Getting the balance right: A renewed need for the public interest test in addressing coastal climate change and sea level rise

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The law with respect to coastal management in New South Wales, particularly those laws dealing with sea level rise, is a dynamic area that is, once again, currently under review. This article discusses Stage 1 of this reform and analyses it in the broader context of the "public interest" test. The importance of this test for decision-makers, especially those at the local government interface, is highlighted, with particular attention paid to both climate change impacts and recent, relevant judicial decisions. It further explores the tension between private property rights and the public interest test in the context of the coastline, and suggests that a balance may be found in applying innovative planning mechanisms such as rolling easements.

INTRODUCTION

The impacts on coastal property due to sea level rise, which include coastal inundation, shoreline erosion and increases in the frequency and duration of storm events, are expected to have devastating consequences for global coastal populations, including that of New South Wales. Indeed, it has been calculated that, with a sea level rise of 1.1 m, between 40,800 and 62,000 existing residential properties alone in New South Wales are at risk of inundation from a 1-in-100 year storm event and the costs of damage to, or loss of, critical infrastructure and other public assets will fall in the hundreds of millions of dollars.[1]

The New South Wales coastline has long been subject to various urban and strategic planning uses. It is valued for its favourable climate, recreational opportunities, and visual, spiritual and cultural amenity.[2] For many years coastal communities across Australia have been experiencing growth at levels well above the national average, reflecting an increasing desire to live on the coast, particularly amongst the baby boomer generation.[3] The combined pressures of continuing (and in some cases increasing) development, existing use rights and sea level rise are intensifying the competition for coastal resources, in turn placing increased stress on those aspects of the natural environment that originally attracted residents to coastal areas.

The question of how best to plan for and adapt to these increasing pressures remains a topic of controversy, and the amendments to the *Coastal Protection Amendment Bill 2012* (NSW) (CP Act)[4] by the *Coastal Protection Amendment Act 2012* (NSW) in October 2012 (the provisions of which commenced on 21 January 2013), as part of Stage 1 of the New South Wales government's coastal reform agenda, has done little to clarify these issues. Further, the proliferation of policies, laws and regulations with respect to balancing the rights of the individual to private property with attempting to protect and preserve the coastal environment and ecology, along with the public amenity of the coastline, clearly demonstrates the difficulties encountered by both planning and environmental law in comprehensively addressing these issues.

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[1] Australian Government, *Climate Change Risks to Australia's Coasts* (Department of Climate Change and Energy Efficiency, 2009).

[2] Green JH, *Coastal Towns in Transition: Local Perceptions of Landscape Change* (CSIRO Publishing, 2010).

[3] Gurran N, Hamin E and Norman B, *Planning for Climate Change Adaptation in Coastal Australia: State of Practice* (University of Sydney Planning and Research Centre, 2011); Stokes A and Faulkner S, *Submission: Productivity Commission Public Inquiry into Barriers to Effective Climate Change Adaptation* (National Sea Change Taskforce, 2011).

[4] Passed both houses of New South Wales Parliament on 17 October 2012, and assented on 22 October 2012.

This article examines the ability of existing coastal legislation and policy to deliver clear, consistent and practical guidance to decision-makers, to achieve a fair balance between stakeholder interests and, where trade-offs are required, to prioritise uses of the coast and its resources according to predetermined, principled criteria. Where the current legal framework fails to properly account for the rights of stakeholders affected by sea-level rise, individuals may be forced to rely on judicial processes to address their concerns.[5]

The courts are, in turn, limited to the interpretation of existing statutory provisions and – as particularly relevant in judicial review proceedings – the interpretation of mandatory decision-making criteria. This article discusses the concept of the "public interest" as a possible vehicle for effective adaptation to climate change and explores its development by the Land and Environment Court of New South Wales. The use of property law mechanisms, namely "rolling easements", is put forward as a possible tool for balancing the varied and competing interests along the New South Wales coastline.

STATUTORY CONSIDERATIONS OF CLIMATE CHANGE AND SEA LEVEL RISE

It has been recognised that the most efficient method of achieving effective adaptation to coastal climate change is for the New South Wales government to initiate appropriate legislative reform in order to provide local authorities – the key decision-makers regarding strategic planning and development along the coastline – with appropriate frameworks for consistent decision-making.[6] Coastal areas in New South Wales are managed under an environmental planning system that combines legislation, statutory and non-statutory strategic planning instruments, and discrete development assessments. Within this complex legal framework, there are currently no requirements mandating *specific* consideration of the impacts of climate change or sea level rise in planning or development assessment in coastal areas. Further, policies and guidelines introduced to deal specifically with sea level rise have not been well integrated into the broader planning legislation framework. At most, they are required to be "taken into account" in the preparation of planning instruments and the assessment of development applications. It does not appear that this will change under the new planning system foreshadowed by the New South Wales planning system by the State government. The *White Paper – A New Planning System* and the accompanying two Exposure Bills, released for public comment on 16 April 2013, in fact demonstrate quite the opposite – there is not a single mention of climate change (or sea level rise) in the entirety of the documents.[7]

More troubling, however, is the fact that the current (and newly proposed) legislative and policy frameworks do not provide clear guidance regarding priorities for the use of coastal resources. This has meant that coastal councils faced with the impacts of sea level rise (amongst, for many, a myriad of other coastal issues) have not been afforded State government support in the form of clear policy and regulation, leaving their planning and development decisions open to potential legal challenge, and local level policy to develop in an ad hoc manner. In addition, local councils and other relevant stakeholders will be reliant on the current planning frameworks for an indeterminate period of time, given that the transitionary arrangements between the current planning frameworks, and the new proposed frameworks, are yet to be definitively determined.[8]

The principal legislative instrument currently governing strategic planning and development assessment in New South Wales is the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act). The CP Act, as well as other legislative and policy instruments, specifies additional requirements

[5] Ghanem R, Ruddock K and Walker J, "Are Our Laws Responding to the Challenges Posed to Our Coasts by Climate Change?" (2008) 31(3) UNSWLJ 895; Lipman Z and Stokes R, "That Sinking Feeling: A Legal Assessment of the Coastal Planning System in New South Wales" (2011) 28 EPLJ 182.

[6] See eg Ghanem R and Ruddock K, "Are New South Wales' Planning Laws Climate-Change Ready?" (2011) 28 EPLJ 17.

[7] New South Wales Government, *White Paper – A New Planning System* (Department of Planning and Infrastructure, April 2013) (White Paper); *Planning Bill 2013* (NSW); *Planning Administration Bill 2013* (NSW).

[8] It is noted that Sch 6, Pt 1, s 6.1 of the *Planning Administration Bill 2013* (NSW) notes that transitionary arrangements may be noted in the Regulations. Compare Rouke F and Studdert J, *Planning Reform: The White Paper – A New Planning System for NSW* (Norton Rose Publication, April 2013), http://www.nortonrose.com/au/knowledge/publications/79342/planning-reform-the-white-paper-a-new-planning-system-for-nsw.

for planning and development undertaken in the "coastal zone".[9] Section 79C(1) of the EPA Act specifies requirements that must be taken into account by a consent authority (usually a local council) determining a development application, which include:

> (a) the provisions of:
>
> (i) any environmental planning instrument, and
>
> (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
>
> (iii) any development control plan, and
>
> (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
>
> (v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),
>
> that apply to the land to which the development application relates,
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
>
> (c) the suitability of the site for the development,
>
> (d) any submissions made in accordance with this Act or the regulations,
>
> (e) the public interest.

As can be seen, there is no express requirement for the consideration of the impacts of climate change in development assessment. However, climate change considerations may be indirectly incorporated through the provisions of Environmental Planning Instruments (EPIs), any "proposed instrument", or any Coastal Zone Management Plan (CZMP).[10] EPIs, including State Environmental Planning Policies (SEPPs) and Local Environment Plans (LEPs), may themselves specify additional considerations to be taken into account in the development assessment process.

Relevantly, the *State Environmental Planning Policy 71 – Coastal Protection 2002* (SEPP 71) applies specifically to the coastal zone, and provides that, for development in a "sensitive coastal location",[11] the consent authority must give notice of the development application to the Minister for Planning and Infrastructure.[12] Development assessment must take into account the matters outlined in cl 8, including the likely impact of coastal hazards and coastal processes on development and the likely impact of development on coastal processes and hazards. These hazards and processes, while naturally occurring, are likely to be exacerbated by climate change and particularly by sea level rise.

Since the introduction of the *Standard Instrument – Principal Local Environmental Plan* (Standard LEP), a LEP prepared by a council whose local government area falls wholly or partially within the coastal zone must adopt cl 5.5 of the Standard LEP, which provides further considerations for development assessment in the coastal zone. These include consideration of how the proposed development will impact upon existing public access to and along the foreshore for pedestrians, natural scenic quality and amenity, and biodiversity and ecosystems.

Local councils situated within the coastal zone have been required since December 2010 to prepare their CZMPs in accordance with the *Guidelines for Preparing Coastal Zone Management Plans*.[13] In addition to EPIs, CZMPs are required to be taken into account in development assessment

[9] The "coastal zone" is defined in s 4 of the *Coastal Protection Act 1979* (NSW) as consisting of the area between the western boundary of the coastline shown on maps and the outermost boundary of the coastal waters of the State. The coastal waters of the State extend, generally, to 3 nautical miles from the coastline.

[10] *Environment and Planning Assessment Act 1979* (NSW), ss 79C(1)(a)(i), (ii), (v).

[11] Being a location 100 m from the mean high-water mark of the sea, a bay or an estuary.

[12] *State Environmental Planning Policy 71 – Coastal Protection 2002*, cll 9, 11.

[13] Gazetted by the Minister pursuant to s 55D of the *Coastal Protection Act 1979* (NSW) on 31 December 2010.

under the EPA Act, s 79C(1)(a)(v). CZMPs generally contain provisions relating to the pressures on coastal ecosystems, community uses of the coastal zone, and the management of risks to public safety and built assets.[14]

In addition to EPIs and CZMPs, consent authorities must also consider the provisions of the *NSW Coastal Policy 1997*, as a "proposed instrument", in approving development in the coastal zone, which relate to the impacts of natural coastal processes and hazards on development.[15] This policy promotes the ecologically sustainable use of the New South Wales coastline as its overarching objective. The New South Wales government has made it clear, however, that the intent of this policy is not to "sterilise" development, even in high-risk areas.[16] This overriding intention is a recurring theme in most coastal management laws and policies.

Other guidelines and policies may shape the formulation of LEPs and CZMPs and, if incorporated into these plans, may have greater force. Standing alone, however, neither LEPs nor CZMPs form or contain mandatory factors to be considered at the development assessment stage.[17] The manner in which coastal climate change risks are dealt with on a case-by-case basis may be guided by such policies, but is not required to be consistent with them.[18]

New South Wales planning law is currently under review. As part of this review, the New South Wales government released an Issues Paper,[19] which indicated that "requiring the consequences of climate change to be considered" is likely to be included in the objectives of the new planning legislation.[20] However, a review of the recently released Exposure Bills reveals that climate change is not a consideration to be included, even in the objectives of the proposed Acts.[21] At best, the references in s 1.3(1)(a) of the *Planning Administration Bill 2013* (NSW) to balancing the "economic growth and environmental and social well-being through sustainable development", and by noting the need to balance short and long-term considerations, as per s 1.3(2): "Sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision-making about planning and development."[22] Aside from these broad references, whilst at the same time noting that sustainable development may in fact be something quite different to *ecologically* sustainable development, there does not at this stage appear to be any solid considerations of the myriad of climate change related issues faced by local councils, particularly the issue of sea level rise. Such inclusions would be a positive step forward, despite any limits to what specific references to climate change in planning legislation can achieve in the absence of mandatory requirements, particularly if included only in an objectives clause.

Preston CJ of the Land and Environment Court of New South Wales has highlighted the weaknesses of objects clauses in legislation for regulating the use and exploitation of the

[14] New South Wales Government, *Guidelines for Preparing Coastal Zone Management Plans* (Department of Environment, Climate Change and Water, 2010).

[15] New South Wales Government, Department of Planning and Infrastructure, Ministerial Direction 2.2, issued under s 117(2) of the *Environment and Planning Assessment Act 1979* (NSW) on 1 July 2009.

[16] *New South Wales Coastal Policy 1997*, p 12; Environmental Defender's Office of New South Wales, *Submission to the NSW Department of Planning on the Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise* (11 December 2009).

[17] Baird R, Murray P, Button J, Crone L and Redman S, "Climate Change Considerations in Environmental Impact Assessment in Victoria, New South Wales and Queensland" (2012) 27(5) AER 152.

[18] Gibbs M and Hill T, *Coastal Climate Change Risk: Legal and Policy Responses in Australia* (Blake Dawson, Department of Climate Change and Energy Efficiency, 2011) p 1.

[19] Moore T and Dyer R, *The Way Ahead for Planning in NSW? Issues Paper of the NSW Planning System Review* (New South Wales Government, Department of Planning and Infrastructure, 2011).

[20] Moore and Dyer, n 19, p 27.

[21] White Paper, n 7; *Planning Bill 2013* (NSW); *Planning Administration Bill 2013* (NSW).

[22] *Planning Bill 2013* (NSW); *Planning Administration Bill 2013* (NSW).

environment.[23] His Honour states that objects clauses, though contained in virtually all modern statutes, are limited in their effect as interpretive tools, particularly when used to resolve ambiguity in the meaning of other provisions of the statute:

> Objects clauses in environmental statutes are often drafted at a high level of generality and are hortatory and aspirational. They are objects for all seasons. An object of conservation, for example, is so wide as to embrace the sustained development as much as ESD. It embraces utilitarianism as much as, or more likely more than, ecocentrism.
>
> The objects enumerated in an objects clause may also be potentially conflicting, such as by encouraging economic development but also environmental protection. Indeed, even a single object, such as encouragement of ESD, in fact may involve multiple principles, which may pull in different directions.[24]

There are limits also to what environmental outcomes can be achieved by the addition of climate change considerations, whether directly or through a policy or guidelines deemed to be a "proposed instrument", to s 79C of the EPA Act. Ultimately the inclusion of climate change and its impacts as mandatory criteria for consideration cannot prevent development from proceeding in areas at risk from the combined effects of sea level rise, storm surge and coastal erosion, where other considerations weigh in favour of approval, but it provides a much more significant and stronger foundation for basing important planning decisions on climate change considerations. However, as it currently stands, provided a decision-maker can provide evidence that they have "considered" the requirements of specified instruments and policies, development in highly vulnerable areas can still proceed.

Since late 2009, New South Wales has seen a slow filtering of the requirement of climate change considerations, specifically in relation to sea level rise responses, into policies for coastal planning and development. In particular, both the *NSW Sea Level Rise Policy Statement 2009* and *NSW Coastal Planning Guideline 2010* included provisions aimed at planning for future sea level rise. The *Sea Level Rise Policy Statement 2009* set a planning benchmark of a 0.9 m rise in sea levels by 2100 above 1990 levels to support an adaptive risk-based approach, and purportedly to provide guidance supporting consistent considerations of sea level rise impacts within applicable decision-making frameworks.[25] Further, Principles 3 and 4 of the *NSW Coastal Planning Guideline 2010* advocate "avoiding intensifying land use in coastal risk areas through appropriate strategic and land use planning" and "considering options to reduce land use intensity for coastal risk areas where feasible". The Guideline provides that, "where feasible, 'soft engineering' options are preferred to hard engineering works *if protection of both assets and coastal habitats are to be achieved*" (emphasis added). It is acknowledged that, while structural protection works, including temporary protection works such as sandbags, can protect immediate areas from coastal erosion, they may also divert or deflect erosive forces elsewhere if designed incorrectly or sited inappropriately.[26]

The *NSW Sea Level Rise Policy Statement 2009* and *NSW Coastal Planning Guideline 2010* have proven difficult to apply in practice. Specifically, because these policies lacked statutory force, they provided inadequate State government support for coastal councils attempting to undertake adaptation, subjecting them to potential legal actions or liability from developers and residents concerned about planning controls and insurance risks.[27] In early 2012, Mr Greg Piper, Member for Lake Macquarie,

[23] Preston B, "Internalising Ecocentrism in Environmental Law" (speech given at the *Third Wild Law Conference: Earth Jurisprudence – Building Theory and Practice*, Griffith University, Queensland, 16-18 September 2011).

[24] Preston, n 23, p 2.

[25] New South Wales Government, *New South Wales Sea Level Rise Policy Statement 2009* (Department of Environment, Climate Change and Water, 2009) p 3.

[26] New South Wales Government, *NSW Coastal Planning Guideline – Adapting to Sea Level Rise* (Department of Planning, 2010) p 8.

[27] Cubby B, "Developer May Sue to Trigger Rethink on Sea Level Rises", *Sydney Morning Herald* (6 March 2012).

expressed concern that attempts made by local councils to follow the *NSW Sea Level Rise Policy Statement 2009* "face vociferous resistance" and councils are subsequently seen as "acting unilaterally rather than in concert with the State".[28]

Some coastal councils have implemented their own climate change adaptation strategies.[29] On 8 September 2012 the responsibility for adapting to, and planning for, sea level rise was in large measure returned to local councils as the New South Wales government announced that the *NSW Sea Level Rise Policy Statement 2009* was no longer in force. The *NSW Sea Level Rise Policy Statement 2009* and *NSW Coastal Planning Guideline 2010* were designed to address the previously perceived "piecemeal" approach to planning for sea level rise. However, despite the small headway made in terms of unifying coastal planning benchmarks in New South Wales and the attempt to specifically address a key issue such as sea level rise, these policies failed to adequately tackle many of the concerns of local councils. The repeal of the *NSW Sea Level Rise Policy Statement 2009* was thus claimed to provide coastal councils with the flexibility to address their localised circumstances, within the framework of the *NSW Coastal Planning Guideline: Adapting to Sea Level Rise*;[30] however, it fails to address the continual complaint of ad hoc coastal planning.

The *Coastal Protection and Other Legislation Amendment Act 2010* (NSW) had made changes to the CP Act, the *Local Government Act 1993* (NSW) (LG Act) and the EPA Act, as well as minor changes to various regulations. It came into force on 1 January 2011. Of significance were the amendments to the CP Act allowing the construction of Emergency Protection Works (EPWs) by a coastal landowner without development approval provided they had a certificate authorising the placement of EPWs[31] and then only under strict and specified circumstances.[32] Pursuant to these provisions, EPWs could be erected by a private landowner to protect property where beach erosion was occurring or imminent or reasonably foreseeable. EPWs could only be installed once on any given parcel of land[33] and were to be removed within 12 months, unless a development application for longer-term coastal protection works was lodged.[34] EPWs could be comprised only of specified material, including sand or fabric bags filled with sand.[35]

While these amendments aimed to provide some clarity for local councils and landowners regarding the placement of protective material in areas subject to coastal erosion, a number of shortcomings were highlighted with regard to the operation of the scheme.[36] First, although development consent was not necessary for the erection of EPWs, certification was required. Such certification, it was considered, would be difficult to obtain in time to prevent erosion during a storm event.[37] Secondly, development consent was still required for works to be in place longer than 12 months. Thirdly, there was an inconsistency between, on the one hand, allowing the construction of EPWs and, on the other hand, sea level rise policies and guidelines that indicated a preference for "soft" adaptation options. Finally, specific references to climate change adaptation were again left to

[28] New South Wales, *Debates*, Legislative Assembly, 15 March 2012 – "Climate Change and Sea Level Rise" (Greg Piper).

[29] See eg Lake Macquarie City Council's *Lake Macquarie Sea Level Rise Preparedness Policy* (8 September 2008), renamed *Lake Macquarie Waterway Flooding and Tidal Inundation Policy* in August 2012; Wyong Shire Council's *Coastal Zone Management Plan 2011* (2011); Greater Taree City Council's *Greater Taree Climate Change Risk Assessment and Adaptation Plan* (November 2010); Ballina Shire Council's *Climate Action Strategy 2012-2020* (December 2011).

[30] See the New South Wales Government, *NSW Coastal Planning Guideline: Adapting to Sea Level Rise* (Department of Planning and Infrastructure, 2012).

[31] *Coastal Protection Act 1979* (NSW), s 55O.

[32] *Coastal Protection Act 1979* (NSW), ss 55Q-55S.

[33] *Coastal Protection Act 1979* (NSW), s 55S.

[34] *Coastal Protection Act 1979* (NSW), s 55P(2). Specifically, the material must be placed: by a landowner; for the purpose of reducing the impact of erosion on a building; in accordance with a certificate under Div 2 that authorises the works; and when beach erosion is either: occurring; imminent; or reasonably foreseeable.

[35] *Coastal Protection Act 1979* (NSW), s 55P.

[36] Ghanem and Ruddock, n 6; Lipman and Stokes, n 5.

[37] Lipman and Stokes, n 5 at 192.

the objects clause of the CP Act, which states that the Act aims to "encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise".

These legislative changes originally effected by the *Coastal Protection and Other Legislation Amendment Act 2010* (NSW) were bought about in large part by the 2009 *Vaughan* litigation,[38] in which the central argument was based on the interpretation of a development consent Byron Shire Council had issued to itself in 2001 for the construction of a protective sandbag wall in front of a number of residences built on a sandbank called Belongil Spit. In May 2009, Belongil Spit (and other areas within the Byron locale) was subject to a combination of king tides and a large storm surge, resulting in significant damage along the beach, including the loss of several metres of the Vaughans' land when a 1.3 m sandbag wall failed and collapsed. The case was centrally concerned with whether the development approval the Council had issued to itself before the erection of the sandbag wall required: (a) maintenance of the sandbag wall; and (b) the wall to be built to specific standards. As a result of the failure of the sandbag wall, the Vaughans sought damages from the Council alleging it had breached its obligation to properly construct and maintain the wall. The legal issues were never resolved, as the case settled in favour of the Vaughans prior to the finalisation of the hearing. Whilst the circumstances of this litigation are somewhat unique in that they primarily concerned the interpretation of a development consent, it is illustrative of the wide scope in which sea level rise litigation may take place in the future.

The Stage 1 coastal reforms now aim to relax "onerous sea level rise planning benchmarks" and give "more freedom to landowners to protect their properties from erosion".[39] The amendments that were made in 2010 have been altered by:

- renaming "emergency coastal protection works" as "temporary coastal protection works";
- providing that a person does not require approval for temporary coastal protection works that comply with the requirements set out in the CP Act, by removing the requirement for such works on private land to be authorised by a pre-existing certificate issued by an emergency works authorised officer;
- removing the requirement that temporary coastal protection works only be placed when beach erosion is occurring or imminent or reasonably foreseeable;
- removing the requirement that temporary coastal protection works be removed 12 months after placement;
- removing the restriction that provides that emergency coastal protection works may be placed on private land only once; and
- reducing by half the maximum penalties applicable to breaches of the relevant provisions.

These most recent amendments reinforce the prioritisation of private property rights, by broadening the frameworks in which such owners can undertake protective measures in the event that coastal protection is required. This move away from providing specific planning advice to local governments has been attributed to uncertainty in the scientific basis for the sea level rise projections in the *NSW Sea Level Rise Policy Statement 2009*. However, these amendments, and particularly the removal of the *Policy Statement 2009*, may generate even greater uncertainty for coastal councils seeking to establish clear planning strategies and guidelines to address the longer-term issues raised by sea level rise. These initial changes only represent Stage 1 of the New South Wales government planning reform agenda on coastal hazards. An initial review of the *White Paper* and Draft Exposure Bills indicates that the presumptions favouring private property rights will gain momentum should those documents proceed in their current form. This is in line with the international shift in focus, seemingly from issues such as climate change, to promoting overall development, post *Rio 20*.[40]

[38] *Vaughan v Byron Shire Council; Byron Shire Council v Vaughan* [2009] NSWLEC 88; *Vaughan v Byron Shire Council; Byron Shire Council v Vaughan (No 2)* [2009] NSWLEC 110; *Vaughan v Byron Shire Council; Byron Shire Council v Vaughan* (NSW Land and Environment Court proceedings 40342 and 40344 of 2009).

[39] Hartcher C, *NSW Moves Ahead on Coastal Management* (media release, 8 September 2012).

[40] United Nations, *Report of the United Nations Conference on Sustainable Development* (Rio de Janeiro, 20-22 June 2012).

MAKING DECISIONS IN GOOD FAITH: ISSUES ARISING WITH RESPECT TO S 733 OF THE LOCAL GOVERNMENT ACT

The legislative changes brought about by the Stage 1 coastal reforms are not without implication for the role that s 733 of the LG Act has in offering some protection for local councils to potential negligence claims made against them. This potential protection from exposure to liability exists for the benefit of local councils, provided the decisions they make are bona fide, with respect to potential liabilities arising from, amongst other things, decisions made within the coastal zone. Relevantly, s 733(2) states:

> (2) A council does not incur any liability in respect of:
>
> (a) any advice furnished in good faith by the council relating to the likelihood of any land in the coastal zone being affected by a coastline hazard (as described in a manual referred to in subsection (5)(b)) or the nature or extent of any such hazard, or
>
> (b) anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being so affected.

Section 733(3)(f5) states:

> (3) Without limiting subsections (1), (2) and (2A), those subsections apply to:
>
> (f5) the provision of information relating to climate change or sea level rise, and
>
> (f6) anything done or omitted to be done regarding the negligent placement or maintenance by a landowner of temporary coastal protection works.

Section 733(5)(b) states:

> (5) For the purposes of this section, the Minister for Planning may, from time to time, give notification in the Gazette of the publication of:
>
> ...
>
> (b) a manual relating to the management of the coastline

Section 733(3)(f6) provides such an exemption with respect to the negligent placement or maintenance of "temporary coastal protection works" by a landowner.[41]. Crucially, however, in accordance with s 733(5)(b), consideration of the CZMP Guidelines is a requirement triggering this statutory protection, and the repeal of the *NSW Sea Level Rise Policy Statement 2009* creates a potential gap as the Guidelines still require compliance with this Policy.[42] The protection offered by s 733(3)(f5) remains, and so local councils can make decisions that do take climate change and sea level rise projections into account within this legislative perimeter. Given that the Stage 1 reforms now revert CZMPs back to a pre-*Sea Level Rise Policy Statement 2009* era, the argument advanced by England (2008) to the effect that local councils have an obligation to ensure that their decisions are not "*so unreasonable*"[43] in light of the increasing literature on climate change impacts, is particularly relevant.[44] To this end, the Stage 2 coastal management reforms promise to offer more guidance on these issues.[45] In the meantime, further approval of CZMPs by the Minister will be deferred until the completion of these reforms.[46]

Climate change – in the public interest

In the absence of any express requirement to consider the impacts of coastal climate change or sea level rise in current coastal planning law, courts, in both judicial and merits review proceedings, have been reluctant to imply this into the legislation. However, the concept of the "public interest", as a

[41] This provision was amended from "emergency coastal protection work" to "temporary coastal protection works" as part of the Stage 1 reforms.

[42] New South Wales Government, *Guidelines for Preparing Coastal Zone Management Plans* (Department of Climate Change, Environment and Water, 2009).

[43] See further s 42 of the *Civil Liability Act 2002* (NSW) regarding the scope of negligence liability relevant to local councils.

[44] England P, "Heating Up: Climate Change Law and the Evolving Responsibilities of Local Government" (2008) 13 LGLJ 209 at 216.

[45] New South Wales Government, *Stage 1 Coastal Reforms Overview* (Office of Environment and Heritage, 2013).

[46] New South Wales Government, n 45.

factor to be taken into account under s 79C(1)(e) of the EPA Act, has been increasingly relied upon by the courts as a gateway for climate change considerations in planning and development assessment processes. The requirement of the public interest remains in the four decision-making criteria featured in the *White Paper* and Exposure Bills, in line with the objectives noted in the *Green Paper* to the effect that the changes to planning in New South Wales would create "*a new planning system that focuses on the public interest*".[47]

The public interest concept is recognised as being multifaceted and flexible.[48] The requirement to consider the public interest operates at a high level of generality and does not of itself require that regard be had to any particular aspect of the public interest.[49] Considerations that can form part of the public interest in any specific case include, inter alia, the importance of safeguarding private property rights, the provision of community services and infrastructure, and the ecological imperative of conserving natural ecosystems and species.[50] Thus, the term "public interest" is "tantalisingly vague"[51] and has the ability to accommodate some, none, or all of these considerations, depending on the facts of a particular case. The examination by Edwards of how policy makers should employ the use of the public interest as a test when designing policy, indicates that, while the reference to it may encourage positive feelings about moral contributions to society, policy, and even law, the actual application of the "public interest" leaves much to be desired, and is often stymied due to market or economic rationalities.[52]

Balancing the public interest against the realm of private property rights, in both the current and proposed planning regimes, is difficult terrain. Whilst mandatory considerations in a particular case may be determined by implication from the scope and purpose of the statute,[53] under common law the longstanding general presumption is that Parliament does not intend to interfere with fundamental rights unless precise words are legislated to that effect.[54] A presumption in favour of private property rights exists as a subset of this general presumption. This "property presumption" was articulated by French CJ in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; 165 LGERA 68 at [41]-[43] (footnotes omitted):

> Blackstone said that the common law would not authorise the "least violation" of private property notwithstanding the public benefit that might follow…
>
> The attribution by Blackstone, of caution to the legislature in exercising its power over private property, is reflected in what has been called a presumption, in the interpretation of statutes, against an intention to interfere with vested property rights. It was expressed by Griffith CJ in *Clissold v Perry (Minister for Public Instruction)*, a land resumption case, thus:
>
> In considering this matter it is necessary to bear in mind that it is a general rule to be followed in the construction of Statutes such as that with which we are now dealing, that they are not to be construed as interfering with vested property interests unless that intention is manifest.
>
> The presumption has been restated on more than one occasion in this court…
>
> … As a practical matter it means that, where a statute is capable of more than one construction, that construction will be chosen which interferes least with private property rights. That approach resembles and may even be seen as an aspect of the general principle that statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law. It operates in the United Kingdom as a manifestation of a "principle of legality" and has been described in Australia as an aspect of the rule of law.

[47] New South Wales Government, *A New Planning System for NSW – Green Paper* (Department of Planning and Infrastructure, July 2012) p2; White Paper, n 7; *Planning Bill 2013* (NSW); *Planning Administration Bill 2013* (NSW).

[48] *Haughton v Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373 at [152].

[49] *Minister for Planning v Walker* (2008) 161 LGERA 423 at [41].

[50] *Mnister for Planning v Walker* (2008) 161 LGERA 423 at [42]-[45].

[51] Edwards G, "Where Does the 'Public Interest' Lie?", *Public Administration Today* (Apr/June 2011) pp 67-73.

[52] Edwards, n 51.

[53] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

[54] *Coco v The Queen* (1994) 179 CLR 427 at 437.

Accordingly, a court will ordinarily interpret legislation in such a way as to preserve property rights and not to diminish them. These interpretive principles apply to environmental legislation, including the current "public interest" requirement in s 79C(1)(e) of the EPA Act.

Several recent cases have demonstrated that the presumption in favour of private property is alive and well in Australia.[55] Indeed, in *R & R Fazzolari*,[56] owners of land at Civic Place in Parramatta sought an injunction to restrain Parramatta Council from compulsorily acquiring their land. The High Court focused on statutory interpretation in resolving the matter, putting the wider public benefits that could have been realised from the development to one side. Section 188 of the LG Act prevented the compulsory acquisition of private land without approval of the landowner where acquisition was for the purpose of resale. The High Court held that the acquisition was for the purpose of resale and the Council was restrained from acquiring the land. The Chief Justice approached the interpretation of the word "resale" by giving primacy to the private property presumption, stating that, when construing a provision authorising the compulsory acquisition of land, a construction that least interfered with private property ought to be preferred.

Parliament can override private property rights, but it must do so clearly, by express language or "unambiguously clear" inference.[57] In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [384], the High Court, while acknowledging the general presumption, definitively established the supremacy of legislative intent in statutory construction regardless of whether it altered common law rights. Further, a purposive and contextual approach to statutory interpretation was favoured in determining Parliament's intention.

A purposive and contextual interpretation of planning legislation facilitates achievement of its environmental objectives and, therefore, interpretation of the public interest requirement should occur in light of the objects of the EPA Act where relevant, which include: the provision of land for public purposes; the provision of community services and facilities; the protection of the environment; and, of course, environmentally sustainable development (ESD) principles.[58] The need to read the "public interest" requirement in light of these objectives, particularly ESD principles, has been recognised in several cases.[59] As McLeod and McLeod identify, "developments in environmental and town planning law have provoked, and no doubt will continue to provoke, substantial changes in concepts such as the 'public interest' and even 'property' itself".[60] This is likely to be further exacerbated by coastal climate change issues such as sea level rise.

If Parliament intends the "public interest" to be interpreted against private property rights, clear words must be used. As canvassed, current planning legislation is far from clear in its intent to take sea level rise impacts into account in development assessment, with climate change considerations imputed into planning law through the requirement to consider the "public interest" as one of a number of relevant factors in the decision-making process.

The courts and the public interest

Under the leadership of Preston CJ[61] the Land and Environment Court of New South Wales has in the last seven years and beginning with *Telstra v Hornsby Shire Council* (2006) 67 NSWLR 256; 146

[55] *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; 165 LGERA 68; *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492; 181 LGERA 331; *ING Bank (Australia) Ltd v O'Shea* (2010) 14 BPR 27,317. See Nash S, "Interpreting Legislation that Adversely Interferes with Property Rights" (2012) 27(5) AER 142.

[56] Nash, n 55.

[57] *Coco v The Queen* (1994) 179 CLR 427.

[58] *Environment and Planning Assessment Act 1979* (NSW), s 5.

[59] *Minister for Planning v Walker* (2008) 161 LGERA 423 at [54]-[56]; *Barrington-Gloucester-Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197 at [153]; *Haughton v Minister for Planning and Macquarie Generation* (2011) 185 LGERA 373 at [152].

[60] McLeod G and McLeod A, "The Importance and Nature of the Presumption in Favour of Private Property" (2009) 15 LGLJ 97 at 106.

[61] Justice Brian Preston was appointed Chief Justice of the New South Wales Land and Environment Court in 2005.

LGERA 10 instigated a rapid growth in the body of case law concerning the application of the principles of ESD as part of the "public interest", and subsequently how climate change considerations, including sea level rise, ought be considered.

Judicial review

It was decided in *Gray v Minister for Planning* (2006) 152 LGERA 258 at [101]-[117] per Pain J, and upon analysis of several relevant cases that dealt with the principles of ESD, that ESD principles were a required consideration for decision-makers approving developments under the EPA Act, due primarily to the fundamental importance of these principles to environmental decision-making. Subsequent to *Gray*, Biscoe J handed down the decision of *Walker v The Minister for Planning* (2007) 157 LGERA 124. In that case, it was held that a concept plan approved under Pt 3A of the EPA Act (now repealed) for a residential development on the New South Wales south coast was invalid, due to the then Minister for Planning's failure to consider whether a proposed residential development located on a flood-prone site would be negatively impacted due to climate change, specifically increased flooding risks associated with sea level rise. In this case, the requirement for planning decisions to be made in the "public interest" was found in the *Environmental Planning and Assessment Regulation 2000* (NSW). His Honour found that a legal error had occurred, due to the fact that case law established it was in the public interest to consider ESD in the decision-making process, and that part of this assessment would be to include considerations of climate change-induced flood risk.[62]

His Honour observed:

> Climate change presents a risk to the survival of the human race and other species. Consequently, it is a deadly serious issue. It has been increasingly under public scrutiny for some years. No doubt that is because of global scientific support for the existence and risks of climate change and its anthropogenic causes. Climate change flood risk is, prima facie, a risk that is potentially relevant to a flood constrained, coastal plain development such as the subject project.[63]

This aspect of Biscoe J's decision was overturned in the New South Wales Court of Appeal.[64] In doing so, Bell JA noted that principles of ESD are "likely to come to be seen as so plainly an element of the public interest in relation to most if not all decisions [by the Minister] that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide".[65] This prediction was recently realised in the case of *Barrington-Gloucester-Stroud Preservation Alliance v Minister for Planning and Infrastructure* [2012] NSWLEC 197 at [170], where Pepper J held that "the time has come" for ESD principles to be seen as "so plainly an element of the public interest" in relation to all project approval decisions, including Pt 3A projects. Her Honour held that the authorities made it "abundantly clear" that the decision-maker was obliged to consider the principles of ESD as part of the public interest, albeit at a high level of generality.[66] The New South Wales Court of Appeal's decision in *Walker*, however, remains authoritative.

Merits review

In relation to Pt 4 approvals, the court in *Aldous v Greater Taree Council* (2009) 167 LGERA 13 held that whilst in 2006 ESD may have been a relatively undefined legal concept, the growing public awareness of climate change and climate change-related issues between 2006 and 2009 meant that both ESD principles and climate change considerations, where relevant, fell squarely within the "public interest" spectrum,[67] despite this reasoning not being the basis for the final outcome.[68] Accordingly, failure to consciously consider the principles of ESD in dealing with any development

[62] *Walker v Minister for Planning* (2007) 157 LGERA 124 at [154].

[63] *Walker v Minister for Planning* (2007) 157 LGERA 124 at [161].

[64] *Minister for Planning v Walker* (2008) 161 LGERA 423.

[65] *Minister for Planning v Walker* (2008) 161 LGERA 423 at [56].

[66] *Barrington-Gloucester-Stroud Preservation Alliance v Minister for Planning and Infrastructure* [2012] NSWLEC 197 at [171].

[67] *Aldous v Greater Taree Council* (2009) 167 LGERA 13 at [28].

application may be considered evidence of a failure to take into account the public interest.[69] This includes the consideration of potential climate change impacts as part of that public interest.

Cases decided by the Victorian Civil and Administrative Tribunal (VCAT) reflect the increased significance of the precautionary principle in planning decisions, and its use as a basis for taking into account the possible adverse impacts of climate change on development. While Victorian planning law contains no "public interest" criteria, climate change considerations have been incorporated via s 60(1)(e) of the *Planning and Environment Act 1987* (Vic), which states that, before deciding an application, the responsible authority must consider "any significant effects which the responsible authority considers the use or development may have on the environment or which… the environment may have on the use or development".

In *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545, it was held that the requirements of this section were "sufficiently broad to include the influence that climate change and coastal processes may have on the proposed developments". VCAT further held that the risk of impacts of sea level rise to the proposed residential development were unacceptable. The tribunal recognised that Victorian planning policy did not contain any specific provisions relating to development approvals for at-risk projects. This decision is significant in that it was the first Australian merits review decision to use climate change impacts as a basis for refusing development consent, in the absence of specific legislative provisions making consideration of the issue mandatory.[70] In this policy vacuum, VCAT applied the precautionary principle by refusing to grant development approval.

Following this decision, a General Practice Note – *Managing Coastal Hazards and Coastal Impacts of Climate Change* – was issued, which incorporated cl 15 (now cl 13.01)) into the Victorian State Planning Policy Framework. The clause requires decision-makers to apply the precautionary principle to planning decisions when considering risks associated with climate change, and helped to alleviate the criticism the original decision received due to the lack of an original policy specifically dealing with climate change issues.

In *Myers v South Gippsland Shire Council (No 1)* [2009] VCAT 1022, VCAT found that there was insufficient information to adequately assess the impact of climate change on the proposed development, and required the applicant to prepare a coastal hazard vulnerability assessment. VCAT found that the impacts of climate change had not been considered by the consent authority, and that regard had not been had to the General Practice Note, or cl 15 of the State Planning Policy Framework or the Victorian Coastal Strategy. Once submitted, the coastal hazard vulnerability assessment showed that the property was at risk of inundation by storm surges. VCAT concluded, in *Myers v South Gippsland Shire Council (No 2)* [2009] VCAT 2414, that without a specific local policy or planning scheme in place to address such issues the project could not be approved.

Where to for decision review?

Considerations of climate change and sea level rise issues in judicial or merits review of planning and development decisions are still in an evolutionary phase. However, cases like *Gippsland* and *Walker* reveal an increasing willingness of the judiciary to bring climate change considerations into the planning and assessment process. The fact remains, however, that in the absence of legislated requirements, determinations of the "public interest" will be conducted on a case-by-case basis, with coastal climate change being merely one factor potentially included as relevant.

PRIVATE PROPERTY VERSUS PUBLIC SPACE

In the application of the "public interest" to development assessment in the coastal zone, there is a clear tension between the environmental objectives of planning legislation, and the traditional

[68] *Aldous v Greater Taree Council* (2009) 167 LGERA 13 at [77].

[69] *Minister for Planning v Walker* (2008) 161 LGERA 423 at [63].

[70] In *Northcape Properties Pty Ltd v District Council of York Peninsula* [2008] SASC 57, the Supreme Court of South Australia refused consent to a coastal development because the development assessment had failed to take into account erosion of the coastline predicted to be the result of rising sea levels. However, in that case, the relevant development planning policy specifically required consideration of sea levels to 2100.

protection of private property rights at common law. Sea level rise (and subsequent coastal intrusion) threatens to exacerbate this tension, as various user groups compete for progressively scarce coastal land and resources.

Indeed, this is evidenced by a report conducted for the Australian Local Government Association in 2011.[71] The report lists several types of legal challenge that have been brought against local governments with respect to planning and development decisions made in light of sea level rise and climate change. These include:

- claims made by property owners against a decision that interferes with their property rights, such as a council's refusal of a development application on climate change grounds or the implementation of a new development standard for coastal developments; or
- claims made by third party objectors against decisions to approve development in low-lying coastal areas where climate change impacts were not considered or not adequately considered.

This tension between the consideration of the public interest in protecting private property rights versus consideration of the public interest in protecting the communal use of coastal ecosystems in their natural state, including access and enjoyment, is not easily resolved. The prevailing justifications for private property are predominately based on economic or market-based ideologies. A number of litigious actions in Australia, notably in New South Wales and Victoria, as highlighted above, have invoked the law to protect private property rights in the face of increased erosion, sea level rise, king tides and storm surges (or combinations of some or all of these).[72] The security of private property, and its concomitant characteristics of exclusivity, tradability and alienability, is still valued today as a fundamental liberty of our market-based society.[73] However, the use of litigation to protect private property rights is highly unlikely to assist in climate change adaptation. Rather, it is merely inherently symptomatic of the societal priority placed on protecting one's private property rights, illustrating the "deeper, intuitive and psychological sense of what private property means to those who hold it",[74] and the lengths people will go in order to protect such rights.

Further, property rights are more entrenched with respect to existing developments because landowners expect that they possess a right to protect their property where and when it is placed under threat. Coleman argues that the right to protect against encroachments of the sea is a fundamental proprietary right that cannot be curtailed by legislation without clear words or just compensation.[75] She points to the existence of precedent in support of this right dating as far back as 1371. However, such precedent may not be inapplicable in light of climate change-induced sea level rise due to the wide spread impact it is expected to have to entire coastlines, likely resulting in significant damage to or complete loss of property, whilst simultaneously negatively affecting public beach access and amenity.

Conserving the social and ecological values of the foreshore

Access to and use of beaches and foreshore areas is an intrinsic part of the Australian culture. Beaches often play host to social and recreational activity, offering a unique environment in which fishing, swimming, surfing, sporting events and other activities take place. Given predictions of sea level rise, however, it is conceivable that rising seas will eventually reach private property boundaries, resulting

[71] Baker & McKenzie, *Local Council Risk of Liability in the Face of Climate Change: Resolving Uncertainties* (Australian Local Government Association, October 2011).

[72] *Vaughan v Byron Shire Council; Byron Shire Council v Vaughan* [2009] NSWLEC 88; *Vaughan v Byron Shire Council; Byron Shire Council v Vaughan (No 2)* [2009] NSWLEC 110; *Myers v South Gippsland Shire Council* [2009] VCAT 1022; *Gray v Minister for Planning* (2006) 152 LGERA 258; *Walker v Minister for Planning* (2007) 157 LGERA 124; *Walker v Minister for Planning* (2008) 161 LGERA 423; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13; *Charles & Howard Pty Ltd v Redland Shire Council* (2007) 159 LGERA 349; *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57; *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545; *Van Haandel v Byron Shire Council* [2006] NSWLEC 394.

[73] McLeod and McLeod, n 60.

[74] Rose A, "Gray v Minister for Planning: The Rising Tide of Climate Change Litigation in Australia" (2007) 29 SLR 725.

[75] Coleman K, "Coastal Protection and Climate Change" (2010) 84 ALJ 421 at 421.

in a "privatisation" of the foreshore. As Titus muses, this could mean that "what once was a leisurely stroll along the shoreline now involves trespassing in the backyards of waterfront property owners".[76] The legal issues in this respect were well canvassed by Lipman and Stokes in 2003.[77] A redelineation of private ownership rights will be required in response to the increasing scarcity of coastal land if the social and ecological values of the foreshore are to be conserved.

Despite the popular conception that access to coastal areas is "part and parcel of being Australian", a predilection for the coast does not necessarily translate into any legal rights of access or use of the coastline or beaches.[78] Particularly in New South Wales, there is no comprehensive legislative scheme governing public access to or use of coastal land. In the absence of a comprehensive statutory scheme for the provision of public foreshore access, government "buyback" schemes, such as the former Coastal Lands Protection Scheme,[79] have traditionally been utilised to ensure certain foreshore land remains in public ownership. However, the procedures required are costly, and as a result such opportunities are not frequently pursued. Though incremental efforts may continue, a strategic approach is required to respond to sea level rise, in order to avoid continued confusion, frustration and conflict that arises in balancing private property rights and public access to the coastline.

Obtaining development consent for coastal protection works requires the consent authority to be satisfied that development "will not unreasonably limit public access to the use of a beach or headland".[80] Where a CZMP is prepared, it must address the following:

- the protection and preservation of the beach environment and beach amenity;
- emergency action to be taken during periods of beach erosion; and
- continuing and undiminished public access to beaches and waterways.

However, there are weaknesses in the ability of these ad hoc measures to protect beach access and amenity in the face of development pressures and preferences for the protection of private property, in that these considerations are triggered only where a landowner is applying to develop coastal protection works or to amend their property boundary to correspond to an increase in area due to accretion. The *Coastal Design Guidelines for NSW 2003* acknowledge that "the coastal edge is ideally a publicly accessible system of foreshore and natural reserves extending along the NSW coast and around lakes and estuaries" and recommends that new strategies for development need to "provide for improved access to the NSW coast".[81] However, no guidance is provided regarding mechanisms that may be used to ensure public access under future sea level rise scenarios.

ROLLING EASEMENTS: A FLEXIBLE SOLUTION

Innovative planning mechanisms that go beyond ad hoc and project-specific controls are required to ensure that the protection of beach access and amenity is appropriately prioritised and balanced against private property rights in practice. The implementation of a system of "rolling easements" is considered as one possible mechanism for achieving this balance.

Where combined pressures of increasing development, existing use rights and sea level rise are intensifying the competition for coastal resources, property or development rights in coastal areas should no longer be granted indefinitely so as to operate to the exclusion of all other ("public") interests in the use and enjoyment of coastal land, and potentially to the survival of accompanying

[76] Titus J, "Rising Seas, Coastal Erosion and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners" (1998) 57(4) MLR 1279 at 1280.

[77] Lipman and Stokes, n 5.

[78] Thom B, "Geography's New Frontiers Conference Proceedings" (paper presented at *Geography's New Frontiers*, University of New South Wales, 2003).

[79] Between 1973 and June 2009, the New South Wales government acquired approximately 15,427 ha of coastal land, set aside for the purpose of national parks and reserves, at a cost of approximately $70.8 million.

[80] *Coastal Protection Act 1979* (NSW), s 55M.

[81] New South Wales Government, *Coastal Design Guidelines for NSW 2003* (Department of Planning and Infrastructure, 2003).

unique ecosystems. Planning approvals may still be granted, but should incorporate lapsing mechanisms to trigger when a certain threshold of risk to coastal access or ecosystem functioning is reached. Conditions attaching to development approvals could, for instance, incorporate triggers for the cessation of the approval after a specified time or, perhaps more appropriately, once a certain mean sea level is reached. Alternatively, such a condition could require that a property be converted to rental use when the sea reaches a pre-specified distance from the property and, when the sea encroaches further, that the property be sold, acquired, or abandoned, providing a long-term and strategic adaptation response. Abel argues that property rights rules triggered by biophysical thresholds, such as mean sea levels, are more suited to addressing the uncertainties associated with predictions of sea level rise than are time-based tenures.[82] This is because they allow individuals to respond "to actual changes in risk as the sea level or erosion progresses, not to events forecast in the distant future". This means that land can continue to be used in a cost-effective manner in the period before the sea reaches the pre-identified trigger level.

These trigger-based methods are examples of the application of a rolling easement in the form of future interest in land. It operates such that a ribbon of land along the coastline of a predetermined width is maintained under public ownership, with ownership "rolling" over as the sea slowly encroaches landward. This mechanism has the potential to ensure that public access to the coast is maintained at all points in time. Further, as Titus explains:

> Rolling easements do not render property economically useless, they merely warn the owner that someday, environmental conditions will render the property useless, and that is this occurs, the state will not allow the owner to protect his or her investment at the expense of the public.[83]

Rolling easements are flexible mechanisms that may be enforced in a number of ways. For example, a scheme could be adopted whereby the government compulsorily acquires coastal land as an option or easement. The purchase of a rolling easement would presumably be less costly than acquiring whole parcels of land, whilst still having the capacity to provide some compensation to landowners, as assessed against the likely extent of sea level rise.

Alternatively, enacting a statutory amendment to modify the common law doctrine of erosion could provide a simple means of introducing a rolling easement mechanism, as the doctrine already operates to transfer land falling below the mean high water mark to Crown ownership. The amendment would require that the width of the foreshore strip converting to Crown ownership extend inland to a distance adequate to ensure public access to the coast. A similar scheme has been implemented in New Zealand, although the transfer of title under that scheme is triggered upon subdivision of the land rather than by rising sea levels.[84]

Where protective works are required in the short and medium term, mandatory conditions attaching to the development consent can ensure continuing public access to the foreshore by specifying that an easement be reserved along the landward edge of the works. In the United Kingdom, the *Marine and Coastal Access Act 2009* (UK) places a duty on the Secretary of State and Natural England to secure a long distance walking trail along the open coast of England ("the England Coast Path") together with public access rights to a wider area of land along the path for people to enjoy. This has been termed "spreading room".

With the ability to be put in place now, but triggered later, rolling easements can provide advance notice of where losses and liabilities will lie. This, in turn, provides private owners and developers with ample time to factor the impacts of sea level rise into their plans and expectations. However, while rolling easements have the potential to provide flexible solutions that achieve a balance or compromise between stakeholders, their implementation and success, like any planning scheme, is dependent upon clear legislative intent and action.

[82] Abel N, Gorddard R, Harman B, Leitch A, Langridge J, Ryan A and Heyenga S, "Sea Level Rise, Coastal Development and Planned Retreat: Analytical Framework, Governance Principles and an Australian Case Study" (2011) 14(3) *Environmental Science & Policy* 279 at 284.

[83] Titus, n 76 at 1343.

[84] New Zealand Land Access Ministerial Reference Group, *Walking Access in the New Zealand Outdoors* (2003).

CONCLUSIONS

The role of the public interest and its treatment by courts in other jurisdictions is an important consideration for the State government as it currently considers Stage 2 of its coastal management reform agenda, as well as wider planning law reforms in New South Wales. Coastal climate change, sea level rise, and their associated impacts will continue to increase in their frequency and severity, despite the attempts of the most recent amendments to the CP Act to appropriately balance the competing interests of public access and amenity with private property protection rights.

The utilisation of rolling easements is a potential solution to these issues. The use of rolling easements may properly and comprehensively address the issues posed by coastal climate change and sea level rise. By properly balancing current competing interests in the coastline, for the benefit of both current and future generations, such measures will, in the long term, be more cost effective. Given the significant risk of costly litigation in the future, weighed with significant costs associated with any future planned retreat process (and, in turn, possible compensation issues), costs associated with compulsory acquisition, and costs associated with possible engineering options for adaptation, the utilisation of rolling easements should be viewed as an appropriate long-term climate adaptation response.

Ultimately, strategic, consistent and appropriate long-term planning for the coastline is crucial. In the current process of planning review, express provision for climate change adaptation is required, and one that travels well beyond a statement in the objects clause(s). This, in turn, needs to be tempered by a policy position from the State government that provides assurance to both local governments and communities at this time of uncertainty.