

# LEGAL RISK ALLOCATION AND SUSTAINABLE COASTAL MANAGEMENT

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## **Abstract**

Governments across Australia and globally are considering climate change and in particular sea level rise and increased risks from coastal hazards, in their decision making.

The legislative and policy response of governments has been primarily directed to reducing the risks of property damage and personal injury from coastal hazards, in part to limit the governments' exposure to liability from its decision making.

The existing legislative framework and potential exposure to negligent liability can result in government taking an overly cautious and inflexible approach to coastal management through the regulation of development.

This does not always result in the optimal outcome for the environment, private landowners or the community generally.

There is also tension between government limiting its liability by releasing all information it holds regarding coastal risks to a property, and the impact of the disclosure of that information.

One of the practical impacts for members of coastal communities of both the regulation of development and the release of information regarding coastal risks, is a reluctance or inability by private landowners to make any significant financial investment in their property.

The law regarding negligent liability in Australia has developed in contexts which are vastly different from the management of coastal hazards in the face of climate change.

This presentation will consider whether the current legislative framework in NSW strikes the right balance in allocating risks from coastal hazards and climate change, or whether reform is required to facilitate sustainable coastal management for the benefit of all key stakeholders.

## **Background**

Global sea level rise is estimated at between 1.7mm and 3mm per year (*Assessment of the science behind the NSW government's sea level rise planning benchmarks*, NSW Chief Scientist and Engineer, April 2012).

Estimates are that for the remainder of the century, the sea level will rise between 40cm to 1 metre above current levels. A rise of only half a metre would on average mean that 1 in 100 year floods would occur every few months, and in Sydney, which is particularly vulnerable, by the end of the century, it is estimated that such floods will occur every day or so. If the sea level rose 1.1 metres, more than \$226 billion in commercial, industrial, road and rail and residential assets could be at risk of flooding (*Counting the Costs: Climate Change and Coastal Flooding*, Climate Council of Australia, 2014).

The potential impact of the predicted sea level rise on coastal communities, the environment and the economy is enormous. Where large amounts of money are at stake, litigation is inevitable.

Whilst the Federal and State governments are involved in policy decisions in respect of climate change and sea level rise it is local government which is responsible for the implementation of that policy, and for decision making which is the most impacted by climate change and sea level rise.

## **Local government decision making**

Local government is charged with decision making in respect of strategic planning and development assessment in the coastal zone, and also has responsibilities in respect of dissemination of information regarding land and coastal protection works, and infrastructure and public assets in the coastal zone.

In this paper I will focus on the making of planning decisions, primarily regarding development applications, and the provision of information regarding sea level rise and coastal risks.

Councils' decisions in this respect can expose them to actions for negligence as well as other legal action such as landowners exercising appeal rights in respect of development decisions, and seeking judicial review of planning decisions on administrative law grounds, such as a failure to follow proper processes under the legislation, or making decisions without power, or which are liable to being set aside for unreasonableness.

## **The Current Legal Framework**

### ***The Environmental Planning & Assessment Act***

Section 79C of the *Environmental Planning & Assessment Act 1979* (**EPA Act**) provides:

*In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*

- (a) *the provisions of:*
  - (i) *any environmental planning instrument, and*
  - ...
  - (iii) *any development control plan, 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.*

Consideration of the public interest involves consideration of the principles of ecologically sustainable development (**ESD**). This includes projected increases in coastal erosion, and sea level rise as a result of climate change (see *Minister for Planning v Walker* (2008) NSWCA 224; *Aldous v Greater Taree Shire Council* (2009) NSWLEC 17).

Most local environmental plans now also require consideration of coastal risk in the development assessment process. Clause 5.5 of the *Standard Instrument – Principal Local Environmental Plan* requires consideration of the impact of proposed development on coastal access, scenic quality amenity, biodiversity, ecosystems and water quality, but also provides:

- ...
- (3) *Development consent **must not be granted** to development on land that is wholly or partly within the coastal zone unless the consent authority is satisfied that:*
  - ...
  - (d) *the proposed development will not:*
    - (i) *be significantly affected by coastal hazards, or*
    - (ii) *have a significant impact on coastal hazards, or*
    - (iii) *increase the risk of coastal hazards in relation to any other land.*

Coastal management plans are also mandatory considerations in the development assessment process in respect of the coastal zone.

The *Coastal Protection Act 1979 (CP Act)* requires a council to prepare a coastal zone management plan (**CZMP**) for the 'coastal zone' as defined in the CP Act to make provision for the management of risks arising from coastal hazards, and the impact of climate change on risks from coastal hazards.

A CZMP must be prepared in accordance with the *Guidelines for Preparing Coastal Zone Management Plans 2013 (CZMP Guidelines)*.

The CZMP Guidelines require a CZMP to:

- identify risks from coastal hazards with a minimum assessment criteria for coastal inundation of wave run-up level and overtopping of dunes assessed under current and projected future conditions;
- include a description of projected climate change impacts on risks from coastal hazards based on council's adopted sea level risk projections;
- include sea level rise projections which are widely accepted by competent scientific opinion; and
- include actions to management current and projected risks from coastal hazards should focus on managing the highest risks

Building design criteria such as footings and floor levels are noted as an appropriate option for avoiding risks of coastal inundation.

The CZMP Guidelines require a CZMP to be prepared consistently with the *NSW Coastal Planning Guideline: Adapting to Sea Level Rise, August 2010 (SLR Planning Guidelines)*.

The SLR Planning Guidelines recommends:

- incorporating coastal hazard studies into strategic planning;
- development control plans including mitigation methods to address coastal risks such as construction methods and building design; and
- development control plans specifying time limited or trigger limited consents.

Sea level rise is therefore clearly a mandatory matter for consideration in respect of development within the coastal zone.

The EPA Act also empowers consent authorities to impose conditions of the type contemplated by the SLR Planning Guidelines, such as time limited consents. Section 80A of the EPA Act provides:

(1) **Conditions - generally**

*A condition of development consent may be imposed if:*

(a) *it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or*

...

(c) *it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or*

(d) *it limits the period during which development may be carried out in accordance with the consent so granted, or*

(e) *it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d)...*

...

Under s149(2) of the EPA Act, and the regulations made thereunder, councils are required to include on planning certificates issued under s149(2):

- Information regarding the Coastal Protection Act;
- Whether the land is affected by a policy which restricts development because of tidal inundation, or any other risk (other than flooding);

- Whether the land is affected by flood related development controls.

In respect of coastal hazards, whilst s149(2) requires a planning certificate to contain some information regarding coastal protection works, and whether the Minister's concurrence is required for certain development, it is not required to state whether the land is affected by coastal hazards **unless** the relevant council had adopted a policy which restricts development as a result of those hazards.

This means that generally, councils provide information regarding coastal hazards only under s149(5). A certificate under s149(5) is not required to be included in a contract for sale of land.

### ***Negligent Liability***

Councils have a duty to exercise statutory powers where a reasonable authority in the position of the council would do so (*Graham Barclay Oysters v Ryan* [2002] HCA 54).

Arguably no duty of care is owed when making policy decisions, and therefore a council's exposure to liability as a result of making planning controls is limited (*Alec Finlayson v Armidale City Council* (1994) 84 LGERA 225).

Negligent liability is now codified in NSW in the *Civil Liability Act 2002 (CL Act)* and there are protections for public authorities in respect of both acts and omissions.

The general principle in respect of duty of care is that:

*A person is not negligent in failing to take precautions against a risk of harm unless...the risk was foreseeable...the risk was not insignificant and a reasonable person in the person's position would have taken those precautions (s5B(1) CL Act)*

There are extensive provisions in the CL Act regarding duty of care, causation, and obvious and inherent risks, which are beyond the scope of this paper to discuss in detail.

The CL Act also contains particular provisions regarding the liability of public authorities.

Section 43(2) of the CL Act provides:

*For the purposes of any... proceedings [for breach of statutory duty], an act or omission of the authority does not constitute a breach of statutory duty unless 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.*

Section 43A(3) of the CL Act provides:

*...any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.*

A special statutory power for the purposes of s43A(3) is a power:

- conferred by or under a statute; and
- that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

In order for a council to be exercising a 'special statutory power' it must be exercising some statutory authority to do something which cannot be done by any person under the general law. By way of example, the power to install traffic control devices is a special statutory power (see *Curtis v Hardin Shire Council* [2014] NSWCA 314), but the power to install guide posts on the side of the road under the Roads Act 1993 has been held not to constitute such a power, on the basis that any person could install guideposts on their own land (see *Bellingen Shire Council v Colavon Pty Ltd* [2012] NSWCA 34).

If a council is exercising a special statutory power it has significant protection under s43A(3) of the CL Act, and will only be found to be liable if a public authority exercising the power could not properly consider it reasonable to do so in the manner in which the power was exercised (see *Curtis v Hardin Shire Council*).

The Court of Appeal in *Curtis v Hardin Shire Council* made it clear that to satisfy the test in s43A, there must be evidence that an authority could have considered the power to be properly exercised. Determination of the issue in the case turned on the evidence of one Council officer whose evidence was the only evidence which could be considered to express a view about whether any council officer could reasonably consider that the relevant power had been exercised reasonably. The conclusion was that the Council could not rely on the protection under s43A as the Council had failed to follow guidelines which were in place to address the type of risk in question.

What this case demonstrates is the importance of ensuring, when exercising powers, that any guidelines available regarding the manner in which those powers should be exercised are complied with, unless there are very cogent reasons for departure from those guidelines. In any proceedings under the CL Act, available guidelines may well be evidence of how a reasonable authority would exercise the power, and to justify a departure will require evidence of why it is reasonable to do so in the circumstances.

Councils also have protection in respect of flooding and coastal risks under the *Local Government Act 1993 (LG Act)*.

Section 733 of the LG Act provides that a council does not incur liability in respect of:

- advice furnished in good faith by the council relating to the likelihood of any land being flooded or the nature or extent of such flooding, or the likelihood of any land in the coastal zone being affected by any coastline hazard or the nature or extent of such hazard; or
- 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(4) provides that a council is, unless the contrary is proven, taken to have acted in good faith if it acted substantially in accordance with the guidelines adopted for the purpose of s733(5).

The CZMP Guidelines are adopted for the purpose of s733(5).

Compliance with those guidelines will result in a presumption of good faith.

What the case law on negligent liability and the protections in s43A, and s733 of the LG Act make clear is that councils will best be able to meet actions in negligence and avoid liability if there are clear guidelines regarding how certain risks should be addressed, and those guidelines are complied with.

## **Risks of Litigation**

The majority of cases involving local government and negligent liability result from the council's responsibilities to road users as a roads authority.

Council decision making processes in respect of climate change and sea level rise pose unique challenges arguably not envisaged by the provisions of the CL Act and the historical development of the common law regarding negligent liability.

The key challenge is the need for councils to make decisions based on projections of future risks which are in turn based on the evolving science of climate change.

That in itself is a significant challenge. In addition, the uncertainty surrounding the real risk makes strategic planning decisions, and decisions to disseminate information regarding land potentially at risk very politically contentious.

The most significant and obvious risk of negligent liability is in approving development within an area which could be subject to coastal risks. If ultimately coastal hazards result in property damage, personal injury or death, litigation against the council is likely. Given the likely cost of liability in such circumstances, local government is not surprisingly very concerned to mitigate such risks.

Measures councils can use to mitigate such a risk involve:

- provisions in planning controls to restrict development in areas which could potentially be at risk;
- refusing to grant consent to development in such areas;
- imposing time limited conditions on any consents which ensure that the use ceases before future risks arise;
- informing the public of the risks in such areas.

However, the implementation of any of those measures also gives rise to additional litigation risks.

Those risks include:

- merit appeals to the Land & Environment Court in respect of refusals of consent or imposition of conditions;
- challenges to the legality of planning controls;
- action arising from concerns about the dissemination of information having an adverse affect on property values; and
- actions if information disseminated is inaccurate, or inconsistently provided.

The case of *Newton and anor v Great Lakes Council* [2013] NSWLEC 1248 demonstrates the difficulties for local councils in attempting to balance those risks.

The case related to two conditions imposed by the Council on a consent for the erection of a dwelling house in an area impacted by coastal hazards. One condition required the dwelling to meet certain engineering standards to protect against coastal hazards in the future (**Engineering Condition**) and the other limited the operation of the consent to 20 years, subject to any further information being submitted to Council at that time to the effect that it was appropriate for the dwelling to continue to be occupied (**Time Limit Condition**).

The Commissioner found that the Engineering Condition was reasonable, as the proposed dwelling did not incorporate any engineering to protect it against the coastal hazards which the evidence clearly indicated could affect the property in the future due to sea level rise.

However, the Court found that the Time Limit Condition was unreasonable. The basis for this finding was not any uncertainty about the potential impacts of coastal hazards on the property, but the fact that the proposed dwelling would have the same setbacks from the sea as all other dwellings along the street, and that no other dwellings were subject to a similar condition. The Commissioner also noted that there were no other vacant blocks, so there would be no further significant development in the street.

In one sense, the Commissioner's reasoning is sound. It would be unusual if in 20 years time the owners of the subject property were required to cease using their dwelling in circumstances where all other dwellings along the street continued to be occupied. If a concern is the danger to emergency services personnel in having to attend the street in the event of a severe coastal event, then clearly the condition would not address this, as all other residents of the street would still require the attendance of the emergency services.

Also, the Commissioner noted that due to the Engineering Condition, the proposed dwelling would fare better in coastal hazard events than other dwellings in the street which were not constructed to withstand the projected coastal hazards.

However, the case highlights the difficulty for councils attempting to deal with new information and new risks arising from sea level rise and climate change. It is likely that at the time the other dwellings in the street were granted consent, Council did not know of the risks from coastal hazards, or the projected impact of those risks in the future. Surely, once the Council becomes aware of the risks it must take action to mitigate the danger from the risks. A failure to do so could foreseeably lead to actions in negligence if damage did occur in the future.

Council's prospects in the case would have been improved if it had amended its planning controls to restrict development for new housing along the street. Although this would have lead to an even worse result for the owners of the subject property (as they would not be able to develop their land at all), the decision to amend the controls would not be subject to a merit appeal to the Court.

The Commissioner did consider the extent to which the owner of the subject property knew of the coastal hazards at the time of purchase of the property. It was noted that the risks may have been made known to the owner on a s149(5) certificate, but were not obvious from a s149(2) certificate. It is not clear whether knowledge of the risks would have affected the outcome in the case. However, as most purchasers only receive a s149(2)



certificate, a legislative change to require more detail on such certificates in respect of coastal hazards would presumably be welcomed by councils, although presumably not property owners. Recent reforms have, however, **decreased** the amount of information regarding coastal risks required on s149(2) certificates.

The case highlights the tensions inherent in planning for climate change between the protection of property from coastal hazards in the future, and the desire of all property owners to develop their land in the present.

### ***Protections Against Negligent Liability***

Councils have significant protections under the CL Act and LG Act in respect of negligent liability for their development decisions.

However, as stated above, compliance with clear guidelines is the best way in which to ensure the availability of the statutory defences.

What the caselaw regarding the CL Act, and s733 of the LG Act demonstrate is the importance of ensuring, when exercising its powers, that any guidelines available regarding the manner in which those powers should be exercised are complied with, unless there are very cogent reasons for depart from those guidelines.

Underpinning the CZMP Guidelines are sea level rise projections.

The move away from the *2009 NSW Sea Level Rise Policy Statement* and the state-wide sea level rise benchmarks by the State government has made it more difficult for councils to demonstrate compliance with the CZMP Guidelines, as councils would need, in any negligence action, to be able to justify the benchmarks it adopts as the basis for its planning decisions. This poses a significant evidentiary burden on councils.

The difficulties councils face in establishing their own benchmarks were acknowledged by the Chief Scientist in the April 2012 report. Support for councils in this regard, and a clear methodology for establishing benchmarks is key to councils being able to properly defend their decisions.

The State governments reforms were intended to promote more flexibility and to encourage sea level rise benchmarks to be more tailored to local conditions. However, until the necessary research is properly funded and local benchmarks established, this objective cannot be achieved as councils concerned about liability continue to apply the statewide benchmarks.

### ***Other Litigation Risks***

Provisions in development control plans regarding coastal risks would provide councils with a basis for defending development decisions.

However, recent changes to the EPA Act are to the effect that development control plans are guides only, and must be applied flexibly (see ss79C(3A) and 74BA of the EPA Act).

Therefore, provisions in development control plans regarding coastal hazards will not preclude appeals, although they may make appeals easier to defend.

In order to limit the number of appeals in respect of planning decisions based on coastal risks, something more is required.

Any attempt to amend the EPA Act to preclude merit appeals in any circumstances would be extremely controversial.

However, appeals against decisions based on protection against coastal risks could be limited if environmental planning instruments, rather than development control plans, restricted development in designated coastal hazard zones or imposed development standards to mitigate such risks which could not be varied under the instrument.

This would require State government intervention either to amend the *Standard Instrument – Principal Local Environmental Plan*, or to make a new state environmental planning policy to override existing controls.

Again, the move by the State government away from designations of coastal hazard zones in the *Coastal Protection Regulation 2011* does not assist.

The more councils do to protect themselves from negligent liability, or appeals against decisions based on coastal risks the more the risks from coastal hazards are pushed back into property owners, either through diminution in property values due to restrictive planning controls, or the risks of damage if development proceeds and the council can properly defend its position.

At present most general insurance policies exclude liability for sea level rise and coastal risks (see Insurance Council of Australia website).

What is needed is some innovative solution to land at risk. However, most of those innovative solutions require extensive funding.

Some of the more innovative approaches to land at risk from coastal hazards worldwide have involved:

- funding to encourage landowners to relocate;
- compulsory acquisition by local government of at risk land to add to coastal enhancement schemes;
- acquisition of properties at risk in the future by local government and leaseback to landowners for the period before the risk materialises;
- marketing projects for businesses at risk to encourage vibrant local communities in the case of uncertainty regarding sea level rise and to overcome concerns about investment in the coastal zone.

It is clear that no solution to the proper allocation of risk is going to come cheaply. What is therefore clear is that any solution which does not place the risk on landowners or local government will involve some acceptance of risk or liability for funding on State government.

Allocation of resources to assist councils with proper planning for coastal risks, backed up by clear guidelines and evidence of appropriate methodologies for keeping coastal risk strategies current seems to be the best first step.

This should provide councils with protection against liability and avoid the unnecessary sterilisation of vast tracts of land in the coastal zone from development.