

HOLDING BACK THE TIDE IN UNCERTAIN TIMES

M. Hawley
Lindsay Taylor Lawyers

Introduction

There has been significant legislative reform in coastal planning over the last few years. Local government is attempting to keep up with the legislative change and ensure it meets its obligations to transition from coastal zone management plans (**CZMPs**) to coastal management programs (**CMPs**), and implement such programs through local environmental plans and development control plans, where appropriate.

The NSW State Government has prepared mapping for the *State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP)*, but the maps for the coastal vulnerability area are not yet finalised.

Many local councils are left with a number of questions regarding their legal obligations and exposure to liability during this transition period, both in terms of the use of hazard information which has been acquired, but has not yet been translated into planning controls, and also in respect of their obligations to communicate hazard information to landowners.

This paper will explain the transitional arrangements in place, some of the challenges during the transitional period, and the obligations on local councils and potential liability issues during the transitional period.

CZMPS and CMPs

The new *Coastal Management Act 2016 (CM Act)* contains savings and transitional provisions consequent on the repeal of the *Coastal Protection Act 1979 (Former Act)* by the CM Act on 3 April 2018.

Some of the most important provisions are in respect of the status of CZMPs which were made under the Former Act. Under the new CM Act, CZMPs are replaced by CMPs.

Some of the key savings and transitional provisions in respect of CZMPs and CMPs are:

- a CZMP that was in force under the Former Act before 3 April 2018 continues to have force and effect until 31 December 2021 in respect of the local council to which it applied immediately before the Former Act's repeal, until the CZMP is replaced by a CMP (clause 4 of Schedule 3 of the CM Act),
- if a draft CZMP had been submitted to the Minister for the Environment (**Minister**) for certification under the Former Act before 3 April 2018, the process could continue and the CZMP could be made under the Former Act. However this provision ceased to have effect on 3 October 2018. Any such

CZMP will be treated as a CMP under the CM Act, but again, only until 31 December 2021 (clause 6 of Schedule 3 of the CM Act),

- a general savings clause that anything done before 3 April 2018 under the Former Act, for which there is a corresponding provision in the CM Act, may be continued and completed under the Former Act, and is taken to be been done under the corresponding provision of the CM Act (clause 5 of Schedule 3 of the CM Act).

It is important to be aware of how the savings and transitional provisions operate depending on the status of a CZMP's preparation as at 3 April 2018.

A CZMP made before 3 April 2018 is not a CMP for the purposes of the CM Act.

By contrast, if preparation of a CZMP was commenced under the Former Act, and has been submitted to the Minister before 3 April 2018, but certified after 3 April 2018 and before 3 October 2018, it is taken to be a CMP under the CM Act.

Finally, if a CZMP was commenced and not submitted to the Minister by 3 April 2018, it cannot be certified by the Minister under the Former Act, and would need to be revised and reviewed to comply with the requirements for CMPs under the CM Act, before it could be certified under the CM Act.

This has consequences for the administration of the relevant plan or program going forward, particularly in respect of modifications.

Modification of CZMPs

Section 18 of the CM Act provides that a CMP may, at any time, be amended (in whole or in part) or replaced by another CMP.

Section 55I of the Former Act provided that a CZMP could be amended or repealed in whole or in part by another CZMP.

However, s55I of the Former Act has been repealed and has no further effect and therefore cannot be relied on to amend a CZMP made before 3 April 2018.

A CZMP made before 3 April 2018 is, as stated above, not a CMP, and therefore cannot be amended under s18 of the CM Act.

The savings provision in clause 4 of Schedule 3 of the CM Act which saves CZMPs and enables them to be replaced by a CMP, does not contemplate the amendment of such a CZMP by a CMP.

There is also a good argument that the general savings provision would not permit amendment of a CZMP, possibly unless the amendment had commenced before the repeal of the Former Act.

Therefore there is no mechanism by which a CZMP made before 3 April 2018 can be amended.

This means that if there is a desire to make changes to a CZMP as a result of new science or any other review or revision, which could have been required by the terms of the CZMP itself, then the only available process is for a completely new CMP, which replaces the whole CZMP, to be made.

This cannot simply be a matter of remaking the CZMP with the required amendment, and calling it a CMP.

This is because of differences between the legislative provisions which govern the requirements for CZMPs and CMPs, and changes to the guidelines or manuals which CZMPs and CMPs are required to be made in accordance with. These apply, both for the purposes of meeting the obligations in respect of the making of the plan or program under the Former Act or CM Act, and for the purposes of ensuring that local councils have the benefit of the good faith defence in s733 of the *Local Government Act 1993 (LG Act)*.

Given the scope for challenges to CZMPs and CMPs by property owners dissatisfied with any restriction on the development or use of their properties, local councils should not take lightly the change in requirements for CMPs, and assume that a CZMP can meet the new legislative requirements without significant modifications.

Furthermore, any new CMP should be based on the best available scientific evidence. To make one based on the evidence available at the time of the making of the earlier CZMP may not be appropriate.

The process, therefore, for local councils wishing to amend or update a CZMP is both complicated, long, costly and open to challenge.

Implementation of CMPs

Section 22 of the CM Act provides that a local council is to give effect to its CMP, including 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.'*

A delay in the making of a CMP therefore also delays the preparation of a suite of other documents including:

- local environmental plans (**LEPs**) and development control plans (**DCPs**) which regulate development, and
- local council's community strategic plans, resourcing strategies, delivery programs and operational plans.

Planning controls

Particularly in relation to planning controls, development cannot be effectively regulated based on the science and conclusions informing the CMP, until the CMP is made, and then implemented through either the DCP or LEP of a local council, or the mapping is incorporated into the Coastal SEPP (noting that vulnerability mapping, dealing with coastal hazards, is not currently included in the Coastal SEPP).

Generally speaking, an amendment to an LEP would be required in order to implement planning controls of sufficient force to be effective and upheld in Land & Environment Court proceedings, as DCPs must be applied flexibly, not stringently, and their weight is a matter for the Court on appeal, and can be affected by matters such as consistency of application (see s4.15(3A) of the *Environmental Planning and Assessment Act 1979 (EPA Act)* and cases including *Stockland Development Ltd v Manly Council* [2004] NSWLEC 472).

Clause 16 of the Coastal SEPP provides that a '*certified coastal management program*' is a relevant matter when determining a development application in respect of land within the coastal zone. There is no requirement to consider a **draft** CMP or studies which might inform the CMP once made.

It is clear that the conclusions of studies informing a draft CMP, and the draft CMP itself could be relevant considerations under s4.15 of the EPA Act as a matter of the public interest (s4.15(1)(e)) and also arguably in respect of the suitability of the relevant site for the proposed development (s4.15(1)(c)).

I would certainly advise a consent authority which holds reliable information and evidence regarding coastal risks to consider that information in the development assessment process.

Also in the recent case of *Johnston v Wollongong City Council* [2018] NSWLEC 1331 (*Johnston*), the Court said at [12]:

'there is no dispute that the Court has the statutory requirement to consider the risks associated with coastal processes, both now and into the future, in any planning and development decision it makes in relation to a coastal zone.'

However, it is preferable for a decision to be made not only on the basis of studies and information available to the consent authority, but planning controls or other documents which the consent authority is specifically required to consider under s4.15 of the EPA Act, in order for the decision to be robust.

In *Dunford v Gosford City Council* [2015] NSWLEC 1016 the Court granted development consent to a development in the coastal zone which Gosford City Council's LEP and DCP did not restrict, despite a coastal management study adopted by the council suggesting that development of the type proposed ought not proceed in the absence of construction of a revetment wall.

For decision making to be robust, therefore, planning controls should be in place. The implementation of studies through planning controls also provides greater certainty to members of the public regarding what will inform the consent authority's decision making.

The uncertainty surrounding development assessment in the transitional period is discussed further below in the context of the savings provisions in the Coastal SEPP itself, and the repeal of clause 5.5 of the *Standard Instrument – Principal Local Environmental Plan*.

In respect of strategic planning and the making of planning controls, the Minister for Planning has issued a direction under s9.1 of the EPA Act in respect of planning proposals for new environmental planning instruments (such as LEPs) applicable to land in the coastal zone.

The direction is to the effect that planning proposals must implement any CMP made under the CM Act, or any CZMP made and saved under clause 4 of Schedule 3 to the CM Act (that is, CZMPs made before 3 April 2018 and not replaced by a CMP).

The direction provides some protection pending the adoption of a CMP or in the absence of a CZMP, in that it provides that a planning proposal must not propose rezoning land to enable increased development or more intensive land-use if the land is either:

- within a coastal vulnerability area identified under the Coastal SEPP, or
- identified as land affected by a current or future coastal hazard in a LEP or DCP or a **study or assessment** undertaken by or on behalf of the relevant planning authority and planning proposal authority, or by or on behalf of a public authority, and which has been provided to the relevant planning authority and planning proposal authority.

Therefore, if studies have been undertaken by or on behalf of a public authority which identify that land is affected by a future or current coastal hazard, it will not be possible to amend a planning instrument to increase development or intensify development on that land.

As noted above, the first dot point would currently have no effect as the coastal vulnerability area is not yet mapped in the Coastal SEPP.

Integrated Planning & Reporting

The challenges for local councils in respect of their obligations under Part 2 of Chapter 13 of the LG Act relate to how a CMP, once made, can be effectively integrated into the plans, strategies, programs and reports made under the LG Act (as required by s22 of the CM Act), the consequence of a delay in the making of a CMP in respect of strategic planning, particularly the financial budgeting for any works required under the CMP, and the need for amendments to a variety of strategies and plans as a result of the content of a CMP.

Development Assessment – the Coastal SEPP and Clause 5.5 of the Standard LEP

The Coastal SEPP also commenced operation on 3 April 2018, and contains savings and transitional provisions in respect of its application to pending development applications and other projects in respect of which environmental assessments had commenced prior to the commencement of the Coastal SEPP.

Clause 21(1) of the Coastal SEPP, states that:

'The former planning provisions continue to apply (and this Policy does not apply) to a development application lodged, but not finally determined, immediately before the commencement of this Policy in relation to land to which this Policy applies.'

'Former planning provisions' are defined to mean:

- (a) *the provisions of each of the following Policies as in force immediately before the Policy's repeal:*
 - (i) *State Environmental Planning Policy No 14—Coastal Wetlands,*
 - (ii) *State Environmental Planning Policy No 26—Littoral Rainforests,*
 - (iii) *State Environmental Planning Policy No 71—Coastal Protection, and*
- (b) *the provisions of State Environmental Planning Policy (Infrastructure) 2007 that would be in force if that Policy had not been amended by this Policy.'*

Therefore, when determining a development application made before 3 April 2018, the Coastal SEPP does not apply to the determination of that development application.

A CZMP or CMP is now only specifically required to be considered in the development assessment process as a result of clause 16 of the Coastal SEPP. Section 4.15 of the EPA Act no longer requires consideration of a CZMP or CMP.

Therefore, if a development application was lodged before 3 April 2018, clause 16 of the Coastal SEPP does not apply to that development application, but s4.15 of the EPA Act no longer expressly requires consideration of a CZMP or CMP, and therefore any CZMP or CMP is not expressly required to be considered under the EPA Act in respect of that application. See however, my comments above in respect of the relevance otherwise of a CZMP or CMP.

Also, in **Johnston** the Court considered whether the Coastal SEPP should be considered as a *'proposed instrument'* for the purposes of section 4.15 of the EPA Act when considering a development application made before 3 April 2018, to which the Coastal SEPP does not strictly apply.

Section 4.15(1)(a)(ii) of the EPA Act requires a consent authority to take into consideration any *proposed instrument* that is or has been the subject of public consultation under the EPA Act, and that has been notified to the consent authority.

The Court found that the effect of clause 21 of the Coastal SEPP was that the Coastal SEPP **could not** be considered as a proposed instrument under s4.15 of the EPA Act.

The Commissioner of the Court does not explain her reasoning in any detail. There is caselaw regarding the application of LEPs to development applications which have been lodged before the LEP's making, to the effect that the LEP should be considered as a proposed instrument. However, those cases are generally dealing with wording in a planning instrument to the effect that in respect of development applications lodged before the making of the LEP, the LEP is to be '*treated as if it had been exhibited, but not made*'. This has been considered by the Court of Appeal to mean that the LEP is treated as a proposed instrument (see *Terrace Tower Holdings Pty Limited v Sutherland Shire Council* [2003] NSWCA 289 (**Terrace Tower**)).

However clause 21 of the Coastal SEPP contains no such words, and simply states that the Policy does not apply to development applications lodged before 3 April 2018.

The decision in **Johnston** was a decision of a Commissioner, not a judge of the Court, and therefore there could be scope for further consideration of this issue.

However, at present, consent authorities must proceed on the assumption that the Coastal SEPP should not be considered as a proposed instrument in respect of development applications lodged before 3 April 2018.

The Court in **Johnston**, and also the Court of Appeal in **Terrace Tower** did note that even if a planning instrument could not be considered a proposed instrument for the purposes of s4.15 of the EPA Act, the instrument can still be considered as a matter of the public interest under s4.15(1)(e) of the EPA Act. Again, see the discussion above in this regard.

The Coastal SEPP also does not apply to development applications lodged up until **3 April 2019** if the application is to be accompanied by an environmental impact statement (**EIS**), and environmental assessment requirements for the EIS were provided by the Secretary of the Department of Planning before 3 April 2018, and require consideration of the *State Environmental Planning Policy No. 14 – Coastal Wetlands* or the *State Environmental Planning Policy No 26 – Littoral Rainforests*.

The Coastal SEPP contains another savings provision in respect of activities under Part 5 of the EPA Act, which are activities which do not require development consent, but which are carried out by public authorities or require some other approval from a public authority. Part 5 also applies to state significant infrastructure (**Part 5 Activities**).

Clause 21(2) of the Coastal SEPP provides that clause 10 of the SEPP does not apply to Part 5 Activities if the Part 5 Activity was assessed and a decision made to proceed with it prior to 3 April 2018, or if the environmental assessment of the activity commenced before 3 April **2018** and a decision is made by 3 April **2019**.

There are some issues with the wording of clause 21(2) as it refers to approvals in respect of Part 5 Activities, whereas Division 5.1 of Part 5 of the EPA Act does not contain any provision for the granting of approvals.

Also it is only clause 10 of the Coastal SEPP which is expressed not to apply to Part 5 Activities. Clause 10 deals with development within the coastal wetlands and littoral rainforests area as defined in the Coastal SEPP. The remainder of the Coastal SEPP does

apply, but many provisions would be of limited relevance as they relate to the exercise of a discretion to grant development consent, which by definition is inapplicable to a Part 5 Activity.

Clause 5.5 of most LEPs was also repealed when the CM Act and Coastal SEPP commenced.

Clause 5.5 has been replaced with various matters for consideration under the Coastal SEPP.

In respect of development applications lodged before 3 April 2018, clause 5.5 of the relevant LEP will still apply as a consequence of savings provisions in the instrument which amended the LEPs.

Distribution of Information in Transitional Period

Many local councils question what they are to do in respect of the dissemination of information regarding coastal hazards to residents, particularly when issuing planning certificates under the EPA Act, and where the information held by the council has not yet been formalised in a CMP or planning controls.

As stated above, such information should inform the development assessment process.

Planning certificates under s10.7 of the EPA Act (formerly s149) must contain certain prescribed information (pursuant to s10.7(2)) and may contain additional information (pursuant to s10.7(5)).

There is no doubt that a local council could include its latest modelling of coastal risks and hazards on a certificate under s10.7(5). However, contracts for sale of land are only required to include a certificate issued under s10.7(2) containing the prescribed information.

In respect of coastal risks and hazards, the information required to be included on a s10.7(2) certificate is as follows:

- the application of any planning controls including state environmental planning policies,
- whether the land is subject to any charges for coastal protection services under s496B of the LG Act, and
- whether or not the land is affected by a policy adopted by the council, or adopted by any other public authority and notified to the council for the express purpose of its adoption by that authority being referred to in planning certificates issued by the council, that restricts the development of the land because of the likelihood of tidal inundation or any other risk (other than flooding).

Coastal SEPP

A certificate under s10.7(2) will need to refer to the Coastal SEPP for land in the coastal zone.

The existence of the Coastal SEPP will therefore be known to people obtaining such a certificate.

The CM Act and Coastal SEPP divide the coastal zone into 4 areas being the:

- coast wetlands and littoral rainforests area,
- coastal vulnerability area,
- coastal environment area,
- coastal use area.

However, mapping is still not complete in respect of the coastal vulnerability area. The coastal vulnerability area is the area which includes land subject to coastal hazards.

Therefore, in the absence of that mapping being completed, inclusion of a reference to the Coastal SEPP on a s10.7(2) certificate is of no assistance in advising the recipient of the certificate of any coastal hazards to which the land may be subject.

Restriction of Development due to Risk

There should be no notation on a planning certificate under s10.7(2) of any risk from coastal hazards, unless that risk is set out in a SEPP, LEP or DCP or is the subject of a policy adopted by the council which '*restricts development of the land*'.

The existence of a study, or a draft, or even an adopted CZMP or CMP, which identifies coastal hazards or risks does not satisfy the requirements for inclusion of a notation on a s10.7(2) certificate, unless the CZMP or CMP itself restricts development of the relevant land.

In my view, even if a CZMP or CMP notes that a property is subject to hazards and that development of the land *should* be restricted, the CMP or CZMP itself would not **restrict development**, as generally the CZMP or CMP would say that the restrictions on development should be given effect by way of a new LEP.

Having said that, there could be instances where a provision of a CZMP or CMP does restrict development as a result of the fact that the CZMP or CMP may be a relevant consideration under s4.15 of the EPA Act either expressly, or as part of the consideration of the public interest. If the terms of the CZMP or CMP were clear that a certain type of development ought not to occur on certain land then that particular CZMP or CMP may be considered to restrict development.

Therefore, in my view, a s10.7(2) certificate should generally not refer to hazards identified in a CZMP or CMP, although it may need to depending on the proper construction of the CZMP or CMP.

I note that in the *Johnston* case discussed above the relevant local council (Wollongong City Council) had included a notation on a s149(2) certificate (as they were then called before the amendment of the EPA Act on 1 March 2018) to the effect that a coastal zone study noted a property as being exposed to a 'coastal geotechnical risk'. There was no consideration in that case of whether the notation was properly authorised by s149(2) of the EPA Act.

It is therefore possible and also probable that a purchaser of land which might be affected by coastal hazards identified in a CZMP or CMP, or draft CZMP or CMP, will not be aware of that fact when purchasing the property.

This poses a significant risk to purchasers of properties where adoption and implementation of hazard lines has been delayed as a result of the transition to the new CM Act from the Former Act, with a corresponding delay in the implementation of a CMP to give effect to those hazard lines in an LEP or DCP.

The solution for local councils is to include the hazard lines in any planning certificate sought under s10.7(5) of the EPA Act.

However, as mentioned above, contracts for sale of land do not need to contain such planning certificates. Most local councils have different fees for planning certificates under s10.7(2) containing the prescribed information, and s10.7(5) containing the additional information, and many vendors would not seek a s10.7(5) certificate, perhaps particularly if they knew this could identify risks to the property that are not legally required to be disclosed in a contract for sale.

There is also a need for accuracy and consistency in the notations included on planning certificates issued under s10.7(5).

Council should be careful to ensure that if notations are included, then all properties subject to a similar hazard, risk or threat have similar notations. Also, the information relied on to draft the notations must be accurate, and the best available information.

Consistency could be an issue where studies and the preparation of CMPs and LEPs or DCPs are inconsistent across a local government area. The concern is that if a person obtains a s10.7(5) certificate in respect of one property which notes that there is a certain risk, and obtains a certificate for another property which contains no notation regarding any risk, the conclusion which could be drawn is that the second property is not subject to any risk. The reality may be, however, that it may be subject to such a risk, but the studies have not progressed in respect of the area in which the second property is located.

It could therefore be prudent for local councils to ensure that s10.7(5) certificates contain information regarding the status of any investigations into coastal hazards and directing interested persons to contact the council.

Conclusion

It can be seen that many challenges will be faced by consent authorities dealing with coastal planning matters during the transition from the Former Act to the CM Act, and in respect of development applications which were not finally determined before 3 April 2018.

Consent authorities should carefully consider all applicable savings and transitional provisions, and the relevance of the Coastal SEPP and any CZMP or CMP when assessing and determining development applications and Part 5 Activities.

Councils have a limited period of time in which to prepare new CMPs to replace CZMPs made prior to 3 April 2018, or CZMPs which were submitted to the Minister before 3 April 2018, with new CMPs made under the CM Act. If new CMPs are not prepared by 31 December 2021 then there will be no CZMP or CMP in force. However, the legislation and directions from the Minister for Planning do provide some protection and give consent authorities the ability to consider studies and assessments in respect of coastal risks in the development assessment process, albeit that decision making would be more robust and defensible in Court if there was an applicable CMP, properly implemented through an LEP, or if mapping had been carried through to the coastal vulnerability area under the Coastal SEPP.

There is also a protection to ensure that rezoning of land does not increase development or the intensity of development where studies exist which identify that land is affected by a current or future coastal hazard.

There is a particular challenge in ensuring the consistent dissemination of information regarding coastal hazards, particularly where a local council is at different stages in the preparation of CMPs for different parts of its coastline.

Local councils should include information on certificates under s10.7(2) of the EPA Act if the prerequisite for doing so is met. However, determining whether this is the case is not always straightforward and could involve a consideration of the particular terms of a CZMP or CMP.

Local councils should include information regarding the status of studies of coastal hazards and any conclusion from those studies on certificates issued under s10.7(5) of the EPA Act of the EPA Act to ensure a consistent approach across their LGAs.