ACS

Australian Coastal Society Ltd

Submission on

NSW Department of Planning + Environment

on Coastal reforms – Stage two.

Comments on proposals for

- a new *Coastal Management Bill*
- an updated 'Coastal Management Manual'
- a new *CM State Environmental Planning Policy*
- a Direction under s 117 *EP & A Act 1979.*

Prepared by members of Australian Coastal Society (NSW Branch)

Endorsed by ACS Executive

February 2016

Contents

Executive Summary

Whilst not exhaustive, we would like to highlight some key points here that we make in further detail within the submission:

- The membership, role and functions of the Coastal *Management* Council, as we would prefer it be re-named, needs to be re-thought, to better reflect the need to successfully engage and co-ordinate the range of stakeholders outside government, in ongoing coastal management;

- The ACS considers it vital that a coastal conservation area be created, using criteria wider that coastal wetlands and littoral rainforest, to include all coastal native vegetation of conservation significance.

- The uncertainty regarding the effect of the movement of the ambulatory boundary of MHWM on property boundaries originally defined by survey should be placed beyond doubt by the codification of the common law in relevant legislative provisions;

- The relationship between Coastal Zone Management Plans and proposed new Coastal Management Programs has not been explained. The ACS supports saving and building on these key Plans, but is concerned that CZMPs and CMPs have competing roles which need clarification.

- The proposed *Coastal Management State Environmental Planning Policy (CM SEPP)* is a positive initiative. However its effectiveness will depend on still unknown provisions, and, critically, maps made to give it effect; and on the clarity of guidance or direction it gives to local councils. It is important that the SEPP's provisions and the relevant maps, are robust and are not subject to 'a death by a thousand cuts'. Proposals for a minimum 'life' for these maps and their periodic strategic review are considered a more appropriate approach.

Furthermore we would like to highlight some positive aspects of the reform package:

Positives
The Minister has fulfilled his promise to draft new legislation.

The draft **Coastal Management Bill 2015**
- includes a statement of the Objects of the Act [s 3, p 4];
- proposes management objectives for four new coastal management areas [ss 6-8, p 7-9];
- sets out the Minister's role in coastal management on behalf of the State [ss 14, 17, p 10,12];
- orders the production and use of an updated *Coastal Management Manual;* [s 21, p 13];
- re-constitutes an independent Coastal Council [s 24-26, p 15];
- makes clear that development consent for the construction of coastal protection works may be refused if public safety or public access are adversely affected [s 27, p 17];
- continues provisions which prevent applications by owners of adjoining property to extend land title seawards, from being granted if it adversely affects public access [s 28, p 17]
- empowers the Minister to take action to sanction a non-compliant council [s 30, p 18];
- requires a review of the Act in five years hence [s 33, p 18];
- 'saves' existing Coastal Zone Management Plans, and plans currently in prep [Sch 3, s 4, p 26];
- allows the imposition of conditions on the construction of coastal protection works [Sch 4.1, p 28];
- provides for Orders and enforcement mechanisms for coastal related offences [Sch 4.1, p 28-29];
- refers any DA for coastal protection works to a Joint Regional Planning Panel [Sch 4.1, p 29];

- facilitates the councils levying of annual charges for "coastal protection services" [Sch 4.4, p 30-31];
- continues councils' exemption from legal liability where they 'act in good faith' [Sch 4.4, p 31].

And some areas that require changes and further consideration:

Several major matters require amendment

- The Objects need reworking: to recognise the public right of pedestrian access to the foreshore [s 3];
- The new 'areas' proposed and their objectives should be amended to become: coastal *conservation* area, coastal vulnerability area, coastal *waterbodies and environs* area, and coastal *development* area [s 5];
- Criteria for coastal *conservation* area should be enlarged to include some coastal lakes' catchments and other high conservation value coastal native vegetation [s 6];
- Processes to ensure councils and public authorities co-operate and co-ordinate need work [ss 15, 16];
- The name of the new body should be amended to become the Coastal *Management Council* [s 24];
- Its role, membership, functions and Constitution warrant review [ss 24, 25, p 15; Sch 2, p 22-25];
- The role of identifying, and power to acquire, land for coastal management purposes should be included.

The document ***Introduction to the NSW Coastal Management Manual***

- signals that the State government understands that partnerships with local councils are required [p 2].
- acknowledges climate change needs to be included in future coastal planning and management [p 7];
- builds on and updates the form and content of valuable resource material from earlier publications.

The booklet ***Coastal Management SEPP – Explanation of Intended Effect***

- consolidates existing provisions from other planning instruments into one *CM SEPP* [p 9];
- retains development controls over *SEPP #14* coastal wetlands and *SEPP #26* littoral rainforests [p 7];
- extends the 100 m buffer around *SEPP # 14* coastal wetlands [p 14];
- states future consent for private 'emergency' coastal protection works will not be possible [p 23];
- reasserts the need for a council-led strategic, integrated approach to coastal management [p 23].
- foreshadows making the *CM SEPP* legally binding via a s 117 Ministerial Direction to councils [p 7];

Citations shown as [s , p] refer to section and page no.s in the relevant document.

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Introduction

The Australian Coastal Society (the ACS) is a national non-government organisation dedicated to promoting effective coastal management policy and practices along Australia's extensive coastline.

The Society, a company limited by guarantee, was formed in 2008 at the National Coast to Coast Conference in Darwin, and was granted charitable organisation status in 2011.

The members of the society have a wide range of professional backgrounds, and in a variety of different roles, are engaged in a diverse range of coastal management tasks and activities.

This submission has been prepared by members of the ACS in New South Wales and has been endorsed by the ACS Executive.

Our Mission

The ACS is dedicated to healthy coastal ecosystems, vibrant coastal communities and sustainable use of coastal resources.

ACS Objectives

- Promote knowledge and understanding of the environmental, social and economic value of the Australian coast.
- Provide a forum for the exchange of ideas and knowledge among people involved in the management, planning and development of the Australian coast.
- Contribute to international, national, state and local debates on coastal issues so as to foster rational, open decision-making in order to achieve sustainable use of coastal resources and responsible stewardship of coastal assets.
- Improve public, government and industry understanding of the value of the Australian coast for individual and social well being, the need to maintain and improve coastal ecosystems, and to ensure the use of ecologically sustainable development practices.
- Promote the protection and conservation of sites of environmental and cultural significance on the coast and in coastal waters.
- Facilitate increased knowledge and skills of people working and studying in coastal natural resource management, planning, development and other relevant industries along the Australian coast.
- Serve as a link between various Australian organisations and individuals with interests in the Australian coast.
- Support national, state and local coastal conferences.
- Do all things necessary for and incidental to the advancement of those objects.

Further information about the Australian Coastal Society (ACS) can be obtained from our website. See http://australiancoastalsociety.org/

About this Submission

To aid readability, proposed amendments to the Coastal Management Bill 2015 are not included in the body of the submission, but are refer to unique paragraph numbers in the Appendix. Eg **A24.5** The Appendix to the submission sets out a list of all amendments to the Bill, recommended by the Australian Coastal Society.

I. Comments on the public consultation draft Coastal Management Bill

The Australian Coastal Society welcomes the production and release of the public exposure draft of a 'Coastal Management Bill 2015'.

The ACS also welcomes the period of consultation on the Bill, with local councils, and people and groups in the community generally.

The ACS notes with approval that the Bill continues some key provisions of, but proposes a number of important changes to, the legal framework created by the old *Coastal Protection Act 1979* (NSW) [the *CPA 1979*] which, when the new Act commences, will be repealed.

The ACS is of the view that the draft Bill, while commendable in many ways, still has scope for improvement through the inclusion of appropriate amendments. Our comments highlighting the need for amendments are included in the following sections of this submission, and refer to the list of amendments recommended by the ACS in Appendix 1 of this submission.

Part 1 Preliminary

Part 1 of the Bill deals with the preliminary matters of name [s 1], commencement [s 2] and includes Objects of the Act [see s 3, p 4].

s 1 Name of Act

The date of the Act will need to be updated. See paragraph A1 of the Appendix.

s 2 Commencement

The ACS suggests that certain provisions of the Act should commence on assent, which other parts might be delayed and commence on a date to be proclaimed.
See the amendment proposed in paragraph A2 of the Appendix.

s 3 Objects of this Act

The inclusion of a statement of Objects is worthwhile because it provides essential guidance on the government's purpose and wider related intentions to those implementing, and interpreting, the legislation – mostly local councils, state agencies and the courts.

ACS strongly supports inclusion of the principles of ecologically sustainable development in the over-arching objective, as defined in section 6 (2) of the Protection of the Environment Administration Act 1991 as the means whereby environmental, social and economic objectives are to be weighed up and applied in decisions.

The ACS is of the view that there are too many draft Objects and several require some tweaking to improve the clarity or focus of the object.

Oddly the powers to identify, and acquire coastal land for coastal *management* purposes, via either voluntary sale or forced resumption where and when it is agreed that it in the public interest to do so, are not included in the Objects or elsewhere in the draft Bill. This power to acquire land for coastal protection purposes existed as an Object of the *CPA Act 1979* as section 3 (e), viz:

> (e) to provide for the acquisition of land in the coastal region to promote the protection, enhancement, maintenance and restoration of the environment of the coastal region;

The task of identifying and recommending suitable lands was part of the former Coastal Council's role, yet no corresponding provisions relating to coastal *management* have been included in the draft Bill. Perhaps their omission was an oversight but such an object, a relevant power and the designation of this role of identifying suitable lands for acquisition by the State government should be included in a revised version of the Bill.

Significant parcels of land have been purchased under the coastal lands protection scheme over many years before their dedication for specific purposes and assignment to the relevant management authority. Though powers of land acquisition exist under other legislation, they do not provide for land acquisition for coastal management purposes. It seems logical that the Government should have the capacity to do this in the future, where and when appropriate. To facilitate and authorise this, the Bill should state the range of public purposes inherent in coastal management, eg to manage risk from coastal hazards, guarantee public safety, provide public access, protect important coastal habitats, conserve coastal natural resources vital to local economies.

The ACS is concerned that Object d) in s 3 of the *CPA 1979 "*to promote public pedestrian access to the coastal region and recognise the public's right to access," has been weakened by proposed new Object (b) "to support the social and cultural values of the coast and maintain public access, amenity and use".

A suggested rewording of this crucial Object is provided in paragraph A3.1 of the Appendix.

Acknowledgement of Aboriginal peoples' diverse interests in the coast in the provision of Object 3 (c) is commendable, but there is a palpable danger of a charge of hypocrisy on the Government's behalf in making this acknowledgement while several hundred land claims over vacant Crown lands, by local Aboriginal land councils under the *Aboriginal Land Rights Act 1984* (NSW) - many of which lie within the coastal zone – have remained stalled and unresolved, some for twenty years! In this instance, some adroit administrative action to expedite resolution of these claims, is definitely called for, rather than an amendment to the Bill.

Two draft objects (j) and (k) may be better deployed as functions of the new coastal management council.

A number of amendments to section 3 are proposed to address these concerns. See paragraph **A3.** of the Appendix 1 of this submission.

s 4 Definitions

The Definitions provided in s 4 are generally appropriate, however several might benefit from minor amendment. The definition of 'beach' proposed is not supported by the ACS because it is not consistent with the plain and ordinary meaning of the term, because its footprint is defined too widely and includes as 'beach', parts of the coast which are not properly described as 'beach'. The rationale for a revised definition for 'beach' is provided in Appendix 4 of this Submission.

Amendments to definitions in section 4 are proposed in paragraphs **A4** of the Appendix.

Part 2 Coastal zone and management objectives for coastal management areas

The ACS supports the idea of four 'coastal management areas' being designated for specific management purposes within the state's coastal zone.

s 5 Coastal zone

The names and proposed management objectives of the four new coastal management areas proposed in draft s 5 of the Bill need some further refinement before they can be effective.

The names of several of these proposed new 'coastal management areas' are considered confusing and hence inappropriate.

In the view of the ACS there are many ways these management areas could be configured and renamed. In this submission and in the Amendments proposed in Appendix 1, two models for the future categorisation of coastal land have been considered.
One, Model A, proposes three of the four coastal management areas should be renamed as shown below.

Draft name of area	*proposed new name*
'coastal wetlands and littoral rainforest area',	coastal *conservation* area,
'coastal vulnerability area'	-
'coastal environment area',	*coastal waterbodies and environs* area
'coastal use area'	coastal *development* area,

Amendments to section 5 are proposed to address these concerns. See paragraphs **A5** of the Appendix.

A second, Model AA, proposes regrouping and renaming the four coastal management areas as shown below.

Draft name of area	*proposed new name*
'coastal wetlands and littoral rainforest area', 'coastal environment area	coastal *conservation* area, (incorporating coastal wetlands, littoral rainforest and coastal environment area)
	Aboriginal Culture area.
'coastal vulnerability area'	-
, 'coastal use area'	coastal *development* area,

Detailed amendments to section 5 to reflect Model AA are given in paragraphs **AA5** of the Appendix.

A detailed rationale for this model is provided in **Appendix 5.**

s 6 coastal conservation area

The ACS is of the view that the first of these proposed new coastal management areas has been too narrowly defined as including (only) SEPP 14 - coastal wetlands and SEPP 26 – littoral rainforests. While the continuation, and extension, of development controls over these important coastal vegetation types are supported by the ACS, they are not the only coastal vegetation types of significance which require protection within the proposed new 'coastal management area'.

Following an extensive review of Environmental Zones (E-Zones) in the councils of the far north coast, consultants Parsons Brinkerhoff recommended that the criteria for defining areas as zone E2 - Environmental conservation should be extended to include other vegetation types of conservation significance.

The Department of Planning and Environment and Planning Minister Mr Stokes in their response to the E-Zone Review report on 20 October 2015, further modified the list of criteria which qualified areas of land and vegetation for inclusion in the highest private land conservation zoning available under the standard instrument for LEPs: the E 2 Environmental Conservation zone. (See http://www.planning.nsw.gov.au/Policy-and-Legislation/Environment-and-Heritage/Environmental-Zones)

In addition to coastal wetlands and littoral rainforests (under the relevant SEPPs), the following criteria were adopted by the Minister and the Department for these five FNC councils' LEPs:

- Endangered Ecological Communities (EECs) listed under either the state or federal Act,
- Key Threatened Species habitat,
- over-cleared vegetation communities and
- land identified as culturally significant by Aboriginal communities.

as explicitly defined in Table 1. E2 Zone criteria, p 13, Northern Councils EZone Review Final Recommendations Report (NSW Department of Planning and Environment, 2015. (Available at http://www.planning.nsw.gov.au/Policy-and-Legislation/Environment-and-Heritage/Environmental-Zones)

Further, The ACS believes that other important coastal native vegetation types of conservation significant also warrant ongoing conservation and protection from development, including mangroves, salt marshes and coastal seagrasses – species under particular threat from coastal development. In many places these important coastal vegetation communities have been identified and their extent has been documented on high resolution maps. These maps ought to be included in the material drawn on by the Department when preparing maps for the proposed coastal *conservation* area, for use in the proposed *Coastal Management SEPP.*

The ACS believes that adopting a wider set of criteria for defining, mapping and protecting native vegetation of conservation significance and sites of cultural significance, in the coastal zone is warranted. After such an extensive process of review, hitherto focussed on five far north coast councils, there is an opportunity to harness these results of this extensive review, with a view to adopting these expanded criteria for defining the zone created under this section, 6 (a) and rename it accordingly as 'coastal *conservation* area'.

Amendments to section 6 are proposed to achieve this sensible extension of criteria of significance. Several amendments to the management objectives for this area are proposed. See paragraph **A6** of the Appendix.

Alternative Model AA.

Alternative Model AA seeks to integrate management of the physical and hydrological coastal environment with coastal biodiversity and ecosystem integrity, as expressed both in the objects of the Draft Bill and the scope and objectives of Areas (a) and (c).

An integrated approach is considered critical, given the extent to which sensitive coastal environments have become degraded as a consequence of ecologically unsustainable development in the catchments of both the open coast and estuaries, coastal lakes and lagoons, wetlands and littoral rainforests. Most ecosystems unique to the coast are listed as Endangered Ecological Communities, with coastal flora and fauna species listed as Threatened. The Coastal Lakes Inquiry 2002 identified only 16 of over 90 coastal lakes as in natural or near natural condition. These 16 coastal lakes identified for "Comprehensive Protection," are increasingly recognised as highly vulnerable to degradation from development and use pressures in their catchments.

It is proposed that the emphasis on the coastal environment, reflected in the objects of the Draft Bill, be realised in an holistic "catchment to coastal waters" approach to conservation, protection and management, rather than the proposed separation of Area A, "Coastal Wetlands and Littoral Rainforest

areas" from the "Coastal environment area." Coastal physical environments and ecosystems do not exist in isolation of their catchments and should be considered holistically, in parallel with recognition of coastal compartments.

The proposed "Coastal Conservation Area" would bring together all high conservation value coastal environments in recognition of the inter-relationship between these physical, hydrological and biological coastal systems, rather than separating Littoral Rain Forests and Coastal Wetlands from other related coastal environments.

One "Coastal Conservation Area" would better integrate with Environment and Water Zones as defined in the LEP Standard Instrument, Council principal Local Environment Plans and existing Council Coastal Zone Management Plans. It would reduce confusion regarding coastal ecosystems that encompass categories such as coastal lakes, estuaries, wetlands and littoral rainforests, which, where they occur together, should be conserved, protected and managed under one set of objectives and with planning and development provisions, specific to each category.

A separate Aboriginal Culture Area is proposed to ensure that planning and management of the NSW coast recognizes Aboriginal peoples' spiritual, social, customary and economic use of the coastal zone consistent with Aboriginal people's Native Title Rights and rights under the NSW Aboriginal Land Rights Act.

Specific consultation arrangements should be made to ensure that Aboriginal people are engaged in and consulted about all issues relating to the coast and their rights prior to finalisation of the draft Bill.

Alternative amendments to give effect to Model AA relating to the scope of the Areas and proposed development controls proposed in the SEPP Statement of Intended Effect are provided in paragraph **AA6** of Appendix

See the Rational for these management objectives in **Appendix 5.*

s 7 coastal vulnerability area,

The ACS supports the inclusion of this zone and does not seek to amend its name.

The management objectives of this coastal management area shown in s 7 (2) need amendment to further clarity and make appropriate, the relevant objectives.

The CS does not support the inclusion in the objectives in the 'coastal vulnerability area' the draft par d) "to encourage land use that would…" etc, when in these areas, objectives that stated "to discourage new development" and limit re-development' and or 'to encourage transition of vulnerable legacy development to safer areas' seem more appropriate given the hazards are real.
Objective d) could then be better deployed in coastal *development* areas.

Amendments to section 7 and amendments to the management objectives for this area recommended by ACS are shown in paragraphs **A7** of the Appendix

s 8 coastal *waterbodies and* environs area,

Though the environment of the coastal region is extensive and diverse, only a limited sub-set of coastal environments are included within the 'coastal environment zone' proposed under s 8.
The consequence of this narrow definition is that there will be extensive areas of well known coastal environments which are not designated 'coastal environment areas'.

The ACS supports the inclusion of a coastal management unit focussed on the coastal waterbodies, being tidal waters, waters of ICOLLs and their immediate shore environs, as presently defined by s 8 (1). However the ACS believes that to avoid the potential for confusion the area created under s 8 should be renamed 'coastal *waterbodies* and environ*s* area'.

The management objectives of this coastal management area shown in s 8 (2) need amendment to further clarity and make appropriate, the relevant objectives:

Amendments to section 8 to achieve this are shown in paragraphs **A8** of the Appendix.

s 9 coastal *development* area,

Use of the word 'use' to designate another of the four proposed new coastal management areas is also potentially misleading because public 'use' of the coastal zone extends over and throughout all four proposed coastal management areas.

It appear that the 'use' implied in establishing this management unit is actually 'development' as defined by the *EP &A Act 1979,* especially development for residential or commercial buildings and or associated infrastructure.

The ACS supports the inclusion of such an area within the scheme of the Bill but seeks the amendment of its name, to become 'coastal *development* area'.

The management objectives of this 'coastal *development* area' shown in s 9 (2) need amendment to further clarity and make appropriate, the relevant objectives:

Amendments to section 9 to achieve this are shown in paragraphs **A9** of the Appendix.

s 10 Matters relating to identification of coastal management areas

The appropriate location of boundaries identifying lands which fall within each of the proposed four new 'coastal management areas is considered by the ACS to be vital to the success of the legislation's effective implementation.

The ACS understands that the defined locations of these four new areas will be specified in the high resolution digital maps gazetted as part of the proposed *Coastal Management SEPP* and these 'new' areas will form core parts of the new legal framework for future coastal management. Future use of or development in these designated areas will, as ACS understands it, be governed by the relevant statutory management objectives and development controls, including a table of prohibited and permissible uses, in the text of the yet to be released *CM SEPP*.

Getting the lines on these maps correct in the SEPP instrument is very important if there is to be public confidence in and wide political support for the *CM SEPP*. Hence it is highly desirable that the criteria used in the mapping be transparently stated and applied rigorously; and that the resulting maps be of such a high standard, and having been developed in consultation with public authorities and landholders, and the subject of a process of public exhibition and comment at the draft stage, that the *need* for amendments to the maps identifying the boundaries of 'coastal management areas' should be reduced to the very minimum absolutely necessary.

Only in that context does the proposed sub-section 10 (1) warrant inclusion. It would be ludicrous to create a legal framework which permitted willy-nilly amendments to the maps of 'coastal conservation area' boundaries by any council, any time after the gazettal of the relevant maps.

Thus the ACS recommends that the maps of the *CM SEPP* not be subject to any amendment by local councils, until a minimum period of three years have elapsed since the maps gazettal.

While the ACS can accept as plausible, the proposition in draft s 10 (1) that local councils should, in theory, be able to amend the key maps of the *CM SEPP,* this is on the basis that this would be for extra-ordinary circumstances requiring this special contingency, not a routine occurrence to steadily subvert the strategic state-wide mapping project. Such an amending LEP must be required to explain precisely what has changed since the maps of the *CM SEPP* were made, and provide a clear rationale for why the map(s) should be amended. This capability to amend a SEPP must not permit a draft LEP to subvert the gazetted *CM SEPP* or allow changes to be made by some surreptitious provision in an omnibus LEP Amendment.

Moreover, it is the view of the ACS that if a provision such as the current draft s 10(1) were retained in the Bill it is important that another provision states clearly that notwithstanding any recommendation by the Minister under current draft s 10(2), until any amending LEP is formally gazetted and enters into legal effect, the provisions of the *CM SEPP* prevail.

Several important amendments to section 10 are suggested as being necessary to prevent the *CM SEPP* and its maps 'dying the death of a thousand cuts'.

The first recommended change would require the inclusion of a transparent statement of the criteria which define, and which drive the identification of the four 'new' coastal management areas in the Bill or in the SEPP. If it thought best to include the actual criteria in the SEPP, then the Bill should include a provision which requires 'a SEPP' to publicly state these criteria and to apply them rigorously, so that it is not possible to suspend or 're-jig' them to achieve 'preferred' results for some locations.

Another recommended amendment would mandate consultation by the Department with local councils on the draft *CM SEPP* maps for the coastal management areas in that local government area when they are being first drafted, and 'statutorily' encourage landholders, and councils, to comment during the process of public exhibition, before the maps are finalised, so the SEPP can then be made and its 'final' maps published, based on the best information available.

Such amendments would ensure that there is no capacity for a council or landholder to claim "the maps are wrong" or relevant information wasn't considered, when the SEPP comes into effect.

A provision should be included which stipulates that the maps of coastal management areas in "a" or "the *CM" SEPP* have a minimum 'in effect' period of (say) three years when they would stand as made, before the Bill's proposed provisions - which would allow councils to propose, and the Minister to consider, any such amendments of a SEPP by a LEP - can come into effect.

Since it likely that the *CM SEPP* maps will identify different coastal management areas on a single parcel of land, in some instances at least, a provision which states the hierarchy of management objectives such as in the proposed draft 10 (3) is essential to address apparently conflicting management priorities.

However the proposed order of priority is not considered appropriate. It is unclear why coastal vulnerability objectives have been given greater precedence over the proposed Coastal Environment Area. Coastal environmental values should be identified as the first priority in their own right, and then considered as information critical in addressing coastal hazards and risk management strategies. Estuaries, coastal lakes and lagoons and their riparian ecosystems together with wetlands and littoral rainforests are the environments likely to be most threatened by coastal inundation and flooding and future sea level rise. According a higher priority to these environments than to coastal vulnerability

areas, would ensure that any development and uses are consistent with the principles of Ecologically Sustainable Development.

The inclusion of such a provision is supported by the ACS.

The ACS recommends that the names of the four coastal management areas in this section be amended to be consistent with the new names for these areas proposed in comments on ss 5 – 9 above.

Amendments to section 10 to achieve these desirable outcomes are shown in paragraphs **A10** of the Appendix.

Part 3 Coastal management programs and manual.

s 11 Part applies to local councils with land within coastal zone

This preliminary section 10, states that Part 3, Coastal Management Programs applies to local councils and any other public authority. This seems obvious. What is omitted is a reference to the Minister administering the Act. While it might be said the minister is included within the definition of 'any public authority' this non-specificity ignores the fact that the Minister has a significant statutory role to play under specific provisions of this Part – see ss 14 (2) and 17 (2).

The current draft does not, but a revised section 11 must refer to the Minister, and state that Part 3 CMPs, in which the minister plays a role, applies to the Minister administering the Act.

An amendment to section 11 is recommended in paragraph **A11** of the Appendix.

Part 3(2) requires coastal management programs - CMPs

s 12 Purpose of coastal management programs

While the ACS supports the notion of 'coastal management programs' as a key 'new' element of the coastal management framework, the ACS does not believe that they should be seen as the principal vehicle for setting "the long term strategy for coordinated management of land in the coastal zone…" Consequently the ACS does not support draft section 12 of the Bill as presently worded.

In the view of the ACS this role of determining the overall plan in the long-term "for the co-ordinated management of land within the coastal zone" and agreeing on priority areas and actions - and identifying multiple relevant short and medium term strategies (note plural) needed to make progress towards, and ultimately achieve the plan over the long-term - is still best undertaken through the preparation of coastal zone management plans (CZMPs), with their vital supporting sub-processes of technical advice and peer review, stakeholder participation and public exhibition for review and comment. This overall plan and its various strategies should continue to be set out in the Coastal Zone Management Plan.

Giving effect to the Plan, and achieving its effective implementation, is where many earlier CZMPs were weakest. Major uncertainties regarding councils' liability, and local, state government and private funding for coastal management activities over the last decade have meant that in some instances 'programs' for implementation could not be finalised, and or implemented with existing funding, with the result that a number of worthy, well-developed 'plans' failed to be 'realised'.

Amendments to section 12 are shown in paragraphs **A12** of the Appendix
S 12 amend and restate purpose of CMPs as to implement CZMP

s 13 Requirement for coastal management programs

In this historical context, the proposal in Part 3 draft s 13 to require councils to develop formal 'coastal management programs' is useful, because it emphasises the need for a schedule of tangible steps, including a financial plan, to ensure implementation of the CZMP. In this way, the Bill legislates current 'best practice'. Including provisions which permit the recovery of funding from private landowners for coastal management 'works', if required, discussed below, give further assistance.

In ACS's view it is vital that before this Division 2 of Part 3 of the Bill relating to CMPs, provisions relating to CZMPs be included, similar to s 55B in the *CPA 1979,* which continue the statutory requirement for councils to prepare and exhibit 'coastal CZMPs prepared in accordance with ministerial directions and the guidance and directions included in the proposed *Manual.*

Revised updated sections 55A – 55L of the *CPA Act 1979* are proposed as new sections 15 – 26 of a 2016 Bill. [See provisions set out in Appendix 2 of this Submission].

The ACS believes it is very important that CZMPs prepared by local councils remain the primary vehicle for developing the long-term plan "for the co-ordinated management of land within the coastal zone" and for agreeing on priority areas and actions and identifying appropriate implementation strategies.

A final step in completing a CZMP should be to finalise its action document: the 'coastal management program' which should have the narrow role of ensuring the faithful and timely implementation of the CZMP. Hence it must be clear that, in the view of the ACS, the development and content of these 'coastal management programs' cannot and should not replace, or subvert, or override coastal zone management plans. The CMPs purpose and its limited task should be to devise a program to implement the CZMP.

Amendments to several sections in Part 3 are therefore necessary.

The ACS proposes that the draft sections 12 – 20 on CMPs be relocated later in the Bill to become new sections 27 – 35. See the recommended changes in paragraph **A13** of the Appendix 1.

s 14 Preparation of coastal management programs

Further, there is a danger that if a CMP may be prepared for only "part" of the area covered by the relevant CZMP the investment in implementation may be distorted by a part-area only CMP by cherry-picking funding and actions for 'desirable' areas and neglecting other areas.

Amendments proposed to section 14 are shown in paragraphs **A14** of the Appendix.

s 15 Matters to be dealt with in coastal management programs

There is a risk, in the view of the ACS, that, with the emphasis on scheduling the implementation of actions which entail high levels of long-term expenditure, and documenting their funding arrangements, [see s 15 (1)(d)] these 'coastal management programs' will be, or could become, too narrowly focussed on solely economic considerations or goals and overlook the vital actions and spending by council and the state government necessary to achieve environmental and social objectives, thus fulfilling the broader goals of CZMPs.

One amendment to draft s 15 Matters to be dealt with in CMPs – proposes that CMPs should recognise and include 'timely' actions by other non-government parties to the coastal management mission to

achieve the economic, social and environmental objectives of a CZMP. These other parties include - but are not limited to - members of the public, coast- and dune groups, other community groups, local progress associations, service groups, regional, state or national level NGOs, professional, business or industry bodies, educational entities or research institutions, Chambers of Commerce, or other private sector networks.

For example: if there were local community support, an annual community based fundraising event, aimed at generating awareness and additional funding for coastal management could, or perhaps should, be included in most local councils' CMPs.

A number of amendments to draft s 15 (1) are recommended in paragraph **A15** of the Appendix.
No amendment is proposed to draft s 15 (2) and its inclusion is supported.

Section 15 (3) & (4) coastal erosion emergency action subplan

The ACS has doubts about the narrowness of this provision. Draft section 15 (3), which provides a definition of *coastal erosion emergency action subplan* appears out of place in this section, s 15 which deals with the content of CMPs. The usefulness of the draft provisions in s 15 (4) which provide no guidance on how these subplans relate to the CMP, but instead prohibit certain matters inclusion, is seriously questioned.

It is unclear why the subsection (3) is required at all given the definition of this term in s 4, *Definitions* could have included this 60! word definition instead of referring to a subsection.

Given the broadness of draft section 15 (2), which authorises the proposed *Coastal Management Manual* created by draft s 21, to designate or 'permit' the inclusion of other matters to be addressed by councils when preparing CZMPs and CMPs, and the scope of the draft section 21 (3), it would appear far more appropriate to include any statements of the limitation on the contents of CZMPs and or CMPs in the relevant sections of this *Manual.*

In the view of the ACS any such 'emergency subplan' ought to form part of the 'overall plan' being the Coastal Zone Management Plan, and hence logically the subplan's implementation should be part of the CZMP implementation 'program'. It is essential that either the scheme of the legislation – if this provision is persisted with – or otherwise the contents of the *Manual* must make it clear that an 'emergency subplan' and its emergency 'actions' must not be permitted to override, suspend, modify, contravene or subvert an adopted CZMP.

In the view of the ACS such a subplan does not require a separate designation as a matter for inclusion in a CMP as in draft s 15 (1) (e) because if actions are necessary under the subplan, made within the CZMP then these actions will of course logically, form part of the program for the CZMP's implementation - the 'coastal management program'.

The inclusion in this section to a reference to 'works for the protection of property' is inconsistent with the ACS's understanding of the core idea for Stage Two 'reforms': to discontinue ad hoc 'emergency works' and return to a long-term strategic planning approach to coastal management. No 'emergency' works to protect property should be possible by private landowners. Any coastal protection works to be done by council can and should only be able to be deemed 'necessary' by the CZMP process, and should be subject of a development consent, so the utility of this provision is seriously questioned.

There is however, a more fundamental problem with these subsections and their references to a *coastal erosion emergency action subplan.*

Given seven 'coastal hazards' have been defined by ss 4(1)(a) – (g) of the Bill, and all seven of these hazards have the potential to create 'threats to life and property' under storm conditions or during "an extreme or irregular event", it is unclear why the 'emergency subplan' referred to in section 15 (3) relates to only one hazard: coastal erosion. It seems logical that in areas of coastal vulnerability, 'emergency action' plans ought to identify and document the actions and or decisions likely to be, or become, necessary under storm conditions, from all coastal hazards known to be present in that area of 'vulnerability'.

If such a provision is to be included in a later version of the Bill, the ACS would recommend that the provision refer instead to *coastal hazard emergency action subplans.*

Further, reference to "an extreme or irregular event" as the basis for this planning and action seems unnecessarily narrow. Coastal hazards such as beach erosion can and will become active well before storm conditions peak, and at storm intensities well below 'extreme'. As well as 'irregular events', regular storm events with ARI of 1 in 1, 1:10 or 1:20 can, and under certain prevailing meteorological conditions almost certainly will, activate coastal hazards. Hence it appears that these sections are not founded on a realistic appreciation of coastal hazards.

The draft sub-sections 15(3) and (4) require a major rethink, or deletion.
Amendments to these subsections are shown in paragraphs **A15.3** and **A15.4** of Appendix 1.

s 16 Consultation

Though section 16 is headed 'Consultation' it is immediately preceded by a provision, draft s 15 (4), relevant to consultation, which prohibiting councils from taking certain actions unless a public authority agrees, before any process of consultation has been described. This is clunky drafting.

Section 16 (1) and (2) are supported by the ACS since they require consultation by councils with the community, adjacent councils and relevant public authorities in the preparation of a CMP, and authorise the *Manual* to designate requirements for such consultation.

Regrettably the importance and value of community and stakeholder consultation and the application of a consistent state-wide standard are however effectively subverted and negated by the provision of draft s 16 (3) which implies that consultation is not essential or legally required. The effect of s 16 (3) is that councils may ignore this requirement for consultation, not follow the steps and fail to meet the standards required by the Manual if they choose, without any effect on the credibility or validity of the CMP.

Incredibly this subsection (3) makes the 'best practice' approach of draft s 16 (1) optional, and because ss 16 (1) and (2) become mere window dressings which look good but don't actually apply, ACS is concerned that it is inevitable that councils will prepare and adopt CMPs without appropriation consultation.

Further, it would appear that, due to the inclusion of this subsection (3), the minister could still certify a CMP under draft s 17 (2), as having "been prepared in accordance with the requirements of this Part and the coastal management manual" without the program actually undertaking relevant consultations under draft s 16 (1) or complying with the requirements for consultation contained in the manual, pursuant to draft s 16 (2)!

These draft consultation provisions, if enacted as is, represent a substantially retrograde change for the worse which will weaken the framework of coastal zone management in New South Wales. Appropriate public participation and democratic decision-making processes will ensure proposed coastal management activities have a greater chance of succeeding in the long-term.

While there is a clear attempt at ensuring co-operation and co-ordination between local councils and state government agencies in the proposed CMPs - a positive initiative - the Bill's draft provision, s 15 (4), contains a clumsy statutory prohibition on including any action by a public authority unless they agree. While presumably the *Manual* might set out relevant processes for such consultation to follow, it may be appropriate to include in the legislation, rather than the *Manual* provisions which can come into effect as a circuit breaker if, or rather when, a council needs timely action by a 'public authority' to implement its plan, but the authority won't agree.

This issue is further considered in comments on draft s 23 below.

Amendments to cure the defects in draft s 16 are shown in paragraph **A16** of Appendix 1.

s 17 Certification adoption and gazettal of CMPs

It is the view of the ACS that this crucial section of the Bill is seriously underworked. As noted above, any CMP considered under this section must have been developed through the coastal zone management planning process and its sole purpose should be to implement the CZMP.

The provisions of this section are too limited in the view of the ACS. Once a draft CMP has been provided to the Minister under s 17 (1), the minister is given only two options: to certify or refuse to certify. A third, and seemingly obvious additional option ought to be included: the minister must be able to decline to certify a draft CMP at that time, but indicate certification may be possible once certain conditions are met. These conditions ought to specify the mandatory compliance with any legal requirements not satisfied, and or the council's consideration and or incorporation of specific amendments recommended by the Minister.

Though this third course of action is considered desirable by the ACS, to minimise the need for the Minister to either refuse or decline to certify a CMP, the provision of draft s 17 (1) should be strengthened to specify that a local council may submit a draft CMP for certification under this section **only** if the council warrants that it has "been prepared in accordance with the requirements of this Part and the coastal management manual".

Part of the role of the Minister in certifying the CMP should be to check compliance with all relevant legal requirement and proper application of the procedures contained in the Manual, not simply take council's word for it.

To allow councils to submit CMPs for certification which do not meet this basic threshold is to invite local councils to submit substandard CMPs and creates a political situation in which there will inevitably be undue pressure on the minister to approve them!

Where the minister decides that certification under s 17 (2) should be refused, it is important that the reasons for this refusal are set out. An amendment which obliges the Minister to give reasons for refusing to certify a draft CMP ought to be included in order to encourage sufficiently transparent decision making processes.

Amendments proposed to section 17 are shown in paragraph **A17** of Appendix 1.

s 18 Review, amendment and replacement of CMPs

In the view of the ACS the inclusion of this section is appropriate. While the draft provisions appear uncontroversial there is still scope to improve this section.

The ACS recommends that the section be amended to make clear that a final, certified and adopted CMP may be amended or replaced by only by a CMP which has been similarly certified and adopted under this Part. Without this important qualifier the notions that a draft CMP may amend or replace a certified, adopted CMP or that a certified CMP is effectively suspended when preparation of a new draft CMP is commenced, remain possible interpretations of this section.
It is unclear why the phrase "at any time" has been included in subsections (2) and (3) since clearly the amendment or replacement of a certified CMP cannot occur "at any time", but rather only when a new instrument has been prepared, certified and adopted.

It would be appropriate, in ACS's view, to include a further subsection which makes plain that a certified CMP may not wholly repealed unless and until a new CMP has been prepared, certified and adopted under this Part.

Amendments to improve draft section 18 are included in paragraph **A18** of Appendix 1.

s 19 Availability of CMPs

The ACS supports the inclusion of this section but proposes one amendment. Council should be obliged to hard copy publish the CMP in a Council newsletter or other regular council publication.
See amendments proposed in paragraph **A19** of the Appendix.

s 20 Minister to prepare CMPs in certain circumstances

The inclusion of this section in the Bill is supported by the ACS. In our view such action should not be a commonplace occurrence, it is an important contingent function, which ought to be available to the Minister.

While the Minister's seeking of advice from the Coastal *Management* Council "in the preparation and adoption" of a CMP is supported, this advice should also be sought in the first instance, when the Minister is considering whether to exercise the power and functions authorised by this section.

Further, the draft subsections 20(6) and (7) which apparently apply in circumstances where the Minister has decided to intervene under this section, have greater application than in these limited circumstances, and might be applied at other times. These subsections might be better relocated to s 13.

Amendments to draft section 20 are included in paragraph **A20** of Appendix 1.

Part 3(3) mandates the new NSW Coastal Management Manual

s 21 Coastal Management Manual

The provisions of this section are generally supported by the ACS. The 'new' manual is in many ways the most significant, but also the least controversial part of the Government's Stage Two coastal reforms. This section, mandating the publication of the Manual, is a clear indication that the State government accepts that it has an enduring role in coastal management.

While the section 21 (1) obliges the Minister to "publish" a coastal management manual, subsection (5) requires its publication only in the government Gazette and subsection (6) refers only to the Manual being available on the websites of the Department and the Office of Environment and Heritage and at these agencies' offices "during ordinary office hours".

In the view of the ACS these actions while appropriate, do not constitute 'publication' as most people would understand the term. It is important that once finalised, the Manual be published, in the conventional sense or having multiple hard copies printed and available for sale. Though the Bill flags the possibility of amendments or updates being made to the Manual at a later date, - and the need for these amendments to be made available publicly – this possibility of the need for revision confronts every book publisher, and should not prevent the printing of hard copies of the Manual as the first edition.

A wholly web-based Coastal Management Manual is not considered appropriate and is not supported. The web-mounting of the material while desirable, should be an adjunct to the hard copy publication, not the sole format of the Manual.

The discipline of actually publishing the Manual 'in print' once a final version has been produced, should provide an incentive to get the Manual content right from the start, and a bulwark against making numerous minor inconsequential changes. As a first edition, hard copies of Manual should include a note that amendments may have been made since printing and provide a URL or other pointer to the relevant websites where subsequent amendments to the Manual can be found.

Several amendments to clarify and improve draft section 21 are recommended by the ACS in paragraph **A21** of Appendix 1.

s 22 Implementation of CMPs by local councils

The general intentions of draft section 22 have qualified support from the ACS.

While the term 'implement' appears in the section heading, it does not appear in the text of this section. This is strange and inconsistent drafting. The three word phrase "give effect to" is considered a poor alternative to one clear word 'implement'.

The use of the indicative, rather hopeful 'future' tense of the verb as in the phrase "is to" give effect… is considered inappropriate. While there is a future intention in the Bill, the wording of the Act must be clear and declarative and should employ the well-known and unambiguous word "shall" which clearly connotes non-discretionary obligation.

The use of the phrase "have regard to" in draft s 22 (1) of the Bill, in reference to the actions councils should take when implementing their CMP and considering the objects of the Act is considered inadequate. The phrase is a weak and poorly defined action which on the face of it can only mean "look at". A phrase which obliges councils to take action to "implement" its CMP consistently [or not inconsistently] with the objects of the Act, would provide some actual direction to councils, where the current wording clearly does not.

Alternatively a requirement for the CMP to align with the Objects of the Act could apply from the beginning of the process of preparing a draft CMP. Though draft s 14 (3) (a) obliges councils (properly, through use of the word 'must') to "consider and promote the objects of this Act" when preparing a CMP, the first is a weak action and the second, though potentially useful, is poorly defined. As presently drafted, they are generalised 'low-bar' requirements, and they only apply to "preparing" a CMP, not to the CMP itself. The ACS notes that draft s 15 – 'Matters to be dealt with in CMP' does not include any

reference to the Objects of the Act, or a requirement to demonstrate how the CMP aligns with the Objects of the Act.
It is the view of the ACS that these defects need remedying.

Perhaps the Manual should proscribe how, when implementing its CMP, a council could demonstrate that its CMP's actions align with the Objects of the Act under draft s 22 (1). This could demonstrated by:

- minutes of the council meeting at which the CMP was 'considered' by council, showing that for every action in the CMP, the relevant Object(s) of the Act had been identified;
- and / or minutes showing that each of the Objects of the Act were considered in turn, discussed by councillors and a form of words adopted by council which explained how each Object related to the relevant part(s) of the CMP;
- the adoption by councils of reference documents such as Tables which provide evidence of this alignment of the CMP with the Objects of the Act;
- reference to the relevant sections of a validly produced Coastal Zone Management Plan, which discusses the application and operation of (all) the Objects of the Act in the CZMP.

Though the text of subsection (2) indicates that councils are not limited in how they give effect to their CMP, the particular ways of doing so cited in draft s 22 (2) (a) and (b) do not include some key highly relevant actions of councils.

The provision of draft s 22 (2) (a) state the processes of "preparation, development and review of" the plans strategies etc but do not include the vital process of "formally making, or adopting" the plan, strategy etc. Without this inclusion the legislation would guide the preliminary processes of preparation and development, and the late stage process of review, but remain silent on the key processes of finalising, making and adopting the plans strategies etc.

The subsection's reference to "plans strategies, programs and reports to which Part 2 of Chapter 13 of the *Local Government Act 1993* applies" is obtuse drafting. Requiring a referral to yet another document to obtain any actual meaning for this sentence is far from desirable. The provision should properly record the relevant document titles used in that Part of the *LGA 1993* i.e Community strategic plan (s 402), Resourcing strategy (s 403), Delivery program (s 404) and its Operational plan (s 405).

It is unclear from the wording of this draft s 22 (2) whether this provision is also intended to apply to other reports mandated under Integrated Planning and Reporting Guidelines (as per s 406), viz: community engagement strategy, annual report and or state of the environment report.
If so, then these documents names should appear in the text of the section.

The ACS is of the view that in draft s 22 (2) that the two vehicles specified by which councils must "give effect to" their CMP, under the *Environmental Planning and Assessment Act 1979,* via planning proposals and DCPs, are too limited and omit one obvious one: preparation of draft environmental planning instruments, such as local environment plans, made under the *EP & A Act 1979.*

Amendments to improve draft section 22 are included in paragraph **A22** of Appendix 1..

s 23 Other public authorities to have regard to CMP and Manual

This section is underworked in the view of ACS. The clunky provisions in this section indicate that there has been no real development in encouraging, and achieving, better co-ordination and co-operation between the two levels of 'public authorities', state agencies and local councils, to achieve, over the long-term the ecologically sustainable management of the state's coastal zone.

The comments above regarding the appropriate verb apply here as well, in the plural. In the initial clause of the sentence "Public authorities (other than local councils) are to" … the last two words should be replaced by "shall".

The phrase in draft s 23 (1) whereby public authorities "have regard to" CMPs is not supported since this 'low-bar' requirement for other public authorities to 'look at' CMPs is clearly insufficient.
The employment of a phrase which provides an actual indication of the action(s) required of the state agencies is considered desirable. eg These public authorities should be required to "liaise, negotiate with and assist local councils" in the development and implementation of CZMPs and CMPs to the extent of the authorities' relevant functions and available funding.

The use of the same phrase in draft s 23 (2) is also inappropriate. As presently drafted, draft subsection (2) does not mandate public authorities' compliance with a council's CMP or the Manual. It repeats the mistake of reciting only certain processes "the preparation, development and review of" – plans etc, during which the Objects of the Act are to be regarded, omitting the crucial process of "finalising, making and adopting" such plans. Though perhaps this is the intention of the section, the drafting is unnecessarily convoluted.

If there is a case for not binding public authorities (other than local councils) to comply with a local council's CMP, when preparing relevant plans of management under this section, it has not been made out. Further, there appears no reason why such authorities should not be bound to comply and act in accordance, or consistently with, the *Coastal Management Manual.* Hence, the ACS is of the view that draft section 23 should include another subsection which makes the Manual's application to all state government public authorities unequivocally mandatory.

Amendments to draft s 23 are included in paragraph **A23** of Appendix 1 of this Submission.

Part 4 NSW Coastal Council

The inclusion of a new independent Coastal Council in Part 4 of the Bill, as promised by the Minister 12 months ago, is welcomed by the ACS. However, the ACS has a range of concerns about most of the draft sections in this Part of the Bill and proposes some major amendments.

s 24 Establishment of NSW Coastal Council

The name proposed for the new body in draft s 24 (1) is confusing and hence inappropriate.

Clearly any reference in speech or writing to the 'NSW Coastal Council' constituted under this Act runs the real risk of being confused with a reference to the 'Coastal Council' constituted under the *Coastal Protection Act 1979.* This confusion may not matter so much if the role and functions of the two bodies were the same: however the new body is intended to be different to the old one. Note too that the term 'coastal council' is employed in the *EP & A Regulation 2000* to refer to a local council located in the coastal zone. It seems obvious that it is necessary to adopt a new name for this new body that prevents this confusion arising, and which clearly signals how it is different from its predecessor.

The ACS strongly supports the idea of a new independent advisory body but recommends it be renamed the Coastal *Management* Council to emphasise its focus and the Bill's, on management.

This suggested revised name is used hereafter in the ACS submission to distinguish it from and prevent confusion with the former body constituted under the old Act.

The number of members of the proposed Coastal *Management* Council is considered insufficient. A total membership of as few as 3 and at the most 7, is considered to be far too small to effectively

pursue the role, functions and tasks with which it is charged, or represent the diverse interests in the coastal zone, or to accommodate the relevant stakeholders across the geographic extent of the NSW.

Serious consideration ought to be given to a substantial enlargement of the membership, based on a functional assessment of what its role, functions and tasks require, rather than adopting a very small number of members based on a political or ideological view that "small government is good" and hence "smaller government is better". The ACS is of the view that a Coastal *Management* Council with as few as three members would likely be ineffective, and unable to fulfil the broad charter of coordinating the coastal management activities of the diverse interests in the coastal management community.

Two enlarged models are proposed:

i. Not less than 7 members, not more than 11 - including the Chair.
ii. Not less than 9 members, with no maximum number defined by the Act.

Relatedly, the ACS does not support the proposed 'expert' model for the Coastal *Management* Council as presented constituted under draft section 24 (3). Though the seven broad fields of expertise nominated in draft s 24 (3) are all relevant, they are not the only disciplines applicable, relevant or needed to achieve effective coastal management.

This expert model is more like the 'old' model of the Coastal Panel, which had a binary role of concurrence authority and technical advisory body, but it doesn't suit the role and functions the Bill proposes for the new Coastal *Management* Council. It is apparent that in this form, the Bill is seeking to reproduce, inappropriately in the view of the ACS, a body akin to the current Marine Estate Expert Knowledge Panel.

This limited 'expert' approach completely mistakes the on-going coastal management project as essentially a 'technical' matter which simply requires the 'right' policy settings at the start, when in reality coastal management is an iterative process, with significant and complex social and economic dimensions, which requires the engagement, encouragement, co-operation and co-ordination of a suite of both government and non-government stakeholders.

The new Coastal *Management* Council is not to be a consent authority – that role goes to the Joint Regional Planning Panels - so a body stacked with experts is neither necessary nor appropriate. Governments can and often do 'buy in' technical expertise from the private sector on contract for specific or short-term projects, so legislating to create a standing Council of experts seems unnecessary and inflexible.

A better option may be a 'stakeholder model', since there is clearly a basis in several intergovernmental frameworks already long agreed for empowering stakeholders in coastal management - like beachgoers, surfers, boaties, divers, wildlife naturalists, local residents, commercial and recreational fishers, coastal tourism businesses, insurers, councils and state agencies – by appointing them to an independent advisory body. See for example Principle 10 of the United Nations' *Declaration on Environment and Development* (1992), *Agenda 21* and Australia's own *National Strategy for Ecologically Sustainable Development* (1992).

It is apposite to note that the 'stakeholder model' is successfully employed in the United Kingdom to deliver Shoreline Management Plans.

A stakeholder model that empowers coastal *management* council members would be more likely to attract support from stakeholders' members if that body were seen as responsive and effective. It is also highly probable a new body on which a diverse suite of stakeholders were represented would be more successful in creating some 'co-ownership' of the ongoing coastal management mission across

diverse sectors of coastal society in the State of New South Wales, and its dependent economy, than would a panel of 'experts'.

In ACS's view this level of engagement is what is needed if the ecologically sustainable coastal management outcomes are to be realised, time and again, and if the residents of New South Wales are to successfully adapt to, and attempt to manage the impacts of, global climate change.

Such a 'stakeholder model' would also ensure that the members of the Coastal *Management* Council come from, and will report back to, key sections of the coastal management community in NSW, via formal associations or informal networks, or both, fostering communication and engendering co-operation at various levels. The experience of ACS members on the former Coastal Council from 1999-2003, informs ACS's view that a closer-to-the-community model will do better at building a shared coastal management culture, noticing new coastal management issues and emerging trends, and identifying potential, innovative, community-led responses, and would do so more quickly, than the 'expert model' might.

Having regard to the minister's reference to climate change as a 'wicked problem' it should be noted that the literature on 'wicked problems', explains that committees of stakeholders, rather than panels of experts, have the best chance of addressing and responding to these massively complex, dynamic, difficult to define or resolve, problems. (For a useful discussion of this see Conklin 2005, Australian Public Service Commission 2007, Levin et al 2010).

Such committees are better at preventing a policy response aimed at assisting one affected stakeholder, from innocently overlooking or unintentionally adversely affecting another. Apparently, by sharing their different perspectives and developing some rapport over time, they are likely to gain a better sense of the 'bigger-picture' and may be more willing to negotiate, and potentially innovate, so that, over perhaps many iterations, they can create workable short to medium term strategies which – though not 'solutions' as such - start to deal with specific aspects of the profound challenges presented by global climate change. And if technical expertise in some particular fields is crucial to these stakeholders' discussions, and their proposals for policies, programs and action, the relevant experts could still be hired. Such a dynamic model clearly has, at least on paper, some very powerful connections and enduring usefulness, which form compelling arguments in support of stakeholder involvement in key policy and decision-making.

The ACS prefers to identify and incorporate the best elements from both approaches in framing the membership of the proposed Coastal *Management* Council. Hence a 'hybrid model' which embraces both approaches and increases both diversity and 'vigour' is considered preferable.

When the Minister calls for expressions of interest in being appointed to the new Coastal *Management* Council, he or she should stipulate that all applicants must have prior experience in some coastal management activity, a technical or professional qualification in a field relevant to coastal management (including but not limited to the seven identified) and a demonstrable association or network within the state's diverse coastal management community.

A series of amendments to ss 24 (1) – (7) are recommended by the ACS to give effect to this proposal for a hybrid model for framing the membership of the new Coastal *Management* Council.
See the paragraphs **A24.1 – A24.7** of Appendix 1.

s 25 Functions of NSW Coastal Council

While the ACS supports, very generally, the functions of the Coastal *Management* Council, it believes that the scope of section 25 as presently drafted is too limited.

Leaving aside for a moment the question of functions, the Bill does not state or otherwise define the role of the proposed Coastal *Management* Council. This is a significant oversight which needs remedying because the functions that the new Council requires, depends on the role(s) it is designated under the Act to play in the state's ongoing coastal management project.

The ACS recommends that draft section 25 be amended to become - **Role and Functions of NSW Coastal *Management* Council.**

As presently conceived the implied 'role' of the new body is quite limited and is primarily that of a ministerial advisory body. This is an unnecessarily narrow role in the view of the ACS.

Set out as a new s 25 (1) should be a statement of the Coastal *Management* Council's role. The ACS's suggested statement of this role is provided in paragraph **A25** of Appendix 1.

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Once a statement of the Council's role has been given in subsection (1) the provisions relating to the Functions of the Coastal *Management* Council should be set out in a subsequent subsection. The current draft s 25 (1) relating to Functions of the Coastal *Management* Council is not however, considered satisfactory and some substantial amendments need to be made to properly ascribe relevant, appropriate functions for the proposed Coastal *Management* Council.

Missing from the functions presently outlined in draft s 25 (1) is mention of the function performed by the previous Coastal Council in identifying and recommending to the Minister the acquisition by the State of any land found to be necessary for the achievement of the Objects of the *Coastal Protection Act 1979.* Such a function should be incorporated into the relevant subsection.

Amendments to draft s 25 (1) Functions, proposed as a new subsection 25 (2) are provided in paragraphs **A25.1** of the Appendix 1.

Amendments to improve draft s 25 (2), proposed as a new subsection 25 (3) are provided in paragraphs **A25.2** of the Appendix 1.

s 26 – Performance audit of implementation of CMPs

The monitoring and reporting function proposed by this section is too limited in the view of ACS. Regrettably, draft s 26 (1) appears to create a 'part-time' role for the Coastal *Management* Council, only at the ministers request, of conducting 'a performance audit' of the implementation of a council's CMP.

This ad hoc and solo-council focus stands in contrast with the broader on-going monitoring and independent annual reporting role, across all local councils in the coastal zone, on progress in implementing CZMPs discharged by the former Coastal Council in 1999 – 2003.

It is important that if the narrow focus of draft section 26 is continued, it be preceded by a general statement of the Council's overall role in monitoring and reporting on CMP implementation, as recommended above.

The purpose of the audit as presently described in draft s 26 (2) is considered too narrow and should be broadened somewhat to identify opportunities for assistance, co-operation and or investment in the implementation of the CMP by other public authorities, non government organisations and or the private sector. The introductory clause of 26(2) should be stated unequivocally as: The purpose of the performance audit shall be:

The provision of draft s 26 (3) relating to the giving of Notice by the Coastal *Management* Council to a local council requiring the production of relevant information or records required for a performance audit is supported by the ACS. However, it appears that a matter relevant to such a Notice and or audit has been overlooked. It is thought appropriate that s 26 (3) include a capacity for the Coastal *Management* Council to require in its Notice for a council to also provide it with access to such areas or locations as may be required for the conduct of the performance audit.

Without this power to seek, obtain and use access to certain sites, any performance audit by the Coastal *Management* Council would be limited to a superficial desk-top review, and would lack the capacity to check on the ground that what a local councils says it has done, has been done.

The provision of draft s 26 (4) is supported by the ACS but the subsection would be improved by the addition of a maximum period of say 28 days, within which a local council must comply with the Notice.

Though the ACS supports draft s 26 (5) requiring the Coastal *Management* Council to provide a report to the Minster, at the conclusion of the a performance audit, the ACS is concerned that there is no further mention of how such a report is then considered or acted upon. It also seems strange that the provisions of draft s 26 (5) do not oblige either the Coastal *Management* Council, or the Minister, to provide a copy of the report made under this section to the local council whose CMP implementation was the subject of the performance audit. A failure to do so would clearly constitute a failure to provide natural justice to that local council.

To prevent such a report being lost forever, it is considered appropriate that a provision be added to this section which requires the Coastal *Management* Council to provide in its annual report to the NSW Parliament a summary of the report of any performance audit undertaken that year.

To increase transparency it may also be appropriate to be insert another provision in this section of the Bill to require the tabling by the Minister in the NSW Parliament of a report by the Coastal *Management* Council on a performance audit of a local council's implementation of their CMP, within a designated period: say within 28 days of the Minister receiving it.

Further, it may be appropriate for this section to include a requirement that the Minister administering the Coastal Management Act, provide to the NSW Parliament, within 3 months of the Minister's recept of such a report, a response by the Government indicating the action(s) it will take in response to the report, to assist in the successful implementation of a certified CMP.

Amendments to improve draft section 26 are included in paragraphs **A26** of the Appendix.

Part 5 Miscellaneous

s 27 – Granting of development consent relating to coastal protection works.

The thrust of draft section 27 is supported by the ACS. However the provisions of this section, as presently drafted, are considered inadequate.

The current draft section would permit the granting of development consent for 'coastal protection works' anywhere within the coastal zone, provided two conditions are satisfied: no threat to public access or public safety. This very broad approach is not supported by the ACS because in some 'coastal management areas' to be defined under the Bill such works would not be appropriate and would be likely to create conflict with or impair the achievement of the areas' management objectives. For example the ACS considers that 'coastal protection works' in areas proposed to be designated 'coastal *conservation* areas' would be quite inappropriate and should be unambiguously prohibited.

The reality is however that such 'coastal protection works' - defined in s 4 as a) 'beach nourishment activities or works; and b) activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters, including (but not limited to) seawalls, revetments and groynes – would need to be located immediately above, at or below the mean high water mark if they were to be in any way effective. Hence it is highly likely that any such works would be located within and or immediately adjacent to, the tidal waters of the state, in the coastal management area proposed as 'coastal water bodies and environs area'.

Development consent for such coastal protection works would only be appropriate in this coastal management area where the works were immediately adjacent to, ie seaward of a 'coastal vulnerability area' or a 'coastal *development* area'. Consent for such works in a 'coastal water bodies and environs area' adjacent to a 'coastal conservation area' would be considered by the ACS to be highly inappropriate.

While the two considerations of draft section 27 -- (a) limits on public access to a beach or headland and (b) likely threat to public safety -- are supported by the ACS, a third matter for the consent authority to consider should be inserted in this section: the authority's satisfaction that the works will not adversely affect the persistence, or amenity of, any nearby beach.

Amendment to draft s 27 are included in paragraphs **A27** of the Appendix.

s 28 – Modification of doctrine of erosion and accretion

The provisions of this section are generally supported by the ACS since they reproduce and continue the important amendments made by s 55N to the *Coastal Protection Act 1979* in 2002 following the Emergency Beach Management Review. These amendments ensure that landowners are not able to succeed in claiming ownership of lands adjoining their existing private properties, under the doctrine of accretion, without regard for long term geomorphological trends or longstanding public rights of pedestrian access to the coast.

Note though that the name of the doctrine is not properly given as 'the doctrine of erosion and accretion'. This name, though it used in the previous Act, does not appear in either the published legal literature or the common law. It is very widely known as the 'doctrine of accretion' and the scope of the doctrine embraces four modes of operation, via two physical processes: movement of sediment and change in level of bounding water body.

While the addition of sediment creates an accretion which adds new land; the removal of sediment constitutes erosion which subtracts from existing land. However these additions and subtractions of areas of land are also affected by changes in the level of the bounding water body. A gradual advance of the bounding water line, due to rising sea levels, [known in law as 'diluvion'] subtracts land, while a gradual fall in the level of bounding waters ['dereliction'] uncovers new land. All these changes in area of land, and the ownership of these affected lands, are governed by the doctrine of accretion, not the doctrine of erosion and accretion. It is particularly inapt for the Bill to persist with an incorrect name of this doctrine which irrelevantly emphasises erosion, but ignores the significant changes being wrought on the coast of New South Wales by rising sea levels, aka diluvion.

The ACS recommends that the name of this section be amended to align with modern legal terminology used in the leading case by the most senior English court. (See the Privy Council in *Southern Centre of Theosophy Inc v South Australia* (1982) AC 706; [1982] 1 All ER 283 at 287.)

Amendments to section 28, and further provisions proposed to follow section 28 declaring the applicable law re the ambulatory boundary of MHWM are shown in paragraph **A28** of the Appendix.

s 29 – Protection of exercise of certain functions from invalidity and inconsistency

The ACS does not support this provision. It appears to be aimed at ensuring the legality, or validity, of any and all actions by or of a council even if or though they are not in compliance with a CMP, the Objects or other provisions of the Act.

On the face of it draft s 29 (1) purports to make valid any actions of a council even if "inconsistent with achieving the outcomes" of a CMP. Further, draft s 29 (2) purports to validate any actions by a public authority, notwithstanding that the action was taken or the function exercised "without regard to a CMP, the coastal management manual or the objects of the Act".

These extra-ordinary provision are not supported by the ACS since they appears quite contrary to the requirement of s 733 of the *Local Government Act 1993* that councils "act in good faith" at all times. Paragraph **A29** of Appendix 1 recommends the deletion of this section.

s 30 – Minister to report failure to comply with directions to Local Government Minister

The ACS supports the action proposed in draft section 30 (1) whereby the Minister administering the Act is empowered to sanction a wayward local council, by reporting non-compliance to the Minister for Local Government, and or publishing an adverse report on a departmental website.

Similarly, the ACS supports the inclusion of draft s 30 (2) whereby the Minister for Local Government is able to consider taking further action under the *Local Government Act 1993.*

No amendment to this section are proposed.

s 31 – Regulations

The ACS supports the provisions of draft s 31 and does not propose amendments to this section.

s 32 – Delegations

The ACS supports the provisions of draft s 32 and does not propose amendments to this section.

s 33 – Review of the Act

The ACS supports the periodic review of the Act as proposed in draft s 33, but proposes several amendments to improve and make more transparent, the process of the proposed review.

The ACS suggests that the Minister is not the most appropriate person to carry out an arm's length review of the Act. Such a review might better be conducted by a person independent of government, experienced in coastal management, appointed by the Minister. Further, the ACS believes such a review ought not to be limited to only the ongoing suitability of the Act's "policy objectives" and related terms, and should review the appropriateness of any and all of the Act's provisions.

A new sub-section could be inserted to enable the review to consider another key matter: the maps, viz:

> (3) The review is to include, via a process of public consultation, the appropriateness of the boundaries defining any coastal management areas, and or the coastal zone generally, as shown in the maps prepared for these purposes under the *Coastal Management SEPP 2016;*

The existing (3) would be renumbered as (4) and a final sub-section could be added as

> (5) The Minister will respond to the report of the outcome of the review in the relevant House of Parliament within 6 months of its tabling.

Amendments proposed to section 33 are shown in paragraphs **A33** of the Appendix 1.

s 34 – Act to bind the Crown

The ACS supports the provisions of draft s 34 but notes however, the apparent inconsistency of this provision which binds the Crown to comply with the Act, with other provisions which allow public authorities to dispense with, discount or permit non-compliance with, key provisions of this Act.

As noted above, this inconsistency is not desirable and ought to eradicated, so that when the Act binds the Crown all public authorities have a public duty, and are specifically directed, to comply with the Act.

An amendment to section 34 is shown in paragraphs **A34** of the Appendix 1.

s 35 – Repeal

The ACS supports in principle the repeal of the *Coastal Protection Act 1979* and the *Coastal Protection Regulation 2011* as provided in draft s 35, but suggests an amendment. This section ought to make plain that the repeal of these statutes occurs "on the commencement of this (new) Act." AND / OR

However the ACS urges the Government to consider deferring the wholesale repeal of the sections of the *CPA Act* and *Regulation* that relate to making and amendment of CZMPs until the savings clause for CZMPs, in Schedule 3 Part 2 section 4, ceases to have effect on 31 December 2021. This date would appear to coincide with the likely date for the Review of the Act under draft s 34. Ie in five (5) years' time.

Of course by incorporating those relevant parts of the *CPA Act 1979* into core provisions of the new legislation, the proposed *Coastal Management Act 2016*, the repeal of the old legislation becomes much simpler.

Amendments to section 35 are proposed in paragraphs **A35** of the Appendix 1.

Schedules to the Bill

The four schedules to the Bill contain some important details, particularly Schedules 2, 3 and 4.

Schedule 1

Schedule 1 lists the LGAs and sediment compartments. This list enables a quick identification of those other local councils which a local council should consult when preparing a coastal management program.

No amendments are proposed to this Schedule, however the ACS queries whether this material might be better placed in the Manual rather than the legislation. The amendment in paragraph **AS1** of Appendix 1 recommends its possible deletion from the Bill.

Schedule 2

This Schedule sets out the constitution of Coastal Council, proposed by the ACS to be renamed the Coastal *Management* Council.

Significant changes to this Schedule are proposed consistent with the proposed new name, newly defined role and augmented functions.

Amendments to Schedule 2 are provided in paragraph **AS2** of the Appendix 1.

Schedule 3

Schedule 3 makes Savings, transition and other provisions. These provisions are for the most part straightforward. However, several matters warrant comment on the ACS preferred position.

The abolition of the Coastal Panel, pursuant to Schedule 3, Part 2 section 3 is supported.

Sch 3, Pt 2 s 4 – Saving of coastal zone management plans

Principal among the saving provisions are those relating to Coastal Zone Management Plans (CZMPs). The future role of these CZMPs is very much at the centre of these Stage Two Reforms. Under the provisions of Schedule 3 Part 2 section 4, these CZM Plans are 'saved' and unless a CMP is adopted before then, these CZMPs will continue to operate, and apply in law up until 31 December 2021 ie in roughly five years.

While the ACS supports the continuation of CZMPs, it does not support these savings and transitional arrangements for CZMPs. The ACS prefers that the legislative provisions for CZMPs are enacted in the 2016 Bill, and has proposed in Appendix 2 provisions which update sections 55 A – 55L of the *CP Act 1979* into new sections 15 – 26 for a new 2016 version of the Bill.

Amendments proposed to Schedule 3 section 4 are shown in paragraph **AS3.4** of Appendix 1.

Sch 3, Pt 2 s 5 – General saving

Under Schedule 3, Part 2 section 5 - General saving, it appears - though the language of the provision is tortured and indirect and the drafting obtuse - that the process (and presumably the Guidelines) for preparing and ultimately finalising CZMPs are saved. Under this provision the status of draft and final CZMPs remain unchanged and the processes of completion, certification, gazettal and commencement of CZMPs continue, as under the *CPA 1979*, until the end of 2021 -- unless a certified CMP is adopted before then.

This approach means that in many council areas effectively both Acts will apply during the next five years. Instead of Councils preparing CZMPs and once they are complete, planning their implementation - a serial process - under the legislative scheme with two Acts operational, councils will now need to develop and pursue parallel paths: completing their CZMP while preparing a CMP.

These problems -- two Acts in operation concurrently and parallel preparation of key documents -- could however be overcome by reconnecting the two strategic documents to recognise that clarifying and articulating the crucial overall long-term plan for a local council area is the role of the CZMP; and the role of the CMP is the effective timely implementation of the CZMP.

The present draft of the Bill appears to confuse this important relationship, and there is no effective connection between the two strategic documents. Rather the Bill attempts to make the 'program for management' a parallel and competing vehicle and process for developing this crucial overall long term plan. This reconnection between the two strategic documents could be achieved by the relevant

provisions of the *CPA Act 1979,* Part 4A, sections 55A – s 55L, being substantially incorporated into the next draft of the Bill for a Coastal Management Act 2016, before the provisions relating to CMPs.

This integration of relevant sections would mean that the provisions of Schedule 3, Part 2 sections 4 – Saving of CZMPs and s 5 – General saving, would be unnecessary, and could be deleted.
See paragraph **AS3.5** of Appendix 1.

Sch 3, Pt 2 s 6 – Certification of pending coastal zone management plans

The substance of the provision of Schedule 3 part 2 section 6 – Certification of pending coastal zone management plans, appears to restate in subsection (1) in the specific case, what was stated in general terms in section 5 – General saving: that the finalisation of draft CZMPs would continue uninterrupted under the provisions of the *CPA Act 1979.* The ACS supports this continuation of the CZM planning process, but believes that the draft provisions of s 6 (1) and (2) are an ineffective way to achieve this continuation. If it is intended that CZMP planning continue as before, this intention should be made explicit.

The provisions of Schedule 3 Part 2 section 6 (3) which state that a certified CZMP made under the *CPA Act 1979* "is taken to be" a CMP under the new Act is not supported by the ACS.

Though closely related in their subject matter, clearly these two strategic documents have different audiences, content, and purposes. This draft provision takes the mistaken view that the CZMP and the CMP are the same, have the same purpose and address the same audience.

The effect of subsection (3) is that for councils complying with the *CPA 1979* with completed CZMPs or plans nearing completion, no new CMP will be required. Because of this deeming provision, the new legislation will not apply to these councils, until and unless the CZMP / CMP undergoes review and the process of amending or replacing it begins, or the Minister triggers the process with a direction under s 13 (1).

Most councils preparing CZMPs will, once their strategic planning is complete, move to prepare a program of implementation based on what has been widely agreed across the local council area, are the priority actions and areas. It would be reasonable to assume that once complete these CZMPs will need to be 'converted' into the form suitable for a CMP. Presumably this will not require a huge additional commitment of time and resources, but the resulting CMP will necessarily look quite different to the CZMP.

It might be observed here that the development and final adoption of the CZMP led by local councils, properly involves the community and especially other local stakeholders in coastal management, in processes of public consultation in order to develop, refine, narrow, then finally choose the range of future options, to define a strategic long term plan of how to manage the coast in that local government area. This is a community based decision on future direction of management, relevant local policies and priorities, facilitated by council staff and ultimately formally adopted by the elected councillors.

The program of implementation is not such a document. Its development is properly the work of the senior officers of council whose paid role it is to implement the decisions taken by the council on behalf of the community. These officers do not need to rethink direction, content or priorities of the Plan, they need to apply their professional management skills and expertise to develop the best program achievable to implement that Plan, and then begin implementation.
So logically, an agreed 'plan' is needed before a program to implement it can be developed.

Because the provisions of s 6 (3) of the Bill do not demonstrate a clear understanding of the distinct ie different natures of the CZMP and proposed CMP, and an appreciation of their serial relationship, they are not supported by the ACS.

The provision Schedule 3, Part 2, s 6 (4) providing an end date for the automatic deeming of certified CZMPs as CMPs is not supported by the ACS, because we do not support such 'deeming. It is not clear why this five year time limit is required when draft s 33 requires the review of the Act and of its provisions' suitability in five years' time.

It is the view of the ACS that the Bill's legislative scheme for coastal management planning and implementation needs a serious rethink, to reinstate the central role of CZMPs, clarify the proper role of the CMP as implementation only, and place the State policy and process framework documented in the proposed *Coastal Management Manual* at the centre. Hence, as noted above, ACS is of the view that Part 3 of the Bill should be renamed 'Coastal management manual, *plans* and programs', and the relevant sections of that Part should be reorganised into that order.

In that Part, provisions relating to CZM Plans ought to be included which facilitate the integration of the policy framework in the proposed State environmental planning policy, into CZMPs.

Provisions to remedy these weaknesses are included in paragraph **AS3.6** of Appendix 1.

Sch 3, Pt 2 s 7 – Temporary coastal protection works

The inclusion of the provisions of Schedule 3 Part 2 draft section 7 – Temporary coastal protection works, continuing the operation of Part 4C (ss 55O – 55Z) is not supported by the ACS.

These provisions continue the prior arrangements whereby ad hoc coastal protection works can be constructed by private landowners, without approval, exempt from any and all otherwise relevant legislation, and where public land may be used for this private purpose – subject to a certificate and Notice being given – without any prior process of environmental impact assessment or public consultation and notwithstanding any prior plan of management !

These are extraordinary and entirely unsatisfactory arrangements in the view of the ACS and are contrary to the widely expressed need to manage the coast using best practice and within an agreed council-led open, transparent strategic planning process.

It seems quite inappropriate to include a reference in draft s 7 (a) to works being on 'private land' when there is a serious basis to believe that such works may not be on private land if they are below mean high water mark (MHWM).

The Government 'committee' process of clarifying the effect in law of the landward movement of the ambulatory boundary of MHWM on coastal land titles originally defined by survey has, if it has even begun, produced no results. Consequently no progress has been made which would determine whether the sites of the temporary coastal protection works are above or below MHWM and thus public or private land

Note that the common law rules, proposed codification, regarding the effect in law of the gradual landward movement of the boundary formed by the MHWM, make it plain that all land below MHWM is Crown land unless the Certificate of title shows that land below MHWM was included in the title at the time it was first registered under the *RP Act 1900.* Under these existing legal rules, coastal protection works at or below MHWM which the landowner may have 'believed' to be located on their privately owned land, may in fact be located on public land owned by the Crown, as the State of New South Wales.

Working through and settling the relevant facts of law in relation to these prior 'emergency' or 'temporary' coastal protection works would greatly simplify the coastal management process for many local councils and would perhaps obviate the need for provisions such as draft s 7.

It is the view of the ACS that the appropriate legislative provisions relating to 'temporary coastal protection works' should do three things:

- repeal sections 55O and 55T of the *CPA Act 1979* to extinguish the legislative basis for any future 'temporary' works on either private or public land;
- provide a new statutory non-extendable time limit to the lawful continuation of existing 'temporary' works of one year from the commencement of the new Act, based on s 55VA; and
- re-make the relevant provisions regarding the mandatory removal of all 'temporary coastal protection works once the statutory time limit has expired, based on ss 55VC.

Until the location of existing temporary coastal protection works can be authoritatively determined -- using existing common law legal principles -- to be in fact private land, no confidence can be placed in legislative provisions which preserve or perpetuate a potentially erroneous assumption that land below MHWM is private land.

Significant amendments to draft s 7 recommended by the ACS are included at paragraph **AS3.7** of Appendix 1.

Sch 3, Pt 2 s 8 – Savings of certain directions

The substance of this provision, Schedule 3 Part 2 section 8 – Saving of certain directions is not supported by the ACS.

As presently drafted the effect of this 'saving' is not to save the direction to prepare a CZMP. Its effect is to convert a direction to prepare a CZMP under s 55B of the *CPA Act 1979* into new direction to prepare a CMP under draft s 13 (1) of the Bill. Thus the original direction is not 'saved'.
The knock on effect of this provision is that a council which has received a direction under s 55B, whose draft CZMP is not yet ready for submission for certification – and hence covered by s 6 (1) – is effectively directed to stop work on the CZMP and instead must start to prepare a CMP.

Alternatively the council could elect to comply with both directions and attempt to prepare a CMP in compliance with a converted direction under this section of the Bill, while it is finalising its CZMP under the earlier direction. Though theoretically possible, realistically such a parallel process is unlikely given most councils' limited time, money and staff resources, so such a council's decision is more likely to be to discontinue work on the CZMP, and redeploy resources to draft a CMP.

As explained above this draft provision is the product of a mistaken understanding of the different nature and role of the CZMP and the CMP. Further, this more likely outcome undermines the utility of continuing the CZM planning process and the general saving of draft CZMPs.

This provision creating an automatic conversion of an earlier Notice into something else would not be required if the Minister simply issued a new and fresh direction under draft s 13 (1) to local coastal councils (which require it) directing them prepare a CMP. Then there would be no confusion over what the direction under s 55B of the old Act means, and how a direction under s 13 (1) of new Act affects the continued preparation, and ultimately the certification, of CZMPs.

It is the view of the ACS that this provision can be simply rendered unnecessary by appropriate administrative action, in the giving of a new Notice by the Minister under draft s 13 (1). Hence the amendment recommended for this section in paragraph **AS3.8** of Appendix 1 is for its deletion.

Schedule 4

In Schedule 4 – Amendment of Acts and instruments several important consequential amendments to other Acts and instruments are made.

Schedule 4.1 Amendments to Environmental Planning and Assessment Act 1979

Foremost among these are a series of amendments to the *Environmental Planning and Assessment Act 1979* (NSW) which seek to do three things:

* allow the imposition of conditions on the construction of coastal protection works, to require their maintenance, and or removal and restoration of the beach and adjacent land;

* provide for additional Orders and enforcement mechanisms for coastal related offences under the *EP&A Act* and

* allow the referral of a development application for coastal protection works to a Joint Regional Planning Panel properly constituted for that purpose.

The ACS supports these provisions but has concerns about other matters in Schedule 4.1.

The ACS does not support clause [1] of Schedule 4.1 which deletes from a consent authorities consideration, when evaluating a development application under s 79C (1) (a), an important and highly relevant item being "(v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979)"*.

In the view of the ACS considering the provisions of an existing CZMP should continue to be a valid matter for councils to have regard to when evaluating a development proposal and deciding whether to grant development consent, and attach appropriate conditions, to determine a development application. In our view clause [1] of Schedule 4.1 should be deleted.

The deletion of the requirement under s 89J for a Ministerial concurrence under Part 3 of the *Coastal Protection Act 1979* for State significant development in or affecting the coastal zone, proposed by clause [3] of Schedule 4.1 is also not supported by the ACS.

Similarly, the ACS does not support clause [4] of Schedule 4.1 which deletes from consideration of a proposal for state significant infrastructure, the requirement under s 115ZG for a concurrence under Part 3 of the *CPA Act 1979.* In the view of the ACS such a consideration is still both desirable and necessary to ensure that state infrastructure development does not ignore and or damage important areas of the NSW coast, or adversely affect its coastal processes.

Moreover, it might be apposite here to ask why and to what extent is State Government investment in state significant infrastructure being planned for the coastal zone? In the view of the ACS it ought to be the NSW Government's policy to minimise or avoid the construction of new state significant infrastructure at risk of coastal hazards and climate change impacts generally.
If there is no concurrence role involving the relevant Minister, how will a consent authority be able to ensure that this is done?

Clauses [5] – [16] of Schedule 4.1 are not objected to by the ACS.

Amendments to Schedule 4.1 are proposed by the ACS in paragraph **AS4.1** of Appendix 1.

Schedule 4.2 Amendments to Environmental Planning and Assessment Regulation 2000

The ACS supports the amendments proposed by Schedule 4.2 of the Bill to the *Environmental Planning and Assessment Regulation 2000.*

The ACS notes that the use of the term 'coastal council' in clause [1] of Schedule 4.2 in this way and its definition under s 3 of the *Regulation*, has the potential to be confused with the new body proposed to be constituted under s 24 of the Bill.

The existence of and use of this term in this context provides, in the view of the ACS, further support for its recommendation made in its comments on draft s 24 above, that the proposed new body be renamed the Coastal *Management* Council, to prevent confusion.
Note though that the date of the new Act will need to be given as 2016 not 2015.
No amendment to Schedule 4.2 is proposed by the ACS.

Schedule 4.3 Amendments to Land and Environment Court Act 1979

The ACS queries the amendments made by Schedule 4.3 to s 20 Class 4 - which deletes the name of the *Coastal Protection Act 1979*, and inserts the name of the proposed new Act. (Note that the date of the new Act will be 2016 not 2015, as given).

In ACS's view it may be premature to delete the reference to the *CPA Act 1979* in this section of the *Land and Environment Court Act 1979* at this time, given that several of the provisions of the new Act have the effect of preserving and continuing relevant sections of the old Act.

It is possible that this concern might be addressed by discontinuing the deletion of the *CPA Act 1979,* and instead only insert the name of the new Act, before its appearance in the list of 'environmental laws' given in s 20 (3) (a).

An amendment to Schedule 4.3 is proposed by the ACS in paragraph **AS4.3** of Appendix 1.

Schedule 4.4 Amendments to Local Government Act 1993

The ACS supports most of the series of largely minor amendments proposed to the *Local Government Act 1993* (NSW) [see Sch 4.4, p31]. These amendments are to facilitate the "making and levying of annual charges for coastal protection services" and related purposes, see clause [2] and [3]; and to continue and update section 733 of the *LG Act 1993,* to provide local councils with statutory exemption from legal liability on coastal management matters, where they act in good faith, see clauses [5] – [12].

Generally speaking, both this cost recovery and continued exemption for local councils who 'act in good faith', are desirable and their inclusion is appropriate in the view of the ACS.

Three amendments to Schedule 4.4 are proposed by the ACS.
i) The name of the new Act in clause [5] and wherever it appears, must be given as 2016.

ii) The ACS does not support the provision of clause [6] of Schedule 4.4 which deletes the current s 733 (3) (b), which provides councils with an exemption from liability for "the preparation or making of a coastal zone management plan, or the giving of an order, under the *Coastal Protection Act 1979*".

It is our view that this exemption from liability should remain in place. This is logical because CZMPs are saved by the Bill and councils will need to continue to prepare, make and implement existing or nearly completed CZMPs into the foreseeable future.
To achieve this continued exemption clause [6] should be amended to delete the words 'Omit the paragraph. Insert instead:"' and replace this with 'After current s 733 (3) (b) insert as (b1)'.

iii) The ACS does support the provision of clause [6] of Schedule 4.4 which inserts a new provision providing exemption to councils for "the preparation and adoption of a coastal management program under the Coastal Management Act".

It is our view that this new exemption from liability relating to a CMP can be inserted without the deletion of the current s 733 (3) (b). Further, this draft provision could be improved by inserting the words "and implementation" after the word 'adoption', so that it reads "the preparation, adoption *and implementation* of a coastal management program under the Coastal Management Act". As noted above this new provision proposed by clause [6] of Schedule 4.4 should be renumbered as s 733 (3) (b1).

Amendments to Schedule 4.4 are recommended in paragraph **AS4.4** of Appendix 1.

Schedule 4.5 Amendments to Rural Fires Act 1997

The ACS supports the provisions of Schedule 4.5 which amend the *Rural Fires Act 1997.*
No amendments to Schedule 4.5 are proposed by the ACS.

End of comments on the draft provisions of the CM Bill 2015.

In the following section comments are provided on important public policy matters directly related to coastal management in New South Wales, which are missing from the draft Bill for legislation intended to guide coastal management in the state for the foreseeable future.

Provisions missing from the Bill

Resolution of ambiguity regarding effect in law of landward movement of MHWM

In ACS's view the Bill misses an opportunity to include provisions which address the present ambiguity and continuing uncertainty regarding the effect of the landward movement of the boundary formed by the mean high water mark (MHWM), under the doctrine of accretion, on property boundaries of coastal land titles originally defined by survey.

Though the NSW Government promised it would clarify the legal effect of the ambulatory boundary in preparing of this Bill, the absence of any reference to this phenomenon indicates that it has not done so. Indeed it appears that a written pre-election commitment by the Baird Government to resolve this uncertainty in the Stage Two coastal reforms has not been honoured.

In the view of the ACS this omission should be remedied by the insertion of a new section 'Codification of common law rules' which unambiguously declares the existing common law and thus resolves all ambiguity on this matter.

Amendments to s 28, in the form of additional provisions which provide this long awaited clarification of the effect in law of the landward movement of the ambulatory MHWM and related matters are included in paragraph A28 of the Appendix.

Concomitant provisions for local councils

Further, relevant provisions might have been included in the Bill which outlined the process for local councils to identify via the CZMP process, land titles of coastal properties affected, or likely to be affected, by the landward movement of the ambulatory MHWM boundary, and to provide formal notice of this affect to the Land Titles Office once Council adopts the CZMP. Alternatively, this giving of council Notice to the LTO could occur when council officers next issue a Planning Certificate under s 149 of the *EP&A Act 1979* which advises an owner or a potential purchaser of the impact of coastal hazard on the property title.

***A*mendments to the *Real Property Act 1900* (NSW)**

Other provisions might also have been included in the Bill's Schedule 4 to amend the *Real Property Act 1900* (NSW) and the Practice of the Land Titles Office to set out the procedures to be adopted by the Registrar General of Land Titles once notified by a local council, to authorise annotation of the folios of the relevant land titles, to require a fresh survey at the time of next dealing, and where appropriate amend the land title description, and any affected boundary of the property, to correct any error created 'post facto' by the landward movement of the ambulatory MHWM, and ultimately to extinguish the land title of any property when it is wholly lost to the sea.

Assisted relocation a.k.a. planned retreat

Also missing are any provisions for policy initiatives to assist councils which have adopted 'planned retreat' strategies in line with NSW Government advice, but now possess little or no capacity to further assist residents affected by the onset of destructive coastal hazards.

A voluntary Crown land exchange scheme which could do this, was suggested for the next round of 'reforms', via a statutory scheme that would connect existing, but currently disconnected, state government powers, facilities and programs. (See Corkill 2013, 'Getting real about shoreline recession'). However the potential 'game-changer' for residents and councils caught in 'coastal squeeze' that the idea for this scheme represents, remains unrealised and un-activated.

Regrettably such provisions were not included. Thus the Bill in its current form is a lost opportunity to craft a scheme that could to help residents whose homes are likely to be lost to the sea…

II. Comments on the draft *Coastal Management Manual*

In addition to comments on provisions in the Bill relating to the Manual's framework and authorisation, made above, some further brief remarks regarding the contents and proposed use of the Manual are considered appropriate.

These comments on the draft *Coastal Management Manual* are necessarily preliminary only since only a very brief review of the draft material available online has been possible to date.

The 'new' manual mandated in Part 3 (3) of the Bill is in many ways the most significant part of the Government's Stage Two coastal reforms. Part of that significance is the Government's acknowledgement that global climate change is real, happening now, affects the coast of NSW in particular ways, and must be factored into future plans. This is welcomed by ACS.

More significant is the Manual's clear indication that the State government accepts that it has an enduring role in coastal management. The Manual provides an ideal framework for the Minister to spell out the best practice in coastal management to guide local councils in the preparation of key coastal management documents: their CZMPs and CMPs.

The ACS understands that the Manual, when finalised, will provide a core set of "mandatory requirements and essential elements" as Part A, a restatement of the revised process for preparing a CMP, as Part B, and a Toolkit as Part C which will assist councils by allowing them to select appropriate measures for use in their CMPs. This new version of the Manual will build on and update the form and content of valuable resource material from the original 1990 edition. The ACS supports in principle this proposed structure for the Coastal Management Manual 2016.

It is understood that once finalised, the Manual is to be co-published, with (most of) it in print and an updated, supplementary version, which gives access to key digital maps, etc available online. The ACS supports this approach because there's more chance the Manual will be in reach, up-to-date and ready to be easily used.

However while the elements of Manual currently released - Parts A and B - describe the contents and processes necessary for the preparation of CMPs, it does not provide any guidance on the relationship of the CMP to the CZMP, nor does it describe how, if it is appropriate, to adapt the work undertaken and the progress made in developing a Coastal Zone Management Plan for use in a CMP.

Much of the Content of Part A reproduces the content of Part 3 of the Bill. In the view of the ACS this development of the Manual's guidance on the preparation of CMPs is probably premature given the legislation has not even been introduced into Parliament. It is possible that substantial further changes in a 2016 Bill will require reworking of the ambit of the Manual. In particular, the ACS is of the view that the re-issue of the Manual provides an excellent opportunity to refresh and revise the requirements for preparation of CZMPs, to more seamlessly integrate the coastal planning of CZMPs with the heighten focus on adopting a program of implementation.

In the view of the ACS the final revised version of the Coastal Management Manual should include updated *Guidelines* for the preparation of CZMPs.

The material provided in Part B Stage 4 is obviously incomplete, so informed comment on it is not possible at this time. Further, ACS members have undertaken only a limited review of material available on line as part of proposed Part C and offer no substantive comments at this time.

The ACS is willing to further review a more advanced version of the draft Manual once the legislation has been enacted and the relationship between CZMPs and CMPs has been clarified.

III. Comments on the *EIE* for the proposed Coastal Management SEPP

In some senses the proposed *Coastal Management SEPP (CM SEPP)* is the most powerful element of the coastal management package, because it does not depend on the passage or content of the Bill. It is also the least 'known' element because, though there is a glossy booklet has been produced, no draft *CM SEPP* was released, consultation has not commenced and the SEPP's crucial maps are yet to be drawn.

The booklet *Coastal Management State Environmental Planning Policy – Explanation of Intended Effect* – hereafter the *EIE* - outlined the scope and effect of the proposed new SEPP and provided some detail on what it will replace, what it will include and what it will aim to do.

General comments on the substance of the *EIE*

The ACS congratulates the Minister and the Government for its stated willingness to continue the protection of SEPP 14 coastal wetlands and SEPP 26 littoral rainforests.

Further, The ACS is delighted to support the proposal to extend the 100m buffer, currently applicable to littoral rainforests, around areas designated as coastal wetlands.

Criteria for mapping localities as part of the proposed 'coastal wetlands and littoral rainforest area' have not been released but there is a strong case for them to be enlarged to include other types of high conservation value coastal native vegetation. This would be in line with the recommendations adopted by Minister Stokes recently to direct five far north coast councils to include in their LEPs' Environmental Zone 2 (known as E2 – Environmental Conservation) areas which are verified as containing SEPP 14 wetlands and SEPP 26 littoral rainforests, plus Endangered Ecological Communities listed under state or federal Acts, Key Threatened species' habitat, over-cleared vegetation communities and lands identified as culturally significant by Aboriginal communities.

Further, other coastal native vegetation of conservation significance such as mangroves, salt marshes and seagrasses, should be recognised and considered for protection within the proposed coastal *conservation* area.

A slightly wider scope for the criteria for mapping this area could also give effect to the Healthy Rivers Commission Report from 2002 which identified 15 coastal lakes and lagoons, and their catchments as requiring 'comprehensive protection' (see list in *EIE* p 31). Rather than being a dangling Schedule 1 to the proposed SEPP, it may be more appropriate for the catchments of the listed coastal lakes and lagoons, to be added as a further criterion for this coastal *conservation* area, and the beds and waters of the lakes and lagoons to be included within the ambit of the suggested coastal *waterbodies and environs* area.

Doing so would justify the new name 'coastal *conservation* area' and enable a better integration of the *CM SEPP* with a local council's CZMP, CMP and its local planning instrument, typically an LEP. This would align with a key goal of these Stage Two coastal reforms: to simplify, flatten and integrate coastal and LEP strategic planning without fundamentally weakening either, or both, and producing dud plans.

This re-working of a wetlands / rainforest area into a more broadly defined 'coastal conservation area' using a supplemented Zone E2 criteria, and the results of the 2002 HRC Report is considered vital.

The ACS notes that the *EIE* advises that *SEPP # 71 - Coastal Protection* (2002) will be absorbed into the proposed new *CM SEPP* and observes that the fate of its various provisions are outlined in the *EIE* booklet [see p 28-9]. We note too that relevant parts of the *Infrastructure SEPP* (2005) will also be

transferred to the new SEPP, an entirely appropriate move - because it will close a 'back door' for ad hoc 'interim' coastal protection works outside of the strategic CZMP process.

The ACS supports these intentions to transfer relevant provisions from these instruments into a new *CM SEPP* but must reserve its judgment on the suitability of the content of the proposed *CM SEPP* until an actual draft of the SEPP is released for public review.

The ACS appreciates that the *EIE* for the *CM SEPP* makes it clear that there will be no future pathway for consent for 'emergency' or 'temporary' coastal protection works by private landholders, with or without consent [see p 22 -24]. Further, we note that proposals for new 'permanent' coastal protection works by private landowners remain possible, whether included in a CMP or not, and that these works will require council or JRPP consent [see p 23].

Further the ACS supports the clear intention in the *EIE* that those legacy works - 'emergency' or 'temporary' coastal protection works constructed without approval under the prior legislative framework - will be removed within 2 years of their construction, voluntarily or compulsorily [see p 24]. These 'reforms' as indicated by the *EIE* are the most valuable features for the proposed SEPP because they reinstate the need for a strategic, integrated approach to coastal zone management and the construction of coastal protection works.

However, the indication of this encouraging reform in the *EIE* is not reflected in the draft Bill whose provisions, regrettably, propose to continue in force the existing provisions relating to 'temporary coastal protection works' (see Schedule 3, draft section 7). This inconsistency must be resolved.

According to the *EIE* the proposed coastal management SEPP will 'carry forward' the goals of the 1997 Coastal Policy [see p 29]. This is desirable in the view of the ACS because they remain largely valid still, are known and understood by the coastal management community and their revival provides continuity with previous policy statements. How these 12 goals will be reflected in the text of the new instrument is unknown at this stage, because while they are listed, how they will function in the proposed SEPP is not explained.

As is well known, "the devil is in the detail" so until a draft of the *CM SEPP* is released for public comment it is difficult to know if these positive indications of its content will ultimately be fulfilled.

13 Questions in the *EIE*

Usefully, the *EIE* booklet poses 13 questions seeking considered responses on key matters yet to be finalised [see p 11-24]. In the next section the ACS provides its responses.

Question 1: Should councils be able to propose changes to the maps for all or some of the coastal management areas?

Yes but only after the expiry of a minimum no-change period of 3 years from the publication date of the SEPP, and subject to appropriate oversight by the NSW Coastal Management Council so as not to lose the integrity of the intent of the areas.

Only finally adopted LEPs should be able to amend these maps, and only if the amending instrument sets out a reason for changing the existing map(s) and a justification for the proposed amendment.

Q 2: Should the development controls be included in the proposed Coastal Management SEPP or as a mandatory clause in council LEPs?

Development controls for 'coastal management areas' should be included in the proposed *CM SEPP*, not as a mandatory clause in council LEPs.

How mandatory clauses could be inserted into councils' existing adopted LEPs is not known, but this approach would obviously constitute or require an amendment to the LEP and trigger the formal processes for amending a LEP. In the view of the ACS it is more likely that the path of including 'mandatory' clauses in council LEPs would require the co-operation of local councils. This approach could fall foul of councils opposed to the proposed development controls *per se*, or hostile to the imposition of mandatory controls by the Department. This latter scenario could lead to the inclusion of development controls in LEPs only at the discretion of local councils: an option that would not ensure their consistent and timely application in all coastal council areas.

Q3: Do the proposed development controls for mapped coastal wetlands and littoral rainforests remain appropriate for that land?

No. The current and proposed development controls for these areas permit a wide range of development in coastal wetland and littoral rainforests, if an Environmental Impact Assessment has been prepared for the development proposal.

The continuation of even the prospect of consent for development in these areas should be extinguished, and a clear statement made that no new developments of the type listed on page 14 of the *EIE* will be permitted within these areas. Works which are not development, such as weed control and native vegetation restoration should, of course, remain permissible activities.

Q4: Do you support the inclusion of a new 100m perimeter area around the mapped wetlands, including the application of additional development controls?

Yes. The extension of a new 100 m buffer around mapped coastal wetlands is supported by the ACS. Hydrological connectivity at the perimeter of wetlands has long been recognised as being crucial to their long-term survival. In our view, no new development should be permitted within this buffer area. Weed control and native vegetation restoration works should remain permissible activities in these buffer areas.

Q 5: Are the proposed development controls for the mapped coastal vulnerability areas appropriate for that land?

Yes. The development controls currently proposed for such an area, on page 17 of the *EIE,* are considered appropriate and are supported by the ACS

Q6: Are the proposed development controls for coastal environment areas appropriate for that land?

The proposal for a 'coastal environment area' is not supported by the ACS. Rather the ACS recommends that these areas be renamed 'coastal water bodies and environs area'.

The development controls currently proposed for this area, on page 18 of the *EIE,* are considered generally appropriate, but the test of council 'considering the extent to which the development" has the potential for adverse impacts on these coastal values is not supported by the ACS.
A consent authority's consideration of the "extent to which the development" does or doesn't do certain things is a weak low-bar test and an ineffective development control.

As these development controls are presently expressed, a council could 'consider' the extent to which the proposed development achieves these protections, conclude that the development does poorly against these criteria and still be able to grant development consent.

In our view the development controls ought to be expressed in unambiguous terms and apply in such a way that a consent authority must not grant development consent to development on land within this area, if the consent authority concludes that the proposed development

- is likely to cause adverse impacts etc
- is likely to impact on geological and geomorphological coastal processes, etc.
- does not adequately protect and preserve native coastal vegetation;
- does not preserve undeveloped headlands etc
- does not appropriately protect Aboriginal cultural heritage and places;
- does not incorporate water sensitive design etc.

In our view a re-write of the development controls for this area, along these lines, is required.

Q7: Is the inclusion of the catchments of the 15 sensitive lakes (listed in Schedule 1) within the coastal environment area appropriate?

The protection of fifteen HRC identified sensitive coastal lakes and their catchments is appropriate and is supported by the ACS.

However, the inclusion of these areas in the proposed 'coastal environment area' is not considered appropriate and is not supported by the ACS.

These catchments should be afforded the highest level of protection possible and included in the areas proposed to be mapped as a coastal *conservation* area.

Q 8: Which is the best option for mapping the coastal use area? Is the proposed approach to mapping the coastal use area for the Sydney metropolitan area appropriate?

The use of distances such as 1km or 500m are completely arbitrary and based on substantial evidence whatsoever. ACS would like the Department of Planning and Environment to produce evidence to show that such distances are either appropriate or inappropriate and result in good outcomes. Crucially the planning controls in this part of the coastal zone must strike the correct balance between being restrictive and being permissive i.e. the level of the development control must be commensurate with the development proposed and the coastal management objectives.

In the view of the ACS the best option for defining the 'coastal zone' is option 3 because it provides greatest continuity which the previous definition of the 'coastal zone'.

The proposed approach to mapping the proposed coastal *development* area in the Sydney metropolitan areas is considered appropriate. However the terms 'land affected by or affecting coastal processes' are not defined and could conceivably include the extent to which wind-blown sand travels, or salt spray. The ACS supports a generally smaller coastal *development* area in urban areas than say for peri-urban or rural areas.

Q 9: Should councils be able to propose variations to the Coastal Use Area maps over time to take into account local characteristics and circumstances?

Yes, subject to some important provisos. Councils should be able to propose variations to 'coastal *development* areas' over time. However these variations should not be permitted by the Department to encompass reductions in proposed coastal *conservation* areas. All proposals for variations ought to be supported by reasons why the status quo is no longer appropriate, why the proposed variation is necessary and a statement demonstrating consideration has been given to the likely implications flowing from the variation sought.

Q 10: Are the proposed development controls for the mapped coastal use areas appropriate for that land?

The proposal for a 'coastal use area' is not supported by the ACS since all areas of the coastal zone are subject to public uses. This name is considered to be indistinct and inappropriate and the ACS recommends that these areas be renamed 'coastal *development* area'.

The development controls currently proposed for this area, on page 19 of the *EIE,* are considered generally appropriate, but the test of council 'considering the extent to which the development" does or doesn't do certain things is not supported by the ACS.
As noted above, a consent authority's consideration of the "extent to which the development" does or doesn't do certain things is a weak low-bar test and an ineffective development control.

The ACS would prefer that the development controls for coastal *development* areas be expressed in more definite terms viz:

A consent authority must not grant development consent to development on land within this area, if the consent authority concludes that the proposed development

- does not maintain or enhance public access etc
- exceeds the scale and size of existing buildings etc
- does not incorporate measures to maintain or improve amenity of the foreshore etc
- does not protect visual amenity and scenic qualities of the coast
- does not appropriately protect Aboriginal cultural heritage and places.

In ACS's view a re-write of the development controls for this area, along these lines, is required.

Q 11: Should the current exempt development and complying development provisions be retained for coastal management areas?

Yes. However the Department must ensure that exempt and complying provisions for these areas have been adequately assessed to ensure the objects and provisions of the *Coastal Management Act 2016* are furthered.

Q 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?

No. See our comments in answer to Q3 above. No new development of any kind which disturbs these areas of coastal native vegetation or the catchments of sensitive coastal lakes should be permitted at all. Coastal *conservation* areas should be subject to minimal disturbance, and leaving assessments of complying development in these areas up to certifiers is less than optimal and counter-intuitive.

Q 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 individual or public authorities?

No. No provisions should be retained for emergency coastal protection works in emergency situations. 'Emergency works' are, in ACS's view, a discredited concept, which are incompatible with strategic integrated approach to coastal zone planning to address foreseeable risks. Emergency situations should not mandate any new *ad hoc* unapproved 'emergency works' because in reality 'emergency situations' are only created by those who ignore the strong likelihood or foreseeable potential for storms to activate and or exacerbate coastal hazards, and deliberately failure to plan for this inevitability..

All planning and approvals for all coastal protection works should be carried out under the relevant provisions of the *Environmental Planning and Assessment Act 1979.*

Every limitation possible, including an explicit 'ban', should be put on all so-called 'emergency works' whether they are being undertaken by private individuals or public authorities.

IV. Comments on the proposal for a Ministerial Direction under s 117

The ACS is of the view that the issue of a formal Ministerial Direction to local councils under s 117 of the *EP &A Act i*s entirely appropriate because it will provide a simple and direct means of the Minister directing local councils to consider the *CM SEPP.*

What the Minister will direct Councils to do is not known because a draft s 117 Direction has not been released. It must to do more however than direct councils "to have regard to" the SEPP when they are preparing their strategic plans, because it ought to be more than simply 'advisory'. Appropriate wording which requires councils to do more than 'look at it' or 'take it into account' is warranted.

The Direction ought to adopt language which directs councils in familiar terms and stipulates that Councils must act ways that are 'in compliance with' or 'consistent with', or even 'not-inconsistent with' the SEPP, so it is clear its provisions apply mandatorily, in transparent ways.

Conclusion

Overall, the draft Bill and other elements of the coastal reforms Stage Two released in 2015 have serious merit.

A number of possible amendments which would improve the Bill have been foreshadowed and it is further hoped that the incorporation of many of them into a revised Bill, to address reasonable concerns, will expedite its passage through the Parliament with wide cross-party support.

A key focus of these Amendments must be to clarify the roles and relationship of CZMPs and the proposed new CMPs. In our view the Bill suffers from a lack of clarity on these central matters.
A major re-think on these matters and the re-drafting of many Parts of the Bill are recommended.

The commitment to re-constitute a Coastal Council, perhaps as a Coastal *Management* Council is much appreciated because it will increase the focus on coastal management and assist local councils, and other stakeholders in the journey towards ecologically sustainable management of the NSW coast.

However, the clarification of appropriate statements of the new Council's role, membership and functions for inclusion in the Bill remain the single largest area of concern to the ACS and requires serious re-consideration by government.

There are many positive indications, in the *EIE* especially, which the ACS hopes will be realised as drafts of the SEPP and ministerial direction are produced, circulated, refined and finally made and issued.