activities. The tried and tested procedure of establishing a specific Coastal Management Committee as outline in the existing manual should be supported, continued and further resourced. This process can then be supported by facilitating reference panels, undertaking community focus groups and provision of regular broader community based information updates. It is also recommended that DECCW needs to ensure that appropriate technical advice and representation to these Coastal Management Committees is also retained and in some regions enhanced.

Recommended that DECCW:

1) Establish monitoring and reporting criteria and example KPIs to be used to monitor implementation and success of new plans
2) Provide a series of model consultant tender briefs for the provision of coastal / estuarine process and hazard definition studies, coastal zone management plan preparations and their associated emergency management plans.
3) Continue to support, and further resource the tried and tested establishment and facilitation of specific Coastal Management Committees as outline in the existing manual and to retain and enhance relevant DECCW technical representations.

Section 3.1 Minimum requirements for CZM Plans (risks). Page 25*“Will these minimum requirements for the coastal hazard component of a coastal zone management plan adequately inform risk assessment and management under the plan? If not, what changes should be made?”.*

The factors listed are again non- specific. For example “to a level of detail sufficient to inform decision making” is subjective and provides little guidance to Local Government in engaging consultants and in-turn preparing the plan.

The description of the coastal hazards is only related to risk to development. None of the requirements consider issues relating to ecological, social, economic, heritage, recreational or foreshore access values. There is no apparent linkage between the coast and the estuaries in the process of planning for hazards.

The mandatory requirement to include “provisions allowing landowners to construct coastal protection works” is ill conceived and may limit the available management strategies being considered. It may also be poor planning and the wrong decision in many locations. We believe this will result in an increase in litigation. (See: SCCG / LGSA legal advice (Part 1 and Part 2) provided by HWL Ebsworth lawyers – as previously provided to the DECCW and the Minister for the Environment.)

Recommended that the descriptions of 'Minimum requirements for coastal zone management plans (section 3.1) must include coastal issues and values including: ecological, social, economic, heritage, recreation, and foreshore access.

Section 4 Coastal processes and hazards. Page 33 ***"The definition of coastal hazard areas is an important component of the risk management process, particularly in relation to land-use planning and development assessment. Are the descriptions of these areas and their definitions appropriate for these purposes? If not, what changes should be made?"***

The areas identified (current, 2050 and 2100) are indicative and consistent with the approach that has been applied to coastal hazard definition in NSW for the past 20 years. The changes to the long accepted terminology may result in some initial confusion. The inundation hazard is correctly to be presented separately from the erosion mapping. However, it needs to be clarified that the inundation mapping also needs to be done for each time step (current, 2050 and 2100).

Recommended that inundation mapping (including wave run up) also needs to be done for each time step (current, 2050 and 2100).

Section 4.3.2 The current (study year) hazard area. Page 36. ***"The calculation of the storm bite is important for defining the extent of the area subject to this hazard. Is the guidance on calculating the storm bite appropriate? If not, what changes should be made?"***

The general definition of the storm bite is appropriate. The procedures for calculating storm bite in NSW are long established and well presented in the literature and known to practitioners. They are site specific. The discussion presented in this section is somewhat confusing and does not significantly add to that current understanding (see Appendix C.2 of the NSW Coastline Management Manual).

Section 4.3.3 Coastal hazard zones for 2050 and 2100 planning horizons. Page 40*. "There is a significant degree of uncertainty associated with estimating the response of unconsolidated shorelines to projected sea level rise, including the application of the Bruun Rule. Is the guidance on estimating sea level rise impacts appropriate, given this uncertainty? If not, what changes should be made?"*

The factors affecting the rate of shoreline evolution are set out in this section. Little guidance is provided as to how or which approaches should be applied. In that regard, the guideline provides little guidance to Local Government as to the appropriate methodology to employ. Rather it reiterates the complexity of the issue and the variability in likely beach response from location to location. Reference to technical considerations already included in the existing manual needs to be incorporated.

Section 4.4 Coastal inundation. Page 43. ***"The calculation of the extent of areas subject to coastal inundation is important in estuarine areas and some areas of the open coastline with relatively low frontal dunes. Is the guidance on calculating inundation appropriate? If not, what changes should be made?"***

Section 4.4 provides a broad description of coastal inundation issues. It does not provide guidance to Local government as to how coastal inundation should be assessed and applied for coastal management. It does not include historical data relating to measured wave run-up levels or inland extent of inundation at present. There is no discussion of depth or velocity of inundation and there is no guidance as to acceptable recurrence for inundation to occur. Further there is no mention of inundation levels and frequencies will increase (for example against coastal protection structures). The issue of estuary inundation which is the most pressing issue for Local Government in approving development in the short term also is not discussed other than to acknowledge its significance and

state that the still water ocean levels are not applicable. The guide simply refers the reader to the Flood Risk Management Guide which also does not provide an appropriate methodology.

Recommended that DECCW undertake a comprehensive review of techniques and technologies (including those identified in the previous manual) used to assess coastal inundation. From this review, a technical guideline for local government be produced which advises on a suitable and consistent methodology for coastal inundation assessment."

Section 6 Emergency action sub plans. Page 54 ***"Emergency action sub-plans are important for both incident management by public authorities and managing the placement of emergency coastal protection works by or on behalf of landowners. Is the guidance on preparing a sub-plan appropriate? If not, what changes should be made?"***

The information provided in this section is clearly focused on the provision of emergency protection to development on open coast beaches. No guidance is provided as to the likely range and suitability of responses in formulating the plan. The guide does not identify the need for a clear chain of command in determining the need for emergency response, who takes responsibility in an emergency and importantly the post emergency removal of temporary works and the rehabilitation of the environment.

Clarification is also needed, in regards the roles of the SES and the NSW Police with additional clear linkages to Councils flood management and emergency strategies and regional and local DISPLANs.

Section 7.1 Minimum requirements for CZM Plans (Estuary Health). Page 56. "These minimum requirements are intended to define the minimum requirements to be met in preparing the estuary health component of a coastal zone management plan for an estuary. Are these requirements appropriate for these purposes? If not, what changes should be made?"

The minimum requirements outlined are basic and straightforward. They restrict the consideration of estuary behaviour and response to this single issue/approach. However, no clear objectives for estuary health are provided to guide this process e.g. to improve estuary health; to maintain existing estuary heath; to manage the rate of decline of the estuary health; etc. Is the objective to maintain the estuaries in a natural condition or is it intended to embark upon a process of managing the issues to a preferred (albeit artificial) outcome. Without these clear objectives there is limited value in establishing current conditions and monitoring future response particularly within urban areas such as those within the SCCG region.

The approach outlined in this draft guide is a clear move away from the past approach of holistic management of the estuaries, balancing the ecological, recreational, development and commercial issues across the system. There is little or no recognition of the estuary as a part of the broader coastal zone with clear linkages to the catchments and the ocean, other than the need for an entrance management strategy. It represents a clear move away from the Government initiative in 2004 to intrinsically link coastal and estuary management through the coastal zone management planning process.

Section 7.4 Assessing Estuary Health. Page 62. ***"Is the information on assessing estuary health adequate for preparing coastal zone management plans? If not, what changes should be made?"***

The section on assessing estuary health is very general. Traditionally, the reporting and amalgamation of data on estuary health has been undertaken by State Government *(with a clear exception of Hornsby Shire Council).* That there is a paucity of data directly measuring estuary health is a reflection of the priority pressures and funding available to various Local Councils with responsibility for managing estuaries. The SCCG is supportive of any efforts to improve the data and hence understanding of the current conditions of estuaries in NSW and specifically Sydney.

The guide provides no information on how this is to be achieved and by whom. It will require more than completion by Council staff of "report cards". The guide fails to recognise the issues and immediacy of the estuarine management issues faced by Local Government from day to day. It is agreed that the best starting point for managing any natural system is a thorough understanding of the key processes controlling a system and their interaction with the variability, use and responsiveness of that system. It is not possible to simply focus on collecting the base data and ignoring the decision making responsibility in the short term. Local Government would welcome clear guidelines that address the range of decisions that are required in managing both urban and pristine estuarine systems.

The SCCG would also assume the DECCW may wish to reference the NSW Water Quality Objectives for Fresh and Estuarine surface waters, river flow and also the marine water quality objectives for NSW ocean waters eg http://www.environment.nsw.gov.au/water/mwqo/index.htm

The SCCG would also further suggest that DECCW also include discussion and inclusion of the OzCoasts (via G.A) formally known as OzEstuaries and potentially further using this resource as a platform for information and associated data management.

Section 8.1 Risk from Climate Change. Page 65. ***"Is the information on assessing threats to estuary health adequate for preparing coastal zone management plans? If not, what changes should be made?"***

The information provided on assessing threats to estuarine health is not adequate. Rather it presents a brief and general discussion on factors that may impact estuarine health. Local Government requires clear guidelines as to what is and is not acceptable in managing the various types of estuaries.

The draft guide does not address urbanisation/use of estuaries and the risk to that urbanisation/use arising from climate change. The guideline authors may also wish to liaise with their science unit to determine the applicability of the "Sustainability assessment of Coastal lakes program and the associated 'Coastal Lake Assessment and Management' (CLAM) tools for potential application and recommendation under these initiatives.

Section 9 Strategies for Managing Risk to Estuary Health. Page 68*. "Is the guidance on managing risks to estuary health adequate for preparing coastal zone management plans? If not, what changes should be made?"*

The target in the State plan that *'By 2015 there is an improvement in the condition of estuaries and coastal lake ecosystems'* is of limited use to local Government. It is already acknowledged in the guide that for most estuaries there is insufficient information available to define the current health of those estuaries. The guidance provided is limited to a general discussion of the issues likely to affect estuary health without any clear guidance as to how these are to be addressed or what methodology should be employed by local government.

Section 9.3 dealing with public access appears to have been added and is not consistent with the remainder of the section. It is noted that "*Most importantly public access should be accommodated in such a way that estuary health is not compromised*". The thrust of the document appears to focus on undeveloped or pristine estuaries, ignoring the level of urbanisation of coastal estuaries state-wide (e.g. Botany Bay, Sydney Harbour, Port Hacking and the Hawkesbury River within the SCCG member's area of responsibility).

Recommended that DECCW provide specific information regarding the management of Urban and ultra urban estuaries.

Section 10 Managing Entrances to Estuaries Page74. *"Is the information on preparing an entrance management policy adequate? If not, what changes should be made?"*

The information provided for the preparation of entrance management polices is inadequate and appears to be aimed solely at 'ICOLLs', not the major estuaries state-wide that accommodate the vast majority of foreshore urban development.

While the objective of a "*long-term goal of entrance management policies should be to retain or progressively reinstate natural entrance behaviour, returning estuary entrances to their natural condition*" is feasible for essentially undeveloped estuaries under current conditions, this is not likely to continue as sea level rises and development and land currently above inundation levels is exposed to coastal hazards. No guidance is provided as to how the future changes to estuaries under climate change should be assessed and how this may affect entrance management practices and hydraulic performance of these estuaries and further consideration and guidance regarding the needs to balance community, industry recreational user expectations or estuarine use and safety.

For the larger estuaries in NSW entrance management has been largely a state function and the entrance management program funded through NSW Treasury remains with the NSW Land and Property Management Authority. These works have been implemented over two hundred years and have significantly altered (and continue to affect) estuary systems state-wide. Current works include construction and dredging of the Lake Illawarra entrance, dredging within Port Stephens and the Myall River, development of regional fishing ports, and ongoing river entrance dredging. Major ports are managed by local port authorities (Newcastle, Sydney Harbour, Botany Bay, and Port Kembla) who undertake a continual program of dredging of entrance channels, maintenance of training walls and harbour deepening. None of these estuary entrances are likely to be returned to their natural conditions, rather the management of the entrances and the impacts on the hydrodynamics of the estuaries are likely to increase as climate change occurs.

The totality of the estuary management guidance in the draft document would appear to be aimed at a very small number of largely undeveloped and near pristine estuaries in isolated locations and completely inadequate for urban and ultra urban environments.

Section 11 Estuary health monitoring programs. Page 75. *"Is the information on monitoring estuary health adequate for preparing coastal zone management plans? If not, what changes should be made?"*

The SCCG acknowledges and supports the recognition of monitoring as a key element of natural resource management. However it is only an element and does not replace the need for estuary management and decision making on a day to day basis. While the additional collection of site specific data would enhance the preparation of Coastal Zone Management plans, the constraint on this data collection of available funds remains a significant issue for Local Government.

The guidance provided in the draft document relating to monitoring estuary health is very narrow in its focus and of limited assistance to Local Government in preparing Coastal Zone Management Plans to address the range of issues facing most coastal areas.

Summary

The SCCG suggests that significantly more work is required to ensure that this guideline is adequate to provide Local Government and other 'Coastal Authorities with the necessary guidance to successfully prepare, implement and monitor Coastal Zone Management Plans. Overall the new guideline does not improve on current processes and will not result in consistent and coordinated coastal management in NSW. Substantial further effort is needed in key areas such as:

- Technical Guidance
- Minimum information requirements
- Consultation and engagement procedures and processes
- Links between open coasts, estuaries and catchments
- Monitoring, reporting and ongoing capacity building and professional development
- Defining the role of The NSW Government in the delivery of CZMPs

It is strongly recommended that in addition to the present consultation process, that DECCW commission an independent technical review of the Guidelines for preparing Coastal Zone Management Plans. This should also be supported by an independent review to be undertaken by the 'Coastal Panel' (to be established via the recently passed Coastal Protection and other Legislation Amendment Bill).

The SCCG looks forward to reviewing the next draft of this guideline and assisting DECCW to undertake consultation with our members to improve the current draft and ensure a suitable risk based framework for developing and review the critically important Coastal Zone Management Plans.

2. Draft Guide for Authorised officers under the Coastal Protection Act 1979

2.1 General Comments

The key role of an authorised officer under the Coastal Protection Act would appear to relate to the issue of certificates for emergency protection works (an emergency works authorised officer), overview of their installation, ongoing maintenance and removal and the restoration of any resulting damage from the works. These emergency works are presently only permitted at 12 defined locations (see Table 1 of the "Draft Guide to the statutory requirements for emergency coastal protection works"), affecting seven Local Government areas state-wide. Only two Councils within the SCCG area have identified locations where these works could possibly be undertaken (Warringah and Pittwater Councils). When each of the Councils finalise / update their CZM Plans, the emergency management requirements will no longer apply.

Other powers also relate to the investigation of and removal of unauthorised works in accordance with the amendments to the Coastal Protection Act. These are powers that already exist under the Act, although the penalties are to be increased substantially and therefore, potentially the risk of conflict with Council officers administering the requirement may also increase. Councils need to assess how often these powers have been applied in the past and whether the current regime would make them more likely or less likely to be used. DECCW also needs to clearly define what enhanced assistance can be provided to Councils in terms of training, provision of relevant information for previous enforcement activities and importantly, compliance and associated assistance in the courts when this occurs.

Council is not required to nominate a delegated authorised officer and this role can be equally fulfilled by an authorised officer nominated from a government department that is a recognised 'Coastal Authority'. Councils will need to weigh the advantages of appointing and maintaining a delegated officer position, the cost associated with their training and ongoing replacement versus the number of times the powers conferred are likely to be required and the potential for litigation and liability against Council or the individual arising from the use of these powers. An alternative position may be for those Councils to call upon the Government authorised officers as and when required.

2.2 Directed Questions for the consultation draft

Section 5 Powers of delegated authorised officers. Page 12. *"Orders provide authorised officers with a powerful tool to regulate activities under the Act. Is the guidance provided below, including the associated checklists and templates in the appendices, sufficient for authorised officers to have confidence in issuing orders? If not, what additional information should be provided?*"

The role of an authorised officer in relation to emergency works is extremely difficult and relates to primarily judgment calls. (e.g. "cause or is likely to cause"; "poses or is likely to pose", etc.). Similarly the checklists provided use the language "in your opinion" when making decisions on the relevant action to take. This requires, in addition to the appropriate training as a designated officer, a comprehensive knowledge of coastal processes and sound qualifications in coastal engineering (or ready access to someone with that expertise).

There is a fundamental flaw in the wording of the guide in relation to the performance of coastal protection works that must not cause or be likely "to cause increased erosion of a beach or land adjacent to a beach".

The purpose of any coastal protection works (emergency or otherwise) is to limit the erosion of that portion of the seabed/dune landward of the protection structure. Where constructed on a sandy beach with unconsolidated, erodible sediment seaward of the structure or up drift /down drift of the structure, once exposed to wave action and preventing landward movement of the profile will increase erosion

either seaward of the structure or down drift of the structure. The only circumstances where this will not result are when the structure is not limiting the erosion of the protected property. In that case, the structure would not be required. This erosion may not be noticeable (where the protection provided is minimal) or may be manifest as more commonly observed scour of the beach seaward of the seawall, end erosion effects for an isolated seawall or realignment of down drift beaches. The only way that this transferred erosion can be avoided would be by the ongoing nourishment of the local beach with a sand volume exactly equivalent to the erosion volume protected by the protection structure. This wording needs to be amended as it requires a designated officer to issue a stop work and removal order for all protection works as they are completed and exposed to wave action.

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3. Draft Guide to the statutory requirements for emergency coastal protection works – comments due 1st October 2010.

3.1 General Comment

Comments were provided by the SCCG to the Department of Environment, Climate Change and Water (10 September 2010) addressing the draft Ministers requirements for emergency works. The comments and conclusions contained in that submission are equally relevant to the current draft guide and our main concerns may be summarised as follows:

- The Ministerial guidelines are designed to restrict emergency works to 12 presently identified hotspot locations where they may be permitted.
- The conditions imposed are such that even at these locations the majority of property owners may not be able to consider implementing emergency works (e.g. not within ten metres of existing escarpment or existing works are in place etc.
- Even if works can be undertaken, they are likely to be ineffective in protecting property.
- When/if the permitted emergency works fail or the conditions relating to their placement are not followed, Council would then be required to oversee their removal and rehabilitate affected areas.
- We do not see the advantage in putting forward a process where the outcome, at considerable effort and expense, is likely to be of little or no benefit either to individual property owners or the wider community.

We note that the DEECCW has not directed review of this guide to specific issue questions, as has been done in some of the other draft guidelines. More specific comments on this guide are therefore included in Section 3.2.

3.2 Specific Comments

Statements included in the draft guideline (page 2) such as “This guide was correct at the date of publication; however, the statutory requirements may have changed subsequently and these requirements take precedence over any information in this guide” render the guide virtually useless to the layperson. It is not practical to expect each person applying the range of guidelines being issued to check to ensure the concurrence of each guide with the latest legislation before applying the guide. They are available from the DECCW website and it would be reasonable to expect the Government to maintain them up to date when and if the legislation is altered.

We have commented on the allowable works (Section 2, page 2) previously in our letter to DECCW relating to the Ministers requirements for emergency works. Those comments remain relevant. In particular, we are advised that even if works can be undertaken (given the stipulated trigger requirements etc.), they are likely to be ineffective in protecting property. More probably the permitted emergency works would fail and Council would then be required to oversee their removal and rehabilitation. The SCCG do not see any advantage in putting forward a process where the outcome, at considerable effort and expense, is likely to be of little or no benefit either to individual property owners or the wider community.

Our consulting coastal engineer further advises the SCCG that the specification of the placement of sand nourishment during a storm event as shown on Figure 2.5 on page 4 would ensure the work is ineffective. For a 5m high erosion escarpment, the sand volume to be placed in the manner shown and at the slopes shown would be limited to less than 20 cubic metres per metre of beach (approximately). For a more modest 2m high escarpment the volume would be limited to around 3 cubic metres per metre. For the minimum trigger requirement in Figure 4.1 with a 0.5 m high escarpment the volume would be limited to less than 0.2 cubic metres per metre. Given that typical

storm erosion demand on the sub aerial beach section of open coast beaches in NSW is around 250 cubic metres per metre of beach, it would be anticipated that the sand placed would be removed by a few waves. If the placement is to be made after the erosion event, it may assist in stabilising the escarpment (or limiting future collapse) if no further storm events occur. Generally it would be expected to be ineffective as an emergency protection measure.

It is unclear to the SCCG why the NSW Government would wish to severely limit the volumes of suitable sand to be placed on the beach by individual residents (at their expense). The SCCG does acknowledge that if large scale nourishment is proposed by individuals, appropriate studies and approvals should be required. However, the restrictions currently proposed will direct affected residents towards the more substantial protection works (Type 1) in the hope of achieving some benefit.

Section 2, page 5 states that "Landowners are also responsible for ongoing public safety risks associated with these works. It is recommended that all landholders seek insurance coverage which extends to all emergency protection works before initiating any form of emergency coastal protection." The SCCG recommends that the Department approached the insurance industry to ascertain whether such insurance cover is likely to be available for structures designed to fail? If as suspected it is not readily available then this should raise alarm bells regarding the proposed emergency measures. If it is available then it should be mandatory for all works with the potential to cause harm or damage to the public and which under the proposed legislation can be constructed without approval on public land.

Recommended that:

1) All landholders must obtain insurance coverage which extends to all emergency protection works before initiating any form of emergency coastal protection."
2) The Department approaches the insurance industry to ascertain whether such insurance cover is likely to be available for structures designed to fail ?

The SCCG would like to refer DECCW to the SCCG submission regarding the Draft Ministerial Requirements under the Coastal Protection Act specifically page 4 section 1.5. The SCCG has highlighted several overarching concerns regarding the construction or placement of temporary works on public lands and significant concerns expressed by SCCG member councils potentially exposing Local Government to potentially increased liability in relation to:

- Injury to members of the public
- Damage to other properties
- Maintenance of temporary works
- The needs for multiple approvals and licenses
- Damage to public infrastructure and utilities
- Impacts on marine parks, Aquatic reserves and intertidal protected areas
- Clearing of dune vegetation, endangered ecological communities and threatened species

The validity period of 2 years for the certificate (Section 3 page 5) is also problematic. If the nature of the works are to be specified at the time of application (no information is provided as to the form or detail required in this specification) then beach conditions, land use, community aspirations, land ownership, etc. may all change over that period. If the works are to extend to adjacent vacant land, then the status of that land and/or its ownership may also change. There is no requirement to verify the information provided when the certificate was issued with the situation at the time the works are constructed.

The list of authorised locations in Table 1 (section 4, page 6) limits the application of emergency works to (currently) 12 locations. The number of locations and their precise application appears to vary from document to document (for example in the press release provided by Minister Sartor dated 21 October

it notes that there are now 15 hotspots ? – clarification is needed). This list is important and requires Councils with these “Hotspots” to undertake a considerable amount of work to satisfy the requirements of the legislation. Will this list be varied (and how)? It is noted that no estuarine locations are identified. Lightweight emergency protection works are frequently used (without approval) at property boundaries fronting estuaries. Are these now to be considered as illegal works and removed or is it proposed that some other approval process will apply to these minor works, potentially affecting several thousand properties with high water mark boundaries that are eroding ?

The figure 4.2 (Section 4, Page 7) shows the erosion escarpment and the front wall of the structure as parallel. In reality this is not likely to be the case. Is the trigger distance defined as the shortest distance between any point on the escarpment crest and any part of the wall of the building, or some other definition? This needs to be clearer.

The statement that severe storms mostly occur in Winter (Section 4, page 8) is misleading. There is a seasonality associated with particular weather systems (e.g. tropical cyclones, east coast lows) and further, the prevalence of these weather systems are affected by location along the coast. A more correct assessment is that severe storm events accompanied by high water levels can occur at most times of year along the NSW Coast. This seasonality and frequency of storms was discussed in some detail in Appendix B.3 of the NSW Coastline Management Manual. This type of technical discussion has not been included in the more recent guidelines which replace the manual.

The statement (section 4, page 8) that “Other periods of increased likelihood of erosion impacts may occur around rarer astronomical events such as king tide cycles (about twice a year), which if combined with storm events have the potential to further increase erosion impacts.” is also misleading. So called King tides (defined as the two highest tides of the year occur in June and December are not rare). Spring tides which may be almost at the same level (as king tides) occur monthly. Variations from the predicted tide (storm surge, wave setup and tidal anomalies) may result in any of these high tides being a significant maximum. Such high water recurrence data is recorded in the long term tidal record.

Each of the tests relating to the use of Public land (section 7, page 8) is subjective and requires the Council to initiate action to remedy the situation after the event. The language used (e.g. ‘where practical’, ‘effective safety fence’, ‘as soon as practical’) is subjective and increases the difficulty for Councils trying to manage such activities. The concept that an individual or contractor is allowed to occupy public land (including a beach) and to fence that area for the duration of construction or maintenance is considered unacceptable to our Member Councils (see previous submission). Given the type of emergency works permitted, it is likely that maintenance and repair work will be frequent and ongoing. The life of the emergency works is given as 6 months (12 months in the revised legislation) and can be substantially longer once a DA for permanent works is lodged.

The information provided relating to landowner (section 6 page 9) preparations is of little practical assistance. While geotextiles could be purchased in advance and bags fabricated, it is not practical to stockpile sand on a residential block for future possible use. The equipment required to fill the bags and place them (other than 18kg sandbags) is generally beyond the means of an individual property owner. The section also acknowledges that the Bureau of Meteorology gives a maximum of 2 days warning on wave conditions and there is no such guarantee (in fact there is a low probability) that the general warning issued would result in erosion at a particular location. It is most unlikely that the permitted emergency works could be placed as described at any time other than well in advance of a storm erosion event.

The information included under safety requirements (section 7 page 10) effectively ensures that emergency works cannot be placed immediately prior to or at a time of peak storm erosion. Works can only take place when erosion is imminent for 3 hours either side of low tide. If the Bureau of Meteorology issues a severe wave warning work must cease or not commence. If erosion is occurring

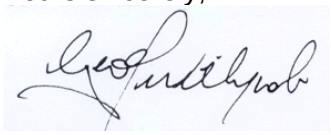
(this is not defined) then the proponent must seek and follow direction from a senior police officer and a professional engineer. These requirements are extremely complicated and considered unworkable.

CONCLUSIONS

The SCCG remains committed to assisting ensure appropriate and workable outcomes of the DECCW reforms to coastal erosion and coastal management more generally for NSW. These proposed reforms must build on and improve the necessary strategic partnerships between Local and State Government and their communities to ensure the sustainable, equitable and strategic management of the NSW coastal zone.

If you wish to clarify any matter in this correspondence or require further information, please contact me directly on (02) 9246 7791 or geoff@sydneycoastalcouncils.com.au.

Yours sincerely,



Geoff Withycombe
Executive Officer

6. COMMISSIONED LEGAL ADVICE

Prepared by
Ms Kirston Gerathy - Partner
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COMISSIONED LEGAL ADVICE

Draft Coastal Protection and Other Legislation Amendment Bill 2010

The Sydney Coastal Councils Group (SCCG) and the NSW Local Government and Shire Association (LGSA) engaged HWL Ebsworth Lawyers to consider the *Draft Coastal Protection and Other Legislation Amendment Bill 2010* (Draft Bill) and provide a broad outline advice addressing the major reforms proposed by the Draft Bill and the potential implications for councils arising from:

- The implementation of the proposed reforms; and
- In the management of development and hazards in the coastal zone.

The advice received by the SCCG and LGSA is attached.

Please note

a) The advice relates to the version of the Bill as tabled in the NSW Parliament, June, 2010,
b) This advice does not comprise a comprehensive analysis of all issues which may arise. Observations made will likely require revision and clarification once the whole reform package, including all Guidelines, are available
c) The advice was provided to the NSW Minister for the Environment and DECCW on 1 October
d) The advice was provided to SCCG member councils on 8 October
e) The advice provide to all NSW MPs on morning of 15 October
f) Please feel free to distribute the advice to those who might be interested

The advice is structured in two parts and covers the following issues:

Part 1

- Background
- Limitations on advice
- Emergency Coastal Protection Works (ECPW) – Section 55P(1)
- Certificates under Division 2 of the Draft Bill
- Beach Erosion or Imminent Beach Erosion
- What may be protected by ECPW
- Additional requirements for placement of ECPW

Part 2

- Modifications to the Infrastructure SEPP 2007
- Long term coastal protection works – preconditions to the granting of consent
- Funding arrangements for restoration and maintenance
- Coastal protection services and levies
- Service charges on existing coastal protection works
- Coastal Zone Management Plans (CZMPs)
- Enforcement of CZMPs

HWL EBSWORTH
LAWYERS

Our Ref: KMG:196826

10 September 2010

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Dear Sirs

Coastal Protection and Other Legislation Amendment Bill 2010 – Part 1

You have asked us to consider the *Draft Coastal Protection and Other Legislation Amendment Bill* 2010 (**Draft Bill**), to provide a broad outline advice addressing the major reforms proposed by the Draft Bill and the potential implications for councils arising from the implementation of those reforms, in the management of development and hazards in the coastal zone.

In accordance with the limitations of our brief, this advice does not comprise a comprehensive analysis of all issues which may arise. Observations made will likely require revision and clarification once the whole of the reform package, including all of the Draft Guides, are available.

We have addressed the major reforms in two parts. This letter considers:

1. Background
2. Limitations on advice
3. Emergency Coastal Protection Works (ECPW) – Section 55P(1)
4. Certificates under Division 2 of the Draft Bill
5. Beach Erosion or Imminent Beach Erosion
6. What may be protected by ECPW
7. Additional requirements for placement of ECPW

8. Placement of ECPW – how often and how long?

9. Removal of ECPW - restoration and rehabilitation

10. ECPW on Public Land

11. Orders and enforcement generally

12. Orders under the Draft Bill.

Our comments on coastal protection works, services and levies and other major components of the Draft Bill will be provided under separate cover in Part 2.

1. Background

1.1 The Draft Bill proposes amendments to the *Coastal Protection Act* 1979 (**CP Act**), the *Local Government Act* 1993 (**LG Act**) and *Regulations* 2005 (**LG Regulations**), the *Conveyancing (Sale of Land)* Regulations (**Conveyancing Regulations**) and the *Environmental Planning and Assessment Regulations* 2000 (**EPA Regulations**).

1.2 The object of the Draft Bill is to:

> *Make amendments to the Coastal Protection Act 1979 (The Principal Act) and other legislation to deal with coastal erosion and projected sea level rise, including amendments relating to the following:*
>
> *(a) the improvement of the operation and enforcement of the Principal Act*
>
> *(b) enabling land owners to place certain emergency coastal protection works (such as sandbags) on beaches and sand dunes to mitigate erosion in specified circumstances without obtaining development consent or other specified permissions*
>
> *(c) enabling local councils to make and levy an annual charge for the provision of coastal protection services (such as services to maintain coastal protection works or to manage the impact of such works) on rateable land that benefits from such services.*

1.3 The Draft Bill does not propose to amend the definition of the Coastal Zone. However proposed section 55B provides that:

> *In this **section**, coastal zone includes land that adjoins the tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries.*

Section 55B only relates to the requirement to prepare a Coastal Zone Management Plan (**CZMP**) which is perhaps a drafting error. We infer it was intended to refer to Division 1 of part 4A of the Draft Bill. As a broad observation, the definitions and terminology used in the Draft Bill, cognate legislation and guidelines require a detailed review.

1.4 The reforms envisaged by the State must operate within the existing planning and legislative framework. The coastal protection regime does not operate in isolation. Proper analysis of the framework into which the Draft Bill will be placed, requires an examination of other statutory powers and obligations including building certificates, the orders regime under the *Environmental Planning and Assessment Act 1979* (**EPA Act**), the LG Act, *Protection of the Environment Operations Act 1997*, the Standard Instrument LEP (**Standard Instrument**), the operation of Part 3A of the EPA Act, Crown Land development and Part 5 of the EPA Act to name a few. This examination does not appear to have been undertaken in detail for the purposes of the proposed reforms.

2. Limitations on Advice

2.1 The Draft Bill proposes a number of significant reforms which of themselves are subject to qualification and explication in a series of draft ministerial requirements (**DMR**) and guidelines. Detailed analysis of every reform proposal is beyond the scope of our advice and brief. Rather, we provide an overview of some of the major reforms.

2.2 Issues in relation to the role and function of the proposed Coastal Panel, coastal authorities and authorised officers are also beyond the scope of this advice. We are happy to address these issues in a supplementary advice if you so instruct.

2.3 Analysis has been hampered to a considerable extent by the legislative reform process. The Draft Bill does not contain all essential details and relies on "Ministerial Requirements" and "Draft Guidelines" for that content. Not all of the guidelines are in the public domain. We have concentrated, for the purposes of this advice, on the provisions of the Draft Bill rather than a detailed analysis of the draft guides. This advice should be understood in this context and with that limitation.

2.4 The process has, in our view, somewhat disadvantaged all stakeholders and it would have been preferable for a complete package to be prepared for consultation and comment in a holistic fashion.

2.5 For ease of reference, we have prepared a consolidated mark up of the CP Act and the LG Act, incorporating the reforms proposed by the Draft Bill. A copy of the consolidated mark up is attached for your information. Please note the attachment is a document prepared for information purposes only and does not purport to be a complete or official version of the consolidated Draft Bill. Reference should be made to the Draft Bill in this regard.

3. Emergency Coastal Protection Works (ECPW) – Section 55P(1)

3.1 One stated purpose of the Draft Bill is to allow for private landowners to erect emergency coastal protection works, under set circumstances and in accordance with specific requirements.

ECPW means:

> *Works comprising the placement of the following material,* ***in compliance with the requirements of this section****, on a beach, or a sand dune adjacent to a beach, to mitigate the effects of* ***wave erosion*** *on land:*
>
> *(a) sand, or fabric bags filled with sand, (other than sand taken from a beach or a sand dune adjacent to a beach),*
>
> (b) *other objects or material prescribed by the regulations (other than rocks, concrete, construction waste or other debris).*
>
> (Emphasis added)

3.2 The basic requirements for ECPW are set out in section 55P of the Draft Bill. As a matter of construction, it seems that if works do not accord with all of the requirements of s.55P, they are not, by definition, ECPW and will not qualify for the exemptions and facilitative provisions of the Draft Bill.

3.3 Arguably therefore, if a landowner does not comply with the requirements of s.55P, the works are not ECPW for the purposes of the Act. The works could then constitute unlawful development and fall to be regulated under the EPA Act regime or indeed the general orders powers in s.55ZA of the Draft Bill. The potential for argument remains in respect of the definition and the matter should be clarified.

3.4 The type, form and scale of ECPW contemplated by the DMR are low scale, soft engineering options, a maximum of 1.5m high. It is generally acknowledged such works would likely have a lower scale environmental impact. Queries have been raised by expert commentators as

to the effectiveness of such works for the stated purpose. That is a matter for expert engineers. The discussion below should be understood in this overall context.

4. Certificate under Division 2 of the Draft Bill

4.1 Proposed section 55P(2) provides:

> *(a) the material must be placed in accordance with a certificate under Division 2 that authorises the works.*

4.2 The Draft Bill does not expressly provide that a Division 2 Certificate must be obtained prior to the placement of works, which means there is the potential for retrospectivity[1].

4.3 Draft section 55T prescribes the method for applying for and issue of a certificate by an authorised officer, relating to ECPW.

4.4 The process described in the Draft Bill for obtaining a certificate requires an application be made by the land owner, or occupier of land, accompanied by the payment of a fee. The Bill does not require owner's consent be obtained for the making of an application by an occupier. Issues could arise where land is tenanted, strata subdivided or the subject of a community title. The certificate may be issued unconditionally or subject to conditions.

4.5 One of our initial criticisms of the certificate process was that it was not controlled by any assessment protocols. There were no criteria, at least not in the Draft Bill, against which such an application could be assessed and there were no requirements to lodge a plan; nominate which of the four options identified in the DMR were proposed to be undertaken as ECPW; or to identify where such works were proposed either on the land owner's land or public land. The failure to require any such information sat uncomfortably in the context of the proposed maintenance requirements of section 55R which provide that a landholder must maintain ECPW in accordance with any conditions of a Division 2 certificate.

4.6 The Draft Guidelines for Authorised Officers under the CP Act subsequently became available on the DECCW website and contain, in Part 4, some proposed guidelines as to the issue of certificates, together with a sample draft certificate. It is contemplated that the authorised officer should inspect the location where the ECPW are to be placed and assess whether they are suitable for the location.

4.7 Apart from s.55R which permits the imposition of a condition in relation to maintenance, there are no prescriptions in the Draft Bill as to the type of conditions which might be imposed. Some suggestions for conditions or criteria for applications, could include compliance with:

(i) part 4C of the Draft Bill;

(ii) the Draft Ministerial Guidelines; and

(iii) the provisions of any emergency action plan.

4.8 Additional conditions could be contemplated to:

(i) govern and control the use of access to and from public land;

(ii) note that works are time limited;

(iii) require notification to the relevant authority prior to placement of the works (see s.55X);

(iv) confirm the removal and restoration obligations; and

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1 By way of analogy, s.96 of the EPA Act applies retrospectively to works already carried out: *Willoughby CC v Dasco Design (2000)* 111 LGERA 422.

(v) provide for a bond to ensure the removal and restoration obligations are complied with by the landowner.

(vi) These are not exhaustive suggestions.

4.9 It is an express criteria of s.55P(2)(c), that ECPW may only be placed to mitigate the effect of wave erosion on a lawfully erected building.[2] If the building is not "lawfully erected", the works will not be ECPW by definition. There is no provision in the Draft Bill which provides there is an onus on an applicant for a certificate to demonstrate the building is lawfully erected. In our view, that is where the onus should lie.

4.10 To require a council officer to determine whether a building meets those criteria could be a significant administrative and costs burden. Furthermore, a DECCW authorised officer would have no means (other than undertaking a full compliance audit utilising the records of the relevant council with the benefit of legal advice) of ascertaining whether a building was lawfully erected. If there is no requirement for an applicant to demonstrate lawfulness at the certificate stage, and a certificate is issued, the potential for litigated disputes may be magnified.

4.11 There is no mechanism in the Draft Bill to enforce the conditions of any Division 2 Certificate, nor does the Bill expressly provide that failure to comply with conditions of the certificate is either a breach of the Act or an offence. Orders and enforcement generally are canvassed in paragraph 11.

4.12 The Draft Bill does not provide for an appeal on the merits against a decision to refuse a Division 2 Certificate or an appeal against the conditions attached to any such Certificate. The only avenue would appear to be an application for judicial review which, subject to sections 20(2) and 71 of the *Land and Environment Court Act* 1979 (**LEC Act**), would need to be brought in the Supreme Court, assuming there is jurisdiction[3].

4.13 In practice an applicant is likely to go "certificate shopping" in the event of refusal. Further, nothing seems to preclude more than one certificate being obtained and on different conditions.

5. Beach Erosion or Imminent Beach Erosion

5.1 The second requirement for the placement of ECPW, is that the material must be placed during a period of beach erosion (where the beach erosion occurs through storm activity or an extreme or irregular event) or when such beach erosion is imminent or it is reasonably likely that such beach erosion is imminent (Section 55P(2)(b)).

5.2 The imminence requirement is further explored in the DMR as follows:

> *For the purposes of section 55P(2)(b), it is likely that beach erosion is imminent or likely to be imminent when the distance between the most seaward part of a wall of an existing residential building or commercial building on or adjoining the site and the most landward extent of the sand dune erosion escarpment is less than 10 metres. This distance is to be confirmed in writing by a registered land surveyor or an authorised officer under the Act before the placing of works is to commence.*

5.3 It is unclear to whom the confirmation is to be provided or what the consequence is if the trigger is not met. Presumably the works would not be EPCW as defined.

5.4 Under the Draft Bill, there are two scenarios which enable the placement of ECPW: during an event or when beach erosion is imminent. A beach erosion event is not subject to the same DMR 10 metre trigger test as the imminence test. As a general principle the DMR cannot be used, in our view, to read down the express imminence test in Section 55P(2)(b) of the Draft

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2 See also discussion in paragraph 6 below concerning s.55P(2)(c)

3 See discussion in paragraph 11 below concerning enforcement, jurisdiction and standing.

Bill to the extent of any inconsistency. The test of imminence will remain subjective. We acknowledge section 55P(2)(e) provides ECPW must be placed in accordance with the DMR.

5.5 Presuming the imminence test in the DMR is effective, there remains uncertainty. The DMR do not require that the 10 metre trigger point be from a lawfully erected building as mandated by Section 55P(2)(c). Rather, the DMR trigger point is from an existing residential building or commercial building. There is no definition of commercial building introduced by the Draft Bill. Residential building is defined in the Draft Bill to mean: *"a building such as a dwelling house or residential flat building that is solely or principally used for residential purposes"*. Both of these terms have meaning under the planning and local government regimes and have been the subject of judicial consideration.

5.6 "Building" is separately defined in part 3 of the CP Act to include a 'structure'. The definition only pertains to that part, not to EPCW in Part 4C. Structures can include walls, fences and the like. A full review of the definitions of terms in the Draft Bill and CP Act is, in our view, essential. The review should encompass all of the terms listed in cognate legislation and environmental planning instruments that will be affected by the reforms.

5.7 As a matter of construction, the use of the examples in the proposed definition of residential building such as a dwelling house or residential flat building, does not qualify the proposed definition of residential building. The definition is *"a building ... that is solely or principally used for residential purposes"* (see *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672). Structures such as stand alone garages, sheds, laundries, outdoor toilets, pergolas and boatsheds etc have been held by the court to be buildings used solely or principally for residential purposes, if properly so characterised.

5.8 The use of multiple terms such as building (which can include structures), lawfully erected dwelling, residential building and commercial building creates uncertainties. Inconsistency and uncertainty in a statutory context increases both the prospects of litigation and the making of ad hoc decisions which can undermine a strategic approach.

5.9 To add to the confusion, the Draft Guide to the Statutory Requirements for Emergency Coastal Protection Works, dated September 2010, asserts *"the works are not permitted for the protection of vegetated or hard stand land areas or other structures and infrastructure (for example, free standing garages, pools, sheds, laundries, outside toilets, gardens, verandas and landscaping works"*. The DMR do not contain the same provisions. If this is the intent of the reform package, it is not achieved by the Draft Bill in its present form. As noted above many of these buildings and structures will meet the test of the definition of building or residential building. The position should be clarified.

6. What may be protected by ECPW

6.1 Pursuant to Section 55P(2)(c) ECPW must be placed:

> *by or on behalf of a landowner or occupier to protect the following from damage due to the erosion:*
>
> *(i) a lawfully erected building,*
>
> *(ii) land on which a building could be lawfully erected that is zoned residential under an environmental planning instrument and is adjacent to land on which a lawfully erected building is located.*

6.2 In relation to the first test, the building to be protected must be *"lawfully erected"*. In this section "building" is not confined to a residential building or commercial building, either as defined or referred to in the Draft Bill or the DMR. It could include any structure. Feasibly, provided the building was lawfully erected, structures such as garages, sheds, laundries, pergolas etc which are expressly excluded by the Draft Guides for Emergency Coastal Protection Works, September 2010, could trigger the criteria.

6.3 Determining whether a building has been lawfully erected can be a difficult task. Unauthorised additions, extensions and internal alterations etc will mean the building is not lawfully erected. Proper analysis of the development and compliance history of a building will be required. Presumably, if the aim is to allow ECPW to protect lawfully erected residential dwellings or commercial buildings but not ancillary structures or sacrificial elements (which a reading of the Draft Guides infers) then a means for determining whether the building is lawful should be implemented at the certificate application stage. The Draft Bill is silent on this issue.

6.4 We suggest the application for a Division 2 Certificate should require the applicant to demonstrate the building is lawfully erected. Similar to any applicant who relies on existing use rights, the onus should rest on the applicant, and not the certifying / regulatory authority to establish lawfulness.

6.5 Building certificates have not been considered. The issue of a building certificate under the EPA Act does not render the erection of any structure "lawful". Building Certificates merely regularise the structure by precluding action being taken, in the circumstances prescribed under section 149D of the EPA Act.

6.6 In relation to the second test, the land which can be protected must meet three requirements: that it is land on which a building could be lawfully erected; that it is land zoned residential under an Environmental Planning Instrument (**EPI**); and that it is land adjacent to land on which a lawfully erected building is located.

6.7 Subclause 55(2)(c)(ii) suffers from the same defects described in relation to the first test. It lacks clarity as to what is meant by 'building', as it would seem to infer that any building or structure could, if lawfully erected on adjacent land, trigger the requirement. Amongst other things, how is an owner of vacant land to establish the building on adjacent land is lawfully erected, in order to meet the test? If the onus of determining whether a building is lawfully erected is (despite our suggestion) shifted to the regulatory authority, we can foresee a number of implications including administrative costs and potential litigation. Unlawful works on adjacent land may deprive the owner of vacant land of the ability to place ECPW.

6.8 If the intent of the section (coupled with the Draft Guides) is to allow EPCW to be placed on adjacent vacant land, to benefit and protect the buildings on the subject land, then the drafting of the section is wholly unclear and does not in our view readily achieve this objective.

6.9 The sub-clause conceivably, when combined with the imminence test as explained in the DMR, places vacant land in a "better" position than land upon which a lawfully erected dwelling house is situate.

6.10 The drafting of s.55P(2)(c)(ii) raises other anomalies and perhaps inequities across local government areas. The criteria mandates the land must be zoned residential. Councils are required to compulsorily adopt the land use zones and permissible uses as defined in the Standard Instrument. Local provisions may not be inconsistent with the compulsory provisions.

6.11 The Standard Instrument provides for two environmental zonings: E3 Environmental Management and E4 Environmental Living (neither or which are residential zones) where dwelling houses are permissible development, provided development consent is obtained. Vacant land upon which a residential dwelling could lawfully be erected within those two environmental zones, would arguably not qualify for the erection of emergency coastal protection works. Similar issues may arise with vacant land zoned RE2 Private Recreation under the Standard Instrument.[4]

[4] An examination and comparison of currently applicable provisions under the LEP's for all affected Councils is not possible within the scope of our brief. Individual councils should examine currently applicable controls. Further land uses and structures permitted outside the planning regime under the LG Act should be considered.

6.12 Lack of clarity in drafting can compromise effectiveness and certainly increases the prospects of litigation.

7. Additional requirements for placement of ECPW

7.1 Section 55P(2)(e) provides that material must be placed in accordance with any requirement adopted by the Minister and published in the gazette. Draft Ministerial Guidelines (DMR) have been released on the DECCW website and for the purpose of this advice we have addressed the version available as at 4 August 2010.[5]

7.2 Paragraph 1.1 of the DMR sets out additional circumstances to control the placement of EPCW. The DMR prescribe that works can only placed at authorised locations noted in Schedule 1 of the DMR. Currently, schedule describes only 12 areas, however, Section 55P(4) of the Draft Bill provides that emergency action sub plans (prepared under CZMP's) may specify further locations where ECPW may or may not be placed. Other technical requirements such as material allowed to be used and construction requirements are also prescribed.

7.3 We can see an argument that limiting the locations where ECPW may be placed by the schedule, may result in some inequities in respect of other coastal landowners who may similarly be affected by coastal hazards. A redress could perhaps involve a review and improved drafting of the imminence test.

7.4 Two elements of the DMR prescribed criteria require particular examination. The first is:

> *Where no form of coastal protection such as a seawall, constructed lawfully or unlawfully, exists seaward of the building, unless the landowner provides an authorised officer with a letter from a professional engineer certifying that these works will provide a lower degree of erosion protection than emergency coastal protection works; this letter is to be provided with the application for a certificate under section 55T.*

7.5 Consequently, there may be a number of local government areas which, despite being identified in schedule 1 of the DMR, do not qualify for the placement of EPCW.

7.6 Secondly:

> *"Works can only be placed during a period of beach erosion when a senior police officer, as defined in the State Emergency and Rescue Management Act 1989* (SERM Act)*, advises that the area is not unsafe for placing the works and a professional engineer certifies that the escarpment has a low likelihood of failure."*

The test is not that it is safe to place works, but that it is "not unsafe".

7.7 The intent obviously is to minimise risk to life and limb during storm events and periods of beach erosion. Whilst police officers acting in accordance with their powers under the SERM Act have immunities and defences under that Act, engineers will be required to rely on their professional indemnity insurance. In practical terms during a period of beach erosion, which in many instances would be during a storm event, the ability to obtain engineer's certification may well be limited.

7.8 Further, if it is the case that in order to meet the definition of ECPW, compliance with all of the provisions of the DMR is necessary, then failure to obtain an engineers certificate during a period of beach erosion would mean such works could not meet the definition. There is no requirement for the engineers certificate to be provided to the relevant coastal authorities or council.

8. Placement of ECPW – how often and for how long?

[5] http://www.environment.nsw.gov.au/resources/water/coasts/10706minrqrcoastalprotact.pdf

8.1 The DECCW stakeholder presentations and the various Draft Guidelines which appear on the DECCW website have emphasised that works may only be placed once. The Draft Bill does not necessarily ensure this outcome.

8.2 The relevant provision is contained in s.55S of the Draft Bill. The prescription for a once off placement however is attached to the landowner, not the land. Conceivably, successors in title will also be able to place ECPW on the property and also on public land, repeatedly.

8.3 Repair and replacement of components of the works are permitted during the "life of the works". The expression differs from the "maximum period" limitation in s.55Q. Works cease to remain ECPW if they are not maintained in accordance with the provisions of s.55R of the Draft Bill. It is unclear whether the maintenance and replacement of components could amount to complete rebuild of ECPW. The DMR options for ECPW are of limited size (1.5 metres high). The prospects of works being damaged and/or completely destroyed during extreme storm events are, as we understand from our enquiries of coastal engineers, high.

8.4 The maximum period allowed for ECPW is six months commencing on the placement of the works. Landowners or occupiers are required by s55X of the Draft Bill, to notify the relevant local council or public authority that owns the land (if works are to be placed on public land) at or about the time of the placement of works. Ostensibly, it should be possible to monitor the maximum period for ECPW.

8.5 In practical terms, a council, owner of public land or any other coastal authority will need to fund and put in place mechanisms for monitoring the commencement period of ECPW and their status, in order to fulfil their compliance functions under the Draft Bill.

8.6 Subject to the discussion below, ECPW cease to be ECPW at the expiry of six months commencing on the placement of the works. Failure by the relevant authority to take action at the expiration period to require the removal of ECPW and restoration will be a relevant factor on discretion when seeking to obtain a remedy.

8.7 In practice, having regard to the provisions of s.55Q of the Draft Bill, ECPW will be in place longer for than six months provided a development application for the purpose of coastal protection works is pending at the expiry of the six month period[6].

8.8 If such an application is pending, the maximum period for ECPW under s.55Q(2) ends:

> *(a) where, on the final determination of that development application (including any appeals relating to that application), the application is refused – 7 days after that final determination, or*
>
> *(b) where, on the final determination of that development application (including any appeals relating to that application), the application is granted – 3 months after that final determination."*

8.9 The maximum period is relevant for the trigger for removal and restoration provisions contained in the Draft Bill. We have concerns that the provisions of the Draft Bill do not ensure removal or rehabilitation will be easily achieved.

8.10 In reality, it is unlikely that ECPW will be removed and that the subject land or public land, if affected, will be restored, except perhaps in circumstances where landowners have obtained development consent for permanent structures and removal and restoration is imposed as a condition of consent. Restoration and rehabilitation of other private lands affected by ECPW will not be guaranteed under the proposed regime.[7] There are several immediately apparent impediments to achieving these objectives:

(i) landowners will not voluntarily remove ECPW and undertake rehabilitation works;

[6] Coastal Protection Works are to be defined as activities or works to reduce the impact of coast line hazards on land adjacent to tidal waters and includes sea walls, revetments, groynes and beach nourishment.
[7] See also discussion on removal and restoration in paragraph 9 below.

(ii) the Draft Bill provides no express open standing enforcement mechanisms other than self help mechanisms;

(iii) rehabilitation works on other private land cannot be ordered or facilitated; and

(iv) in certain circumstances, there might be more environmental damage due to removal of ECPW.

These impediments are not exhaustive and we acknowledge the criminal penalties proposed under the Draft Bill may be coercive.

9. Removal of ECPW, restoration and rehabilitation

9.1 A fundamental premise of the Draft Bill is that ECPW are temporary in nature to achieve particular short term objectives. Further, DECCW has emphasised the restoration and rehabilitation requirements for ECPW, that ECPW must not have adverse impacts, or that any such impacts will either be managed or trigger removal requirements. The Draft Bill does not readily ensure these fundamental premises and outcomes are achieved.

9.2 Section 55Y of the Draft Bill provides:

(1). A person who has placed emergency coastal protection works (or caused such works to be placed) on land must, before the expiry of the maximum period allowed for emergency coastal protection works, remove the works and restore the land in accordance with:

(a) any requirements adopted by the Minister and published in the Gazette for the purposes of this subsection, and

(b) any requirements specified in the regulations for the purposes of this subsection.

9.3 While s.55Y(1) goes on to provide for some maximum penalties, the section does not, of itself, provide that it is an offence not to comply with the requirements for removal and restoration[8].

9.4 The DMR, at clause 3, make some provision for and reference to, removal requirements including rehabilitation to pre-existing conditions to the greatest extent practical.

9.5 Clause 3 of the DMR includes a provision that:

Clauses 2.4.1 and 2.6 of the requirements under section 55O(2)(e) are to be followed, where reference to placing works is to be read as a reference to the removal of works.

9.6 There is no section 55O(2)(e) of the Draft Bill. We expect it should be a reference to s.55P. In the published DMR we cannot find any clause 2.4.1 and 2.6 of the requirements in any event. It seems that the detailed requirements for removal and restoration are as yet unresolved.

9.7 Section 55Y(1) does not provide that failure to comply with the removal and restoration requirements is a breach of the Act. The failure to expressly provide for a breach and a civil statutory remedy within the Act permeates the Draft Bill. Contrast section 123 of the EPA Act for example. There seems therefore no express civil enforcement mechanism available to local councils or coastal authorities in the statute itself, to require compliance with the removal and restoration requirements[9].

9.8 Section 55Y(3) does provide that if a person does not comply with the removal and restoration requirements, the coastal authority concerned may itself remove the works and

[8] See however s.57 of the CP Act concerning offences generally.
[9] Subject to further discussion at paragraph 12 below and in respect of civil enforcement generally at paragraph 11.

restore the land, and any costs reasonably incurred by the authority may be recovered in a Court of competent jurisdiction, as a debt due.

9.9 This type of provision is known colloquially as a "self help" provision. Such provisions are not new and predecessor examples can be found in s.121ZJ of the EPA Act and s.678 of the LG Act.

9.10 Whilst the proposed maximum penalties for offences are significant and may perform a coercive or deterrent function, the failure to provide for any express civil enforcement remedy other than self help remedies as described above, has considerable consequences for councils and regulatory authorities.

9.11 The CP Act largely sits outside the planning regime. Through the introduction of ECPW, the CP Act performs a development control function that circumvents the safeguards and provisions for both landowners and regulatory authorities as presently provided in the EPA Act.

9.12 Criminal sanctions aside, the self help provisions are often problematic to enforce and may expose the relevant regulatory authority to a myriad of litigation risks. Local councils and regulatory authorities do not, in our experience, exercise statutory self help remedies without the imprimatur of the Court generally, and for good reasons. Entry onto private land to exercise self help provisions can be fraught with difficulty.

9.13 Where works have been placed on, or affect private land (other than that of the landowner who has placed EPCW) there does not appear to be a statutory ability under the Draft Bill for a council or coastal authority to enter other private land to undertake the removal of those works and/or any necessary restoration and rehabilitation works.

9.14 What is required by restoration works is unclear. There is considerable room for debate as to impacts, the pre-existing state and the works required to rehabilitate any land to the pre-existing state.

9.15 Importantly for your council members, the Draft Bill assumes councils will have access to appropriate technical expertise to establish a compliance monitoring body and the funding resources to undertake removal and rehabilitation works, if and where possible.

10. ECPW on Public Land

10.1 Section 55Z(1) provides:

> *a certificate under Division 2 that authorises a person to place and maintain emergency coastal protection works on land owned or occupied by the person extends to authorising the person to use and occupy public land for the placing and maintaining of the works (without obtaining a lease, licence or permit in respect of, or an easement or right-of-way in relation to, the land), but only if the person takes all practical measures:*
>
> *(a) to avoid placing those works in the public land, and*
>
> *(b) to avoid damage to assets and vegetation on the public land, and*
>
> *(c) to minimise risks to the public on the public land, and*
>
> *(d) to maintain reasonable public access (including access for local and public authorities) to and through the beach concerned.*

10.2 A public authority must not unreasonably refuse a person access to the public authorities public land to enable the person to lawfully place ECPW on land (whether public or private).

10.3 A Division 2 Certificate extends to authorise a person to use and occupy public land for placing and maintaining of ECPW, if the person takes all practical means as described above.

10.4 This test is wholly subjective and the Draft Bill gives no guidance as to what "all practical means" means. As orders can be issued to landowners under the Draft Bill for "failing to take all practical means" and criminal sanctions can apply, the matter should be clarified. Presently, it is in our view unclear and will expose regulatory authorities and landowners to litigation risks.

10.5 Whilst the recently released guidelines for authorised officers contemplate inspection of a site prior to the issue of a Division 2 Certificate (see section 4 of those guides) there is nothing in the Draft Bill which provides that a landowner must nominate the area of public land potentially to be used. Further, issue of the Certificate authorises the use of any public land under the Draft Bill.

10.6 The Draft Bill does not address the issue of exposure to occupier's liability. Local government authorities and/or other public authorities who own land on which ECPW are installed by private land owners under the Act, may face increased risks. Liability in tort is highly fact dependant and beyond the scope of this advice.

11. Orders and enforcement generally

11.1 In previous paragraphs we have commented on enforcement mechanisms, in the context of particular sections.

11.2 Much has been made by the State and the DECCW of the enhanced order provisions of the Draft Bill said to benefit councils and coastal authorities. The proposed powers require some examination.

11.3 The Draft Bill provides three separate avenues for compliance and enforcement of its terms.

11.4 The first avenue is to provide for the imposition of a maximum penalty for breach of specified parts of the Draft Bill (see, for example, sections 8(5), 11(5), 55X(2), 55ZE(5)).

11.5 The second is to set out an enforcement regime whereby a Coastal Authority can order a person to remove certain material or structures, or refrain from erecting a structure, or stop ongoing work relating to such materials and structures, but only where certain preconditions are met (Part 4D).

11.6 Failure to comply with the order is an offence for which a person may be prosecuted and face criminal sanctions. If the recipient of the order fails to comply the Coastal Authority may undertake the works and recover the costs as a debt due (see s.55ZF).

11.7 The immediate difficulty with such self-help provisions is their likelihood of use. At present, councils rarely act to themselves carry out the work required by orders issued under section 121B of the EPA Act, or 124 of the LG Act, preferring instead the comfort and added security of obtaining an order of the Land and Environment Court (**LEC**).

11.8 Further, where the works and restoration requirements are on "other" private land, the orders powers do not assist in our view.

11.9 The third avenue is to provide, at section 55L, that a council or the Minister may bring proceedings in the LEC for an order to remedy or restrain a breach of a coastal zone management plan[10].

[10] Proposed subsections 55L(5) and (6) exclude proceedings for a breach of a CZMP being brought in certain circumstances.

11.10 In many cases, councils will not have a coastal zone management plan in place, thus rendering a council's ability to utilise a breach of the plan as a way to seek civil enforcement remedies under the Act (if made) practically impossible.

11.11 The existing section 56A of the CP Act does provide the LEC with power to make orders remedying or restraining an act to prevent, control, abate or mitigate any harm to the environment, or to make good certain damage, or such loss of amenity. However, it would seem that the proceedings referred to would ordinarily arise as a criminal prosecution under the CP Act, rather than any other specific power to commence civil proceedings to restrain a breach[11].

11.12 In circumstances where legislation provides for a criminal sanction, the NSW Supreme Court can exercise an equitable jurisdiction to enforce that obligation by way of civil remedies, such as an injunction. However, whether it would choose to do so will depend upon the circumstances of the case (see *Peek v NSW Egg Corporation* (1986) 6 NSW LR 1). This would seem to leave affected councils in a bind. Further, in the absence of open standing provisions[12], there is also a question as to who has standing to constitute an applicant or plaintiff and seek such a remedy in any event.

11.13 The LEC would have the same jurisdiction as the Supreme Court to grant equitable relief where a monetary penalty is identified in the Draft Bill (see s.20(2) of the LEC Act). However, the LEC would not have a greater jurisdiction, and would presumably seek to determine whether to grant such relief having regard to the matters identified in Peek. In other words, in some cases, councils may achieve a civil remedy such as an injunction or mandatory order, in others, the Court may refuse to grant such relief where the relevant sanction is criminal in nature.

12. Orders under the Draft Bill – Part 4D

12.1 Part 4D of the Draft Bill prescribes, in general terms, the powers and orders regime under the Act generally and also specifically in respect of the ECPW.

12.2 Section 55ZA empowers a coastal authority to order removal of material deposited on the beach, to refrain from erecting a structure on a beach, on or near the boundary of the land and the beach or remove a structure in such circumstances. (Proposed Section 55ZA in effect seeks to replace section 55M of the CP Act as presently in force.)

12.3 The qualification for the exercise of the power is that the Coastal Authority must form the opinion that the works increase erosion, or unreasonably limits public access, or poses a threat to public safety. An order to remove may include a restoration requirement.

12.4 There are limitations to the general orders power. It does not apply to ECPW and orders may not be given to a minister or another public authority under s.55ZA(8).

12.5 Proposed Section 55ZC provides for orders relating to removal and restoration of ECPW again, subject to preconditions. To account for the fact ECPW may be placed on public land; s.55ZC provides additional sources of power in respect of public land. A person may be ordered to restore assets or vegetation on public land (but not third party private land) damaged by the placement of works. ECPW on public land may be the subject of a removal order, if the Coastal Authority is of the opinion the person did not take all practical means to avoid placement on or damage to public land.

12.6 There is no appeal on the merits against an order issued under part 4D. A recipient's only recourse would be judicial review[13].

[11] The burdens of proof are different in criminal and civil proceedings.
[12] Such as section 123(1) of the EPA Act, where "any person" may as of right commence civil proceedings to remedy a breach, without having to establish special standing entitlements
[13] See discussion above concerning the operation of s.20(2) of the *Land and Environment Court Act* 1979

12.7 Again, failure to comply with an order is an offence. The council can then undertake the act/thing it asked the person to undertake, and can recover reasonable costs from the person to whom the order was given

12.8 Orders powers for removal and rehabilitation only relate to the subject land and assets and vegetation on public land. A third party private landholder whose land is affected has no statutory recourse under the Draft Bill to compel removal or rehabilitation that we can ascertain. Further, the self-help provisions do not enable an authority to restore other privately owned land which may have been affected by the emergency protection works.

12.9 The ECPW orders powers vested in councils are subject to a form of review and direction by the Director General (**DG**). If the person who issued the Division 2 Certificate was authorised by the DG, then a council as a coastal authority must give the DG notice of intention to issue an order. The DG may direct the council as to the exercise of its powers.

12.10 Successors in title of land on which ECPW are erected, who become owners of the land before ECPW are removed and the land is restored, may be made the subject of an order as if they were the original owner (s.55ZH).

12.11 The successor in title will be subject to the order only if, before the land is transferred, notice is given to the respective council and a copy of the order provided to the new owner. If the criteria are not complied with, the order does not bind the successor in title.

12.12 The general requirement to remove emergency coastal protection works and restore land in s.55Y after 6 months, does not assist in these circumstances as it is directed to the failure of the person who placed the works to remove them at the expiry of the maximum period, not the land and thus successors in title.

13. Conclusion

13.1 The Draft Bill proposes some extensive reforms. Review of the Draft Bill reveals the stated intent is not always readily achieved. Councils, proposed coastal authorities, authorised officers and certainly landholders would benefit from a clearly stated policy position on behalf of the State in respect of which a legislative solution could then be crafted to accurately give effect to that policy position.

13.2 The reform process relies heavily on the DMR and draft guides rather than subordinate legislation such as Regulations. Ministerial requirements and Guidelines can be amended at departmental level, which may well have been the intent in order to provide for flexibility. The corollary of flexibility is potential legislative uncertainty and inconsistency.

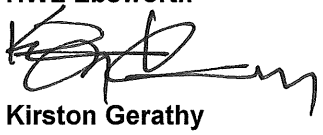
13.3 Where the detail and substance of the reforms is contained in extra-legislative documents, uncertainty may have particular consequences for regulatory authorities, such as your member councils, and indeed other affected interests.

13.4 It is proposed that the DMR are to be given some statutory force (by adoption through draft s.55P and others). The Draft Guides (with the exception of the Draft Guidelines for the preparation of Coastal Zone Management Plans, see s.55D) will not have express statutory weight, as presently drafted.

13.5 As a matter of statutory interpretation, neither the DMR nor the Draft Guides can be used to "read down" the provisions of the Draft Bill, to the extent of any inconsistency. The Draft Bill, if and when enacted, will have primacy.

We trust the above has been of assistance. Part 2 of our advice, canvassing the balance of the major reforms will follow shortly. In the interim if you have any queries please contact Kirston Gerathy of our office.

Yours faithfully
HWL Ebsworth



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22 September 2010

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Dear Sirs

Coastal Protection and Other Legislation Amendment Bill 2010 – Part 2

We refer to our letter of 10 September 2010 comprising part 1 of our overview advice in relation to the Draft Bill. In that letter we considered components of the reforms including emergency coastal protection works (**ECPW**) and the orders and enforcement regime. The version of the Reforms we have considered is that publicly available as at June 2010. We are uncertain whether amendments have been made to the June 2010 version for tabling the Bill in Parliament; hence we have referred to the reforms as the Draft Bill.

In this letter we consider the following:

- Modifications to the Infrastructure SEPP 2007
- Long term coastal protection works – preconditions to the grant of consent
- Funding arrangements for restoration and maintenance
- Coastal protection services and levies
- Service charges on existing coastal protection works
- Coastal zone management plans
- Enforcement of CZMPs
- Section 733 of the *Local Government Act* 1993

This advice should be read in conjunction with Part 1 and expressly with regard to the same caveats as to the limitations on our brief and thus the advice. Detailed analysis of all of the provisions of the Draft Bill and the affected Acts and subordinate legislation has not been possible within the scope of our instructions. Nor have we reviewed the various draft guides (such as are available) which support the reforms with any particularity.

Opinions expressed in this letter and Part 1 of our advice may require revision on a comprehensive analysis. Accordingly, the discussion must be understood in the context of the express limitations. Circumstances will also vary between local government areas and in the event the Draft Bill is enacted, your member councils should seek advice when responding to the reforms. We have used the same abbreviations for legislation etc in this letter. In some instances we have extracted sections from the Draft Bill. We refer you also to the consolidated mark up provided with Part 1, again with the caveat that recourse should be made to the Draft Bill itself.

1. **Proposed Modification to Infrastructure SEPP 2007 (ISEPP)**

1.1 In March 2010 the Department of Planning (**DOP**) released a discussion paper for the review of the ISEPP.

1.2 The modifications to the ISEPP do not form part of the Draft Bill. Detailed consideration of the provisions is therefore beyond the scope of our instructions. However, in our view the ISEPP amendments will have a significant impact on the holistic management of the coastal zone, and will necessarily affect the reforms proposed in the Draft Bill. The relevant components of the ISEPP review include: long term coastal protection works, complying development and exempt development.

1.3 Proposed clause 129A, development permitted with consent, provides:

> *Development for the purpose of works required for long-term coastal protection to reduce coastal erosion of their properties by individuals or corporations may be considered development permitted with consent where the consent authority is satisfied that:*
>
> *(a) the works are consistent with Best Practice Guidelines for Design and Assessment of Coastal Protection works*, and*
>
> *(b) the potential offsite impacts of the works can be managed, and*
>
> *(c) the landowner will fund any ongoing works, including beach nourishment that may be required to minimise off site impacts and maintain the works.*

1.4 Complying development is addressed in clause 129B which states:

> *Development for the purpose of works required for coastal protection and hazard reduction by individuals or corporations may be considered complying development but only if the development:*
>
> *(a) will be of low or minor environmental impact, including off-site impacts and*
>
> *(b) is certified as complying with the Best Practice Guidelines for Design and Assessment of Coastal Protection works*, and*
>
> *(c) will be in place for a period of no more than 5 years.*
>
> *purpose of temporary works required for coastal protection and hazard reduction by individuals or corporations may be considered exempt development but only if the development is:*
>
> *(a) temporary minor development, and*
>
> *(b) complying with the Code of Practice for Emergency and Minor Coastal Protection Works *, and*
>
> *(c) will remain in place for a period of no more than 12 months.*

1.5 The best practice guidelines and code of practice referred to are not yet in the public domain.

1.6 The proposed amendments to the ISEPP intend that coastal protection works may be erected by private individuals or corporations, if they comply with all three requirements specified in cll 129A, 129B or 129C.

1.7 There is considerable overlap between ECPW under the Draft Bill and exempt and complying development as proposed under the ISEPP modifications. Consistency between the planning regime as proposed to be modified and the reforms contemplated by the Draft Bill would be desirable.

1.8 It will be important for your member councils to undertake a detailed review of the implications of the modifications proposed to the ISEPP and compare them to existing EPIs and the Standard Instrument. The ISEPP applies to the State and will affect the provisions and operation of adopted LEPs[1]. It will also affect the operation of Coastal Zone Management Plans (**CZMPs**).

1.9 Preparation of CZMPs, or indeed existing CZMPs[2] and policies which presently adopt methods such as planned retreat, restrictive zoning or other non-protective measures for coastal hazard, risk management and development control will likely be affected if the modifications to the ISEPP are made.

1.10 As noted in Part 1 of our advice, the limited ability for councils and the Minister to take civil action to restrain a breach of a CZMP does not apply to development for which consent has been obtained. Such development would include long term coastal protection works, complying development or exempt development under the ISEPP amendments.

1.11 Whilst our brief and instructions are to consider the Draft Bill, the coastal reform package put forward by the State should be considered as an integrated whole. We are happy to provide further advice in relation to the implications of the ISEPP amendments and other planning reforms should you so instruct.

2. Long Term Coastal Protection Works (CPW) – Preconditions to Granting Consent

2.1 The Draft Bill proposes a replacement section 55M in the following terms:

> *(1) Consent must not be granted under the Environmental Planning and Assessment Act 1979 to development for the purpose of coastal protection works unless the consent authority is satisfied (by conditions imposed on the consent or otherwise) that **satisfactory arrangements have been made** for the following for the **life of the works**:*
>
> *(a) the restoration of a beach, or land adjacent to the beach not protected by the works, **if any increased erosion** of the beach or adjacent land is caused by the presence of the works,*
>
> *(b) the maintenance of the works.*
>
> *(2) Where the coastal protection works are constructed by or on behalf of landowners or by landowners jointly with a council or public authority, the arrangements are to secure adequate funding for the carrying out of any such restoration and maintenance, including by either or both of the following:*
>
> *(a) by legally binding obligations of all or any of the owners from time to time of the land protected by the works,*

[1] See clauses 4 and 8 of ISEPP
[2] See discussion in paragraphs 6 and 7 below

(b) by payment to the relevant council of an annual charge for coastal protection services (within the meaning of the Local Government Act 1993).

(3) The funding obligations of landowners referred to in subsection (2)(a) are to include the percentage share of the total funding of each landowner.

(Emphasis added)

2.2 CPW are defined in the Draft Bill as follows:

Coastal Protection Works *means:*

Activities or works to reduce the impact of coastline hazards on land adjacent to tidal waters and includes seawalls, revetments, groynes and beach nourishment.[3]

2.3 At first instance it might be thought that the only work that proposed section 55M might do is in respect of the proposed amendments to the ISEPP.

2.4 Despite the use of different terminology throughout the legislative regime, (which we recommend be clarified and reviewed), the requirement by proposed section 55M that the consent authority be satisfied in relation to sub-sections (1) and (2) will likely apply to environmental protection works as defined under the Standard Instrument and indeed commensurate land use definitions in existing LEPs[4].

2.5 Under the Standard Instrument, environmental protection works means:

> *works associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation, and includes bush regeneration works, wetland protection works, erosion protection works, dune restoration works and the like.*

2.6 Section 55M would also apply where such works were permissible with consent under other environmental planning instruments. The mandatory zoning provisions for residential land under the Standard Instrument does not include erosion protection works as permissible uses.

2.7 Section 55M purports to provide preconditions to the granting of development consent, under the EPA Act, by requiring the consent authority to be satisfied of the satisfactory arrangements before exercising the power to grant approval. Satisfaction of the preconditions will be a threshold or precursor to the grant of consent, in addition to other mandatory and relevant merit considerations.

2.8 Despite the threshold requirement, the current wording of paragraph 55M(1)(a) suggests that satisfactory arrangements are in place to deal with, for example, increased beach erosion if the presence of the works causes the erosion. The question of whether works cause off site impacts which require mitigation is a question of fact to be determined having regard to all relevant circumstances.

2.9 As presently drafted proposed s.55M(1) is problematic[5]. For the purpose of analysis it can be broken down into the following components:

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[3] The definition is to be inserted in the CP Act and the LG Act, but not the Standard Instrument. S.733 of the LG Act uses the term "coastal management works".

[4] Detailed analysis of the terms and land use definitions of all LEPs is beyond the scope of this advice. Individual councils should review their instruments.

[5] Proposed s.55M requires extensive redrafting in our view, if it is to achieve what we infer is the intent to ensure consent is not granted to CPW which may have impacts, unless the consent authority is satisfied before approval, that any impacts will effectively be mitigated in perpetuity.

i. consent must not be granted for CPW;

ii. unless the consent authority is satisfied (by conditions imposed on the consent or otherwise);

iii. that satisfactory arrangements have been made;

iv. for the life of the works;

v. for restoration of the beach or land adjacent to the beach not protected by the works;

vi. if any increased erosion of the beach or land is caused by the presence of the works; and

vii. for the maintenance of the works.

2.10 Issues in relation to the creation of legally binding obligations or the payment to the relevant council of a charge for coastal protection services contemplated under s.55M(2), are discussed in paragraph 3 below.

2.11 One of the mechanisms which will enable a consent authority to be satisfied as to arrangements, is the imposition of conditions. Conditions of consent are of course amenable to s.96 modifications and appeal and will require monitoring for compliance by the relevant council.

2.12 The section also requires that *"satisfactory arrangements have been made ... for the life of the works"*. Leaving aside for the moment what is meant by the life of the works, the requirement that the arrangements have been made, is past tense.

2.13 What does this therefore mean for landowners or proponents of development applications for CPW or indeed councils and other consent authorities. Does the past tense requirement assume that councils have agreed or indeed have the resources, funding and other technical capabilities to provide coastal protection services to mitigate any impact of such works?[6]

2.14 On one view the section will require a proponent seeking development consent for CPW to provide a detailed consideration of the management proposals for maintenance and restoration works as part of the development application at first instance, to enable the consent authority to inform itself about the arrangements.

2.15 Alternatively, the relevant consent authority will be responsible for formulating detailed mitigation measures for restoration during the assessment phase to satisfy the threshold. In the event a proponent does not accept the imposition of relevant conditions, or seeks to modify them later, there will be a potential for dispute as to whether the condition was so fundamental to the grant of consent that approval would not have been given in its absence.

2.16 Section 55M(1)(a) is only triggered *"**if any** increased erosion of the beach or adjacent land **is caused** by the presence of the works"*. There is therefore room for debate and potential litigation as to whether or not and at what time, works cause erosion so as to trigger the implementation of the satisfactory arrangements (whatever they are).

2.17 Factual disputes may arise as to whether or not the subject works have caused the erosion, whether the erosion has been caused by natural processes unaffected by the works or whether the erosion has been caused by other works implemented, and to

[6] See discussion in paragraphs 3 and 4 below

what degree, by third parties. Enforcing the restoration works will likely present some difficulties.

2.18 The Draft Bill is silent as to what satisfactory arrangements for restoration of the beach or land adjacent to the beach not protected by the works, means. It is also unclear what is meant by adjacent land. Presumably in this context it includes private and public land. If the annual charge provisions in proposed s.469B of the LG Act are to be taken into account, the adjacent land could include land not in the local government area[7].

2.19 It will be incumbent on councils to monitor the impact of any CPW in order to enforce the requirements for restoration, presuming councils can demonstrate or prove the trigger has been met.

2.20 On the assumption that a relevant council elects not to provide coastal protection services[8] and the land owner or proponent of the CPW is to undertake restoration of a beach or land adjacent to a beach (including private or public land) through ongoing beach nourishment or other mechanisms itself, then the premise of the preconditions seems flawed.

2.21 We reiterate, the consent authority must be satisfied that arrangements have been made for the life of the works for restoration and maintenance as a precursor to the exercise of power to grant consent. However beach and estuary environments are regulated by myriad other Acts and controls. Permits, authorities, licences and other types of approvals for restoration works or maintenance are likely to be required from other authorities such as: Crown Lands, DECCW, Marine Parks, National Parks and Wildlife and Fisheries, depending on the individual circumstances.

2.22 We acknowledge the Draft Bill proposes to augment the concurrence provisions in existing sections 38, 39 and 40 of the CP Act. Concurrence by the Minister to carry out development is also taken to be concurrence to any other necessary permit or approval (if such approval also requires concurrence). As drafted, the amendments appear directed to works carried out by a public authority and do not address the issue of private works.[9]

2.23 A condition of consent or a deferred commencement condition of consent, requiring all such relevant permits must be obtained cannot, arguably, be imposed in order to demonstrate satisfactory arrangements have been made as a precondition to the grant of consent. The difficulty becomes more apparent when we consider that the trigger to provide restoration works is only *"if any increased erosion"* is caused.

2.24 For argument's sake and taken to the extreme, the section as presently drafted contemplates or requires detailed modelling of the proposed works, and pre-emptively obtaining permits or approvals from other authorities to enable beach and land restoration, when those works have not yet been approved and the requirement has not been triggered.

2.25 Despite the terms of s.55M(1), the imposition of a condition that all other necessary approvals and permits be obtained to enable the carrying out of beach or land restoration works and maintenance, does not necessarily cure the defects. Firstly, because the satisfaction as to arrangements is expressed to be a threshold and second, even if that could be overcome, the consent authority cannot pre-empt the terms upon which such other approvals may be given, if at all.

[7] See paragraph 4 in relation to s.469B(8)
[8] It is not mandatory for a council to provide such services
[9] We have not revisited the integrated development provisions in the EPA Act, which may be relevant. There does not seem to be any proposal in the Draft Bill to amend those provisions

2.26 In the event other necessary approvals are refused (and given the trigger to restore is if and when erosion is caused), CPWs could conceivably be approved and constructed in reliance on proposed restoration works which cannot lawfully be implemented in practice. Apart from failing the threshold, such consents may be open to challenge. The corollary is that consents could be granted on conditions which may not ever be able to be satisfied, and thus the consent cannot be implemented. That outcome would not be satisfactory for landowners.

2.27 Proposed s.55M not only contemplates restoration of the beach or public land affected by the CPW, but also requires satisfactory arrangements be made for the life of the works for adjacent land, which would include private land. It is unclear how a consent authority is to be satisfied, as a precondition to the granting of development consent, that permanent arrangements are in place for the life of the works to restore adjacent private land.

2.28 The Draft Bill cannot authorise a private trespass. A condition cannot be imposed requiring works be undertaken on other private land. Even if a proponent for CPW comes armed, in their development application, with a letter from the proponent's neighbours authorising restoration works on their land, the Draft Bill is silent on how this is to bind the neighbours' successors in title and to be legally enforceable for the life of the works. The restoration works themselves may constitute, depending on their nature, development for which consent is required to be obtained.

2.29 The likelihood of adjacent landowners jointly proposing CPW has been an underlying assumption in DECCW stakeholder presentations on the Draft Bill. That may well occur in practice. However, the assumption is premised on the fact that all relevant landowners have the assets or funding resources to contribute to the works and maintain them and the beach, if affected, in perpetuity[10]. The potential for landowner disputes must be acknowledged.

3. Funding Arrangements for Restoration and Maintenance

3.1 The precondition to the power to grant consent for CPW requires the consent authority be satisfied arrangements have been made for restoration and maintenance. Proposed s.55M(2) provides the arrangements are also to secure adequate funding by either or both of:

(a) imposing "legally binding obligations" upon all or any of the landowners from time to time benefiting from the works (presumably to manage the impacts and maintain the works); or

(b) payment to the relevant council of an annual charge for coastal protection services (to permit the relevant council to manage the impacts and maintain the works).

3.2 No guidance is given as to how such legally binding obligations can be formulated and enforced. Options which come to mind include public positive covenants under the *Conveyancing Act* and Planning Agreements under the EPA Act. Both can prove unwieldy and clarification from the State to what constitutes legally binding obligations is desirable. Nor is there any test in this section as to who 'benefits' from the works. Even if a third party benefits from the works, there is no ability within the development consent regime to bind or require third parties to do anything in respect of a consent. A development consent runs with the land.

3.3 The alternative is for the consent authority to be satisfied that a charge for services will or can be levied and / or to impose a condition requiring the payment of a charge.

[10] The alternative is the provision of coastal protection services by council. See discussion below.

Whilst the levying of a charge may appear to be a more expedient solution, given the difficulties in structuring and implementing effective private obligations, it is not mandatory for a council to provide coastal protection services (**CPS**).

3.4 We see a potential conflict arising between the discretion to provide CPS and the proposed consent requirements for the erection of CPW, pursuant to section 55M of the Draft Bill. The potential problem can be illustrated when considering that the proposed NSW Coastal Panel (**the Panel**) may have functions conferred upon it as consent authority to approve CPW[11].

3.5 The decision by a council to provide CPS is a discretionary one that will require a consideration of available technical expertise, resources, competing budget requirements and the like. The proposed amendments do not empower the Panel (or any other consent authority) to require a council to provide CPS generally or particularly in respect of any application, nor would a Court be able to do so on appeal from a decision of a consent authority. Section 39(2) of the *Land and Environment Court Act* 1979, while providing a wide power, only provides the Court "all the functions and discretions [of] the person or body whose decision is the subject of the appeal ". If the Panel is the consent authority then the Court's powers would be limited to those functions exercisable by the Panel[12].

3.6 Whilst not entirely free from doubt, we do not believe the Court on appeal would be able to stand in the shoes of council to require a council to provide CPS, even if the application for CPW had originally been determined by the council, irrespective of whether the particular council has determined to provide CPS generally in its area. The circumstances are somewhat analogous to the Court of Appeal decision in *Codlea Pty Ltd v Byron Shire Council* [1999] NSWCA 399.

3.7 Without going into the facts in *Codlea* at length, the Court determined that the making of the relevant arrangements (which in that case was the provision of sewerage services) was within the exclusive province of the council as the sewerage authority, and was not a function exercisable by the court as development consent authority[13]. Further, the making of arrangements required at least a willingness on the part of the authority to being the scheme to fulfilment.

3.8 In our opinion the decision whether to provide coastal protection services could be held to fall into the same category. This has the potential to limit the options of the preconditions to the grant of consent for CPW, as consent authorities will have to rely (solely, if councils do not agree to provide the services) on imposing conditions ensuring legally binding obligations upon landowners, to manage the impacts and maintain the works. The position in any event is circular, as the consent authority must be satisfied, as a pre-condition to the granting of consent, that adequate arrangements are in place, albeit those arrangements can include conditions.

4. Coastal Protection Services and Levies [14]

4.1 Section 496B of the Local Government Act 1993 (**LG Act**) is to provide:

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[11] The Draft Bill contemplates the Panel can exercise functions conferred on it under the EPA Act relating to the granting of development consent (s.13(1)(b)). There are no such provisions in the EPA Act at present and it is unknown whether functions will be limited to advice or whether the panel will have the functions of a consent authority.

[12] We have not expressly examined the various options for other potential consent authorities such as the JRPP etc

[13] Section 55M is not drafted precisely in the same terms as the provision considered by the Court of Appeal in *Codlea* and there is room for argument.

[14] Due to the limitations of our brief, an examination of how the proposed annual charge sits within, and is affected by, the LG Act rates and charges provisions generally has not been possible. Such analysis if undertaken may affect the opinions expressed.

(1) If a council provides Coastal Protection Services that benefit a parcel of rateable land in the council's area, being services that relate to coastal protection works that were (or are being) constructed by or on behalf of the owner or occupier (or a previous owner or occupier) of the parcel of land, the council must, in accordance with this Act and the regulations, make and levy an annual charge on that parcel for those services.

(2) A council may, in accordance with the Act and the regulations, make and levy an annual charge for the provision by the council of coastal protection services for a parcel of rateable land that benefits from the services, being services that relate to coastal protection works that were (or are being) constructed jointly by or on behalf of:

(a) the owner or occupier (or a previous owner or occupier) of the parcel of land, and

(b) a public authority or a Council.

....

4.2 A definition of coastal protection service (CPS) is to be inserted into the LG Act to mean: *a service:*

(a) to maintain and repair coastal protection works, or

(b) to manage the impacts of such works (such as changed or increased beach erosion elsewhere),

but does not include a service that relates to emergency coastal protection works.

4.3 As noted above, it is not mandatory for a council to provide CPS. The Draft Bill in some respects presumes any council will have the technical expertise and other resources to provide CPS. Further, the Draft Bill is silent on how such coastal protection services or works are to be provided, in view of the potential need for environmental assessment and various other approvals and permits to be obtained from other regulatory authorities to enable CPS to be undertaken. CPS may indeed constitute development for which consent is required[15].

4.4 In the event a decision to provide CPS is made, a council must issue an annual service charge if the CPW have been constructed by a private landowner. A council will retain a discretion whether to issue an annual service charge if it has jointly constructed the CPW with private landowners.

4.5 If a council has the resources and exercises its discretion to provide CPS, statutory obligations arise to maintain the works and manage the impacts.

4.6 A standard for coastal protection services is proposed to be inserted into the Local Government (General) Regulation 2005 through clause 413B. Proposed clause 413B provides:

(a) A coastal protection service carried out by a council to maintain coastal protection works must maintain the structural integrity of the works to a reasonable engineering standard.

[15] The provisions of CPS will also need to account for the concurrence requirements in the CP Act.

(b) *A coastal protection service carried out by a council to manage the impacts of coastal protection works must ensure that the works do not result in any significant change in the long term position of the coastline.*

4.7 Your member councils will therefore need to give consideration to whether resources are available to fulfil these obligations. The second obligation is particularly onerous and we can foresee a potential for litigation, should councils provide CPS otherwise than to the standards set out in clause 413B. Questions of causation in relation to the change in the long term position of the coastline aside, query whether failure to meet the standards may affect the statutory exemption from liability afforded by s.733 of the LG Act.

4.8 The levying of charges is limited to parcels of rateable land[16] that "benefit from the service" where:

(c) CPW are constructed by a landowner or previous landowner on that parcel of land; or

(d) CPW are constructed jointly by a council or public authority and a landowner or previous landowner, on that parcel of land.

4.9 There is no provision for levying a charge where works are solely constructed by a council or other public authority even if they benefit private land.

4.10 The relevant rateable parcel of land which may be levied appears to be limited to a parcel of land on which CPW have or are being constructed.

4.11 The Draft Bill is unclear as to what constitutes a benefit to a parcel of rateable land, despite s.469B(8) discussed below. Where a council provides CPS in the form of maintenance works to CPW, for example a seawall constructed by a landowner, the nexus is relatively clear.

4.12 However, where the CPS are in the form of management of impacts and mitigation works, such as beach nourishment and dune replenishment, the situation is unresolved. The impacts to be mitigated may occur "off site". How then is nexus to be established between the particular land parcel (on which CPW are constructed) and the benefit of CPS provided, of necessity, on other land?

4.13 If CPS in the form of nourishment or dune stabilisation is necessary on other private land (presuming a council is permitted to access other private land) or public land not being the land on which the CPW causing the need for CPS are constructed, it seems the council cannot levy the land parcel so benefited by the CPS.

4.14 Further, a landowner who has constructed CPW could potentially argue that off-site CPS do not "benefit" their parcel of rateable land, but rather benefit adjacent public or private land on which the CPS are undertaken, so that they ought not be levied, even though they constructed the CPW.

4.15 The charges and levies regime forms a significant platform of the proposed reforms. Presently the test of benefit lacks clarity such that the ability to implement the scheme is questionable in its current form. The benefit test requires review and explanation and the concerns expressed in paragraphs 4.10 to 4.14 arise as a consequence of the present drafting. Perhaps it should be refined to include a test for off-site mitigation provided in respect of CPW.

[16] See the LG Act for what constitutes rateable land.

4.16 Proposed s.469B(8) seeks to provide some guidance as to what is intended by the benefit criteria as follows:

for the avoidance of doubt, a parcel of land benefits from the provision of coastal protection services even if:

(a) the services relate to private coastal protection works (such as a seawall) wholly on the parcel or on a neighbouring parcel of private land; or

(b) the services are carried out on land that is outside the council's area.

4.17 Again, the subsection does not clearly explain what is meant by benefit. Moreover, it sits uncomfortably with s.469B(1). The decision by a council to provide CPS will require an analysis of funding sources, including the amount of funds available to be collected by the imposition of annual charges for those services. Presently, the Draft Bill is not clear as to which parcels of land and in what circumstances those parcels of land, will be held to benefit from CPS.

4.18 The Draft Bill provides that a person aggrieved by the amount of the annual charge may appeal to the LEC. Whilst the appeal right is expressed to be limited to the quantum of the charge, we can foresee arguments concerning whether a parcel of land benefits at all from CPS, being conducted in that context.

4.19 The determination by the LEC of the reasonable cost relating to particular CPW is to be binding on all other parcels that benefit from those CPS. The assumption is that all parcels benefit equally from the CPS, presuming what is meant by benefit is resolved.

5. Levying Service Charges on Existing Coastal Protection Works

5.1 Proposed section 553B of the LG Act is intended to address the levying of annual service charges on pre-existing CPW, and is to provide:

(1) An annual charge for coastal protection services may not be levied on a parcel of rateable land in relation to any coastal protection works that existed before the commencement of this section without consent of the owner of the land.

(2) An annual charge for coastal protection services may not be levied on a parcel of rateable land in relation to any coastal protection works if:

(a) the maintenance of the works or the management of the impacts of the works (as appropriate) is a condition of an approval or consent under the Environmental Planning and Assessment Act 1979 relating to the works, and

(b) that maintenance work is not being carried out by or on behalf of the council.

5.2 A charge for CPS in respect of pre-existing works may be levied in two circumstances

(i) where the works have been erected unlawfully, and

(ii) where the works have been erected in accordance with a development consent.

5.3 Subsection (1) of s.553B will apply to both circumstances, while subsection (2) will only apply in the latter.

5.4 Taking subsection (2) at the outset, it will not be possible to issue a levy in respect of approved CPW if the landowner is required to undertake the maintenance of the works and management of the off site impacts as a condition of consent.

5.5 By extension, and subject to subsection (1), it follows that an annual service charge will be able to be levied in respect of approved CPW and in respect of CPW constructed unlawfully.

5.6 Pursuant to subsection (1) however, a charge cannot be levied without the consent of the landowner. Prima facie we can see the reason for requiring landowner's consent, in circumstances where CPW may predate the enactment of the Bill. There are consequently impediments to implementation and administration of the 'fee for service' proposals in the Draft Bill.

5.7 The ability to levy for pre-existing works, whether lawful or unlawful, depends upon the consent of the landowner to accept the charge (presuming the benefits test is resolved). Landownership is not static. The agreement of a current landowner to pay an annual charge for CPS cannot bind successors in title.

5.8 If councils are to provide CPS they must be able to identify the costs of such services. In budgeting whether to provide CPS (if at all) the funds available by imposition of charges will be a necessary component. As the ability charge for CPS in respect of existing CPW is dependant upon the consent of the landowner from time to time, costing and budgeting may be an uncertain process.

5.9 Should a landowner benefiting from unlawful CPW refuse to accept the imposition of an annual service charge, a council will have available to it the proposed order provisions in the CP Act. The unlawful works could be ordered to be removed[17].

5.10 Alternatively, recourse could be made to the enforcement regime for unlawful development existing under the EPA Act and otherwise. The ability to enforce removal and restoration through civil proceedings is always dependant upon circumstances and discretionary factors.[18]

5.11 Those landowners benefiting from existing authorised CPW will be protected from such a response. The proposed order provisions cannot be utilised in respect of works the subject of a lawful consent (see section 55ZA(6) of the Draft Bill). Should those landowners refuse to accept the imposition of a charge there is no mechanism in the Draft Bill to recoup costs for CPS provided, which relate to those works.

5.12 If CPS are to be provided by a council, it is difficult to see how they can be performed piecemeal and apportioned only in respect of CPW for rateable parcels of land in respect of which a charge can be levied, for either pre-existing works or those post the enactment of the Bill. In this context the benefit criteria in proposed s.496B of the LG Act becomes more critical.

5.13 The costs for providing holistic CPS, if a council determines to provide them, will in many circumstances need to be absorbed by the council, supplemented where possible by annual charges.

5.14 We recommend your member councils seek further detailed advice before determining whether they will provide CPS in the event the Draft Bill is enacted.

[17] The powers provided and difficulties with, the orders regime in the CP Act are canvassed in Part 1 of our advice.
[18] Removal of unlawful works could also be complicated by new applications for CPW, which may be designed to "key in" to existing works.

5.15 The inability to impose an annual service charge on certain landowners benefiting from CPW has the potential to affect the utility and operation of the charge provisions proposed to be included within the LG Act. The charge proposals underpin much of the reform package, including the consent considerations for CPW.

5.16 The perceived inequity that will result from certain landowners being able to avoid having to pay annual service charges may well increase the likelihood that landowners who are levied, will appeal the annual service charge. Section 496B(4) permits persons aggrieved at the amount of the levy to appeal to the Land and Environment Court against the sum imposed.

6. Coastal Zone Management Plans

6.1 The Draft Bill proposes a number of changes to coastal zone management plans (**CZMP**). The Minister can direct a council to prepare a CZMP, either in relation to the whole of the coastal zone within its local government area, or for a specific part of an area within the coastal zone (s 55B CP Act).

6.2 The coastal zone is defined in the CP Act. Proposed s.55B appears intended to increase the areas to which these provisions apply and to include land that adjoins tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries. However the expanded definition of coastal zone only applies to section 55B itself. That section only relates to the requirement to prepare a CZMP. We recommend clarification be sought whether it was intended to apply to part 4A of the Draft Bill.

6.3 A CZMP must be prepared in accordance with the relevant Minster's Guidelines. Draft Ministerial Guidelines were released in August 2010 and contain minimum requirements in addition to those set out in the CP Act. We have not reviewed them in detail, and recommend your relevant member councils seek comprehensive advice in respect of them.

6.4 The Draft Guidelines are to repeal and replace the existing Coastal Manual (**Manual**). The Manual presently identifies a range of hazard management options, spanning from protective works to accommodation of natural processes through restrictive zoning, buffers and planned retreat. The Draft Guidelines have, on cursory review, abandoned the identified hazard management options. Instead, the Draft Guidelines provide CZMPs must be prepared having regard to coastal management principles. Many existing and current draft CZMPs refer expressly to the hazard management options as described in the Manual.

6.5 Coastal management principles, to be reflected in CZMPs, include:

(a) considering the objectives of the CP Act and the goals, objectives and principles of the NSW Coastal Policy and the Sea Level Rise Policy Statement;

(b) adopting an adaptive risk-based management approach;

(c) adopting a reasonable, balanced and consultative approach to planning and decision-making; and

(d) providing information to the public to inform decision-making.

6.6 Presently the CP Act provides the Minister must approve or refuse to approve a draft CZMP prepared by a council. By way of contrast, the Draft Bill requires the Minister to certify or refuse to certify that a draft CZMP was prepared in accordance with the CP Act. The draft can be referred by the Minister to the Coastal Panel for advice.

6.7 We understand that the change in terminology, from "approval" to "certification" has been of some concern to your member councils. Approval suggests some endorsement or ratification of the CZMP by the State.

6.8 The requirement that the CZMPs be certified, rather than approved suggests that this particular step in the adoption process will be more procedural in nature. The Minister is only required to certify that a CZMP was prepared in accordance with the CP Act, absent endorsement. The practical consequence of the difference in terminology is unknown at this time.

7. Enforcing Breaches of CZMP

7.1 The provisions in the CP Act in respect of enforcement of adopted CZMPs will arguably be more limited effect under the Draft Bill and the Reform Package generally.

7.2 Works which have the benefit of a development consent do not have to comply with a CZMP. A CZMP is not presently a mandatory statutory consideration under s.79C of the EPA Act. If the ISEPP amendments are adopted, then the ISEPP will add to the category of exempt and complying development which does not need to comply with a CZMP. Finally, Part 3A projects do not need to comply with a CZMP.

7.3 Only the Minister or a council may bring proceedings in the LEC to remedy or restrain a breach of a CZMP. A council cannot bring enforcement proceedings in the LEC against the State or a NSW government agency, which includes the Panel. Consequently the Minister is the only one empowered to bring enforcement proceedings in the event the State or a NSW government agency contravenes a CZMP.

8. Section 733 of the LG Act

8.1 The Draft Bill also proposes amendments to the statutory exemption from liability provisions contained in s733 of the LG Act. Sections 731 to 734 of the LG Act exempt councils and council employees from liability in respect of any matter or thing done in good faith, in the execution of the LG Act. The exemptions whilst useful, are not blanket protections as liability in tort is highly fact dependant.[19]

8.2 The primary exemption provision is contained in s.733(2). The exemption for the provision of advice appears to be limited to land within the coastal zone, whilst the acts and omissions general exemption in s.733(2)(b) is not so limited.

8.3 Subsection 3 provides a list of activities for which the general exemptions in s.733(1)(flooding) and s.733(2) apply. The circumstances identified in s.733(3) are not exhaustive and s.733(3) does not limit the effect of the general exemptions in ss.733(1) and (2). Other activities or omissions may be exempt from liability, even if not expressly listed in subsection 3.

8.4 The proposed amendments in the Draft Bill provide for additional categories of actions and omissions relating to climate change, sea level rise and erosion.

8.5 For the purposes of the proposed amendments, three new definitions are introduced by s733(8). Those definitions apply exclusively to s733 and provide:

In this section:

[19] It is unlikely s 731 – 734 protect councillors, employees and others from liability for criminal acts. See *Garret v Freeman* (2006) 147 LGEPA 96

Coastal management works *includes the placement and maintenance of emergency coastal protection works.*

Coastal zone *has the same meaning as in the Coastal Protection Act 1979, and includes land previously in the coastal zone under that Act and land that adjoins the tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries.*

Manual *includes guidelines.*

8.6 Coastal management works is a term which currently appears in existing s733(3)(f). It is now to be defined as including ECPW, but not CPW as that term is understood and to be inserted as a definition in the CP Act and elsewhere in the LG Act, pursuant to the Draft Bill.

8.7 The reason for the difference in terminology is unclear. We can only presume it was deliberate. We have suggested a review of terms and definitions throughout the coastal reform package and all affected cognate legislation and instruments is required. As a matter of statutory construction, the Courts will presume different language was purposeful. Inconsistency in drafting increases both uncertainty and the prospects of litigation.

8.8 What is meant by the coastal zone is not consistent across the legislative regime, and sometimes even within the same piece of legislation.

8.9 Section 733(4) LG Act creates a presumption of good faith in favour of a council if the advice was furnished or thing was done or omitted to be done substantially in accordance with the principles in the relevant manual as defined. Absent the benefit of presumption, a Council may have the onus of establishing it has acted in good faith if litigation ensues from its actions[20].

8.10 The adoption of a new manual to replace the 1990 Coastal Manual, in the form of Guidelines is proposed. Currently, this document is only in draft form, namely the Draft Guidelines for CZMPs. We have not undertaken an analysis of the draft for the purposes of this advice.

8.11 Inevitably a change in the manual will have an impact upon the preparation and implementation of CZMPs, and it follows there may be some affect on the good faith presumption in s.733(4).

9. Conclusion

9.1 The comments made at the conclusion of Part 1 of the advice remain pertinent in the context of the reasons canvassed in this letter.

9.2 We have not undertaken an exhaustive analysis of all of the amendments in the Draft Bill, affected cognate legislation or the DMR and guidelines upon which much of the detail and substance of the reforms depend. Our opinions may change and new issues could arise on a detailed review.

9.3 The approval regime for CPW, and the suggested mechanisms for funding CPS are integral to the reform package. On even a cursory examination the provisions are problematic and under the stated intent of the reforms is not readily achieved.

[20] What is meant by 'good faith' in the context of statutory protections has been the subject of considerable judicial review. An examination of the authorities is beyond the scope of this advice.

9.4 The Draft Bill proposes extensive reforms which will affect and be affected by related reform processes currently being undertaken by DOP. The legislative framework for managing development and hazards on the coast presents a complex web of Acts, instruments, policies and guidelines.

9.5 Within that context, the Draft Bill, if enacted, will have a considerable impact upon the responsibilities, powers and functions vested in councils for managing their coastal areas in a holistic fashion. Whilst we appreciate the legislative process is not static, the Draft Bill will require considerable revision to avoid inconsistency and uncertainty in a statutory context which in turn increases both the prospects of litigation and the making of ad hoc decisions which can undermine a strategic approach.

We trust the above has been of assistance. If you have any queries please contact Kirston Gerathy of our office.

Yours faithfully
HWL Ebsworth

Kirston Gerathy
Partner

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7. SCCG WORKSHOPS

- **SCCG Technical Committee Discussion Forum:** NSW Coastal Reform Package - 22 April 2010
- **Sydney Coastal Councils Group Information Session Reforms to Coastal Management in NSW -** 29 November 2010
  - Letter of invite to SCCG member councils
  - Workshop Agenda

Presentations attached

- **Overview: Reforms to coastal management in NSW** Mr Mike Sharpin - NSW Department of Environment Climate Change and Water
- **The LGSA Perspective on the Coastal Protection and other Legislation Amendment Bill and supporting documents** Mr Robert Verhey - NSW LGSA
- **Engineering, management and implementation considerations - Guidelines for the preparation of Coastal Zone Management Plan** Mr Doug Lord - Coastal Environment Pty Ltd
- **Legal Considerations -** ***Coastal Protection and other Legislation Amendment Bill -*** Ms Kirston Gerathy- HWL Ebsworth Lawyers

CM027-10

SCCG Technical Committee Meeting 22 April 2010
Discussion Forum: NSW Coastal Reform Package

Summary
The NSW Government has produced a coastal erosion reform package to amend state and local government management of coastal erosion in response to sea level rise. The reforms include amendments to legislation, new guidelines such as:

- Coastal Protection and Other Legislation Amendment Bill 2010
  www.environment.nsw.gov.au/resources/water/ExposureDraftCoastalBill.pdf
- Temporary Emergency Coastal Protection Works Ministerial Requirements and Guidelines
  www.environment.nsw.gov.au/resources/water/coasts/10231CPworksMinReq.pdf
  www.environment.nsw.gov.au/resources/water/coasts/10230CPworksLandowners.pdf

The aim of this discussion forum was to inform delegates and seek their feedback on the specific aspects of the *Coastal Protection and Other Legislation Amendment Bill 2010* (the draft Bill) and *Temporary Emergency Coastal Protection Works Ministerial Requirements and Guidelines* (Ministerial Requirements and Guidelines).

To assist in providing information about the draft Bill as well as the Ministerial Requirements and Guidelines delegates were provided copies of the Department of Environment Climate Change and Water (DECCW) presentation given at the stakeholder information sessions in early April. The discussion forum focused on the following key aspects of the draft Bill, Ministerial Requirements and Guidelines for consideration:

1. The Emergency Temporary Protection Works Ministerial Requirements and Guidelines; and
2. Amendments to the Infrastructure SEPP and Permanent Protection Works.

Overall delegates felt that actions of protecting private property in response to coastal erosion and sea level rise should not come without the necessary planning, management and approval processed. Additionally, such actions should never come at the expense of maintaining beach amenity, function and public access. Significantly, delegates believed that that the Ministerial Requirements and Guidelines for emergency temporary protection works as they were currently drafted would:

- Prove difficult to implement and enforce;
- Increase exposure to liability for councils for activities undertaken on public land; and
- Impact negatively on the amenity and function of the NSW coastal zone.

Attached is a summary of the discussion and recommendations for the key aspects of the draft Bill, Ministerial Requirements and Guidelines.

Following the discussion it was concluded that delegates had a number of concerns with the intent and implementation of the Ministerial Requirements and Guidelines as well as the Coastal Protection and other Legislation Amendment Bill. As a result it was resolved that:

The SCCG would formally request the NSW Minister for Planning provide further time for consultation in relation to the "*Coastal Protection and other Legislation Amendment Bill 2010";* and the associated "*Minister's requirements for Temporary Coastal Protection Works";* and the *"Guide to the Statutory Requirements for Temporary Coastal Protection Works".*

SCCG Technical Committee Meeting 22 April 2010
Discussion Forum: NSW Coastal Reform Package

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- Potential impacts on Marine Parks, Aquatic Reserves and Intertidal Protected areas
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1. The Emergency Temporary Protection Works Ministerial Requirements and Guidelines
Delegates considered that a number of aspects of the Ministerial Requirements and Guidelines for emergency temporary protection works required amendment or further clarification. These included:

Circumstances where works are permitted
Discussion centred on both the climatic circumstances and physical triggers needed for emergency temporary protection works to be permitted.

Climate Conditions: It was felt that a 3 metre wave height combined with a 1.8 metre tide would result in opportunities to construct temporary protection works a high number of times per year. As a result is was recommended that the trigger wave height be increased to 5 metres.

It was also noted that while wave and tide height triggers were appropriate in open coast situations their application in estuarine environments was less relevant. Therefore, for estuarine environments, where issues of prevailing wind direction and strength are more relevant than offshore wave height, the circumstances where construction of works are permitted should be altered to include wind direction and strength. As a result it was recommended that:

- Different circumstances for coastal and estuarine environments be developed;
- Circumstances for estuarine environments take into account thresholds for wind direction and strength.

Recommendations:

1. A 5 metre wave height combined with a 1.8 metre tide be the climatic circumstances under which emergency temporary protection works can be constructed.
2. Different circumstances for coastal and estuarine environments be developed;
3. Circumstances for estuarine environments take into account thresholds for wind direction strength.

Physical Conditions: In addition to the climate circumstances a number of physical requirements need to be met to trigger the construction of emergency temporary protection works. Delegates felt that overall the requirements seemed reasonable but their practical application and proving non-compliance would be difficult.

One area of the Ministerial Requirements and Guidelines delegates believed needed amendment were the notification provisions. It was agreed that residents must be required to do more than simply inform councils of the construction of emergency temporary protection works after they have been constructed. If these requirements were to remain un-amended the result would be ad-hoc building of emergency temporary protection works with a greater need for councils to enforce compliance with the Ministerial requirements. As a result it was recommended that:

1. All home owners be required to obtain pre-approval from councils or the appropriate coastal authority for the construction of emergency temporary protection works. Such pre-approval could be conditional on home owners having a clear operational plan that addresses issues including but not limited to:
    - source and storage of sand and sand bags;
    - design of temporary protection works;
    - ongoing maintenance of protection works;
    - requirements for access to public land; and

- Informing surrounding land owners and managers of commencement of works.

2. Home owners be required to contact a Council's 24 hour emergency hotline once construction of emergency temporary protection works are planned to commence.

Implementation of both these recommendations would ensure that residents had a greater understanding of the complexity of building temporary works in the active beach environment and had all the necessary plans, approvals and licenses prior to construction.

Some delegates noted that there were examples on Sydney beaches where the seaward boundary of many coastal properties already extended into the beach zone (therefore already less than the trigger distance). As a result a number of property owners in NSW would be able to potentially "reclaim" land within the active beach zone through the construction of emergency temporary protection works. This had the potential to significantly reduce public access and safety on beaches and intertidal environments once residents started protecting these properties.

Recommendations:
To address some of the enforcement and compliance issues surrounding the physical triggers it was recommended:

1. All home owners be required to obtain pre-approval from councils or the appropriate coastal authority for the construction of emergency temporary protection works.

Recommendations:

2. Such pre approval be conditional on home owners having a clear operational plan that addresses issues including but not limited to:
   - source and storage of sand and sand bags;
   - design of temporary protection works;
   - ongoing maintenance of protection works;
   - requirements for access to public land; and
   - Informing surrounding land owners and managers of commencement of works.
3. Home owners be required to contact a councils 24 hour emergency hotline once construction of emergency temporary protection works are planned to commence.

Use of public land

The threshold for access or use of public land for the construction or placement of temporary protection works of "if required" under the Ministerial Requirements and Guidelines was considered to be too broad and open to discretion. Generally it was felt that the use of public land for either the construction or placement of emergency temporary protection works was unjustified and inappropriate.

Of overarching concern to delegates was that the construction or placement of temporary protection works on public land could potentially expose councils to increased liability in the following areas:

- **Injury to members of the public**: Once the materials used for the temporary protection works are placed on public land councils have a duty of care to ensure members of the public using the public land for recreation are not injured in the vicinity of the works or the tools used to construct the works.
- **Damage to other properties**: Once a council has consented to access onto or through public land for the purpose of construction of temporary protection works a council could be exposed to liability for any damage done to surrounding property as well as public assets and utilities as a result of the works.

- **Maintenance of temporary works:** As councils are responsible for ensuring compliance with the guidelines for the maintenance of temporary structures, councils would be exposed to liability if compliance with the guidelines was not enforced.

Additional to the increase exposure to liability delegates also questioned the legality of councils allowing long term private use of public lands classified as community. Overall, it was felt that issues associated with increased exposure to liability of councils could be removed if all activities required for the construction and placement of temporary protection works were to be undertaken on private property via a development application process.

Combined with an increased exposure to liability and the legality of using public land classified as community for private use a number of other issues arise from the use of public land for the construction or placement of temporary protection work. These were:

- **The need for multiple approvals and licences:** Within the coastal zone a number of public authorities are responsible for managing land as well as providing approvals and licences for access and use. Such agencies include but are not limited to councils, the National Parks and Wildlife Service, NSW Department of Lands and in Sydney, Sydney Water. Therefore a resident wishing to get access through or place temporary works on public land may potentially require licences or approvals from a number of authorities.
- **Damage to public infrastructure:** Residents driving trucks or earth moving equipment through or onto public land are likely to cause damage to public infrastructure above or below the ground (including sewer and stormwater assets).
- **Potential impacts on Marine Parks, Aquatic Reserves and Intertidal Protected areas:** The potential for temporary works to have an impact on the ecological function of Marine Parks, Aquatic Reserves and Intertidal Protected areas must be considered within the Ministerial Requirements and Guidelines.
- **Clearing of dune vegetation, endangered ecological communities and threatened species:** Additional to the licences required for access to public land the potential for clearing or damage to dune vegetation, endangered ecological communities and threatened species to occur is high.

Recommendations:

1. Activities required for the construction and placement of temporary protection works to be undertaken entirely on private property.
2. The NSW Department of Local Government clarify the legality of councils allowing the long-term private use of public land classified as community under NSW Local Government Act
3. The NSW Departments of Planning, Local Government, Lands and Environment Climate Change and Water clarify the range of licenses and approvals required to undertake such activities on private and public land in the coastal zone of NSW.
4. DECCW clarify what information is required to ensure activities on public land do not negatively impact on public infrastructure and services.
5. DECCW clarify what information, licenses and approvals are required to ensure activities on public land do not negatively impact on Marine Parks, Aquatic Reserves and Intertidal Protected areas as well as dune vegetation, endangered ecological communities and threatened species.

Enforcing compliance with guidelines
Proof of non-compliance and enforcement of compliance with the guidelines will be left to councils. This will require additional demands on council resources for the following activities:

- Preparing for and participating in Land and Environment Court cases;
- Enforcing compliance (requiring extra staff and training);
- Engaging independent experts; and
- Undertaking the necessary communication and education activities.

Councils simply do not have the resources or expertise to provide authorised officers under the Protection of the Environment Operations Act with the necessary capacity building activities to ensure they are able to ensure compliance with the Ministerial Requirements and Guidelines. To address this delegates recommended that as well as residents being required to seek pre-approval for the construction of temporary protection works they must also be required to demonstrate compliance with the Ministerial Requirements and Guidelines for the life of the temporary works.

Recommendations:
1. Proof of compliance with the Ministerial Requirements and Guidelines for the life of the temporary works be the responsibility of the landowner.
2. The Ministerial Requirements and Guidelines be amended to allow councils to seek proof of compliance at the expense of the resident.

Additional to the ongoing cost and resource implications for councils in enforcing compliance with the Ministerial Requirements and Guidelines delegates raised a number of other issues associated construction of emergency temporary protection works. These included:

Source of sand for temporary works: Where sufficient sand cannot be sourced on the property of the resident constructing the temporary protection works, owners will be required to import sand from an off-site external source. This creates a number of practical issues related to sourcing the necessary volumes of sand and ensuring the materials sourced closely matched the existing sand on the beach.

Further, the potential for contaminated sand to be used in either sand bagging or nourishment activities is not addressed in the Ministerial Requirements or Guidelines. To rectify this delegates recommended that:

- All materials used for sand bagging or nourishment be waste Virgin Excavated Natural Material (VENM) as identified in Schedule 1 of the Protection of the Environment and Operations Act 1997; and
- Suppliers of sand to residents or coastal authorities be required to demonstrate a “chain of custody” that complies with an associated Australian Standard (similar to the Forestry Chain of Custody - AS 4707) that verifies the origin of the sand, its appropriateness for placement on a beach environment and its quality (ie not being contaminated).

Removal of works: The Ministerial Requirements note that removal of works and rehabilitation of the site are to occur through “geotextile containers or plastic sand bags are to be opened up and removed from the site with the sand returned to be beach system”. Delegates believed that returning sand to the beach system should only be undertaken with the approval of councils. If a council does not approve of the sand being returned to the beach system the residents should

be required to transport the materials away from the beach. The final destination of the sand should be identified during a pre-approval processes.

Remediation of site: Damage done to the beach environments or public lands during construction of the temporary works, their maintenance and removal is to be remediated to as near as possible the pre existing condition. For this to be meaningfully achieved DECCW must establish:

- How pre-existing conditions are determined by the resident and the appropriate Coastal Authority;
- Responsibility for monitoring and ensuring completion and maintenance of remediation works.

Informing other owners: From the guidelines it is unclear what responsibility landowners building emergency temporary construction works have to inform their neighbours of the works. Even temporary works are likely to have a visual and physical impact on surrounding properties. DECCW must provide clear and prescriptive criteria for residents to apply when informing their neighbours of the intent to construct emergency temporary protection works. Such activities should be integrated into a pre-approval process for works.

Recommendations:

1. All materials used for sand bagging or nourishment be waste Virgin Excavated Natural Material (VENM) as identified in Schedule 1 of the Protection of the Environment and Operations Act 1997.
2. Suppliers of sand to residents or costal authorities be required to demonstrate a “chain of custody” that complies with an associated Australian Standard (similar to the Forestry Chain of Custody - AS 4707) that verifies the origin of the sand, its appropriateness for placement on a beach environment and its quality (ie not being contaminated).
3. Returning sand to the beach system should only be undertaken with the approval of councils.
4. If a council does not approve of sand being returned to the beach system residents should be required to transport the materials away from the beach. The final destination of the sand should be identified during a pre approval processes.
5. DECCW must establish:
    - How pre-existing conditions are determined by the resident and the appropriate Coastal Authority;
    - Responsibility for monitoring and ensuring completion of remediation works.
6. DECCW must provide clear and prescriptive criteria for residents to apply when informing their neighbours of the intent to construct emergency temporary protection works. Such activities should be integrated into a pre-approval process for works.

Communication and education

The issue of communicating the existence and intent of the Ministerial Requirements and Guidelines to residents and business affected by coastal erosion was raised as a major area of concern. Delegates believed the potential for miss-information (shared between residents’) and misunderstanding (residents’ miss-interpreting the Requirements and Guidelines) were very high.

This could result in residents believing they were allowed to undertake a number of actions that did not comply with the Ministerial Requirements and Guidelines. Such actions include:

- Undertaking emergency temporary protection works outside the required circumstances and triggers;
- Placing materials other than sand or geotextile bags on the beach;
- Taking sand off the beach for temporary protection works; and
- Not maintaining the integrity of temporary works.

To address this, and prevent councils having to explain the Ministerial Requirements and Guidelines on a resident by resident basis, it was recommended that the DECCW work with coastal councils on the production of the necessary educational materials. Such materials could include:

- Fact sheets;
- Frequently asked questions and answers of staff on council inquiry counters;
- Consultancy briefs for design of emergency works

These types of material were required to ensure that the Ministerial Requirements and Guidelines were communicated consistently and appropriately.

2. **Infrastructure SEPP and Permanent Protection Works**
From the information provided it was noted that the following development assessment classifications were in place for temporary and permanent protection works.

Exempt development: emergency temporary protection works for up to 12 months.
Complying development: works in place for no longer than 5 years.
Development permitted with consent: permanent protection works.

Overall delegates believed that all protection works (both temporary and permanent) should require approval from the appropriate Coastal Authority. Considering the dynamic nature of coastal processes and the complex engineering requirements for building in the coastal zone delegates believed the application of exempt and complying development standards was not appropriate. As a result is was recommended that all works be reclassified to development permitted with consent.

Recommendation
All temporary and permanent protection works be reclassified to development permitted with consent.

Much of the conversation surrounding Infrastructure SEPP and Permanent Protection Works the focussed on the appropriateness of Joint Regional Planning Panels approving the works and identification of appropriate coastal service fee.

Joint Regional Planning Panels (JRPPs)
Although it was considered that JRPPs had the potential to remove some of the politics surrounding the approval of protection works, delegates believed approval of both temporary and permanent protection works should remain with the appropriate coastal authority. It was observed that as councils would be responsible for enforcing compliance with the necessary legislation and regulation when works are approved by JRPPs councils should be the consent authority.

Additionally, delegates sought clarification on the following issues:

1. If a decision made by a JRPP was challenged in the Land and Environment Court, who will be responsible for defending the decision.

2. If works approved by a JRPP are proven to have had unforseen impacts of surrounding properties and the environment who would be:
    - Liable for damages caused.
    - Responsible for remediation.

Recommendations

1. Coastal Authorities, such as councils retain approval powers for temporary and permanent protection works
2. The NSW Department of Planning clarify the following issues:
    1. If a decision made by a JRPP was challenged in the Land and Environment Court, who will be responsible for defending the decision.
    2. If works approved by a JRPP are proven to have had unforseen impacts of surrounding properties and the environment who would be:
        - Liable for damages caused.
        - Responsible for remediation.

Coastal Service Fee

The Coastal Service Fee is intended to allow councils the ability to levy land owners who are benefiting from long term protection works for the maintenance of the works and management of off-site impacts. While delegates believed there was some merit to a Coastal Service Fee, further guidance or consideration was required for the following issues:

Identifying the appropriate fee

At the time of the meeting it was understood that DECCW would be providing councils with a framework and tools to assist in identifying the beneficiaries from works as well as the appropriate charges. Delegates believed such frameworks and tools should provide guidance on the following issues:

- Identifying the broad range of residents and businesses who benefit from maintenance works such as beach nourishment.
- Identifying the level of protection provided to public assets and infrastructure from private protection works.
- What actions councils should undertake if they recognise that a Coastal Service Fee is not adequate.
- Communicating the Coastal Service Fee to all residents within the LGA.

Recommendation:

The frameworks and tools developed should provide guidance on the Coastal Service Fee to address the following issues:

- Identifying the broad range of residents and businesses who benefit from maintenance works such as beach nourishment.
- Identifying the level of protection provided to public assets and infrastructure from private protection works.
- Communicating the Coastal Service Fee to all residents within the LGA.

Delegates also raised concern with the following aspects of the application of a Coastal Service Fee:

Provision of a Coastal Service Fee charges within 30 days: The requirement for councils to provide an estimate of the Coastal Service Fee within 30 days or request from a resident. It was noted that councils did not have the expertise or resources to meet such a deadline. Therefore the expectation that a councils provide a landholder with the value of a proposed coastal service fee within 30 days be withdrawn.

Challenging nominated Coastal Service Fee charges: The option for residents to appeal to the Land and Environment Court for a revised Coastal Service with if they are unhappy with the amount nominated by a council. It was felt this would place an unnecessary cost burden on to councils that could be removed if a nominated Minister (Such as the Ministers for Environment or Local Government) were responsible for approving proposed fees.

Conclusion
Following the discussion it was concluded that delegates had a number of concerns with the intent and implementation of the Ministerial Requirements and Guidelines as well as the Coastal Protection and other Legislation Amendment Bill. As a result it was resolved that:

The SCCG would formally request the NSW Minister for Planning provide further time for consultation in relation to the "*Coastal Protection and other Legislation Amendment Bill 2010";* and the associated "*Minister's requirements for Temporary Coastal Protection Works";* and the *"Guide to the Statutory Requirements for Temporary Coastal Protection Works".*

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4 November 2010 CM056-10

All Mayors
SCCG Member Councils

cc. All General Managers, SCCG Member Councils

Re: SCCG Information Session - Reforms to coastal management in NSW

The NSW Government has developed the coastal erosion package to provide the State Government and Councils with guidelines and tools to deal with the challenges of coastal erosion. The key elements of this reform include the *Coastal Protection and Other Legislation Amendment Bill 2010* and a series of supporting documents.

Following the passing of the *Coastal Protection and Other Legislation Amendment Bill 2010* by the NSW Parliament on the 20th of October 2010 the SCCG is facilitating an information session on the reforms to coastal management in NSW to assist Member Councils understand the intent and implementation of these reforms. Topics to be discussed include the *Coastal Protection and other Legislation Amendment Bill* and supporting documents, the NSW Coastal Panel as well as some of the technical, legal and implementation considerations associated with the reforms.

The information session details are:
What: Information Session - Reforms to coastal management in NSW
Where: Southern Function Room, Level 4 Town Hall House, 456 Kent Street, Sydney
When: 9am – 2pm Monday 29 November 2010

The reforms outlined in the *Coastal Protection and Other Legislation Amendment Bill 2010* and information contained in the supporting documents apply to all coastal areas of NSW, including the NSW Coastal Zone, as well as the Hawkesbury, Sydney Harbour and Botany Bay. The SCCG has been actively involved in the consultation phase of the reforms and has produced the following submission to the following documents:

- Draft Minister's Requirements under the Coastal Protection Act 1979
- Draft Guidelines for preparing Coastal Zone Management Plans;
- Draft Guide for Authorised officers under the Coastal Protection Act 1979; and
- Draft Guide to the statutory requirements for emergency coastal protection works.

More information about the reforms can be found at:
www.environment.nsw.gov.au/coasts/coastalerosionmgmt.htm

The SCCG would appreciate if you could ensure this information is forwarded to the appropriate people within your council. The SCCG Secretariat will liaise with our Councillor and Staff Delegates in nominating the appropriate planning, environment, asset management and senior executive delegates to participate in the workshop. I trust that the information provided in this letter will receive appropriate attention. If you wish to discuss any matter in this correspondence, please contact SCCG Senior Coastal Projects Officer, Craig Morrison on (02) 9246 7702 or craig@sydneycoastalcouncils.com.au

Yours sincerely,

Cr. Wendy McMurdo
Chairperson

Sydney Coastal Councils Group Information Session
Reforms to coastal management in NSW

Monday 29 November 2010

Level 4, Southern Function Room
456 Kent Street Sydney

The Sydney Coastal Councils Group is facilitating this information session to provide information to Member Councils on the reforms to coastal management in NSW. Topics to be discussed at this information session include the Coastal Protection and other Legislation Amendment Bill and supporting documents, the NSW Coastal Panel as well as some of the legal and implementation considerations associated with the reforms to coastal erosion management in NSW.

Agenda

9.15am	**Introduction and Welcome** Cr. Wendy McMurdo – Chair Sydney Coastal Councils Group
9.25am	**Overview: Reforms to coastal management in NSW** (The Bill and supporting documents, funding and implementation, key tasks for councils) Mike Sharpin - NSW Department of Environment Climate Change and Water
10.10am	Questions
10.25am	**The LGSA Perspective on the Coastal Protection and other Legislation Amendment Bill and supporting documents** Mr Robert Verhey - NSW LGSA
10.50am	Questions
11.00am	**Morning Tea**
11.25am	**Engineering, management and implementation considerations - Guidelines for the preparation of Coastal Zone Management Plan** Doug Lord - Coastal Environment Pty Ltd
11.50pm	Questions
12.00pm	**Legal Considerations - *Coastal Protection and other Legislation Amendment Bill*** Kirston Gerathy- HWL Ebsworth Lawyers
12.25pm	Questions
12.35pm	**Panel Discussion**
1.15pm	**Forum Close and Lunch**

To RSVP: Email events@sydneycoastalcouncils.com.au or contact Craig Morrison on (02) 9246 7702 by 22 November 2010.

More information about the Reforms to coastal erosion management in NSW can be found at: www.environment.nsw.gov.au/coasts/coastalerosionmgmt.htm

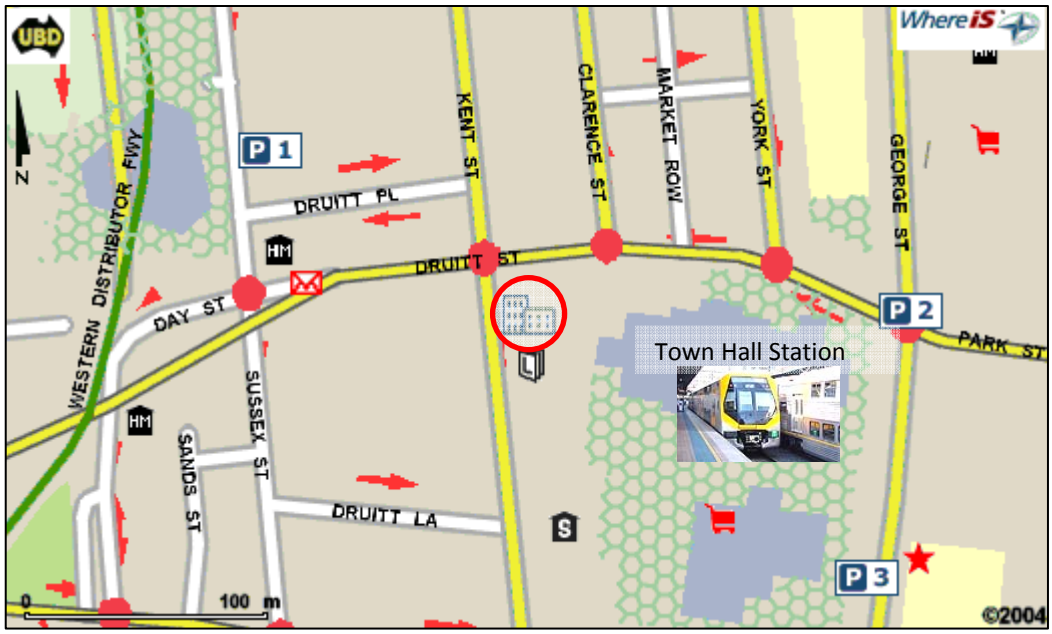
WORSKHOP LOCATION

Sydney Coastal Councils Group Information Session
Reforms to coastal erosion management in NSW

Southern Function Room
Level 4 Town Hall House
456 Kent Street, Sydney

Please note: Town Hall House is a security building, to gain access to the Southern Function Room on Level 4 please go to the Concierge Desk on Level 1 and advise them that you are there for a meeting with the Sydney Coastal Councils Group in the Southern Function Room on Level 4. You will then be given directions to the Southern Function Room.

Parking is limited so public transport is recommended.



The Coastal Protection and Other Legislation Amendment Act 2010

Where to from here?

Mike Sharpin, DECCW

1

Presentation structure

- Overview of the *Coastal Protection and Other Legislation Amendment Act 2010*
- Next steps – implementation
- Questions

Aims of the Coastal Amendment Act

- Improves and extends current coastal erosion management arrangements
- Provides additional options for councils & landowners
- Reinforces coastal zone management planning - develop solutions for local erosion problems
- Framework legislation – does not seek to solve erosion problems at individual locations.

What the Amendment Act does

- Allows landowners to place emergency coastal protection works under strict conditions
- Requires consent authorities assessing seawall DA's to be satisfied that any erosion impacts will be managed
- Allows councils to levy a coastal protection service charge on land where owners voluntarily constructed coastal protection works

What the Amendment Act does

- Establishes a NSW Coastal Panel to provide expert advice to the Minister and councils
- Improves coastal zone management planning arrangements
- Strengthens authorised officer powers and order powers; increases penalties.
- Enhances council statutory exemptions from liability for "good faith" coastal actions

5

The next steps…

6

Act commencement arrangements

- 15 December - Coastal Panel and coastal zone management planning provisions
- 1 January 2011 - most remaining provisions of Coastal Amendment Act and Infrastructure SEPP amendments
- 25 February 2011 - s.149 certificate amendments & successor-in-title provisions

Establish NSW Coastal Panel

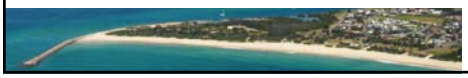
- Nominations being sought from LGSA
  - 3 members
- 3 State Government nominees being finalised
- First meeting TBC – possibly before Christmas/early 2011

Gazette statutory guidelines – 1 January

- Minister's Requirements under the Coastal Protection Act
- Guidelines for preparing coastal zone management plans
- Coastal Protection Service Charge Guidelines

CZMP Guidelines

- "Strategic guidelines" with management principles and minimum requirements
  - Link to Coastal Protection Act and s.733 Local Govt Act
- Supporting web-based technical resources
- Revised guidelines – broader focus on risk management, ecosystem health, community uses



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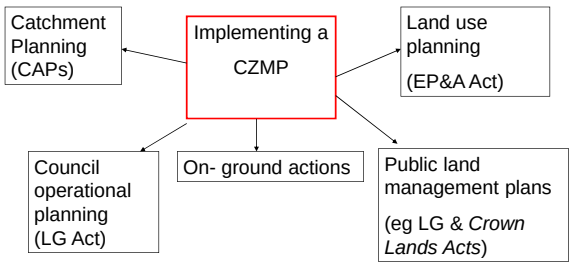
The Coastal Zone

- Act extends the definition of the coastal zone to include Sydney Harbour, Botany Bay and Hawkesbury River for:
  - Preparing coastal zone management plans
  - Coastal authorities
  - Application of s.733 Local Govt Act

CZMP Implementation



12

Finalise supporting guidelines

- Guidelines for Authorised officers
- Assessing seawall impacts (UNSW consultancy)
- Landowner guide to emergency works

Authorised officer training

- Training program being developed
  - Builds on POEO Act training
- Pilot program for DECCW staff in December
- Training available for council staff late February

Liability and authorised officers

- Authorised officers should act in “good faith”:
  - honest, no ulterior motive
  - "a genuine attempt to perform the function correctly”
- Statutory exemptions from liability for officers acting in good faith:
  - Local Govt Act – s.733
  - Civil Liability Act
- No legal action against POEO authorised officers

15

Preparing plans

- Minister to issue direction early 2011 to councils in “hot spots” to prepare:
  - Emergency action plans within 6 months
  - Coastal zone management plans within 12 months or longer if negotiated
- Grants available for councils to prepare plans

16

Further information:

DECCW website:

www.environment.nsw.gov.au/coasts/coastalerosionmgmt.htm

Website will be regularly updated

Questions?

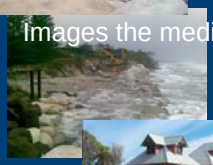
Sydney Coastal Councils Group Information Session
Reforms to Coastal Management in NSW

Monday 29 November 2010

The LGSA Perspective on the Legislation and supporting documents

Robert Verhey
Strategy Manager – Environment
Local Government and Shires Associations of NSW
Robert.verhey@lgsa.org.au

Images the media love



Everyday Coastal Zone Management

Coastal Erosion "Package"

- *NSW Sea Level Rise Policy Statement* (October 2009)
- *NSW Coastal Planning Guideline: Adapting to Sea Level Rise* (August 2010)
- *Coastal Risk Management Guide: Incorporating sea level rise benchmarks in coastal risk assessments (for exposed coastal areas)* (August 2010)
- *Floodplain Risk Management Guide: Incorporating sea level rise benchmarks in coastal risk assessments (for estuary situations)* (August 2010)
- *Minister's Requirements under the Coastal Protection Act 1979*
- *A Guide to the Statutory Requirements for Emergency Coastal Protection Works*
- *A guide for Authorised Officers under the Coastal Protection Act*
- *Guidelines for preparing coastal zone management plans*
- *Guidelines for assessing and managing the impacts of seawalls*
- *Coastal Protection Service Charge Guidelines*

Passage of the Bill (1)

- *Consultation Draft March 2010*
- *DECCW workshops and consultation, amendments*
- *Tabled in Parliament 11 June, intention to debate 22 June*
- *Local Government called for further consultation*
- *Debate in Parliament deferred until Spring Session (September 2010)*
- *Local Government workshops and*
- *on-line survey (July)*
- *Local Government draft response (6 August)*

Passage of the Bill (2)

- *Local Government workshops and on-line survey (July)*
- *Local Government draft response to Minister / DECCW (6 August)*
- *Further negotiation of some detail*
- *Bill re-introduced into Lower House on 22 September*
- *Some amendments (from Cross Benches) in Upper House*
- *Assent 27 September 2010*
- *Commencement date tbc*
- *Guidelines being finalised*

Seven Workshops in July

Site visits

Issues for discussion

1. Coastal Panel
2. Coastal Zone Management Plans
3. Emergency Coastal Protection Works
4. Placement /stockpiling of emergency works on public land
5. Orders and Penalties
6. Property Charges and Fees
7. Training of council Authorized officers
8. Statutory exemptions from liability for councils, officers
9. Broad comments about the “Package” of coastal reforms

Issues for discussion (1)

Coastal Panel

The Bill includes a provision to establish a Coastal Panel with an independent chair, three Local Government representatives (endorsed by LGSA) and 3 state agency representatives. This Panel can act as an advisory body to the Minister and a consent body for development applications where there is no Coastal Zone Management Plan (CZMP) in place.

What councils told us…….

Council Views on Coastal Panel…….

- Generally supported, preferred to JRPPs,
- Could be beneficial for smaller councils lacking expertise,
- Should be “arms length” from DECCW,
- Should have role in Part 3A developments,
- Some confusion about interactions between DECCW, Coastal Panel and councils.

Status:
LGSA has been approached to provide nominations

Issues for discussion (2)

Coastal Zone Management Plans

The Coastal Protection Act currently provides for the Minister to approve Coastal zone management plans prepared by councils. The Act requires these plans to be prepared in accordance with the Minister's guidelines (which will be prepared in consultation with councils). The Bill proposes to change the Minister's role to certifying that the plan has been prepared in accordance with the Act. The Minister may seek the Coastal Panel's advice when certifying plans.

What councils told us…….

Council Views on CZMP…..

- Generally supported,
- Timeliness of certification process?
- Does “certification” expose councils more than approval?
- Definition of “coastal zone”, to include estuaries?
- Need for data to enable preparation

Status:
- CZMP Guidelines prepared, generally well accepted
- Reasonable emphasis on estuaries

Issues for discussion (3)

Emergency Coastal Protection Works

One of the main changes proposed in the Bill relates to the ability of landowners to protect their properties

What councils told us…….

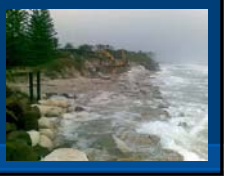
Council Views on emergency Works……(1)

- Preferred to previous proposal (exempt development)
- Issues about workability:
- Neighbour impacts,
- Removal after 12 months could be hard to enforce,
- 10 metre Threshold may be meaningless if 25 metres lost in one storm,
- Certificate should be on property, not owner,
- Designated sites, five properties or more, what about 1-4 properties?
- Effectiveness of 1.5 metre sandbag wall in many situations: false sense of security?
- Complexity for strata titles,
- Potential for financial bond ?
- Clarity re SES overruling in emergency,
- Liability issues for careless placement / movement.
- Very reactive, why not a proactive approach given that it only involves some 200 properties?

Council Views on emergency Works……(2)

Status

- Still concerns that removal after 12 months could be hard to enforce,
- 10 metre Threshold has been relaxed,
- Certificate on property, not owner,
- Initially gazetted Minister's requirements will eventually become Regulation (Sept 2011)



Issues for discussion (4)

Placement /stockpiling of emergency works on public land

Under the provisions in the Bill, Emergency Works (sand or sandbags) can be placed / stockpiled on public land, provided risk to public is minimized and public access is maintained. The use of public land is also controlled by any requirements in council's emergency sub-plan, any certificate conditions and the Minister's Requirements.

What councils told us…….

Council views on stockpiling on public land

- Generally not supported in principle,
- Generally not well understood,
- Potential liability and damage to vegetation,
- Council should be able to charge a fee for this.

Status

- No changes to this section

Issues for discussion (5)

Orders and Penalties

1. Orders may be issued by council in relation to illegal structures / works, emergency works on private and public land. An Administrative Charge similar to POEO ($320) can accompany the issuing of an Order
2. An Administrative Charge similar to POEO (circa $440) can accompany the issuing of an Order
3. Penalty provisions apply for failure to comply with an Order, $247,500 plus $22,000 per day, double for corporations
4. The regulation will specify the amount payable for breaches of the Act where an authorised officer issues a penalty notice instead of taking court action
5. A new owner is bound by Order provisions if the property changes hands
6. Penalties apply for general breaches of the Act up to $247,500 ($495,000 for a corporation) for an Act breach and $22,000 ($44,000 for a corp) for a Reg breach.(cl 58, page 30)
7. Under the proposed Bill, "a person who wilfully delays, threatens, intimidates or obstructs an authorised officer in the exercise of the authorised officer's powers under this Act is guilty of an offence ($11,000 individual, $55,000 corporation)

What councils told us…….

Council views on orders and penalties

- Increase in fines and notice fees generally supported,
- Should also apply to existing illegal works,
- Should be non-appealable,
- If council removes, cost recovery fee should become a charge on the land

Status
- No changes to this section
- Ongoing concerns about enforceability

Issues for discussion (6)

Property Charges and Fees

1. Council can require a property based coastal management fee (for restoration / maintenance) on land where the current or former landowner has constructed protection works or jointly constructed these works with council
2. These charges can be set "at cost" (similar to domestic waste charge)
3. Charges cannot be levied for existing works / maintenance, only for maintenance of works commenced after passing of Act
4. These charges cannot be applied where council is the sole funder of works (must be council / landholder venture)
5. The landowner can request council to provide information about their contribution or independent report on usage of levy, but council can charge "at cost" fees for providing this information.

What councils told us…….

Council views on property charges and fees

- Should be for construction, upgrading as well as maintenance,
- Illogical ability to apply fee only if landowners are sole / joint funders of works,
- Lack of clarity about who are beneficiaries of infrastructure

Status
- This will be a problematic area, probably "too hard"
- Guidelines very complex and circuitous

Issues for discussion (7)

Training of council Authorized officers

- **Council can authorize an officer who has undergone training, and issue an ID card**
- **Training for authorized officers will be provided by State Government**
- **Powers can be exercised in the same way as POEO authorized officers**

What councils told us…….

Council views on training of authorised officers

- Supported,
- Should be offered at no cost,
- Should be offered regionally.

Status
- No changes to this section

Issues for discussion (8)

Statutory exemptions from liability for councils, officers

- **The Bill proposes that provisions of Section 733 of the Local Government Act will be extended to cover acts / omissions under Coastal Protection Act, provided those actions / omissions are in good faith.**
- **This also covers any acts / omissions by council officers including issuing orders**

What councils told us…….

Council views on statutory exemptions

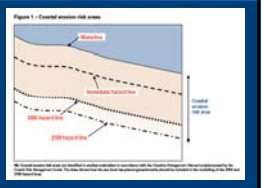
Local Government Association of NSW

Shires Association of NSW

- Generally supported,
- Need for clarity about how it applies, and what constitutes “good faith”.

Status

- No changes to this section



Local Government Association of NSW

Shires Association of NSW

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Reforms to Coastal Management in NSW

SCCG Information Session 19th November 2010

Outline

- Background to coastal zone management in NSW
- What the amendments are intended to achieve
- Guideline for authorised officers
- Engineering concerns
- Conclusions

Coastal Management in NSW (1)

Background

- Extreme damage along the NSW coast in 1974
- Coastal Engineering Branch formed within then PWD mid 1970s
- NSW Coastal Protection Act 1979
- BIP program
- Coastal Hazards Policy 1987
- Egger ats Gosford Council 1988
- Coastal and Estuary Management Programs with funding of approximately $7m per annum 1990
- Coastline Management Manual and Estuary Management Manual 1990
- IE Aust Guidelines on Climate Change 1990

Coastal Management in NSW (2)

Since 1990

- Relatively calm period with limited storm events affecting the NSW coast
- NSW Coastal Policy 1990 and revision 1997
- Comprehensive Coastal Assessment 2002
- Government restructures, since 2000(DLWC, DIPNR, DSNR, DNR, DECC, DECCW) loss of human resources and fragmentation of responsibilities.
- Additional internal restructures resulting in loss of expertise, corporate history and capacity.

Coastal Management in NSW (3)

Current Coastal Reforms

- Internal Review commenced in early 2009 within DECCW
- Announcement at the 2009 coastal conference of a suite of coastal reforms.
- Release of NSW Sea Level Rise policy in November 2009
- Draft amendment legislation and suite of guidelines
- Amendment Bill passed through the Parliament 20/10/2010
- Intention to implement the revised Act from 1st Jan 2011
- A new era in CZM for NSW

Coastal Management in NSW (4)

Current Coastal Reform Guidelines

- ***Minister's Requirements under the Coastal Protection Act 1979***
- ***A Guide to the Statutory Requirements for Emergency Coastal Protection Works***
- ***A guide for authorised officers under the Coastal Protection Act***
- ***Guidelines for preparing coastal zone management plans***
- ***Guidelines for assessing and managing the impacts of seawalls***
- ***Coastal Protection Service Charge Guidelines***

Rationale for Change (1)

Perception of the failure of the current system

- "New South Wales has an established framework for managing coastal erosion risks under the Coastal Protection Act. This sees local councils, with Government support, prepare coastal zone management plans which inform land-use planning, development controls and coastal activities. However, councils' progress on completing the plans, has been slow, with only two plans for estuaries and no plans for broader coastal areas yet completed." – First reading speech
- "Three new estuary management plans, and one new coastal management plan, were completed in 2008-09, bringing the cumulative total to 81 coastal zone management plans completed by councils in partnership with the NSW Government." - DECCW Annual Report 2008/09

Rationale for Change (2)

Perception of the failure of the current system

- Some 40 houses have been lost to erosion in recent decades and around 200 are currently under threat. - Second reading speech
- 2 homes lost since current coastal management process implemented and those were identified and planned for.
- Need to provide greater protection to local government.
- No record of a Local Government or Council officer being found liable for decisions made under a coastal zone management plan

NSW DECCW perspective

The Act, achieves a reasonable balance between the concerns of beachfront landowners threatened by coastal erosion and the community's continuing use and enjoyment of beaches.

The Act:

- Increases options available to councils when dealing with coastal erosion and unauthorised coastal protection works;
- Clarifies what landowners can do to protect their own properties, particularly in emergencies;
- Strengthens requirements for the preparation of coastal management plans;
- Creates an expert NSW Coastal Panel to advise on coastal management and approve temporary or permanent coastal protection works in some circumstances; and
- Provides additional protection for councils dealing with coastal erosion issues.

Emergency Management (1)

Proposed emergency works will not protect at risk properties

- For coastal management works to be effective they must change erosion to adjacent areas (either alongshore or seaward. Under the legislation as soon as this occur they must be removed.
- Conditions requiring certificate from a licensed engineer cannot be satisfied.
- Assuming the works can be implemented, they will not prove effective.

Emergency Management (2)

"The requirements incorporated in the guideline mean that in all probability the process to be followed in gaining approval for the installation of emergency works means that they could not be effectively constructed to satisfy their intended purpose. If they are approved, then it is the considered opinion of the Maritime Panel that the works as proposed would be ineffective in protecting property at risk. This only raises an unrealistic expectation from property owners that they may be able to protect their properties, committing them to significant expenditure with little prospect of an effective outcome. The emergency measures proposed in the amendments (and outlined in the draft Guideline) may be undertaken under the present legislation, with appropriate consideration and approval.

The reality is that the best form of emergency coastal management is to avoid the prospect. The areas currently identified as appropriate for emergency works have been long identified in NSW and the hazards well quantified. When/if this hazard is realised that should not be described as an emergency, rather it is a failure to address the issue. In general the only way in which protection strategies can be appropriately implemented is through development and implementation of a comprehensive coastal zone management plan, as is the process under the existing legislation. "

Source: Engineers Australia, Sydney Division, Maritime Panel. Letter to Minister Sartor dated 9/9/2010

Emergency Management (3)

"Without expanding on the ridiculously naïve nature of the proposed emergency management provisions in the Act, the question needs to be asked as to why they have even been included in detail in the Act at all. Ministerial regulations and guidelines/policy provide a far more appropriate vehicle for such detail. They also provide a better opportunity to remedy errors.

The only obvious argument for inclusion of emergency management provisions in the form they are presented in the Act, is the apparent public relations benefit of saying that emergency situations are covered in the Act and the cynical relief of the State in knowing that they can't be successfully installed anyway, so the State is apparently in the clear."

Source: *Gordon, 2010*

Coastal Environment

Stockton Beach, October 2010

Coastal Environment

Stockton Beach, October 2010

Coastal Environment

Stockton Beach, October 2010

Coastal Environment

Belongil Spit, November 2010

Coastal Environment

Belongil Spit, November 2010

Coastal Environment

Belongil Spit, November 2010

Coastal Environment

Belongil Spit, November 2010

Coastal Environment

Kingscliff, November 2010

Coastal Environment

Belongil Spit, November 2010

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Kingscliff, November 2010

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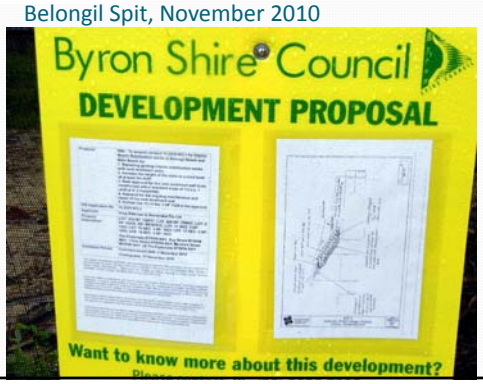
Belongil Spit, November 2010



Guideline for designated officers(1)

Responsibilities of a delegated officer

- The Act also allows for the Coastal Authority to delegate certain functions (section 9) to an authorised officer or other person specified by regulation, including its functions relating to issuing orders under Part 4D of the Act. An authorised officer appointed as a delegate of a Coastal Authority is defined as a **delegated authorised officer..**
- A Coastal Authority cannot appoint a person to be an authorised officer unless the person has completed the necessary training or competency standards set by the Minister (section 7(2)).

Guideline for designated officers(2)

Qualifications of a delegated officer

- 7(2) A Coastal Authority must not appoint a person to be an authorised officer under this section unless the person has undergone such training or has such competency as is required by the Minister.

Guideline for designated officers(3)

Coastal and Ocean Engineering Qualifications (Engineers Australia)

A qualified Coastal and Ocean Engineer is expected to give due consideration to all the natural processes involved and to be responsible for the consequence of human intervention in the near-shore zone to ensure ecologically sustainable development. It is recommended that for a person to be considered suitably qualified, he or she should meet the following essential minimum requirements:

- Corporate Membership (MIEAust) of The Institution of Engineers, Australia (IEAust).
- Chartered Professional Engineer (CPEng), registered on NPER.
- Membership of the Civil College of IEAust.
- State registration where applicable, e.g. RPEQ.
- A tertiary qualification in Engineering with particular relevance to coastal and ocean engineering.
- Experience in development of coast protection strategy or investigation, design and construction of coastal and ocean works.
- Experience in environmental assessment with particular emphasis on coastal and ocean engineering.
- Knowledge of the processes and methods involved in coastal and ocean engineering.

In addition to the above, further desirable requirements include:

- Post-graduate qualifications and/or studies in coastal and ocean engineering or related fields.
- Experience and knowledge in the earth sciences relevant to coastal management.

Engineering Concerns (1)

Inequitable treatment of coastal hazards

- Responsibility for climate change does not lie with individual property owners.
- Recession and coastal hazards exist separate to climate change.
- In many instances previous actions and poor planning have increased individual exposure.
- Neighbour vs neighbour, user vs user, and community divisions.
- No insurance for coastal properties at risk.

Engineering Concerns (2)

Exposes local government

- Authorised officers may not have the professional training to make decisions.
- Removes responsibility from State and increases responsibility of local government.
- "An important, but somewhat down played, change to the Act is the provision that the Minister is no longer the Approval Authority for coastal management plans, simply the Certifying Authority. That is, the Minister no longer takes responsibility for the plan but rather simply certifies that it has been carried out in accordance with required process. It can therefore be argued the State has abdicated rather than delegated its responsibility for coastal management." **Gordon, 2010**

Engineering Concerns (3)

Opens a window of opportunity

- Increased urgency to prepare and implement management strategies while continuing to reduce available funding and technical support for local government and communities.
- Resident sponsored works, emergency management works are not achievable in the long term.
- Estuaries are now divorced from the coast in terms of their management.
- We will not understand how the suite of guidelines interact and how they will be applied until after they are put into effect.

Engineering Concerns (4)

Short term move to poor management practice

- Movement away from Integrated Coastal Zone Management and ESD principles.
- Loss of a well accepted and understood risk based approach to planning for coastal areas.
- "The practicality of permitting an individual property owner to initiate protective strategies outside of the Local Government Coastal Management Planning process is of real concern. Worldwide, the current trend within coastal management is towards effective use and implementation of Integrated Coastal Zone Management (ICZM,) which balances the competing coastal uses and issues. We believe that to take the process back to an individual issue is a retrograde step, winding back the advances made in coastal zone management over the past 20 years in NSW." (Letter to Minister Sartor from EA)

Conclusion

- Difficult to reconcile the management changes in NSW with the findings and recommendations of the Commonwealth Inquiry " ***Managing our coastal zone in a changing climate: the time to act is now***"

In response to recommendation 44 of that report the Commonwealth agreement in principle states that:

"The Australian Government recognises the need for national leadership and cooperation between all levels of government to develop an integrated, cohesive and effective national approach for the management of Australia's coastal zone."

Conclusion

We are all working for a common outcome. The immediate challenge is:

- To ensure that the guidelines and policies are finalised such that that future management of the coastal zone is based on a sound coastal process understanding.
- To ensure that poor decisions through a lack of understanding of the new process and intent, are avoided in the short term.
- To identify, question and lobby to modify aspects of the new amendments that lead to poor or inequitable outcomes.

"….none of us can fix these problems in isolation – we are all in this together."

(Julia Gillard 20th July, 2010)

Thank You

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HWL EBSWORTH LAWYERS

Coastal Protection and Planning Legislative Reform 2010

Kirston Gerathy
Partner, HWL Ebsworth Lawyers

Sydney Coastal Councils Group
29 November 2010

1. The more things change…

"Coastal management requires an integrated approach to the many and varied coastal problems and issues. The Bill provides the integrated framework for the development of Government policy on coastal management …

Experience has shown conclusively that our beaches and coastline cannot be taken for granted, and that careless development and misuse can endanger a fragile, natural system. Our coastline is a dynamic system constantly altering with the interaction of land and water. This dynamic system can have catastrophic consequences where man tries to defy nature…"

2. Policy Context

- Urban expansion and hazard management
- Base philosophy: ecologically sustainable development (**ESD**)
- Balancing competing interests in different coastal environments may mandate different solutions

3. The current framework for managing coastal development, hazards and emergencies

- *Environmental Planning and Assessment Act 1979*
- *Coastal Protection Act 1979* (**CPA**)
- *State Emergency and Rescue Management Act 1989*

4. Coastal Planning Principles

1. Assess and evaluate coastal risks taking into account the NSW sea level rise planning benchmarks.
2. Advise the public of coastal risks to ensure that informed land use planning and development decision-making can occur.
3. Avoid intensifying land use in coastal risk areas through appropriate strategic and land use planning.
4. Consider options to reduce land use intensity in coastal risk areas where feasible.
5. Minimise the exposure of development to coastal risks.
6. Implement appropriate management responses and adaptation strategies, with consideration for the environmental, social and economic impacts of each option.

5. The Coast, the Courts and Climate Change

- Judicial response in a planning context
- "ESD provides a framework for reconciling, and where necessary, making choices between competing demands for access to the resources of the coastal zone" (NSW Coastal Policy)
  - *Walker v Minister for Planning* (Sandon Point): increased flood risk due to climate change
  - *Aldous v Greater Taree City Council* (Old Bar): climate change induced coastal erosion and the principles of ESD
  - *Gippsland Coastal Board v South Gippsland SC* (VIC): application of the precautionary principle seal level rise, climate change
  - *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* (SA): coastal hazards, sea level rise and the need to preserve an ecologically sensitive area
  - *Taip v East Gippsland Shire Council* (28 June 2010) (VIC): vulnerability of proposed development to climate change impacts considered against State policy and other relevant planning materials
- Past responses to emergency responses – civil enforcement

6. Coastal Reform Package

- Government put forward a number of documents starting in early 2009, including:
  - Draft Sea Level Rise Policy
  - Draft Coastal Planning Guidelines
  - Draft Coastal Risk Management Guide: Incorporating Sea level rise benchmarks in coastal risk assessment
  - Draft Flood Management Guide
- Sea Level Rise Policy statement, adopted in October 2009
- Coastal Planning Guideline: Adapting to Sea Level Rise, adopted in August 2010
- In early 2010, the State prepared the *Coastal Protection and Other Legislation Amendment Bill 2010*
  - Proposed a number of changes, in terms of emergency coastal protection works, long term coastal protection works, liability of local councils and ability of local councils to impose charges for coastal protection services
  - Technical and regulatory information foreshadowed to be contained in a series of guidelines prepared by DECCW – consultation drafts out and Act passed 21 October 2010.

7. Emergency Coastal Protection Works

Emergency coastal protection works (**ECPW**) are defined as:

> "works comprising the placement of the following material, in compliance with the requirements of this section, on a beach, or a sand dune adjacent to a beach, to mitigate the effects of wave erosion on land:
>
> a. sand, or fabric bags filled with sand, (other than sand taken from a beach or a sand dune adjacent to a beach),
>
> b. other objects or material prescribed by the regulations (other than rocks, concrete, construction waste or other debris)."

8. Certificates under Division 2

- Section 55P(2)(a) CPA
- Process
- Conditions
- Criteria
- No appeal/review
- Mechanism to enforce requirements of certificates
- Final form of Act amended to precent certificate shopping

9. ECPWs during erosion or when erosion is imminent

- Section 55P(2)(b) CPA:

  the material must be placed when:
  (i) beach erosion is occurring, or
  (ii) beach erosion is imminent, or
  (iii) it is reasonably foreseeable (because of proximity to the erosion escarpment) that beach erosion is likely to impact on a building being lawfully used for residential, commercial or community purposes.

- Draft Minister's requirements under the CPA (July 2010):

  For the purposes of section 55P(2)(b) (now (c)), it is likely that beach erosion is imminent or likely to be imminent when the distance between the most seaward part of a wall of an existing residential building or commercial building on or adjoining the site and the most landward extent of the sand dune erosion escarpment is less than 10 metres. This distance is to be confirmed in writing by a registered land surveyor or an authorised officer under the Act before the placing of works is to commence.

10. What can be protected?

Section 55P(2)(b) CP Bill used to say:

the material must be placed by or on behalf of a landowner or occupier to protect the following from damage due to the erosion:

i. a lawfully erected building,

ii. land on which a building could be lawfully erected that is zoned residential under an environmental planning instrument and is adjacent to land on which a lawfully erected building is located,

Section 55P(2)(b) CPA provides:

the material must be placed by or on behalf of a landowner to reduce the impact or likely impact from the erosion on a building being lawfully used for residential, commercial or community purposes.

11. Ministerial Requirements and Regulations

- Authorised locations
- Authorised accesses and exclusion zones
- Disturbance of dune restoration areas and vegetation (prior written approval)
- Where no form of coastal protection, lawful or unlawful exists
- Only when it is “not unsafe”

12. One shot deal

ECPW can only be placed once (s 55S CPA):

1) Works are not emergency coastal protection works for the purposes of this Act if the works are placed on a parcel of land (other than public land) on which other emergency coastal protection works had at any time previously been placed (other than works placed by an owner of adjacent land in accordance with section 55Z (2)).

2) Nothing in subsection (1) prevents the repair of emergency coastal protection works (including the replacement of components of the works) during the period allowed for the works.

13. ECPW on Public Land

- Taken to be authorised by issue of Division 2 certificate
- What does “all practical measures” mean?

14. How temporary is temporary? – Was 6 months but now 12

- Maximum period (s 55Q CPA):

(1) The maximum period allowed for emergency coastal protection works is 12 months commencing on the placement of the works.

(2) Despite subsection (1), if at the expiry of the 12-month period referred to in that subsection, a development application is pending under the *Environmental Planning and Assessment Act 1979* for consent to development for the purposes of coastal protection works on the same land, the maximum period allowed for the works ends:

(a) where, on the final determination of that development application (including any appeals relating to that application), the application is refused—21 days after that final determination, or

(b) where, on the final determination of that development application (including any appeals relating to that application), the application is granted—such further period as is specified in the consent.

(3) Works cease to be emergency coastal protection works for the purposes of this Act if the works remain in place for longer than the maximum period allowed for emergency coastal protection works under this section.

- What is the likely practical outcome?

15. Works cease to be emergency protection works

- if the works remain in place for longer than the maximum period allowed for emergency coastal protection works under section 55Q(3) CPA
- if they fail to be maintained, despite a requirement under s 55R(2) CPA
- if the landowner or occupier of the land had previously placed other emergency coastal protection works on that land (s 55S(1) CPA)
- consequences

16. Removal and restoration

- Emergency protection works must be removed from the land before the expiry of the maximum period allowed for them to be in place, and the land has to be restored in accordance with the Minister’s requirements or any regulations
- The Minister’s requirements provide that:

  “In addition to other requirements under the Act, the works are to be removed within seven days if the alignment of the sand-dune erosion escarpment adjacent to the works:

  - is located more than 3 metres landward of the works
  - is, in the opinion of an authorised officer, reasonably likely to move from public land onto private property (other than the property benefiting from the works), without the written permission of the owner, where the escarpment was not located on this property when the works were begun.” (p 5)
- If the owner/occupier does not comply with this section, then the Coastal Authority may remove the emergency protection works, restore the land and recover the costs from the owner/occupier.
- Failure to remove and restore is an offence
- No civil enforcement mechanism

17. Orders Regime for ECPWs (S.55ZC)

- Remove/alter/repair/restore private land where there is:
  - Increased erosion
  - Unreasonably limit public access
  - Threat to public safety
  - Cease to be ECPW
- Restore assets and vegetation on public land
- Orders functions only exercised with notice to issuer of certificate and sign off by Director General
- Failure to comply is an offence
- No appeal against order
- Coastal Authority can undertake works the subject of the order and recover costs
- No civil enforcement mechanism
- No third party rights to enforce removal or restoration of affected land
- Successors in title
- Orders for restoration of adjacent land

18. Long Term CPW

- "Activities or works to reduce impact on coastal hazards on land adjacent to tidal waters and includes seawalls, revetments, groynes and beach nourishment"
- s.55M – introduces heads of consideration as preconditions
- ISEPP – March 2010 cl.129 A
- s.55M –will apply to any activities/works that can be characterised as CPW (definitions not the same)
- Current LEPs – erosion protection works
- Standard instrument – problem – erosion protection works under mandatory zoning provisions are not presently permissible in residential zones

19. Issues with s 55M pre-conditions

- Satisfactory arrangements for life of works for: restoration of beach if increased erosion is caused, and maintenance of work – not "erosion is likely to be caused".
- Secure adequate funding for restoration and maintenance by legally binding obligations
- By payment of charge for council for coastal protection services
- 1st problem – precondition to granting consent is satisfaction as to arrangements by imposition of conditions or otherwise. Cart before horse – conditions can be modified/appealed.

20. Coastal Protection Services and Levies

- CPS – defined in LG Act – "services to maintain/repair, manage impacts of such works"
- Manage impacts – beach scraping, nourishment, works on Crown land.
- Not mandatory to provide CPS – issues for councils such as funding, technical resources – other permits
- If provide CPS – statutory obligations arise to maintain and manage to standards and criteria (s.41313) – if don't – possibly affect liability exemption under s.733 –potentially liable in perpetuity if commence provision

21. Potential conflict

- Between discretion to provide CPS and proposed consent requirements in s.55M (which are preconditions)
- Coastal panel (and/or JRPP) will/may have functions conferred on it as consent authority
- Panel is not empowered to require a council to provide CPS nor is court on appeal
- Fall back on "legally binding obligations" – whatever they are:
  - Does applicant have to "propose" as part of DA what the mechanism is?
  - Shifts onus to councils to come up with mechanism

22. Levies

- Pre-existing works – lawful and unlawful – can only be imposed with consent of owner
- lawful works which cause impact are protected
- Can't impose levy if maintenance is a condition of consent and maintenance not carried out by council
- Position in respect of pre-existing works is understandable – but may well increase likelihood that owners who can be levied will appeal the amount of the annual service charge.
- Successors in title and funding sources

23. CZMPs

- s.55B expands definition of coastal zone – land adjoining Sydney Harbour, Hawkesbury, Botany Bay
- Requirement now they be "certified" by minister – not "approved" – approval connotes endorsement
- Introduces additional matters to be addressed in CZMP – climate change and maintenance and management of long term CPW
- Guidelines say CZMP are to provide for proposed funding arrangement for landowners
- Must be in accordance with gazetted guides – draft guides differ significantly from existing manual
- Flow-on impact on s 733 defence

24. CZMPs (cont'd)

- CZMP/breaches can be enforced by civil proceedings in LEC (s.55L). Irrespective of what CZMP says about long term CPW or EPW – other provisions prevail – exempt/complying under ISEPP can be approved and undertaken irrespective of CZMP provisions

25. s.733

- s.733 has been expanded
- Benefit in s.733 is that the expanded list does not purport to limit the general exemption – an advice provided or act done/omitted in good faith insofar as it relates to the likelihood of land in coastal zone being affected by a coastline hazard as described in the manual

27. Benchmarking Effectiveness

Objects of *Coastal Protection Act 1979*:

(a) to protect, enhance, maintain and restore the environment of the coastal region, its associated ecosystems, ecological processes and biological diversity, and its water quality, and
(b) to encourage, promote and secure the orderly and balanced utilisation and conservation of the coastal region and its natural and man-made resources, having regard to the principles of ecologically sustainable development, and
(c) to recognise and foster the significant social and economic benefits to the State that result from a sustainable coastal environment, including:
  (i) benefits to the environment, and
  (ii) benefits to urban communities, fisheries, industry and recreation, and
  (iii) benefits to culture and heritage, and
  (iv) benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water, and
(d) to promote public pedestrian access to the coastal region and recognise the public's right to access, and
(e) to provide for the acquisition of land in the coastal region to promote the protection, enhancement, maintenance and restoration of the environment of the coastal region, and
(f) to recognise the role of the community, as a partner with government, in resolving issues relating to the protection of the coastal environment, and
(g) to ensure co-ordination of the policies and activities of the Government and public authorities relating to the coastal region and to facilitate the proper integration of their management activities, and
(h) to encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise, and
(i) to promote beach amenity.

28. Crystal Ball Gazing

- Positives in a proactive legal framework
- Some issues
- Inconsistency in definitions and terms
- Reliance on guidelines which do not have statutory weight

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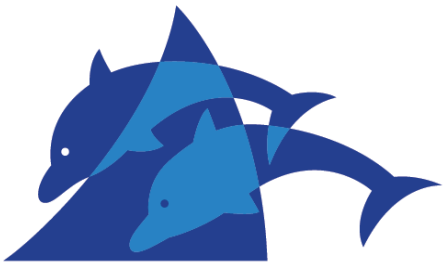

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