



# SYDNEY COASTAL COUNCILS GROUP INC.

councils **caring** for the coastal environment

## SUBMISSION

# Coastal Management Reforms

February 2016

To: Coastal Reforms Team  
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# 1 Introduction

The Sydney Coastal Councils Group (SCCG) is thankful for the opportunity to contribute to the development of the proposed new coastal management framework for NSW. These reforms provide a once in a generation opportunity to instil the necessary whole of government partnerships required to achieve the Bill's aim to "manage the coastal environment of NSW consistent with the principles of ecological sustainable development for the social, cultural and economic well-being of the people of the State".

Following the completion of stage 1 coastal reforms the Government has now released components of the stage 2 coastal reforms to include:

- Draft Coastal Management Bill, 2015),
- An Explanation of Intended Effect for the proposed new Coastal Management State Environmental Planning Policy (SEPP), and
- Key elements of the draft Coastal Management Manual.

The SCCG is pleased to note the clear recognition by the Government that improvements to the way we manage the NSW coast now and into the future are required.

We are strongly supportive of the Government's recognition that the NSW coast (including estuarine areas) is dynamic, ambulatory, valuable and often highly contested and controversial. We strongly agree that coastal management and planning in NSW must be consistent with the principles of Ecologically Sustainable Development and that any improved management response must focus on the proactive sustainable management of hazards and the ecological integrity of the coast rather than protection methods.

The SCCG strongly supports the essential need to embed coastal management into the State's land use planning framework while ensuring:

- Protection of coastal processes and the enhancement of environmental, cultural and ecological values of the coast
- Maintenance of public access and protection of coastal amenity, natural character and use
- Recognition of the need to manage both present and future coastal hazards taking into account the effects of climate change
- Both local and regional scale effects of coastal processes are considered and that cross-council and state agency collaboration is realised
- Community engagement and participation in the development and implementation of coastal management and planning strategies for the coast.

We are deeply concerned however that the proposed framework in its current form fails to adequately address the fundamental need to enhance the whole of government partnership approach necessary to ensure the sustainable management of the coast and achieve the objectives of Bill.

Of particular concern is the fact that the current proposed reforms continue recent attempts (e.g. 2010 Coastal Reforms) to fundamentally shift responsibility for coastal management to local government. The proposed framework focusses on those areas which are under the control of local government; and proposes enforceable obligations to implement Coastal Management Programs on local government and that Public

authorities only have to “have regard to” local governments’ Coastal Management Programs when exercising their functions.

This approach neglects the fact that the majority of the NSW coast is under public ownership, and that the State holds many responsibilities and has enormous economic interests in coastal NSW. This key limitation of the proposed new framework requires urgent attention.

Without the provision by the State of a clear understanding of the current and future challenges facing the coast, and a comprehensive and transparent review of the current management and planning regimes in place, the SCCG has difficulty understanding how these new reforms deal with many of the legacy coordination, integration, management, vulnerability, land use planning and inadequate funding issues affecting our coast.

Sea levels are rising and coastal foreshores will continue to recede at increasing rates, inundation will escalate and pressures for protection from some sections of the community and the relocation of development as the preferred approach by other sections will increase. Unfortunately it is hard to see how the current reforms will effectively address the increasing conflicts of the numerous vested interests and instil the essential, and more equitable partnership with the State and the NSW community.

This submission provides detailed responses to each of the three documents released for public consultation to date. Comments and recommendations are made separately and in detail to each of these three documents:

Section 4.1 [Response to the draft Coastal Management Bill](#)

Section 4.2 [Response to the Explanation of Intended Effect for the Proposed New Coastal Management State Environmental Planning Policy \(SEPP\)](#) and

Section 4.3 [Response to the draft Coastal Management Manual](#)

Given the level of detail in these documents, summaries of our concerns and recommendations are deliberately not provided. Where there is overlap or repetition between two or more of the State documents, our recommendation(s) are repeated in both or all sections for ease of reference.

We further draw your attention to the legal commentary regarding the Bill and the Coastal Management SEPP - Explanation of Intended Effect that has been provided by HWL Ebsworth Lawyers. This commentary forms part of the SCCG submission for consideration through the consultation process(es).

A key point within this legal commentary is the observation that the Bill proposes to enforce obligations on local government to implement their Coastal Management Programs (CMPs) (see Appendix 1). Caution is required with this proposed provision. This provision is a substantial intervention to local government resource allocation, and more worryingly, raises the possibility of litigation against councils (potentially from third parties) for insufficient implementation of a CMP. This may be an unintended consequence of the wording of the Bill and if so, we strongly request that it be amended as per our recommendations (see Table 4.1).

This submission has been prepared with the assistance of a dedicated SCCG Coastal Reforms Advisory Committee including nominated representatives from our Member Councils. We have also sought input from additional technical, academic, governance and legal experts and consulted with other councils outside of our region.

We note that critical information, including the draft text of the actual SEPP, maps of the proposed coastal areas, and details of funding and financing provisions have not been released at the time of public consultation.

We therefore reserve the right to provide additional comments on the coastal management reforms when this information is released.

**The SCCG formally request that all our issues, concerns, opportunities and recommendations are considered and we seek specific feedback on all of these via a publically available submissions representations report.**

## 2 Sydney Coastal Councils Group Incorporated (SCCG)

The SCCG is the peak NSW Regional Organisation of Councils (ROC) representing fifteen Sydney coastal councils, and the third largest ROC based on population, with over twenty-five years' experience leading sustainable coastal management ([www.sydneycostalcouncils.com.au](http://www.sydneycostalcouncils.com.au)).

The SCCG harnesses the individual and collective knowledge of its Member Councils, a suite of technical and academic experts, as well as other stakeholders. Accordingly, we are able to provide unique insights drawing upon the technical, experiential and local knowledge of Members. The management of the coastal zone is a key area of concern for Member Councils and this submission draws upon their feedback.

## 3 Scope and structure of this submission

This submission will address the following three documents released for public consultation by the NSW Government:

- The draft Coastal Management Bill
- An Explanation of Intended Effect for the Proposed New Coastal Management State Environmental Planning Policy (SEPP)
- The draft Coastal Management Manual.

Comments and recommendations are made separately for each of these three documents. Where there is overlap or repetition between two or more of the documents, the recommendation(s) are repeated in both or all sections for ease of reference.

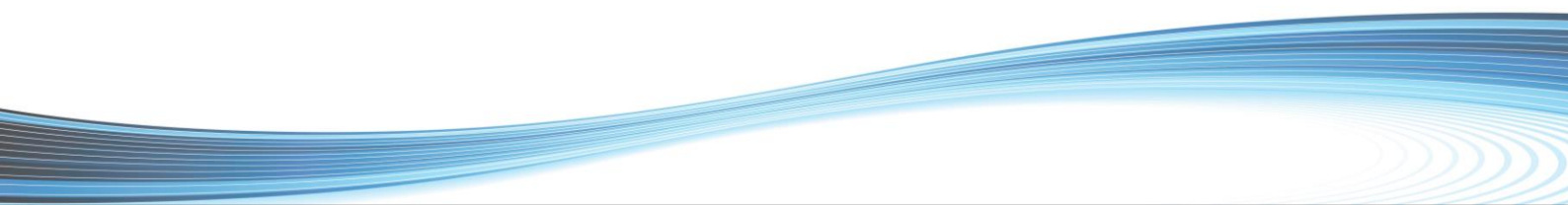
It is noted that critical information, including the draft text of the actual SEPP and the maps of the proposed coastal areas, has not been released at the time of public consultation. The SCCG reserves the right to provide additional comments on the coastal management reforms when this information is released.

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## **4 Responses to the Draft Document**

### **4.1 Response to the Draft Coastal Management Bill**



# COASTAL MANAGEMENT BILL

## Part 1.

Section	Issue / Comment (positive or negative)	Recommendations
3 Objectives	General Comments: <ul style="list-style-type: none"> <li>• A hierarchy for these objectives is desired</li> <li>• Not all objectives are measurable</li> <li>• Stronger language such as “demonstrate” be included.</li> </ul>	
	(f) Need to define “future risk” from coastal hazards.	OEH / DPE should clarify the time scale(s) for assessment of future risk in the SEPP or the Manual. – (there is some reference to these on p17 part B – Stage 3)
	(h) Questionable if “promote” is an appropriate objective of the Act.	Amend objective to: “to <i>ensure</i> <del>promote</del> integrated and coordinated ...”
	(i) .... <i>improve the resilience of coastal assets</i> ” clarification is required on definition of resilience and coastal assets	The Coastal Management Manual provide definition and management guidance on terms “resilience” and “coastal assets”.
4 Definitions	Beach – 10m depth in estuaries - Clarification is sought on why and how this depth has been determined and if it is required.  E.g. recent examples of beach erosion apparently caused by sub surface sediment movement due to wave and tidal action and or channel dredging in Middle Harbour would not have been addressed if this depth definition was followed in this part of the estuary.	Consider removing the specific depth limits of submerged lands particularly in relation to estuaries, and or specifically acknowledge that depths of closure particularly for beaches at heads of estuaries can vary significantly.

Section	Issue / Comment (positive or negative)	Recommendations
4 Definitions (cont.)	<p><b>“Foreshore”</b> land between MHW and MLWM..... Is this definition of foreshore consistent with all other related legislative definitions of these lands?</p> <p>Need to address the issue of jurisdiction/responsibility below the MHW.</p> <p>The new Bill provides an opportunity to tidy up various pieces of related legislation that provide the same definition for foreshore and beach areas and/or these same parcels of land defined in some other manner. E.g. beach intertidal zones etc.</p>	Review other legislation applying to the “coastal zone” to ensure consistent definition of foreshore zones. Example pieces of legislation: Fisheries Management Act, Crown Lands Act, National Parks Act and the Marine Estate Management Act and their associated regulations.
	<b>“Public Authority”</b> – consideration is needed for situations where entire or specific functions and assets of a public authority are privatised or leased (e.g. utilities and major coastal asset owners such as ports).	<p>Clarification is sought on what occurs if part of a whole public authority is privatised– e.g. Sydney Water Corporation, Energy providers, Port Authorities etc.</p> <p>Issues also occur when an agencies change their name and have refused to honour previously endorsed agreements (for example the current unresolved situations with Rockdale Councils having previous funding partnership agreements with the Waterways Authority who are now RMS (correspondence on this issues can be provided).</p>
	An additional definition is required for <b>“tidal limits”</b> .	Include definition of “tidal limits” with the Part C Glossary

## Part 2 Coastal Zone and management objectives for coastal management areas

Section	Issues/Comments	Recommendations
Maps	Land managers need to be provided with the proposed coastal zone maps prior to any detailed assessment of applicability and practicality of the proposed areas.	<p>Provide draft coastal zone maps as soon as possible, and provide a sufficient timeframe for Councils to comment on the maps in their draft form prior to finalisation and release for public comment.</p> <p>The SCCG reserves the right to amend their comments and recommendations and provide additional commentary to the all aspects of the reforms when the Maps (and the SEPP) are provided for consultation.</p> <p>Where councils mapping is included in a gazetted plan, this hazard information should prevail (unless otherwise determined by the Local Council).</p>
6. Coastal Wetlands and Littoral Rainforests	<p>Requirements to include wetlands and littoral rainforest areas previously, not included in SEPP 14 and 26, within the defined Greater Metropolitan area (Newcastle to Shellharbour).</p> <p>Information provided to Department of Planning by the SCCG estimates over 100 mapped wetlands and over 90ha of littoral rainforest within the SCCG region alone.</p> <p>The SCCG's Member Councils question why other significant ecological communities are not specifically included in this area or potentially the "Coastal Environment Area".</p>	<p>Define maps and include wetland and littoral rainforest areas within the greater metropolitan region.</p> <p>Consider the inclusion of other significant and or highly valued ecological communities within this area.</p>
7. Coastal Vulnerability Area 2 (b)	<p>Some consideration of current and future hazard exposure is required in the objectives of this section.</p> <p>Needs for objectives to reduce risk in these locations. The NSW Government released the <i>NSW Coastal Planning Guideline: Adapting to Sea Level Rise</i> in August 2010 to apply to all coastal areas of NSW. Key recommendations to reduce risk from these guidelines should be instilled within the Bill.</p>	<p>Specify what are the time considerations for future hazards.</p> <p>Include additional objectives for this proposed area to include those from the NSW Coastal Planning Guideline: Adapting to Sea Level Rise":</p> <ul style="list-style-type: none"> <li>• <i>Avoid intensifying land use in coastal risk areas through appropriate strategic and land-use planning</i></li> <li>• <i>Consider options to reduce land use intensity in coastal risk areas where feasible.</i></li> </ul>

Section	Issues/Comments	Recommendations
8. Coastal Environment Area	<p>8 (1) – some confusion with this definition for this area –</p> <p>The area focuses on coastal waters and all lands adjoining these including headlands and rock platforms.</p> <p>It is therefore assumed that this includes all areas of the open coast and all lands around any coastal and estuarine lake, creek or drainage features.</p> <p>We question the specific reference to headlands and rock platforms. We also question the meaning of “land adjoining”.</p>	<p>Provide a better description of this defined area.</p> <p>Clarification is required to define limits of “land adjoining”.</p>
9. Coastal Use Area	<p>Some concerns with this area in relation to duplications and conflicts with other planning policies that already exist for development and management issues within all these areas.</p> <p>If the goal here is to gain greater support and consideration of the NSW Coastal Design Guidelines it is suggested that this be achieved via alternative mechanisms directly relating to LEP development and amendment within coastal NSW.</p> <p>However the existing <a href="#">Local Planning Direction 2.2 (Coastal Protection)</a> states that:</p> <p><i>What a relevant planning authority <u>must do</u> if this direction applies</i></p> <p><i>(4) A planning proposal <u>must</u> include provisions that give effect to and are consistent with:</i></p> <p><i>(a) the NSW Coastal Policy: A Sustainable Future for the New South Wales Coast 1997, and</i></p> <p><i>(b) the <b>Coastal Design Guidelines 2003</b>, and</i></p> <p><i>(c) the manual relating to the management of the coastline for the purposes of section 733 of the Local Government Act 1993 (the NSW Coastline Management Manual 1990).</i></p>	<p>Reconsider the necessity of this proposed area where these areas are already covered by numerous other management and statutory plans including LEPs, DCPs and numerous Plans of management.</p> <p>If this area is to remain within the Act – a “<i>maintenance of public access</i>” objective is required to be included.</p> <p>Undertake a review and update the 13 year old NSW Coastal Design Guidelines where needed. Also refer to any other available studies in relation to coastal design.</p> <p>Consider the inclusion of the NSW Coastal Design Guidelines directly within Part 3 of the EP&amp;A Act if the existing 117 direction is considered ineffective.</p> <p>Once reviewed and updated the Government consider producing the NSW Coastal Design Guideline as a specific state government policy with direct guidance on how to include these within LEPs.</p>

Section	Issues/Comments	Recommendations
10. Matters relating to identification of coastal management areas	<p><i>(3)Hierarchy of management objectives if overlapping:</i></p> <p><i>“if the management objectives of the areas are inconsistent, the management objectives of the highest of the following coastal management areas (set out highest to lowest) prevails to the extent of the inconsistency:</i></p> <p><i>(a) the coastal wetlands and littoral rainforests area,</i></p> <p><i>(b) the coastal vulnerability area,</i></p> <p><i>(c) the coastal environment area,</i></p> <p><i>(d) the coastal use area.</i></p>	The SCCG is supportive of this approach and the proposed hierarchy (assuming all ecologically sensitive areas are adequately captured in the maps).

## Part 3 Coastal Management programs and manual

Section	Issues / Comments	Recommendations
Section 14 - preparation of the CMP	Concerns with this overriding clause providing the State government (Minister) to be able to give a direction to a local council to prepare a Coastal Management Program (CMP) that could be inconsistent with the Act and the Coastal Management Manual (i.e. the state wide ‘rules of the game’).	<p>This clause be amended to ensure that any direction under this subsection issued by the Minister be required to be consistent with the Coastal Management Act and the Coastal Management Manual.</p> <p>Consideration by the Minister that a Ministerial Direction to a Council may address a specific location or issue of concern rather than stipulating the preparation of a plan in its entirety (dependant on the circumstances).</p>
Section 15 – Matters to be dealt with in the CMP	<p>A coastal management program should address all coastal issues within each of the four proposed coastal management areas not only the managing risks and vulnerabilities as noted within this section.</p> <p>Councils should also be afforded the flexibility to respond rapidly to specific issues without having to address the entire CMP.</p>	<p>All coastal management matters should be dealt with in the preparation and delivery of a Coastal Management Program, not just managing risks and vulnerabilities from coastal hazards.</p> <p>Include a provision to ensure that a CMP specifically sets the long term strategic intent of the coastal zone area(s). (i.e. incorporate the requirement to develop a ‘Coastal Strategy Statement’) (as required by Stage 1 of Manual), taking into consideration that there needs to be some consistency in Coastal strategy statements included in the CMP of Councils (particularly those that share boundaries/sediment compartments etc).</p>

Section	Issues / Comments	Recommendations
	<p>Coastal management programs must also address the bigger picture, the strategic intent for an area and not necessarily be limited to consider actions that are currently 'affordable' management options only.</p> <p>(Section 15(2) is not considered efficient to address the above).</p> <p>Section 15(1d ) identify cost should be expanded to "identify life cycle costs" to ensure that any proposed cost sharing arrangements are indeed feasible and sustainable in the longer term – it is not sufficient to address initial capital costs only and this needs to be articulated in the Bill.</p>	<p>Ensure that the focus on identified currently available funding mechanisms does not overlook the necessity and potential benefit of larger and more long term coastal management actions to achieve defined objectives, including regional solutions).</p> <p>Make amendment to 15(1d) to specifically determine life cycle costs of management actions.</p> <p>Clarity on the planning horizons for specific hazards in relation to what sort of risks must be considered must be provided in detail in Section 15 of the Bill, the SEPP and also in the Coastal Management Manual Part B, Stages 1 &amp; 2.</p> <p>Issues in relation to small scale or 'nuisance' sand movements both erosion and accretion that do not warrant an Coastal erosion action subplan but are causing significant inconvenience, disruptions to function or coastal values should also be included within this section.</p>
Section 15 (3)	<p>Further consideration is needed on the necessity of this section and the preparation of <u>separate</u> "coastal erosion emergency actions sub plans" – there is considerable overlap here with plans prepared under the Emergency Management and Reuse Act and/or the Police Act. These local and regional plans are the 'go to' plans for these situations.</p> <p>The coastal management programs to now be developed should address all existing and future erosion locations rather than develop additional plans or focus on previously nominated NSW erosion hotspots.</p>	<p>If this clause is to persist, rename <i>Coastal Erosion Emergency Action Subplan</i> to "Coastal Hazard Response Plans" or "Coastal Hazard Management Plans".</p>
Section 15 (4)	<p>Confusion remains in relation to the linkage between coastal erosion and flooding responses as defined in CMP or in Coastal Erosion <i>Emergency Action Sub plan</i> and those within Local DISPLANs and or other Councils Incident response plans.</p>	<p>Matters not to be dealt with in relation to Emergencies within the CMP, be specified e.g. "risks to life".</p> <p>A state wide review of local DISPLANs and Incident response plans be undertaken to more specifically identify current duplications in natural hazard and emergency response plans (in relation to defined coastal hazards).</p> <p>An additional clause be included:</p>

Section	Issues / Comments	Recommendations
	<p>15(4) (b)<i>proposed actions or activities to be carried out by any public authority or relating to any land or other assets owned or managed by a public authority, unless the public authority has agreed to the inclusion of those proposed actions or activities in the plan.</i></p> <p><b>Below also relevant to clause 23</b></p> <p>Additional clauses in this section are also required to ensure consultation and importantly participation of relevant agencies (when needed) during the development and also implementation and reporting of CMPs. This has been an ongoing limitation of all CMPs to date and must now be addressed in the new legislative framework.</p> <p><b>NB:</b> With about 75% of the NSW coast in public ownership there is very little in the Bill that binds the other government instrumentalities or publicly privatised entities to participate in the CMP development process. It should also be noted that the fundamental underpinning of an approach based on sediment compartments is a clear recognition that the things done at one location affect the response of the coast at other locations. It should also be recognised that many of the more severe problems in NSW have resulted from works undertaken by the State and still under their care and control.</p> <p>Participation of regional agency staff during the preparation of CMPs is critical to ensure effective CMP support, sign off and in turn coordinated implementation. It is suggested that OEH regional staff be the key facilitator(s) to ensure other agencies participate when needed and that regional DPC staff get involved when activities involved and affect multiple agencies.</p>	<ul style="list-style-type: none"> <li>i) Public authorities should be required to participate during the development of CMPs. That OEH representatives to be primary state agencies' delegates for this and to obtain the participation of other relevant agencies during the CMP development process when needed. (Regional Premier and Cabinet staff to get involved when activities involved multiple agencies (e.g. Department of Planning, National Parks, Crown Lands, RMS, Sydney Water).</li> <li>ii) Public authorities be required to assist councils where appropriate to provide implementation information in relation to reporting requirements via Part 3 of Chapter 13 of the <i>Local Government Act 1993</i>.</li> <li>iii) Include additional provisions in the Bill (Clauses 15,16, 23) to ensure participation of Stage agencies including deemed approval after a period of 3-6 months when no responses are forthcoming.</li> </ul> <p>Further consideration is also needed for harbour and other including Botany Bay Council where they are not the primary land manager of the 'coast' which includes, State agencies, State owned corporations and private entities operating on crown lands via long term leases.</p>



Section	Issues / Comments	Recommendations
	It is no longer appropriate that agencies participate only when final draft CMPs are prepared and / or hold up the gazettal of CMPs due to conflicts with endorsement of CMPs actions.	
Section 16 – Consultation	<p>16(1) (a) More guidance and direction is required for minimum acceptable consultation process and time frames.</p> <p>Working with adjacent councils with the same sediment compartment, which needs to be better defined.</p> <p><i>“(3) A failure to comply with this section does not invalidate a coastal management program”</i>: This clause should be removed, with community and agency consultation considered an essential element to any successful coastal management program.</p>	<p>Minimum consultation principles, process and consultation time frames regarding coastal management programs need to be prescribed here, or specifically cross-referenced to the prescribed standards articulated in the coastal manual (for all 5 CMPs development stages) (Part A: Mandatory requirements and essential elements for the preparation of a coastal management program).</p> <p>16(1)(b) Individual councils preparing coastal management programs within the same sediment compartment should be encouraged to develop these plans together (or at least components, e.g. process studies) with this clause moved to Section 14 “Preparation of coastal management program”.</p> <p>Remove clause 16(3).</p>
Section 18 – review and amendment of CMP	<p>Sufficient NSW Government funding and technical support availability and capacity to ensure the 10 year review period is achievable.</p> <p>This resource and capacity review process should also link to the IP&amp;R framework where possible.</p> <p>When undertaking the processed 10 year review the coastal zone areas must also be reviewed.</p>	<p>Undertake an open and transparent assessment of State and local government resources, capacity and investment required to ensure coastal management programs are reviewed in 10 year intervals, as a minimum.</p> <p>Clarification is need to articulate if the review is to be ‘completed’ or ‘commenced’ within 10 years.</p> <p>Include a clause to ensure that the NSW Coastal zone areas are also reviewed at 10 year intervals (particularly vulnerability areas).</p>
Section 19 - Availability of CMPs	CMP should also be available electronically via the relevant council’s web site and or the DPE/OEH web site.	Including additional clause to ensure that CMPs are also freely available online.

Section	Issues / Comments	Recommendations
Section 20 - Minister to prepare a Coastal Management Program	<p>20(1) (b) Question: in what circumstances can the Minister refuse to certify a CMP?</p> <p>20(1) Clarification is sought in relation to requirements for community consultation (section 16) and funding preparation of a Coastal Management Program when developed by the Minister.</p> <p>20(3) This clause to be amended to include provision that the local council is to adopt the Minister's plan in consultation with the Minister following a joint assessment of plan implementation feasibility.</p> <p>20(8) Information is sought to clarify if cost recovery of the Minister's plan preparation is a 50:50 distribution as with the NSW Coastal Management program, and that an upper contribution by Councils be set at a maximum of 50%.</p>	<p>Section (1)(b) should specifically identify circumstances when the Minister can refuse to certify a CMP consistent with Part A of the Coastal Management Manual.</p> <p>Provide clarification regarding requirement of community consultation, and plan preparation funding when the Minister prepares a CMP.</p> <p>Include a clause to ensure that when the Minister prepares a CMP that the affected local council is given opportunity for consultation and negotiation prior to Plan adoption including an assessment of implementation feasibility.</p> <p>That cost sharing provision be included in this section consistent with the current 50:50 funding from the NSW coastal management program.</p>
Section 22 - Implementation of CMP by local councils	<p>A local council is "to give effect to" its coastal management program.</p> <p>Cross council and sediment compartment CMP preparation is supported. Further direction is needed in relation to requirement under the IP&amp;R framework when a Coastal Management Program applies across council boundaries.</p>	<p>Creating a positive statutory obligation to give effect to a CMP may have considerable consequences and potential give right to third party actionable right to seek to enforce compliance with action items (with many of these actions also relevant to participation and or resources from the State).</p> <p>With local government having wide and ever increasing responsibilities with limited resources and competing priorities, councils may from time to time seek some flexibility to determine where finite resources are applied and in what circumstances. While it is recognised that CMPs need to be developed and also implemented so flexibility here is required and this clause should be amended as such. (see legal commentary in Appendix 1 for more information in this regard).</p> <p>Provide greater clarification in relation to requirement under the IP&amp;R framework when a Coastal Management Program applies across council boundaries.</p>

Section	Issues / Comments	Recommendations
	Guidance on requirements for this clause should come from the Office of Local Government and revised guidelines developed.	IP&R guidance on requirements in Section 22 is required from the Office of Local Government including the preparation of guidelines to be included within the Coastal Management Manual.
Section 23 – other public authorities	This section is strongly supported however the language of “have regard to” is unclear and requires strengthening.	<p>Amend language to ensure “other public authorities” do not just have to “have regard to” but “must act in accordance with” “bound by”, “must adhere to”, “must abide by” or “ must not take actions contrary to” adopted coastal management programs and the coastal management manual. (See also SCCG recommendation to the draft Coastal Management Manual Essential Element No. 30.)</p> <p>It should be further recognised that in some circumstances other public authorities and not local councils are the appropriate authority to prepare a CMP. (For example Botany Bay Council)</p>
Additional section required - “Funding”	Funding and financing mechanisms must be addressed in the Bill.	Including specific reference to funding and financing mechanisms in the Bill including embedding of the proposed beneficiaries pays principle(s) and their implementation mechanisms.
Additional section - Land Acquisition	Power to identify and acquire coastal land for coastal management purposes has not been carried over from the previous <i>Coastal Protection Act 1979</i> .	Include clauses within the Bill to enable the acquisition of coastal land for coastal management purposes via both voluntary and forced means based on relevant criteria.

## Part 4 NSW Coastal Council

Section	Issues / Comments	Recommendations
24 – Establishment of the Coastal Council	The re-establishment of an independent and accessible NSW Coastal Council is strongly supported.	
24 (2)	The NSW Coastal Council should include a membership of not less than 7 members containing the identified expertise. A Coastal Council to “ <i>consist of at least 3</i> ” is not considered representative nor adequate to perform their proposed responsibilities.	<p>The NSW Coastal Council include a minimum of at least 7 members covering all of the identified expertise.</p> <p>Further consideration should be given to the nomination processes of Coastal Council members with opportunities for local councils and their coastal communities to have input (for at least some of the membership). This is to ensure that this body that is to be appointed, directed, remunerated and potentially removed by the Minister “at any time” is seen as independent, transparent and receptive to broader community input.</p>
24 (4)	This clause is supported and should be considered as an additional member to the minimum 7 expertise members identified in 24(3).	The MEMA representative on the Coastal Council should be in addition to the minimum 7 expertise based members.
25 Functions of the NSW Coastal Council	Limiting the function of the Coastal Council to review implementation and compliance of only local councils and not including other public authorities significantly limits the scope of the Coastal Council to achieve the Bill Object (h) – <i>to promote integrated and coordinated coastal planning management and reporting.</i>	<p>25(1) (ii) This clause be amended to also capture other public authorities in addition to local government to read “<i>the compliance by local councils (and other public authorities were applicable) with the management objectives and coastal management manual...</i>”</p> <p>The proposed functions of the Coastal Council are limited to compliance and advising the Minister. Further consideration must be given to the needs to improving communication between government agencies and Local Councils and their communities and the potential for mediation and arbitration roles when conflict occurs and to ensure that the Council is transparent in their activities and also receptive to broader community input including from Local Councils.</p> <p>(Please see other comments within the submission regarding these needs).</p>
25 (2)		Insert an additional clause (c) <i>to identify opportunities to strengthen collaboration and integration of relevant public authorities to effectively implement a Coastal Management Program</i> ”.

Section	Issues / Comments	Recommendations
26 Performance audit of implementation of the CMP	<p>Support is given for the power of the Coastal Council to audit implementation of the CMPs with amendments.</p> <p>It should be ensured that councils are not overburdened in terms of audit resources, timeframes and costs.</p>	<p>Clause 26(3) to be amended to require the <u>Minister</u> to write to Council seeking such information.</p> <p>OEH should have a direct role with auditing local council performance in consultation with the Coastal Council.</p>
26(5)		Clause 26(5) be amended to ensure that the Coastal Council's audit report to the Minister also be provided to the affected local council.

## Part 5 Miscellaneous

Section	Issues / Comments	Recommendations
27 Granting development consent for coastal protection works	<p>Clarification is sought regarding the phase “over the life of the works”.</p> <p>E.g. Coastal works: Design life, expected time in situ, predicted works failure threshold(s).</p> <p>Details to be included in the Coastal manual with reference to other key literature such as produced by the National Committee on Coastal and Ocean Engineering.</p>	<p>Clause 27 be amended to define “over the life” of the work and refer to relevant sections of the Coastal Management Manual.</p>
28 Modification of doctrine or erosion and accretion	<p>Clarity of ambulatory water boundaries requires determination prior to this section being considered and the Bill finalised.</p> <p>(a) Clarification is sought to ensure that Sydney Harbour and Botany Bay are included as part of the NSW Coastal Zone as defined in Part 3 of the Bill.</p> <p>Sub section 2 and 3 – Further clarity is required on determination of water boundaries when lands are <u>lost</u> due to erosion and or inundation.</p>	<p>The NSW Government in consultation with local government clarify the current question in relation to the status of right line water boundaries in NSW prior to the finalisation of the Bill. At the launch of the reforms in November 2015 the Minister confirmed that these important considerations will be resolved before the reform consultation process concludes. We look forward to further consultation on these critical issues.</p> <p>The NSW Government ensure that all the NSW coast is now included in the NSW Coastal zone including Sydney Harbour and Botany Bay.</p> <p>Include additional clause in this section - <i>No compensation is payable by the State of New South Wales for the loss of land or infrastructure to the sea.</i></p>

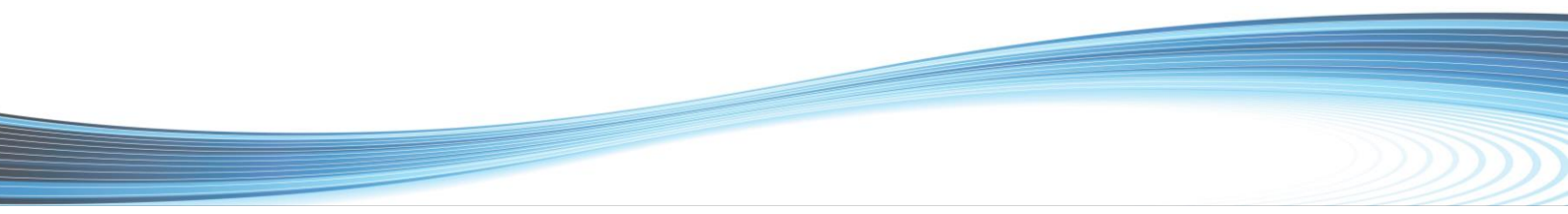
Section	Issues / Comments	Recommendations
		Consider inclusion of clause – ‘ <i>When land formerly above the MHWM is lost to the sea, its ownership reverts to the Crown</i> ’.
30 Minister to report failure to comply	This clause should also apply to other public authorities not complying with the Coastal Management program, The Act, The SEPP and the Coastal Manual.	Included additional clause to ensure all public authorities comply with the Coastal Management Act, The SEPP and the Coastal Management Manual.
Schedule 1 – Sediment compartments	Unable to locate copies of the NSW sediment compartment maps. We have only been able to locate point data for Australian Coastal Sediment Compartments from the <a href="#">Geoscience Australia</a> website. Maps should be produced for download via the OEHL / DPE web sites.	Maps of the NSW sediment compartments be publically available via the OEHL and DPE web sites.  Other Councils within the Sydney Harbour sediment compartment(s) should be included e.g.: City of Sydney, North Sydney, Mosman etc.
Schedule 2 Constitutional and procedure of the NSW Coastal Council	The new NSW Coastal Council should be provided with a dedicated secretariat to provide them with full time administrative and policy support.	The NSW Coastal Council be appropriately resourced to ensure it can carry out its powers effectively.
Part 3 Procedure	The current lack of transparency of the NSW Coastal Panel and NSW Coastal Expert Panel is of concern and has dramatically eroded stakeholder confidence and ability to participate in identification of priorities and decision making.	All minutes of the NSW Coastal Council be publically available and placed on a relevant government website in a timely manner after meetings.
Schedule 4 [2] 80A	Imposition of conditions	Although ensuring that Coastal Management works don’t negatively impact beach amenity and lands adjacent to works must be a foundation for approval for approval of such works, further consideration of the practicality of imposing such securities over long times frames (ie until these works cause an impact) may not be practical and indeed maybe be challengeable (Please see the legal commentary in Appendix 1 for further information)

Section	Issues / Comments	Recommendations
Schedule 4 [5] –[12]	Proposed Amendments to s733	<p>Further consideration is required on the proposed amendment to s 773 of the Local Government Act. There are two significant issues requiring further consideration</p> <p><i>(a) they differentiate between the provisions pertaining to natural hazards in terms of flood and bushfire risk - and coastal hazards;</i></p> <p>Flood, bushfire or coastal hazards are all a part of local government’s responsibility and it is assumed that all should be treated on an even playing field.</p> <p><i>(b) they set a more onerous threshold for the presumption of good faith in respect of advice, actions or omissions pertaining to coastal hazard management and planning in the coastal zone.</i></p> <p>The threshold has been changed from “substantially in accordance with” to “in accordance” within the coastal management manual. If actions, advice or omissions are not undertaken in accordance (as opposed to 'substantially in accordance with') with those Mandatory Requirements then it seems the rebuttable presumption of good faith may not be available to the Council or its staff as a statutory defence under s733.</p> <p>It is recommended that this section (733(4)(b) be amended to reinstate the terms 'substantially in accordance with'.</p> <p>Please see the Legal commentary in the Appendix 1 for further information regarding the above and other issues requiring further consideration.</p>
Minister’s enforcement powers under the CP Act 1979	<p>Section 52 of the CP Act 1979 has not been carried over into the new Bill.</p> <p><b>52 Enforcement by direction to public authority</b></p> <p><i>(1) Without affecting or derogating from any function of the Minister under any law, the Minister may direct a public authority having functions under any Act in respect of the implementation or enforcement of any law relating to the use</i></p>	<p>The SCCG requests strongly recommends that Section 52 of the CP Act be retained within the Coastal Management Bill.</p> <p>See legal Commentary Appendix 1 (Appendix D – New approach to compliance and enforcement (2.1 through 2.5)</p>

Section	Issues / Comments	Recommendations
	<p><i>or occupation or the carrying out of development in the coastal zone to exercise those functions at such time and in such manner (not inconsistent with any provision made by or under the Act by which the function is conferred or imposed) as may be specified in the direction where any part of the coastal zone is used or occupied or development in any part of the coastal zone is carried out without or otherwise than in accordance with a concurrence of the Minister required by or under this or any other Act.</i></p> <p><i>(2) The Minister shall not give a direction to a public authority under subsection (1) to exercise a function conferred or imposed under a provision of an Act without first having obtained the consent of the Minister administering that provision.</i></p> <p><i>(3) A public authority shall comply with a direction given to it under subsection (1) in accordance with the terms of the direction.</i></p> <p>Although this provision has apparently not been used (See legal Commentary) the powers of the Minister to provide separate supervisory and enforcement regimes over public authorities <u>must</u> be retained in the new Bill. Again leaving all responsibilities for enforcement to local government particularly when considering potential actions by public authorities is not appropriate.</p>	



## **4.2 Response to the Explanation of Intended Effect for the Proposed New Coastal Management State Environmental Planning Policy (SEPP)**



## COASTAL MANAGEMENT STATE ENVIRONMENTAL PLANNING POLICY: EXPLANATION OF INTENDED EFFECT

### General Comments

- Minister committed to exhibit the draft SEPP when ready (SCCG Full Group meeting 12 December 2016, SCCG letter sent to Minister 21 December reaffirming exhibition of the draft SEPP)
- Very difficult to provide detailed comments without seeing the actual draft SEPP
- Generally supportive of the intent of the SEPP (i.e. the EIE) and the consolidation of other related instruments (SEPP 14, 26, 71)
- Coastal area mapping is not available and therefore difficult to provide detailed comment on proposed development controls – The SCCG will seek to provide additional commentary once the maps and the SEPP are released for consultation.

### Specific Comments

Component	Comments / Questions	Recommendations
<b>Part A – The Coastal Context (p4)</b>		
<ul style="list-style-type: none"><li>○ “Importance of the coast” <i>Effective Coastal management must protect the natural processes that shape the environment, and maintain public access, amenity and use of coastal areas.</i></li><li>○ ‘Role of land use planning’ - <i>Some of the more complex challenges arise from the inherently dynamic character of our coastline. In the past, this variability was not always acknowledged, resulting in a range of legacy coastal management issues where patterns of settlement have not anticipated the trends and cycles in coastal processes.</i></li></ul>	SCCG is supportive of key statements.	See comments column.

Component	Comments / Questions	Recommendations
<i>"The Act will also provide updated enforcement and compliance powers in respect of unauthorised development on the coast".</i>	This is supported	It is suggested that the State Government including OEH provide assistance for inspections, evidence based investigations, risk assessments and property boundary issues (particularly when works are outside local government areas i.e. certain crown lands and reserves etc) – Please see comments in Coastal Manual section).
<b>Regional Plans (p6)</b>		
<p><i>"Coastal regions for which Regional Plans will apply are:</i></p> <ul style="list-style-type: none"> <li>○ <i>the Hunter;</i></li> <li>○ <i>Central Coast;</i></li> <li>○ <i>Illawarra;</i></li> <li>○ <i>the South East; and</i></li> <li>○ <i>the North Coast.</i></li> </ul> <p><i>Regional Plans will focus on strategic planning... They will include consideration of coastal matters, and will inform and be informed by, coastal management programs developed under the proposed Coastal Management Act.</i></p>	It is questioned why Sydney has not been included in the 'coastal regions for which Regional Plans will apply. ". There is no mention of Sydney's regional plan - <i>A Plan for Growing Sydney</i> , released in December 2014.	It is recommended that the 'Sydney regional plan' and future regional plans for this region (and their 'sub regional / District' plans) be included. It is however acknowledged that amendments / revised versions will be required of these plans to enable the objectives of Bill to be achieved and not solely focus on urban growth with limited considerations for natural hazards (including coastal hazards) nor ecological sustainable development.

Component	Comments / Questions	Recommendations
<b>Local Planning Directions (p7)</b>		
<p><i>"LEPs prepared by councils will need to align with the objectives of the proposed Coastal Management Act, and a local planning direction is the appropriate mechanism to achieve this".</i></p> <p><i>"A new Local Planning Direction on Coastal Management will replace Local Planning Direction 2.2 to require a planning proposal to give effect to, and be consistent with, the objectives of the Coastal Management Act, the coastal management manual and any coastal management program, and relevant guidelines and strategies including the Coastal Planning Guidelines: Adapting to Sea Level Rise and the Coastal Design Guidelines".</i></p>	<ul style="list-style-type: none"> <li>• What is the process and timing of this?</li> <li>• How do new Coastal area maps apply to LEPs?</li> <li>• What resources will be available to Councils to assist with the necessary reviews and changes to LEPs as a result of the coastal reforms?</li> <li>• What consultations will be required with any LEP amendments incorporating the new coastal areas and other relevant elements of the Bill and the SEPP?</li> </ul> <p>With the new s117 direction doing the above, duplications with the proposed "Coastal Use Area" requires review. (see part b Q.8 for more information).</p>	<p>This process should be as streamlined and efficient as possible so that no undue burden is placed on Local councils.</p> <p>Consideration be given for potential concurrent CMP and LEP approval processes.</p>
<b>Coastal Planning Guideline Adapting to Sea Level Rise: (p7)</b>		
<i>Coastal Planning Guideline Objectives</i>	<p>The objectives contained within the <i>Coastal Planning Guideline: Adapting to Sea Level Rise</i> should be transposed over to the new Bill and to the objectives of the Coastal Vulnerability Area, specifically objectives including:</p> <ul style="list-style-type: none"> <li>• <i>Avoid intensifying land use in coastal risk areas through appropriate strategic and land-use planning</i></li> <li>• <i>Consider options to reduce land use intensity in coastal risk areas where feasible.</i></li> </ul> <p><i>(See comments on the Bill for more information (Clause 7 - Coastal Vulnerability areas).</i></p>	<p>1) The SCCG recommends that the area of application of this Guideline be more specific than the current listing of affected councils. The area of application should be linked to the new Coastal Vulnerability Areas of current and future hazards (taking the assumption the future hazards will be defined as for 2100)</p> <p>2) SCCG questions the merit of <u>revoking</u> this guideline unless all materials are transposed into the manual and there are adequate linkages with the planning system to ensure its implementation via LEPs.</p>

Component	Comments / Questions	Recommendations
<b>Local Environment Plans and Development Control Plans (p8)</b>		
<i>"Since the introduction of the Standard Instrument LEP, councils are now able to zone submerged land in estuaries, lakes and lagoons within their local government area."</i>	<ul style="list-style-type: none"> <li>Are all relevant submerged lands contained within local government areas and mapped as such within their LEPs? What is this provision used for? What are the linkages to Crown Lands and Fisheries? Does this refer to private land lost to the sea? Complication: dedicated purpose of crown land?</li> </ul>	Further clarification is required in relation to the implications, advantages and liabilities of zoning such (crown) lands outside Council jurisdiction.
<b>Part B – Proposed Coastal Management State Environmental Planning Policy (p9)</b>		
<b>The existing coastal State Environmental Planning Policies... will be repealed.</b>	This is supported.	<p>The Coastal Management SEPP must incorporate <u>all</u> relevant provisions from the three SEPPs to be repealed.</p> <p>The Sydney area should be included.</p>
<b>The existing State Environmental Planning Policy (Infrastructure) 2007</b>		
<i>"It is also proposed that provisions in State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP) which relate to coastal protection works be incorporated into the proposed SEPP. The relevant coastal provisions within the Infrastructure SEPP are found in Division 25. This division provides for waterway and coastal management activities. It is not proposed to amend the provisions relating to waterways (i.e. riverine situations)".</i>	This is supported.	<p>Further consideration is necessary for appropriate development assessment provisions for river bank 'back filling' and / or reclamation works being undertaken in estuarine and riverine systems classified as either i) construction works, ii) routine maintenance works, iii) emergency works and or new works under Division 25 s129 and s129A. It is suggested that many of these activities do require some level of EIA and associated development approval processes.</p> <p>Actions under the Infrastructure SEPP must be compliant with CMP with the current SEPP silent on 'other' coastal assets and infrastructure other than "coastal protection works"</p>

Component	Comments / Questions	Recommendations
<b>Policy Objectives (p10)</b>		
<p><i>The objectives of the proposed Coastal Management SEPP.</i></p> <p><i>Coastal management area 4 – coastal use area</i></p>	<p>Amendments to the objectives need to be considered.</p> <p>Defined as ‘<i>an area that contains land with important coastal values</i>’. What are these ‘coastal values’? – Does this include amenity, recreation? – How are these to be defined and mapped?</p>	<p>Suggested amendments are marked in Bold “The objectives of the proposed Coastal Management SEPP are to:</p> <ul style="list-style-type: none"> <li>• <del>Promote</del> <b>ensure</b> an integrated and coordinated approach to coastal planning and management, consistent with the objects of the proposed Coastal Management Act</li> <li>• map the four coastal management areas which comprise the NSW coastal zone, consistent with the definitions and requirements of the proposed Coastal Management Act</li> <li>• establish a framework for land use planning to guide decision-making for the coast</li> <li>• manage development in coastal areas and protect the environmental assets of the coast</li> <li>• <b>avoid intensifying land use in coastal risk areas through appropriate strategic and land-use planning and consider options to reduce land use intensity in coastal risk areas where feasible”.</b></li> </ul>

Component	Comments / Questions	Recommendations
<b>Coastal Management Areas (p10)</b>		
<i>Question 1: Should councils be able to propose changes to the maps for all or some of the coastal management areas?</i> (p 11)	<p>Yes , details for this need to be articulated in the SEPP to include but not be limited to:</p> <ul style="list-style-type: none"> <li>• What type of amendments and on what basis amendments can be suggested</li> <li>• Standards for information and justifications for proposed amendments</li> <li>• Requirements for notifications and associated public consultation</li> <li>• OEH / DPE and the NSW Coastal Council should be provided with these proposals in the first instance for technical advice prior to submission to the Minister for determination.</li> </ul>	<p>All Coastal Management Area(s) maps should include all relevant council-based information that forms part of an adapted policy / planning instrument of that council.</p> <p>Reactive politically based amendment must be avoided.</p>
<b>Explanation of the provisions</b>		
<i>Question 2: Should the development controls be included in the proposed Coastal Management SEPP or as a mandatory clause in council LEPs?</i> (Page 13)	<ul style="list-style-type: none"> <li>• They should be included within the SEPP Inclusion in the SEPP to also bind State agencies and other public authorities to comply.</li> </ul>	<p>Development controls to be included in the SEPP.</p> <p>In the Coastal Vulnerability Areas exempt and complying approvals should be removed and DAs should be referred to councils for approval (more in Q.11).</p> <p>Compliance of the SEPP by state agencies and other public authorities should be an activity of the Minister and the Coastal Council in collaboration with the local council and technical expertise of OEH.</p>

Component	Comments / Questions	Recommendations
<b><i>Development controls for Coastal Management Area 1 – Coastal Wetlands and Littoral Rainforest Area (p13)</i></b>		
<i>“SEPP 14 was first published in 1985, SEPP 26 in 1988, and SEPP 71 in 2002. Most of the arrangements provided by these policies continue to be vital to a healthy and sustainable coastal environment. Appropriate development of the coast continues to be a matter requiring a State and regional response and an integrated approach. For this reason, it is proposed that the relevant provisions within these SEPPs be updated and incorporated into the proposed new Coastal Management SEPP.” (Page 9)</i>	<ul style="list-style-type: none"> <li>• SCCG information provided to DPE estimates over 100 mapped wetlands and over 90ha of littoral rainforest within the SCCG region alone (Hornsby to Sutherland).</li> <li>• Member councils question why other significant ecological communities are not specifically included in this area or potentially the Coastal Environment Area.</li> </ul>	Inclusions of wetlands and littoral rainforest areas previously not included in SEPP 14 and 26 within the previously defined Greater Metropolitan area (i.e. Newcastle to Shellharbour) is required.
<p><i>Question 3:</i> <i>Do the proposed development controls for mapped coastal wetlands and littoral rainforests remain appropriate for that land?</i> <i>(Page 16)</i></p> <p><i>Question 4: Do you support the inclusion of a new 100m perimeter area around the Mapped wetlands, including the application of additional development controls?</i> <i>(Page 16)</i></p>	<p>Yes these are supported – but development controls could be stronger. Review the detail in the draft SEPP is required to comment more specifically at this time.</p> <ul style="list-style-type: none"> <li>• The additional 100m perimeter area is strongly supported and is consistent with the award-winning SCCG <i>Model Development Control Plan (DCP) – Protecting Sydney’s Wetlands</i> Project.</li> </ul> <p>NB - The Model DCP and the supporting resource folder provide local governments and other development consent authorities with a generic model planning mechanism for consistent and coordinated protection and management of coastal wetlands.</p> <p>Issues relating to private land or when wetlands and littoral rainforest straddle public and private lands requires further consideration.</p>	<p>Needs to apply to coastal wetlands/littoral rainforests in the Greater Metropolitan area (Newcastle – Shellharbour).</p> <p>It is recommended that any drainage works within identified land (including the 100m perimeter (for both wetlands and littoral rainforest) be included as an activity requiring development consent.</p> <p>NB Botany Council doesn’t support this inclusion, as they have a catchment based approach for wetlands (where applicable). Such a 100 buffer as proposed in the SEPP should not override such a progressive and community supported local inclusion from a Council.</p>



Component	Comments / Questions	Recommendations
<b><i>Development controls for Coastal Management Area 2 – Vulnerability Areas (p17)</i></b>		
	<ul style="list-style-type: none"> <li>• Determination is required on what constitutes “Future Coastal Hazards”.</li> <li>• Definition is required regarding the proposed development controls noting “is not likely”. It is suggested that these be based on defined probabilistic threshold(s) / triggers to be development with councils considering development life and addressing both existing and future hazards and associated risks.</li> </ul>	See comments column
<p><i>Question 5: Are the proposed development controls for mapped coastal vulnerability areas appropriate for that land?</i> (Page 17)</p>	<ul style="list-style-type: none"> <li>• It is difficult to assess the implications of development controls without knowledge of what hazards and their extents is proposed to be included in these areas with draft Coastal Area maps not yet available.</li> <li>• In addition to those development controls proposed for inclusion in the Coastal Management SEPP, existing controls that are already in place for appropriately defined vulnerability areas in individual councils’ planning schemes that are more restrictive these should not be overridden by the SEPP (unless with agreement by the Council).</li> <li>• It must be acknowledged that individual councils may not have the internal technical expertise to assess all coastal processes, impacts and other items within this clause. A statewide capacity assessment should be undertaken with relevant capacity building activities and or provision of additional external technical expertise provided to councils to ensure consistent statewide application.</li> <li>• The SEPP needs to provide advice and associated tools, including potential training, to clarify how an applicant <i>demonstrates</i> compliance with the proposed development controls.</li> </ul>	See comments column

Component	Comments / Questions	Recommendations
<b><i>Development controls for Coastal Management Area 3 – Coastal Environment Area (p17)</i></b>		
<p><i>Question 6: Are the proposed development controls for coastal environment areas appropriate for that land? (Page 18)</i></p>	<ul style="list-style-type: none"> <li>• There is some confusion in relation to application to lands including the 500m landward perimeter with coastal lakes and lagoons and the associated linkages to the “Coastal Wetlands and Littoral rainforest area” having a 100m buffer area. It is suggested that this be reviewed with a focus on working with local councils to base these buffer zones for coastal lakes and lagoons on drainage and hydrological units.</li> <li>• It is further suggested the ‘Schedule 1 – Coastal Lakes’ of the SEPP71 be carried over into the Coastal Management SEPP as an additional schedule to ensure continuity and the inclusion of important coastal lakes in Sydney including Manly lagoon, Dee Why Lagoon and the Narrabeen lakes.</li> <li>• Need to define what is to occur if an undeveloped headland (or parts of) are currently zoned for development and if estuarine / coastal lake “headlands” are to be covered.</li> <li>• Some definition of rock platforms is required in addition to those identified as “intertidal protected areas” and or Aquatic Reserves in Sydney.</li> <li>• Other sites and high value environmental ‘assets’ should also be considered for specific inclusion under lands to which development controls apply (e.g. threatened and criteria habitats, aquatic and marine vegetation, cultural sites, surfing reserves and other key surfing locations, water quality criteria).</li> <li>• It must be acknowledged that individual councils may not have the internal technical expertise to assess all coastal processes, impacts and associated vulnerabilities to ‘coastal environments’ and other items within this clause. A statewide capacity assessment should be</li> </ul>	<p>See comments column</p>

	<p>undertaken with relevant capacity building activities and or provision of additional external technical expertise provided to councils to ensure consistent statewide application. (see comment in relation to the manual i.e. Section 1.10 and 1.11 regarding use of Capacity Assessment templates.</p> <ul style="list-style-type: none"> <li>• All existing conditions with Section 5.5 of the standard instrument need to be carried over to the SEPP e.g. clauses 3(b) and (c) Effluent discharge via a non-reticulated system and untreated stormwater.... into the beach .... – (also include rock platform)</li> <li>• The SEPP needs to provide advice and associated tools to clarify on how an applicant <i>demonstrates</i> compliance with the proposed development controls.</li> </ul>	
<p><i>Question 7: Is the inclusion of the catchments of the 15 sensitive lakes (listed in Schedule 1) within the coastal environment area appropriate? (Page 18)</i></p>	<p>Clarification is required on what is intended in rational catchment management to operationalise this clause:</p> <p><i>“coastal lakes and lagoons, and the land comprising the catchment of those lakes and lagoons, if the lake or lagoon is identified as requiring comprehensive protection (refer to Schedule 1)” (page 17)</i></p> <p>NB see above Q6 in relation to incorporation of ‘Schedule 1 – Coastal Lakes’ of the SEPP71 into the Coastal Management SEPP.</p> <p>Refer to the Issues Paper or the Draft Paper for the Coastal Lakes Inquiry for further information on the <u>criteria</u> used by the Commission to select coastal lakes.</p>	See comments column

Component	Comments / Questions	Recommendations
<b><i>Development controls for Coastal Management Area 4 – Coastal Use Area (p18)</i></b>		
	<ul style="list-style-type: none"> <li>The SCCG questions the intent of this area. There are concerns with this area in relation to duplications and conflicts with other planning policies that already exist for development within all of these areas. If the goal here is to gain greater support and consideration of the NSW Coastal Design Guidelines it is suggested that this be achieved via alternative mechanisms directly relating to LEP development and amendment within coastal NSW.</li> </ul> <p>The existing Local Planning Direction 2.2 (Coastal Protection) states that:</p> <ul style="list-style-type: none"> <li><i>What a relevant planning authority must do if this direction applies</i></li> <li><i>(4) A planning proposal must include provisions that give effect to and are consistent with:</i></li> <li><i>(a) the NSW Coastal Policy: A Sustainable Future for the New South Wales Coast 1997, and</i></li> <li><b><i>(b) the Coastal Design Guidelines 2003, and</i></b></li> <li><i>(c) the manual relating to the management of the coastline for the purposes of section 733 of the Local Government Act 1993 (the NSW Coastline Management Manual 1990).</i></li> </ul>	<p>The SCCG recommends that the NSW Government review this proposed area in terms of potential duplications and conflicts with other planning instruments of Councils. These areas are already covered by numerous other management and statutory plans including LEPs, DCPs and numerous Plans of management.</p> <p>The Group recommends that the Government consider the inclusion of the NSW Coastal Design Guidelines directly within Part 3 of the EP&amp;A Act if the existing 117 direction is considered ineffective.</p> <p>Regardless of outcomes of the above, DPE is strongly encouraged to review and update the 13 year old NSW Coastal Design Guidelines where needed and develop an implementation guidance document to assist Council interpret how the visions and objectives of this document is to be enacted.</p>

Component	Comments / Questions	Recommendations
<p><i>Question 8: Which is the best option for mapping the coastal use area? Is the proposed approach to mapping of the coastal use area for the Sydney metropolitan area appropriate?</i> (Page 19)</p> <ul style="list-style-type: none"> <li>• Option 1 – generally one kilometre landward of mean high water mark. Councils may propose to increase or decrease the area.</li> <li>• Option 2 – generally 500 meters landward of mean high water mark. Councils may propose to increase, but not decrease, the area.</li> <li>• Option 3 – generally one kilometre landward of mean high water mark. Councils may propose to increase the area, or decrease it to no less than 500 meters.</li> </ul>	<ul style="list-style-type: none"> <li>• Option 3 is favored as it most closely aligns with the existing NSW coastal zone that is well understood while also allowing some flexibility for the local council to reduce this to not less than 500m. Any proposed reduction in area should only be applicable in already high density areas with limited scenic qualities outside existing and future coastal vulnerability locations.</li> <li>• Amendment to the current narrow 'coastal zone' for Sydney is acknowledged and required.</li> <li>• It is acknowledged that some councils already have existing development within 500m of the MHWM.</li> </ul>	<p>Implementation of Option 3 is recommended.</p>
<p><i>Question 9: Should councils be able to propose variations to the Coastal Use Area maps over time to take into account local characteristics and circumstances?</i> (Page 19)</p>	<ul style="list-style-type: none"> <li>• It would be hoped that councils' LEPs ensure that urban design, location and scale is appropriate for these areas band based on the existing Coastal Policy and the various s117 directions that have been historically issued. When new development areas are proposed (i.e. only allowable outside Coastal Vulnerability Areas and areas of significant conservation values) these new subdivisions would be subject to the same principles and development provisions to ensure that urban design, location and scale is appropriate and that key values of biodiversity conservation, public access and scenic qualities be retained.</li> <li>• Adjustment to Coastal Use Areas would also be considered appropriate in situations when coastal hazards arise that were not originally anticipated when</li> </ul>	<p>See comments column</p>

Component	Comments / Questions	Recommendations
	developing their Coastal Vulnerability Areas – considering current and future coastal hazards.	
<p><i>Question 10: Are the proposed development controls for mapped coastal use areas appropriate for that land?</i> (Page 20)</p>	<ul style="list-style-type: none"> <li>• Please see response to Q9.</li> <li>• Yes, if the retention of this area is indeed considered necessary (refer to above).</li> <li>• More information is required in relation to the interpretation of ‘does not exceed the scale and size of <u>existing buildings</u> and the visual impact of the surrounding area’. There could be situations where a local authority may wish to increase urban density in existing urban centers and CBDs (outside vulnerability areas) to reduce urban sprawl and coastal ribbon development, and reducing the need to develop new green field areas preserving ecological and public open space values.</li> <li>• Amendments to foreshore building lines and protection areas will require further consideration when the draft maps are available for comment.</li> <li>• Clarification is sought in the final SEPP if the current 14 m height restrictions within the NSW Coastal Policy will be carried over in the new framework.</li> </ul>	See comments column

Component	Comments / Questions	Recommendations
<b>Other matters relating to development (p20)</b>		
<b>Exempt and complying development</b>		
<p><i>Question 11: Should the current exempt development and complying development provisions be retained for coastal management areas?</i></p> <p><i>(Page 21)</i></p>	<ul style="list-style-type: none"> <li>No Exempt and complying development provisions in the proposed Coastal Vulnerability Areas should be reviewed. For example including but not limited to: <ul style="list-style-type: none"> <li>Subdivision 1 Access ramps</li> <li>Subdivision 5 Awnings, blinds and canopies</li> <li>Subdivision 6 Balconies, decks, patios, pergolas, terraces and verandas</li> <li>Subdivision 9 Cabanas, cubby houses, ferneries, garden sheds, gazebos and greenhouses</li> <li>Subdivision 10 Carports</li> <li>Subdivision 10A Change of use of premises</li> <li>Subdivision 14 Driveways and hard stand spaces</li> <li>Subdivision 16 Farm buildings</li> <li>Subdivision 21AA Fuel tanks and gas storage</li> <li>Subdivision 23 Home-based child care</li> <li>Subdivision 26 Minor building alterations (internal)</li> <li>Subdivision 27 Minor building alterations (external)</li> <li>Subdivision 39B Tennis courts</li> <li>Subdivision 40A Waterways structures—minor alterations</li> </ul> </li> <li>This review is particularly relevant for current Coastal Vulnerability Areas’ but should also consider ‘future coastal vulnerability areas’ due to the economic and often emotional pressures to attempt to protect these often expensive ‘minor’ developments and their often important function to the other elements of the development (e.g. driveways, entertainment areas).</li> <li>Issues in this regard could be addressed via considering Coastal Vulnerability Areas the same as Foreshore zones.</li> </ul>	See comments column

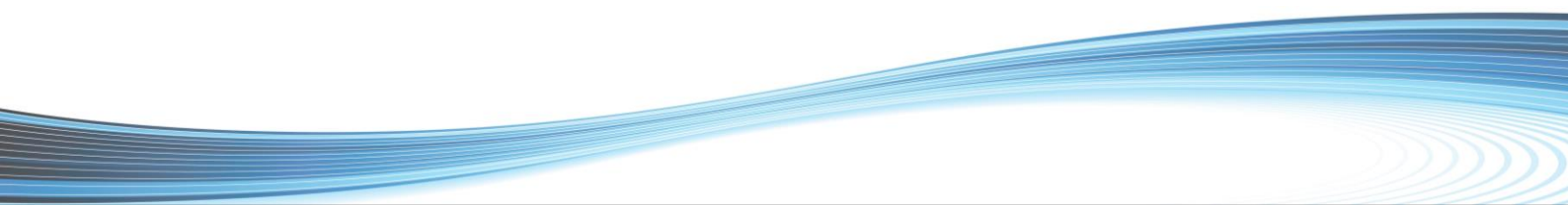
Component	Comments / Questions	Recommendations
	<ul style="list-style-type: none"> <li>The “Manufactured Homes estate, Caravan Parks, Camping Grounds and Moveable Dwellings Regulation 2005” should also be amended to ensure that any type of dwelling in “Vulnerability areas” must require development assessment to ensure they account for coastal processes and hazards. There are numerous regrettable examples along the NSW coast where we have single and even 2 story “manufactured” villas directly on incipient and fore dunes of active beaches.</li> </ul>	
<p><i>Question 12: Should consideration be given to applying other controls for these areas? For example, what types of exempt and complying development might be appropriate in coastal wetlands and littoral rainforests or in the catchments of sensitive coastal lakes and lagoons?</i></p>	<ul style="list-style-type: none"> <li>No development is appropriate, with the exception of educational signage or walking systems where environmental assessments have been implemented. If any development is allowed it should make no impact and can be easily removed and/or will not be protected if coastal hazards are realised.</li> </ul>	See comments column
<b>Coastal Protection Works (P22)</b>		
	<ul style="list-style-type: none"> <li>The SCCG is supportive of closing the loophole allowing ‘coastal protection works’ within the SEPP Infrastructure and placing all coastal management related issues within the strategic context of the Coastal Management Act and the Coastal Management SEPP. There have been numerous concerning examples of both Local Councils and State agencies using the Infrastructure SEPP for the installation of protection structures outside any Coastal Management Plan or LEPs and/or without appropriate community consultation.</li> </ul>	See comments column



Component	Comments / Questions	Recommendations																
<p><b>Approval pathways for new coastal protection works (CPWs)</b></p> <table border="1"> <thead> <tr> <th data-bbox="163 220 353 260" rowspan="2"></th><th colspan="2" data-bbox="353 220 535 260">Proponent</th></tr> <tr> <th data-bbox="353 260 535 292">Private</th><th data-bbox="535 260 777 292">Public authority</th></tr> </thead> <tbody> <tr> <td data-bbox="163 292 353 339">New CPW identified in the CMP <sup>(1)</sup></td><td data-bbox="353 292 535 339">Permitted with council consent</td><td data-bbox="535 292 777 339">Permitted without consent</td></tr> <tr> <td data-bbox="163 339 353 507" rowspan="3">New CPW where no CMP currently applies or where CPW not identified in the CMP</td><td data-bbox="353 339 535 507" rowspan="3">Permitted with JRPP consent</td><td data-bbox="535 339 777 395">Beach nourishment permitted without consent <sup>(2)</sup></td></tr> <tr> <td data-bbox="535 395 777 451">Sand bags permitted without consent <sup>(3)</sup></td></tr> <tr> <td data-bbox="535 451 777 507">Other works permitted with JRPP consent</td></tr> <tr> <td data-bbox="163 507 353 555">Emergency protection works consistent with CEEASP <sup>(4)</sup></td><td data-bbox="353 507 535 555">N/A</td><td data-bbox="535 507 777 555">Exempt development <sup>(3)</sup></td></tr> </tbody> </table> <p>(1) Works included in a coastal management program (CMP) applying to the land where the works are proposed.</p> <p>(2) Beach nourishment refers to the placement or spreading of sand on a beach only. It does not include sourcing or extracting of sand for beach nourishment purposes. The extraction of material may be subject to other development controls.</p> <p>(3) Sand bags are to be removed within 30 days of the date of placement whether undertaken as exempt development or development permitted without consent.</p> <p>(4) Coastal Erosion Emergency Action Sub-Plan will cover emergency works such as sand bags and beach nourishment by public authorities.</p>		Proponent		Private	Public authority	New CPW identified in the CMP <sup>(1)</sup>	Permitted with council consent	Permitted without consent	New CPW where no CMP currently applies or where CPW not identified in the CMP	Permitted with JRPP consent	Beach nourishment permitted without consent <sup>(2)</sup>	Sand bags permitted without consent <sup>(3)</sup>	Other works permitted with JRPP consent	Emergency protection works consistent with CEEASP <sup>(4)</sup>	N/A	Exempt development <sup>(3)</sup>	<ul style="list-style-type: none"> <li>• <i>New CPW identified in the CMP:</i> when a public authority is proposing any new CPW as identified in a CMP, the SCCG suggests that the associated EIA(s) and final designs for works be referred to OEH and the Coastal Council for consideration and comment.</li> <li>• <i>New CPW where no CMP currently applies or where CPW not identified in the CMP:</i> This provision should not be utilised as a ‘backdoor’ way to seek approval via the JRPP when a council has made a determination that no CPW are to be placed on a beach or anywhere within the local government area. This same provision should be also applicable to any public authority.</li> <li>• <i>Sandbags:</i> clear guidance on definition of what constitutes appropriate sandbags (size, materials, design and construction) is required within the Coastal Management Manual and with reference to in the SEPP.</li> <li>• <i>JRPP consent:</i> Further details of powers and the expert referral requirements of the JRPP to properly assessment CPW approves is required. It is assumed and strongly recommended that direct consultation with the local council and the Coastal Council would be a mandatory process in any such determinations.</li> <li>• <i>Emergency and Temporary Coastal Protection Works:</i> The SCCG questions the practicality of setting the specific 30 day removal requirements for permitted emergency coastal protection works. Timing should be set by regional OEH staff in collaboration with the local council with a maximum installation of 3 months. There may be circumstances where it would be inadvisable to remove these temporary structures if the beach profiles have not yet recovered within 30 days and if another major storm event is imminent.</li> </ul>	<p>See comments column</p>
		Proponent																
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Component	Comments / Questions	Recommendations
	<ul style="list-style-type: none"> <li>Situations when temporary structures are damaged and are littering the beach or near shore environment, or where the removal of temporary structures is extremely difficult if they have become buried, should be referred to in the Act with provision to allow pollution litigation and directions for removal.</li> </ul>	
<p><i>Question 13: Should any provisions be retained to allow the use of emergency coastal protection works in emergency situations? What limitations should be put on such works being undertaken by private individuals or public authorities?</i> (Page 24)</p>	<ul style="list-style-type: none"> <li>Some councils currently have Emergency Management Plans which set out plans and strategies to address issues arising from storms, floods, fire etc. These plans are generally prepared in reaction to a particular event and should remain under the control of the Emergency Management group until such time that the council has a gazetted Coastal Management Program.</li> </ul>	See comments column.
<b>Other infrastructure works in Coastal vulnerability areas (P24)</b>		
	<ul style="list-style-type: none"> <li>The requirement for public authorities to consult with the council before undertaking an activity is supported and should be in place regardless if these works are in a Coastal Vulnerability Area or are inconsistent with coastal management arrangements set out in an adopted CMP. Indeed, proposed CPW inconsistent with any adapted CMP should be prohibited. With new requirements that councils must consult with all relevant public authorities before adopting a Coastal Management Program, should come a concomitant requirement for all public authorities to adhere to the final plan. If an amendment to the CMP is determined to be necessary then this plan should be amended in consultation with the community and resubmitted via OEH and the Coastal Council, for Ministerial approval.</li> </ul>	See comments column
<b>Part C Background and analysis</b>	<ul style="list-style-type: none"> <li>All comments addressed above.</li> </ul>	See comments column.

## **4.3 Response to the draft Coastal Management Manual**



# COASTAL MANAGEMENT MANUAL

## General Comments

- Comprehensive with some repetition.
- Requires stronger links to the Bill and visa versa (ensuring state government agency participation and input).
- Confusion about ability, practicality and appropriateness of preparing a CMP for only one of the proposed coastal management area(s).
- Confusion regarding implementation of the process with OEH and linkages to grant programs. It is assumed that Councils will not have to prepare five different grant applications to undertake the five proposed CMP stages, as this will place excessive burden on council staffing resources and work schedules.
- Further work is required to give better direction and specific tools for tasks such as community consultation and engagement, CBA and other economic evaluations and multi-criteria analysis, business case development and monitoring and reporting. Templates or methodology/formulations should be provided for consistency across council areas. The online toolkit, whilst useful, is a multitude of information/previously published materials that takes a substantial amount of time to sift through, and mentions/links to materials that are not yet available online. More direction and prescription is required.
- Need to include better summaries of what is required as well as flow chart to include: Stage / Element / process / activities / consultations / approval processes - sign off / evaluations / next steps (for ease of use this should be made into one overall CMP development and implementation diagram).
- Should include templates and guidance documents including template consultant briefs.
- Numerous components of a CMP should be done at a state level especially within Stage 2.
- The Draft 'Manual' doesn't include actual 'Principles' to which to base s733 considerations.

## Part A: Mandatory requirements and essential elements for the preparation of a Coastal Management program

Element	Issue / Comment	Recommendations
General Comments	<ul style="list-style-type: none"> <li>Wording is ambiguous. Essential elements indicated it is mandatory however the use of 'should' throughout the text indicators Councils can use their discretion</li> </ul>	<p>Language to be cleaned up</p> <p>Mandatory vs discretionary nature of the essential elements requires clarification.</p>
Overview of Part A (p1)	<ul style="list-style-type: none"> <li>Change wording and focus to more clearly articulate that both councils and state agencies must engage with this process, and must follow the manual.</li> </ul> <p>(e.g. see wording on Part 5, Section 5.3.1)</p>	<p>Amend first line of document to read: <i>Local councils and public authorities in NSW must undertake the management of coastal areas in accordance with the Draft Coastal Management Bill and the proposed Coastal Management State Environmental Planning Policy.</i></p> <p>Same with second paragraph: <i>The coastal management manual has been developed to provide local councils <u>working with public authorities and local and regional communities</u> with information and guidance to assist their development of CMPs.</i></p> <p>The above is expressed in the fine print on page one - adjust to the diagram "Manual is presented in three parts" (ie <i>Public authorities should also use Part A</i> – however this is insufficient and the above amendments should be made. (See Part 5 section 5.3.1 as an example – Such wording needs to be in <b>Part A mandatory requirements.</b>)</p>
What is a coastal management program (p4)	<p><i>Where a CMP has been prepared in accordance with the draft CM Bill and the Manual, the Minister may certify that CMP. <u>A certified CMP meets the good faith requirements of Section 733 of the Local Government Act 1993.</u></i></p>	<p>Amend this line to considering including: <i>A certified CMP(s) <u>being implemented by the local council meets the good faith requirements...</u></i></p> <p>Further consideration of this statement is required. Just preparing a CMP would not provide sufficient evidence to cover all good faith requirements – surely a council in partnership with state government would need to provide evidence that they are indeed at least attempting to implement that plan with the State "in good faith".</p> <p>Issues raised within the comments on the Bill and the legal commentary contained within the Appendix 1 requires attention.</p>

Element	Issue / Comment	Recommendations
Mandatory requirements & essential elements (pp6-16)		
1.	<i>A CMP should be developed and delivered by local councils in the coastal zone. It should be a partnership between councils, state agencies, community groups and individuals.</i>	<p>The essential requirement that a CMP should be developed and delivered <b>as a partnership between councils, state agencies community groups and individuals</b> must be better articulated within the Bill within Section 16 and Section 23 amended appropriately to include the highlighted words above.</p> <p>An additional clause be included: Public authorities be required to participate during the development of CMPs.</p> <p>(In examples such as within Botany Council where they are not the primary coastal manager, the State should lead the development of CMPs).</p>
2.	2. Local councils must determine and map the area that their CMP will cover. This may include any combination of the four coastal management areas, namely: a) coastal wetlands and littoral rainforest areas b) coastal vulnerability areas c) coastal environmental areas (including coastal lakes, lagoons, estuaries headlands and rock platforms, and relevant buffer areas)	<p>It is difficult to see how the objectives of the Bill can be realised if a local council chooses to prepare a CMP for only one or a selected few of the coastal management areas. The management objectives of each coastal area and their defined hierarchy, together with the well-recognised interdependencies and interconnectivity of coastal assets, functions and values may very well be compromised if not all areas are at least considered properly in the Stage 1 – Scoping a CMP. If a council chooses to only address coastal vulnerability issues they may not necessarily address the essential ecological, environmental or cultural objectives requiring attention within the Coastal Environment and Coastal Use management areas.</p> <p>It is recognised that less attention to other areas might be warranted where a council has a good understanding of these areas and they are being managed well – however this should all be addressed within the scoping phase (Stage 1) and then incorporated into the CMP during CMP development phases 3 and 4.</p>

Element	Issue / Comment	Recommendations
5, 6 , 7	<p>5. <i>At the conclusion of the scoping study, councils <b>should</b> take the opportunity to seek advice from OEH and the Coastal Council.</i></p> <p>6. <i>Councils <b>should</b> take the opportunity to seek advice from OEH and the Coastal Council at the conclusion of key stages of the CMP process.</i></p> <p>7. <i>Councils <b>should</b> submit a draft CMP that is consistent with the requirements of the Manual to OEH. After exhibition of the draft CMP, councils should provide a copy of the final draft of the CMP.</i></p>	<p>It is recommended that amendment be made to replace “<b>should</b>” with “<b>must</b>”.</p> <p>There is confusion and inconsistency through the numerous Coastal Management Manual documents regarding requirements and / or suggestions as to when to consult with OEH and the Coastal Council.</p> <p>It is recommended that an overall CMP preparation process flow chart be developed summarising key stages, what is to be included in those stages, what community consultation is required or desirable in those stages and when OEH and the Coastal Council consultation and advice should be sought (and at what management level within OEH i.e. regional staff vs manager / director level).</p>
9.	The list of priority management issues to be considered are strongly supported, and should be expanded to include two additional key issues of intergenerational equity and systems management.	<p>Two key matters need to be directly included in the list of “<i>priority management issues and opportunities</i>” to enable the Bill’s objectives to succeed, namely:</p> <ul style="list-style-type: none"> <li>• Intergenerational equity (ESD component)</li> <li>• Systems management (addressing interrelationships and interconnectedness of the environment, infrastructure and their associated services and functions).</li> </ul>
10.	<p>10. <i>The CMP should be developed after the preparation of: a) a Coastal Strategy Statement.</i></p> <p>It is questioned why a Coastal Strategy Statement, specific trigger points, coastal management actions consistent with Strategy statement, a business plan should necessarily be developed before the preparation of a CMP (see further comments in Part B stage 1 comments).</p>	<p>The requirement to develop a Coastal Strategy Statement is strongly supported and should clearly be articulated in the Bill and inserted within “<i>Section 15 – Matters to be dealt with in coastal management program</i>”.</p> <p>The proposed timing for preparation of Strategy Statements and other requirements in this element needs to be further considered. Surely some of these requirements could only been finalised after “Part B Stage 2 Details Studies” and “Part B Stage 3; Response identification”.</p>
12	<i>Councils must develop a business plan that demonstrates .....</i>	Guidance on developing ‘fit for purpose’ business plan(s) must be provided within the Coastal Management Manual, and templates and best practice examples provided within the Coastal Management Toolkit.

Element	Issue / Comment	Recommendations
13	<p><i>If a CMP is prepared to address a coastal vulnerability area, that program should include all parts of the coastal zone that are:</i></p> <p><i>a) vulnerable to existing or potential hazards (including extreme events), or</i></p> <p><i>b) likely be affected by coastal hazards over a <b>defined planning horizon</b>.</i></p> <p><i>This could include the waters, beaches, dunes and <b>headlands</b> of the open coast, the waters, shorelines and riparian areas of coastal lakes and the shorelines, and the waters, banks, riparian areas and floodplains of estuaries, as far upstream as the tidal limit.</i></p>	<p>Clarity on the planning horizons for specific hazards in relation to what sort of risks must be considered must be provided in detail within the Bill, the SEPP and also in Part B, Stages 1 &amp; 2. (N.B. There is some reference to these on page 17, Part B - Stage 3 – see comments on this below.)</p> <p><b>Cliffs and bluffs</b> should be included in addition to headlands.</p> <p>Issues in relation to tidal limits need to be clarified. There are currently no references to tidal limits in the Bill nor the EIE for the SEPP. (This be at least provided with the Glossary to the Manual.</p>
14	<p><i>The CMP should be developed to consider potential very large, low probability events and ongoing long-term changes, at timeframes up to, and if appropriate, beyond 100 years.</i></p>	<p>Being able to consider events outside 100 year return intervals is supported, including considerations for catastrophic marine inundations such as tsunamis and offshore landslides. See the following key SCCCG projects for possible inclusion in the Toolkit(s):</p> <p><a href="http://www.sydneycoastalcouncils.com.au/node/106">http://www.sydneycoastalcouncils.com.au/node/106</a> (2014)</p> <p>and</p> <p><a href="http://www.sydneycoastalcouncils.com.au/Project/Vulnerability_of_Buildings_Tsunami_Flooding">http://www.sydneycoastalcouncils.com.au/Project/Vulnerability_of_Buildings_Tsunami_Flooding</a> (2009)</p> <p>Greater linkages to SES activities in this area including their current work on evacuation mapping are also strongly encouraged.</p>
17	<p><i>A CMP may also include opportunities to enhance biodiversity (within coastal wetlands and littoral rainforest areas and coastal environment areas) and social and economic assets and conditions in the coastal zone including enhanced public access and enjoyment of the coastal amenity.</i></p>	<p>We recommend that <b>may</b> is replaced with <b>must</b> to reaffirm the need to achieve the Bill and the associated management objectives for Coastal Environment Areas.</p>



Element	Issue / Comment	Recommendations
18	<i>As a minimum, a stakeholder engagement strategy should be prepared and implemented by the council, and should identify relevant stakeholder groups within the community and include adjoining local councils and public authorities, where applicable, and outline methods that will be used to engage each group.</i>	<p>This element is strongly supported. The wording within this clause requires amendment to ensure that relevant agencies (public authorities) are part the CMP development process from the outset and therefore have requirements to consider and endorse components of the draft engagement strategy involving them and commit to participation as defined within.</p> <p>It is not sufficient that agencies and public authorities are only consulted when draft CMPs are developed. The ongoing issues up and down the coast of lack of agencies participation and buy in throughout CMP preparation and then not agreeing to actions right at the end jeopardizing the entire CMP and its associated gazettal, must be addressed as a key priority in the coastal reform agenda.</p> <p>There are many historic and current situations where councils are unable to secure engagement with numerous agencies including Planning, Crown lands, National Parks, SES / Emergency services, and Utilities including Sydney Water.</p> <p>OEH should take the lead to assist councils secure and maintain this critical element, if any CMP is to be successful in the short, medium and longer term.</p> <p>The toolkit should be rationalised to include only the most relevant of material and useful guidance documents and templates, to assist councils in developing the CMP (e.g. relevant guidance material on community consultation to manage often highly charged and controversial engagements with interested parties).</p> <p>It should be noted that if the toolkit is referenced in the manual, it is suggested that local councils will then be expected to utilise the toolkit in the development of the CMP. The toolkit as it currently stands, whilst useful, includes a multitude of information/previous studies etc. Some of this material may not be relevant or overly useful to some councils, and therefore its use should not be in any way mandatory when developing the CMP.</p>
20	<i>CMP must be exhibited for a period of not less than 28 days .....</i>	<p>This element is consistent with other processes, which is appropriate – however reference to and guidance for exhibition of other stage outcomes should also be referenced in Part A. i.e. exhibition for the Scoping Study(s) Stage 1 and exhibition for Stage 2 details study outcomes etc.</p>

Element	Issue / Comment	Recommendations
30.	<i>Public authorities are to have regard to a CMP, the coastal management manual and the draft CM Bill to the extent that they are relevant to the functions, plans of management and activities of the authority.</i>	<p>Amendment required to read “Public authorities <b>must act in accordance</b> with a CMP, the coastal management manual and the Draft CM Bill to the extent...”</p> <p>Amendments to Section 23 (1 and 2) of the Bill are also required (see SCCG comment in relation to the Bill).</p>

## Part B: Stage 1 Scoping a Coastal Management Program

Element	Issue / Comment	Recommendations
1.1.1 Involving stakeholders up front	<ul style="list-style-type: none"> <li>These activities are strongly supported.</li> <li><i>Prior to commencing Stage 1 councils should raise awareness with stakeholders of the requirements of the draft Coastal Management Bill (draft CM Bill) and the proposed Coastal Management SEPP, as well as the links between these statutory requirements and other legislation such as the relevant provisions for coastal management contained in the Environmental Planning and Assessment Act 1979 and the Local Government Act 1993.</i></li> <li><i>In order to ensure that the stakeholders are engaged at the outset, it is recommended that the stakeholder engagement strategy be developed to inform consultation and engagement during the scoping stage.</i></li> </ul>	<p>OEH and DPE should prepare standard overview materials for local councils to include in their initial consultation materials to stakeholders.</p> <p>See comment in Part A mandatory requirements No. 18 – i.e. requirements for relevant agencies to consider and endorse relevant components of the engagement strategy ensuing commitment to participate throughout the CMP development process.</p>

Element	Issue / Comment	Recommendations
1.4	<p><i>Getting started –</i></p> <p>Addressing the 4 Coastal Management areas</p>	<p>Further emphasis is recommended to ensure that councils with their state government partners ensure they consider objectives, priorities and needs for all 4 proposed coastal management areas. Final decisions to focus on only some of these areas in this initial stage could potentially be premature until the necessary detailed assessment is undertaken in Stage 2. It is recommended that final decision in this regard be determined in Stage 3.</p>
1.6	<p>Coastal wetlands and littoral rainforests</p> <p><i>This section applies if a CMP is being developed for, or includes, coastal wetlands and littoral rainforest areas. At the scoping stage it will be necessary to consider the <b>baseline or current condition of the relevant assets</b> and values in the coastal management area.</i></p>	<p>More guidance tools and collaborations with responsible state agencies will be required to effectively “<i>consider the <b>baseline or current condition of the relevant assets</b>”</i>. It is unlikely that this could be completed as part of Stage 1 and will require additional time and resources. This is further complicated by the fact that the majority of these areas are with protected areas, crown lands and private lands.</p> <p>It is recommended that the OEH Wetlands unit and those managing Endangered Ecological Communities including Littoral rainforests and their associate recovery plan(s) take the lead on these important actions.</p> <p>Consider adding reference to and links within the Toolkit to the award-winning <a href="#">SCCG Model Development Control Plan (DCP) – Protecting Sydney’s Wetlands Project</a>.</p> <p>NB - The Model DCP and the supporting resources provides local governments and other development consent authorities with a generic model planning mechanism for consistent and coordinated protection and management of coastal wetlands.</p>

Element	Issue / Comment	Recommendations
1.7	<p>Coastal Vulnerability Areas</p> <p><i>Particular attention should be given to cliffs, bluffs and rock platforms as these locations may involve risk to life</i></p>	<p>The emphasised focus on cliffs and bluffs is strongly supported.</p> <p>Reference to work undertaken by the AGS supported by SCCG i.e. AGS 2007 is also supported.</p> <p>It is recommended that specific reference also be made to the web site developed for these resources as well the included training / awareness raising tools aimed at i) regulators, ii) practitioners and iii) the community  <a href="http://lrm.australiangeomechanics.org/">http://lrm.australiangeomechanics.org/</a></p> <p>Further specific reference could also be provided to the Fact sheet (Geo Guide LR10 - Coastal Landslides) that was developed as part of this AGS 2007 program focusing on Coastal issues.</p> <p>When 'risk to life' issues are involved council via the Coastal program should be referenced directly to NSW Justice and regional and local combat agencies (SES, police).</p>
1.7.1	<p><i>Public infrastructure and other assets</i></p> <p><i>When commencing a scoping study. .... In such cases councils should identify and map the locations of vulnerable infrastructure and assets and the anticipated timing of impact relative to the infrastructure/asset life.</i></p> <p><i>Infrastructure assets to consider include, but are not limited to:</i></p> <ul style="list-style-type: none"> <li>• roads and rail lines</li> <li>• power transmission lines</li> <li>• water supply infrastructure including systems, pipelines and plants</li> <li>• telecommunications infrastructure</li> <li>• ports</li> <li>• sea walls and revetments, and....</li> </ul>	<p>It is strongly recommended that the text around infrastructure highlight the important infrastructure systems, interconnectedness and interdependencies. Understanding the system and how infrastructure components relying on each other is very important particularly in the coastal zone when long term severability of communities will increasingly become challenging as hazard(s) exposure increases.</p> <p>The SCCG major project <a href="#">Demonstrating Climate Change Adaptation of Interconnected Water Infrastructure Project</a> might be a useful inclusion in the Toolkit</p> <p>It is further suggested that the SCCG project also be added to the Toolkits reference list; <a href="#">Assessment and Decision Frameworks for Seawall Structures Project</a>.</p> <p>This project enables Local and State Governments to evaluate the robustness and condition of existing small seawalls for coastal climate change protection and outline possible options for further upgrades and or alternative solutions.</p>

Element	Issue / Comment	Recommendations
1.7.2	<i>The scoping study should consider the legality, sustainable competency and effectiveness of these existing structures.</i>	<p>Councils are not responsible for ongoing monitoring of private structures.</p> <p>Following approval of the initial structure, private asset owners have sole responsibility for managing these assets. It would be inappropriate for Council to undertake an LGA wide assessment of the sustainable competency and effectiveness of all existing structures.</p>
1.9.1	<p><b>Access, use and amenity</b></p> <p><i>Where a CMP is to be developed that considers access, amenity and use...</i></p>	<p>This text is concerning. Surely any CMP developed for any part of the NSW coast must consider <b>access and amenity</b> to ensure adherence to the Bill, SEPP and the Manual.</p> <p>Rewording to emphasis this critical issue is required.</p>
1.9.2	<p>Cultural and Heritage assets include:</p> <ul style="list-style-type: none"> <li>National Surfing Reserves</li> </ul>	<p>It should be recognised that many surf locations are not yet included with the recently established surfing reserves system, with only 7 sites so far identified in NSW. There are many other very well known and highly valued surf spots that would need to be identified and managed as such within CMPs.</p>
1.10	<b>Performance review of current coastal management arrangements</b>	<p>There is a key gap in this stage that needs to be considered within Stage 1 – Scoping Study.</p>
1.11	<p><b>Scoping Study</b></p> <p><i>The scoping report should cover 10 key points:.....</i></p>	<p>As part of the Stage 1 it is critically important for the local council together with their public authority partners to undertaken an internal capability assessment. As part of a related project on <a href="#">Prioritising Coastal Adaptation Development Options for Local Government</a>, the SCCG (with its research partner) developed <a href="#">A Guide to Monitoring and Evaluating Coastal Adaptation which we suggest may be of assistance in this stage.</a></p> <p>The Guide provides a framework for monitoring and evaluating the climate change adaptation strategies and practices of local government in coastal areas, focusing on three key areas – best practice planning, adaptive capacity and monitoring outcomes.</p> <p>The “<b>Adaptive Capacity assessment template</b>” within this guideline provides a suitable starting point to assess internal capacity (simply replace replacing “adaptation” with “Coastal Management”). The template and supporting resources enables council to assess their ability and potential to implement (adaptation) coastal management. Based on comprehensive review of literature, six key areas of capacity have been identified as necessary for successful implementation. These are: Human capital; Organisational capital; Social capital; Natural capital; Built capital and Financial capital.</p>

## Part B: Stage 2 Detailed studies of vulnerability and opportunities

Element	Issue / Comment	Recommendations
Overriding issues	<p>There so many possible studies identified as potential “types of studies which may be included in Stage 2 to inform management decisions”, many of which are clearly outside local government responsibilities, capacity, resources and in some cases jurisdictions (below low water, in crown reserves and/or protected areas).</p> <p>Many of these studies should be undertaken at a state level and are often key responsibilities and core business of state agencies. It is a real concern that it again seems that responsibilities for these studies are being pushed onto councils with comments such as:</p> <p><i>When planning detailed studies in Stage 2, councils should consider the availability of, or need for, data, the ..... value added by intensive analysis, <b>their capacity to fund the studies</b> and the important information for .... (page 9)</i></p> <p>Some level of priority and information about how the resultant studies can be utilised to make management decision is also suggested.</p> <p>Those studies providing cross cutting information applicable across all four coastal management areas should be highlighted and potentially prioritised for funding support.</p>	<p>See comments in the “Issues” column.</p> <p>Funding arrangements provided via the Coastal Program and also other sources such as the NSW Environment Trust must recognise issues raised in the adjacent column.</p> <p>There is great future potential to utilise Stage 1 Scoping Study reports to target state government grant programs and to also assist with developing agency resource and research plans.</p>

Element	Issue / Comment	Recommendations
2.5	<i>Studies in Coastal wetlands and Littoral Rainforest areas.</i>	Many of these studies should be undertaken at a state level (and/or bioregion level) by state agencies with support from academia (where needed) with local councils encouraged to use this work to consider any local circumstances.  Further consideration needs to be provided as many of these ecological features are on private lands or protected areas.
2.6	<i>Studies in Coastal Vulnerability areas</i>  <i>erosion of foreshores caused by the action of <b>wind</b>, waves and catchment floodwaters.</i>	Amend hazard description for erosion to include wind.  Consider also reintroducing wind in the description of coastal hazards in the Bill, SEPP and also the Manual.
	<ul style="list-style-type: none"> <li>Many suggested studies are clearly outside local government responsibilities, capacity, and resources and in some cases jurisdictions (below low water, in crown reserves and/or protected areas).</li> </ul>	<p>Many of these studies should be undertaken at a state level (and or bioregion) by agencies with support from academia (where needed) with council encouraged to use this work to consider any local circumstances. For example:</p> <ul style="list-style-type: none"> <li><i>Sediment sharing between primary, secondary and tertiary sediment compartments</i></li> <li><i>Developing conceptual models for Sediment budgets / shorelines trends</i></li> </ul> <p>Surely it would be prudent that the State develop such models for each of the states 40 odd sediment compartments.</p>
2.6.1	<i>Beach erosion and shoreline recession</i>  <i>Coastal erosion ..... Studies of coastal erosion and shoreline recession should aim to .... Time-frames to consider include <b>immediate, 20 years, 50 years 100 years</b> and beyond if ongoing recession is likely.</i>	<p>This is the first time that time frames for hazard assessment have been mentioned.</p> <p>There is a clear need to ensure consistency throughout the range of materials in the coastal reform package</p> <p>Clarity is required on what timeframes should be, definition of acceptable exceedance probabilities and their associated applicability to development standards and controls and mechanisms for management intervention via triggers.</p>
2.6.4	<i>Coastal Cliff or Slope Instability</i>	See comments above Table - Part B: Stage 1 Scoping a Coastal Management Program section 1.7
2.6.5	<i>Risks to Life</i>	Further consideration is needed on the appropriateness of including Risk to life issues within CMPs and how they relate to Strategic and Land Use planning, local DISPLANs and activities of the LEMC, REMCs and Police.

Element	Issue / Comment	Recommendations
2.7 & 2.8	<p><i>Studies in Coastal Environment Areas</i>  <i>Studies in Coastal Use Areas</i></p> <ul style="list-style-type: none"> <li>Many suggested studies are clearly outside local government responsibilities, capacity, and resources and in some cases jurisdictions (below low water, in crown reserves and/or protected areas).</li> </ul>	Many of these studies should be undertaken at a state level (and or bioregion) by agencies with support from academia (where needed) with council encouraged to use this work to consider any local circumstances.

## Part B: Stage 3 Response identification and evaluation

Element	Issue / Comment	Recommendations
3.2	<p><i>Purpose of Stage 3</i></p> <p><i>Management action and responses should include:</i></p>	<p>Add additional points:</p> <p>“projected population growth” should also include industrial and commercial change including coastal reliant industries</p> <p>To consider ‘systems’ thinking, assessments and considerations including interconnected and interdependencies of infrastructure and other public sector services.</p> <p>Add ‘Opportunities’ to “<i>constraints (and opportunities) associated with regeneration of natural ....</i></p>
3.2.1	<p><b>Engagement within Council</b>  <i>Councils should consult with adjoining councils during stage 3</i></p> <p><b>Engagement with public authorities</b>  <i>Refine opportunities for alignment of management actions of public authorities .....</i></p>	<p>Add issues of shared and interconnected assets and infrastructure</p> <p>Clearly this is beyond the scope or ability of local councils – this should be led by OEH representatives as part of the CMPs development committee and or regional DPC officers</p>
3.3	<i>Strategic approaches, opportunities and management actions in coastal wetlands and littoral rainforests areas</i>	Add to <a href="#">SCCG Model Development Control Plan (DCP) – Protecting Sydney’s Wetlands Project</a> . To materials (See 1.6 above)



Element	Issue / Comment	Recommendations
TableB3.1	<b>Table B3.1: Strategic management approaches and examples of responses for coastal wetlands and littoral rainforests</b>	<p>A brand new report entitled - <a href="#"><u>Climate-ready biodiversity management - A tool to help design biodiversity projects in the face of climate change</u></a> has just been released by the SCCG (prepared by the CSIRO).</p> <p>The 'climate-ready' approach to adaptation emphasises the inevitability in the long-term of significant levels of ecological change, and the need to consider impacts of multiple different aspects of biodiversity that are valued by the community.</p> <p>The tool was developed for use by local government officers undertaking biodiversity conservation initiatives that might need to consider climate change, such as on-ground projects or strategies.</p> <p>The tool has been developed, prototyped and trialled with SCCG member councils and other partners, and the documentation reviewed by council and SCCG officers, to help make it as accessible as possible to people who are initially unfamiliar with the key adaptation concepts upon which the tool is based.</p> <p>Consider adding reference to this resource within the Toolkit.</p>
3.4	Strategic approaches, opportunities and management actions in coastal vulnerability areas	<p>It is recommended that the concepts of transformational management options or – 'Coastal Adaptation Pathways' be introduced within this section. This will allow managers to better understand potential sustainable, affordable and no regrets pathways forward through the triage of accommodation, protection and retreat.</p>

Element	Issue / Comment	Recommendations
3.4.1	<p><i>Further information about risk management responses and opportunities linked to strategic direction in coastal vulnerability areas</i></p> <p><i>Details about what is involved in the design and delivery of different responses, and the likely advantages or disadvantages of each response are in the coastal management toolkit (see Management options).</i></p>	<p>The critically important “management options” are not included in the Toolkit.</p>
	<p><b>Avoid risk and deliver opportunities by land-use planning</b> (p16).</p>	<p>This section contains numerous notations to average recurrence intervals (ARI) and time scale considerations as well as exceedance probabilities.</p> <p>This is the first time such specific planning and design consideration have been introduced in any of the publicly available Coastal Management Reform documents.</p> <p>It is strongly recommended that specific consideration of these matters is also included within the Bill and the SEPP. It is not adequate to bury such important planning and management considerations on page 17 of Part B - Stage 3 of the manual.</p>

Element	Issue / Comment	Recommendations
3.7	<b><i>Linking management responses over time</i></b>	<p>As part of the Stage 1 it is critically important for the local council together with their public authority partners to undertake an internal capability assessment. As part of a related project on Prioritising Coastal Adaptation Development Options for Local Government, the SCCG (with its research partner) developed <a href="#">A Guide to Monitoring and Evaluating Coastal Adaptation which we suggest may be of assistance in this stage.</a></p> <p>The Guide provides a framework for monitoring and evaluating the climate change adaptation strategies and practices of Local Government in coastal areas, focusing on three key areas – best practice planning, adaptive capacity and monitoring outcomes.</p> <p>The <b>best practice planning template</b> may assist councils <u>to assess linkages of management responses between related plans</u> to ensure that they are indeed integrated, equitable, sustainable, informed and responsive.</p> <p>Ideally, users would review the Best Practice Planning Template <i>prior</i> to developing a adaptation plan (or CMP) to inform the planning process. However the Template can also be used to identify strengths and weaknesses in adaptation plans that have already been developed. It is also recommended that the Template also be revisited as part of any review of council's planning processes.</p>
3.8	<b><i>Guidance on selecting the appropriate management strategy</i></b>  <i>All responses that are included in a coastal management program must be evaluated in relation to feasibility, using well established techniques such as multi criteria analysis.</i>	<p>It is recommended that at least some guidance in the form of examples and a template for multi criteria analysis be provided within the framework. See SCCG report on <a href="#">Prioritising Coastal Adaptation Development Options for Local Government</a>, for examples.</p>

Element	Issue / Comment	Recommendations
3.8.1	<p><i>Preparing an Economic evaluation.</i></p> <p><i>When undertaking this analysis councils should consider the capacity of beneficiaries to pay when apportioning the costs.</i></p>	<p>It is recommend that guidance on 'how to' assess capacity of beneficiaries to pay when apportioning the costs be provided within the framework. It is also recommended that a methodology be prepared and provided to councils to assist in the assessment to provide some consistency across council areas, and to uphold transparency and equity/fairness throughout the process.</p> <p>IPART and social service agencies may provide assistance in development of tools and processes to ensure feasibility of this activity.</p>
3.9.4	<p><i>Potential funding mechanisms.</i></p>	<p>With this issue being the key to success of any CMP it is strongly recommended that further guidance be provided in this area. This should be supported by agreement made at a cabinet level on how particular agencies and public authorities will or will not support implementation of CMPs.</p> <p>Seeking individual councils to negotiate on individual actions within local CMPs with state agencies is very unlikely to succeed nor achieve the objectives of the Bill.</p>

## Part B: Stage 4 Preparing, exhibiting, finalising, certifying and adapting the CMP

Element	Issue / Comment	Recommendations
	The majority of comments relevant to this section are covered in Stages 1-3.	
4.3.1.3	<p>Issues in relation to public authority engagement and actions sign off.</p> <p><i>During Stage 4, councils should engage with public authorities about proposed actions that would be the authority's responsibility.</i></p>	<p>As noted previously, agencies need to engage in CMPs from the outset and not only when draft actions are developed and letters of implementation support are requested.</p> <p>Clarification is also sought on what should be done when an agency does not support actions. What mechanisms will be put in place in the Bill to address this and ensure that such inevitable situations will be mediated quickly via an independent adjudication (potentially the Coastal Council)?</p>
4.3.1.4	<p><i>Public authority (p5)</i></p> <p><i>Councils share responsibility for implementing and resourcing actions in the coastal zone with public authorities. The preparation and implementation of CMPs by local government is a key mechanism for achieving the state's objectives for integrated management of the coast, supplementing the state's own investment in the protection, maintenance and enhancement of important coastal values.</i></p>	<p>This statement is strongly supported and should be repeated within the Bill and the SEPP. Such a clear positive statement to ensure success of coastal management in NSW should not be buried only within Stage 4 of the Coastal Manual.</p>
4.4	<p><i>Consultation and exhibition of the draft CMP</i></p> <p><i>Figure B4.3 shows the steps that council will undertake in exhibiting, finalising, certifying and adopting their CMP.</i></p>	<p>This diagram is supported</p> <p>It is suggested that such a process diagram be prepared relating to all 5 stages of CMP preparation to highlight opportunities and requirements for consultation within each of these 5 stages.</p>

## Part B: Stage 5 Implementing, monitoring, evaluating and reporting.

Element	Issue / Comment	Recommendations
	Majority of comments relevant to this section covered in Stages 1-3	
5.3.2	<b>Linking with the Asset Management Plan</b> <ul style="list-style-type: none"> <li>“the CMP should provide a service standard for coastal assets, related to safety, structural integrity and amenity”</li> </ul>	<p>This statement is supported however more guidance is required on what it means, and the tools and standards to be used, e.g. Standards Australia and/or Engineers Australia for certain types of assets etc.</p> <p>An additional statement should be added to include consideration of development of environmentally sustainable management and maintenance protocols and practices for assets e.g. <a href="#">National Committee on Coastal and Ocean Engineering</a> and various Council documents.</p>
5.3.3	<b>Compliance and enforcement</b> <p><i>At any time during the preparation of or after the gazettal of a CMP, it is important that councils undertake compliance and enforcement activities when illegal or unauthorised activities take place, to minimise environmental impacts and to minimise the likelihood of public safety issues arising from poorly designed, placed and maintained works.</i></p>	<p>OEH technical expertise is often required with enforcement activities in the coastal zone especially when it relates to issues of engineering, safety and removal of illegal works.</p> <p>We further understand courtesy of Lake Macquarie Council:</p> <p><i>That additional amendments to the Environmental Planning &amp; Assessment Act and Local Government Act 1993 are required to enable effective compliance/enforcement to occur, as the existing legislative framework prevents councils from issuing ‘orders’ for illegal, or unapproved works (such as seawall structures) on Crown reserves.</i></p> <p><i>Section 126 of the Local Government Act, and section 121C of the Environmental Planning &amp; Assessment Act (both titled “Giving orders to public authorities”) require that prior to the issuing of ‘orders’, written consent of the Minister is required. It is believe that the intent of these provisions was to require the Minister’s consent when issuing orders to ‘public authorities’, the legal interpretation of these clauses applies to the issuing of ‘orders’ to any party. This is due to <a href="#">section 35(2)(a) of the Interpretation Act 1987</a> (which provides that a heading to a provision of an Act is not part of the Act), and the only references to ‘public authorities’ within section 126 of the Local Government Act 1993, and</i></p>

Element	Issue / Comment	Recommendations
		<p><i>section 121C of the Environmental Planning &amp; Assessment Act are contained within the headings.</i></p> <p><i>There have been two Land and Environment Court of NSW decisions concerning this issue (Anderson v Lake Macquarie City Council) at <a href="http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2013/1038.html">http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2013/1038.html</a> and <a href="http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2013/96.html">http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2013/96.html</a>. These decisions relate to council's unsuccessful attempts to 'order' the removal of an unapproved seawall on a Crown reserve.</i></p> <p>These gaps and loopholes require attention.</p>

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# Appendix 1: Legal commentary on the draft Coastal Management Bill and the Explanation of Intended Effect (for the proposed Coastal Management State Environmental Planning Policy (SEPP)



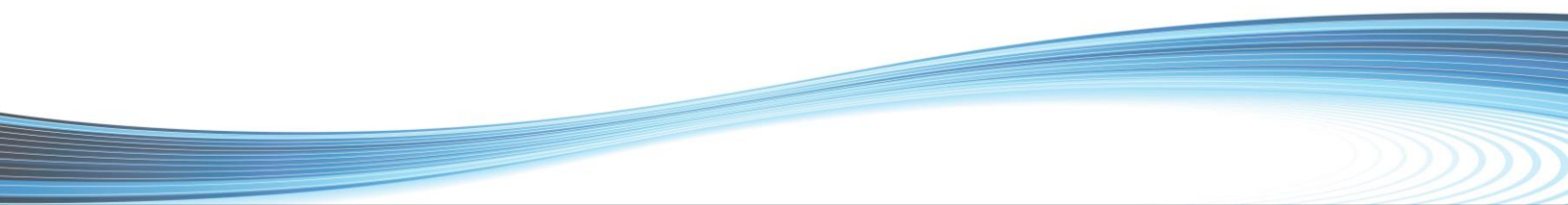
Prepared by Ms Kirston Gerathy (Partner HWL Ebsworth Lawyers)



This Commentary has been provided to all SCCG Member Councils and all NSW Coastal Councils (via LGNSW). The advice is now provided to the NSW Government via the Coastal Reforms Stage 2 Consultation process for their consideration prior to the finalisation of the Bill for parliamentary consideration.

The SCCG endorses this commentary, the concerns and issues it raises and the recommendations outlined within it. The SCCG seeks formal response to issues contained within the document as part of the Submissions Representations Report.

**N.B.** The SCCG would like to thank LGNSW for supporting preparation of this advice and co-funding its production.



Our Ref: KMG:587202

22 February 2016

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Dear Sir

## **Coastal Management Framework - Stage 2 Reforms**

Following completion of the Stage 1 Reforms, the following documents have been released for public comment:

1. Draft Coastal Management Bill (**Draft Bill**);
2. An Explanation of Intended Effect for the proposed new Coastal Management State Environmental Planning Policy (**New SEPP**); and
3. Key elements of the draft Coastal Management Manual (**Draft Manual**).

The State has indicated it will accept submissions on these drafts until 29 February 2016.

You have asked us to consider the Draft Bill and New SEPP and provide a broad outline advice addressing the major reforms and the potential implications for councils arising from the implementation of those reforms, in the management of development, hazards and impacts in the coastal zone and other reforms proposing new responsibilities for Local Government authorities.

In accordance with the limitations of our brief, this advice does not comprise a comprehensive analysis of all issues which may arise from the Stage 2 Reforms. Rather, we have undertaken an overview analysis of key components of the reform package as we see them. Observations made will likely require revision and clarification once the entirety of the reform package is available and we have had the opportunity to review the voluminous material in detail.

### **1. Limitations on advice**

- 1.1 The Draft Bill and associated documents propose a number of significant reforms. The effect of these reforms will not be capable of analysis in a legislative or operational sense until the complete framework, particularly the provisions of the

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proposed New SEPP are known. Detailed consideration of every reform proposed is beyond the scope of our brief.

- 1.2 We have concentrated, for the purposes of this overview advice, on the provisions of the Draft Bill, New SEPP and some of the proposed amendments to associated legislation rather than a detailed analysis of the key elements of the Draft Manual. This advice should be understood in this context and with that limitation.
- 1.3 Any exercise of an administrative decision making function is potentially reviewable and could give rise to exposure to liability. The potential for merit or judicial review, and the existence of actionable duties of care and liability in the exercise of statutory functions and duties by councils under the Stage 2 Reform framework, will be dependent upon individual facts and circumstances.
- 1.4 Thus our comments must be understood as general in nature only and should not be relied on for any purpose other than general commentary.
- 1.5 Councils should seek specific advice informed by their individual circumstances. In the case of the revised provisions for Coastal Management Programs (**CMP's**) and the intended revisions to s733 of the LG Act, such advice would prudently involve councils' insurers.
- 1.6 For ease of reference, we have prepared a consolidated mark up of the *Environmental Planning and Assessment Act 1979 (EPA Act)* *Environmental Planning and Assessment Regulation 2000 (EPA Regulation)*, the *Local Government Act 1993 (LG Act)* and *Rural Fires Act 1997*, incorporating the amendments proposed by the Draft Bill. A copy of this consolidated mark up is attached at Appendix A for your information.
- 1.7 Please note Appendix A is 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.
- 1.8 Further, proper analysis of the framework into which the proposed amendments will be placed will require examination of the broader statutory provisions, powers and obligations in Part 3, Part 4, Part 5 and Part 6 (particularly the orders regime) in the EPA Act.
- 1.9 Detailed analysis of the instruments, policies and land use definitions in all LEP's is beyond the scope of this advice. Individual councils should review their own instruments and plans and seek specific advice.

### Structure of Advice

- 1.10 The Stage 2 Reforms squarely position coastal hazard and processes management in land use planning terms. This appears, from information released in conjunction with the Stage 2 Reforms, to be a deliberate policy shift.
- 1.11 This Advice addresses:
  1. Strategic planning reforms in overview (Appendix B);
  2. Development assessment issues, threshold consideration and conditions of consent (Appendix C);
  3. Enforcement and compliance regimes under the EPA Act (Appendix D);
  4. Statutory immunities - section 733 of the LG Act (Appendix E);

5. CMP's and the Integrated Planning and Reporting framework (Appendix F).

## 2. Background

- 2.1 The Draft Bill proposes to repeal the *Coastal Protection Act 1979 (CP Act)* and associated regulations and replace it with the Coastal Management Bill 2015. The Draft Bill contemplates (and indeed the Stage 2 reform framework is dependent upon) the making of regulations which have yet to be formulated.
- 2.2 Also proposed in the Draft Bill are amendments to the EPA Act and Regulations, LG Act and minor amendments to the RF Act and LEC Act.
- 2.3 A major component of the Stage 2 reforms is the consolidation of land use planning in a coastal context into one SEPP and the foreshadowed repeal of SEPP 14, SEPP 26 and SEPP 71.
- 2.4 Also proposed is the repeal of existing provisions in clause 5.5 of the Standard Instrument (and any local coastal risk clauses) and the replacement of provisions in State Environmental Planning Policy Infrastructure 2007 (**ISEPP**), insofar as they relate to coastal protection works (**CPW**) by landowners or public authorities.
- 2.5 The creation of express statutory obligations upon councils to 'give effect' to any CMP, and requirements to do so in the Plans prescribed pursuant to the Integrated Planning Reporting Framework (**IPR Framework**) under the LG Act and in LEP's and DCP's, are also contemplated.
- 2.6 Other key features of the Stage 2 Reforms include:
- (a) the establishment of a NSW Coastal Council with advisory, oversight, and audit functions;
  - (b) the repeal of most of the express powers and obligations on the Minister in terms of general oversight and enforcement in the Coastal Zone;
  - (c) retention of ministerial powers to 'make' a CMP in prescribed circumstances;
  - (d) requirements for consultation between public authorities across sediment compartments.
- 2.7 Whilst the public consultation period expires on 29 February 2016, the material available in the public domain for consideration and submission does not comprise all essential components of the Stage 2 Reforms. The State has indicated *'additional elements of the proposed new framework will be released later for public comment, including maps of the coastal zone that will form part of the SEPP and proposals concerning the effects of coastal erosion on coastal boundaries, to inform finalisation of the draft Coastal Management Bill and SEPP'*.<sup>1</sup>

## 3. Overview of the Draft Manual

- 3.1 The revisions to the Draft Manual are far reaching. It provides for Mandatory Requirements; Essential Elements; procedural mechanisms and content prescriptions.
- 3.2 A cursory review of the Draft Manual indicates significant work and reconfiguration of existing draft CZMP's may need to be undertaken to meet the Mandatory Requirements

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<sup>1</sup> Overview of the Coastal Management Reforms page 5

and Essential Elements of Coastal Management Programs as intended to be prescribed by the Draft Manual.

- 3.3 The Draft Bill does provide for transitional provisions and sunset clauses for revisions to plans.
- 3.4 The exhibited Draft Manual does not expressly provide for readily identifiable 'Principles'. This is of import as such were a feature of the Coastal Zone Management Plan Guidelines ('**CZMP Guidelines**') the Draft Manual is intended to replace. The statutory immunities contained in s733 of the *Local Government Act 1993* (**LG Act**), as proposed to be amended by the Draft Bill, continue to refer to the 'principles' in the Draft Manual.
- 3.5 Prescribing separate coastal management areas (both for the purposes of the New SEPP and the Draft Manual), new procedural requirements and some primary changes in content and implementation, will necessitate the application of considerable resources by local government when preparing and updating CMP's and EPI's.

#### **4. Potential Creation of Enforceable Obligations to implements CMPs**

- 4.1 CMP's must be prepared in accordance with the Draft Manual. The Draft Manual is action and implementation focused. Division 4 of the Draft Bill prescribes the obligations of local councils and other public authorities. Proposed s.22 provides:

- (1) *A local council is to give effect to its coastal management program and, in doing so, is to have regard to the objects of this Act.*
- (2) *In particular, without limiting subsection (1), a local council is to give effect to its coastal management program in:*
  - (a) *the preparation, development and review of, and the contents of, the plans, strategies, programs and reports to which Part 2 of Chapter 13 of the Local Government Act 1993 applies, and*
  - (b) *the preparation of planning proposals and development control plans under the Environmental Planning and Assessment Act 1979.*

- 4.2 The creation of a positive statutory obligation to give effect to a CMP under proposed s22 of the Draft Bill, may have considerable consequences and potentially give rise to actionable rights on behalf of landowners or stakeholders to seek to enforce compliance with action items, works or responsibilities in any CMP.

- 4.3 The Draft Bill does not provide for open standing provisions authorising any person to commence proceedings to restrain a breach of the Act<sup>2</sup>.

- 4.4 However, the Land and Environment Court (**LEC**) has civil jurisdiction under s.20(2) of the LEC Act:

- (2) *The Court has the same civil jurisdiction as the Supreme Court would, but for section 71, have to hear and dispose of the following proceedings:*
  - (a) *to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract,*

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<sup>2</sup> Neither does the present CP Act. Contrast the EPA Act and LG Act.

- (b) *to review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract,*
  - (c) *to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function,*
  - (d) *whether or not as provided by section 68 of the Supreme Court Act 1970 - to award damages for a breach of a development contract.*
- 4.5 The *Coastal Protection Act 1979* is an environmental law for the purposes of the LEC Act (s20(3)). The Draft Bill proposes to replace the reference to 'Coastal Protection Act 1979' in s20(3)(a) of the LEC Act with 'Coastal Management Act 2015'. The Draft Bill will therefore be an environmental law for the purposes of s20 of the LEC Act.
- 4.6 To engage the court's jurisdiction a person would need to establish 'standing' in the usual administrative law sense. One would expect affected or interested landowners would be able to establish standing.
- 4.7 The potential creation of an enforceable obligation to comply with an adopted CMP is problematic for coastal councils. Local Government has area wide responsibilities which are increasing.
- 4.8 Limitation on resources and competing priorities for such resources, in practical terms, mean councils seek flexibility to determine where finite resources are applied and in what circumstances.
- 4.9 CMP's may provide for emergency actions by councils during extreme events or in response to coastal processes and hazards. The Draft Manual prescribes that they should.
- 4.10 The introduction of a positive (and potentially enforceable) obligation to give effect to CMP's has no precedent under the CP Act. In the time available we have not identified any other circumstances where a council is statutorily obliged to give effect to a management plan or policy.
- 4.11 Possible implications are of broad ambit. It may be that the potential creation of an enforceable obligation was not intended. Further, future judicial interpretation may not accord with our preliminary view that an enforceable obligation arises.
- 4.12 We highlight the issue for your member's consideration.
- 4.13 We recommend coastal councils make submissions opposing the inclusion of clause 22 of the Draft Bill insofar as it imposes a positive obligation to give effect to CMP's.
- 4.14 The inclusion of proposed s29 of the Draft Bill - protection of certain functions from invalidity and inconsistency, is no real answer to the concerns we identify above in relation to clause 22.
- 4.15 All that section (if enacted) would do, is protect the exercise of functions inconsistent with a CMP if undertaken. The efficacy of privative clauses is in doubt in any event given the High Court decision in *Kirk v Industrial Relations Commission (2010) 239 CLR 531*.

## 5. General observations

- 5.1 The object of the Draft Bill "is to provide for the integrated management of the Coastal Environment of New South Wales consistent with the principles of ecologically sustainable development for the social, cultural and economic well being of the people of the State".
- 5.2 The reforms are broad ranging - and in a policy sense appear to effect a shift from coastal protection - to management of land use planning. Oversight from the State and the proposed Coastal Council is prescribed in the Draft Bill.
- 5.3 The intended roles and functions of the Coastal Council add a further layer to the overview of the exercise of council functions with the potential consequence being that the disciplinary or accountability provisions of Chapter 13 of the LG Act may be engaged.
- 5.4 The reforms envisaged by the State must operate within the existing planning and legislative framework. The coastal management regime cannot and will 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 LG Act, *Protection of the Environment Operations Act 1997*, the Standard Instrument LEP (**Standard Instrument**), the effect of State significant development, Crown Land development and Part 5 of the EPA Act and the reconciliation of exempt and complying development provisions to name a few.
- 5.5 The public consultation material for the Stage 2 Reforms is voluminous.
- 5.6 We must reserve our position to clarify or correct any views we express, pending further review of the material.
- 5.7 Given the scope, we cannot guarantee we have identified all issues which may be of import to your member councils or that future judicial interpretation will accord with our opinions.

We trust the above is of assistance. Should you wish to discuss these issues further please do not hesitate to contact me.

Yours faithfully



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## APPENDIX A - DRAFT BILL CONSOLIDATION STAGE 2 REFORMS

### 1. Environmental Planning and Assessment Act 1979

#### 79C Evaluation

##### (1) Matters for consideration-general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
  - (i) any environmental planning instrument, and
  - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
  - (iii) any development control plan, and
  - (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
  - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
  - ~~(v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979 ),~~

that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest.

#### 80A Imposition of conditions

##### (1) Conditions-generally

A condition of development consent may be imposed if:

- (a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or
- (b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or



- (c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or
- (d) it limits the period during which development may be carried out in accordance with the consent so granted, or
- (e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or
- (f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C (1) applicable to the development the subject of the consent, or
- (g) it modifies details of the development the subject of the development application, or
- (h) it is authorised to be imposed under section 80 (3) or (5), subsections (5)-(9) of this section or section 94, 94A, 94EF or 94F.

**(2) Ancillary aspects of development**

A consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority.

- (3) A consent authority that has not determined a request to indicate whether a specified aspect of development has been carried out to the satisfaction of the consent authority, or a person specified by the consent authority, within the relevant period, prescribed by the regulations, applicable to the aspect or the development is, for the purpose only of section 97, taken to have determined the request by indicating that it, or the person, is not satisfied as to the specified aspect.

**(4) Conditions expressed in terms of outcomes or objectives**

A consent may be granted subject to a condition expressed in a manner that identifies both of the following:

- (a) one or more express outcomes or objectives that the development or a specified part or aspect of the development must achieve,
- (b) clear criteria against which achievement of the outcome or objective must be assessed.

**(5) Modification or surrender of consents or existing use rights**

If a consent authority imposes (as referred to in subsection (1) (b)) a condition requiring the modification or surrender of a consent granted under this Act or a right conferred by Division 10, the consent or right may be modified or surrendered subject to and in accordance with the regulations.

**(6) Conditions and other arrangements concerning security**

A development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of any one or more of the following:

- (a) making good any damage caused to any property of the consent authority (or any property of the corporation) as a consequence of the doing of anything to which the consent relates,
- (b) completing any public work (such as road work, kerbing and guttering, footway construction, stormwater drainage and environmental controls) required in connection with the consent,

- (c) remedying any defects in any such public work that arise within 6 months after the work is completed.
- (d) in relation to coastal protection works (within the meaning of the *Coastal Management Act 2015*), either or both of the following:
  - (i) the maintenance of the works
  - (ii) the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works.
- (7) The security is to be for such reasonable amount as is determined by the consent authority.
- (8) The security may be provided, at the applicant's choice, by way of:
  - (a) deposit with the consent authority, or
  - (b) a guarantee satisfactory to the consent authority.
- (9) The security is to be provided before carrying out any work in accordance with the development consent or at such other time as may be agreed to by the consent authority.
- (10) The funds realised from a security may be paid out to meet any cost referred to in subsection (6). Any balance remaining is to be refunded to, or at the direction of, the persons who provided the security.
- (10A) A condition of a consent has no effect to the extent that it requires a compliance certificate to be obtained in respect of any development.
- (10B) Review of extended hours of operation and number of persons permitted**

A development consent that is granted subject to a reviewable condition may be granted subject to a further condition that the consent authority may review that condition at any time or at intervals specified by the consent and that the reviewable condition may be changed on any such review.
- (10C) The regulations may make provision for or with respect to the kinds of development that may be subject to a further condition referred to in subsection (10B), the matters that must be included in such a condition and the procedures for a review under such a condition.
- (10D) A decision by a consent authority to change a reviewable condition on a review is taken to be a determination of a development consent for the purposes of this Act.
- Note :** A review application or an appeal against a determination of a development consent may be made under this Division or Division 8.
- (10E) For the purposes of subsections (10B)-(10D), a "reviewable condition" means any of the following:
  - (a) a condition that permits extended hours of operation (in addition to other specified hours of operation),
  - (b) a condition that increases the maximum number of persons permitted in a building (in addition to the maximum number otherwise permitted).
- (11) Prescribed conditions**

A development consent is subject to such conditions as may be prescribed by the regulations.

#### **89J Approvals etc legislation that does not apply**

- (1) The following authorisations are not required for State significant development that is authorised by a development consent granted after the commencement of this Division (and accordingly the provisions of any Act that prohibit an activity without such an authority do not apply):

- ~~(a) the concurrence under Part 3 of the Coastal Protection Act 1979 of the Minister administering that Part of that Act,~~
  - (b) a permit under section 201, 205 or 219 of the *Fisheries Management Act 1994* ,
  - (c) an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977* ,
  - (d) an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974* ,
  - (e) an authorisation referred to in section 12 of the *Native Vegetation Act 2003* (or under any Act repealed by that Act) to clear native vegetation or State protected land,
  - (f) a bush fire safety authority under section 100B of the *Rural Fires Act 1997* ,
  - (g) a water use approval under section 89, a water management work approval under section 90 or an activity approval (other than an aquifer interference approval) under section 91 of the *Water Management Act 2000* .
- (2) Division 8 of Part 6 of the *Heritage Act 1977* does not apply to prevent or interfere with the carrying out of State significant development that is authorised by a development consent granted after the commencement of this Division.
- (3) A reference in this section to State significant development that is authorised by a development consent granted after the commencement of this Division includes a reference to any investigative or other activities that are required to be carried out for the purpose of complying with any environmental assessment requirements under this Part in connection with a development application for any such development.

#### **1152G Approvals etc legislation that does not apply**

- (1) The following authorisations are not required for approved State significant infrastructure (and accordingly the provisions of any Act that prohibit an activity without such an authority do not apply):
- ~~(a) the concurrence under Part 3 of the Coastal Protection Act 1979 of the Minister administering that Part of that Act,~~
  - (b) a permit under section 201, 205 or 219 of the *Fisheries Management Act 1994* ,
  - (c) an approval under Part 4, or an excavation permit under section 139, of the *Heritage Act 1977* ,
  - (d) an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974* ,
  - (e) an authorisation referred to in section 12 of the *Native Vegetation Act 2003* (or under any Act repealed by that Act) to clear native vegetation or State protected land,
  - (f) a bush fire safety authority under section 100B of the *Rural Fires Act 1997* ,
  - (g) a water use approval under section 89, a water management work approval under section 90 or an activity approval (other than an aquifer interference approval) under section 91 of the *Water Management Act 2000* .
- (2) Division 8 of Part 6 of the *Heritage Act 1977* does not apply to prevent or interfere with the carrying out of approved State significant infrastructure.
- (3) The following directions, orders or notices cannot be made or given so as to prevent or interfere with the carrying out of approved critical State significant infrastructure:
- (a) an interim protection order (within the meaning of the *National Parks and Wildlife Act 1974* or the *Threatened Species Conservation Act 1995* ),
  - (b) an order under Division 1 (Stop work orders) of Part 6A of the *National Parks and Wildlife Act 1974* , Division 1 (Stop work orders) of Part 7 of the *Threatened Species Conservation Act 1995* or Division 7 (Stop work orders) of Part 7A of the *Fisheries Management Act 1994* ,

- (c) a remediation direction under Division 3 (Remediation directions) of Part 6A of the *National Parks and Wildlife Act 1974*,
  - (d) an environment protection notice under Chapter 4 of the *Protection of the Environment Operations Act 1997*,
  - (e) an order under section 124 of the *Local Government Act 1993*.
- (4) A reference in this section to approved State significant infrastructure includes a reference to any investigative or other activities that are required to be carried out for the purpose of complying with any environmental assessment requirements under this Part in connection with an application for approval to carry out the State significant infrastructure.

#### 121B Orders that may be given by consent authority or by Minister etc

- (1) An order may be given to a person by:
- (aa) the Minister or the Secretary (but only in connection with a project to which Part 3A applies, in connection with State significant infrastructure or in connection with development for which the Minister or Secretary is or has been the consent authority), or
  - (a) a council, or
  - (b) any other person who exercises functions as a consent authority, except in relation to complying development for which a complying development certificate has been issued, or,
  - (c) any other public authority prescribed by the regulations for the purposes of this paragraph, but only in relation to orders under items 2, 7, 8, 12, 14 and 20 of the Table to this subsection concerning land owned or managed by the person or body that is within the coastal zone (within the meaning of the *Coastal Management Act 2015*), or
  - (d) the Minister or the Secretary, but only in relation to orders under items 2, 7, 8, 12, 14 and 20 of the Table to this subsection concerning land that is within the coastal zone (within the meaning of the *Coastal Management Act 2015*),

to do or to refrain from doing a thing specified in the following Table if the circumstances specified opposite it in Column 2 of the Table exist and the person comes within the description opposite it in Column 3 of the Table.

	Column 1	Column 2	Column 3
	To do what?	In what circumstances?	To whom?
1	To cease using premises for a purpose specified in the order	(a) Premises are being used for a purpose that is prohibited(b) Premises are being used for a purpose for which development consent is required but has not been obtained(c) Premises are being used in contravention of the conditions of a development consent	Owner of premises, or person by whom premises are being used for the purpose specified in the order
2	To demolish or remove a building	(a) Building is erected without prior development consent of consent authority in a case where prior development consent is required or is erected without prior development consent of a	Owner of building or if the building is situated wholly or partly in a public place, the person who erected the building

		<p>consent authority and a prior construction certificate in a case where both prior development consent and a prior construction certificate are required</p> <p>(b) Building is or is likely to become a danger to the public</p> <p>(c) Building is so dilapidated as to be prejudicial to its occupants or to persons or property in the neighbourhood</p> <p>(d) Building is erected without prior approval of council, in a case where prior approval was required under the <i>Local Government Act 1919</i> or the <i>Local Government Act 1993</i> when the erection of the building commenced</p> <p>(e) Building is erected in contravention of this Act</p>	
3	Not to demolish, or to cease demolishing a building	<p>(a) Building is likely to be demolished without prior development consent of consent authority in a case where prior development consent is required</p> <p>(b) Building is being demolished without prior development consent of consent authority or otherwise than in accordance with prior development consent of consent authority in a case where prior development consent is required</p>	Owner of building, person likely to demolish or person engaged in demolition
4	To repair or make structural alterations to a building	<p>(a) Building is or is likely to become a danger to the public</p> <p>(b) Building is so dilapidated as to be prejudicial to its occupants or to persons or property in the neighbourhood</p>	Owner of building
5	To alter, obliterate, demolish or remove an advertisement and any associated advertising structure	<p>(a) The advertisement is unsightly, objectionable or injurious to the amenity of any natural landscape, foreshore, public reserve or public place at or near where the advertisement is displayed</p> <p>(b) The advertisement is displayed contrary to a provision made by or under this Act</p> <p>(c) The advertising structure is erected contrary to a provision made by or under this Act</p>	The person who caused the advertisement to be displayed or advertising structure to be erected or the owner or occupier of the premises on which the advertisement is displayed or the advertising structure is erected
6	To do or refrain from doing such things as are specified in the order so as to ensure or promote	(a) Provisions for fire safety or fire safety awareness are not adequate to prevent fire, suppress fire or prevent the	Owner of premises or, in the case of a place of shared accommodation, the owner or manager

	adequate fire safety or fire safety awareness	spread of fire or ensure or promote the safety of persons in the event of fire(b) Maintenance or use of the premises constitutes a significant fire hazard	
7	To erect or install on or around a building such structures or appliances as are necessary to protect persons or property on or in a public place	(a) Building is about to be erected(b) Building is situated in the immediate vicinity of a public place and is dangerous to persons or property on or in the public place(c) Building is about to be demolished(d) Work is about to be carried out(e) Work is about to be demolished	Owner or occupier of land
8	Not to conduct, or to cease conducting, an activity on premises (being an activity that is, or is capable of being, the subject of a development consent, whether or not the activity is the subject of a development consent or is prohibited)	The activity constitutes or is likely to constitute:(a) a life threatening hazard, or(b) a threat to public health or public safety, and is not regulated or controlled under any other Act by a public authority	Any person apparently engaged in promoting, conducting or carrying out the activity or the owner of premises
9	To cease the use of a building	The use of the building:(a) is not consistent with its classification under this Act or the <i>Local Government Act 1993</i> , and(b) constitutes or is likely to constitute a life threatening hazard or a threat to public health or public safety, and(c) is not regulated or controlled under any other Act by a public authority	The owner or occupier of the building
10	To cease the use of premises or to evacuate premises	A person to whom order No 6 or 8 is given has failed to comply with the order	The person to whom order No 6 or 8 is given
11	To leave premises or not to enter premises	A person to whom order No 6 or 8 is given has failed to comply with the order	Any person
12	To do such things as are specified in the order to restore premises to the condition in which they were before building was unlawfully erected or before work was unlawfully carried out	(a) Building has been unlawfully erected, and an order No 2 has been given requiring the building to be demolished or removed(b) Work has been unlawfully carried out	The owner of the premises, any person entitled to act on a development consent or complying development certificate, any person acting otherwise than in compliance with a development consent or complying development certificate or, in relation to work unlawfully carried out that was the deposit of material in a public place, the person who deposited the material



			<del>The owner of the premises, any person entitled to act on a development consent or complying development certificate or any person acting otherwise than in compliance with a development consent or complying development certificate</del>
13	To do such things as are necessary to bring into compliance with relevant development standards any building or part of a building that has been unlawfully erected	Building has been unlawfully erected and does not comply with relevant development standards	The owner of the premises
13A			
14	To repair or remove a building	The building is situated wholly or partly in a public place	Owner or occupier of building <del>or the person who erected the building</del>
15	To comply with a development consent	The development consent is not being complied with	Person entitled to act on the development consent or person acting otherwise than in compliance with the development consent
16	To complete development that is subject to a development consent within such time (not being less than 12 months from the date of service of the order) as the consent authority considers reasonable, having regard to all relevant circumstances, including ...	The development has been commenced within the period specified in section 95 (1) but has not been completed within that period	The owner of the land to which the development consent applies
17	To carry out works associated with a subdivision	There has been a failure to carry out the works in accordance with a development consent or an agreement made with the applicant for development consent	The person required to carry out the works
18	To do or refrain from doing any act to remedy or restrain a breach of Part 3A or Part 5.1 or of an approval under that Part	The breach has occurred, is occurring or is likely to occur	The person who caused, is causing or is likely to cause the breach, or the person entitled to act on the approval
19	To cease carrying out specified building work or subdivision work	(a) Building work or subdivision work is being carried out in contravention of this Act(b) Building work or subdivision work is being carried out that affects	Owner of land or any person apparently engaged in carrying out the building work or subdivision work

		the support of adjoining premises	
20	To cease carrying out or conducting an activity on a beach of foreshore (within the meaning of those terms in the <i>Coastal Management Act 2015</i> ), whether or not the activity is subject to a development consent	The activity is being carried out in a contravention of this Act	Any person apparently engaged in promoting, conducting or carrying out the activity

- (2) The regulations may prescribe acts and circumstances that are taken to be included in or excluded from any of the acts or circumstances specified in Column 1 or 2 of the Table to subsection (1).
- (3) An order under item 18 of the Table to subsection (1) may only be given by the Minister or the Secretary.

#### **SCHEDULE 4 – Joint Regional Planning Panels (selections)**

##### **2 Members**

- (1) A regional panel is to consist of the following 5 members:
  - (a) 3 persons appointed by the Minister, each having expertise in at least 1 of planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration,
  - (b) 2 council nominees of an applicable council, at least one of whom has expertise in planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering or tourism.
- (2) One of the State members is to be appointed by the Minister as chairperson of the regional panel. The Minister is required to obtain the concurrence of the Local Government and Shires Association of New South Wales to the appointment unless:
  - (a) the Association fails to notify its concurrence or refusal to concur within 21 days of being requested to do so by the Minister, or
  - (b) the Association has refused to concur in 2 different persons proposed by the Minister for appointment.
- (3) In appointing a State member, the Minister is to have regard to the need to have a range of expertise represented among the panel's members.
- (4) Each applicable council is to nominate 2 persons as council nominees for the purposes of the regional panel, at least one of whom has expertise in planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering or tourism.
- (5) If an applicable council fails to nominate 1 or more council nominees, a regional panel is not required to include 2 council nominees for the purposes of exercising its functions in relation to the area of the council concerned.

##### **(6) Substitute members for coastal protection works**

Despite subclause (1), if a matter is the determination a development application regarding coastal protection works on land within the coastal zone (within the meaning of the *Coastal Management Act 2015*), the Minister is to appoint substitute State members of the Panel in substitution for the State members (other than the chairperson) of the Panel. A substitute State member is not required to have expertise in an area referred to in subclause (1) (a) but is required to have expertise in coastal engineering or coastal geomorphology.

##### **8 Alternates**



- (1) The Minister may, from time to time, appoint a person to be the alternate of a State member **(including a substitute State member)**, and may revoke any such appointment.
- (2) An applicable council may, from time to time, appoint a person to be the alternate of a member nominated by the council, and may revoke any such appointment.
- (3) In the absence of a member, the member's alternate may, if available, act in the place of the member.
- (4) While acting in the place of a member, a person has all the functions of the member and is taken to be a member.
- (5) A person while acting in the place of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.
- (6) A person may be appointed as the alternate of 2 or more members, but has only one vote at any meeting of the regional panel.

**SCHEDULE 4A – Development for which regional panels may be authorised to exercise consent authority functions of councils** (selections)

**1 Definitions**

(1) In this Schedule:

...

**"coastal zone"** has the same meaning as in the *Coastal Management Act 2015*  
~~**"coastal zone"** has the same meaning as in the *Coastal Protection Act 1979*.~~

...

**2 Excluded development**

Development of a class or description otherwise set out in this Schedule is excluded from this Schedule if it is:

- (a) complying development, or
- (b) development for which development consent is not required, or
- (c) development that is State significant development, or
- (d) development for which a person or body other than a council is the consent authority,
- (e) development within the area of the City of Sydney.

**3 General development over \$20 million**

Development that has a capital investment value of more than \$20 million.

**4 Council related development over \$5 million**

Development that has a capital investment value of more than \$5 million if:

- (a) a council for the area in which the development is to be carried out is the applicant for development consent, or
- (b) the council is the owner of any land on which the development is to be carried out, or
- (c) the development is to be carried out by the council, or

- (d) the council is a party to any agreement or arrangement relating to the development (other than any agreement or arrangement entered into under the Act or for the purposes of the payment of contributions by a person other than the council).

#### **5 Crown development over \$5 million**

Crown development that has a capital investment value of more than \$5 million.

#### **6 Private infrastructure and community facilities over \$5 million**

Development that has a capital investment value of more than \$5 million for any of the following purposes:

- (a) air transport facilities, electricity generating works, port facilities, rail infrastructure facilities, road infrastructure facilities, sewerage systems, telecommunications facilities, waste or resource management facilities, water supply systems, or wharf or boating facilities,
- (b) affordable housing, child care centres, community facilities, correctional centres, educational establishments, group homes, health services facilities or places of public worship.

#### **7 Eco-tourist facilities over \$5 million**

Development for the purpose of eco-tourist facilities that has a capital investment value of more than \$5 million.

#### **8 Particular designated development**

Development for the purposes of:

- (a) extractive industries, which meet the requirements for designated development under clause 19 of Schedule 3 to the *Environmental Planning and Assessment Regulation 2000* , or
- (b) marinas or other related land and water shoreline facilities, which meet the requirements for designated development under clause 23 of Schedule 3 to the *Environmental Planning and Assessment Regulation 2000* , or
- (c) waste management facilities or works, which meet the requirements for designated development under clause 32 of Schedule 3 to the *Environmental Planning and Assessment Regulation 2000* .

#### **9 Coastal subdivision**

Development within the coastal zone for the purposes of subdivision of the following kind:

- (a) subdivision of land for any purpose into more than 100 lots, if more than 100 of the lots will not be connected to an approved sewage treatment work or system,
- (b) subdivision of land for residential purposes into more than 100 lots, if the land:
  - (i) is not in the metropolitan coastal zone, or
  - (ii) is wholly or partly in a sensitive coastal location,
- (c) subdivision of land for rural-residential purposes into more than 25 lots, if the land:
  - (i) is not in the metropolitan coastal zone, or
  - (ii) is wholly or partly in a sensitive coastal location.

#### **10 Development subject to delays in determination**

Development that has a capital investment value of more than \$10 million but less than \$20 million:

- (a) for which a development application to the relevant council has been lodged but not determined within 120 days after the application was lodged, and
  - (b) that is the subject of a written request to that council by the applicant for the application to be dealt with by a regional panel,
- unless the chairperson of the regional panel concerned determines that the delay in determining the development application was caused by the applicant.

## 11 Development in council areas where development assessment unsatisfactory

- (1) Development within the area of a particular council for particular purposes designated by the Minister by order published on the NSW legislation website.
- (2) Such an order cannot be made unless the Minister is satisfied that the performance of the council concerned in dealing with development matters has not met applicable performance criteria.

## 12 Coastal protection works

Development within the coastal zone for the purpose of coastal protection works (within the meaning of the *Coastal Management Act 2015*)

## 2. Environmental Planning And Assessment Regulation 2000

### 3 Definitions:

- (1) in this Regulation:

**"coastal council"** means a local council to which the *Coastal Management Act 2015* applies.

~~"coastal council" means a council whose area, or part of whose area, is included within the coastal zone (within the meaning of the *Coastal Protection Act 1979*) or whose area includes land that adjoins the tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries.~~

### 3A Exclusion from definition of "development"

For the purposes of the definition of **"development"** in section 4 (1) of the Act, the demolition of a temporary structure is prescribed as not being such [development](#).

### 3B Extension of the meaning of "work"

For the purposes of section 4 (2) (d) of the Act, the deposit of material on a beach (within the meaning of the *Coastal Management Act 2015*) is specified to be a work for the purposes of the Act.

## SCHEDULE 4 – Planning certificates

### 4 Coastal protection

~~Whether or not the land is affected by the operation of section 38 or 39 of the *Coastal Protection Act 1979*, but only to the extent that the council has been so notified by the Department of Finance, Services and Innovation.~~

### 4A Certain information relating to beaches and coasts

~~(1) In relation to a coastal council whether an order has been made under Part 4D of the *Coastal Protection Act 1979* in relation to temporary coastal protection works (within the meaning of~~

~~that Act) on the land (or on public land adjacent to that land), except where the council is satisfied that such an order has been fully complied with.~~

~~(2) In relation to a coastal council:~~

~~(a) whether the council has been notified under section 55X of the Coastal Protection Act 1979 that temporary coastal protection works (within the meaning of that Act) have been placed on the land (or on public land adjacent to that land), and~~

~~(b) if works have been so placed whether the council is satisfied that the works have been removed and the land restored in accordance with that Act.~~

## SCHEDULE 5 – Penalty notice offences

Offence	Individual \$	Corporation \$
order No 3, 4, 6, 7, 8, 9, 10, 11, 13, 15, 18 <del>or 19</del> 19 or 20 in the Table to section 121B	3,000	6,000

### 3. Land And Environment Court Act 1979

#### Section 20 Class 4—environmental planning and protection and development contract civil enforcement

(2) The Court has the same civil jurisdiction as the Supreme Court would, but for section 71, have to hear and dispose of the following proceedings:

- (a) to enforce any right, obligation or duty conferred or imposed by a planning or environmental law or a development contract,
- (b) to review, or command, the exercise of a function conferred or imposed by a planning or environmental law or a development contract,
- (c) to make declarations of right in relation to any such right, obligation or duty or the exercise of any such function,
- (d) whether or not as provided by section 68 of the Supreme Court Act 1970 -to award damages for a breach of a development contract.

(3) For the purposes of subsection (2), a planning or environmental law is:

(a) any of the following Acts or provisions

~~Coastal Protection Act 1979~~

~~Coastal Management Act 2015~~

### 4. Local Government Act 1993

#### 22 Other functions

A council has the functions conferred or imposed on it by or under any other Act or law.

...

The exercise by a council of its functions under this Act may also be modified by the provisions of another Act. Some of those Acts and some of the modifications they effect include:

~~Coastal Protection Act 1979~~

~~limitation on coastal development by councils~~

#### **496B Making and levying of annual charges for coastal protection services**

- (1) A council may, in accordance with this 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 constructed:
  - (a) by or on behalf of the owner or occupier (or a previous owner or occupier) of the parcel of land, or
  - (b) jointly by or on behalf of:
    - (i) the owner or occupier (or a previous owner or occupier) of the parcel of land, and
    - (ii) a public authority or a council.
- (2) An annual charge for the provision of coastal protection services must be calculated so as to not exceed the reasonable cost to the council of providing those services (including any legal, insurance, engineering, surveying, project management, financing and similar costs associated with providing those services).

The coastal protection services for which an annual charge may be made and levied are services:

- (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).

See the definition of

"coastal protection service" in the Dictionary.

- (3) If a person is aggrieved by the amount of the annual charge, the person may appeal to the Land and Environment Court and that Court may determine the amount.
- (4) The fact that an appeal is pending does not in the meantime affect the levying of the annual charge to which the appeal relates and the charge may be recovered as if no appeal were pending.
- (5) If a person's appeal is, in whole or in part, successful, the council must refund any amount paid in excess of a requirement for payment under this Act.
- (6) If the Land and Environment Court, in the course of determining an appeal under subsection (3), determines the reasonable cost to the council of providing coastal protection services in relation to particular coastal protection works, that determination is binding in relation to the calculation of the annual charge for all other parcels of land that benefit from those same services.
- (7) 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.

- (8) Subsection (1) does not authorise or permit a council to make or levy an annual charge for the provision of coastal protection services for rateable land that is held under a lease for private purposes granted under the *Aboriginal Housing Act 1998* or the *Housing Act 2001*.
- (9) The Minister administering the *Coastal Management Act 2015* ~~*Coastal Protection Act 1979*~~ is to issue guidelines relating to the making and levying of charges under this section. A council is to have regard to any such guidelines when making and levying such charges.

**606C Review of cost of coastal protection service charges on direction of Minister administering Coastal Protection Act 1979**

- (1) The Minister administering ~~the *Coastal Management Act 2015* (the **Coastal Management Minister**) Part 4A of the *Coastal Protection Act 1979* (the **Coastal Protection Minister**)~~ may direct a council to provide the Coastal ~~Management Protection~~ Minister with a report prepared by an independent person on the cost to the council of providing coastal protection services.
- (2) A council directed to provide a report under subsection (1) must submit the report to the Coastal ~~Management Protection~~ Minister:
  - (a) within 90 days of the direction, or
  - (b) within such longer period as may be agreed to by the Coastal ~~Management Protection~~ Minister.
- (3) If a council fails to comply with this section, the Coastal ~~Management Protection~~ Minister may:
  - (a) commission an independent person to prepare the report, and
  - (b) recover the cost of preparing the report from the council.

The council is to co-operate with the independent person in the preparation of the report.

- (4) The council is to have regard to any report of an independent person referred to in this section in determining an annual charge for the coastal protection services concerned.

**733 Exemption from liability-flood liable land, land subject to risk of bush fire and land in coastal zone**

- (1) A council does not incur any liability in respect of:
  - (a) any advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of any such flooding, or
  - (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being flooded or the nature or extent of any such flooding.
- (2) A council does not incur any liability in respect of:
  - (a) any advice furnished in good faith by the council relating to the likelihood of any land in the coastal zone being affected by a coastline hazard (as described in ~~the coastal management manual under the *Coastal Management Act 2015* a manual referred to in subsection (5) (b)~~) or the nature or extent of any such hazard, or
  - (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being so affected.
- (2A) A council does not incur any liability in respect of:
  - (a) any advice furnished in good faith by the council relating to the likelihood of any land being subject to the risk of bush fire or the nature or extent of any such risk, or
  - (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being subject to the risk of bush fire.
- (3) Without limiting subsections (1), (2) and (2A), those subsections apply to:
  - (a) the preparation or making of an environmental planning instrument, including a planning proposal for the proposed environmental planning instrument, or a development control plan, or the granting or refusal of consent to a development application, or the determination of an application for a complying development certificate, under the *Environmental Planning and Assessment Act 1979*, and

- ~~(b) the preparation or making of a coastal zone management plan, or the giving of an order, under the Coastal Protection Act 1979, and~~
  - (b) the preparation and adoption of a coastal management program under the Coastal Management Act 2015, and
  - (c) the imposition of any condition in relation to an application referred to in paragraph (a), and
  - (d) advice furnished in a certificate under section 149 of the *Environmental Planning and Assessment Act 1979*, and
  - (e) the carrying out of flood mitigation works, and
  - (f) the carrying out of coastal protection management works, and
  - (f1) the carrying out of bush fire hazard reduction works, and
  - (f2) anything done or omitted to be done regarding beach erosion or shoreline recession on Crown land, land within a reserve as defined in Part 5 of the *Crown Lands Act 1989* or land owned or controlled by a council or a public authority, and
  - (f3) the failure to upgrade flood mitigation works or coastal protection management works in response to projected or actual impacts of climate change, and
  - (f4) the failure to undertake action to enforce the removal of illegal or unauthorised structures that results in erosion of a beach or land adjacent to a beach, and
  - (f5) the provision of information relating to climate change or sea level rise, and
  - ~~(f6) anything done or omitted to be done regarding the negligent placement or maintenance by a landowner of temporary coastal protection works, and~~
  - (g) any other thing done or omitted to be done in the exercise of a council's functions under this or any other Act.
- ~~(4) Without limiting any other circumstances in which a council may have acted in good faith, a council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished, or the thing was done or omitted to be done, substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time.~~
- (4) Without limiting any other circumstances in which a council may have acted in good faith, a council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished, or the thing was done or omitted to be done:
- (a) substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time, or
  - (b) in accordance with the principles and mandatory requirements set out in the current coastal management manual under the *Coastal Management Act 2015*.
- (5) For the purposes of this section, the Minister for Planning may, from time to time, give notification in the Gazette of the publication of:
- (a) a manual relating to the management of flood liable land, or
  - ~~(b) a manual relating to the management of the coastline, or~~
  - (c) a manual relating to the management of land subject to the risk of bush fire.
- The notification must specify where and when copies of the manual may be inspected.
- (6) A copy of the manual must be available for public inspection, free of charge, at the office of the council during ordinary office hours.
- (7) This section applies to and in respect of:
- (a) the Crown, a statutory body representing the Crown and a public or local authority constituted by or under any Act, and
  - (b) a councillor or employee of a council or any such body or authority, and
  - (c) a Public Service employee, and
  - (d) a person acting under the direction of a council or of the Crown or any such body or authority, and



- (e) Water NSW, but only with respect to the exercise of its functions in the Sydney catchment area (within the meaning of the *Water NSW Act 2014*),  
in the same way as it applies to and in respect of a council.
- (8) In this section:

~~"coastal management works" includes the placement and maintenance of temporary 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.~~

"Coastal zone" has the same meaning as in the *Coastal Management Act 2015*

"manual" includes guidelines.

#### Dictionary:

"coastal hazard" has the same meaning it has in the *Coastal Management Act 2015* ~~*Coastal Protection Act 1979*~~

"coastal protection service" means 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 temporary coastal protection works.

"coastal protection works" means activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters and includes seawalls, revetments, groynes and beach nourishment.

~~"temporary coastal protection works" has the same meaning as in the *Coastal Protection Act 1979*~~

#### Rural Fires Act 1997

##### 100C Carrying out of bush fire hazard reduction work

- (1) An environmental planning instrument under the *Environmental Planning and Assessment Act 1979* cannot prohibit, require development consent for or otherwise restrict the doing of:
  - (a) emergency bush fire hazard reduction work on any land, or
  - (b) managed bush fire hazard reduction work on land other than excluded land.
- (2) Part 5 of the *Environmental Planning and Assessment Act 1979* does not apply to or in respect of emergency bush fire hazard reduction work carried out on any land.
- (3) Part 5 of the *Environmental Planning and Assessment Act 1979* does not apply to or in respect of managed bush fire hazard reduction work carried out on land other than excluded land if:
  - (a) the work is carried out in accordance with a bush fire risk management plan that applies to the land, and
  - (b) there is a bush fire hazard reduction certificate in force in respect of the work and the work is carried out in accordance with any conditions specified in the certificate, and
  - (c) the work is carried out in accordance with the provisions of a bush fire code applying to the land specified in the certificate.



**Note :** If work to which Part 5 of the *Environmental Planning and Assessment Act 1979* would apply but for this subsection is not carried out in accordance with this subsection, the person carrying out the work will be in breach of that Act.

- (4) Bush fire hazard reduction work may be carried out on land despite any requirement for an approval, consent or other authorisation for the work made by the *Native Vegetation Act 2003*, the *Threatened Species Conservation Act 1995*, the *National Parks and Wildlife Act 1974* or any other Act or instrument made under an Act only if:
  - (a) the work is carried out in accordance with a bush fire risk management plan that applies to the land, and
  - (b) there is a bush fire hazard reduction certificate in force in respect of the work and the work is carried out in accordance with any conditions specified in the certificate, and
  - (c) the work is carried out in accordance with the provisions of any bush fire code applying to the land specified in the certificate.
- (5) A person is not guilty of an offence under any of the following Acts merely because of the carrying out of bush fire hazard reduction work in accordance with subsection (4):
  - ~~(a) *Coastal Protection Act 1979*,~~
  - (b) *Environmental Planning and Assessment Act 1979*,
  - (c) *Fisheries Management Act 1994*,
  - (d) *Heritage Act 1977*,
  - (e) *Native Vegetation Act 2003*,
  - (f) *Protection of the Environment Operations Act 1997*,
  - (g) *Soil Conservation Act 1938*.

**Note :** Failure to comply with subsection (4) (a), (b) and (c) when carrying out bush fire hazard reduction work may expose a person to offences under the Acts referred to above.

- (6) Bush fire hazard reduction work carried out in accordance with a bush fire hazard reduction notice on a neighbourhood safer place or land adjacent to a neighbourhood safer place is deemed to be emergency bush fire hazard reduction work for the purposes of this section.

## **100R Carrying out vegetation clearing work**

- (1) This section applies to the following buildings only:
  - (a) a building containing habitable rooms that comprises or is part of residential accommodation or a high-risk facility (but not if there is no lawful authority for the use of those rooms as habitable rooms),
  - (b) a building that is a farm shed (but not if there is no lawful authority for the use of the building as a farm shed).
- (2) The owner of land in a 10/50 vegetation clearing entitlement area may carry out any of the following vegetation clearing work on the land if the work is carried out in accordance with the requirements of this section:
  - (a) the removal, destruction (by means other than by fire) or pruning of any vegetation (including trees or parts of trees) within 10 metres of an external wall of a building,
  - (b) the removal, destruction (by means other than by fire) or pruning of any vegetation, except trees or parts of trees, within 50 metres of an external wall of a building.
- (3) Vegetation clearing work may be carried out under this section despite any requirement for an approval, consent or other authorisation for the work made by the *Native Vegetation Act 2003* or the *Environmental Planning and Assessment Act 1979* or any other Act or instrument made under an Act.
- (4) A tree must not be removed or destroyed under subsection (2) (a) unless part of a trunk of that tree, having a circumference at a height of 1.3 metres above the ground of more than 0.3 metres, is within 10 metres of the external wall of the building.
- (5) If there is no external wall of a building on land owned by a person that authorises particular vegetation clearing work under this section, the person may rely on an external wall of a building on adjoining land to authorise the clearing. However, the person must not carry out the

work unless he or she has obtained the written consent to the particular vegetation clearing work of each owner of adjoining land on which there is an external wall of a building that could be used to authorise the work.

**Note :** For example, a tree on a person's land that is more than 10 metres away from the person's home but that is within 10 metres of the homes of 2 neighbours could be removed under this section only if both of those neighbours provide written consent.

- (6) Vegetation clearing work is not authorised to be carried out under this section on land unless it is carried out by or with the authority of the owner of the land.
- (7) Vegetation clearing work is not authorised to be carried out under this section unless it is carried out in accordance with the 10/50 Vegetation Clearing Code of Practice.
- (8) The Commissioner may prescribe in the 10/50 Vegetation Clearing Code of Practice whether, for the purposes of this section, particular rooms of a building are or are not habitable and what is or is not an external wall of a building.
- (9) A person is not guilty of an offence under any of the following Acts merely because of the carrying out of vegetation clearing work in accordance with this section:
  - ~~(a) Coastal Protection Act 1979,~~
  - (b) *Environmental Planning and Assessment Act 1979* ,
  - (c) *Fisheries Management Act 1994* ,
  - (d) *Heritage Act 1977* ,
  - (e) *Native Vegetation Act 2003* ,
  - (f) *Protection of the Environment Operations Act 1997* ,
  - (g) *Soil Conservation Act 1938* .
- (10) In this section:

**"lawful authority"** means development consent or other lawful authority under the *Environmental Planning and Assessment Act 1979* .

## APPENDIX B - OVERVIEW OF STRATEGIC PLANNING REFORMS

The NSW Planning regime presents a complex web of Acts, EPI's, Policies and Guidelines which regulate coastal planning, management and development and for which Local Government has the primary responsibility of administration.

It exercises those functions in the context of a framework set by the State.

### 1. Background

- 1.1 Prior to the Stage 1 Reforms and the introduction of the Standard Instrument, the coastal planning and land use management framework recognised the coast as a unique area which presented particular planning challenges. Many LEPs contained designated coastal land use zones with specific objectives responsive to the needs and hazards of the coast.
- 1.2 The Standard Instrument abandoned this format. There are no dedicated coastal land use zones in the Standard Instrument. Consequently councils must deal with a myriad of coastal management issues using generic residential land use, environmental protection, or public recreation zones.
- 1.3 Councils are required to compulsorily adopt the permissible uses defined in a Standard Instrument for each land use zone. Local provisions may not be inconsistent with the compulsory provisions.
- 1.4 Clause 5.5 of the Standard Instrument, as a compulsory provision, is directed specifically to development in the Coastal Zone as defined. The clause provides a relatively detailed list of objectives. However the Standard Instrument does not mandate that development must be consistent with, or promote, the objectives set out in clause 5.5 nor indeed the objectives of the LEP.
- 1.5 SEPPs operate as an overlay to local EPI's. Relevantly in a coastal context these include:
  - (a) SEPP 14 - Coastal Wetlands.
  - (b) SEPP 26 - Littoral Rainforests.
  - (c) SEPP 71 - Coastal Protection.
- 1.6 As a general observation, those SEPPs do not provide for additional land uses to become permissible either with or without consent in the coastal zone. Rather they operate to effect additional restrictions on development to prescribe consent, require higher threshold consent requirements, and impose consideration and concurrences when considering development applications or making local environmental plans, on land to which they apply.
- 1.7 The exception to that general proposition is the ISEPP. Division 25 - Waterway or Foreshore Management Activities is expressed also to relate to coastal protection works as defined in the CP Act. It overrides Local Environmental Plans and permits, despite the provisions of any LEP:

- (a) development for the purpose of activities (which include CPW) to be carried out by or on behalf of a public authority on any land without consent (but with approval under Part 5 of the EPA Act where required - clause 129);
  - (b) development for the purposes of a **sea wall** or **beach nourishment** to be carried out by any person with consent on the open coast or entrance to a coastal lake<sup>1</sup> (clause 129A).
- 1.8 The definition in clause 129A seems to prescribe certain types of CPW for which consent can be obtained irrespective of a provision in an LEP.
- 1.9 SEPPs generally prevail over Local Environmental Planning Instrument to the extent of any inconsistency and subject to the EPA Act.
- 1.10 The interrelationship between EPI's is important, particularly insofar as councils' functions and administrative actions are circumscribed by statutory provisions in SEPPs and other state policies - even if those documents do not coincide or indeed in circumstances are contrary to, strategic positions adopted through the Local Environmental Planning process and the process mandated under the LG Act for preparation of the Community Strategic Plan.
- 1.11 In a strategic planning context other relevant documents are prescribed by directions made pursuant to s117 of the EPA Act. Considerations also include the Coastal Planning Guideline: adapting to sea level rise.<sup>2</sup>

## **2. Proposed Reforms**

- 2.1 The Stage 2 Reforms will, if implemented, effect significant structural procedural, content and management changes to the framework for which Local Government will have increasing responsibility of administering.
- 2.2 Absent the text of the New SEPP, it is difficult to analyse potential legal consequences other than conceptually.
- 2.3 Key features of the proposed reforms as we see them are discussed below.
- 2.4 Stage 2 proposes the repeal of the CP Act and its replacement with the Coastal Management Act. Changes in objectives and the operative provisions proposed in the Draft Bill emphasise integration of matters pertaining to the coast within the land use planning framework, rather than the protection of the coast in a stand alone regime.
- 2.5 Express powers and oversight responsibilities for coastal protection vesting in the Minister under the CP Act are proposed to be deleted.
- 2.6 The Coastal Zone is to be redefined and constitute separate management areas:
- (i) Coastal Wetlands and Littoral Rainforest Area;
  - (ii) Coastal Vulnerability Area;

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<sup>1</sup> Coastal protection works are defined as having the same meaning in the Coastal Protection Act 1979. Clause 129A however does not make permissible all forms of coastal protection works with development consent but only development for the purposes of a sea wall or beach nourishment.

<sup>2</sup> We have previously advised SCCG on the implications of the retirement of the State's sea level rise policy in respect of the Coastal Planning Guidelines and associated documents.

- (iii) Coastal Environment Area; and
  - (iv) Coastal Use Area. (**Management Areas**).
- 2.7 Specific objectives for each area are prescribed. Councils are required to give effect to the objectives for each Management Area when preparing Coastal Management Programs (**CMP**).
  - 2.8 Consequently existing CZMP's or draft CZMP's may require significant revision, even if it is in a procedural sense, to ensure that the CMP's are responsive to the objectives of the new proposed Act and address Management Areas and mandatory requirements.
  - 2.9 Whether or not that is the case should be determined by councils reviewing their own plans and examining the effect of the proposed transitional provisions.
  - 2.10 The Draft Bill expressly provides for circumstances where Management Areas overlap. Clause 10(3) of the Draft Bill recognises that land may fall within one or more of the designated Management Areas and provides a hierarchy of objectives. The objectives are said to prevail from highest to lowest to the extent of any inconsistency.
  - 2.11 As noted above, presently the framework for land use planning controls under the Standard Instrument does not identify specific coastal zones. Generic land use zones are instead mandated. Those land use zones of course have their own objectives. For instance, a residential zone will have certain objectives in relation to the provision of housing.
  - 2.12 Councils will need to grapple with inconsistencies not only between potentially overlapping Management Area objectives but also the underlying zoning objectives. The Draft Bill does not seek to prescribe a hierarchy for balancing potentially competing objectives as between Management Areas and land use zones.
  - 2.13 This of itself is not unusual. Balancing competing objectives is part of the assessment process. In most instances state policies prevail to the extent of any inconsistency (s36 EPA Act). The case law in respect of reconciling inconsistencies between provisions of EPI's is complex and beyond the scope of this advice.
  - 2.14 In general terms the task of construction involves:
    - (a) identifying whether there is a provision of a SEPP and a provision of an LEP which are potentially inconsistent; and
    - (b) asking the question: are the two clauses capable of concurrent operation  
*Hastings Point Progress Association Inc v Tweed Shire Council [2009] NSW CA 285*.
  - 2.15 The courts are reluctant to find an inconsistency if both provisions can be given effect.
  - 2.16 If the provisions are in direct conflict or the prevailing instrument appears to 'cover the field', then the construction exercise is more simple. For example the ISEPP provisions rendering certain types of CPW permissible when the local instrument prohibits them.
  - 2.17 Where the State instrument is silent, or does not directly engage with local provisions the construction exercise is more difficult. Recourse to litigation may ensue.
  - 2.18 It is proposed that the Management Areas will be mapped by the State and published as part of the New SEPP. Such mapping may or may not coincide with existing detailed mapping undertaken by councils for strategic land use and management purposes and

in respect of which legacy and current EPIs and policies pertain. Presumably any such mapping exercise will draw heavily on existing spatial data and statutory mapping under extant EPIs.

- 2.19 Changes in mapping, like any change to land use controls, may have consequences in terms of future management of existing development at risk, development assessment for new proposals and strategic management of the coastal zone.
- 2.20 The Draft Bill contemplates that a planning proposal for an LEP may amend the New SEPP to identify or amend a Management Area.
- 2.21 This may be of assistance to councils where maps, yet to be published under the New SEPP, do not necessarily reflect local conditions or extensive hazard line and/or other mapping which has been reflected in existing EPI's long term policies, and development approvals.
- 2.22 In any event, amendment of a SEPP by the making of an LEP is not readily feasible under Part 3 of the EPA Act in our view.
- 2.23 Part 3 of the EPA Act prescribes the making of Environmental Planning Instruments including SEPPs and LEPs. Division 4 of Part 3 governs the making of an LEP. The planning proposal process prescribed in that Division does not expressly provide for the amendment of a SEPP by the mechanism of an LEP.
- 2.24 The proposed amendments to the EPA Act in the consolidated Draft Bill are attached in Appendix A. Additional revisions to the Draft Bill would appear to be required to give effect to the intent of clause 10 of the Draft Bill which intends to enable LEPs to amend maps under the New SEPP.
- 2.25 It is proposed to repeal SEPPs 14, 26 and 71. Some elements of those SEPPs to be retained or removed in any New SEPP are set out in the Explanation of Intended Effect document.
- 2.26 Division 25 of the Infrastructure SEPP which allows for coastal protection works will be adapted and inserted into the New SEPP. It is also anticipated that Coastal Management Programs developed by individual councils will consider coastal protection works and especially emergency protection works in emergency action sub plans for public assets.
- 2.27 In principle, consolidation of SEPPs into one Instrument is desirable from all stakeholders' perspective. It will enable theoretically a more streamlined approach to formulation of policies, development control plans and/or instruments and reduce the need to construe potential inconsistencies between EPI's.
- 2.28 The Explanation of Intended Effect of the New SEPP provides for additional consent requirements and considerations but expressly identifies that in certain Management Areas, where development is prohibited under another EPI, it will remain prohibited and/or if consent is required, that prescription will also remain.
- 2.29 What is not clear, given the expressed intent to amend the provisions of the ISEPP (which permits coastal protection works or certain forms of them, either without consent or with consent, despite LEP controls,) and replicate them within the New SEPP, is how such permissive provisions will operate in the context of the detailed objectives for

Coastal Vulnerability Areas in particular. Without the proposed text of the New SEPP it is not possible to evaluate any proposed interaction with certainty<sup>3</sup>.

- 2.30 The New SEPP will operate, as usual as an overlay and prevail over LEP's.
- 2.31 As noted above, the ISEPP overrides many LEP provisions which prohibit CPW and other works which might perform a similar function in the active coastal zone. However, the ISEPP (with certain limited exceptions<sup>4</sup>) expressly does not prevail over SEPP 14 or SEPP 26 to the extent of inconsistency (clause 8 ISEPP). It does presently prevail over SEPP 71.
- 2.32 On the making of the New SEPP it is proposed that clause 5.5 of the Standard Instrument and any related local risk clauses be repealed.
- 2.33 Local risk clauses and cognate controls in Development Control Plans by and large manifest and give effect to local conditions, historical land use controls and extensive hazard mapping exercises as reflected in those controls.
- 2.34 The introduction of coastal management areas and the repeal of clause 5.5 of the Standard Instrument conceivably will require a realignment of all relevant policy frameworks developed and presently implemented by local government.

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<sup>3</sup> See further discussion Appendix C.

<sup>4</sup> For example emergency works for existing electricity distribution networks - clause 41(2)(b) ISEPP.



## APPENDIX C - DEVELOPMENT ASSESSMENT ISSUES, THRESHOLD CONSIDERATIONS AND CONDITIONS OF CONSENT

The intent of the strategic reforms will be played out operationally in the exercise of development assessment and enforcement functions.

### 1. Background

- 1.1 The landscape for development assessment in the coastal zone was significantly changed by the introduction of the Standard Instrument and the introduction into the ISEPP of provisions relating to waterways and foreshore management activities and coastal protection works.
- 1.2 Further revisions were made in the Stage 1 Reforms: introduction of the Coastal Planning Guidelines, the inclusion of coastal zone management plans as heads of consideration under s79C of the EPA Act, a scheme relating to the undertaking of emergency coastal protection works (now temporary coastal protection works) without the need for development consent, introduction of a levy or fee scheme for coastal protection services under the LG Act and additional consideration requirements for development applications seeking approval for coastal protection works under s55M of the CP Act.
- 1.3 Several key elements of the Stage 1 Reforms are proposed to be unwound in Stage 2:
  - (a) CZMP's (or CMP's) will be removed from s79C.
  - (b) The TCPW Scheme is to be repealed.
  - (c) Section 55M of the CP Act in its counterpart provision clause 27 of the Draft Bill is to be revised, and partly transferred to s80A of the EPA Act.
- 1.4 We have previously expressed concern as to the efficacy of s55M of the CP Act. As its counterpart will play a significant role in the management of impacts of CPW on beaches, we set out some of the issues with the present provisions below.
- 1.5 Section 55M acts as a pre-condition to the granting of development consent for CPW. These are mandatory considerations which will apply whether the application is made under the ISEPP or an LEP.
- 1.6 Section 55M provides:
  - (1) ***Consent **must not be granted** under the Environmental Planning & Assessment Act 1979 to development for the purpose of coastal protection works, **unless the consent authority is satisfied that:*****
    - (a) *the works will not over the life of the works:*
      - (i) *unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland, or*
      - (ii) *pose or be likely to pose a threat to public safety, and*



(b) *satisfactory arrangements **have been made (by conditions imposed on the consent)** for the following for the life of the works:*

(i) *the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works,*

(ii) *the maintenance of the works.* (Emphasis added)

- 1.7 A number of issues must be borne in mind.
- 1.8 Firstly, and practically, for the consent authority, to be satisfied that the proposed works will not, for the life of the works, unreasonably limit public access to the beach or pose a threat to public safety; restoration and maintenance of the works are in all likelihood going to be necessary.
- 1.9 Secondly, the requirement that satisfactory arrangements have been made is a threshold to the issue of consent. The consent authority must be satisfied that satisfactory arrangements for the life of the works have been made for restoration of a beach or land adjacent and or maintenance works as a precondition to the grant of consent.
- 1.10 The mechanism to enable a consent authority to be satisfied as to arrangements - is the imposition of conditions which is post the exercise of the relevant satisfaction.
- 1.11 The section also requires that '*satisfactory arrangements have been made ... for the life of the works*': the requirement that the arrangements have been made, is past tense.
- 1.12 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 and impose relevant conditions.
- 1.13 Alternatively, the relevant consent authority will be responsible for formulating detailed mitigation measures for restoration during the assessment phase to satisfy the threshold.
- 1.14 Conditions of consent are in any event amenable to s96 modifications and appeal and will require monitoring for compliance by councils. 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.
- 1.15 Section 55M 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 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).
- 1.16 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 what degree, by third parties.

- 1.17 On the assumption that councils elect not to provide coastal protection services<sup>1</sup> 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 numerous issues may arise.
- 1.18 Beach and estuary environments are regulated by a myriad of other Acts and controls. Permits, authorities, licences and other types of approvals for restoration works or maintenance may be required from other authorities such as: Crown Lands, OEH, Marine Parks, National Parks and Wildlife and Fisheries, depending on the individual circumstances.
- 1.19 Query whether a condition of consent or a deferred commencement condition of consent, requiring all such relevant permits must be obtained can be imposed in order to demonstrate satisfactory arrangements have been made as a precondition to the grant of consent for CPW.
- 1.20 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.
- 1.21 Section s55M not only contemplates restoration of the beach or public land affected by 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.
- 1.22 Finally, 'satisfactory arrangements' for restoration and maintenance are to be secured by either legally binding obligations imposed upon landowners or by the payment to the council of an annual charge for coastal protection services (s55M(2)).
- 1.23 A 'coastal protection service' is defined as a service:
- (a) *to maintain and repair coastal protection works, or*
  - (b) *to manage the impact of such works (such as changed or increased beach erosion elsewhere),*
- but does not include a service that relates to emergency coastal protection works.*
- 1.24 It is not however mandatory for councils to provide the coastal protection service. The decision whether to provide such services is discretionary and will require a close consideration of a councils capacity to do so as council will arguably assume responsibility for the management of the works and their impacts.
- 1.25 One feature of the present s55M is it only applies to development applications seeking consent for coastal protection works as defined. There will be a need to audit the breadth of EPI's which have effect in the coastal zone in order to ensure that other works such as environmental protection works, which might perform the function of coastal protection works, are also the subject of such clause.

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<sup>1</sup> See general discussions below. The provisions introducing coastal protection services and the levies scheme are complex and beyond the scope of this advice. We are happy to address in a supplementary advice should you so instruct.

- 1.26 Consideration might also be given to widening the application of any threshold consideration clause to other development or works in the active zone which of themselves could have similar consequences. Presuming the practical and legal impediments to operation of the provision we identify, can be addressed.

## **2. Proposed Reforms**

- 2.1 Stage 2 contemplates a number of reforms which will impact upon the development assessment process. Some key features of the reforms include:
- (a) The introduction of coastal management areas with specific objectives and heads of consideration for each Management Areas and in some instances specific heads of consideration for land within a perimeter area of 100 metres of the mapped wetland or littoral rainforest.
  - (b) The repeal of existing clause 5.5 of the Standard Instrument and local risk clauses, upon the making of the New SEPP.
  - (c) Proposed amendments to s80A of the EPA Act to permit the imposition of a condition of development consent requiring security in respect of coastal protection works.
  - (d) Transfer of the coastal panel's approval functions for CPW under the ISEPP to the JRPP.

## **3. Threshold considerations for CPW and security conditions**

- 3.1 The Draft Bill provides threshold considerations in relating to coastal protection works:

Clause 27

*Granting of development consent related to coastal protection works.*

*Development consent must not be granted under the environmental Planning and Assessment Act 1979 to the development for the purpose of coastal protection works, unless the consent authority is satisfied that the works will not, over the life of the works:*

- (a) *unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland, or*
  - (b) *pose or be likely to pose a threat to public safety.'*
- 3.2 The retrospective precondition under s55M that satisfactory arrangements have been made (by the imposition of conditions) for beach restoration or maintenance, has been removed.

- 3.3 Rather as set out in Appendix A, it is proposed to augment the conditions power in the EPA Act to include security for maintenance of works etc. To understand the full effect of s80A reference should be made to Appendix A in its entirety. For present purposes salient extracts of the section and the proposed amendments are:

*Section 80A Imposition of Conditions*

- (1) *Conditions generally. A condition of development consent may be imposed if:*

- (a) *it relates to any matter referred to s79C(1) of relevance to the development the subject of the consent, ...*

- (6) *A development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of any of any one or more of the following:*
- (a) *making good any damage caused to any property of the consent authority (or any property of the corporation) as a consequence of the doing of anything to which the consent relates,*
  - (b) *completing any public work (such as road work, kerbing and guttering, footway construction, storm water drainage and environmental controls) required in connection with the consent,*
  - (c) *remedying any defects in any such public work that arise within 6 months after the work is completed.*
  - (d) ***In relation to coastal protection works (within the meaning of the Coastal Management Act 2015), either or both of the following:***
    - (i) ***the maintenance of the works;***
    - (ii) ***the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works.***
- ...
- (7) *The security is to be for such a reasonable amount as is determined by the consent authority.*
- (9) *The security is to be provided before carrying out any work in accordance with the development consent or at such time as may be agreed to be the consent authority.*
- (10) *Funds realised from a security may be **paid out to meet any cost** referred to in subsection (6). **Any balance remaining is to be refunded to, or at the direction of,** the persons who provided the security. (Emphasis added).*

- 3.4 Prescribing a power to impose security conditions does not address some of the key concerns expressed in Part 1 above relating to s55M of the CP Act (see paragraphs 1.14 to 1.20 in particular). Conditions are amenable to both modification applications and appeal on an individual development consent business. Ad hoc or inconsistent outcomes may result as a consequence.
- 3.5 The temporal manifestation of 'any increased erosion of the beach or adjacent land caused by the presence of the works' may not occur until some time in the future. Contrast the other security provisions in s80A which are directed to readily ascertainable damage to public property arising as a consequence of the carrying out of the development at the time or shortly thereafter.
- 3.6 Other forms of security relate to public lands or public works. Security contemplated in the reforms could relate to work on private land, or land under the control of another public authority being the beach in certain circumstances. The holding of security does not authorise a trespass on private land. This difficulty applies whether or not conditions are imposed on the land owner/applicant to undertake maintenance or restoration works or a consent authority is the holder of security in respect of such works.

- 3.7 CPW may be static works and/or development. It is not clear how land use changes will be accounted for either in any conditions contemplated to require maintenance or restoration of a beach or adjacent land, or the application of security to be held by the relevant consent authority.
- 3.8 Increased erosion may not become apparent for some period of time. Factual disputes may arise between land owners and consent authorities as to whether or not any increased erosion is due to the presence of the CPW or other dynamic coastal processes and if so how those might be attributed.
- 3.9 It is unclear how security, if held, will interrelate with levies able to be made by coastal councils in the event they provide coastal protection services as defined under the LG Act.
- 3.10 All conditions of consent are capable of review by reference to what is colloquially known as the Newbury tests. That is, to be valid a condition of consent must:
- (a) be for a proper planning purpose (ie relate to a 79C consideration);
  - (b) fairly and reasonably relate to the development the subject of the approval; and
  - (c) not be so unreasonable that no reasonable authority proper in contemplating its functions would impose the conditions.
- 3.11 Merely falling within the express powers in s80A of the EPA Act does not immunise a condition from review under these tests.
- 3.12 Providing security conditions in respect of beach restoration, rather than including them as a threshold consideration to the grant of consent such as public access to the foreshore, inherently recognises that such works will have impacts. We have concerns about the efficacy of the proposed security conditions and suggest your member councils seek further information from the State in respect of how the security conditions are capable of functioning to meet their intended effect.

#### **4. New SEPP Considerations and Repeal of Clause 5.5 of the Standard Instrument**

- 4.1 The Explanation of Intended Effect of the New SEPP indicates that selected matters for consideration and relevant development standards and controls in SEPPs 14, 26 and 71 and the provisions of clause 5.5 of the Standard Instrument, will be migrated into the New SEPP.
- 4.2 It is also proposed that local risk clauses be repealed.
- 4.3 As a general proposition, consolidation of consent considerations and development controls into one comprehensive EPI is likely to be beneficial and provide a more streamlined assessment platform.
- 4.4 Consideration of the effect of the amendments will ultimately depend on the text of the New SEPP and precise threshold considerations and development controls contained therein. Member Councils will need to evaluate the potential implications for them upon the final form of the SEPP. Particularly where local risk clauses specific to local conditions have been included in their LEP.
- 4.5 The Explanation of Intended Effect of the New SEPP sets up differential threshold considerations. To illustrate: in Coastal Management Area 1 - coastal wetlands and littoral rainforests area - it is intended the proposed SEPP will include one additional

matter for consideration (based on the Standard Instrument LEP, clause 5.5(2)(e), in relation to any development on land identified as a littoral rainforest as follows:

*Development consent must not be granted to development on land that is identified as a littoral rainforest unless the consent authority **is satisfied that** there are sufficient measures to protect the bio-physical, hydrological and ecological integrity of the littoral rainforest. (Emphasis added)*

- 4.6 Satisfaction is a relatively high benchmark as a precondition to the grant of development consent.

- 4.7 By way of contrast, in perimeter areas for littoral rainforests the New SEPP is intended to include the following:

*Development consent not be granted to development on land within the 100 metre perimeter area of a littoral rainforest unless the consent authority **has considered the extent to which**<sup>2</sup> that the development will impact on:*

- *The bio-physical, hydrological or ecological integrity of the adjacent littoral rainforest .... (Emphasis added)*

- 4.8 This is a lower threshold than requiring the consent authority be 'satisfied' the development is consistent with or achieves certain desired outcomes. Greater weight will be afforded to matters which are expressed in terms of 'prior satisfaction' because of the internal hierarchy created by the different phrases.

- 4.9 Provided those controls are given proper consideration in the sense that they had been demonstrably taken into account, they do not mandate any positive obligations and could be departed from in approving a development. The obligation to 'consider the extent to which' is akin to a requirement to 'have regard to' identified matter. That obligation is not of course without some practical force.

- 4.10 The phrase 'have regard to' has been held by the Courts to require those matters to be 'taken into account and give weight to them as a fundamental element' in making decisions, although they are not per se determinative.<sup>3</sup>

- 4.11 The different threshold may be reflective of the relative sensitivity of the Land/Management Area to which they apply.

- 4.12 The proposed development controls for Coastal Management Area 2: Coastal Vulnerability Area relate to land identified as being exposed to current or future coastal hazards. They have some interesting interactions with proposed s27 of the Draft Bill and the conditions pertaining to the provision of security for coastal protection works.

- 4.13 In Management Area 2 the proposed development controls will provide that:

*Development consent must not be granted to development on land within this coastal management area unless the consent authority is satisfied that, for the life of the works, the development:*

- *Allows for the ambulatory and dynamic nature of the beach and foreshore, or otherwise includes arrangements to maintain the presence of a beach, if there is an existing beach adjacent to the proposed development.*

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<sup>2</sup> See also the consent considerations and development controls for Coastal Management Area 3 - Coastal Environmental Area which are expressed in the same terms.

<sup>3</sup> See *R v Hunt*; ex parte Sean Investments Pty Limited (1979) 180 CLR 329.



- *Is not likely to cause increased coastal vulnerability in respect of the land itself or any other land in the coastal vulnerability area.*
  - *Is not likely to alter coastal processes to the detriment of the environment, or other properties or public land.*
  - *Is not likely to reduce the public amenity, access to and use of the beach, foreshores and headlands.*
  - *Incorporates appropriate measures to manage risk to life and public safety from coastal hazards.*
  - *Provides for the relocation, modification or removal of the development in the event that the above outcomes cannot be satisfactorily achieved.*
- 4.14 Presumably those development controls would also apply to applications for coastal protection works. Depending on individual coastal circumstances there appears an underlying tension between permitting coastal protection works and the objects of the development controls which apply to all other forms of development.

## **5. Exempt and complying development and other activities**

- 5.1 The Stage 2 Reforms do not propose to alter present circumstances pertaining to activities which require approval under Part 5 of the EPA Act or the exempt and complying development provisions.
- 5.2 The State sought feedback as to whether 'the current exempt development and complying development provisions be retained for coastal management areas'.<sup>4</sup>
- 5.3 Whilst an analysis of the plethora of exempt and complying development provisions in SEPPs and Codes is beyond the scope of this advice, consideration could be given to reviewing the definition of environmentally sensitive areas in which exempt development cannot occur. Presently that definition includes land to which SEPP 14 or SEPP 26 applies and land with 100 metres of such land. Importantly whilst environmentally sensitive areas include the coastal waters of the state there is not similarly a prescription on exempt development on land within 100 metres of the coastal waters of the state.
- 5.4 Conceivably some forms of exempt development in the 'active zone' could still be able to be undertaken. Carports on slab construction, earthworks and retaining walls on sloping sites, and masonry fences on sloping sites (which could arguably be used as de facto erosion protection works) are but some examples of development which could conceivably occur as exempt development within areas to be mapped under the New SEPP. The issue requires further detailed review and we highlight it for your member councils' consideration.
- 5.5 In addition, fairly intensive forms of residential development can occur in coastal areas unregulated by the EPA Act. The *Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005* enables manufactured homes to be erected in caravan parks provided the requirements of that Regulation are adhered to.<sup>5</sup> Provisions of LEPs and SEPPs are not relevant. Whilst those Regulations contain some controls upon the installation of manufactured homes, there are no equivalent provisions in relation to coastal hazards and coastal processes.

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<sup>4</sup> Question 11 in Explanation of Intended Effect

<sup>5</sup> Provisions of SEPP 21 and SEPP 36 would also need to be considered.

- 5.6 Where councils have existing caravan parks within coastal management areas to be mapped, it may be advisable for a local approvals policy to be adopted incorporating some mirror provisions as required to be consent considerations under the New SEPP. Integration of the coastal management and land use planning framework realistically may also require the State to investigate amending Part 2 of the Local Government Manufactured Home Estate Regulations to incorporate appropriate considerations of coastal hazards and processes.



## APPENDIX D - NEW APPROACH TO COMPLIANCE AND ENFORCEMENT

### 1. Background

- 1.1 The Draft Bill does not include compliance and enforcement powers, rather it is proposed to integrate those powers into the existing framework under the EPA Act and repeal existing orders and enforcement provisions in the CP Act (See Appendix A for the proposed amendments).
- 1.2 The Fact Sheet<sup>1</sup> - compliance and enforcement in the coastal zone states:  
*This is consistent with integrating coastal management into the legal framework for land use planning. It will make enforcement simpler and more effective.*
- 1.3 The State Government has identified the integral nature of compliance and enforcement activities in the coastal context. The Draft Manual Part B - Stage 5 Implementing, Monitoring, Evaluating and Reporting provides (at page 6):  
*Compliance and enforcement arrangements are essential to ensure the orderly management of the coastal zone. They act to ensure that unauthorised works in a coastal zone do not increase erosion, introduce public safety hazards or cause other impacts on beaches that create legacy issues for coast communities.*  
*At any time during the preparation of or after gazettal of a CMP, it is important that councils undertake compliance and enforcement activities placed and maintained works.*
- 1.4 The proposed mechanism is to make amendments to the provisions of s121B of the EPA Act. Doing so will have some consequences, as the framework for enforcement and compliance in the EPA Act, contains extensive notice and appeal provisions not presently found in the orders regime as it exists in the CP Act. Amendments to the table in s121B will have implications beyond land in the coastal zone as it will apply state wide. Detailed consideration of those broader implications are beyond the scope of our brief.
- 1.5 During the Stage 1 reform process, much was made of the 'enhanced order provisions' of the Draft Bill (as it then was), which were said to benefit councils and coastal authorities.
- 1.6 The Stage 2 reforms propose to repeal all of the orders and compliance regime under the CP Act, including those introduced in Stage 1.
- 1.7 On your instructions we examined and provided advice in respect of the proposed Stage 1 order provisions in our letter dated 10 September 2010<sup>2</sup>. Whilst that advice was prepared in respect of the then Stage 1 Draft Bill, as enacted the provisions were largely identical. Consequently we do not repeat the analysis here.

### 2. Minister's enforcement powers under CP Act

- 2.1 The CP Act presently contains a separate supervisory and enforcement regime capable of being exercised by the relevant Minister as well as designated coastal authorities and authorised officers.
- 2.2 Despite the existence of these provisions largely since the commencement of the CP Act, we have not identified any occasion where such powers have been exercised by the Minister or other coastal authorities.

<sup>1</sup> Fact Sheet: Compliance and Enforcement in the Coastal Zone, Department of Planning.

<sup>2</sup> Advice HWL Ebsworth Lawyers - 'Coastal Protection and other Legislation Amendment Bill - Part 1, 10.9.10 in particular ss11 and 12.

- 2.3 In summary, the Draft Bill will repeal express powers of the Minister to issue non-appellable Notices to any person and/or public authorities to:
- (a) refrain from doing anything in the coastal zone without, or otherwise in accordance with, the concurrence of the Minister required under the CP Act or any other Act.<sup>3</sup>
  - (b) refrain from doing anything in the manner specified as necessary to ensure the coastal zone is not adversely affected by that thing or to do such things as restoration work to ensure the coastal zone is restored in the condition it was in before the works were carried out.
- 2.4 The recipient of a notice is required to comply with such notice [s51(3)]. If a person fails to comply with the notice, the Minister has the power to do all things as are required by the notice and recover the costs against that person.
- 2.5 The Minister's oversight extends to directing a public authority having functions under any Act, in respect of rules relating to the use or occupation or development in the coastal zone, to exercise those functions at such time and in such manner as specified in the direction, where part of the zone is used or occupied or developed otherwise or without a concurrence of the Minister. Public authorities are required to comply with such a direction in accordance with its terms<sup>4</sup>.

### 3. Part 4D of the CP Act compared with the EPA Act

- 3.1 Also proposed to be repealed are the order provisions in Part 4D of the CP Act (with respect to material and structures on beaches).
- 3.2 Upon examination, the orders powers in the CP Act have some considerable limitations<sup>5</sup>. The Fact Sheet - "Compliance and Enforcement in the Coastal Zone" issued by the Department of Planning and Environment with the release of the consultation drafts, identifies some of the limitations with the orders regime under the CP Act. It states:

*Currently, orders under the CP Act can only be issued for works that are unlawful (eg. works that require development consent but where development consent has not been granted), and only in three circumstances:*

- (c) *if the structure or work causes or is likely to cause increased erosion of a beach or land adjacent to a beach,*
  - (d) *if the structure or works unreasonably limit or is likely to unreasonably limit public access to a beach or headland, or*
  - (e) *if the structure or work poses or is likely to pose a threat to public safety.*<sup>6</sup>
- 3.3 This is correct insofar as ss 55ZA(6) and 55ZB(2) exclude the operation of the orders power under the CP Act, where development consent for the works has been granted or that is exempt development or development not requiring consent. On one construction, the CP Act orders powers do not apply, even if the works are not being carried out in accordance with any conditions of consent, or whether or not the works required a Part 5 approval under the EPA Act.
- 3.4 The orders regime in section 121 B of the EPA Act does provide for the issue of orders in circumstances where development consent may have been granted but the development or work has been carried out either in breach of the conditions of that consent or otherwise in contravention of the Act. Further there are instances (see for example, order 2 of the table in Appendix A) providing for demolition in circumstances where a building is, or is likely to,

<sup>3</sup> The concurrence requirements are in fact very limited. They do not, for example, apply for development for which consent is required.

<sup>4</sup> CPA Act, s.52

<sup>5</sup> We have not addressed orders in respect of temporary coastal protection works in circumstances where those provisions are proposed to be repealed and not replaced in the new Coastal Management Bill.

<sup>6</sup> See also our advice 10 September 2010.

- become a danger to the public irrespective of whether or not consent is required and/or obtained.
- 3.5 The orders regime in the EPA Act into which the reforms are proposed to be inserted relate to the following:
- (i) notification provisions, appeal provisions
  - (ii) the description of land in respect of which orders might be issued
  - (iii) the circumstances under which the orders can be issued.
- 3.6 Section 55ZD provides the general provisions relating to orders under the CP Act. Orders under that Part may be given to a person by notice in writing, or orally, and no prior notice of intent to issue such order or submission period is prescribed.
- 3.7 Orders given under the CP Act take effect immediately or from the date specified in the written or oral notice, and are subject to such conditions as the coastal authority may specify.
- 3.8 Indeed s55ZD(6) expressly dispenses with the need for the notification of any person who may be affected by the order before making an order under that Part. Orders given under the Part remain in force until revoked by the coastal authority concerned or any activity to which the Order relates obtains planning approval.
- 3.9 Under the CP Act there is no express right of merit appeal against orders. A recipient's only recourse would be judicial review (such as failure to consider a relevant matter, unreasonableness, procedural fairness, error of law etc).
- 3.10 It also an offence to fail to comply with an order issued under the CP Act. Maximum penalties are prescribed in section 55ZF.
- 3.11 Importantly an order given under the CP Act does not authorise the recipient to enter other land without the permission of the owner of the land [s55ZD (9)]. This constitutes a practical impediment to the observance of the order if it requires the carrying out of demolition work and/or restoration works where those works were constructed partly on adjoining privately owned land and/or partly on public land.
- 3.12 This issue is replicated in the EPA Act regime insofar as it is not possible for a regulatory authority to order a person to undertake works on another person's land, with the exception of provisions which relate to public land and public places.
- 3.13 The circumstances in which a 'designated authority' under the CP Act<sup>7</sup> is able to issue orders, relate to the description of land as a 'beach' or land interrelated with a beach. Under s55ZA the power is enlivened '*in respect of a beach on land for which it is a designated authority*'. The power in section 55ZB is enlivened in respect of land on which activity is occurring if such activity is likely to cause increased erosion of a beach or land adjacent to a beach. Utilising the term 'beach' does not differentiate between whether the land is private or publicly held.
- 3.14 By way of contrast the ability to issue orders under section 121 B of the EPA Act is, with some exceptions, limited to the owners or occupiers of premises. The provisions in the Draft bill as proposed amend s121B of the EPA Act in some instances refer to a 'public place'.

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<sup>7</sup> Designated authorities are defined under the CP Act under s4C as follows:

- (a) in relation to all land - the Minister;
- (b) in relation to land within a local government area, or that is a beach adjacent to a local government area, of a council that is a coastal authority - a council; in relation to Crown land within the meaning of the Crown Land Act 1989 or land within a reserve as defined in Part 5 of that Act - the Minister administering that Act;
- (d) in relation to public land not referred to in paragraph (c) - the public authority that is the owner of, or has the care, control or management of, the land.

3.15 There is a notable exception with proposed order 20 in the Draft Bill which is the only draft provision which expressly relates to a beach or foreshore. Proposed Order 20 is discussed below.

3.16 The EPA Act borrows the definition of public place from the LG Act:

*Public place means:*

- (a) *a public reserve, a public bathing reserve, public bath or public swimming pool, or*
- (b) *a public road, public bridge, public wharf or public road ferry, or*
- (c) *a Crown reserve comprising land reserved for future public requirements, or*
- (d) *public land or Crown land that is not:*
  - (i) *a Crown reserve (other than a Crown reserve that is a public place because of paragraph a, b or c), or*
  - (ii) *a common, or*
  - (iii) *land subject to the Trustees of Schools of Arts Enabling Act 1902, or*
  - (iv) *land that has been sold or leased lawfully contracted to be sold or leased, or*
- (e) *land that is declared by the reservations to be a public place for the purposes of this definition.*

3.17 In addition public land means 'any land (including public reserve) vested in or under the control of the council, but does not include:

- a public road; or
- land to which the *Crown Lands Act 1989* applies, or
- a common, or
- land subject to the *Trustees of Schools of Arts Enabling Act 1902*, or
- a regional park under the *National Parks and Wildlife Act 1974*.'

3.18 The coastal environment can be characterised as having fragmented and sometimes unclear land ownership patterns. There is interaction between public and private lands and land controlled by a variety of public authorities. All of which might fall within the proposed definition of a 'beach' under the Draft Bill.

3.19 Future implementation of the orders powers as proposed under the Draft Bill may be complicated by the nature of land ownership in the coastal zone. To some extent this is potentially ameliorated by the current form of the table to s.121B Orders or a combination of orders may be able to be issued to owners, occupiers of premises, or in respect of public places. Practical enforcement given appeal rights and resources is another issue.

3.20 The use of the term 'beach' under the CP Act insofar as it enlivened the power to issue orders, dispensed in some respects with potential technical argument as to the ability to issue orders and the identity of the proper recipient. It is not possible to identify the extent to which such concerns may eventuate as it will entirely depend upon the particular factual matrix as it emerges at the time.

3.21 The Draft Bill proposes the insertion of a new Order 20 as follows:

*To cease carrying out or conducting an activity on a beach or foreshore (within the meaning of those terms in the Coastal Management Act 2015), whether or not the activity is subject to development consent. Such order can be issued in circumstances where the activity is being carried out in contravention of this Act to any person apparently engaged in promoting, conducting or carrying out the activity.*

- 3.22 This is the only order expressed to be in relation to a 'beach' or 'foreshore' and conceivably could relate to building works or the deposition of material having regard to the definition of building work (incorporating activity) in s 4 of the EPA Act. The circumstances in which it could be issued include a breach of conditions of development consent, works or activities which are prohibited or works or activities which do not comply with the prescribed requirements of exempt or complying development.

#### **4. Notice Provisions Appeal Rights and express enforcement provisions under the EPA Act**

- 4.1 The largest consequence of the proposed amendment will be the application of existing notice provisions appeal rights and statutory enforcement provisions under the EPA Act in respect of orders relating to unlawful works or development in the coastal zone, where there are presently none. The process requirements of the EPA Act enforcement regime will be familiar to your member councils.

- 4.2 The EPA Act provides that before giving an order, a relevant authority must comply with ss121F to 121K (except for emergency orders, or orders 8 or 19 - see Appendix A). Those sections prescribe matters pertaining to procedural fairness and require:

- (a) consideration of any adopted criteria in a development control plan before issuing an order (s 121F);
- (b) the giving of notice of a proposed order;
- (c) affording an opportunity for the making of representations and consideration of such representations.

- 4.3 Once issued, an order binds successors in title and the EPA Act contains other facilitative provisions as between owners and occupiers of land not found in the CP Act. CP Act orders are 'personal' in large part, except for some provisions relating to CPW.

- 4.4 S121ZK prescribes a right of appeal against an order within 28 days. There is no express merit appeal right against an order issued under the CP Act. An appeal does not law stay the effect of an order. If a person does not comply with an order, or appeal against such order, the remedies available to the relevant authority are:

- (a) do all things necessary and/or carry out such work as to give effect to the order and seek to recover costs from the recipient (coequally known as self help powers) s 121ZJ. In practice, very rarely used without the imprimatur of a court order;
- (b) commence civil enforcement proceedings seeking to enforce compliance with the order or provisions of the EPA Act generally if another breach, such as failure to obtain development consent, is extant; or
- (c) criminal proceedings for an offence (failure to comply with an order is a breach of the Act in a sense) or issue of a penalty notice; or
- (d) do nothing.

- 4.5 In relation to (b) and (c), the decision to commence civil or criminal proceedings depends upon the desired outcome - whether the rectification and restoration of the unlawful works or punishment. A higher burden of proof applies to criminal proceedings.

- 4.6 In respect of (d) - the 'do nothing' option - there may be of course situations where a local government authority has other priorities and limited resources area wide. However, failure to exercise a statutory power (such as an enforcement power) can have liability consequences<sup>8</sup>.
- 4.7 In respect of (b), civil enforcement, the EPA Act has express open standing provision enabling 'any person' to bring proceedings in the Land and Environment Court to restrain a breach of the Act (s123).
- 4.8 There is no commensurate open standing provision in the CP Act. Rather, proceedings for offences, which include criminal proceedings for failure to comply to observe Orders under the CP Act, may be taken by the Minister other person or body authorised under the CP Act (such as Councils) in the Land & Environment Court (s59 CP Act) The Court is empowered to make restoration orders or other orders in such proceedings (s56A CP Act).
- 4.9 Proceedings in respect of offences are criminal in nature and subject to the higher evidentiary burden of proof. Civil proceedings have a less onerous burden of proof and are the more usual mechanism by which rectification and restraint is sought. Section 124 provides express functions and powers for the Land and Environment Court to restrain a remedy of breach of the EPA Act. Those express powers do not derogate from the Court's general powers.
- 4.10 As your member councils will be aware, the Court maintains a discretion in the exercise of its judicial functions (*Warringah Shire Council v Sedevic* 1987 10 NSWLR 355).
- 4.11 In order to obtain consequential orders requiring restraint of unlawful activity or remedy of a breach (such as failure to comply with an order in the coastal zone) is not sufficient to merely prove the existence of a breach.
- 4.12 Discretionary factors must be balanced. Where the exercise of discretion is in the enforcement of a public duty, including upholding the integrated and co-ordinated nature of planning legislation, the Courts do recognise that regulatory authorities such as Councils are proper guardians of public interest and compliance with the planning regime is an integral factor.
- 4.13 Other matters relevant to the exercise of discretion include:
- (a) whether the breach is merely technical;
  - (b) whether the breach results in an adverse effect on the environment or amenity of the locality or has a beneficial effect;
  - (c) whether the relief sought is against a static development (such as the erection of a building which could only be remedied at great cost or inconvenience);
  - (d) the degree of environmental harm or lack thereof.
- 4.14 In a coastal context involving for example, unlawful construction of coastal protection works, discretionary factors in civil enforcement proceedings might include balancing impacts on coastal processes and the environment against potential risk to private land and assets.
- 4.15 The LEC Act expressly preserves an option for the Court, where the breach complained of is failure to obtain development consent, to adjourn proceedings to enable and development application to be made to obtain relevant consent - which might mean that unlawful works remain in situ during that process or any subsequent during merit appeals, if consent is not granted.

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<sup>8</sup> see for example *Pyrenees Shire Council v Day* [1998] 192 CLR 330.



## 5. Key Observations

- 5.1 The Draft Bill proposes amendments to the orders regime and s121B of the EPA Act in particular. In doing so, it will have an affect once implemented beyond the coastal zone. Some of those amendments may be beneficial to councils as regulatory authorities.
- 5.2 The orders regime in the CP Act has rarely, if ever, been used. The addition of notice requirements and express appeal rights ostensibly could have made the CP Act Orders regime more certain, in terms of implementation and achieving a restoration outcome on a beach in respect of unlawful work (albeit in limited circumstances).
- 5.3 Efficacy is hampered by the lack express statutory provisions for civil enforcement action in the CP Act.
- 5.4 The restoration and rehabilitation powers vested in the LEC under the CP Act (s56A) are available only in proceedings under the CP Act for offences which are criminal in nature where a higher standard of proof applies.
- 5.5 The Orders and compliance framework under the EPA Act is well utilised and understood by regulatory authorities. There is a body of case law which can be used for guidance in enforcement action.
- 5.6 Procedural fairness requirements and appeal provisions are statutorily prescribed within the EPA Act framework.
- 5.7 The documents released for publication consultation with the Draft Bill emphasise the importance of councils undertaking compliance and enforcement activities when unauthorised works take place to minimise impacts and adverse affects on the coastal zone.
- 5.8 Effectiveness of any compliance regime depends upon resourcing. There may be competing requirements and priorities for compliance resources throughout any Local Government area. Importantly for your council members the Stage 2 Reforms assumes councils will have access to appropriate technical expertise to undertake compliance monitoring in the coastal zone and the resources to enforce removal and rehabilitation works.
- 5.9 The Draft Bill does provide for the Minister or Secretary or other public authorities to be prescribed to exercise functions under s121B. Only in respect of certain of the orders in the proposed amended table and in respect of land in the coastal zone insofar as the Minister is concerned and only in respect of land managed or owned by public authority in respect of the latter.
- 5.10 If history is a guide, it is probable that Councils will be primarily responsible for compliance actions in the coastal zone and orders under consolidated framework. In view of resource limitations and competing priorities, it may be prudent or advisable for Councils (or the LGNSW) to consider writing to the Minister responsible for the EPA Act to request the foreshadowed Regulations prescribe other public authorities to exercise functions in respect of orders under the EPA Act, as is contemplated in the Draft Bill.
- 5.11 Many Councils' have adopted provisions in DCP's or specific policies which relate to prioritising enforcement action and/or criteria for the exercise of compliance functions such as the giving of orders.
- 5.12 If adopted, such criteria set in development control plans are required to be considered before the giving of an order (s121F EPA Act). Consideration could be given to reviewing any such criteria to account for matters particular to the impact of works and activities in the coastal zone.

## APPENDIX E - STATUTORY DEFENCES TO LIABILITY - SECTION 733 OF THE LG ACT

As a matter of policy, the legislature has recognised that public authorities should not bear an unnecessary burden for the effects of coastal and other natural hazards. In this regard there are various statutory immunities available to councils - commonly known as the good faith immunities.

The Draft Bill also proposes amendment to the statutory exemption from liability provisions contained in s733 of the LG Act. Sections 731 to 734 of the LG Act exempts councils and council employees from liability in respect of advices given or any matter or thing done, good faith, in the circumstances prescribed in those sections. The exemptions whilst useful, are not blanket protections as liability in tort is highly fact dependent.<sup>1</sup>

Section 733 has been the subject of revisions through the Stage I reform process.

### 1. Background

1.1 Section 733 of the LG Act operates, insofar as the law permits, to protect councils from liability in respect of any action, omission or advice given in relation to the likelihood of any land in the coastal zone being affected by a coastline hazard - provided the council has acted in 'good faith'.<sup>2</sup>

1.2 Relevantly, section 733(2) provides:

- (2) *A council does not incur any liability in respect of:*
- (a) *any advice furnished in good faith by the council relating to the likelihood of any land in the coastal zone being affected by a coastline hazard (as described in a manual referred to in subsection (5) (b)) or the nature or extent of any such hazard, or*
  - (b) *anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being so affected.*

1.3 Section 733(4) provides:

- (4) *Without limiting any other circumstances in which a council may have acted in good faith, a council is, **unless the contrary is proved**, taken to have acted in good faith for the purposes of this section if the advice was furnished, or the thing was done or omitted to be done, **substantially in accordance with** the principles contained in the relevant manual most recently notified under subsection (5) at that time.* (emphasis added)

1.4 Section 733(5) provides:

- (5) *For the purposes of this section, the Minister for Planning may, from time to time, give notification in the Gazette of the publication of:*

<sup>1</sup> It is unlikely ss731-734 protects against liability for criminal acts. See *Garrett v Freeman* (2006) 147 LG ERA 96.

<sup>2</sup> See also s731 LG Act and ss42-46 of the Civil Liability Act and s149(6) of the EPA Act.



- (a) a manual relating to the management of flood liable land, or
- (b) a manual relating to the management of the coastline; or
- (c) a manual relating to the management of land subject to the risk of bushfire.

(8) In this section:

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

**manual** includes guidelines.

- 1.5 The presumption of good faith provided in section 733(4) is predicated on the relevant advice, action or omission being undertaken substantially in accordance with the principles in the manual referred to in subsection 5(b). The manual was repealed and replaced by the CZMP Guidelines as a consequence of the 2010 coastal reforms. The CZMP Guidelines were published in the NSW Government Gazette for the purposes of section 733(5)(b) on 25 February 2011. They contain principles, some of which are predicated on the State's SLR Policy and sea level rise benchmarks. That policy has been revoked, and local government is expected to adopt its own projections for local circumstances.
- 1.6 Some coastal councils have not yet done so (presumably as their position had been informed by the SLR Policy). The foreshadowed state-wide methodology does not presently exist<sup>3</sup> and the state agencies websites advise that reference in the CZMP Guidelines to the SLR Policy and benchmarks within that document (and the Planning Guidelines) should be taken as references to a council's adopted sea level rise projections.
- 1.7 The section 733 presumption of good faith is rebuttable and the ability to rely on it can in any event, be displaced on an examination of the specific facts. To rely on section 733 immunities, a council will need to demonstrate they have nonetheless advised, acted or omitted to act, in good faith.
- 1.8 We note also that the *Civil Liability Act 2000* also provides for some immunities and defences to Councils and other public authorities.<sup>4</sup> Examination of those provisions is outside the scope of SCCG's request for advice. Please let us know if you would like us to deal with those specific provisions.
- 1.9 The term 'good faith' is not defined in either the EPA Act or the LG Act. However the concept has undergone judicial consideration in cases alleging negligence against public authorities.
- 1.10 Some general principles can be distilled from the cases in relation to good faith:<sup>5</sup>
- (a) good faith requires more than just an honest attempt (or honest ineptitude);
  - (b) councils cannot 'hide behind' an argument that information in its possession is doubtful, without proper consideration of its reliability;

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<sup>3</sup> The SLR methodology was foreshadowed in Stage 1, to be provided in Stage 2.

<sup>4</sup> See ss43 to 44 of the Civil Liability Act 2002 where public authorities are not liable for a breach of statutory duty unless the breach is so unreasonable that no other reasonable public authority would have acted so.

<sup>5</sup> *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 209, *Armidale City Council v Finlayson* [2000] FCR 330 for example. Not exhaustive.

(c) it is not a duty to guarantee that information or advice is accurate but a duty to act reasonably in ensuring that data is as accurate as possible and the information communicated is not misleading; and

(d) each case will turn on its own facts.

1.11 We emphasise that the existence of actionable duties of care and potential liability for negligence, including the exercise of statutory functions and duties, are dependant on individual facts and circumstances. Our comments must be understood as generalisations only and should not be relied on for any purpose other than general commentary.

1.12 Councils should seek specific advice informed by their individual circumstances. Such advice would prudently involve councils' insurers.

## 2. Proposed Amendments

2.1 Attached in Appendix A is the consolidated version of s733 in the LG Act as proposed to be amended by the Draft Bill. Without repeating the entirety of those revisions, the salient points are reproduced here (please however refer to the entirety of the proposed amendments):

(4) *Without limiting any other circumstances in which a council may have acted in good faith, a Council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished, or the thing was done or omitted to be done:*

(a) ***substantially in accordance** with the principles contained in the relevant manual most recently notified under subsection (5) at that time, or*

(b) ***in accordance with the principles and mandatory requirements** set out in the current coastal management manual under the Coastal Management Act 2015.*

(5) *For the purposes of the section, the Minister for Planning may, from time to time, give notification in the Gazette of the publication of:*

(a) *a manual relating to the management of flood liable land, or*

(c) *a manual relating to the management of land subject to the risk of bushfire.*

*A manual includes guidelines. (Emphasis added)*

2.2 Section 733 expressly relates to exemption from liability in relation to flood liable land, land subject to the risk of bushfire and land in the coastal zone. The Stage 2 amendments have two significant consequences:

(a) they differentiate between the provisions pertaining to natural hazards in terms of flood and bushfire risk - and coastal hazards; and

(b) they set a more onerous threshold for the presumption of good faith in respect of advice, actions or omissions pertaining to coastal hazard management and planning in the coastal zone.

- 2.3 To explain, subsection (4) is proposed to be amended to provide that the rebuttable presumption of good faith applies in circumstances where:
- (a) advice is furnished or the thing is done or omitted to be done substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time or
  - (b) in accordance with the Principles and Mandatory Requirements set out in the current coastal management manual under the *Coastal Management Act 2015*.
- 2.4 There is a distinct difference in drafting as between:
- (a) 'substantially in accordance with' - (which has been considered by the courts on numerous occasions) and which denotes a degree of flexibility; and
  - (b) 'in accordance with' which is arguably more onerous.
- 2.5 Whilst the matter is always a question of fact and degree, the phrases 'substantially in accordance with' and 'generally in accordance with' have long been held to denote a degree of latitude, flexibility and deviation (see *Lake Macquarie Landscapes Pty Ltd (No. 2) [2015] NSW LEC 114*; *Oshlack v Irongates Pty Ltd (1997) 130 LGERA 189*).
- 2.6 The threshold in respect of 5(a) is lower than the threshold in 5(b). The difference in drafting will be interpreted for statutory construction purposes, as deliberate and the courts will endeavour to give effect to an apparent legislative intent.
- 2.7 As noted in the preamble to this advice we have not undertaken a detailed analysis of the draft Coastal Management Manual. To do so is beyond our brief. However, on our quick review we have not been able to identify many readily discernible 'principles' set out in the Draft Manual. This leaves some uncertainty as to what the terminology 'in accordance with the principles and mandatory requirements' means in the proposed subsection 4(b)<sup>6</sup>.
- 2.8 By way of contrast the Mandatory Requirements are quite prescriptive. If actions, advice or omissions are not undertaken in accordance (as opposed to 'substantially in accordance with') with those Mandatory Requirements then it seems the rebuttable presumption of good faith may not be available to the Council or its staff as a statutory defence under s733. Absent the benefit of a presumption, a council may have the onus of establishing it has acted in good faith if litigation ensues for its actions.
- 2.9 In order that all natural hazards whether they be flood bushfire or coastal hazards and Council's responsibility therefore, be treated on an even playing field, at a minimum we would recommend that proposed subsection 733(4)(b) be amended to reinstate the terms 'substantially in accordance with'. Alternatively there would be no need to amend subsection (5) but merely amend the definition of Manual in the section itself to include the Coastal Management Manual under that Act.
- 2.10 Particular consideration needs to be given to the operation of transitional provisions in circumstances where many councils have either implemented CZMPs or are in the process of preparing, and implementing CZMP's under the pre-existing regime. Deletion of the reference to a Manual relating to the management of the coastline at subsection 5 may have implications for past and current actions or advice given in terms of the ability to rely on the s733 statutory defences.

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<sup>6</sup> There are two references to the principles in the Coastal Design Guidelines: Part B stage 1 paragraph 1.93 and Part B stage 3 paragraph 3.6.1. There are securing funding principles in that part at paragraph 3.9.1.

- 2.11 Inevitably a change in the manual will have an impact upon the preparation content and implementation of CZMPs and CMP's, and it follows there may be some affect on the good faith presumption in s.733(4). It is not possible to gauge the extent of the effect and Council's should seek express advice relevant to their individual circumstances.

## APPENDIX F - CMPS AND THE IRP FRAMEWORK UNDER THE LG ACT

The Stage 2 reforms are expressed, in the public consultation documents released by the State, to emphasise implementation. Responsibility for structuring responses and actions will fall in the main to local government.

### 1. General Observations

- 1.1 The Draft Bill introduces terms and obligations with potentially legal or disciplinary consequences. Although the consequences we have identified may have been unintended, we have nevertheless highlighted and advised in respect of them in order to provide an understanding of potential implications of the Stage 2 Reforms.
- 1.2 As the regime is a draft and untested, it is possible the Courts may not agree with the issues we raise and our interpretation of possible implications in the future.
- 1.3 Changes in nomenclature are not merely an exercise in semantics:
  - The CP Act is to be recast as the Coastal Management Act; and
  - Coastal Zone Management Plans are to be replaced by Coastal Management **Programs**.
- 1.4 The new terms and obligations introduced in the Draft Bill reflect the State's emphasis on implementation.
  - 'Plan' denotes a high level strategy whereas 'program' infers detailed action; and
  - The Draft Bill at s 22 requires councils to give effect to an adopted CMP.<sup>1</sup>
- 1.5 The Draft Bill also contemplates:
  - Integration of any CMP into the IRP Framework (irrespective of whether a CMP is the result of a Council's own strategic processes or imposed by the Minister);
  - Consequent specific budgeting and inclusion of CMP action items in Delivery Programs and Operational Plans (even where there may be competing demands for resources and other items in a particular local government area);
  - Auditing, monitoring and reporting functions conferred on the Coastal Council (with potential for administrative and disciplinary consequences under Chapter 13 of the LG Act on the Coastal Council's recommendation).
- 1.6 These observations are not exhaustive.
- 1.7 In circumstances where:
  - (a) the statutory guidelines (created under s 406 of the LG Act) for the preparation of plans under the IRP expressly provide for flexibility,

<sup>1</sup> This may create a statutory obligation which is potentially enforceable by third parties.

- (b) the Minister in announcing the Stage 2 reforms identified flexibility was key to the construction of those reforms, and
- (c) an extensive body of case law recognises (absent express statutory obligations to give effect to plans or perform functions) that competing priorities and limits on resources can be a defence to claims for liability when public authorities have statutory processes and functions,

your member councils should give consideration to the prescriptive sections and oversight requirements proposed in the Draft Bill and associated documents and how those reforms may affect their operations.

- 1.8 Taken to their logical (if extreme) conclusion, the reform package could be seen to mandate councils to set and budget for actions in the coastal zone and potentially prioritise those actions over other area-wide responsibilities, irrespective of immediate need, competing resources or priorities.
- 1.9 Failure to do so may invite oversight, disciplinary action or litigation to enforce identified actions in a CMP and may increase exposure to potential liability.
- 1.10 In that context, we have set out our preliminary observations arising from the Stage 2 reform package on the preparation of CMPs and how they are to be given effect.

## **2. Outline of Requirement to prepare a Coastal Management Program**

- 2.1 Part 3 of the Draft Bill outlines the new CMP framework which applies to councils whose local government area, or part of whose local government area, is included within the coastal zone, and any other public authority that exercises functions in connection with the coastal zone.
- 2.2 Under proposed s13, a council may, and must, if directed to do so by the Minister, prepare a CMP in accordance with the Draft Manual. In so doing, the Minister may, by notice in writing, direct a council in its preparation of a CMP. This direction prevails to the extent of any inconsistency between it and the Draft Manual.
- 2.3 In summary, the CMP must, pursuant to s15 of the Draft Bill:
  - (a) Identify the coastal management issues;
  - (b) Identify the actions required to address those issues in an integrated and strategic manner;
  - (c) Identify how and when those actions are to be implemented;
  - (d) Identify the costs of those actions and how they will be funded;
  - (e) Prepare a coastal erosion emergency action subplan if a council has land identified as a coastal vulnerability area (to be mapped by the State under the foreshadowed new SEPP) within its local government area and beach erosion is occurring on that land.
- 2.4 The Draft Bill requires consultation with the community (and other public authorities if required by s 16) before a CMP is adopted. Consultation is to include other councils identified as being part of the relevant sediment compartment.
- 2.5 Where a council fails to comply with the Minister's direction in preparation of its CMP or the Minister has refused to certify a draft CMP under s 17, the Minister may prepare and

adopt a CMP as if he were the council. The Minister is to seek the advice of the NSW Coastal Council (a body proposed to be established under s 24) in the preparation and adoption of a CMP (s 20). Once certified, completion of the process requires the CMP to be adopted by a council and gazetted.

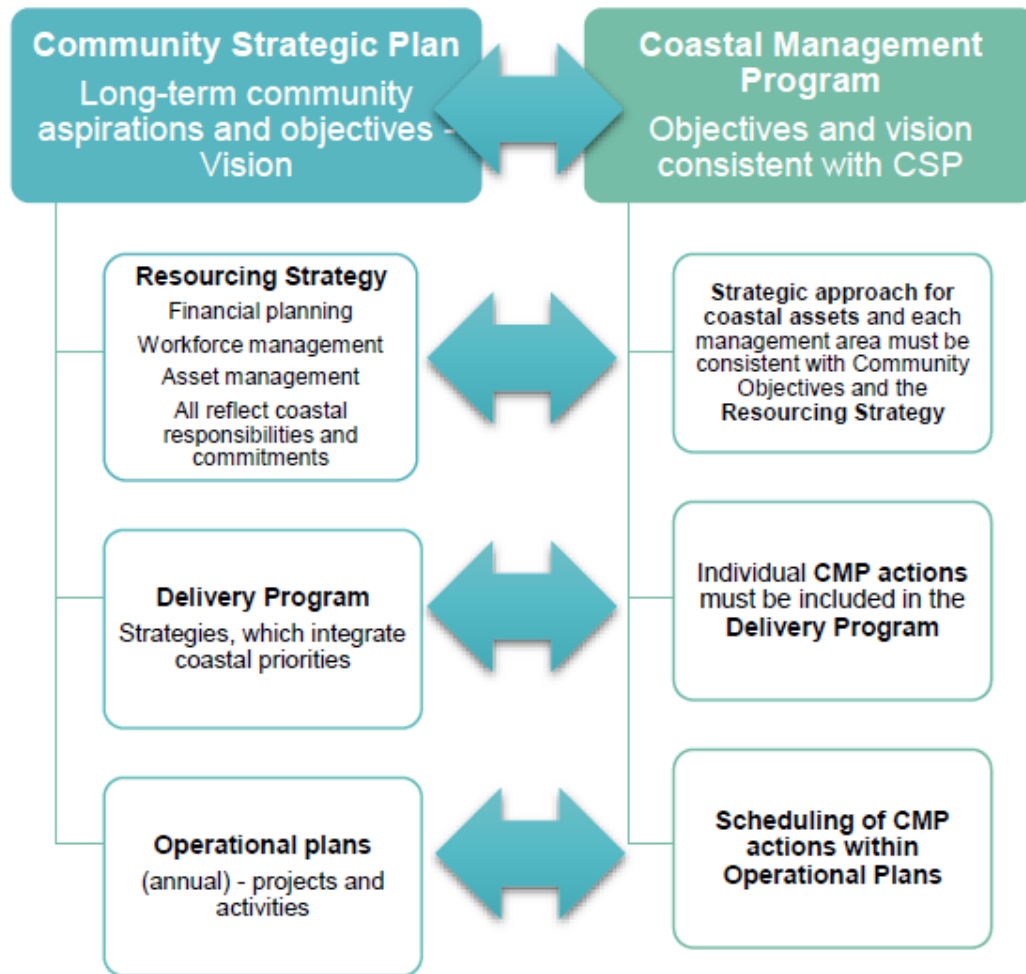
- 2.6 We have set out what is required to incorporate a CMP into council's usual reporting under the LG Act below. Guidance on how the CMP is to fit within the IRP framework is provided in the Draft Manual.

### 3. Integrated Planning and Reporting Framework

- 3.1 The Draft Bill aims to promote integrated and co-ordinated coastal planning, management and reporting and ensure coordination of the policies and activities of government and public authorities relating to the coastal region and to facilitate the proper integration of their management activities.
- 3.2 Division 4 of Part 3 of the Draft Bill outlines the obligations of councils. Section 22(1) requires a council to give effect to its CMP generally and in particular in:
- (a) the preparation, development and review of, and the contents of, the plans, strategies, programs and reports to which Part 2 of Chapter 13 of the LG Act applies, and
  - (b) the preparation of planning proposals and development control plans under the EPA Act.

*The CMP provisions will interact with the IPR Requirements*

- 3.3 The LG Act sets a broad brush integrated framework for reporting. That Act provides that projects and priorities should be set out in the Community Strategic Plan (**CSP**), Delivery Program and Operational Plan.
- 3.4 The Integrated Planning and Reporting Guidelines for local government in NSW (**Guidelines**) list the mandatory requirements from the LG Act, the *Local Government (General) Regulation 2005 (LG Regulation)* and Essential Elements that the Guidelines require that councils follow. Section 406(4) of the LG Act provides that a council must ensure that the requirements of the Guidelines are complied with.
- 3.5 The Guidelines acknowledge that the Essential Elements have been kept to a minimum and are deliberately broad in nature to allow councils flexibility in implementing the reporting requirements.
- 3.6 This flexibility is contrasted with the prescriptive nature of s 22 of the Draft Bill which requires that councils are to give effect to a CMP in their CSP, resourcing strategy, delivery program and operational plan.
- 3.7 The diagram below taken from page 2 of Part B, Stage 5 of the Draft Manual illustrates how the CMP process informs and is informed by the reporting framework.



- 3.8 The objectives and vision of the CMP should be consistent with the overarching CSP which, pursuant to s402 of the LG Act, identifies the main priorities and aspirations of the community for the future 10 years and strategies for achieving strategic objectives.
- 3.9 Following a council election, council must review the CSP before 30 June following the election and may endorse the existing plan, endorse amendments to the existing plan or develop and endorse a new CSP. If giving effect to a CMP in the IPR framework called for amendments to the CSP, these could be incorporated within the operation of s402.
- 3.10 The integration of the CMP into a council's resourcing strategy is expressed as "critical" to the implementation of cost effective CMP actions (page 2 of Part B, Stage 5 of the Draft Manual). A detailed figure in the Draft Manual shows how the CMP should be linked to council's financial planning processes.



Timeframe – 10 years and longer-term:	Timeframe – four years:	Timeframe – one year
<p>Financial projections and assumptions for a financially viable council:</p> <p>Have long term coastal opportunities and commitments, including contingent liabilities been included?</p> <p>CMP to inform the 10 year and longer-term financial plan:</p> <p>What are the future coastal opportunities for growth and income?</p> <p>What impact could coastal risks and responses have on council's revenue?</p> <p>Is what the community wants affordable?</p> <p>What financial mechanisms can be used to deliver the coastal objectives?</p>	<p>More detailed financial planning for the Delivery Program</p> <p>CMP Stages 4 and 5 – consistent with Delivery Program</p> <p>Incorporate detailed costs and benefits of coastal management responses; specify funding mechanisms for each coastal response, for example:</p> <p>Short-term levies or rate changes</p> <p>Grant programs</p> <p>Internal workforce</p> <p>Borrowings</p>	<p>Very detailed financial planning</p> <p>What coastal actions will be delivered (or continue to be delivered) in this year?</p> <p>Are any changes to specific funding models required (e.g. changes to grant programs and priorities)?</p> <p>Link Stage 5 of the CMP with the Delivery Program and Operational Plan</p>

3.11 Asset management planning is addressed separately in the Draft Manual at page 4 of Part B, Stage 5 which sets out actions to be taken by a council to facilitate integration of the CMP with the resourcing strategy including management of assets in coastal management areas, service standards for coastal assets amongst other considerations.

3.12 The four year delivery program is intended to be the focal point for council decision making and performance monitoring. The Draft Manual provides that each CMP action should be incorporated into the delivery program. More specifically, the Draft Manual gives the following guidance on what the CMP should include to assist its incorporation into the delivery program and operational plan:

- *distinguish those coastal management actions which are council's responsibility from those which are the responsibility of a public authority*
- *identify ongoing programs and commitments for the coast, including social or environmental enhancement programs and capital works programs*
- *demonstrate that resourcing is identified in council's long-term financial planning. The CMP must include discussion of council's priorities for expenditure/investment and how the balance has been established between short, medium and long-term costs and benefits, to maintain sustainable financial and environmental outcomes. The CMP should also highlight any funding for coastal actions that is expected to be contributed from private stakeholders (including landholders and volunteers) or public authorities*
- *demonstrate that the actions are consistent with the 'level of service' expected by the local community. For instance, this relates to the condition of coastal wetlands, littoral rainforests and environmental areas; the level of protection of assets; and the type/quality of coastal access and enjoyment offered. This is closely linked to the community's tolerance of risk and how much extra the community is prepared to pay for coastal management, and*
- *identify specific responsibilities for delivery within council.*

3.13 The Draft Manual suggests that councils develop and implement a monitoring program for the CMP and explores issues that should be covered at page 6 of Part B, Stage 5.

*Preparation of planning proposals and DCPs to implement CMPs*

- 3.14 Councils may need to prepare planning proposals to change the zoning of coastal areas in their LEPs in accordance with an adopted CMP. Amendments to DCPs are also envisaged (page 5 of Part B, Stage 5 of the Draft Manual).

*Implications of giving effect to CMP in the Integrated Planning and Reporting framework*

- 3.15 Many councils already consider and address management of coastal issues and like environmental issues such as bushfire protection and water management in their reporting under the LG Act.
- 3.16 The Draft Bill creates a requirement for councils to incorporate a CMP into their reporting. Our research into similar provisions requiring integrated reporting revealed that no other Act we reviewed contains such a requirement. It is of course possible that other legislation which we may not have considered does so.
- 3.17 The implications of the obligation for a council to give effect to its CMP in its reporting required by the LG Act is that particular emphasis may be placed on managing coastal processes potentially at the expense of other priorities adopted by councils in consultation with their communities.
- 3.18 The potential for tension could be exacerbated in the event that the Minister has stepped in to make a CMP and where a council's CSP contains an overarching strategy to follow a certain course that conflicts with that in any CMP made by the Minister.
- 3.19 This might conceivably divert a council's allocated resources to a strategy which it has not endorsed. Further, failure to implement a CMP can result in disciplinary action as discussed at 4 below.

**4. Non-compliance with a CMP by a council**

- 4.1 The Minister may, pursuant to s26 of the Draft Bill, request that the Coastal Council conduct a performance audit and provide a report to the Minister in relation to the implementation of a CMP to determine whether a council is effectively implementing its CMP and to identify opportunities for council capacity building.
- 4.2 If it is found that the council is not complying with the CMP to a significant extent, the Coastal Council may make recommendations to the Minister on appropriate remedial actions, including that the Minister refer the matter to the Minister for Local Government.
- 4.3 Under s30, the Minister may report any failure by a council to comply with a direction to the Minister for Local Government who may consider such a report in determining whether to take action under the accountability provisions such as performance management or temporary suspension of council provisions of the LG Act (Parts 6 and 7 of Chapter 13).
- 4.4 Of course there are fairly extensive statutory provisions and considerations prescribed under the LG Act before disciplinary action is taken at the discretion of the Minister. Analysis of these is beyond the scope of this advice.

## **Appendix 2: Economic commentary on the consultation draft cost-benefit analysis guide within Part C - Coastal Management Toolkit**

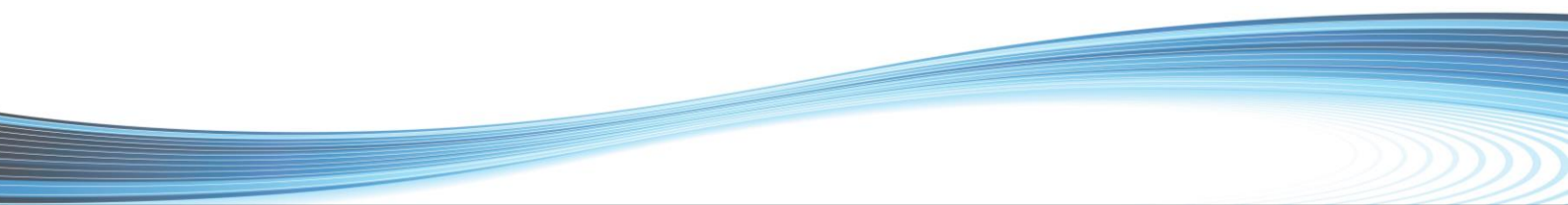


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This Commentary has been provided to all SCCG Member Councils. The advice is now provided to the NSW Government via the Coastal Reforms Stage 2 Consultation process for their consideration prior to the finalisation of the Bill and the relevant components of the Coastal Management Manual.

The SCCG seeks formal response to issues contained within the document as part of the Submissions Representations Report.



# Review of the proposed use of cost-benefit analysis in NSW coastal management reforms.

Rohan Nelson

January 2016

## Terms of Reference

In December 2015 the Executive Officer of Sydney Coastal Councils requested a brief independent review of the proposed application of cost-benefit analysis to develop Coastal Management Programs as part of the New South Wales Government's coastal management reforms. The request was to evaluate whether the proposed approach was fit-for-purpose, and especially whether it was likely to achieve the intended goals. In doing so, the review could look at issues including:

- Practicality for NSW Councils;
- Capacity for Councils to prepare and communicate to their communities;
- Reflections on best practice;
- Longevity of potential implementation; and
- Gaps and limitations on what is proposed.

This review did not focus on whether the guidelines for the application of cost-benefit analysis are technically sound, and in most respects found that the guidelines were technically very sound.

The review is provided pro-bono, and the reviewer has no connection to any of the parties involved in the coastal management reforms.

## Background

### Objectives of the reform

The goal of the coastal management reforms being introduced by the Government of New South Wales (NSW) is to better equip coastal communities to respond effectively to existing and emerging coastal challenges and opportunities.

Documents describing and supporting the reforms emphasise that coastal management is a process of reconciling diverse and sometimes contended values over the use and management of coastal assets. Councils are variously described as a decision maker in terms of designing and implementing public works or other management responses to coastal challenges, and as a mediator facilitating collective action by diverse individuals, communities and government agencies.

### Guidelines for implementation

Draft legislation is supported by a set of explanatory notes, and a draft NSW Coastal Management Manual. Part A of this manual (NSW Government 2015a) lists the mandatory and essential elements of Coastal Management Programs (CMPs). These elements include the scope of issues and opportunities to be covered by the manual, and the actions that

will be taken to manage each issues or opportunity. It is mandatory for councils to “identify the cost of those actions and proposed cost-sharing arrangements and other viable funding mechanisms for those actions” (NSW Government 2015a, pg 8).

Part A of the manual also requires councils to describe cost sharing arrangements in a Business Plan (Box 1).

### **Box 1 - What is required in a business plan for a CMP?**

12. Councils must “...develop a business plan that demonstrates viable funding mechanisms for proposed coastal management actions that are consistent with their IP&R Resourcing Strategy. In the business plan:

- a) councils should identify and consider the full capital, operational and maintenance costs of potential coastal management actions
- b) councils should identify the distribution of costs and benefits of potential management actions. The distribution analysis should consider council, agency, directly affected coastal community stakeholders (such as landholders in coastal hazard areas), indirectly affected coastal community stakeholders and the environment, and
- c) the costs of coastal management actions should be apportioned among beneficiaries, taking into account capacity to pay.”

(NSW Government 2015a, pg 10)

Other features of Part A of the manual relevant to the proposed application of cost-benefit analysis are that it:

- provides flexibility for councils to fast-track the process, to tailor the level of analysis to local conditions, and to develop locally relevant management responses (NSW Government 2015a pg 3);
- allow councils to vary the scope of CMPs to include multiple or single issues (NSW Government 2015a pg 4);
- requires councils to review CMPs every 10 years;
- requires councils to create CMPs in partnership with other councils, state agencies, community groups and individuals; and
- requires councils to prepare and implement an engagement strategy outlining how diverse groups of stakeholders will be engaged.

In Part B of the manual:

- Stage 1: This stage focused on scope, and there is no direct reference to cost-benefit analysis.
- Stage 2: Anticipates that “a detailed cost-benefit analyses will be part of the evaluation process for risk treatment options” pg 14
- Stage 3:
  - a) Defines cost-benefit analysis as a significant element in business plans that identify actions in response to coastal challenges and opportunities (see Box 2).

- b) Identifies cost-benefit analysis as one possible future evaluation response when triggers or thresholds are crossed that may require a review of management strategies.
  - c) Defines apportioning of costs to beneficiaries as a major goal of stakeholder engagement processes - which may affect the design and interpretation of cost-benefit analyses.
- Stage 4: Locates cost-benefit analysis within the Business Plan section of CMP documents.
- Stage 5: Cost-benefit analysis is not explicitly mentioned as a monitoring or review tool, an idea that was identified in Stage 3 as part of adaptive management.

## Box 2 – the business case for CMPs.

Councils will prepare material to support a business case for actions that are both feasible and viable. The business case will take into account the opportunities and constraints arising from integration with the council's resourcing strategy and asset management plan and be supported by a fit for purpose economic evaluation. The evaluation may be simple and qualitative for low risk situations through to complex and fully quantitative cost-benefit analysis for high risk situations. The business case should also include:

- identification of the distribution of costs and benefits of coastal management actions
- identification of funding and financing arrangements, including projected cash flow requirements, for the implementation of coastal management actions.

The evaluation process which informs the business case should provide an appropriate level of rigor, transparency and discriminating power to reflect the complexity and impact of the decision to be made. It should also take into account the levels of uncertainty and availability of quantitative data.

(NSW Government 2015b, pg 7)

Part C of the manual is described as "a compendium of technical information and best practice techniques to assist local councils to develop their coastal management program" ([www.environment.nsw.gov.au/coasts/coastreforms-toolkit.htm](http://www.environment.nsw.gov.au/coasts/coastreforms-toolkit.htm), accessed 28/1/16). The compendium is too voluminous to fully review here. It contains an eclectic mix of past consultancies and research reports on topics as diverse as community engagement, governance, economic evaluation, decision support, estuary management and flood inundation.

The key document for economic evaluation is *Using cost-benefit analysis to assess coast management options – guidance for councils* (NSW Government 2015 c). This document provides a description of cost-benefit analysis and provides guidance for its application to coastal management planning.

The introduction to the guidelines portray cost-benefit analysis as an appropriate methodology for overcoming a lack of community consensus on the most suitable



strategies to implement. This complements stage 3 of part B of the manual that describe cost-benefit analysis as an appropriate methodology for decision making characterised by high risk and controversy between stakeholders over appropriate course of action.

## Analysis

The methodological guidelines for applying cost-benefit analysis are technically sound in terms of providing a metric that could be used to compare the net present value of alternative course of action described within coastal management plans. However, it is much less clear what contribution the generation of these metrics will make to reconciling contended values concerning coastal management in NSW.

## Methodology

The guidance provided to councils on the application of cost-benefit analysis is generally technically sound, and provides contextualised advice for applying cost-benefit analysis to coastal management planning in NSW.

Dobes (2008) provides a history of the application of cost-benefit analysis in Australia. A quick google search will find that contextualised guidelines for the application of cost-benefit analysis are a ubiquitous staple of economic consultants across a number sectors, and that these complement generic guidelines provided by public and private agencies such as the Australian Government Department of Finance and Administration (DOFA 2006) and the Business Council of Australia (Deloitte 2012).

There is value in producing guidance specific to new and important applications. Standardisation of data and assumptions enhances comparability, and reduces the cost of new analyses. Nested scales of governance mean that important parameters such as discount rates may be set by other tiers of government, and guidelines provide an efficient pathway for communicating these settings.

It is worth noting that these are guidelines, and reflecting on the considerable methodological flexibility that this provides for future application. While this is helpful in the sense of enabling future applications to be tailored to the specific circumstances of future projects, it allows a diversity of application that could reduce comparability. This diversity of application in terms of choice of assumptions and sources of data could also work against the intended goal of reconciling contended values concerning coastal management.

## When to use cost-benefit analysis?

The methodology guidelines do not quite resolve a tension that is common in the application of cost-benefit analysis – that is the question of *Who is the decision maker?* Cost-benefit analysis portrays a single decision making perspective. A single decision making perspective implies a single set of values concerning what is preferred, or at least defers the potential need to reconcile contended values to some other process. While Sydney coastal councils will often apparently be the single decision maker for projects such as public works, it is difficult to think of any decision they will make on coastal management that does not concern a diverse array of community stakeholders. This begs the question of what process will be put in place to reconcile the contended values raised by the application of cost-benefit analysis?

**Figure 1:** When can science compel collective action? Derived from Pielke (2007).

		Values consensus	
		Low	High
Uncertainty	Low	<p>Science used to select between well defined options</p> <p>Information may reduce ambiguity about what the options are, but does not help to select between them</p>	<p>Science used to select preferred option</p> <p>There is clear agreement about what the options are, why action should be taken and what the best course of action is</p>
	High	<p>Science used to justify divergent approaches</p> <p>More science leads to increasing number of contended options, paralysing decision processes.</p>	<p>Strong commitment to act, but not sure how.</p> <p>Policy may decide to act ahead of science with varying consequences.</p> <p>Science can be used to build governance systems for managing societal change.</p>

The analysis in Stage 3 of Part B of the manual concerning the decision contexts in which the use of cost-benefit analysis is appropriate seems to contradict authoritative international analysis in this field. Pielke (2007), for example, has shown that for issues characterised by low values consensus and high uncertainty, science-based analysis tends to be used to justify an ever increasing number of divergent courses of action, paralysing decision making (figure 1). This analysis has been developed and applied to coastal management and the management of coastal hazards arising from climate change (Pielke 2010). It seems to directly contradict Figure B3.4 in Part B of the manual, which is uncited and hence not evidence based.

### The need for participatory governance processes

A potential mismatch is emerging between the goals of the coastal management reforms and methodology development to support these goals. Ostrom (1999) and (Dietz et al. 2003) have shown that science-based analyses such as cost-benefit analysis can play an important role as mediating devices or boundary objects (Star and Griesemer 1989) in governance processes that bring stakeholders together to reconcile contended values over the use of natural resources such as coastlines. The need for stakeholder engagement is recognised as a mandatory element of the proposed coastal management reforms, and the manual contains compelling justifications for this in terms of co-ownership and cost sharing. It seems that the processes for community engagement in which cost-benefit analysis and other techniques could be used to reconcile contended values are currently under-developed in the coastal management toolkit.

Participatory approaches to policy development are highly developed in fields such as collaborative governance (Ansell and Gash 2008, Emerson et al. 2011) and deliberative democracy (Dryzek 2010). Emerson et al. (2011 pg 2) define collaborative governance as *the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished*. Collaborative governance explores collaboration between public agencies and civil society to implement policy. It nests within

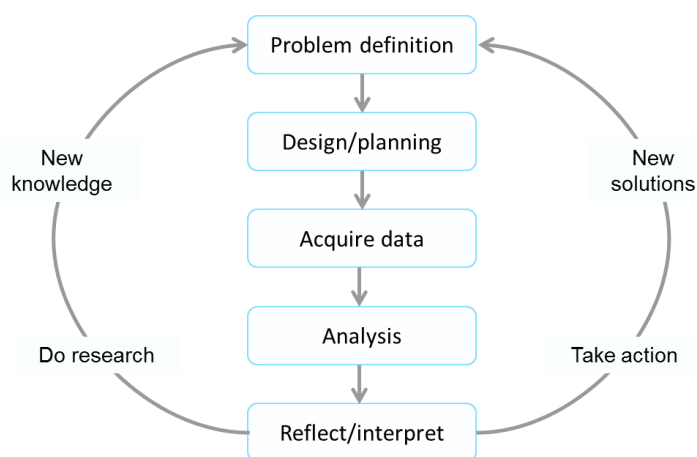


the broader field of deliberative democracy (Dryzek 2010), which explores the use of participatory approaches to set policy priorities.

Participatory approaches are deliberative (figure 1). They involve inclusive processes that bring diverse stakeholders together to reflect on the nature of issues confronting them, and options for addressing these issues. A key step in this process is often the introduction of conceptual frameworks and analytical techniques such as cost-benefit analysis that help to deductively refine the understanding of problems, and identify data and analyses that can be used to generate options and evaluate outcomes. Conceptual frameworks used in this way were labelled *boundary objects* by Star and Griesemer (1989), and provide an efficient interface between science and policy (Wu and Hobbs 2002, Cash et al. 2003). They facilitate deliberation by creating a bridge between different types of knowledge held by diverse stakeholders. They help to establish a shared understanding of complex issues by providing diverse stakeholders with intuitively accessible ways of visualise complex information.

The injection of conceptual frameworks, data and analyses such as cost-benefit analysis (figure 1) from both local and scientific sources is sometimes described as “provocation”, reflecting a constructive challenge to existing perspectives on what the issues are and how they can be addressed. The process of looking for solutions beyond the immediately obvious has become known more generally as double and triple loop learning (Argyris and Schon 1974, Flood and Romm 1996, Tosey et al. 2012). Such learning seeks to reframe issues and the options for addressing them by encouraging a broader understanding of what knowledge and actions are considered, and reassessing the governance processes that determine who is able to participate in problem definition and solution evaluation.

**Figure 2** - The action learning cycle adapted from Whyte (1991).



## Recommendations

The findings of this brief review are that cost-benefit analysis has potential as a method for comparing the economic viability of alternative coastal management options. Calculating this metric, however, does not in itself provide a mechanism for reconciling the contended values concerning which management options should be implemented. To be effective, cost-benefit analysis and other tools in the coastal management toolkit need to be embedded in governance processes that reveal and manage contended values. These

governance processes are highly developed and well understood, and expertise to assist councils to design and implement these processes is readily available.

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## **Appendix 3: Sydney Coastal Councils Group responses to the NSW Coastal Management Reforms 2010**



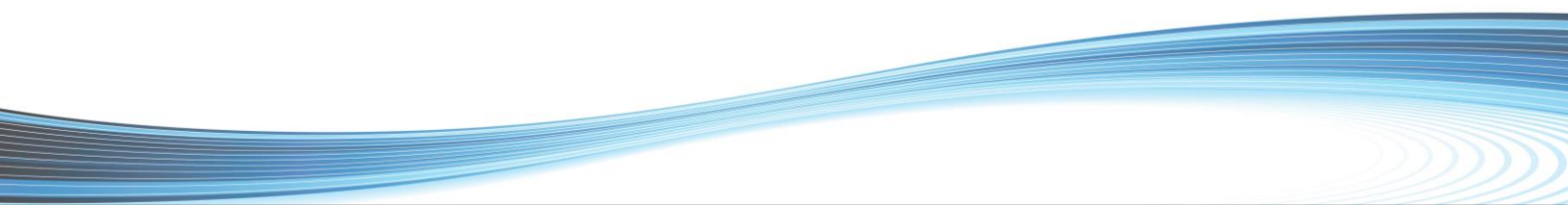
The SCCG refers the NSW Government to the extensive and detailed recommendations and advice provided to the 2010 coastal management reforms process.

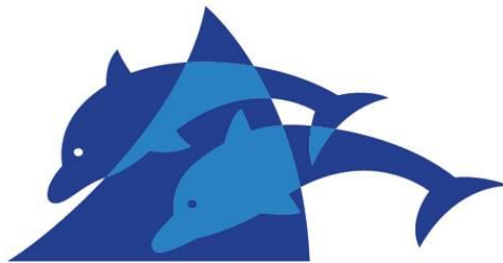
All documents available from:

<http://sydneycoastalcouncils.com.au/sites/default/files/sccgpackage2010.pdf>

This documentation includes:

- Introduction to the reforms
- History of Coastal Management in NSW
- SCCG correspondence to the NSW Government
- 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;
  - Draft Guide to the statutory requirements for emergency coastal protection works.
- Commissioned Legal Advice - prepared by Ms Kirston Gerathy (HWL Ebsworth Lawyers)
- SCCG Workshops / Forums





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