

From: angus gordon

Date: 3 March 2023 at 10:21:31 am AEDT

To: Damian King

Subject: Re: story

Dear Damian

It is understood that TfNSW has responded to the question of a Development Application being required for an upgrade of the Southern Breakwater with the following:

"The Breakwater upgrade has been assessed appropriately under Division 5.1 of the Environmental Planning & Assessment Act 1979 (the Act). A Part 4 Development consent from council is not required.

More information can be found in the Review of Environmental Factors. Here is the relevant excerpt

2.3 Statutory and planning framework

2.3.1 State Environmental Planning Policy (Transport and Infrastructure) 2021

This SEPP aims to facilitate the effective delivery of infrastructure across the state.

The proposal would involve upgrades to the Port Macquarie southern breakwall, which is a type of 'navigation and emergency response facility' as per the definition provided by clause 2.77 of the SEPP.

The following clauses are applicable to the proposed works:

- Clause 2.79(2)(a) of the SEPP provides that development for the purposes of 'navigation and emergency response facilities' carried out by or on behalf of a public authority, is permitted without consent on any land. The proposed upgrade of the existing southern breakwall is permitted without consent pursuant to this clause.*

- Clause 2.73(2)(c) provides that development for any purpose may be carried out without consent on*

Crown managed land, by or on behalf of a Crown land manager of the land if the development is for the purpose of implementing an adopted plan of management in relation to Crown managed land managed by a Council. The proposed footpath upgrade would be undertaken on Crown land managed by Port Macquarie-Hastings Council. As detailed above, the footpath upgrades would align with the strategic objectives contained within the Hastings Regional Crown Reserve Precinct A Plan of Management.

The proposal can be assessed under Division 5.1 of the Environmental Planning & Assessment Act 1979 (the Act). Development consent from council is not required.

Features such as the proposed establishment of a temporary construction compound and stockpile site is considered ancillary and incidental to the proposal and therefore, is also permitted without consent."

This part of the Planning Legislation has been in place for more than a decade and was intended to facilitate State Government and Local Councils undertake works without requiring a DA, including “navigation and emergency response facilities.

However, as part of the NSW Government’s Coastal Reform Package this provision was limited to “repair and routine maintenance whereas significant upgrades DO require a DA if there is not a certified Coastal Management Program in place. It is understood from Council that although they have a certified Coastal Management Plan in place it does not include major upgrades to the Southern Breakwater and Council is currently in the process of developing a Coastal Management Program in accordance with the Coastal Legislation.

The Coastal Reform Package had several parts including the Coastal Act which passed through Parliament in 2016 and the Coastal SEPP which came into force in 2018. The Coastal SEPP was later renamed the Resilience and Hazard SEPP and it specifically addresses the issues of the need for a DA for anything other than emergency works or repair or routine maintenance, especially in regard to Government Authorities such as TfNSW. The Coastal legislation is linked to the Environmental Planning and Assessment Act and is therefore a matter TfNSW should have addressed, but they seem unaware of that..

Just to be quite clear, under the Coastal legislation in regard to works by a Government Authority the SEPP states:

"Development for the purpose of coastal protection works may be carried out on land to which this Policy applies by or on behalf of a public authority:

(a) without development consent—if the coastal protection works are:

1. (i) identified in the relevant certified coastal management program, or
2. (ii) beach nourishment, or
3. (iii) the placing of sandbags for a period of not more than 90 days, or
4. (iv) routine maintenance works or repairs to any existing coastal protection works, or

(b) with development consent—in any other case."

Note the words **"in any other case"**

The southern breakwater ranks, under the definition in the Act, as a “Coastal Protection Works” . Further, Land and Environment Court cases at Byron Bay have clarified the definition between “repair” and “upgrading”

But, there is another issue as well in regard to TfNSW’s statement. In particular:

"Clause 2.79(2)(a) of the SEPP provides that development for the purposes of ‘navigation and emergency response facilities’ carried out by or on behalf of a public authority, is permitted without consent on any land"

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The issue being that it appears TfNSW is saying that the work on the Southern breakwater is necessary for “navigation” reasons as there is no emergency response facilities involved in the proposed works. The problem with this is that TfNSW’s own consultant, MHL, made it clear that the Northern breakwater was in a far worse state than the Southern, and in particular the head of the Northern breakwater, which is clearly evident to even untrained persons. But, the safest navigation route across the entrance bar, both coming in and going out is to the north, past the damaged head of the Northern breakwater. Hence, logically the priority for providing the safest navigation is clearly repair of the Northern, not the Southern breakwater.

Even though their own consultant brought their attention to the parlous state of the Northern breakwater TfNSW didn’t even consider it in their proposed works.

Therefore it is reasonable to argue that any reliance on Clause 2.79(2)(a) as quoted by TfNSW has a significant credibility issue.

Hence it would seem TfNSW does not understand the current State legislation governing their proposed upgrades. Importantly it was pointed out in my report that TfNSW could undertake repair without a DA but that upgrades required a DA, and I did quote the legislation. What is important is that I am not providing an opinion, simply the actual legislative requirements.

Kind regards

Angus Gordon OAM