

Shoalhaven City Council Submission – Review of Roads Act 1993

Shoalhaven City Council – staff submission

Overview

Shoalhaven City Council thanks the NSW Government and TfNSW for the opportunity to comment on the current review of the Roads Act 1993.

Council has reviewed the Issues Paper and supports the focus areas, including *the four targeted objectives for improvement*:

- *More contemporary uses for roads and streets that are safe and responsive to community needs.*
- *Faster local decision making with appropriate mitigations to manage network risk.*
- *A streamlined and easy to use statute that keeps pace with change.*
- *A more operationally effective statute.*

Council believes the review should be expanded further to address;

- Removal of unnecessary administrative and bureaucratic layers
- Use of specific reference to TfNSW or Council's (ie suggested removal of the term "Roads Authorities" which has long created confusion across functions and responsibilities)
- Strengthen protection and functions for Council's (addressing short comings of the current Act)
- Remove the need for any secondary layers of administration or bureaucracy (in particular – "delegation of functions to council's") by addressing delegated functions within the Act itself, removing the need for any separate "delegations" process, which has never kept pace.
- Council's need to be protected from ongoing cost shifting (transfer of Crown Roads in particular is a key concern). The Act should not allow any transfer of functions or assets to Council without the opportunity for comprehensive consultation and adequate compensation including upfront and ongoing maintenance and operational costs.
- Council has also outlined specific parts of the Act which we would also like reviewed, in the interests of addressing confusion, current lack of clarity, cost shifting, process improvements, and more powers to undertake the necessary safety or efficiency improvements more broadly across the networks we are delegated to manage.

The additional and specific matters we would like to be addressed in the Roads Act review are outlined below in more detail.

Because of the confusion that has long been around with interpretation and exercise of various functions under the Roads Act, and the myriad of other Acts, Regulations, Guidelines and Delegation documents, Council also respectfully requests that with the roll out of any legislation changes, should come with it- training for Council's and other practitioners to ensure that we understand the changes, the new legislation, and to ensure that across the board we are all on the same page (which we cant say with the current legislation framework around roads).

Specific Sections/Parts to be Addressed

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Shoalhaven City Council acknowledges the Issues Paper, and that the questions within are very specific and detailed. The review looks to be very comprehensive, which is supported. Council has further provided the following specific points for consideration;

General

- Following the review of the Roads Act 1993, “if” there is still a need for an ongoing “Delegation” instrument to Council’s, the delegations instrument needs to be updated more frequently than it has been in the past. Notwithstanding, we are hopeful the review will update the Act sufficiently to do away with the need for any supplementary delegation’s process.
- The review not only needs to further empower Council’s but similarly reduce the need for Council’s to have to continually obtain concurrence or referral of matters to TfNSW, and further needs to be expanded to capture all functions that Council’s need to undertake in, on, and adjacent to the roads they manage, and extend all functions to include road related areas and address all forms of Transport (not just “traffic”)
- Council’s still don’t have delegation to install boom gates, paid parking, or any other regulatory parking mechanisms, this should also be addressed in the review, within roads, and road related areas

Specific Sections/Parts to be addressed (addressing current or historic challenges)

- Part 4 (Closing of Public Roads) – Div 1 (Interpretation) – Section 32B (Definition) – the definitions don’t address what “closing a public road” actually means and this has, and continues to, create confusion (ie difference between the road reserve – the land, or a developer road itself, for traffic or other users of the space).
- Part 5 (Classification of Roads) – Div 1 (General) – Sections 46-52A (Classifications) – the current classifications are not in keeping with AUSTROADS or Australian Standards, and don’t define “local roads” “regional roads” “designated regional roads”, nor do they define “arterial” “sub-arterial” “collector” or any other categories or sub-categories of roads regularly used by roads authorities. This inconsistency (between the Act and Standards/Guidelines) has in turn led to inconsistencies in the use/and application of classifications broadly across Council’s and State road authorities (just about everyone would have their own take on classifying roads, depending on the purpose), this needs to be tightened up to achieve State wide consistency, preferably in the Act.

By and large it would appear that there is only a practical distinction between classified roads and local roads in the context of the rest of the act (ie roads where TfNSW concurrence is required, and roads where it is not). We are just making the point that as part of the review it would be beneficial for the classification system to be more consistent with how road standards and guidelines have evolved.

- Part 5 (Classification of Roads) – Div 2 (Consultation with Road Authorities) – there is no Section “Consultation by Roads Authorities”. The need for consultations, based on a range of different functions used to be spelled out in former Transport (DMR/RTA) guidelines which have since been superseded. There are some sections in the Act where this is addressed (for example s116) however that is too specific just for those particular applications to TfNSW under Part 8, and in our view there should be a general section discussing the range of consultations required under the various functions.

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- Part 5 (Classification of Roads) – Div 3 (Distribution of Certain Functions between TfNSW and other road authorities) – this Section has been written to address protections/immunity for TfNSW but doesn't offer the same protections/immunity for other road authorities. Not saying that Div.3 doesn't have its place, just that Council's also need more protection/immunity to protect its own interests.
- Part 5 (Classification of Roads) – Div 3 (Distribution of Certain Functions between TfNSW and other road authorities) – across the board District Engineers and Roads Engineers/Roads Assets staff will no doubt be providing feedback on this section, however to protect Council's interests the Act should not allow any transfer of functions or assets to council's without consultation and adequate compensation including upfront and ongoing maintenance and operational costs
- Part 6 (Road Work) – Div 3 (Miscellaneous) – Section 88 (Tree Felling) – similar to the way drainage and embankment works can extend to include private land adjacent to road reserves where required, similarly, Section 88 should be extended to make provision for any tree/vegetation clearing works on adjoining land where required to address clear zones or maintain minimum standard sight lines. This would avoid the need to try and apply Part 7, Div2, s104 which was really not written for that purpose, but notwithstanding we've had to use s104 for that purpose on numerous occasions (and just hoped the affected owner was agreeable – not always). This situation would be completely avoidable and far more efficient for s88 to simply be expanded to allow adjacent land to be expressly included (where justified under the various suite of standards/guidelines) as part of the s88 provisions. (In the same way the Act needs to also be able to be applied to fencing and hedging, where the erection of fencing or hedging creates a road safety issue due to design or location, which may be a physical constraint or clear zone issue, or more commonly that the fence or hedging is causing a safety issue by blocking minimum safe sight lines for traffic, pedestrians, or cyclists. This is becoming more of a concern due to speeds associated with e-mobility, and Council's need more powers to address these more varied forms of off road hazards).
- Part 7 (Protection of Public Roads and Traffic) – Div 1 (Protection of Public Roads) – Section 102 (Liability for Damage to Public Road) – s102 needs to address development impacts on the surrounding road network, where it can be demonstrated that the impacts are clearly not "reasonable wear and tear", and in our view – the Act should place the onus on developments to undertake their own dilapidation reports before/during/after development and submit that detail to roads authorities, and empower road authorities to be able to seek compensation for any impacts sustained within the road reserve (impacts to roads, traffic facilities, footpath, drainage, any other road related assets managed by roads authorities) where the damage is clearly over and above "reasonable wear and tear", and attributed to development, events, or any other traffic generating activities. Addressing this in the Act would reduce the need for consent authorities to have to specify individual clauses to this effect in individual development consents, and empower Council's to more efficiently address these concerns as opposed to arguing and getting now where with developers.
- Part 7 (Protection of Public Roads and Traffic) – Div 1 (Protection of Public Roads) – Section 102 (Liability for Damage to Public Road) – s102 also needs to be extended beyond roads, to expressly include signs, lines, barriers, fencing, guard rails, traffic control devices, traffic calming devices, pedestrian crossing treatments, intersection treatments, trees, vegetation/landscaping, and any other road or road related assets managed by roads authorities

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- Part 7 (Protection of Public Roads and Traffic) – Div 2 (Off Road Traffic Hazards) – Section 104 (TfNSW may direct removal etc of traffic hazards) – Council's need to be empowered to utilise s104 provisions on roads under its care and control, and further – s104 should be expanded to expressly allow adjacent land to be included (where justified) as part of the s104 provisions, where it can be demonstrated that any hazards exist on adjoining land (including the boundary) that is impacting the safety of road users within the road reserve, not just relating to traffic, but extending to expressly include any form of transport including but not limited to active transport users of shared paths/footpaths/verges etc, or impacting the safety of any other legal users of the road reserve space. The list of hazards to expressly include not just structures but fencing, trees/vegetation/hedging, signs (of any form), and empower road authorities to be able to take any reasonable actions to remove any off-road hazards, which needs to expressly extend into adjoining land at times to include addressing/maintaining clear zones or providing/maintaining minimum standard sight lines.
- Part 7 (Protection of Public Roads and Traffic) – Div 3 (Obstructions and Encroachments) – Section 107 (Obstructions and Encroachments) – s107 should be extended to expressly include trees/vegetation
- Part 8 (Regulation of Traffic by Roads Authorities) – Div 1-4 – Sections 114-123 – there has been confusion as to whether Council's have been delegated all aspects of Part 8 and this should be addressed in the review, including but not limited to the application of s116 which has been the subject of inconsistent legal advice and inconsistent advice from TfNSW over time. Further Part 8 needs to be amended/or extended to;
 - Move s116 into Div 1 to expressly empower Council's in respect of a broader range of functions (ie - other than "road work")
 - expressly address all functions that Council's need to undertake to lawfully carry out its obligations
 - expressly address all forms of Transport (not just limited to 'Traffic')
 - modification of Sec 115(2) would go a long way to removing significant legal ambiguity within Part 8, and free Council's from the current shackles placed on it by the Roads Act
 - Would also like to see further detail provided within of section 122. (free from the restrictions placed on Roads Authorities within section 115).
 - In our view modifying section 115(2) could go along way to addressing any need for a separate delegation's process. (Having Council's ability to undertake/approve certain works where controlled by a separate delegation mechanism which is subject to change, creates confusion and legal ambiguity, and requires process changes every time a change is made to the delegation, notwithstanding, we've also made the point that the delegations document simply hasn't kept pace). Over time TfNSW has also had less and less appetite for actually asserting any of their powers under this section "on local roads" (preferring to leave it to Council to act as the initiator and manager the process, but via another separate process - LTC).
 - Further to the above comments, and to provide another example of the current inconsistencies, it makes no sense that Councils have the power to close a road for 'temporary' (which can include prolonged periods) for the purposes of outdoor dining under the liquor act (Section 166 - Liquor Act 2007 No 90 - NSW)

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Legislation), but cannot close a road for an hour for an Anzac Day march without LTC approval.

- Part 9 (Regulation of Works, Structures and Activities) – Div 1-7 – Sections 125-144H – Part 9 should be extended to address utility works in road reserves, and provide road authorities with more powers to approve, direct improvement works, seek compensation for works, and minimise the cost of undertaking utility works/relocations required to perform its functions or make necessary improvements to its road network.

We would also like to see S138 clarified so that it explicitly states consent can be given to undertake traffic control work, in connection with any form of work, activity (which can be very broad – for example “filming”), and extend to include any event, or training. We believe that the current interpretation is that traffic control is considered a type of ‘work’ under section 138, but we don’t believe that is really supported anywhere else more broadly throughout the Act (it’s always framed as “a roads authority may regulate traffic “ etc.).

It has evolved that almost any form of work or activity within the road reserve (or road related areas) might require some form of “Traffic Control Work” in order to be undertaken safely, but there needs to be more flexibility within the Act for Council to manage this on roads under its care/control.

- Part 9 (Regulation of Works, Structures and Activities) – Pursuant to Division 1 – subsequent Sections 122 (temporary regulation of traffic) and s144 (events) are at odds, this should be addressed and all road authorities should be given the necessary powers to undertake or authorise any form of temporary regulation of traffic (including but not limited to any form of works, events, or training activities) required to carry out its functions and obligations as a roads authority with respect to the roads and road related areas it has care/control
- Part 9 (Regulation of Works, Structures and Activities) – Division 2 (Public Gates) – needs to be extended to expressly address the illegal installation or closure of gates (which has the effect of preventing access by any member of the public to a Public Road/road reserve and by any form of transport)
- Part 9 (Regulation of Works, Structures and Activities) – Division 3 (Other Works and Structures) – Sections 137A-143 – including Section 138 – across the board District Engineers and Roads Engineers/Roads Assets staff will no doubt be providing feedback on this section, however there needs to be more consistency and guidance provided to Council’s to prevent inconsistency in s138 processes being written and applied by different Councils and roads authorities
- Part 9 (Regulation of Works, Structures and Activities) – Division 4 (Road events) – Section 144 – In its current form section 144 is of little practical use, largely because of the extremely narrow definition of a “Road Event” provided for in Part 79 the Roads Regulation 2018 (Roads Regulation 2018 - NSW Legislation). Because it only covers ‘on road filming activities’ and ‘neighbourhood activities’ that are on/near the address of the applicant. Even if approval is sought (which has never occurred in my time) it ends up being easier to simply issue a Section 138 for the traffic control ‘works’ as we already have established processes (and portals) for this (the NSW planning portal does not currently support S144 applications).

In its current form section 144(3) in particular has no practical use, because essentially zero activities that fit the definition of a “Road Event” under the Regulation match the

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corresponding definition of activities that required S115 Road Transport Act approval (Road Transport Act 2013 No 18 - NSW Legislation). I.e a bike race on a public road with traffic control in place by rights should require S144 approval, as it requires S155 RT act approval and S144(3) re-iterates this, but because it is considered an 'ineligible' event under the Roads Regulation, a S144 approval cannot be given. As such we end up issuing a S138 approval for the traffic control works, and either no approval for the activity itself (it is implicit within the S138), or a use of council land approval under the LG act (not familiar with the exact process). In either case a S115 RT act approval is almost never sought as this is not specified as required under S138, but it is still definitely a requirement of the RT act for these activities. Point of fact, the Shoalhaven LAC were not even aware until recently that they were even required to give a S115 RT act approval for bicycle races!. Such is the confusion and over complication of having multiple pieces of legislation in addition to separate delegations processes.

In line with the suggested changes to Part 8, we suggest the definition of "Road Event" should be broadened to include any and all forms of event or activity, provide a clear and distinct legal approval process, separate to section 138, and an actual use case for this part of the Act. We acknowledge this would require amendment to the Roads Regulation as well, but we presume that would have to be a given, with any broad sweeping changes to the Act.

- Part 13 (Finance) – Division 5 (Miscellaneous) – Section 223 (Roads Authorities may charge fees for service) – item 3 should be removed (there shouldn't be a cap set in an Act when there is no guarantee of any annual review), history suggests it may be a long time before the next review, accordingly an Act should not be used to set or cap fees, and Councils' need to have the discretion to set reasonable fees for its services, endorsed by Council through the usual annual review of fees/charges pursuant to its powers under the Local Government Act
- Dictionary – "Road Work" must be extended to expressly include not just physical works, but extended to include any form of other works including (but not limited to) planning, investigations, surveying, traffic surveying including all forms of data collection/monitoring, project scoping, assessments, or any other functions required to be undertaken as part of Council's normal operations and obligations as a roads authority

Property Matters to be Addressed

1. Notification requirements in print media (newspaper)

The Roads Act requires notification of certain activities (eg road closures, short term leases of roads) in a local newspaper. This requirement needs to be made consistent with the 2018 changes to the Local Government Act whereby the requirement for newspaper notification was replaced with a requirement for a Council to "determine the method of publication they will use to best bring a notice to the public's attention."

Councils *should be able* to work under consistent legislation frameworks across its land and road management activities and the prevailing newspaper advertising requirement adds financial burden and does not allow for a consistent communication and consultation platform with the local community.

This needs to be reviewed broadly to ensure methods of notification and consultation keep pace with changes in consultation practices and community expectations.

2. Concurrence from Transport for NSW

The Act requires Council's to obtain concurrence from TfNSW on a range of matters. These need to be reviewed and eliminate any requirement for a Council to obtain TfNSW concurrence for a work or activity on a Council controlled road, just for eg; s149 Roads Act and approval for lease of air space, but further this needs to be reviewed broadly throughout the Act to remove all unnecessary red tape and address inefficiencies.

3. Transfer of Crown roads to Council (s152I of the Act)

There are significant financial implications of Council's being transferred more assets from the Crown. Council objects to Government cost shifting and the Roads Act needs to be strengthened and provide adequate protections to Council's to prevent the transfer of any assets without adequate consultation and compensation.

The Crown Lands guideline does not provide adequate protections to Council's (the current Act allows for transfer to Council but does not stipulate the grounds, being contained with an internal Crown policy document). Council advocates that the grounds must be included in the Act, following consultation with Council's in relation to the grounds (as opposed to the current situation where the grounds are determined by a Department which has a financial incentive to transfer the roads away from its own care/control).

The current provisions of the Act that permits transfers of Crown roads to Council's, using the Department's own internal guidelines, and without adequate budgetary considerations needs to be addressed (currently makes no provision for Council to address its role under s8A of the Local Government Act 1993) specifically;

(b) Councils should carry out functions in a way that provides the best possible value for residents and ratepayers.

(e) Councils should work co-operatively with other councils and the State government to achieve desired outcomes for the local community.

(f) Councils should manage lands and other assets so that current and future local community needs can be met in an affordable way.

That is - Council must be able to properly inform and demonstrate to the community that it has the capacity to accept responsibility for new assets, and the community must be given opportunity to make representation on any proposal. Against Council's control, those requirements of the Local Government Act are not being fulfilled when it comes to Crown Road Transfers, as the Crown applies s152I of the Roads Act through its interpretation and reliance on its own internal Crown Land guidelines, in turn delivering increasing, unreasonable, and unaffordable financial cost burdens on Councils (ie cost shifting) which is not supported (Council objects).

Accordingly, Council requests that the current untenable situation (in relation to Crown Roads transfers) also be addressed in the current review of the Roads Act.