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Margo Fraser
Peter Robinson

[redacted]
Rose Bay NSW 2029

[redacted]

[redacted]

Coastal Reforms Team
Office of Environment and Heritage
PO Box A290
Sydney South
NSW 1232

Email: coastal.reforms@environment.nsw.gov.au

Submission - Draft Coastal Management Bill 2015 and related documents

Thank you for the opportunity to submit comments on the Draft Coastal Management Bill 2015 ("draft Bill") and related documents, currently being promoted by Hon Rob Stokes, Minister for Planning, recently released, in November 2015, along with a number of other documents for public consultation.

While it is intended that the draft Bill, if passed by Parliament, will repeal and replace the current Coastal Protection Act 1979 ("current Act") and regulations (and consequential amendments), there appears to be no explanation as why the Government thinks that the existing law is not working sufficiently to explain the need for new legislation.

For reasons indicated below, the Minister may be seeking to avoid the requirements of section 65 of the current Act which require him to review the current Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. He is required to table a report of the outcome in each House of Parliament by 27 October 2016.

The draft Bill is a significant departure from the current Act in terms of intent and purpose.

The objects of the current Act in section 3 are to provide for the protection of the coastal environment of the State for the benefit of both present and future generations and, in particular:

(a) to protect, enhance, maintain and restore the environment of the coastal region, its associated ecosystems, ecological processes and biological diversity, and its water quality;
(b) to encourage, promote and secure the orderly and balanced utilisation and conservation of the coastal region and its natural and man-made resources, having regard to the principles of ecologically sustainable development; and

(c) to recognise and foster the significant social and economic benefits to the State that result from a sustainable coastal environment, including benefits to the environment, to urban communities, fisheries, industry and recreation, to culture and heritage, and benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water;
(d) to promote public pedestrian access to the coastal region and recognise the public's right to access, and
(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;
(f) to recognise the role of the community, as a partner with government, in resolving issues relating to the protection of the coastal environment;
(g) to ensure co-ordination of the policies and activities of the Government and public authorities relating to the coastal region and to facilitate the proper integration of their management activities;
(h) to encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise, and
(i) to promote beach amenity.

The objects of the draft Bill declared in clause 3 are "to manage the coastal environment of New South Wales consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State", and whilst playing lip-service to enhancing natural processes and environmental issues introduces the need to recognise vital economic zones and sustainable economics, coastal development and planning decision making, coastal assets (although not defined, essential infrastructure is defined in clause 4). The draft Bill is concerned with infrastructure and development. This is a significant departure from the current Act's coastal protection objectives (refer below).

Fundamental changes to existing law:
The object of the current law in the Coastal Protection Act is to protect the "coastal environment" of the State for present and future generations and to protect and maintain the coastal region and its use and occupation. The draft Bill has, by sleight of hand, changed the concept of the "coastal environment".

The current law defines the coastal region to include the coastal zone which consists of the area between the western boundary of the coastal zone shown on the maps outlining the coastal zone and the outermost boundary of the coastal waters of the State. The coastal waters of the State extend, generally, to 3 nautical miles from the coastline of the State.

Central to the current definition of "coastal zone" and coastal region and coastal environment are "the maps" outlining the coastal zone in section 4A. The Minister, in approving the maps, is required by law to apply the following principles to the determination of the western boundary of the area to be included in the coastal zone as referred to in subsections (2) and (3):
S4A(3)
(a) the boundary is to be generally one kilometre landward of the western boundary of the coastal waters of the State,
(b) the boundary is to be generally one kilometre landward around any bay, estuary, coastal lake or lagoon,
(c) the boundary is to follow the length of any coastal river inland generally at a distance of one kilometre from each bank of the river:
(i) to one kilometre beyond the limit of any recognised mangroves on or associated with the river, or

(ii) if there are no such recognised mangroves—to one kilometre beyond the tidal limit of the river,

(d) the boundary is to be shown to the nearest cadastral boundary or easily recognisable physical boundary (determined in consultation with relevant councils),

(e) the boundary is to exclude:

(i) those parts of the local government areas of Pittwater, Warringah, Manly, Woollahra, Waverley, Randwick and Sutherland that are not, and are not likely to be, affected by and that do not, and are not likely to, affect coastal processes, including coastal wave and wind action, and

(ii) the waters of Sydney Harbour and Botany Bay.

NB: as stated in the second reading speech to the 2002 amendment, the excluded parts are not/not likely to be affected by coastal processes.

In short, under the current law, the coastal zone area is that area plotted on or depicted in the series of (approved) maps taking in the entire open seas coastline of NSW. In contrast, that clarity and precision is abandoned in the draft Bill, and by inclusion of a number of vague definitions in the draft Bill by a sleight of hand, the Bill brings in vast areas not forming part of the traditional coastal area under the new proposed law, including Sydney Harbour.

The draft Bill defines the *coastal zone* by reference to land comprised of coastal areas identified by a State Environmental Planning Policy: this proposed new Coastal Management SEPP has not been and may not be made available by the Minister or his Department until after the Bill is passed. Maps of the coastal management areas have also not been made available.

Note: The NSW Coastal Management Reforms Newsletter dated 25 February 2016 has, at this late stage, altered the parameters for public consultation. It is not clear in the last sentence of the last paragraph thereof if it is the Government's intention not to progress the draft Bill until the completion of the second stage of the public consultation which will give the public an opportunity to comment on the full draft Coastal Management SEPP and maps of the coastal management areas. It would not be open government to attempt to pass the draft Bill to permit the new SEPP and the maps without Parliamentary scrutiny of them.

It is not possible to provide a comprehensive submission or commentary on the draft Bill in the absence of the new Coastal Management SEPP and the maps which will be instruments used to develop the coastal areas of NSW. The second public consultation must provide for commentary on the finalised draft Bill together with the new Coastal Management SEPP, maps of the coastal management areas, as well as the new Coastal Management Manual. It appears as if the Government is seeking to avoid uniform commentary on the combined effects of the draft Bill, new SEPP, maps and manual. This is not open government.

The draft Bill's definition of *coastal zone* does not provide all stakeholders with legally defensible boundaries that will improve administration over NSW's offshore jurisdiction and

minimise the potential for litigation. Furthermore, under the draft Bill, local councils will be able to alter the extent of the coastal zone by way of increase or decrease without limit.

The current law: Recognition of need for specific exclusions from definition of coastal zone

Previously under the Coastal Protection Act 1979 the coastal zone to which the Act applied and defined excluded the urban regions of Sydney Newcastle, Illawarra and Central Coast. Pursuant to a 2002 amendment, by the removal of the old section 4A (3) (e) and insertion of a new section 4A (3) (e) (i) and (ii), the definition of coastal zone was extended to include additional land along the open sea coastal area between Shellharbour in the south and Newcastle in the North, and the open sea coastal area of Sydney. (Additional maps were gazetted in 2005).

Notwithstanding the extension of the "coastal zone" along the open sea coastline of NSW in 2002, the harbour areas of Sydney Harbour, its tributaries and Botany Bay continued to be excluded pursuant to s4A (3) (e) (i) and (ii) of the current Act. These specific exclusions recognise that these areas are not being affected by the coastal processes or the challenges of the open sea coastline in NSW. The areas that continued to be excluded specifically were parts of the local government areas of Pittwater, Warringah, Manly, Woollahra, Waverly, Randwick and Sutherland, that are not and are not likely to be affected by coastal processes including coastal wave and wind action. The waters of Sydney Harbour and Botany Bay continued to be excluded from the coastal zone.

The specific exclusions from the definition of coastal zone in the current Act pursuant to s 4A(3)(e)(i) & (ii), including Sydney Harbour, also recognises Maritime Services' traditional authority over the harbour pursuant to relevant Maritime legislation. The exclusions serve not to impinge on Maritime's jurisdiction. The reasons for Sydney Harbour's continued exclusion from the definition of "coastal zone" in the current Act includes the recognition by the State Government that, due to the strategic defence and security requirements of Sydney Harbour, the State needed to maintain the position of having one authority over Sydney Harbour (refer below).

Harbour security issues:

Up until now, Maritime Services has had authority (pursuant to maritime legislation[1]) over Sydney Harbour and its tributaries from below the mean high water mark. The 13 local councils dotted around Sydney Harbour and its tributaries and, Botany Bay have had authority above the mean high water mark.

> [1. For the purposes of s105 *"Port Boundaries*" of the Ports and Maritime Administration Act 1995, clause 40 *"Boundaries of Ports"* of the Ports and Maritime Administration Regulation 2012 defines the authority of Roads and Maritime Services and the Ports Authority of NSW as extending from below the mean high water mark of Botany Bay, Clarence River (Yamba), Eden, Newcastle Harbour, Port Kembla and Sydney Harbour]

The specific exclusions from the definition of coastal zone in the current Act pursuant to section 4A(3)(e) including Sydney Harbour, recognised Maritime Services' long held authority over the harbour pursuant to relevant Maritime legislation and did not impinge on Maritime Services' legal jurisdiction.

The NSW State Government has previously recognised that, due to the strategic defence and security requirements of Sydney Harbour, the State needed to maintain the traditional

position of one authority over Sydney Harbour with overall authority over the harbour from below the mean high water mark. The current authority is Roads and Maritime Services which reports to Minister Duncan Gay, Minister for Roads, Maritime and Freight. Under the State owned Corporations Act and the Maritime Administration Act, the Minister has allocated to the Ports Authority of NSW, the navigation, security and operational needs including in respect of commercial shipping and waterway usage including security of the ports of Sydney Harbour, Port Botany, Port Kembla and the Ports of Newcastle, Yamba and Eden.

The Port of Sydney like other major ports around the world operates under a heightened sense of security awareness. In June 2014, the Commonwealth Office of Transport Security ("OTS") approved the Port Authority of New South Wales' maritime security plans for Sydney Harbour and Botany Bay.

In the port of Sydney Harbour, Sydney Harbour, Barangaroo 5, Overseas Passenger Terminal at Circular Quay, Glebe Island/White Bay and Shell Gore Coves are required to have maritime security plans under the Maritime Transport and Offshore Facilities Security Act ("MTOFSA").

In Port Botany, the facilities that are required to have maritime security plans under the MTOFSA are the DP World and Patrick Container Terminals, Caltex Kurnell jetty/berths and Port Authority of New South Wales Bulk Liquids Berth.

The draft Bill will place Sydney Harbour within the coastal zone with the consequence that each and every local council dotting the Sydney Harbour foreshore will have extended powers over Sydney Harbour for planning use and development purposes in a way not allowed under the current legislation. Under the draft Bill, local councils would each have control of land use and planning extending into the harbour waters below the mean high water mark (i.e. over the seabed, subsoil, and airspace).

The State has previously recognised that safety of the Sydney Harbour and the State would be severely compromised if numerous local councils all had authority extending below the mean high water mark in Sydney Harbour. Before the Sydney Olympics, the NSW State Government, outlined the requirement for Sydney Harbour to remain under the authority of one State department from below the mean high water mark for security reasons. Councils' authority for planning and land development was to remain above the mean high water mark and the State's authority below the mean high water mark was to remain with Maritime Services (now RMS).

The security and defence challenges facing NSW have increased significantly since the Olympic Games in 2000, and the need to keep Maritime Services (now RMS) as the sole authority over Sydney Harbour (from below the mean high water mark) remains more important. This can only be achieved if Sydney Harbour is not included in the definition of coastal zone/coastal management areas in the draft Bill.

There appears to be no trace of any consultation with or input by Roads and Maritime Services, which has ownership of and is the current authority responsible for administering all land below mean high water mark in Sydney Harbour, Botany Bay, Newcastle Harbour and Port Kembla Harbour. That leaves a number of questions unanswered, including:

1. For RMS, as ownership and agency controlling below the mean high water of Sydney Harbour and certain other waterways is currently excluded from the "coastal zone", what

effects will the proposed legislative changes in the draft Bill have on RMS' current existence as a maritime agency, its operations, duties and responsibilities in relation to Sydney Harbour and other waterways?

2. How will the passing of the draft bill impact on RMS' responsibilities for NSW ports?

3. How will the passing of the draft bill impact on the Ports Authority of NSW's responsibilities for NSW ports?

4. Why does RMS, or the State Government support the changes to the existing laws removing State Government control below the mean high water mark and the giving of control to local councils?

5. What submissions, consultation and discussions have taken place between RMS, Department of Planning and other persons and agencies? What input (if any) did RMS have in the creation of the draft Bill?

6. Given RMS' ownership and control below the mean high water mark, why have the section 4A (3) (e) (i) and (ii) exclusions from the definition of coastal zone in the current Act not been carried over into the draft Bill and why have previously excluded local council areas now been included in a list under Schedule 1 of the draft Bill – is it to divest RMS of that responsibility and control and give it to local councils?

7. In relation to greater powers being given to local councils (particularly in relation to Sydney Harbour and other excluded areas (referred to above), why does RMS support the legislative changes giving control to local councils without State Government oversight?

8. What consultation has taken place between Ministers, Federal, State and Local Government agencies and the private sector and what submissions and recommendations have been made or exchanged?

Furthermore, there is no trace of any consultation with or input by the Australian Federal Police, the NSW Police and the Department of Defence all of which, for security purposes, liaise with Roads and Maritime Services.

Failure to acknowledge RMS' jurisdiction

There is a lack of transparency in Minister Stokes' proposal which includes the lack of acknowledgement of RMS' control of Sydney Harbour and Botany Bay from below the mean high water mark and the attempt to remove control from RMS and transfer it to the 13 local councils dotted around Sydney Harbour, its tributaries and Botany Bay leading to adverse environmental and security issues.

The reform package fails to acknowledge RMS' responsibility for infrastructure development, leasing and licensing of wharves, jetties, pontoons and private marinas below the mean high water mark in Sydney Harbour and Botany Bay.

RMS is the consent authority for most water-based development in Sydney Harbour; and in the same way as a land owner is required to give permission for the lodgement of a Development Application ("DA"), RMS may consent to the lodgement of a DA. RMS' webpage advises:

- *<u>Development Applications</u>: In the same way as a local council is the consent authority for most land-based development, Roads and Maritime Services is the consent authority for most water-based development within Sydney Harbour including jetties, wharves, boat lifts, slipways pontoons, mooring pens and the like but excluding commercial marinas"*

- *<u>Permission to lodge:</u> In the same way that permission form the landowner is required to lodge a development applications on land, this is also required in respect of development applications on waterways under the ownership of Roads and Maritime Services. In order to obtain "permission to lodge" from Roads and Maritime you must make a formal application. This is not a consent*

The Minister's Office has stated that the draft Bill does not remove State Government controls – it remains the owner of most of the land below the high water mark and continues to manage water based activities. However, in relation to a DA, what the Minister's Office claims has to be considered in light of the proposed repeal of Environment Planning and Assessment Act 1979 ("EPA Act") section 79C(1)(a)(v) and the abandonment of the State/Ministerial concurrence provisions for development below the mean high water mark referred to above.

The approval pathways for coastal protection works have been changed (FAQ 43). The proposed new Coastal Management SEPP which has not been disclosed will identify the approval pathways for proposed "coastal protection works" (FAQ 6). The "Coastal Management State Environmental Planning Policy Explanation of Intended Effect" discloses part of the approval pathways for new coastal protection works; it refers to "beach nourishment" being permitted by a public authority without State/Ministerial consent.

The current Act has a definition of, "Coastal protection works" which incorporates "beach nourishment" into "activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters".

However, under the draft Bill, "coastal protection works" is split and means:

(a) beach nourishment activities or works; and

(b) activities or works to reduce the impacts of coastal hazards etc.

This apparently minute change (i.e. removing the requirement of beach nourishment activities or works to be linked to reducing the impact of coastal hazards), has a significant impact of permitting local councils to carry out coastal development works under the guise of coastal protection works. Local councils will be free to authorise and/or create artificial beaches and extend and alter the topography of existing beaches under the guise of beach nourishment activities or works.

Note: (i) The definition of beach nourishment has its ordinary and natural meaning which one can look up on Google. The Coastal Management Manual however, has numerous definitions of "nourishment" in the Glossary (i.e. beach nourishment, artificial nourishment and sand nourishment)
(ii) The definition of "coastal protection works" is significantly extended in the Glossary which under the draft Bill's definition is not limited.

In addition to artificial beaches, local councils can create public access/walkways to areas in Sydney Harbour and Botany Bay and elsewhere along the coast where they currently do not exist. The inclusion of "or works" in the definition (removed from the link to activities to reduce impacts of coastal hazards) is an open ended invitation with no limits.

In short, by altering the definition of "coastal protection works", by removing the requirement of beach nourishment activities or works to be linked to reducing the impact of coastal hazards, the draft Bill effectively allows what would in effect be coastal development works. This additional extension of local councils' powers to alter the coastal topography and undertake development works under the guise of "coastal protection works" will also lead to the very real possibility of adverse impacts on the marine environment and on Sydney Harbour security.

Input into the development of the reform proposals:
The advisory bodies for the draft Bill this have largely been representatives from or for local government including:

(i) the Sydney Coastal Councils Inc.,
(ii) the Coastal Panel pursuant to Part 2A, s12 of the current Act, and
(iii) the Coastal Expert Panel

The Sydney Coastal Councils Inc appears to be a non registered lobby group which has lobbied extensively to extend the powers of numerous local councils surrounding Sydney Harbour and its tributaries onto the waters of Sydney Harbour thereby removing Maritime Service's sole authority and responsibility over Sydney Harbour from below the mean high water mark.

The statutory Coastal Panel was established in 2010 pursuant to the *Coastal Protection and other Legislation Amendment Bill 2010 and* acts as an advisory body to the Minister and a consent body for development applications where there is no current Coastal Zone Management Plan (CZMP) in place. Under the proposed draft Bill the NSW Coastal Panel will be extinguished and replaced by a NSW Coastal Council with advisory functions only and no development consent function over local councils, thereby extending local councils' development powers. The membership of the statutory Coastal Panel comprises local government and public authority nominees. Arguably by extending its advice beyond the current Act's definition of coastal zone this statutory Coastal Panel is acting beyond its statutory powers.

The Coastal Expert Panel has extensive local council representation. It is to be noted that as (i) Mr Angus Gordon (former Pittwater Council General Manager for 9 years) is both the Chair of the statutory Coastal Panel as well as a member of the Coastal Expert Panel and (ii) Emeritus Professor Bruce Thom – (nominee of Local Government NSW) also sits on both Panels, arguably the two bodies are not independent. Furthermore as Mr Angus Gordon has strong past links with local government, and is on both panels, he is potentially conflicted.

Public Consultation at Kiama on 1 December 2015
Removal of Parliamentary Scrutiny:
Peter Robinson and I attended a community consultation meeting conducted by representatives of the Office of Environment & Heritage ("OEH") and raised two issues: the proposed regulations; and the proposed new Coastal Management SEPP.

Representatives of OEH advised Peter (and the audience) that in relation to the regulations, none were intended as it was the intention that (the legislative) "heavy lifting" would be done by the manuals i.e. the details in relation to coastal management would be covered by the manuals provided for in Part 3 of the draft Bill. Local councils in preparing a coastal management plan are required to have regard to the coastal management manual published by the Minister for the purpose of the Act.

This proposal removes Parliamentary scrutiny in relation to a legislative instrument, removing the opportunity for Parliament to review, discuss, accept or reject the content of the Coastal Management Manual which will regulate the local management plans which will be a local council planning instrument affecting the rights, property and interests of the citizen and likewise impose liabilities and sanctions.

If the draft Bill is passed by Parliament, Parliament will be surrendering control of the coastal zone, not only along the whole of the coastline of NSW, but also Sydney Harbour, Botany Bay, Newcastle Harbour and Port Kembla Harbour below the mean high water mark. There is not one justification in material released by the Planning Minister to justify the extension of the coastal zone to areas of State significance, namely Sydney Harbour and other waterways exempted by current legislation.

In response to my question to the representatives of OEH about the proposed new Coastal Management SEPP, representatives from OEH advised me (and the audience) that the SEPP would not be produced for public consultation because it would be "too legalistic for the public to understand". The whole legislative framework is dependent on the SEPP, and informed community consultation is not possible without it. This is not "open government". Like the manual, the SEPP is not open to Parliamentary scrutiny; and in any event, it can be changed by a local council at any time by a LEP. i.e. LEPs may amend SEPPs to identify coastal management areas pursuant to s 10 of the draft Bill.

The proposed new Coastal Management SEPP will contain maps: again which have also not been made available. This is not "open government". During this consultation stage, instead of the proposed new Coastal Management SEPP, the public has been provided with an Explanation of Intended Effect Coastal Management State Environmental Planning Policy. The meaning of the 4 coastal management areas in s 5 a, b, c and d can only be identified by reference to s 6, 7, 8, and 9 of the draft Bill which are the areas of land identified by a proposed new Coastal Management SEPP (which have not been and may not be made available until the draft Bill is passed).

> Note: As the period for consultation is about to close, the Government has belatedly released a newsletter dated 25 February 2016 indicating that the new Coastal Management SEPP, including maps of the coastal management areas will be released separately in the coming months for public consultation. The Government, in the newsletter, is ambiguous as to whether the new SEPP and the maps will be available for full consultation before progressing the draft Bill to Parliament.

Ideally, under the Westminster System of Government, the manual and the SEPP should (if not part of the Act) form part of the regulations so that Parliament may make an informed decision in relation to the law it proposes to allow or reject. As the law cannot take effect without them, it is not unreasonable for this process to be adopted.

Sydney Harbour to become the new Gold Coast – adverse environmental impacts:
Up until now, Maritime Services has had authority (pursuant to maritime legislation) over Sydney Harbour and its tributaries from below the mean high water mark. The 13 local councils dotted around Sydney Harbour and its tributaries and, Botany Bay have had authority above the mean high water mark.

Under the draft Bill, each local council will have separate development and infrastructure powers extending into the waters of Sydney Harbour. This will occur, first because draft Bill redefines the "coastal zone" to include Sydney Harbour, Botany Bay and other areas not affected by coastal processes along the coastline; and the proposed new SEPP (incorporating provisions from Division 25 of the current Infrastructure SEPP 2007 and the amalgamation of the three existing coastal SEPPs: 14 –Coastal Wetlands, 16 – Littoral Rainforests and 71 Coastal Protection). The introduction of infrastructure provisions (refer below) into the proposed new Coastal Management SEPP (full details yet to be made public) together with new and conflicting definitions of foreshore and works in the draft Bill and Manual (refer below) will allow local councils to build into the waters of Sydney Harbour (which up until now was not part of coastal zone) and elsewhere in the open sea coastal zone without the need for consent. As a result, the draft Bill will allow Councils unlimited development powers in the coastal zone including into waters below the mean high water mark. This is contrary the current Act's coastal protection objectives.

The granting of each and every local council around Sydney Harbour development and land use planning authority stretching into the waters of Sydney Harbour below the mean high water mark as well as powers to resume private properties fronting the harbour is a significant departure from previous legislation. Control of Sydney Harbour and Botany Bay, if left in the hands of the local councils (i.e. often in reality the local developers) scattered along the foreshore, is a licence to turn the environment into another "Gold Coast" or "Surfer's Paradise".

Given the existing government policy in relation to "development/opportunity sites" to promote high-rise/high density living, that policy will now have greater impact on the harbour foreshore. This risk of high rise along the harbour foreshore, above and below the mean high water mark, is accentuated by the power given to local councils to alter the boundaries of the coastal zone (not that any clear boundary has been given by means of maps or by means of the proposed Coastal Management SEPP).

Local Councils' powers to build into the waters of Sydney Harbour to effect security and impact adversely on marine environment:
The increased infrastructure powers (without State oversight) afforded to numerous local councils under the draft Bill and the power to develop, build and maintain wharves, jetties, pontoons, and access ways extending into the waters of Sydney Harbour, together with an additional and conflicting definitions of "foreshore" (refer below) extending into the waters of Sydney Harbour and elsewhere will lead to the very real possibility of adverse impacts on Sydney Harbour security and marine environment. Hitherto these powers to build into the waters of Sydney Harbour has been under the jurisdiction of Maritime Services.

Each Local Council can vary the extent of the "coastal zone – removal of certainty for the public:

Under the current Act, the coastal zone is clearly defined. A consequence of the draft Bill's new definition of coastal zone, in terms of its management requirements and local form, is that each local council can vary the extent of the coastal zone by way of increase or decrease without limit.

Details of how the coastal zone will be varied will only be available in the proposed new Coastal Management SEPP which has not been made available and may not be published until after the draft Bill is passed.

For example, according to the public consultation document "Coastal Management State Environmental Planning Policy Explanation of Intended Effect" ("EIE") different options are being considered for initially mapping the coastal use area "with an ability for councils to refine the maps in future to pick up local characteristics". Further, the EIE (at pages 31 – 33) discusses under the heading "Options for Mapping the Coastal Use Area" which, among other things nominates increased development as an advantage. It states:

> *An ability to adjust a map boundary allows the council to propose extending the relevant management objectives and development controls to those areas where they are warranted, and remove them from areas where those controls are not required. This is the only option which allows a council to decrease the upstream extent to which the Coastal Use Area and the related controls apply in relation to estuaries.*
>
> *The removal of unnecessary development controls will provide incentives for increased development activity, where previously those controls were a barrier to investment, or created additional development costs.*

Again, these details have not been published for public consultation, and may not be made available for Members of Parliament to consider before the draft Bill is presented to Parliament.

Furthermore, the "unnecessary development controls" in the coastal zone which the Department of Planning is seeking to remove have not been disclosed.

Additional special levies and rate changes– Ratepayers to be charged:

The draft Coastal Management Manual gives local councils power to impose additional special levies and rate changes from ratepayers for coastal infrastructure (e.g. jetties, marinas, pontoons and public walkways) as well as protection works. Local councils will have the authority to fund their coastal management projects through the imposition of special levies and rates on ratepayers and "beneficiaries[2]".

> [2. Local councils will decide who the "beneficiaries" of the above works are for the purposes of imposing levies to cover the local councils' infrastructure and development works.]

This represents an unnecessary burden on the public ratepayers. It should be for Parliament and not local councils to determine what special levies and rates are imposed on ratepayers.

Modification of Common Law Doctrine of erosion and accretion:
S28 of the draft Bill is designed to remove the common law doctrine of erosion and accretion in relation to properties adjoining Sydney Harbour, its tributaries and Botany Bay. This is an unnecessary and unjustified interference with the property rights of existing landowners without any reference to compensation. The provision also exposes land owners to risk (where there is accretion) of losing their access to the water, loss of privacy and other enjoyment of their property.

Removal of development control provision:
Coastal specific development control provisions relating to effluent disposal and stormwater will be removed.

Local Councils' powers to order demolition of existing buildings and structures:
Consequential amendments in the draft Bill (Schedule 4 clause 4.1) insert new compliance provisions into the EPA Act which would allow orders to be made by local councils and other consent authorities to require existing buildings and structures to be demolished or removed.

Under the current Act orders can only be issued where works are unlawful and in limited circumstances where the structure or works in the coastal zone:

(a) cause or is likely to cause increased erosion of a beach or land adjacent to a beach;
(b) unreasonably limits or is likely unreasonably limit public access to a beach or headland, or
(c) poses or is likely to pose a threat to public safety.

Now under the proposed amendments to the EPA Act orders can be made to demolish or remove existing buildings and structures if the building "is or is likely to become a danger to the public", or "if the building is situated wholly or partly in a public place". This could include not only Crown land but also land that is a beach or foreshore (The definition of foreshore as discussed at page 14 below is subject to conflicting definitions in the Coastal Management Manual and the draft Bill).

As a result, existing waterfront beach houses and structures such as piers along the open coastline on New South Wales could become subject to demolition orders. Furthermore, as a result of the draft Bill's extension of "coastal zone" into Sydney Harbour and its tributaries and Botany Bay, existing harbour waterfront houses and structures such as piers and boat ramps in established suburbs such as Manly, Pittwater, Hunters Hill, Drummoyne, City of Sydney, Woollahra and Botany Bay may be subject to local council demolition orders. There is no recognition of "existing use" rights.

Compulsory Acquisition of Properties:
The Minister has flagged the intention for the new Coastal Management SEPP (which has not been made available) *"to manage the legacy of existing coastal hazards and help plan to ensure new hazards are avoided".* A consequence of this could be the compulsory acquisition of properties in the coastal zone. As a consequence of amendments to the existing definition of coastal zone, properties adjacent to Sydney Harbour and its tributaries and Botany Bay will potentially be subject to compulsory acquisition by local councils; including councils at Manly, Pittwater, Hunters Hill, Drummoyne, City of Sydney, Woollahra and Botany Bay. Once again, there is no recognition of "existing use" rights.

Removal of right to protect property:
The draft Bill and related documents removes the right for private property owners to carry out temporary protection works to protect their properties.

Legislative Establishment of Separate NSW Coastal Council:
The proposed NSW Coastal Council will effectively be a mouthpiece of local councils not just a coordinating body.

The legislative establishment of the NSW Coastal Council is in contravention of NSW procurement policy as follows:

> *The NSW Government expects that the professional expertise of public employees will be used in preference to engaging external service providers. External consultancy services should be engaged only when the required professional expertise is not available internally or cannot be provided in a cost effective manner.*

The NSW public service departments contain extensive expertise in coastal management issues and processes. The legislative establishment of a separate NSW Coastal Council is unnecessary**.**

The remuneration provisions relating to members of the NSW Coastal Counsel pursuant to Schedule 2, Part 2 s4 allows the Minister to pay the members whatever amount he/she determines. This is in contravention of the NSW State "value for money" procurement requirements.

The proposed NSW Coastal Council, as a consequence of extending the definition of "coastal zone" to include Sydney Harbour and Botany Bay, will duplicate the functions of the Maritime Advisory Council established under section 34 of the Ports & Maritime Administration Act 1995 and per Ports and Maritime Administration Regulation 2012.

Legislative establishment of substitute members for Coastal Protection Works
Similarly the consequential amendment to the Environmental Planning and Assessment Act 1979 leading to the establishment of "substitute members for Coastal Protection Works" is unnecessary and in contravention of NSW procurement policy.

Multiple and Inconsistent definitions
Under the draft Bill, the Minister is to publish a Coastal Management Manual imposing mandatory requirements and guidance to the local councils in relation to their Coastal Management Programs. The draft Bill contains definitions which have to be adhered to. There will be no regulations permitting a variation of those definitions. However, the Coastal Management Manual provides a Glossary of definitions which form part of the mandatory manual.

These definitions will, in effect, have regulatory application. Strangely enough, the Glossary provides two definitions of "coastal zone" – one as defined by the draft Bill and one which is described as a general definition. This alone may lead to confusion and ambiguity. Strangely enough, the source of the definitions include: "the US Army Corps of Engineers and from glossaries provided in relevant Standards, as well as from other coastal management guidelines in current use in Australia". There is no reference to the Australian Government's Geoscience Australia.

It is not clear in the future how the Courts are going to interpret the legislation given the lack of clarity of definitions in the draft Bill and the Coastal Management Manual. Will they go to American cases where definitions from the US Army Corps of Engineers have been subject to judicial discussion? This question highlights the absurdity of the drafting.

The definition in the Management Manual's Glossary of "foreshore" takes it beyond its common meaning, and together with the infrastructure powers of local councils, will extend their authority to include the building of stormwater drains, wharves (with or without commercial and/or residential capacity), jetties, pontoons, access ways, restaurants and amusement parks (fixed or floating), piers, boat ramps and refuelling facilities below the mean high water mark.

The definition of "foreshore" in the Glossary is inconsistent with the definition in the draft Bill which will likewise cause confusion. Furthermore, under the draft Bill's definition of "foreshore", local councils will be able to build below the mean high water mark.

Failure to comply with mandatory requirements to have no effect:
There is an unanswered question as to why the Parliamentary draftsman has included mandatory requirements for consultation in relation to Coastal Management Programs whilst also providing that a failure to comply with such a requirement does not invalidate the Coastal Management Program (see s16(3)3). In effect, could the failure to comply with a legal requirement which has no legal consequences ever be considered by the Ombudsman or ICAC?

The Department of Planning claims that the legislation is about modernising coastal land use planning and local government laws. The Department further claims that the coastal reforms are needed to make the system simpler. The Minister wants legislation which is more helpful in managing our coast, rather than a hindrance to local councils trying to do the right thing (however, there is no explanation as to what the hindrances are).

The Minister's expressed desire confirms what we have stated on page 2 above i.e. the draft Bill is really concerned with infrastructure and development: paying lip-service to enhancing natural processes and environmental issues whilst emphasizing what the government considers to be vital, namely economic zones and sustainable economics, coastal development and planning decision making, coastal assets (although not defined) and essential infrastructure. And that planning decision making, at Local Government level, includes the areas excluded from the coastal zone under current law, namely: Sydney Harbour, Botany Bay and those parts of the local government areas of Pittwater, Warringah, Manly, Woollahra, Waverley, Randwick and Sutherland not affected by coastal processes.

When the Minister's Office was asked for the reason as to why the exclusion for Sydney Harbour and its tributaries and Port Botany (specifically excluded by s4A (3) (e) (i) and (ii) of the current Act) had been dropped from the new draft Bill, it said that in relation to Sydney Harbour and Botany Bay they have a lot in common with the coastline elsewhere in NSW and face similar challenges. This claim is false. There is more dissimilarity e.g. there is no example of major erosion in the Sydney Harbour area similar to the coastal erosion being experienced at e.g. the community of Old Bar on the mid-north coast. More to the point, the current Coastal Protection Act section 4A states that "the local government areas of Pittwater, Warringah, Manly, Woollahra, Waverley, Randwick and Sutherland that **are not, and are not likely to be, affected by and that do not, and are not likely to, affect coastal processes, including coastal wave and wind action**", and in addition to excluding these areas from the coastal zone, excludes the waters of Sydney Harbour and Botany Bay. Sydney Harbour and Botany Bay have long been recognised as not being affected by the coastal processes or the challenges of the open sea coastline elsewhere in NSW.

The Minister's Office also claims that draft Bill does not affect the existing powers of public authorities in the exercise of their functions. This claim has to be considered in terms of the draft Bill's greater emphasis on local council infrastructure powers; and the removal of environmental oversight e.g. the consequential amendments to the EPA Act (contained in Schedule 4 of the draft Bill) which delete section 79C(1)(a)(v):

EPA s 79C:

(1) **Matters for consideration—general**

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

(a) the provisions of:

(v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),

that apply to the land to which the development application relates

The removal of the State/Ministerial concurrence provisions, including EPA s79C (1) (a) (v), applicable to a consent authority has to be considered in light of the government's/draft Bill's expressed intentions in its publication "Coastal Management State Environmental Planning Policy Explanation of Intended Effect" at page 30:

> **What is no longer needed?**
>
> The concurrence provisions for development within 100 metres below mean high water mark are considered now unnecessary. Development in this area typically includes pontoons and jetties

This proposal will form part of the new Coastal Management SEPP which has not been published and may not be published before the draft Bill is progressed to Parliament i.e. there may be no opportunity to make representations to one's local Member of Parliament before the passing or rejection of the draft Bill. Further, MPs will be kept in the dark about the substantial flow on effects of the draft Bill. This is contrary to the Westminster System of Government where Parliament determines the rights and interests of its citizens.

In relation to the harbour environment, the building of structures adjacent to and below the mean high water mark by or with the approval of numerous local councils must have an adverse impact on the marine environment.

Further, in relation to harbour security, the building of structures adjacent to and below the mean high water mark must have impact on security issues because such structures in themselves may become targets, impinge on navigation including naval, police and rescue vehicles; and in relation to such facilities as refuelling facilities and fuel bowsers must present a particular risk.

Removal of a consent authority's requirement to consider a coastal management plan in determining a development application:

S 79C (1) (a) (v) of the Current Environmental Planning and Assessment Act (1979) ("EPA Act") requires a consent authority to take into consideration, where relevant to a development application, any coastal zone management plan within the meaning of the current Coastal Protection Act 1979. However, the consequential amendments to the draft Bill (Schedule 4, clause 4.1 [1] delete section 79C (1) (a) (v) from the EPA Act without making any corresponding provision in the EPA Act for a consent authority to consider any coastal management plan provided for under the draft Bill. This seems to leave a vacuum in the legislative scheme.

Internationally agreed sea level rise benchmarks

The NSW Government has unwisely set aside the international sea level rise benchmarks on the basis that it considers local councils know better.

The NSW Government has announced that local councils would have the flexibility to determine their own sea level rise projections to suit their local conditions. The Government would no longer prescribe statewide sea level rise projections for use by local councils and the 2009 NSW Sea Level Rise Policy Statement would no longer be NSW Government policy.

This leaves ratepayers in one local council area to be subject to sea level falls (in the opinion of that local council) while the ratepayers in an adjoining local Council area to be subject to sea level rises (in the opinion of that local council). The farce is obvious.

Consultation Process

The draft Bill and other documents for public consultation were released at a time when most people would be distracted by the Christmas-New Year celebrations and annual holidays. It is expected that those intending to respond will do so by 29 February 2016. This is not sufficient for community consultation and informed response.

The NSW Coastal Management Reforms Newsletter, not issued until 25 February 2016, does not make it clear (in the last sentence of the last paragraph) whether or not it is the Government's intention not to progress the draft Bill until the completion of the second stage of the public consultation. It would not be open government to attempt to pass the draft Bill without further public consultation. Furthermore, by separating out "the full draft of the SEPP" and "Maps of the coastal management areas" for future public consultation this will not provide the public with opportunity for comprehensive submissions or commentary on the coastal reform package. None of the documents in the costal reform package can take effect in their own right. It is not possible to provide for comprehensive submissions or commentary on the coastal reform package if the public must look at elements in isolation.

The second public consultation must provide for:

(i) further public information sessions for both consultants and members of the public on the combined draft Bill, the Coastal Management Manual, the Coastal Management SEPP and the maps of coastal management areas, and

(ii) public commentary and submissions on the combined draft Bill, the Coastal Management Manual, the Coastal Management SEPP and the maps of coastal management areas.

It appears, from the Newsletter and Minister Stokes' Media Release, that the Government is seeking to avoid uniform commentary on the combined effects of the draft Bill, new SEPP, maps and manual. This is not open government.

Coastal Protection Act 1979 – Requirement to Review/Table in Parliament:
The Minister is required to review the current Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. Section 65 requires that review to be taken as soon as possible after the period of 5 years from the assent of the Coastal Protection & Other Legislation Amendment Act 2010: i.e. 27 October 2015. A report of the outcome is to be tabled in each House of Parliament within 12 months: i.e. 27 October 2016.

It is reasonable to assume that the draft Bill is designed to avoid the need for the Minister to undertake the review of the existing Act, particularly when the draft Bill and other documents were released to the public one month after the commencement of the 12 month review period. The Minister needs to force the reforms through Parliament before 27 October this year. That leaves one question to be answered: Why wasn't all the energy, time and cost put into the drafting of the Bill, documents, meeting with government agencies and the consultation process put into a review of the Act to see if the policy objectives were being met or were still valid.

It is our respectful view that:

(i) the above review of the current Act should proceed and the Minister should table the report as required by law,

(ii) the tabled section 65 review will be available to the public and can then be subject to public comment and informed debate as to the need to amend the existing law, and

(iii) the draft Bill's new legislative proposal by the current government should in any event be rejected; or at the very least, it should not be considered by Parliament without knowing the content of the new Coastal Management Manual, Coastal Management Plans and relevant Coastal Management SEPP and maps of the coastal management areas as well as any relevant LEPs which have the capacity to amend the Coastal Management SEPP. They should be tabled in Parliament so that Parliament may consider permitting or disallowing them.

It is of particular concern to us why the Minister has not given any indication as to what in the existing law is not working sufficiently to explain the need for new legislation which is concerned with coastal development. The previous Labor Government made significant amendments to the Coastal Protection Act 1979 in 2002. Whilst the Labor Government extended the coastal zone to include additional land along the open sea coastal area, it rightly excluded Sydney Harbour, Port Botany and local government areas not, or not likely to be affected by coastal processes, including coastal waves and wind action

All of the above matters may be suitable for a Parliamentary enquiry including the environmental and security imperatives relating to Sydney Harbour, its tributaries and other major ports.

Yours faithfully

Margo Fraser

Peter Robinson