That sinking feeling: A legal assessment of the coastal planning system in New South Wales

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Recent evidence indicates that the New South Wales coast faces increasing risks from erosion and inundation as a consequence of the enhanced greenhouse effect and rising sea levels. At the same time, a rapidly expanding population in coastal New South Wales is fuelling demands for more subdivision and development. Both of these trends are increasing the likelihood and quantum of damage to private property in oceanfront or low-lying locations along the coast. An escalating threat of damage generates an increase in the likelihood of claims against public authorities with responsibility for land-use planning in coastal areas. This article examines the measures New South Wales has adopted to deal with coastal erosion and climate change flood risks. An analysis of recent initiatives, including the legislative changes to the Coastal Protection Act 1979 (NSW) and the Local Government Act 1993 (NSW), as well as a case study of coastal erosion at Belongil Beach, will be undertaken to assess the efficacy of the current system. The article then considers the capacity of current measures to protect public authorities from future litigation arising from land-use planning decisions on the New South Wales coast. Finally, the article offers some suggestions for replacing the current system with an integrated sustainable coastal planning framework.

INTRODUCTION

One of the greatest challenges for land-use planning in New South Wales is the increased threat of coastal erosion and inundation posed by anthropogenic climate change and rising sea levels. Like other coastal areas throughout the world, New South Wales' demographic pressures are intensifying the pace of private residential development in low-lying coastal areas and on the coastline. Two and a half billion people – approximately a third of the global population – currently live in the coastal zone.1 In Australia, the percentage of the population living in the coastal zone is ever higher, at approximately 86%, while in New South Wales 80% of the population live within 3 km of the coast.2 Coastal populations are particularly susceptible to natural hazards from storms and fluctuating sea levels. These hazards are likely to be exacerbated by climate change.

Climate change is predicted to lead to an expansion in the range of tropical storm activity and in the frequency and intensity of storm surges. Rising sea levels could potentially inundate wetlands and other low-lying lands, erode beaches, intensify flooding, and increase the salinity of rivers, bays and groundwater tables.3 Beach and dune erosion will make coastal properties more vulnerable to storm waves and affect areas further inland. These hazards present a threat to private and public assets in affected areas. Industries such as agriculture, aquaculture, tourism and construction are likely to suffer

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adverse effects, as well as residential property. This could generate an increase in claims for compensation and present considerable challenges for the legal system. Legal risks are amplified by a lack of specific legislation on the issue.

**DEVELOPMENT OF COASTAL PLANNING IN NEW SOUTH WALES**

Prior to the 1970s, coastal lands management in New South Wales, as in other Australian jurisdictions, was concerned mainly with river training works to facilitate ship access to coastal harbours, and with regulation of sand mining. Regulation of urban development in coastal areas was largely left to local governments. However, a series of conflicts between environmentalists and coastal development interests from the early 1970s led the New South Wales government to take action to secure public access and environmental protection to undeveloped coastal lands. New laws to manage coastal lands outside protected areas followed as massive sustained low pressure systems off the New South Wales coast caused huge damage in coastal communities in the mid-1970s. The 1974 storms destroyed homes and public infrastructure along Sydney’s northern beaches and the Central Coast, while on the far North Coast, the hamlet of Sheltering Palms was abandoned following catastrophic damage.

The Coastal Protection Act 1979 (NSW) (CP Act) was introduced at the same time as the Environmental Planning and Assessment Act 1979 (NSW) (EPA Act) and was designed to be an umbrella Act, providing direction and leadership, but leaving the local planning for coastal management to the relevant local councils. The CP Act required councils to prepare coastal zone management plans to address coastal erosion risks, and provided the relevant Minister with powers to introduce an effective local plan where a council failed to do so.

The next major reforms were introduced by the Greiner Government in the late 1980s, with the release of the New South Wales Coastline Hazard Policy in 1988, the commissioning of the New South Wales Coastline Management Manual in 1990 and, as a central reform, the introduction of the first New South Wales Coastal Policy, also in 1990. A review of the coastal policy was prepared in 1994, but the change of government meant that it was 1997 before the new coastal policy was introduced. The New South Wales Coastal Policy 1997 sets a strategic framework for coastal management based on the principles of ecologically sustainable development (ESD). It identifies 23 objectives, one of which is the need to recognise and consider the effects of climate change in the planning and managing of coastal development. State Environmental Planning Policy 71 – Coastal Protection (SEPP 71) was introduced in 2002 and imposes significant controls on inappropriate development on the New South Wales coast, and lays down a clear development assessment framework for the coastal zone. The CP Act was amended at the same time to limit the rights of

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6 New South Wales Government, Byron Bay/Byron Point Erosion Study (Report No PWD 78026, Public Works Department, Coastal Engineering Branch, November 1978).

7 To date, no plans have been prepared, with the exception of two estuary plans, New South Wales Legislative Assembly, Agreement in Principle Debate on Coastal Protection and Other Legislation Amendment Bill (No 2) (19 October 2010), http://www.bulletin/prod/parlment/hansard.nsw/V3Key/LA20101019049 viewed 29 March 2011.


10 New South Wales Coastal Policy 1997, n 2, Pt B(2.2) “Implementation”, p 47.

11 SEPP 71 provides, inter alia, for the protection, improvement and enhancement of existing public access to coastal foreshores, and for the protection and preservation of beach environments and beach amenity: State Environmental Planning Policy 71 – Coastal Protection, s 2(b), (c), (f). It reinforces the need to manage the coastal zone in accordance with ESD principles: State Environmental Planning Policy 71 – Coastal Protection, s 2(j).
waterfront landowners to claim accreted foreshore land. The *Floodplain Development Manual* was introduced in 2005 to outline the methodology for assessing and managing flood hazards.

Yet, during the mid-2000s, the balance shifted quite dramatically. First, the independent Coastal Committee appointed by the Greiner Government in 1989 was abolished, depriving the coast of an independent advocate in government. Next, the insertion of Pt 3A into the EPA Act and its interaction with *State Environmental Planning Policy (Major Development)* 2005 – which specifically applied to certain coastal areas and categories of coastal development – meant that any significant subdivision of coastal land was removed from the jurisdiction of local councils and the protection of SEPP 71. The *Coastal Zone Management Manual*, promised as an updated replacement for the *Coastal Management Manual*, did not materialise.

The publication of the fourth report of the Intergovernmental Panel on Climate Change in 2007 and growing community concern about climate change led the government to examine whether there was a need to adopt new measures to address sea level rise and to amend existing policies and legislation.

The New South Wales government released its *Sea Level Rise Policy Statement* in 2009. The policy outlines the government’s objectives in relation to sea level rise adaptation and support that will be provided to councils and coastal owners to assist them in adapting to sea level rise. It promotes an adaptive risk-based approach to managing the impacts of sea level rise. It does not preclude development, but aims at ensuring that development is adapted to it. This is achieved by adopting sea level rise planning benchmarks for an increase above the 1990 mean sea levels of 40 cm by 2050 and 90 cm by 2100.

The policy is supported by guidelines that explain how the sea level rise benchmarks are to be applied in coastal and flood hazard assessments and in land-use planning. To complement this policy, the Department of Planning has released the *New South Wales Coastal Planning Guideline: Adapting to Sea Level Rise*. At the same time, the CP Act and the *Local Government Act 1993 (NSW)* (LG Act) have been amended by the *Coastal Protection and Other Legislation Amendment Act 2010 (NSW)*. These developments will be considered in more detail below.

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12 *Coastal Protection Act 1979 (NSW)*, s 55N.


14 Although a consideration of Pt 3A is beyond the scope of this article, its ramifications are apparent form the decision in *Walker v the Minister for Planning* (2007) 157 LGERA 124.


INCORPORATION OF COASTAL PLANNING INTO LAND-USE PLANNING SYSTEM

Role of local government

Under the EPA Act, local councils are largely responsible for the preparation of the strategic land-use planning regulations to guide development in their local areas. Strategic land-use planning regulations prepared by local councils include Local Environmental Plans (LEPs) and Development Control Plans (DCPs). LEPs are prepared in draft form by the relevant local council, with the power to make LEPs vested in the Minister for Planning. DCPs are drafted and made by councils, although, unlike LEPs that are legally binding on anyone applying for development consent, and on the consent authority, DCPs are designed as guidelines and do not have legal force.

LEPs contain the major strategic planning controls that apply in a local government area, and a council can prepare a draft LEP for the purpose of achieving any of the purposes of the EPA Act. Such purposes might include traditional land-use zoning objectives, such as providing for the “orderly and economic use and development of land” or “protecting, improving or utilising, to the best advantage, the environment”. While protection of coastal areas, or adapting to the likely impacts of climate change, are not specifically identified as objects for which draft LEPs might be prepared, such purposes are consistent with the general objects of the EPA Act, so that councils are empowered to consider climate change in the preparation of local planning controls.

In preparing draft LEPs, local councils are also subject to the direction of the Minister for Planning, who can insist that certain matters be included in a draft LEP, and who has wide discretion to make substantive changes to draft LEPs. The ministerial power to give directions under s 117(2) of the EPA Act is one of the principal means of incorporating coastal planning strategies into land-use planning, eg:

- The New South Wales Coastal Policy is given legislative effect through SEPP 71 and through a Ministerial Direction under s 117 of the EPA Act that requires the policy to be taken into account in planning and development decisions.
- EPA Act, s 117 Direction 2.2 – “Coastal Protection” – directs that a draft LEP shall include provisions that give effect to and are consistent with the New South Wales Coastal Policy, the Coastal Design Guidelines for New South Wales and the Coastline Management Manual.
- EPA Act, s 117 Direction 4.3 – “Flood Prone Land” – requires that a draft LEP shall include provisions that give effect to and are consistent with the Floodplain Development Manual 2005 and the New South Wales Flood Prone Land Policy.

Local councils have traditionally fulfilled a dominant role in assessing development proposals within their jurisdictions. In assessing development applications, councils are required to take into consideration certain relevant matters, including:

- planning regulations, such as environmental planning instruments, draft environmental planning instruments, DCPs and coastal zone management plans;

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22 Environmental Planning and Assessment Act 1979 (NSW), s 54.
23 Environmental Planning and Assessment Act 1979 (NSW), s 74C.
24 Environmental Planning and Assessment Act 1979 (NSW), s 79C(1)(a)(iii) does require consent authorities to consider the provisions of any DCP. See Stockland Development Pty Ltd v Manly Council (2004) 136 LGERA 254 for principles relevant to such consideration.
25 Environmental Planning and Assessment Act 1979 (NSW), s 24.
26 Environmental Planning and Assessment Act 1979 (NSW), s 5(a)(ii).
27 Environmental Planning and Assessment Act 1979 (NSW), s 5(a)(viii).
28 Environmental Planning and Assessment Act 1979 (NSW), s 26(1)(a).
29 Environmental Planning and Assessment Act 1979 (NSW), s 59.
likely impacts of the proposed development, including impacts on the natural and built environment, and social and economic impacts in the locality;

- the suitability of the site for the development;
- any submissions made in accordance with the EPA Act or the regulations; and
- the public interest.\textsuperscript{31}

Each of these matters for consideration may require a council to consider the impacts of climate change, especially for a development proposal in a coastal area. Since the 2010 amendments to the CP Act, coastal zone management plans are required to incorporate provisions dealing with natural hazard management and climate change. When these plans are made, they will be an important factor for assessment of applications in the coastal zone. In assessing a development application in a coastal area, a local council would also need to take into account a range of matters listed in SEPP 71, including "the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards".\textsuperscript{32} It should also be noted that the Standard Instrument used in preparing a LEP\textsuperscript{33} requires consideration of the \textit{New South Wales Coastal Policy} and coastal processes, and potential hazards and impacts, including sea level rise, before granting development consent.

A consideration of the suitability of the site for development would also require consideration of whether the land is subject to inundation or is in the immediate hazard zone. The courts have also held that consideration of the mandatory obligation to have regard to the public interest obliges the council to take into account the principles of ESD, which would include the risk of climate change-induced coastal erosion, where principles relevant to those considerations arise.\textsuperscript{34}

Apart from the mandatory considerations outlined, there is a plethora of guidelines intended to assist councils in planning and assessment of development proposals in the coastal zone. Some of the key guidelines relate to sea level rise and benchmarking. The \textit{New South Wales Coastal Planning Guideline: Adapting to Sea Level Rise} adopts the New South Wales sea level rise planning benchmarks in the \textit{New South Wales Sea Level Rise Policy Statement} and provides guidance to councils on how sea level rise is to be considered in land-use planning and development assessment in coastal New South Wales. The benchmarks must be used in undertaking coastal and flood hazard assessments under the \textit{Coastline Management Manual} and \textit{Floodplain Development Manual}. The guideline points out that the sea level rise planning benchmarks are not intended to be used as a blanket prohibition on development of land projected to be affected. Instead, new LEPs and development applications should continue to be assessed on their merits using a risk-based approach to determine whether the impacts of sea level rise and other coastal processes can be mitigated and managed over time.\textsuperscript{35} Two additional recent guidelines to assist councils in preparing coastal hazard and flood risk studies to incorporate the sea level rise planning benchmarks are the \textit{Coastal Risk Management Guide: Incorporating Sea Level Rise Benchmarks in Coastal Risk Assessments 2010}\textsuperscript{36} and the \textit{Flood Risk Management Guide: Incorporating Sea Level Rise Benchmarks in Flood Risk Assessments 2010}.\textsuperscript{37}

\textsuperscript{31} \textit{Environmental Planning and Assessment Act 1979} (NSW), s 79C(1). The requirement to consider any relevant coastal zone management plan was inserted by the \textit{Coastal Protection and Other Legislation Amendment Act 2010} (NSW), Sch 3.2.

\textsuperscript{32} \textit{State Environmental Planning Policy 71 – Coastal Protection}, cl 8(j).


\textsuperscript{34} \textit{Minister for Planning v Walker} (2008) 161 LGERA 433; \textit{Aldous v Greater Taree City Council} (2009) 167 LGERA 13.


Role of State government

The State Government can prepare State Environmental Planning Policies (SEPPs) for matters that are – in the opinion of the Minister – of State or regional environmental planning significance. SEPP 71 was passed in 2002 to curtail inappropriate development in the coastal zone. As discussed above, this SEPP is required to be factored into local government planning and development assessment.

State Environmental Planning Policy (Major Development) provides that certain proposed developments within the coastal zone are areas to which Pt 3A of the EPA Act applies. Part 3A of the EPA Act establishes a specific development assessment process for particular development proposals, and appoints the Minister for Planning as the decision-maker. Certain types of development within coastal areas are among the development proposals subject to the assessment process outlined in Pt 3A of the EPA Act. The types of coastal development subject to assessment by the Minister for Planning under Pt 3A include landfill, mining, subdivision, and construction of tall buildings. Consequently, development that is “likely to have the greatest impact on the coastal environment in New South Wales will be decided by the Minister for Planning”.

The new planning regime was tested in 2007 when Sandon Point, about 53 km north of Wollongong, was the subject of a Pt 3A application for an extensive residential subdivision on low-lying flood-prone coastal land. The Minister’s approval for this application was challenged in the Land and Environment Court, where Biscoe J found that in circumstances where neither the Director General’s report nor any other document before the Minister appeared to have considered whether climate change flood risk was relevant to this flood-constrained coastal plain project, the Minister was obliged to consider coastal erosion risks. The judge determined that the Minister did not discharge that function. The government disagreed, with the Minister appealing on the basis that he was under no duty to consider ESD or the issue of climate change flood risk. The appeal was successful, although the Court of Appeal noted that ESD was likely to become a mandatory consideration over time.

PROPERTY RIGHTS AND PUBLIC ACCESS TO BEACHES

In Australia, titles to waterfront land are based on a fixed “right-line” property boundary, or on the mean high watermark, unless some other boundary is specified in the grant. Both of these methods of designating boundaries are potentially problematic in the event of coastal inundation.

Accretion

Where the mean high watermark is the boundary, the common law doctrine of accretion has traditionally applied. This doctrine has been held to apply to land registered under Torrens title. Under this doctrine, a landowner can apply for the boundary to be extended where it has been varied by accretion. It has the potential to limit public access to beaches as private property owners apply to extend the boundaries of their land. The CP Act was amended in 2002 to limit the operation of the doctrines of accretion by requiring that no change be made to land to the landwards side of the water boundary, if the accretion is not likely to be indefinitely sustained by natural means, or if public access

38 Environmental Planning and Assessment Act 1979 (NSW), s 37(2).
39 State Environmental Planning Policy (Major Development), reg 13C.
40 See State Environmental Planning Policy 71 – Coastal Protection, cl 6, Sch 2.
41 State Environmental Planning Policy (Major Development), Sch 2(1).
44 Minister for Planning v Walker (2008) 161 LGERA 433. This view was subsequently endorsed by the New South Wales Land and Environment Court in Aldous v Greater Taree City Council (2009) 167 LGERA 13, which dealt with an appeal under Pt 4 of the Environmental Planning and Assessment Act 1979 (NSW).
45 Verrall v Nott (1939) 39SR (NSW) 89 at 99.
to a beach or headland is affected. This amendment presents a significant obstacle to obtaining an application for boundary change based on accretion, as climate change and fluctuating sea levels make it difficult to establish that the new boundaries are capable of being indefinitely sustained by natural means. However, the amendment has not effectively addressed the question of erosion.

Erosion

Coastal erosion is more common than accretion, as storm surges and sea level rise break down dunes and erode their effectiveness as buffers. Erosion is the converse of accretion in that a coastal property owner may be left with a reduced land area as a result of rising sea levels and wave action. This has led to numerous disputes between landowners and public authorities as to whether they are entitled to take protective action to protect their property. Such disputes have intensified as specific restrictions on development and protective works have been aimed at waterfront owners in particular areas. Of course, land-use regulations do not treat landowners differently, but rather they can impose different burdens on different parcels of land. Nonetheless, a feeling that “wealthy” coastal landowners are targeted under coastal land-use restrictions pervades the argument about managing vulnerable coastlines. As Stallworthy noted in relation to disputes over coastal land-use planning, “scepticism and resistance cannot be dismissed as simply NIMBYism. It can be rather seen as a rational response to a disproportionate burden imposed in large part retrospectively”. Clearly, there is a fundamental dichotomy between the landowner’s common law right to protect their land from the sea, and the role of public authorities to ensure that the actions of waterfront landowners do not undermine the public interest in ensuring public access to public beaches.

While there are a number of cases that establish the rights of landholders to defend their property from the sea, and the duty of the Crown to protect private land from “the incursions of the sea”, Australian courts have also long upheld the public interest in maintaining public access to the foreshores. In *Re Sydney Colleries Co* (1895) 5 LAC (NSW) 243, the Land Appeal Court determined that the colonial government was obliged “to take the greatest care to protect both present and contingent public interests” in relation to waterfront land, which “if the Crown could in law be a trustee, it holds in trust for the health, recreation and enjoyment of an enormous and ever-increasing population”. More recently, there are a growing number of cases in which courts have upheld local planning instruments that prioritise public access to the foreshore over defensive works that protect existing homes or which might facilitate increased residential development. In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57, a decision by a local council in South Australia to refuse an application for a residential development at Marion Bay on the basis of inconsistency with the objectives for coastal development in council’s development plan. The Environment, Resources and Development Court of South Australia upheld council’s refusal on the

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46 *Coastal Protection Act 1979 (NSW)*, s 55N.
basis of expert evidence that the adjacent coastline could erode by between 30-45 m in the next 100 years. This decision was subsequently confirmed in the South Australian Supreme Court.56

Adaptation strategies of protect, adapt, retreat and the rights of property owners to protect their land

Choices for managing coastal erosion, amplified by rising sea levels, are stark – to protect, to accommodate, or to retreat.57 Coastal management options for eroding coasts therefore include non-intervention, managed realignment, or soft or hard protection works.58 The New South Wales Coastline Management Manual 1990 canvasses each of these approaches, grouping possible hazard management options into four categories:

1. environmental planning (buffer zones, restrictive zoning, planned retreat and voluntary purchase);
2. development control conditions;
3. dune management; and
4. protective works.59

These options are all used to some extent in coastal planning in New South Wales.

Planned retreat is the more controversial of the options outlined in the Coastline Management Manual 1990. This strategy would permit development either for a limited time, or until it is threatened by coastal hazards. At this stage the consent would lapse and the structure would have to be moved back, relocated or demolished. This strategy has the advantage of maximising the use of land until any potential hazards are realised. However, the obvious disadvantage is that a property owner stands to lose complete use of land once erosion is so severe that there is nowhere to retreat to. Byron Shire Council has favoured a policy of planned retreat in areas affected by coastal erosion. The policy has been in place since 1988 as a means of managing the receding coastline and is found in the DCP, which was adopted in its current form in 2002.60 In terms of this policy, no new development is permitted in the immediate impact line. Between the immediate impact line and the 50-year erosion line, development will be considered subject to the proviso that when the erosion escarpment comes within 50 m of any building, the development consent will cease. The owner will then be responsible for the removal of any buildings onsite or, if possible, to a location onsite further than 50 m from the erosion escarpment.

The respective rights and duties of property owners and local councils in relation to coastal erosion works and the effectiveness of the policy of planned retreat as a means of addressing erosion interests has recently been tested in the New South Wales Land and Environment Court. This case and its background is discussed below.

Byron Shire Council v Vaughan

Belongil Beach at Byron Bay on the north-west coast of New South Wales has a long history of coastal erosion. In 2001, Byron Shire Council granted development consent to itself to erect interim coastal protection works consisting of a sandbank and sandbag wall on private property belonging to Mr and Mrs Vaughan and on adjoining public land. The work was carried out in 2002. In May 2009, following severe storms, substantial erosion occurred at Belongil Beach, including about 10 m of beachfront property owned by the Vaughans. The erosion appears to have been caused by waves overlapping the geobag erosion control wall constructed by the council. The storm surge effectively destroyed the wall so that the Vaughans’ property was unprotected from further wave action. The Vaughans sought to create a rock barrier in front of their property to prevent further erosion of the sand dune.

60 Byron Shire Council, Development Control Plan (2002), Pt I. This policy was upheld by a Commissioner of the LEC in Van Haandel v Byron Shire Council [2006] NSWLEC 394.
In May 2009, the council commenced an action against the Vaughans in the Land and Environment Court to injunct them from carrying out the proposed remedial erosion protection work without development consent. The Vaughans responded, with an action against the council, alleging breach of conditions of the 2001 development consent granted by the council to itself for the construction of the wall; thus seeking to enforce the development consent by mandatory injunctions that the council construct the wall in accordance with the consent, or alternatively seeking a declaration or order that the Vaughans were entitled to do so. The council argued that as it had not obtained a construction certificate for the work, the development consent had lapsed and the works were unauthorised. The council was not prepared to reconstruct the sandbag wall because it considered that circumstances had changed, and that although the wall might be effective in protecting the Vaughans’ property, it could have adverse consequences for other land in the vicinity and impede public access to the beach. The court granted an injunction restraining the work proposed by the Vaughans.

In February 2010, the Land and Environment Court approved consent orders, effectively discharging the injunction. The court declared that the 2001 consent that council had granted to itself was still valid and applied to the Vaughans’ land and adjoining land. Further, the terms of the 2001 consent obliged the council to monitor, and maintain and repair the beach stabilisation works they had erected. The council was ordered to restore the interim protection wall to its height and shape before the May 2009 storm. The court also declared that the Vaughans were entitled to maintain, repair and restore the wall, although they were not obliged to do so. In addition, the Vaughans had the option of bringing an action in negligence or nuisance in the Supreme Court seeking damages for the loss of their property.

The decision of the Land and Environment Court gives precedence to an existing development consent over the council policy of planned retreat. This could create a number of legal problems for council and exposes the council to the possibility of having to pay significant damages for beach erosion where it has failed to maintain existing structures. The decision highlights the vulnerability of councils and the need for clarification of the legal issues in question. Many local councils, such as Byron Shire Council, have a responsibility for determining coastal adaptation practices for their area relating to protect, design, rebuild, elevate, relocate and retreat policies. These policies need to be embodied in legislation if they are to prove effective. There is also a need to provide for compensation issues if sea level adaptation strategies result in a property becoming uninhabitable. The New South Wales government has adopted a number of policies and strategies to address these issues, including comprehensive amendments to the CP Act. These measures, and their likely effectiveness are discussed below.

**Recent New South Wales Reforms to Address Enhanced Coastal Erosion**

The New South Wales government has amended the CP Act and the LG Act to combat beach erosion. These proposals address some of the issues that arose in the Vaughan case. Indeed, longstanding erosion problems at Belongil Beach may well have provided the trigger for the amendments.  

*Emergency temporary coastal protection works (emergency works)*

A new Pt 4C has been inserted into the CP Act to facilitate emergency coastal protection works. Beachfront landowners at “hot spot” beaches are enabled to conditionally place sand or sandbags on beaches to protect houses at “imminent” threat from erosion for a period of up to 12 months on a once only basis.

Emergency works can only be undertaken during a period of beach erosion or when such beach erosion is imminent. Such works must only be undertaken in accordance with gazetted Minister’s

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63 See suggestion in New South Wales Legislative Assembly, n 7.
requirements. Emergency works must also be placed in accordance with the relevant regulations, the requirements of any applicable council Emergency Action Subplan, as well as the conditions contained in the certificate issued by a council or the Department of Environment, Climate Change and Water authorising the emergency works.\(^{64}\)

The most common form of emergency works will consist of large sand-filled, geo-fabric bags laid to a maximum height of about 1.5 m along the toe of the beach erosion scarp but only if the scarp-face has eroded to within 20 m of the most seaward wall of a lawfully-erected building. Hard surfaces, such as rocks, concrete or construction waste are expressly excluded.\(^{65}\) Where emergency works cannot be accommodated wholly on the affected private property, adjoining public land may be used for this purpose. Public authorities must not unreasonably deny access to public land to enable a landowner to lawfully place emergency works on land (whether public or private).\(^{66}\)

Local councils will be responsible for monitoring the emergency works to ensure there are no off-site impacts as a result of the sandbag structures and will also be responsible for ensuring the work is properly maintained and then removed at the end of the 12-month period. If, however, a development application for permanent coastal protection works is lodged prior to the expiry of the 12-month period, the emergency works will be permitted to remain until the application has been finally determined.\(^{67}\) If a beachfront property already has coastal protection works in situ (approved or otherwise) that would provide a higher degree of protection than emergency temporary coastal protection works, then no emergency works will be authorised.

**Coastal protection service charge**

Amendments to the LG Act enable a council to make and levy an annual charge for the provision of coastal protection services on rateable land that benefits from the service, ie properties that have approved long-term coastal protection works paid for wholly by the property owner or jointly with the council.\(^{68}\)

The charge is intended to provide councils with a source of funds, not subject to rate pegging, that could help in meeting the costs of maintaining long-term coastal protection works as well as the costs of managing off-site impacts of the works. The charge will be similar in concept to the Stormwater Management Service Charge already in existence.

*Coastal Protection Service Charge Guidelines*\(^{69}\) are being developed by the State government and will include how councils should calculate the reasonable costs of providing a coastal protection service and how these costs should be apportioned between the various parcels of land subject to the charge.

**Other provisions**

The amendments extend the existing legislative immunity from liability for actions taken in good faith by local councils in relation to land in the coastal zone (discussed in more detail below). The amendments also provide councils with new powers to issue orders (including stop work orders) in relation to materials placed on a beach illegally or for works that are likely to cause erosion, present a public safety risk or impede beach access.\(^{70}\) Significant increases in the maximum penalties applicable

\(^{64}\) *Coastal Protection Act 1979* (NSW), s 55P(2).

\(^{65}\) *Coastal Protection Act 1979* (NSW), 55P: Emergency coastal protection works are defined as the placement of “sand, or fabric bags filled with sand, (other than sand taken from a beach or a sand dune adjacent to a beach)”, or “other objects or material prescribe by the regulations (other than rocks, concrete, construction waste or other debris)”.

\(^{66}\) *Coastal Protection Act 1979* (NSW), s 55Z.

\(^{67}\) *Coastal Protection Act 1979* (NSW), s 55Q.

\(^{68}\) *Local Government Act 1993* (NSW), s 496B.


\(^{70}\) *Coastal Protection Act 1979* (NSW), ss 55ZA, 55ZB, 55ZC.
to individuals and corporations have been introduced to underpin the new order powers.\textsuperscript{71} The amendments also impose a requirement to consider any relevant coastal zone management plan when assessing a development application under the EPA Act.\textsuperscript{72}

The amending Act requires councils to review or prepare coastal zone management plans within 12 months, if directed by the Minister. The Minister can prepare the plan and recover the costs from councils that fail to comply. Coastal zone management plans must now deal with additional matters, such as the management of risks from coastal hazards, the impact of climate change on these risks, and provide for adequate maintenance of coastal protection works and associated impacts.\textsuperscript{73}

The Act also provides for the formation of a New South Wales Coastal Panel to provide advice to the Minister as requested on coastal development and to assist local government in determining coastal development applications where the council does not have in place a gazetted Coastal Zone Management Plan.\textsuperscript{74}

The successful implementation of the legislation also relies heavily on a range of seven supporting non-legislative guidelines.

**Analysis of effectiveness of recent legislative reforms to coastal planning**

There are several significant flaws in the recent coastal reforms. Most coastal processes are reasonably predictable.\textsuperscript{75} Coastal erosion in particular is a natural phenomenon that only becomes a problem if assets are poorly sited. As Gordon notes, the insertion of provisions into the CP Act to deal with emergency works is a startling admission of failure by the New South Wales government, since wise planning and a structured effort over the preceding 30 years should have eliminated the need for emergency works. Gordon concludes, “to address a coastal hazard that has been identified, quantified and discussed for over 30 years can hardly be credibly called ‘emergency management’”.\textsuperscript{76}

Permitting the erection of emergency coastal protection works offers some assistance to waterfront landowners, such as the Vaughans, to defend their property against imminent storm surges and inundation. Previously such works could only have been carried out pursuant to a development consent under the EPA Act. However, a certificate is still required for emergency works, which may be difficult to obtain in time to prevent the erosion, especially if the event occurs on a weekend or public holiday. A major drawback of the amendments is that the protection measures can only be taken once and can only be in place for 12 months, or an extended period until a development application is determined. This means that landowners will have to apply for development consent to erect a more permanent structure.\textsuperscript{77} This could prove difficult where the council is opposed to permanent works. For example, in the Vaughan case, it is unlikely that development consent would have been granted, given Byron Shire Council’s policy of planned retreat. It should also be noted that the New South Wales Planning Guideline Adapting to Sea Level Rise does not seem to provide support for permanent beach protection works, as it indicates a preference for “soft” engineering options and discourages permanent works in the immediate impact zone.

Further, approval for long-term works, such as seawalls, is contingent on whether they “unreasonably limit or are likely to unreasonably limit public access to a beach or a headland”. What constitutes an “unreasonable” limitation is not specified and could potentially give rise to further disputes.

\textsuperscript{71} Coastal Protection Act 1979 (NSW), s 55ZF: $247,000 for an individual and $495,000 for a corporation. Daily penalties are applied for continuing offences.

\textsuperscript{72} Environmental Planning and Assessment Act 1979 (NSW), s 79C(a)(v).

\textsuperscript{73} Coastal Protection Act 1979 (NSW), s 55C.

\textsuperscript{74} Coastal Protection Act 1979 (NSW), s 12.

\textsuperscript{75} Gordon, n 5, p 7.

\textsuperscript{76} Gordon, n 5, p 11.

\textsuperscript{77} Coastal Protection Act 1979 (NSW), s 55M.
The scope of the amendments is limited since public authorities are already permitted to construct emergency coastal protection works without consent.\(^7^8\) Consequently, the council could have undertaken emergency works to protect the Vaughan property had it wished to do so. The ability of councils to levy a charge for coastal protection services may provide an incentive for future action. However, this may have negative consequences, including:

- Potential for conflict between landowners, and between landowners and local government, over financing expensive engineering solutions on vulnerable stretches of coastline. There will then remain the costs of managing the adverse environmental consequences of such works and determining liability for potential costs and damage.
- Promoting defensive asset-protection works at the expense of strategic hazard management policies.
- Risk establishing a precedent for landowners to focus on fortifying their homes and land in vulnerable locations at escalating cost as climate change-induced sea level rise amplifies the existing vulnerability.

The recent legislative reforms represents a complete departure from the integrated partnership approach between State government and coastal councils set out in the Coastal Policies of 1990 and 1997, whereby public authorities have sought to achieve consistent strategic planning and management outcomes along the entire New South Wales coast, in favour of an ad hoc “hotspot” approach, whereby the State government has sought to minimise its role in coastal management in favour of providing for the creation of a series of unrelated agreements between councils and landowners in vulnerable parts of the coast as that vulnerability increases over time.

**CIVIL LIABILITY FOR DAMAGE OCCasionED BY ENHANCED COASTAL EROSION AND INUNDATION**

**Local government**

A major concern for coastal councils in the coastal zone is an action in nuisance or negligence for damages occurring as a result of an inappropriate planning decision or an omission to take action to prevent property loss. This was well illustrated in the *Vaughan case*, where an action in nuisance or negligence is contemplated against Byron Shire Council. An action in private nuisance can be sustained against an authority such as a council whose management action or inaction wrongfully interfere with another’s use or enjoyment of land.\(^7^9\) Knowledge and foresight of risk is essential.

Councils may also be liable in negligence for certain acts or omissions occasioning property damage. It must be proved that the council owed the litigant a duty of care, that the duty of care was breached by the council and that the litigant suffered foreseeable damage or loss as a result of that breach. When a public authority, such as a local council, exercises its power in a manner that causes loss or damage to the plaintiff, the courts will generally have little difficulty in finding a duty of care. It becomes more difficult to decide whether a duty is owed in situations where the loss or damage results from failure to exercise a statutory power. The test currently favoured by a majority of the High Court is known as the “salient factors” test. “Salient factors” include considerations such as the knowledge of the risk, degree of control exercised by the council and the vulnerability of the plaintiff.\(^8^0\) If the “salient factors” test is imposed, councils who had special knowledge may be required to warn property owners of the risks of sea level rise. The degree of control exercised by councils may be difficult to establish where damage is caused by storm surges and sea level rise, unless the damage was exacerbated by some specific act or omission of council. For example, liability may arise from a decision to permit inappropriate development on land known to be flood prone, or failure by council to maintain a seawall it has erected in a coastal hot spot. It is now well established

\(^7^8\) State Environmental Planning Policy (Infrastructure) 2007, cl 129(2).

\(^7^9\) Sedleigh-Denfield v O'Callaghan [1940] AC 880 at 896-897; Halsey v Esso Petroleum Co Ltd [1961] 2 All ER 145; [1961] 1 WLR 683.

that in assessing a development application under s 79C of the EPA Act, councils must have regard to
the principles of ESD, which would include the risk of climate change-induced coastal erosion, where
principles relevant to those considerations arise.\textsuperscript{81} Clearly a failure to do so that results in foreseeable
damage could give rise to an action in negligence.

**Civil Liability Act 2002 (NSW)**

The Civil Liability Act 2002 (NSW) restricts the potential tortious liability of public authorities, such as
councils. The Act requires consideration of the financial and other resources that are reasonably
available to the authority for the purpose of exercising their functions in deciding whether a duty of
care is owed and whether it has been breached. The general allocation of those resources by the
authority is not open to challenge. The fact that the authority complied with general procedures and
applicable standards can be relied on as evidence of the proper exercise of its functions.\textsuperscript{82} In
determining whether a duty of care has been breached, it is necessary to find that the act or omission
was “in the circumstances so unreasonable that no authority having the functions of the authority in
question could properly consider the act or omission to be a reasonable exercise of its functions”.\textsuperscript{83}
The Act also excludes liability for obvious risks. A person who suffers harm from an obvious risk is
presumed to be aware of the risk and the defendant does not owe a duty of care to the person to warn
of the risk unless the person had requested advice about the risk or if a warning is required by
legislation.\textsuperscript{84} The Act makes it considerably more difficult for a litigant to succeed in a tortious action
against a council or other public authority.

Adopting:

a reasonable strategy for dealing with climate change issues...will provide local governments with a
strong defence to civil liability claims. It will provide good evidence that local governments are acting
to incorporate climate change considerations into the exercise of their statutory duties.\textsuperscript{85}

Conversely, denying the reality of anthropogenic global warming, ignoring the evidence regarding the
impacts of climate change, and making decisions that increase vulnerability to climate change may all
constitute “manifestly unreasonable” decisions.\textsuperscript{86} For example, a failure to consider flooding or sea
level rise when assessing a development application on land subject to periodic inundation could be
considered “manifestly unreasonable”. However, a failure to permit a property owner to erect a
permanent seawall is unlikely to constitute “manifest unreasonableness” if the council has considered
all the guidelines and planning instruments. Nevertheless, liability in such situations may be difficult
to establish given the high standard of “unreasonableness” under the Civil Liability Act. It is also
likely that in the future, a council could be liable in circumstances where damage arises because of a
failure of the council to take into account the benchmarks in the New South Wales Sea Level Rise
Policy Statement when granting a development consent.

**Statutory exemption clause**

An important exemption clause for local councils is found in s 733 of the LG Act. Section 733(1)
exempts councils from liability in respect of advice given, or actions or omissions that relate to
flooding or its nature or extent, provided the decision was taken in good faith. Section 733(2) exempts
councils from liability in respect of advice given, or acts or omissions in relation to natural hazards in
the coastal zone, provided that the decision was taken in good faith. Section 733(3) extends these
immunities to:

- the preparation or making of an environmental planning instrument or DCP;
- the granting or refusal of consent to a development application;

\textsuperscript{81} Minister for Planning v Walker (2008) 161 LGERA 433; Aldous v Greater Taree City Council (2009) 167 LGERA 13.

\textsuperscript{82} Civil Liability Act 2002, s 42.

\textsuperscript{83} Civil Liability Act 2002, s 43(2).

\textsuperscript{84} Civil Liability Act 2002 (NSW), s 51H.


\textsuperscript{86} England, n 85 at 218.
• the determination of an application for a complying development certificate;
• the imposition of conditions;
• advice furnished in a s 149 certificate under the EPA Act;
• the carrying out of coastal management works; and
• any other thing done or omitted to be done in the exercise of a council’s functions.

The list of exemptions in s 733(2) is extended by the Coastal Protection and Other Legislation Amendment Act to include:
• the preparation or making of a coastal zone management plan, or the giving of an order, under the CP Act;
• anything done or omitted to be done regarding beach erosion or shoreline recession on Crown land or land owned or controlled by a council;
• the failure to upgrade flood mitigation works or coastal management works in response to projected or actual impacts of climate change;
• the failure to undertake action to enforce the removal of illegal or unauthorised structures on Crown land or land owned or controlled by a council that results in beach erosion; and
• the provision of information relating to climate change or sea level rise.

Section 733(4) provides that, unless the contrary is proved, a council is taken to have acted in good faith for the purposes of s 733 if advice was furnished, or the act or omission was substantially in accordance with the principles in the relevant manual relating to the management of flood-prone land or the management of the coastline identified by the Minister for Planning. Guidelines may also be adopted for this purpose.

The statutory exemption in s 733 is potentially an important protection for councils. However, the requirement that good faith be established can prove a stumbling block. This requirement was considered by the High Court in Bankstown City Council v Alamo Holdings Pty Ltd (2005) 223 CLR 660; 142 LGERA 1. The council had been found liable in nuisance for the increased frequency with which land, owned by the respondent, was likely to be flooded. Liability was based on council’s past conduct in relation to the construction and operation of the drainage system while involved in the process of urbanisation. The council’s claim that it was exempt from liability under s 733(1) had been rejected both at first instance and on appeal to the New South Wales Supreme Court. These decisions were overturned by the High Court who held that the council was indemnified from liability under s 733(1) and that the section was also wide enough to protect the council from exposure to injunctive relief. However, in Melaleuca Estate Pty Ltd v Port Stephens Council (2006) 143 LGERA 319, the New South Wales Court of Appeal found the council liable in nuisance for discharging water onto the plaintiff’s land. Council’s reliance on s 733(1) was rejected because it had not shown good faith, due to its failure to rectify the nuisance and its disregard of the rights of owners to the use and enjoyment of their land.

It is clear from the above cases that the statutory immunity from liability in s 733 will not always protect councils who would otherwise be liable. However, no hard and fast rule can be laid down and each case has to be decided on its own facts. It would seem that councils in the coastal zone would be required to keep up-to-date with climate change predictions and the current state of knowledge and inform purchasers of any hazards on certificates issued under s 149 of the EPA Act.

STATE GOVERNMENT

The State government is also potentially liable in nuisance or negligence for damage sustained by landowners or businesses affected by coastal inundation; the circumstances in which liability can arise would be analogous to that discussed above in relation to local councils. The Civil Liability Act applies to “public authorities”, which are defined to include the State, but there is no provision analogous to s 733 of the LG Act applying to works approved by State authorities, crucially for the Minister, under Pt 3A of the EPA Act. The Minister and the State government could be potentially liable to claims in negligence for inappropriate decisions made in relation to coastal development under Pt 3A. In the Sandon Point case, for example, the State accepted that the Minister and the department had failed to properly consider climate change flood risk in reaching a determination. The
State government was well aware that the land was flood prone. It is therefore arguable that a decision to approve the development would be “manifestly unreasonable” in the circumstances. On the basis of the evidence in that case, damage from reasonably foreseeable climate change flood risk may well be payable by the taxpayers of New South Wales.

In any attempt to exclude State liability, the *New South Wales Sea Level Rise Policy Statement 2009* includes a number of disclaimers for any liability arising in respect of anything done or omitted to be done in reliance on it. It states that coastal hazards are natural processes and that the risks rest with the property owners concerned. The New South Wales government does not have nor “accept any obligations to reduce the impacts of coastal hazards and flooding caused by sea level rise on private property”. Similarly, no responsibility for any consequential hazards is accepted in the case of funding provided for voluntary purchases of private property that are subject to current and future hazards. The effectiveness of these disclaimers as a means of protection for the State from liability has been questioned. The Sea Level Rise Policy is only a policy statement and stating where responsibility lies is different from clarifying where liability will lie. As McDonald observes, “unless they legislate to eliminate liability that is still a point that is easily arguable in court in an appropriate case”. The above analysis indicates that the New South Wales State government is potentially liable to actions in negligence and that legislation is necessary to address this issue.

### Options for reform of the coastal planning framework

#### Develop a national sustainable coastal planning framework

There is a clear need for a proactive, integrated approach to sustainable coastal planning around the entire Australian coast. There is also a need to move from mere integrated coastal management to holistic sustainable coastal planning, which Norman defined as an “integrated and adaptive systems approach to coastal planning that leads to long-term improved environmental outcomes for the coastal zone”.

The federal government has a responsibility to develop a national sustainable coastal planning framework, which incorporates a strategy for mitigating greenhouse gas emissions and adapting to climate change impacts. However, although it has developed a number of guidelines, and commissioned reports, no decisive action has been taken. A recent report by the federal government into coastal zone management and climate change made 47 recommendations to increase the resilience of coastal communities to climate change. These relate to adaptation strategies, governance and institutional change, as well as planning and legal issues. The House Standing Committee on Climate Change, Water, Environment and the Arts recommended a cooperative approach to coastal management and called for the federal government to develop an Intergovernmental Agreement on the Coastal Zone in cooperation with State, Territory and local governments, and in consultation with coastal stakeholders to be endorsed by the Council of Australian Governments. The Committee also recommended that the Australian Building Codes be amended to ensure that the risks of future climate change are recognised and adaptation measures considered. These recommendations should be implemented.

Although it may not be practical for the federal government to have full responsibility for planning for coastal management, it should outline the responsibilities of the different levels of

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92 Australian Government, n 18.
93 Australian Government, n 18, Recommendation 44.
94 Australian Government, n 18, Recommendation 22.
government and promote a consistent approach to adaptation strategies allowing for flexibility for regional differences. For example, there is a need for an agreed sea level rise benchmark figure for planning purposes in Australia. Currently, each jurisdiction in Australia has set a different benchmark for projected sea level rise. For example, the federal government has assumed a sea level rise up to 1.1 m by 2100; the New South Wales Sea Level Rise Policy Statement 2009 assumes sea level rises of up to 90 cm to 2100; while the Victorian Coastal Strategy of 2008 sets a benchmark of not less than 0.8 m by 2100.

**Develop an integrated planning system at State level**

The New South Wales government should consider adopting an integrated, comprehensive approach to manage coastal erosion with strong State government direction that allows for local variation by local communities based on local conditions. The approach should have three elements. First, there is a need to prevent the mistakes of the past. Residential subdivision, intensive redevelopment, and building permanent structures on impermanent littoral lands need to cease. In 1991, a federal parliamentary committee made the explicit comment that existing “ad hoc, hodge-podge pattern of development slowly nibbles away at a precious and beautiful resource, the natural coastline”. Yet right along the New South Wales coast, the pattern of unsustainable, uncoordinated ribbon development has picked up pace. New development in existing coastal settlements should focus on avoiding this ribbon development. As Short and Woodruff conclude, coastal development should be contained and constrained.

Secondly, a clearly structured Act and policy based on contemporary evidence and a comprehensive and continuing coastal vulnerability assessment could provide clear leadership and guidance for councils and owners. Coastal managers will require detailed environmental information to be able to assess the vulnerability of the coastal zone and its ecosystems to both human pressure and natural hazards. This information could feed into coastal policies that are effectively managed and enforced, ensuring that the coast and its habitats are protected and that development is excluded from coastal hazard zones as well as sensitive valuable coastal environments and ecosystems. There is also an important role for a specialist, independent standing Coastal Council to provide advice to councils, State governments and owners, and to maintain an overview of New South Wales’ coastal planning and management issues. While the recently constituted Coastal Panel goes some way to achieving this end, the independence and capacity of this Panel could be strengthened by ensuring its membership includes a specialist coastal engineer (considering the Panel’s role in assessing the adequacy of coastal protection works) and ensuring access to adequate secretariat resources. Alternatively, the jurisdiction of the Natural Resources Commission could be expanded to include a dedicated Coastal Commissioner operating under the provisions of both the Natural Resources Commission Act 2003 (NSW) and the CP Act.

The third and final element of a proper, evidence-based approach is to ensure that coastal zone management planning, properly prepared in genuine consultation with affected communities, forms part of clear and simple land-use plans. Coastal zone management should not be separate from land-use planning under the EPA Act, but rather should all be in the one place and under the one system. Consideration should be given to including both climate change and environmentally-sustainable development as mandatory considerations in development assessment and as specific objects of coastal and land-use planning laws. The EPA Act should be radically revised and Pt 3A of the Act should be repealed.

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95 Australian Government, *Climate Change Risks to Australia’s Coast: A First Pass National Assessment* (Department of Climate Change and Energy Efficiency, 2009).

96 Australian Government, n 18, Fig 4.2.


98 Short and Woodruff, n 57, p 278.

The Australian Coastal Society has also suggested that a rationalisation and reorganisation of relevant State agencies could provide more effective development and implementation of coastal planning and management through coordinated action by CEOs of agencies responsible for coastal planning and management. All agencies should collectively seek to achieve sustainable economic growth, protection of high value environmental assets such as beaches, estuaries and wetlands, and managing the risks of extreme weather events and climate change to coastal natural and built assets.\(^\text{100}\)

**Development of a consistent adaptation strategy at local level**

It is essential that local authorities incorporate climate change considerations into the exercise of their statutory duties. A good starting point would be for councils to address the potential for local climate change impacts when preparing an LEP. There is a need for education and training on climate change and strategies for mitigation and adaptation. Encouragingly, local councils are already working collaboratively to share knowledge, resources and experience to develop clear and consistent strategies. Examples include the establishment of the National Sea Change Taskforce in 2004, comprising 68 coastal local councils representing more than four million residents,\(^\text{101}\) and the Sydney Coastal Councils Group, established in 1989 and including 15 councils covering more than 1.3 million residents. The Sydney Coastal Councils Group has commissioned research on risks to their member councils from coastal climate change impact.\(^\text{102}\) In addition, a number of councils are reportedly in the process of developing climate change adaptation strategies.\(^\text{103}\)

**Clarify and strengthen the legal liability of public authorities and landowners**

As this article has shown, there are a number of legal issues that require clarification and resolution. These issues were also identified in a recent federal government report and include:

- land title and right of public access to beaches;
- the legal issues associated with adaptation strategies of protect, adapt, retreat and the scope of these strategies;
- clarification about liability issues with regard to private property holders’ right to take action to protect their properties and where the cost should fell;
- liability issues, such as who should be liable and the extent of liability;
- clarification about liability issues with regard to government authorities;
- legal liability for past planning decisions;
- compensation issues;
- potential liability under common law negligence and nuisance; and
- indemnity issues.\(^\text{104}\)

The authors strongly support the recommendation of the report that the Australian Law Reform Commission be requested to undertake an inquiry into the legal issues involved.\(^\text{105}\)

**Covenants and other agreements**

One possible means of protecting local authorities is the use of covenants on property titles, with owners agreeing to abide by actions stipulated in an approved climate change response plan. The agreement would bind the owner and successors in title. It would be prepared at the owner’s expense and be registered on the title of the land.

A further measure that could be taken to prevent future harm is to transfer the costs of adaptation to those deriving benefits from it, with a focus on developers. In terms of this approach, developers could be required to indemnify property owners for a specified period following the release of the

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\(^{100}\) Australian Coastal Society, n 99.


\(^{103}\) Ghanem and Rudder, n 102 at 22.

\(^{104}\) Australian Government, n 18, pp 114-147.

\(^{105}\) Australian Government, n 18, Recommendation 23.
land. Similar protection could be derived by requiring a developer to lodge a performance bond that endures for 20 years, or by requiring the developer to insure the property. A failure to obtain insurance would be a good communication of risk to the market. Indeed, it is arguable that inflated land prices in “at risk” locations on the New South Wales coast demonstrates a failure to convey the known risks of coastal hazard to the market. This may already be changing, eg the New South Wales Valuer-General has reportedly reduced land valuations of beachfront properties at Belongil Beach by 50%

**Provide statutory immunity for the State**

As this article has shown, there are no statutory exemptions clauses, such as s 733 of the LG Act that apply for the benefit of State government, although the Civil Liability Act does confer a limited type of liability. It is therefore necessary to extend the protection in s 733 of the LG Act to the State or provide some similar form of statutory immunity. Disclaimers in guidelines are clearly insufficient to protect the State from legal liability.

At the same time, consideration should be given to including lands owned by New South Wales government entities and to development projects assessed under Pt 3A of the EPA Act to the management regime imposed on all other coastal land. The State government should be fulfilling a leadership role in relation to coastal planning, and should subject itself to the same management regime as it seeks to impose on other coastal landowners.

**CONCLUSION**

The New South Wales coastal planning system has become increasing complex. There is a plethora of coastal plans and guidelines, some of which date back to the 1990s, before the publication of any of the reports of the Intergovernmental Panel on Climate Change.

The case study of coastal inundation at Belongil Beach has illustrated the complex legal issues that can arise. The amendments to the CP Act are an ad hoc response, which fails to resolve these issues and creates further potential for litigation. Adaptation strategies, such as planned retreat, impose considerable restrictions on the use of property and may even result in land being sterilised from any form of habitation.

Protective structures, such as seawalls, can cause further sand loss and inhibit access to beaches. A better option may be to consider the potential for offshore sand sources to offset climate change impacts on New South Wales beaches. Gordon posits that the creation of a separate authority to manage large-scale sand nourishment schemes in densely-populated areas may be preferable to the approach adopted by the amendments to the CP Act of allowing individual owners to use their best efforts to engineer a solution on their property boundary. Recent research by the Sydney Coastal Councils’ Group indicates a strong business case for beach nourishment to protect valuable beaches along the Sydney coastline.

There remains a need to clarify the legal liability of public authorities. The exemption clause in s 733 of the LG Act is an important source of protection for local government, but there is a need to extend this protection to the State. Agreements and covenants between public authorities and developers and property owners may be a useful tool to decrease the potential liability of local authorities. It is also necessary to clarify the legal liability of landowners and the issue of compensation in appropriate cases. This need has been highlighted by the recent attempts by State government to gradually shift responsibility for property loss back to the property owners in question. It may prove difficult for owners and developers to insure against property damage through storm

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106 Australian Government, n 18, suggestion by MacDonald J at p 150.
107 Australian Government, n 18, p 150.
108 Gordon, n 5, p 1.
110 Sydney Coastal Councils’ Group, Beach Sand Nourishment Scoping Study - Maintaining Sydney’s Beach Amenity Against Climate Change Sea Level Rise (2010).
erosion in high risk areas. Sea level rise may also lead to a reduction in property prices in affected areas.\textsuperscript{111} A fall in property prices could expose lending institutions to significant losses.

Finally, there is an urgent need to reform the coastal planning system. At federal level, this requires Commonwealth action to develop a national sustainable coastal planning framework that incorporates strategies for mitigation and adaptation to climate change. The New South Wales coastal planning system needs radical revision to provide an integrated, holistic approach to coastal planning. Constraints should be placed on inappropriate coastal development. A clearly structured Act and policy must be developed in consultation with the community. Rather than treating coastal and land-use planning separately, consideration should be given to consolidating coastal and land-use planning in one statute. Mitigation and adaptation strategies should be included in LEPs and climate change impacts should be a mandatory consideration in assessing development applications. Similarly, local authorities should factor climate change into all aspects of their statutory duties and develop appropriate adaptation strategies.

Although immediate action is required, it must be recognised that legal action and planning is not necessarily a panacea for all the difficulties ahead. As has been pointed out:\textsuperscript{112}

We in Australia attach permanence to the occupation of our property that is ultimately ephemeral. Our attachment is not real. We are not here forever; nor is the land that we live on. We need to manage, love and protect our land and our homes, but also to recognise that the ocean will always do what it has always done—no matter how many laws, guidelines, litigation, and how much money we throw at the problem. As Canute the Viking English King said to his courtiers after he demonstrated to them his impotence over natural processes when he ordered the tide to stop: “Let all men know how empty and worthless is the power of kings. For there is none worthy of the name but God, whom heaven, earth and sea obey”.\textsuperscript{113}

\textsuperscript{111} See eg \textit{Sea Change Submerges Coastal Land Values}, n 109.
\textsuperscript{112} New South Wales Legislative Assembly, n 7.
\textsuperscript{113} King Canute quoted in Forrester T, \textit{The Chronicle of Henry of Huntingdon Comprising the History of England, from the Invasion of Julius Caesar to the Accession of Henry II} (1848) p 199.