THE NEXT WAVE OF COASTAL PLANNING LAW: A LEGAL UPDATE

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Introduction

Whilst the *Coastal Management Act 2016* (**CM Act**) has passed, and the draft *State Environmental Planning Policy* (*Coastal Management) 2016* (**CM SEPP**) has long since completed its public consultation, the new legislative regime proposed by those documents (and others) (**Coastal Reforms**) has not yet commenced operation.

In the meantime, many other aspects of the planning system and regulation of the environment have been or are in the process of being reformed. The *Environmental Planning and Assessment Amendment Bill 2017* (**Planning Amendment Bill**) was introduced into parliament on 18 October 2017, amendments have also been made to the *Environmental Planning & Assessment Act 1979* (**EPA Act**) to strip councillors of some local councils of consent authority functions, the *Biodiversity Conservation Act 2016* (**BC Act**) is in force (although does not operate as yet for a variety of types of development proposals), and there have been a number of changes to various state environmental planning policies made or proposed.

This paper will examine the suite of planning and environmental reforms and the status of the Coastal Reforms and consider any issues for coastal planning and impacts on coastal environments and communities arising from the reforms.

It will also consider whether, taken as a whole, the coastal and planning reforms will have a positive impact on coastal environments, bodies who regulate development within coastal environments, and coastal communities.

The Coastal Reforms

When the Coastal Reforms were initially announced by the then Minster for Planning in November 2014 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.

Since the 2016 NSW Coastal Conference, the only progress in respect of the Coastal Reforms has been the release of the CM SEPP and associated mapping. The CM Act is still not in force.

In order to discuss the CM SEPP it is necessary to recap the features of the CM Act.

The CM Act

The key features of the 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 areas. The areas are the:
    - coastal wetlands and littoral rainforests area (**CWLR Area**);
    - the coastal vulnerability area (**Vulnerability Area**);
    - the coastal environment area (**Environment Area**); and
    - the coastal use area (**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. This will be a departure from the current situation where there is a disconnect between Councils' coastal management processes and obligations and their reporting processes. 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 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 in respect of coastal protection works.

The CM SEPP

The 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).

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

Maps for the CWLR Area, Environment Area and Use Area are available. Mapping for the Vulnerability Area is being done partly by local councils. This does raise some issues with consistency of the mapping of this area at local government are boundaries.

The effectiveness of the CM SEPP to help achieve the aims of the Coastal Reforms depends on how it regulates development.

The draft CM SEPP does not prohibit any development.

However, in respect of the CWLR Area (the most sensitive of the management areas in the coastal zone), it requires development consent for certain activities (including earthworks, damaging vegetation etc) and makes that development *designated development*, which ensures a rigorous environmental assessment process as an environmental impact statement must be prepared and publicly exhibited.

I note that the CM SEPP provides that clearing of native vegetation can occur in the CWLR Area with development consent. There is a note regarding the fact that the BC Act may deal with clearing of native vegetation. See the discussion below regarding clearing of native vegetation under the BC Act and the *Local Land Services Act 2013* (**LLSA**).

Another positive inclusion in respect of the Vulnerability Area (being the management area subject to coastal hazards), is that consideration must be given by the consent

authority, when determining a development application for land within this area, to whether proposed buildings or works should be temporary, and whether any land use should be temporary. This should greatly assist consent authorities to defend conditions on development consents which are time limited (that is the consent is only valid for a certain number of years or until a trigger point is reached), or which require buildings to be removed at the end of a certain period. Such conditions have been recommended in various policy documents over the years in respect of management of coastal hazards, but have not previously been supported by the Land & Environment Court (see *Newton and anor v Great Lakes Council* [2013] NSWLEC 1248). I consider this provision of the CM SEPP to be particularly helpful in supporting council decision making.

The inclusion in the CM SEPP of a clause dealing with considerations currently set out in clause 5.5 of the *Standard Instrument - Principal Local Environmental Plan* (**PLEP**) (which is to be deleted from the PLEP) gives some further strength to that provision, as the CM SEPP will prevail over other environmental planning instruments to the extent of any inconsistency. Also, the consent authority now needs to be *satisfied* of certain matters, rather than just to have considered certain matters. This is a significant strengthening of the provision, as in the absence of any evidence of the satisfaction of the consent authority, there is no power to grant the consent.

However clause 5.5 as it was in the PLEP will not apply in its entirety to land within the coastal zone. Some of the considerations under clause 5.5 (such as in respect of biodiversity and ecosystems) will not be relevant in the Use Area, but will be relevant to the Environment Area. This is presumably because the mapping is intended to capture environmentally sensitive biodiversity and ecosystems in the Environment Area.

The focus of the considerations for the Vulnerability Area is the effect on and of coastal processes and hazards, rather than environmental impacts. So the considerations under the old clause 5.5 have effectively been split and allocated to the management area which aligns with that type of consideration. I query whether in all cases this is appropriate. There is however, a general obligation for the entire coastal zone for consent authorities to be satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that or other land.

In respect of impacts on biodiversity, however, the CM SEPP will not apply to the extent of inconsistency with the BC Act (see below).

Another noteworthy provision of the CM SEPP is that it includes a requirement to consider a coastal management program (**CMP**) or coastal zone management program (**CZMP**) when considering whether to grant development consent to development in the coastal zone.

Currently, s79C of the *Environmental Planning & Assessment Act 1979* (**EPA Act**) requires consideration of CZMPs when determining a development application. However the CM Act proposes to remove the reference to CZMPs from s79C, and not to replace that reference with a reference to CMPs. That would have been of concern in the absence of this provision in the CM SEPP as it would mean that a CMP or CZMP would arguably ***not*** be relevant to development assessment given previous decisions of the Court (see *Dunford v Gosford City Council [2015] NSWLEC 1016).* The inclusion of the clause in the CM SEPP requiring consideration of those documents ensures that a CMP or CZMP remains relevant to development assessment.

Planning Amendment Bill

On 18 October 2017 (two days before this paper was finalised), a public consultation draft of the Planning Amendment Bill was introduced into parliament. The Planning Amendment Bill proposes a range of new measures claimed to improve and modernise the current NSW Planning system.

Many of the reforms relate to administrative matters and consequences of the changes to allocation of responsibility for development decisions made by the *Environmental Planning and Assessment and Electoral Legislation Amendment (Planning Panels and Enforcement) Bill 2017*. Development decisions in the Greater Sydney Region and City of Wollongong will be removed from local councillors once those councils establish local planning panels which they are required to do by March 2018.

Development decisions will instead be required to be made by the local planning panel, an officer or employee of the council as a delegate of the council, or a regional panel.

The Minister also has the power to order other councils to establish a local planning panel and once they do, the same arrangements for development decisions apply.

One of the motivations for the reforms arose from perceived conflicts of interest and corruption of local government councillors. It will remain to be seen whether in terms of planning and environmental outcomes removing consent authority functions from councillors will lead to more consistent and fair decision making, or have any positive impact on the environment.

The other amendments to the EPA Act proposed by the Planning Amendment Bill include:

- requiring planning authorities to prepare community participation plans explaining how the authority will engage the community in plan-making and development decisions which must be in accordance with certain community participation principles set out in the Act;

- updating the current minimum public exhibition requirements;

- requiring councils to develop and publish local strategic planning statements which will explain how strategic priorities at the regional and/or district level are given effect at the local level through LEPs and DCPs;

- requiring decision makers to publish their reasons for decisions and how the views of the community were considered;

- providing that the regulations may include provisions relating to the form, structure and subject-matter of DCPs and which may require standardisation of DCPs;

- providing that the regulations may require proponents of development to consult the community before making an application.

Amendments to standardise the form of DCPs could assist in members of the community and developers being better able to understand DCPs due to consistency across local government areas.

It is also helpful for any local strategic planning statements to be consistent with strategies of the council under the LG Act.

However, other than the standardisation of DCPs, there is really nothing which simplifies the planning process, unless your development is of a type which can be carried out as complying development (a type of development which is expanding).

However even in respect of complying development, the Planning Amendment Bill proposes amending the EPA Act to allow deferred commencement conditions to be imposed on such consents, and to enable planning agreements to be entered into in connection with complying development. So perhaps whilst the type of development which can be carried out as complying development is expanding, the process for obtaining a complying development certificate may be becoming more complicated, albeit not necessarily in a way which protects the natural environment (see below).

Expansion of Complying Development

The State government has sought to expand the range of development which can be carried out as complying development.

Complying development is defined primarily by reference to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (**Codes SEPP**) which contains codes for types of development (such as housing).

If a proposal meets the standards for complying development set out in the relevant code under the Codes SEPP, a private certifier can grant a complying development certificate (which is a development consent) without undertaking a separate assessment and without any community consultation.

Over the past 12 months, the State government has sought public comment on proposals to enable further types of development to be carried out as complying development.

The first is medium density housing, and the second is residential projects in new urban release areas (or greenfields areas) (see the *Explanation of Intended Effects of the Proposed Medium Density Housing Code*, which explains the proposed amendments to the Codes SEPP in respect of medium density housing, and the *Explanation of Intended Effect for a new Greenfield Housing Code*).

The standards prescribed for such development would seek to limit their impact to some extent. Also, development under the Codes SEPP cannot be carried out on environmentally sensitive areas (which include areas within 100m of coastal waters and

coastal lakes) and will presumably also (once the CM SEPP is in force) include land in the CWRL Area.

Complying development also cannot be carried out on land that is identified by an environmental planning instrument, a development control plan or a policy adopted by the council as being or affected by coastal hazards.

This would presumably cover land mapped under the CM SEPP as in Vulnerability Area. However, land in the Environment Area (but not the CWLR Area) may still contain complying development.

This is concerning as complying development involves no community participation and is not subject the biodiversity offsets scheme under the BC Act (see below).

Biodiversity Legislation

The BC Act commenced operation on 25 August 2017. It repeals and replaces the *Native Vegetation Act 2003*, the *Threatened Species Conservation Act 1995 (***TSC Act'***)*, the *Nature Conservation Trust Act 2001* and parts of the *National Parks and Wildlife Act 1974.*

It also makes significant changes to the EPA Act regarding threatened species and the impacts on threatened species and ecology and significant changes to the *Local Land Services Act 2013* (**LLSA**) in respect of clearing of native vegetation.

The raft of changes to the assessment of impacts on biodiversity are comprehensive and beyond the scope of this paper to assess in full.

In terms of reducing complexity of the planning system, the BC Act and associated documents do quite the opposite.

The new scheme for biodiversity assessment and conservation set up by the BC Act involves the following regulations and orders. This is also not an exhaustive list. There are a range of guidelines which have been or are yet to be developed:

- *Biodiversity Conservation Regulation 2017* (**BC Reg**)
- *Biodiversity Conservation (Savings and Transitional) Regulation 2017*
- *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*
- *Biodiversity Assessment Method Order 2017*
- *Biodiversity Offsets Payment Calculator Order 2017*
- *Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017*

- *Land Management (Native Vegetation) Code 2017*
- *Local Land Services Amendment (Land Management – Native Vegetation) Regulation 2017*
- *Interim Grasslands and other Groundcover Assessment Method*
- *Standard Instrument (Local Environmental Plans) Amendment (Vegetation) Order 2017*

There are some key points to make about the biodiversity reforms in respect of development assessment and clearing of native vegetation.

Development Assessment

Development assessment continues to be primarily governed by the EPA Act. However if a proposal involves impacts on threatened species, communities or their habitat, then the process for assessment of that impact is now governed by the BC Act.

If a development which required consent under Part 4 of the EPA Act will affect threatened species, ecological communities or their habitats then it may be necessary to prepare a biodiversity development assessment report (**BDAR**). A BDAR is required if the proposal is likely to have a significant effect on the environment, if it is proposed in an area of outstanding biodiversity value, or if it is over the '*biodiversity offsets scheme threshold'* (**BOS Threshold**).

A BDAR would be publicly notified or exhibited in connection with the relevant development application.

The only relevant area of outstanding biodiversity value currently is the habitat of the Little Penguin at Manly. However there is scope for more areas to be declared.

The BOS Threshold is prescribed by the BC Reg and can be either determined having regard to the area of native vegetation to be cleared (which is a sliding scale based on the minimum lot area controls applying to the land), or whether certain actions are taken on land included on a Biodiversity Values Map.

Significant parts of the coastline are included on the Biodiversity Values Map. If development will impact on habitat of threatened species or communities, connectivity of areas of habitat or water quality that sustains such species, on those areas of the coast identified on the Biodiversity Values Map, a BDAR will be required.

A proponent of a development must attempt to minimize the impact on biodiversity of its proposal. To the extent that there are any residual impacts which cannot otherwise be mitigated, the developer must surrender biodiversity credits under the biodiversity offsets scheme (**BOS**) to offset those impacts. However the BOS does not apply to complying development, which is one concern of the expansion of complying development types discussed above.

A consent authority must also ***refuse*** to grant consent if development has a *serious and irreversible impact* on biodiversity values. There is guidance on what will constitute a serious and irreversible impact (see the *Guidance to assist a decision-maker to determine a serious and irreversible impact* published by the Office of Environment and Heritage). The guidelines identity species and communities on which there is potential for a serious and irreversible impact because of their rapid rate of decline, small population size and limited geographic distribution.

The listed communities include the Umina Coastal Sandplain Woodland in the Sydney Basin Bioregion, Low woodland with heathland on indurated sand at Norah Head, and the Shorebird Community occurring on relict tidal delta sand at Taren Point. There are presumably other communities found in the coastal zone on the list and in respect of which there is potential for serious and irreversible impacts.

The above scheme therefore proposes a rigorous assessment process and should result in no overall impact on biodiversity, and certainly no serious and irreversible impacts.

However, where a proposal does ***not*** require development consent, because it is proposed by a government entity (including councils), and comes to be determined under Part 5 of the EPA Act, or where the proposal is state significant development or state significant infrastructure under the EPA Act the protections fall away to some extent.

For those types of projects (generally government projects) there is no absolute requirement for the BOS to apply to require offsets to address residual impacts which cannot be mitigated, and there is no absolute prohibition on an activity which has serious and irreversible impacts.

Given the potential application of the BC Act to species and communities in the coastal zone, and in particular those with potential to be subject to a serious and irreversible impact, this is of some concern.

The combination of the relaxation of biodiversity controls for government projects and the expansion of complying development means the application of the apparently strict regime under the BC Act is of less significance as its application is narrowed.

Land Clearing

The provisions of the LLSA regarding land clearing apply to rural land in the state (being local government areas other than the greater Sydney area and Newcastle) and regulates clearing of native vegetation on that land depending on the categorization of the land, which is mapped in the new Native Vegetation Regulatory Map.

The categorisations are:

- *category 1 – exempt land, which is not regulated*
- *category 2 – regulated land, which is regulated under the LLSA; and*

- *Category 2 – vulnerable regulated land which is regulated under the LLSA and is subsect to additional restrictions, including a restriction on clearing dead and non-native plants.*

Generally speaking, category 1 land is land which was cleared of native vegetation before 1990, or lawfully cleared of native vegetation between 1990 and the commencement of the LLSA (as amended by the BC Act).

Category 2 land is land that was ***not*** cleared before 1990 or was *unlawfully* cleared after 1990.

Section 60I of the LLS Act provides that land in the CWLR Area of the coastal zone is '*category 2 – regulated land*', although the categorisation can be changed to category 1 if the Chief Executive of OEH considers the land contains low conservation value grasslands, or native vegetation which was regrowth identified in a property vegetation plan under the *Native Vegetation Act 2003* or other land prescribed by the regulations as being category 1 land.

It is an offence to clear native vegetation on category 2 land unless authorised under the LLSA. There are a range of clearing activities listed in Schedule 5A of the LLSA which can be carried out **without** approval, even on category 2 regulated land.

Those authorised activities include dune restoration works and wetland protection works, but not coastal protection works, and some infrastructure works. The types of infrastructure works which can be carried out are different for the '*coastal zone'*, central zone and western zone.

The '*coastal zone*' for the purposes of Schedule 5A of the LLSA is not defined by reference to the CM Act, but is defined to be the local government areas of Ballina, Bega Valley, Bellingen, Byron, Central Coast, Clarence Valley (to the east of the line that follows Summerland Way from the north, then Armidale Road until its intersection with Orara Way, then Orara Way), Coffs Harbour, Eurobodalla, Kempsey, Kiama, Lake Macquarie, Lismore, Maitland, Mid-Coast (except the former area of Gloucester), Nambucca, Port Macquarie-Hastings, Port Stephens, Richmond Valley, Shellharbour, Shoalhaven, Tweed and Wollongong.

Clearing is also authorised without any approval in a category 2 regulated area if it is carried out by a landholder in accordance with a land management (native vegetation code (**Land Management Code**).

However, the Land Management Code does contain significant exclusions to some types of clearing otherwise authorised under the code in the coastal zone (as defined in the LLSA).

Clearing of vegetation is dealt with by the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (**Vegetation SEPP**) in respect of 'non-rural areas' being the greater Sydney local government areas and the city of Newcastle.

The Vegetation SEPP will prevail over any tree preservation orders currently adopted by councils.

Councils will need to amend their development control plans to designate vegetation as being vegetation to which the Vegetation SEPP is intended to apply.

Permits from the local council are required under the Vegetation SEPP for clearing of vegetation, but cannot be issued for clearing which would exceed the BOS Threshold (see above) or clearing which affects heritage or Aboriginal places or objects.

Also permits are not required if the clearing is of a kind authorised under s60O of the LLSA, which refers to authorisation under other legislation (besides the LLSA).

Clearing above the BOS Threshold requires approval from the '*Native Vegetation Panel'* (**NVP**) and a BDAR under the BC Act must be submitted with the application.

Biodiversity credits must be surrendered under the BOS before any approval from the NVP can be acted on. The NVP must refuse an application if it is likely to have serious and irreversible impacts on biodiversity values.

Issues for Coastal Planning

Viewed in isolation there are some significant benefits for coastal planning under the CM Act and CM SEPP.

In particular, the need for consent authorities to be satisfied of certain matters under the CM SEPP before granting any development consent, and the provisions in the CM SEPP regarding time or trigger limited consent conditions will support council decision making and assist councils to defend development decisions in respect of development in the coastal zone.

The BC Act and associated legislative changes also provide significant protection for threatened species and communities, including those in the coastal zone in respect of private development. However the manner in which the legislation applies in respect of government projects, including permitting impacts which are serious and irreversible, is of concern.

One of the objectives of the Coastal Reforms was a simplification of laws, to better integrate laws regarding coastal planning with other planning and local government laws.

This will be achieved to some extent by requiring consistency between strategic plans under the CM Act, EPA Act and LG Act.

However, coastal planning is not confined to those pieces of legislation.

The provisions of the BC Act and LLSA are also relevant to coastal planning, and management of coastal environments, and there remain a significant and increasing number of environmental planning instruments which will impact upon coastal environments, including the Codes SEPP and Vegetation SEPP, in addition to the CM SEPP.

In particular the BC Act, LLSA and Vegetation SEPP are particularly complex in respect of the clearing of vegetation and impacts of biodiversity, which are all relevant in the coastal zone.

The layers of guidelines, codes and mapping which underpin the various recent reforms only add to the complexity.

This complexity is nowhere near offset by the standardisation of DCPs proposed in the Planning Amendment Bill and the attempts at streamlining strategic planning in the coastal zone under the CM Act.

The proposed amendments to the EPA Act in respect of community participation seek to strengthen the community's involvement in planning. Increasing the complexity of the raft of legislation relevant to environmental planning does not assist in this regard.

Increasing community participation at a strategic planning phase is positive in theory, but community engagement is often difficult in the absence of concrete development plans. And it is at the proposal stage that community participation can be eroded by the expansion of complying development.

The reforms discussed in this paper are predominantly not yet operational and there is no certainty regarding the final form of many of the proposed planning instruments, and regulations.

It is often in the detail of the supporting instruments and the application of reforms in practice that the true effect of proposed reforms can be ascertained.

It is to be hoped that the positive reforms in the CM SEPP survive any further review. However the promise of a streamlined and integrated system for coastal planning seems unlikely to be realised.