

Climate Change Readiness (Coastal Planning and Protection) Bill 2013

Explanatory Memorandum

1. Overview of Bill

The Bill is divided into 8 Parts, which in turn may have two or more divisions. The Part headings are: Preliminary; WA coastal plan; Adaptation and management plans; Development control in the transition zone; Coastal protection notices; Miscellaneous; Consequential amendments to the *Environmental Protection Act 1986* and Consequential amendments to the *Planning and Development Act 2005 (PAD Act)*. The content of each part is set out in more detail below.

The main object of the Bill is to provide for the regulation of planning, development and management in the coastal zone, taking into account the current and projected impacts of climate change. Important subsidiary objects include the requirement that the precautionary principle must apply to planning decisions that affect the coastal zone.

The objects of this Act are to be achieved by coordinated and integrated planning and decision-making, involving, among other things:

The preparation of a state wide coastal plan, which:

- identifies the coastal zone and the natural management framework of the coast (including coastal compartments and sediment cells) comprising the coastal zone;
- includes a vulnerability assessment which is used to identify the transition zone, being the area of the coastal zone most vulnerable to adverse impacts of coastal hazards and subject to specific development controls;
- sets out adaptation and management principles, guidelines and measures for the coastal zone which give direction to the local coastal plans that must be prepared by local governments;
- is developed in consultation with the public; and
- has regard to Aboriginal Traditional Owners' distinct cultures, identities and connections to land and sea.

Where land is included in the transition zone, a memorial to this effect must be lodged with the Registrar of Titles and the owner notified accordingly.

The WA coastal plan has legislative effect and overrides any scheme or local law to the extent of any conflict or inconsistency.

There are provisions in the Act for the review and amendment of the WA coastal plan and the local plans. Reviews may be periodic or triggered in specified circumstances.

Each local government (or other controlling body) of land in the coastal zone must prepare an adaptation plan and a management plan (each a "local coastal plan") to ensure integrated management for the protection of the environmental, social, cultural and economic values of the coast.

The Act regulates development within the transition zone. Only certain exempt and short term development is permitted, subject to conditions. There is no compensation for injurious affection caused by the making of the WA coastal plan or a local coastal plan. If short term development in

the transition zone is damaged by the impact of a coastal hazard, the WAPC may serve a coastal protection notice requiring the development to be removed and the land remediated.

The EPA is required under the Act to keep climate science up to date and to notify relevant public authorities of changes. Under the Act public authorities that act in good faith and in accordance with the Act are protected from liability. There are penalties prescribed for certain breaches of the Act.

It is the intention of the Act to reactivate the Coastal Planning and Coordination Council to advise the WAPC on matters relating to coastal planning and coordination throughout the State and to fulfil certain functions as set out in the Act.

2. Summary of substantive provisions

Part 1 – Preliminary

Clause 1 Short Title

This clause provides the short title of the *Climate Change Readiness (Coastal Planning and Protection) Act 2012*.

Clause 2 Commencement

This clause specifies the dates on which various clauses of the Act will come into operation.

Clause 3 Objects of the Act

The main object of the Act is to provide for the regulation of planning, development and management in the coastal zone.

Important subsidiary objects are set out in clause 3(2).

Clause 3(3) provides that “any action, decision or exercise of discretion under this Act must be consistent with the objects of this Act and taken or made as expeditiously as is practicable”. This is intended to ensure that the process does not stall at any stage.

Clause 4 Terms Used

This clause sets out the definitions of the terms used in the Act. These definitions have been drafted, so far as possible, to be consistent with the definitions in the draft revised State Planning Policy 2.6, and to reflect the invaluable work already done in relation to preparing vulnerability assessments and mapping the coastal compartments of the WA coastal zone.

Coastal compartment is defined as a “component of the geological framework of the coast comprising primary coastal compartments, secondary coastal compartments and tertiary coastal compartments” and definitions of those terms are also provided. These definitions are important in relation to the preparation of vulnerability assessments of the Western Australian coast (clause 18) and in relation to the preparation of local management and local adaptation plans by local governments (clause 34).

Development is defined as “development for which approval under a scheme is required”. This is not as wide as the definition in the PAD Act 2005, which would have vastly expanded the operation of the Bill. The definition of **public authority** includes “local government”.

Clause 5 Terms used: owner

This clause provides a separate definition for the term **owner**, because the definition is lengthy and incorporates terms defined in the Land Administration Act 1997.

Clause 6 Crown bound

This clause provides that the Act binds the State and, so far as the legislative power of the State permits, the Crown in all its other capacities.

Clause 7 Inconsistency with other Acts

Clause 7 provides that if a provision of this Act is in conflict or inconsistent with a provision of another act, this Act prevails to the extent of the conflict or inconsistency.

Part 2 – WA coastal plan

Division 1 – Making of WA coastal plan (clauses 8 – 17)

Essentially this division sets out the steps that must be followed by the WAPC in taking the WA coastal plan from draft to gazettal.

Clause 8 Draft WA coastal plan

Clause 8(1) provides that a draft plan must be prepared for the coastal zone by no later than 3 years after the date on which this clause of the Act comes into operation. It was not possible to set a date by which the approved plan must be gazetted, since the time involved in some of the steps in the process cannot be determined (for instance the steps involved in obtaining EPA approval as set out in clause 9).

As outlined in the overview, clause 8(2) sets out what the draft plan must include, namely:

- Identification of the coastal zone and of the coastal compartments comprising the coastal zone;
- A vulnerability assessment of the coastal zone prepared in accordance with clause 18 (see Division 2);
- Identification of the transition zone in accordance with Division 3 (clause 20);
- Climate change adaptation principles, guidelines and measures, which give direction to the matters referred to in 8(2)(e). These have been drafted to exclude canal developments such as the development proposed at Point Peron but not necessarily to exclude marinas and maritime infrastructure; Amongst other things a local coastal adaptation plan must set out the hierarchy of planning measures for hazard risk management, being avoidance, planned or managed retreat, accommodation or protection (clause 8(2)(e)(i)); and
- Climate change management principles, guidelines and measures, which give direction to the matters referred to in 8(2)(f). Amongst other things a management plan may allow “essential” buildings and infrastructure that “provide a public service and cannot feasibly be located elsewhere” (clause 8(2)(f)(ix).

Clause 8(3) sets out the collaboration and consultation that the WAPC must undertake in preparing the draft coastal plan. Clause 8(4) provides that in preparing the WA coastal plan the WAPC must have regard to the views of any public authority or person consulted and to the latest scientific projections.

Clauses 9 – 17 WA coastal plan approval process

Clauses 9 – 17 set out the detailed approval process in relation to the WA coastal plan.

Clause 9 Draft WA coastal plan must be referred to the EPA

Clause 9 provides that the WAPC must refer any draft WA coastal plan to the Environmental Protection Authority (EPA) under clause 48A of the *Environmental Protection Act 1986*. For the purposes of EPA assessment and review the plan is treated as a 'scheme'.

Clause 10 Draft WA coastal plan to be submitted to Minister for publication approval

Once the process under clause 48A has been complied with (including a review if this is required by the EPA), under clause 10 the draft plan must be submitted to the Minister to consent to public notification of the draft. Under clause 10(4), the Minister must consent to public notification if the Minister is of the opinion that the draft plan complies with the objects and provisions of the Act. Under clause 10(5), consent is implied if the Minister does not either consent or refuse consent within 60 days.

Clauses 11 – 14 Public notification, public submissions and final approval of WA coastal plan

Clauses 11 – 14 deal with the process for public notification of the draft plan, public submissions, and submission of the plan to the Minister for final approval. Under clause 14 the Minister has the right to approve the plan, refuse to approve it, or approve it "subject to amendments being made to it, as directed by the Minister". Under clause 14(3) the Minister must give final approval "if the Minister is of the opinion that the draft WA coastal plan complies with the objects and provisions of the Act".

Clause 15 Gazettal of WA coastal plan

Under clause 15, the WAPC must publish a notice in the Gazette that the WA coastal plan has been approved, where it can be inspected, and where a copy of the plan can be obtained.

Clause 16 Parliament may disallow WA coastal plan

If there is no disallowance motion within the stipulated time periods or a disallowance motion is defeated, the final WA coastal plan comes into operation.

Clause 17 Availability of WA coastal plan

Clause 17 specifies that the WA coastal plan must be available for inspection during office hours free of charge and on a public website maintained by the WAPC. Regulations may prescribe a fee for obtaining a copy of the plan.

Division 2 – Vulnerability Assessment (clauses 18 – 19)

Clause 18 Vulnerability assessment of coastal zone

Clause 18 provides that the WAPC must cause a vulnerability assessment to be carried out on all parts of the Western Australian coast that are already developed and any other parts that are likely to be developed within 5 years from the day after Royal Assent. Under clause 18(4), a vulnerability assessment must be prepared having regard to the guidelines prepared by the WAPC that address the matters set out in clause 18(5).

A number of vulnerability assessments have already been carried out globally, nationally and at state, regional and local levels. Under clause 18(1)(b), the WAPC must adopt such an assessment provided it conforms with the guidelines in clause 18(6).

Under clause 18(2), the initial WA coastal plan must include the vulnerability assessment prepared or adopted under clause 18(1). A map drawn from this vulnerability assessment will be included as part of the WA coastal plan.

Under clause 18(4), any vulnerability assessment must be prepared in relation to coastal compartments according to whether the components of the coastal compartments are scaled by the WAPC as primary, secondary or tertiary coastal compartments. Clause 18(5) provides that the appropriate scale must be determined having regard to the guidelines in clause 18(6).

Clause 18(7) requires the precautionary principle to be applied in preparing the vulnerability assessment. Clause 18(8) requires the WAPC to have regard to the latest scientific projections available as at the date of preparation as advised by the EPA under clause 73(b). Clause 18(9) makes provision for the amendment of a vulnerability assessment from time to time.

Clause 19 Restrictions on development in areas without vulnerability assessment

Clause 19 provides that development may not be carried out on land within the coastal zone unless a vulnerability assessment of that land has been included in the WA coastal plan or the development is short term or exempt and is authorised under the Act or any relevant scheme. Short term and exempt development are defined in clauses 51(4) and 59(5).

Division 3 – Transition Zone (clauses 20 – 23)

Clause 20 Identification of the transition zone

Clause 20(1) provides that the transition zone is “the area of the coastal zone which, in the opinion of the WAPC, is likely to be vulnerable to adverse impacts of a coastal hazard, either current or future under the latest scientific projections available as at the date of preparation as advised by the EPA under clause 73(b)”. Under clause 20(2), the WAPC must have regard to the relevant vulnerability assessment when identifying any part of the coastal zone as the transition zone in the WA coastal plan.

Clauses 21 and 22 Memorial must be lodged and notice given if land included in transition zone

Under clause 21, the WAPC must cause a memorial to be lodged in respect of land that is included in the transition zone and that memorial must be registered against the relevant land. Under clause 22 notice of the memorial must be given to the parties specified in the clause as soon as practicable.

Clause 23 Amendment of transition zone on request of responsible authority or owner

An amendment to the transition zone may be requested by the responsible authority or owner in accordance with clause 23 or under division 5 (see below).

Division 4 – Effect of WA coastal plan (clauses 24 – 26)

Under clause 24, the responsible authority must comply with the WA coastal plan when making a decision about the approval of development in the coastal zone. Under clause 25, the plan will prevail to the extent that it is in conflict or inconsistent with a scheme or local law. Under clause 26, the WA coastal plan has legislative effect.

Division 5 – Review and amendment (clauses 27 – 31)

Under clause 27, there is a general review of the WA coastal plan every 5 years. In addition the WAPC must carry out a review as soon as practicable after the occurrence of one or more of the **change criteria** set out in clause 28. The procedure for amendment pursuant to a general review or change criterion review is set out in clauses 29 - 31.

Part 3 – Adaptation and management plans

Clause 32 Terms used

The terms **controlling body** and **local coastal plan** are defined in clause 32.

Clause 33 Draft local coastal adaptation plans and draft local coastal management plans

Under clause 33, the **controlling body** of land in a coastal compartment must prepare a local coastal adaptation plan and a local coastal management plan for that land. Where the land the subject of a local coastal plan is within the district of a local government, the **controlling body** will be that local government; where it is not within such a district, the **controlling body** will be the person with the “care, control and management” of the land, or where there is no such person, the WAPC.

Under clauses 33 (2) and (3), where the land that is the subject of a local coastal plan crosses a boundary, the relevant controlling bodies for those districts must prepare the plan together.

The controlling body that prepares the local coastal plans must work with and consult the various bodies, groups and people mentioned in clause 33(5) and have regard to their views.

Clause 34 Principles, guidelines and measures for preparation

The controlling body must prepare a draft local coastal plan in accordance with the principles, guidelines and measures set out in clauses 8(2)(e) and (f), and according to whether the land is “scaled under section 18(4) in the relevant vulnerability assessment as a primary coastal compartment, a secondary coastal compartment or a tertiary coastal compartment”.

Clauses 35 and 36 Matters to be provided for in local coastal plans

The matters that must be covered in the local coastal plans are in clauses 35 and 36. Such matters include integrated management for coastal erosion and conservation or rehabilitation, coastal buffers, beach driving management, monitoring and reporting.

Clause 37 Local coastal plan may adopt codes or other documents

Under clause 37, where an approved local plan already exists this may be adopted or incorporated into a local coastal plan. Since the content of the local coastal plans will depend on the final WA coastal plan it is unlikely that any existing plan will be adopted without modification but this provision means that valuable work in this regard will not be lost.

Clause 38 Consultation with other controlling bodies

Under clause 38, before submitting a draft local coastal plan to the Minister for approval, the controlling body that prepared the draft must submit it to the controlling body of any adjoining land, and may amend the draft to take account of any submissions made by that controlling body.

Clauses 39 - 42 Approval procedure for draft local coastal plans

Draft local coastal plans must go through an approval procedure similar to that in relation to the WA coastal plan, with submission to the EPA and Ministerial approval prior to being gazetted (clauses 39 – 42). Draft plans must be submitted to the Minister within 5 years from the day after Royal Assent (clause 40(5)).

Clause 43 Parliament may disallow local coastal plan

If there is no disallowance motion within the stipulated time periods or a disallowance motion is defeated, the final local coastal plan comes into operation.

Clauses 44 - 46 Review, amendment and repeal of local coastal plans

Under clause 44, the controlling body must review any local coastal plan prepared by it and approved by the Minister every 10 years, using 30 year projections from the date of the review.

Under clause 45, the controlling body that prepared a local coastal plan may amend that plan and clauses 38 to 42 apply to that amendment, with relevant changes.

Under clause 46, a local coastal plan is repealed by a subsequent local coastal plan.

Clause 47 Inconsistency with other instruments

This clause sets out what happens in the event of a conflict or inconsistency between a local coastal plan and other instruments.

Clause 48 Functions to be carried out in accordance with local coastal plans

Compliance with local coastal plans is mandatory.

Clause 49 Offences and penalties

Clause 49 sets out the penalties for contravention of a local coastal plan.

Part 4 – Development control in the transition zone

Division 1 – Development in the transition zone.

Clause 50 Development principles in the transition zone

Clause 50 provides that a responsible authority must comply with the principles in this division when making a decision about the approval of development in the transition zone.

Clause 51 What development can be carried out in the transition zone

The only development that is permitted in the transition zone is **exempt development** (defined in 51(5)) and **short term development** (defined in 51(4)), which are themselves further subject to the provisions of clauses 53 and 54 (see below). Infill development is only permitted if it is short term development or exempt development permitted under the Act.

Clause 52 Accommodating sea level rise

Under clause 52, the responsible authority must try to accommodate sea level rise in relation to exempt development, rather than protecting against it with hard defences. Hard defences must only be approved if there is no reasonable alternative available.

Clause 53 Certain short-term development must not be approved

Under clause 53, short term development must not be approved if it poses a significant risk to coastal processes unless the responsible authority is satisfied that the impact will not endure beyond the useful life of the development.

Clause 54 Certain exempt development must not be approved

Under clause 54, exempt development must not be approved if it is at significant risk of harming or being harmed by coastal processes unless the responsible authority is satisfied that it meets prescribed standards for reasonable resistance to damage from coastal hazards for the duration of its expected life.

Clause 55 Responsible authority must advise of effect of the Act

Under clause 55, before a responsible authority grants approval for any development in the transition zone, it must give the applicant for development approval notice of the relevant provisions of the Act, including that the development may have to be removed or abandoned under the regulations or in accordance with a coastal protection notice (see below Part 5).

Clause 56 Regulations about development in the transition zone

Clause 56 provides that the Governor may make regulations about development in the transition zone. Clause 56(2) provides that no compensation is payable in relation to the removal or abandonment of short-term or exempt development in the transition zone.

Division 2 – Transactions relating to short-term development

Clause 57 Maximum term for lease or licence

Clause 57 sets out the maximum length of lease or licence that may be granted in relation to short term development

Clause 58 Acknowledgment in lease of licence

Clause 58 requires an acknowledgment from the parties to any lease or licence in relation to land in the transition zone (where that lease or licence is entered into after the coming into operation of this clause) that any short-term development on the land may have to be removed or abandoned.

Division 3 – Land surrender (clauses 59 – 65)

This division relates to a land surrender condition (for coastal management purposes) that may be applied to approvals for subdivision or amalgamation of lots within the transition zone.

Clause 60 Minister may approve inclusion of land surrender condition

Clause 60 provides that where an application for approval to subdivide or amalgamation of a lot in the transition zone is made under clause 135 of the PAD Act, the WAPC may include a condition (***land surrender condition***) that part or the lot must be surrendered to the State for coastal management purposes. The inclusion of a land surrender condition must be approved by the Minister.

Clause 61 Notice of condition about land surrender

Clause 61 provides that notice of a proposed land surrender condition must be given to the applicant before a decision is made.

Clause 62 Criteria for decision

Clause 62 provides that in deciding whether to include a land surrender decision, the WAPC must consider how the surrender of the land would avoid or minimise detrimental impact on coastal management and coastal processes.

Clause 63 Notice of decision about land surrender

Clause 63 provides that notice of a decision about whether or not a land surrender condition will be imposed must be given to the applicant with all relevant details relating to the decision.

Clause 64 When land surrender condition may not be included

Clause 64 sets out the circumstances in which a land surrender condition may not be made.

Clause 65 Surrendered land to be dedicated for coastal management purposes

Under clause 65, land subject to a land surrender condition vests in the State and must be reserved under any applicable local planning scheme for the public purpose of coastal management.

Part 5 – Coastal protection notices (clauses 66 – 72)

This part provides that if short term development on land in the transition zone is damaged by the impact of a coastal hazard, the WAPC may cause a coastal protection notice to be given requiring the owner, occupier or other person to remove the development and restore the land to its previous condition. Clause 66(6) provides that any person who does not comply with a coastal protection notice is subject to a fine.

Under clauses 67 and 68 a coastal protection notice may be amended or reviewed.

Under clause 69, a coastal protection notice must be registered on the title of the land to which it relates.

Clause 70 sets out the duties of a person who ceases to be the owner or occupier of land to which a coastal protection notice relates.

Under clause 71, the WAPC must keep a record of the prescribed particulars of a coastal protection notice, and from time to time must publish particulars of that record.

Clause 72 provides that if action that is required to be taken under a coastal protection notice is not taken, the WAPC may cause that action to be taken and recover the cost of taking that action from any person bound by the notice.

Part 6 – Miscellaneous (clauses 73 – 77)

There are 3 important provisions in this part.

Clause 73 Role of EPA

Clause 73 provides that the EPA must keep itself informed and advise relevant public authorities of changes to coastal climate science and the impact of those changes on projections in relation to the transition zone.

Clause 74 Protection from liability

Clause 74 affords protection to **protected persons** (as defined in clause 74(1)) for anything done in good faith in the performance or purported performance of a function under the Act, and the other matters set out in clause 74(3).

At present there is a possibility that a public authority (including a State instrumentality or local government) could face legal action for refusing planning approval in the coastal zone on the basis of projected sea level rise. Similarly an authority could face legal action for granting planning approval for a development that is subsequently affected by an impact of climate change. The rationale for including the “protection from liability” provision is to enable public authorities to act in accordance with the Act without fear of liability either way.

Clause 75 No compensation for injurious affection

Western Australia is the only state that still retains a provision in the PAD Act for compensation to be paid to owners for “injurious affection” arising as a result of rezoning of their land. Clause 75 provides that no compensation is payable in respect of land that is injuriously affected by the making or amendment of the WA coastal plan or a local coastal plan.

It is recognised that striking a balance between achieving essential adaptation outcomes, respecting property rights and avoiding the creation of compensable rights under new regulatory schemes is difficult. It is also recognised that the impacts of climate change are not equally borne. The state cannot be legally liable for compensation every time loss occurs as a result of a natural disaster. By this rationale under this Act the state is not liable for compensation where loss arises as a result of taking necessary steps to protect Western Australians from the impacts of coastal climate change.

Excluding compensation for injurious affection arising from compliance with this Act also brings Western Australia into line with other states.

The other provisions in this Part relate to the making of regulations (clause 76) and the review of the Act (clause 77) which is required every 5 years.

Part 7 sets out consequential amendments to the *Environmental Protection Act 1986*.

Part 8 sets out consequential amendments to the *Planning and Development Act 2005*.