



***Submission to the  
NSW Coastal Management Reforms***

***February 2016***

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### Submission to the NSW Coastal Management Reforms

Dear Sir and/or Madam,

Thank you for the opportunity to submit comments regarding the NSW coastal management reforms currently being developed, together comprising of the draft *Coastal Management Bill 2015* (NSW) (**draft Bill**), the *Explanation of Intended Effects for the proposed Coastal Management State Environmental Planning Policy* (**proposed SEPP**) and the Coastal Management Manual (together referred to throughout this submission as the **proposed reforms**).

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 23,000 members, is the largest Aboriginal member based organisation in Australia. NSWALC is a self-funded statutory corporation created under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**), and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC also provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their own local communities, and manage land for the cultural, economic and social benefit of their members.

Coastal areas in NSW are extremely significant for Aboriginal peoples and the network of Aboriginal Land Councils that represent them (both NSWALC and LALCs). Aboriginal people, as the traditional custodians of lands and waters in NSW, have historic and on-going cultural, social and economic associations with coastal areas. NSWALC and LALCs are significant landowners of coastal lands across NSW with functions as land owners and managers in these areas. Coastal lands also contain an array of tangible and intangible culture and heritage sites and features, being part of broader cultural landscapes linked with Aboriginal identity. Coastal areas are also places of key importance for the exercise of Aboriginal people's traditional rights to hunt, fish and gather, contributing to Aboriginal people's livelihoods.

While NSWALC generally supports the proposed coastal management reforms, this submission makes several key recommendations which highlight the need to **ensure the proposed reforms are consistent with the objectives of the ALRA**, ensure that the proposed compliance arrangements **do not unnecessarily burden LALCs** and ensure that Aboriginal interests are broadly integrated throughout the reforms, including providing for **best practice engagement and consultation with Aboriginal people for**



informing coastal management strategies.

**NSWALC makes the following recommendations:**

- That the definition of *public authority* be amended to ensure that Aboriginal Land Councils are not defined as public authorities.
- The proposed reforms must not override the intention of the NSW Parliament when passing the *Aboriginal Land Rights Act* by hindering the ability of Aboriginal Land Councils to utilise land for the economic, social and cultural benefit of Aboriginal people;
- That the objectives of the proposed coastal areas in Part 2 of the draft Bill are amended to include “protect Aboriginal culture and heritage assets in conjunction with the Aboriginal community;”
- NSW Government must consult with coastal Aboriginal Land Councils before finalising the proposed SEPP – including providing notification of draft mapping and providing the opportunity to comment and provide objections;
- The NSW Government should recognise that Aboriginal Land Councils may have limited capacity to comply with costly coastal management orders. The Government should provide exemptions to Aboriginal Land Councils for costly compliance and enforcements processes;
- That staff applying compliance and enforcement processes under the proposed reforms are made aware that Aboriginal Land Councils may require assistance or extended timeframes to comply with coastal management orders;
- That the Coastal Management Manual be amended with regard to the suggestions provided by NSWALC, in order to improve the efficacy of local council’s engagement with Aboriginal people in informing coastal management;
- Development of CMPs must consult and engage with affected Aboriginal Land Councils and Aboriginal communities.

## 1. General comments regarding draft Bill and proposed SEPP

NSWALC generally supports the proposed reforms and recognises the need to modernise coastal management processes. NSWALC is of the view that moves to integrate coastal strategic planning and compliance and enforcement provisions into the *Environmental Planning & Assessment Act 1979* (NSW) (**EP&A Act**) and *Local Government Act 1993* (NSW) may assist in reducing the existing fragmentation and complexity in NSW planning processes. The comments provided below highlight some important issues to consider with regard to the intersection between the proposed reforms and the Aboriginal land rights’ system.

It is important to ensure that the proposed reforms do not conflict with the intentions of the NSW Parliament when the ALRA was drafted; and to ensure that coastal management processes do not frustrate the objectives underlying the ALRA of providing for the economic, cultural and social



development of Aboriginal people across NSW.

### 1.1 Definition of 'public authority' requires clarification

The draft Bill defines *public authority* as: "a Minister of the Crown of the State, a department or instrumentality of the State, a local council and any other public or local authority constituted by or under any Act, and includes any prescribed body."

NSWALC are concerned that this definition is unduly broad. It is unclear whether obligations for public authorities may be applied in some circumstances to organisations such as Aboriginal Land Councils. We request clarification on this issue to ensure that the NSW Aboriginal Land Council and Local Aboriginal Land Councils are not captured by the definition of *public authority*.

#### **Recommendations:**

- That the definition of *public authority* be amended to ensure that Aboriginal Land Councils are not defined as public authorities.

### 1.2 Revised coastal zones - impacts on Aboriginal land

A major element of the proposed reforms is the revised definition of the coast, along with the concurrent mapping of revised coastal areas and the development of Coastal Management Programs (CMPs) linked to the new coastal zonings. The draft Bill proposes dividing the coastal zone into four distinct management areas, varying according to their features and management requirements. The four areas are defined in the draft Bill and are to be mapped out across NSW in the proposed SEPP. Concurrently, SEPP 14 – Coastal Wetlands, SEPP 26 – Littoral Rainforests and SEPP 71 – Coastal Protection will be repealed. These provisions will introduce a revised system of development controls to coastal areas, including in some cases affecting restrictions applying to land in coastal areas, including the ability of landowners to deal with land.

The Aboriginal land rights network currently owns and manages land across the NSW coastland, with numerous further land claims awaiting Ministerial determination in coastal areas. Under the ALRA, LALCs hold land for the economic, social and cultural benefit of all Aboriginal people living within their boundaries. With the consent of their members, LALCs are able to develop or sell their land, and may also seek to maintain key parcels of land for their cultural or environmental values.

The preamble of the ALRA recognises that '*Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples.*' The ALRA was established to facilitate the return of land in NSW to Aboriginal people through a process of lodging claims for unused and unneeded Crown land. The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for

Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

Unfortunately, on-going issues related to NSW planning processes are stymieing the objectives of the ALRA. These chiefly relate to restrictive zoning provisions applied by local councils to LALC-owned land which have hindered the ability of LALC to fully utilize their land assets, including LALC land being seen as parkland to be 'downzoned' through environmental conservation zonings. To date, there is a failure by local councils to integrate their strategic planning processes and developmental controls with the long-term strategic objectives of Aboriginal Land Councils and the ALRA. NSWALC has previously made extensive submissions on this issue, which can be provided upon request<sup>1</sup>.

NSWALC reiterates these concerns in light of the proposed reforms and the pending re-definition and re-mapping of coastal areas in NSW. The proposed reforms must remain consistent with the objectives of the ALRA, and not restrict the ability of LALCs to deal with their land in the best economic, social and cultural interests of their members. Given that the proposed reforms will involve a process of mapping out the revised coastal zones in the proposed SEPP, there is a valuable opportunity to address these on-going issues through ensuring integration between the strategic objectives of Aboriginal Land Councils and the proposed coastal management reforms.

#### **Recommendations:**

- The proposed reforms must not override the intention of the NSW Parliament when passing the *Aboriginal Land Rights Act* by hindering the ability of Aboriginal Land Councils to utilise land for the economic, social and cultural benefit of Aboriginal people;
- That the management objectives for the proposed coastal areas in Part 2 of the draft Bill are amended to include "protect Aboriginal culture and heritage assets in conjunction with the Aboriginal community," and
- NSW Government must consult with coastal Aboriginal Land Councils before finalising the proposed SEPP – including providing notification of draft mapping and providing the opportunity to comment and provide objections.

### **1.3 Compliance and enforcement provisions and Aboriginal Land Councils**

Another key element of the proposed reforms is changes to the compliance and enforcement framework for works in coastal areas, which are being integrated into the EP&A Act. These provisions broadly cover issues arising due to unauthorised works, or works that cause or may cause erosion, public safety hazards and other impacts on beaches.

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<sup>1</sup> See NSWALC's submissions to: *Planning Review Panel: Review of NSW Planning System* (November 2011), the *Planning Review Panel: Issues Paper* (March 2012), *Submission to NSW Government Green Paper: A new planning system for NSW* (September 2012) and *Submission to NSW Government White Paper: A new planning system for NSW* (June 2013) available at <<http://www.alc.org.au/publications/other-publications.aspx>>.



While the reforms will carry over some of the existing provisions under the *Coastal Protection Act 1979* (NSW), enforcement powers will also be considerably expanded. This will include broadening the investigative powers of authorised officers, expanding the type of orders that can be applied for, and, significantly, allowing penalty infringement notices and fines to be issued for breaches. Notably, the penalties that can be applied under the revised compliance and enforcement provisions are significantly higher than under the previous regime. For example, maximum penalties for offences under the EP&A Act may in some cases range from between \$250 000 – \$5 million.

NSWALC is concerned that there is scope for the compliance and enforcement provisions to be imposed on LALCs in a way that will burden them unnecessarily. This may occur in circumstances where, for example, a section 121B order under the EP&A Act is issued and runs with the land. Land transferred to LALCs under the ALRA land claims process may have pre-existing s121B orders which impose costly burdens and liabilities upon LALCs, which in many cases have limited capacity to undertake costly land management reparations. In other circumstances, an LALCs may need additional time or assistance in order to comply with s121B orders issued with regard to land which they manage.

LALCs may lack financial capacity to comply with penalties under the EP&A Act, which NSWALC submits would be excessive and extremely burdensome for organisations created for the purpose of furthering Aboriginal economic, social and cultural development. As such, NSWALC submits that it may be necessary for exemptions for LALCs to be written into the supporting regulations for the proposed reforms, or for staff applying compliance and enforcement powers to be made aware of the limited capacity of LALCs and the need for a targeted approach.

**Recommendations:**

- The NSW Government should recognise that LALCs may have limited capacity to comply with costly coastal management orders. The Government should provide exemptions for Aboriginal Land Councils for costly compliance and enforcements processes; and
- That staff applying compliance and enforcement processes under the proposed reforms are made aware that Aboriginal Land Councils may require assistance or extended timeframes to comply with coastal management orders.

## 2. The Coastal Management Manual

The Coastal Management Manual will play a pivotal role in guiding local councils in their development of the new CMPs under the new coastal management framework. CMPs will be the primary strategic planning mechanism for local councils to manage coastal areas in order to fulfil the objectives of the draft Bill. NSWALC notes one of the objectives of the draft Bill is “to acknowledge Aboriginal peoples’ spiritual, social, customary and economic use of the coastal zone.”

NSWALC submits that the Coastal Management Manual lacks detail regarding Aboriginal people's interests in coastal areas. In its present form, it does not provide clear guidance for protecting Aboriginal economic and cultural interests in coastal areas (including culture and heritage), nor for engaging with Aboriginal stakeholders in coastal areas. The comments provided below highlight some key areas where the Coastal Management Manual could be improved to ensure these issues are addressed.

## 2.1 Manual to more broadly incorporate consideration of Aboriginal peoples interests in coastal lands

Better consideration of Aboriginal interests should be integrated throughout each part of the Coastal Management Manual. Some specific examples include:

- Part A, Section 11, page 10: Vulnerable assets should explicitly include "Aboriginal cultural assets", as well as natural, social and economic.
- Part A, Section 17, page 16: The reference to a CMP including opportunities "to enhance biodiversity ... and social and economic assets and conditions in the coastal zone," should specifically include "Aboriginal cultural assets and values, in conjunction with local Aboriginal communities and Aboriginal representative organisations."
- Part B, Stage 1, Section 1.9.1, page 14: Access, use and amenity should include "access by Aboriginal people for their traditional practices, including fishing, hunting and gathering."
- Part B, Stage 1, Section 1.9.2, page 15: It should be noted that the Aboriginal Heritage Information Management System and culture and heritage protected under the *National Parks and Wildlife Act 1974* (NSW) is far from being a comprehensive register of Aboriginal culture and heritage. In fact, the majority of Aboriginal culture and heritage assets are not identifiable through desktop surveys. It should be noted that consultation with local Aboriginal peoples, through Aboriginal Land Councils and native title representatives should be the primary method of identifying Aboriginal culture and heritage assets in the coastal areas.

This section could also refer local councils to seek out or develop Aboriginal cultural mapping initiatives<sup>2</sup>.

## 2.2 Best practice engagement with Aboriginal communities

The Coastal Management Manual would benefit from added detail regarding the importance of community consultation to inform CMPs, including information about best practice consultation and engagement with Aboriginal stakeholders. This should include:

- Stakeholders, including Aboriginal Land Councils, must be provided the opportunity to provide input to the CMP prior to being drafted, especially with regard to informing the values and uses

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<sup>2</sup> For more information about cultural mapping, please see the references listed in note 1.



of the areas, including Aboriginal culture and heritage uses and suggested management responses. Input would ideally be through face-to-face consultations;

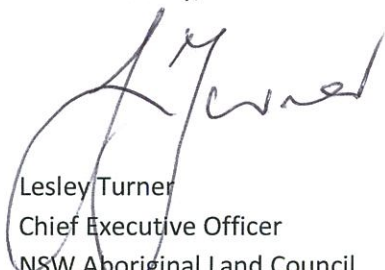
- Engagement should be with Aboriginal Land Councils, any native title representatives and any other Aboriginal representative organisations such as Elders' groups;
- Aboriginal Land Councils must be notified of draft CMPs and given ample opportunity to provide comment;
- Need for a clear acknowledgement of the status of Aboriginal people as the original custodians of lands and waters along the NSW coastline, and their extensive Traditional Ecological Knowledge of coastal processes;
- Part C, the Coastal Management Toolkit, should provide more targeted, relevant and quality publications to assist local councils to engage with Aboriginal communities. The only link provided with regard to engaging with Aboriginal communities is a resource for engaging with rural and remote Aboriginal communities in parts of the NT/WA. It is not overly useful for the current context.
- The Coastal Management Manual should refer to best practice engagement standards for consultation with Aboriginal communities and identification and management of Aboriginal culture and heritage, which include: provisions under the the *United Nations Declaration on the Rights of Indigenous People*, the *Convention of Biological Diversity: Akwé Kon Guidelines* and the *Australia ICOMOS Charter for Places of Cultural Significance: The Burra Charter*.

#### **Recommendations:**

- That the Coastal Management Manual be amended with regard to the suggestions provided by NSWALC, in order to improve the efficacy of local council's engagement with Aboriginal people in informing coastal management;
- Development of CMPs must consult and engage with affected Aboriginal Land Councils and Aboriginal communities.

We thank you for the opportunity to make a submission to the proposed reforms. If you have questions or comments regarding the content of this submission, please contact Julia Martignoni (Policy Officer) on (02) 9689 4444 or [julia.martignoni@alc.org.au](mailto:julia.martignoni@alc.org.au).

Yours sincerely,



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Date: 29/2/16