

# COASTAL PLANNING REFORMS: A LEGAL ANALYSIS

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## Introduction

The *Coastal Management Act 2016* (**CM Act**) received assent on 7 June 2016 shortly after Southern Queensland and New South Wales were hit by severe storms which had devastating effects on lives, beaches, public infrastructure and private property.

At the time of writing the CM Act was not in force. It will commence operation on a date to be set by proclamation. No date has been set.

The CM Act cannot be considered in isolation. The Reform Package released by the Minister for the Environment in November 2015 also consisted of an Explanation of Intended Effect for the proposed *Coastal Management State Environmental Planning Policy* (**CM SEPP**) and a draft coastal management manual (**CM Manual**).

The CM Act cannot be properly implemented until the CM SEPP is in force, and regulations pursuant to the CM Act are made. Currently there are no draft regulations.

This paper will examine the effect of the CM Act and review its operation against the stated objectives of the Reform Package and highlight any areas which may pose difficulties for authorities or property owners within the coastal zone or give rise to legal dispute.

## The Reform Package

On Monday 17 November 2014 the Minister initially announced a reform package for coastal hazards involving the repeal of the *Coastal Protection Act 1979* (**CP Act**) and a new coastal management act. The major aspects of the reform package as announced appeared to be a step in the right direction, and to remedy some of the issues which arose with this Government's previous reforms in respect of coastal hazards.

The Media Release issued by the Minister stated that the 3 major aspects of the proposed reforms were:

- replacing the current laws with less complex laws which are a 'better fit' with land use planning and local government legislation;
- new arrangements to better support council decision making, including a new manual and improved technical advice; and

- developing a clear system for funding and financing of coastal management actions.

The Office of Environment and Heritage's website currently states that the aims and purposes of the CM Act include recognition of natural coastal processes and the local and regional dynamic character of the coast, and promotion of land use planning decisions that accommodate them. The reforms ensure coordinated planning and management of the coast and support public participation in these activities.

This paper will consider whether the Reform Package, as currently understood, will achieve the objectives of:

- Better supporting council decision making;
- Supporting public participation in coastal planning;

and will consider any other legal issues with the CM Act.

## **Significant Features of the CM Act, CM SEPP and CM Manual**

### ***The CM Act***

The key features of the new CM Act are:

- A new definition of the '*coastal zone*' which will divide the coastal zone into four coastal management areas and prescribe management objectives for those area. The areas are the coastal wetlands and littoral rainforests area, the coastal vulnerability area, the coastal environment area, and the coastal use area;
- The requirement for councils to prepare coastal management programs (**CMP**) to replace current coastal zone management plans, to be implemented through local environmental plans and development control plans;
- CMPs are intended to be integrated into the *Local Government Act 1993* (**LG Act**) as an additional component of the Integrated Planning and Reporting Framework contained in Chapter 13 of the LG Act. Relevantly, the development of a CMP will require an appropriate level of consultation not only at the local level, but also at the regional level where necessary;
- The incorporation of existing provisions in the CP Act relating to the protection of beaches and headlands from the impacts of inappropriate coastal protection works together with a new condition making power in the *Environmental Planning & Assessment Act 1979* (**EPA Act**) to enable consent authorities to impose a condition on a development consent in respect of coastal protection works to require maintenance of the work or restoration of any beach or land adjacent to a beach if increased erosion results from the works; and
- The inclusion of enforcement measures in the EPA Act.

### ***Proposed CM SEPP***

The proposed CM SEPP will contain the statutory objectives of and map out the four coastal management areas that constitute the 'coastal zone'.

Further, the CM SEPP will consolidate into the one document various existing provisions of environmental planning instruments relating to coastal management, including:

- *State Environmental Planning Policy No 14 – Coastal Wetlands (SEPP 14)*;
- *State Environmental Planning Policy No 26 – Littoral Rainforests (SEPP 26)*;
- *State Environmental Planning Policy No 71 – Coastal Protection (SEPP 71)*;
- the provisions of *the State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP)* that refer to the requirements for proposals for coastal protection works; and
- clause 5.5 of the *Standard Instrument Local Environmental Plan (Development within the coastal zone)*,

and will include the guidance contained in the NSW Coastal Policy and Coastal Design Guidelines.

### ***Draft CM Manual***

The CM Manual is intended to provide instruction and guidance for the preparation of CMPs and to '*promote collaboration and consultation to ensure CMPs are developed by the community for the community*'.

The CM Manual deals with mandatory requirements and essential elements for CMPs, the process for preparation of CMPs and a 'technical toolkit' which contains detailed technical advice to assist councils.

### **Supporting Council decision making**

Local government is responsible for strategic planning and development assessment in the coastal zone, and also has responsibilities in respect of dissemination of information regarding land and coastal protection works, and infrastructure and public assets in the coastal zone.

There are a number of issues which impact upon effective decision making by councils in the coastal zone.

One issue is the availability of funding both for coastal protection works, and for the extensive scientific studies that are required in order to enable councils to make informed decisions regarding coastal hazards and coastal planning.

A second major issue is the risk of litigation and its associated costs. This can be a risk of negligent liability in respect of decisions regarding coastal hazards, or simply the costs of planning appeals if councils attempt to refuse consent to development within the coastal zone, or impose conditions to mitigate impacts from coastal hazards.

### ***Negligent Liability***

Decisions made regarding planning in the coastal zone can give rise to negligent liability.

Councils have a duty to exercise statutory powers (such as their planning and enforcement powers) where a reasonable authority in the position of the council would do so (*Graham Barclay Oysters v Ryan* [2002] HCA 54). However, generally no duty of care is owed when making policy decisions, and therefore a council's exposure to liability as a result of making planning controls is limited (*Alec Finlayson v Armidale City Council* (1994) 84 LGERA 225).

Councils can be liable in negligence for development decisions, such as approving development, or failing to take or taking action to mitigate coastal erosion or hazards.

The most significant and obvious risk of negligent liability is in approving development within an area which could be subject to coastal risks. If ultimately coastal hazards result in property damage, personal injury or death, litigation against the council is likely. Given the likely cost of liability in such circumstances, local government is not surprisingly very concerned to mitigate such risks.

Measures councils can use to mitigate such risks involve:

- provisions in planning controls to restrict development in areas which could potentially be at risk;
- refusing to grant consent to development in such areas;
- imposing time limited conditions on any consents which ensure that the use ceases before future risks arise;
- informing the public of the risks in such areas.

However, the implementation of any of those measures also gives rise to additional litigation risks, in particular, planning appeals against refusals of consent or imposition of conditions.

Other obvious risks are in a council deciding not to carry out any coastal protection works in an area which then suffers a severe storm event resulting in property damage, personal injury or death, or in not maintaining infrastructure damaged by coastal hazards.

To support council decision making, council's need to have adequate protection against negligent liability to ensure decisions are made to achieve the best outcome for the community and the environment, and not as a result of a fear of liability.

Council's have some protection against negligent liability under s733 of the LG Act which currently reads:

...

*(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.*

...

*(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*
- (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*
- ...
- (f) the carrying out of coastal management 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 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.

(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:

...

(b) a manual relating to the management of the coastline,

...

(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.

**manual** includes guidelines.

Currently the *Guidelines for Preparing Coastal Zone Management Plans 2013 (CZMP Guidelines)* are the relevant manual for the purposes of s733(5)(b).

The CM Act will amend s733 of the LG Act such that the CM Manual will become the relevant manual, compliance with which will lead to a presumption of good faith.

Section 733 will be amended so that there will be a presumption that a council has acted in good faith if it acts:

- substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time, or
- substantially in accordance with the **principles and mandatory requirements** set out in the CM Manual, or
- in accordance with a direction under section 14 (2) of the CM Act.

The CM Manual as currently drafted does not contain a succinct expression of its principles, although in Part B, Stage 3 of the CM Manual there is a statement of the 'general principles' to consider when determining a strategic approach to management responses (see section 3.5). This is not consistent, however. General principles are provided in that section for 'coastal environment areas' but not for other coastal

management areas. It is therefore left to councils to determine what the **principles** set out in the CM Manual are.

Also, the '**mandatory requirements**' are expressed to include compliance with s14 of the CM Act (see Part A of the CM Manual)

Section 14(1) of the CM Act provides that a *local council is to prepare a coastal management program in accordance with the coastal management manual.*

This means that it is a mandatory requirement of the CM Manual, that a council's CMP be prepared substantially in accordance with the CM Manual. This is circular, but effectively means that all provisions and requirements of the CM Manual must be complied with in preparation of the CMP.

Substantial compliance with the CM Manual, means there does not need to be **strict** compliance with every provision.

However, given the scope of the CM Manual, it would be a difficult evidentiary task to demonstrate that all aspects of the CM Manual have been substantially complied with, such that a Council could argue that its CMP, and decisions based on its CMP are substantially in accordance with the CM Manual and have been made in good faith.

It may be that the intention is that s14(1) of the CM Act is only intended to refer to the process of making a CMP, rather than the content, but this is by no means clear.

At the 2014 NSW Coastal Conference, in my paper entitled *Legal Risk Allocation and Sustainable Coastal Management* I expressed concern that the Government's decision to move away from the *2009 NSW Sea Level Rise Policy Statement* and the state-wide sea level rise benchmarks made it more difficult for councils to demonstrate compliance with the CZMP Guidelines, and hence to have a presumption of good faith when making planning decisions. This is because councils would need, in any negligence action, to be able to justify the benchmarks it adopts as the basis for its planning decisions, rather than being able to point to the policy position of the State government.

For some time councils have been left in a difficult position in terms of lack of guidance and technical support in respect of their preparation of coastal zone management plans, and in the exercise of planning functions.

The 'toolkit' section of the CM Manual is a link to numerous resources to assist with community engagement, threat and risk assessment, modelling and other matters. I will leave it to others to comment on the usefulness of those resources. However I note that part of the 'Upcoming information' referred to in the toolkit is technical advice on sea level rise which *'provides a synthesis of sea level rise research applicable to NSW to provide input into coastal erosion and inundation risk assessment'*.

Whilst this information may previously have been available, its inclusion in the toolkit and CM Manual gives councils comfort that acting in accordance with the information will provide the benefit of the good faith defence, and may also assist councils to gain support for their programs from the community.

The *NSW Coastal Planning Guideline: Adapting to Sea Level Rise, August 2010 (SLR Planning guideline)* is to be updated, and included in the CM Manual. Depending on how this occurs, this will address a current difficulty of complying with that document (as part of compliance with the CZMP Guidelines) when the document is out of date and relies on the previous sea level rise planning benchmarks.

However it would be preferable for the CM Manual to be clearer about what is a mandatory requirement, and to have sections highlighting the relevant 'principles' to assist councils in ensuring their actions are undertaken substantially in accordance with the principles and mandatory requirements of the CM Manual.

I note that under s14(2) of the CM Act, the Minister can direct the council in respect of the preparation of its coastal management program, and that direction prevails over the provisions of the CM Manual.

This power is acknowledged in 733 so that a council will not be disadvantaged if it acts in accordance with the Minister's direction rather than the CM Manual.

### ***Costs of Other Litigation***

There can be a significant cost incurred by councils defending decisions on particular development applications within the coastal zone.

Generally a council's prospects of defending decisions in the Land & Environment Court in respect of conditions placed on development consents or refusals of consent are improved if based on clearly expressed development controls.

Development control plans (**DCPs**) are required under the *Environmental Planning & Assessment Act 1979 (EPA Act)* to be applied flexibly (see s79C(3A) and 74BA of the EPA Act), and controls in DCPs can be applied in the decision maker's discretion.

However, development standards in local environmental plans (**LEPs**) or state environmental planning policies (**SEPPs**) must be complied with, in the absence of a decision that the application of the standard is unreasonable or unnecessary (see clause 4.6 of the *Standard Instrument –Principal Local Environmental Plan (Standard instrument)*). Prohibitions in LEPs or SEPPs have the force of law, and deprive the consent authority of the power to approve development.

Council decision making within the coastal zone is therefore supported by development controls and prohibitions in SEPPs or the ability to include binding development controls and prohibitions on development in certain areas in LEPs.

Currently, there is little scope for council to include prohibitions on development in coastal zones or to dictate certain requirements for development in the coastal zone through their LEPs, as those plans need to be prepared based on the Standard Instrument. Development can only be prohibited through zoning tables which do not necessarily suit planning in the coastal zone.



In my 2014 paper I commented that some state government intervention in this respect was required, possibly by the making of a new state environmental planning policy to override existing planning controls, or an amendment to the Standard instrument.

The CM SEPP will contain some provisions currently contained in SEPP 14, SEPP 26 and SEPP 71 and clause 5.5 of the Standard Instrument.

It does not appear as though there will be any significant new development controls in the CM SEPP, although there is proposed to be some additional requirements for consideration in respect of some development. Moving clause 5.5 of the Standard Instrument to the CM SEPP does provide that clause with some additional weight, as it would be considered to override any provision in an LEP inconsistent with it.

There is a reference in the CM SEPP to the NSW Coastal Policy and the principles in that policy for consideration in preparation of local environmental plans, such as preservation of headlands, public access, scenic factors and building design criteria.

The Explanation of Intended Effect then states that *'these development controls will be tailored to the relevant coastal management area...'*

It is not clear whether this means that the guidance contained in the NSW Coastal Policy in this respect will be translated into development controls in the CM SEPP. If it does, this would provide great assistance to Councils in refusing consent to development which did not comply with those controls.

The making of the CM SEPP provides an opportunity for the State government to set some additional development standards of state wide application for each of the coastal management areas, to assist Council to defend its decisions.

Of course, the response from State government to the lack of any more substantive additional controls will be that such controls are best made at a local level to reflect local conditions. Council's might also prefer in a strategic planning sense, to have control over the development of planning controls for the coastal management areas in its area.

If that is the case, then councils need to have some greater flexibility in respect of what can be included in their LEPs.

The Reform Package does not indicate whether there is to be any amendment to the Standard Instrument to enable councils to include more robust development controls in respect of the coastal zone in their LEPs, or whether the Minister for Planning will adopt a more flexible policy in respect of councils within the coastal zone including additional provisions in their LEPs for that purpose.

If councils are left in the position of having to control development in the coastal zone primarily through DCPs, the litigation costs, and constrained ability to defend development decisions remains an issue for councils.

I also note that it is proposed to amend the EPA Act to delete the requirement to consider a coastal zone management plan when determining a development application. However, there is no intention to replace that requirement with a requirement to consider a CMP.

This suggests that the intention is that the CMP is **NOT** relevant to planning, other than to the extent it informs the content of LEPs and DCPs. It could be argued that the content of the CMP may be relevant as part of the public interest. However, it would clearly be more helpful to councils if they could readily point to an ability to consider the CMP in development decision making, as the Courts have been unpredictable in the extent to which they have considered council documents regarding climate change and sea level rise to be relevant to the determination of a development application (see *Dunford v Gosford City Council* [2015] NSWLEC 1016).

Clearly councils will need to ensure that any component of their CMPs which they wish to strictly apply in development decisions is incorporated into an LEP, which will be difficult in the absence of changes to the Standard Instrument.

## **Supporting Public Participation**

### ***Community consultation on CMP***

The CM Act has public participation as an object, consistently with most environmental legislation.

Before adopting a CMP councils must *consult* with the community in accordance with the CM Manual. The CM Manual requires councils to prepare and implement a stakeholder engagement strategy to manage consultation with the community and other councils and authorities.

However s16(3) of the CM Act provides that a failure to consult does not invalidate the CMP. Therefore, a CMP will remain valid even if there was no or inadequate community consultation. Presumably, however, the Minister could, in those circumstances exercise his power to refuse to certify the CMP on the basis that it was not prepared in accordance with the CM Manual (see s17 of the CM Act ).

Failure to comply with the CM Manual could have implications for councils' negligent liability.

### ***Coastal Protection Works and Enforcement***

Once the CM Act is in force there will no longer be any provision for the carrying out of temporary coastal protection works by private landowners without development consent.

The CM SEPP proposes that coastal protection works which are not identified in a CMP adopted by the council will only be permitted with the consent of the relevant Joint Regional Planning Panel.

Only public authorities will have the ability to carry out coastal protection works without consent.

In one sense, these reforms allow for greater public participation to the extent that a requirement for development consent for coastal protection works will generally involve advertisement or at least notification of the proposed works, enabling members of the public, or adjoining landowners to comment on the proposal.

However, landowners with properties at risk will no doubt feel excluded, and that their participation in coastal management will be reduced by being deprived of the ability to protect their own properties in the case of an imminent threat.

The CM Manual also contemplates that one response to coastal hazards is '*managed retreat*' and states that managed retreat may involve '*a decision not to permit protection of private assets that are located in the immediate hazard impact area*'. Given that there is no ability for a private landowner to take action without consent from council or a JRPP to install coastal protection works, taking of such action could have significant consequences for landowners.

## **Other Legal Issues**

### ***Implementation of CMP***

The CM Act provides that councils must give effect to their CMPs through their local environmental plans and development control plans (see s22 of the CM Act), and in preparation of their plans under Chapter 13 of the LG Act.

However, s29 provides that a failure to do so does not render any resulting instrument or plan invalid.

The CM Act proposes that the Minister for Planning be given the power to report a failure to implement the CMP to the Minister for Local Government who may consider the report in determining whether to take performance management action against the Council.

The provision does however provide councils with some comfort that if they have attempted to give effect to their CMP, members of the public will not be able to challenge local environmental plans on the basis of an alleged failure to do so.

### ***Enforcement***

A new provision in the EPA Reg will clarify that depositing material on a beach can constitute 'work' for the purposes of the EPA Act. This means that such an action is 'development' and can be controlled using the suite of enforcement powers under the EPA Act in respect of unlawful development. Therefore, in the absence of any provision making temporary coastal protection works permissible without development consent, carrying out such work without consent will be a breach of the EPA Act.

There is a new order proposed to be included in s121B of the EPA Act. Councils (and other authorities) will be able to issue an order requiring the recipient to '*cease carrying out an activity on a beach or foreshore*' if that activity is being carried out in breach of the

EPA Act. The order can be issued on *'any person apparently engaged in promoting, conducting or carrying out the activity'*.

There are amendments to some of the other existing types of orders which can be issued under the EPA Act to ensure they can be utilised in respect of placement of materials in public places such as beaches. Also, the power to issue orders is extended to the Minister or Secretary, or other prescribed authorities in respect of land in the coastal zone.

### ***Management objectives for coastal management areas***

Section 6-9 set out management objectives for the 4 different coastal management areas.

A CMP prepared by a local council must give effect to the management objectives for each coastal management area. Arguably, if there is no CMP prepared by a council the management objectives are irrelevant.

Section 10 of the CM Act states that a single parcel of land may be identified as being within different coastal management areas, and that in such a case, if the management objectives are inconsistent, the management objectives of the highest management area in the hierarchy prevail. The hierarchy of coastal management areas is:

- Coastal wetlands and littoral rainforests
- Coastal vulnerability area
- Coastal environment area; and
- Coastal use area.

This provision could operate unfairly in respect of large parcels of land which are a single parcel, and could give rise to dispute or litigation, depending on the extent to which the management objectives give rise to planning controls which effect the use of the parcel.

## **Conclusion**

The Reform Package's full effect cannot be known until the CM SEPP and CM Manual are finalised.

There are certainly some aspects of the Reform Package which are likely to assist council's in particular in their decision making, and will certainly improve the position above that currently facing councils.

However, even once the Reform Package is fully operable, there will remain some significant obstacles to proper management of the coastal zone and coastal hazards,

primarily arising from funding constraints on councils and the continual tension between private and public interests.