

# Protecting the beach house from rising seas

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New legislation in NSW sets up a framework, albeit an unwieldy one, for resolving the issues arising from property damage due to rising seas.

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COASTAL EROSION HAS BEEN A longstanding problem for many beachfront properties right across the NSW coastline. It is even more of a concern now that climate change is predicted to result in rising sea levels and increased frequency and ferocity of storms. Those affected by the issue include owners and occupiers, developers, financiers, coastal local councils, insurers and public authorities with significant coastal public lands.

Opinions on the appropriate response to the issue are polarised. Some argue that nature should be allowed to take its course and no protection works should be allowed, partly because sea walls and the like can simply redirect the wave energy to another unprotected part of the coastline and can significantly affect natural coastal processes. Others argue that they should have discretion to protect private property from being lost to the sea. It is difficult to find an acceptable middle ground.

The NSW Government has responded to this issue by enacting the *Coastal Protection and Other Legislation Amendment Act 2010*, which was passed on 21 October 2010. The legislation makes significant changes to the existing *Coastal Protection Act 1979* (CPA) which commenced on 1 January 2011.

The legislation is intended to be a framework for resolving the issues – it is not a solution for erosion problems on all properties. The emphasis is on coastal zone management planning as a key tool to resolve the issues at the individual property level. The legislation follows some other recent steps on coastal erosion management, including the Sea Level Rise Policy Statement.<sup>1</sup> There are also some other related documents including proposed amendments to State Environmental Planning Policy (Infrastructure) 2007 (the Infrastructure SEPP), draft ministerial guidelines under the CPA<sup>2</sup>, as well as drafts of statutory and non-statutory guidelines.

The legislation gives rise to a range of controversial issues, such as the adequacy and effectiveness of many protection works, their impacts on other potentially unprotected parts of the coastline in the vicinity, the need for urgent works during storm events, responsibility for maintenance of any protection works and access to public land for works

to protect private land. The new legislation attempts to deal with many of these issues and strike a balance between the opposing, often irreconcilable viewpoints. In doing so, it will inevitably be criticised for failing to provide a solution for the individual property in need of emergency protection from an approaching storm. It is also overly complex, giving rise to some ambiguity and increasing the difficulty of relying on it to undertake emergency protection works. Overall, it remains to be seen whether it will provide an adequate mechanism for many landowners to take emergency protection works. Some of these issues are discussed below.

### **The case of Vaughan v Byron Shire Council**

The issue of emergency response to storm events has been hotly contested in the NSW Land and Environment Court in *Vaughan v Byron Shire Council* [40342 and 40344 of 2009]. The Vaughans owned a beachfront property on the Belongil spit, west of the Byron Bay township. Rock protection measures are in place along this section of coastline, with some exceptions, including the Vaughan property. The Vaughan property was protected by interim geo-bag protection works and sand nourishment behind the wall, constructed by Byron Shire Council in accordance with a 2001 development consent (the 2001 consent). The 2001 consent contained conditions requiring ongoing maintenance of these protection works. A sub-plan of the council's disaster emergency plan listed council as the agency responsible for the repair and re-establishment of interim measures at the beach.

In May 2009, a major storm hit Byron Bay. The properties on Belongil Beach currently protected by rock walls suffered little or no damage, notwithstanding the ferocity of the storm. However, all unprotected properties suffered damage. The failure of the interim protection works on the Vaughans' property became evident on Friday 22 May. On the evenings of Sunday 24 May and Monday 25 May, the property suffered considerable damage, losing about 12 metres of frontage due to the geo-bag wall being overtopped by waves. The Vaughans made direct pleas to council for assistance. The storm was still raging and the highest king tide of the year was known to be commencing and continuing. There was a real risk that a large part of the property would be lost to the sea.

Council commenced proceedings on 26 May seeking an injunction to restrain the Vaughans from constructing their own erosion protection works on their land until such time as they had been given development consent to do this under the planning legislation. The council argued that the 2001 consent was not a basis for it being required to undertake the protection works notwithstanding the maintenance obligation in the 2001 consent. An interlocutory injunction was granted restraining the Vaughans from undertaking works to protect their land.

On 1 February 2010, prior to the listed hearing dates and by way of a negotiated agreement between council and the Vaughans, the parties approached the court with consent orders which the court agreed to make. The orders, in substance, discharged the council's injunction and made a number of significant declarations. These declarations were that:

Q the 2001 consent was a valid consent which applied to the Vaughan land and the council's adjoining land, and approved interim beach protection works;

Q the terms of the 2001 consent obliged council to monitor, maintain and repair the interim beach protection works (including by sand nourishment) in accordance with the development application report prepared for council in 2001; and

Q the Vaughans are entitled, but not obliged, to maintain and repair the existing protective works, including restoring those works to the same height and shape as prior to the May storm event.

The court also made further orders requiring council to maintain the existing geo-bag revetment wall to the heights specified in the council's own development application report for as long as the 2001 consent subsists and, by no later than 5pm on 31 March 2010, to re-establish the sand dune behind the existing geobag wall on its own adjoining land to the height and shape of the dune prior to the May storms.

The government has decided that the situation now requires legislative intervention to provide a uniform approach across the state.

### **Coastal authorities and a Coastal Panel**

New "coastal authorities" are established under the CPA which include: the minister; the minister administering the *Crown Lands Act 1989*; a coastal council within the coastal zone or adjoining the tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries. Also included are roads authorities for a road within the coastal zone or land that adjoins the tidal waters mentioned above; and public authorities that are the owners of, or have the care, control or management of land within the coastal zone and tidal waters already mentioned.<sup>3</sup>

Coastal authorities will appoint authorised officers<sup>4</sup> who may exercise functions under Chapter 7 of the CPA and s.319A of the *Protection of the Environment Operations Act 1997* for compliance purposes.<sup>5</sup> A "Draft Guide for Authorised Officers under the *Coastal Protection Act 1979*" has been published.

A new NSW Coastal Panel is also established comprising seven members appointed

by the minister.<sup>6</sup> It is a NSW Government agency and a public authority under the *Environmental Planning and Assessment Act 1979* (EPAA). Essentially, the Coastal Panel will provide advice to the minister and local councils, and perform functions conferred on it under the EPAA relating to the granting of development consent. Under proposed amendments to the Infrastructure SEPP, the panel will be the consent authority for long-term coastal protection works where the council does not have a coastal zone management plan in place.<sup>7</sup>

### **Coastal zone management plans**

Councils currently prepare coastal zone management plans (CZMPs) under Part 4A of the CPA. These provisions are amended. The minister can now direct a council to review its existing CZMP and make a new plan.<sup>8</sup> This must be done within 12 months unless otherwise agreed by the minister.<sup>9</sup> Alternatively, the minister can make the plan and recover costs from the council (CPA 55B(7)).

A CZMP must include an emergency action subplan, which must deal with emergency actions carried out during periods of beach erosion.<sup>10</sup> The government's intention is to ask councils in erosion hotspots to finalise emergency action subplans by mid-2011 and CZMPs by the end of 2011, or later if necessary.

The new matters to be dealt with in CZMPs are:

- q the management of risks arising from coastal hazards to the coastline;
- q the management of estuaries;
- q the impacts from climate change on risks arising from coastal hazards and on estuary health; and
- q where either councils or private landowners construct coastal protection works, the adequate maintenance of the works and the management of associated impacts of such works (such as increased beach erosion elsewhere).<sup>11</sup>

Draft guidelines for preparing CZMPs have been published.<sup>12</sup>

It is an offence to carry out work for the purpose of preventing or remediating erosion or for protecting property against erosion unless the work is done in accordance with the CZMP, or for which development consent has been given, or which is an emergency coastal protection work.<sup>13</sup> Similarly, the minister may not bring proceedings to remedy or restrain a breach of a CZMP in the Land and Environment Court if these factors are present.<sup>14</sup>

### **Obtaining development consent for protection works**

Section 55M deals with the granting of development consent relating to coastal protection works (CPWs). It provides that consent must not be given under the EPAA for such works unless the consent authority is satisfied that for the life of the works:

- q the works will not unreasonably limit public access to or the use of a beach or headland or pose a threat to public safety;
- q satisfactory arrangements have been made for: the restoration of a beach, or land adjacent to the beach; if any increased erosion to them is caused by the works; and
- q that the works will be maintained. This will require the consent authority to expressly consider the impacts of the protection works on other unprotected parts of beaches or beachfront land. It is a particularly controversial aspect of the new legislation, and likely to be a key issue for many protection works.

Where CPWs are constructed, the consent authority must be satisfied that adequate funding is secured through legally binding obligations on owners, or by charges levied by a local council, to ensure that the works can be restored and maintained.

### **Emergency coastal protection works**

Previously, most protection works required development consent. A new Part 4C will be inserted into the Act to allow a person to construct "emergency coastal protection works" (ECPWs) for which planning approval is not required, although the works must still be authorised by a certificate from the local council or the Director General. ECPWs are defined as the placement of "sand, or fabric bags filled with sand, (other than sand taken from a beach or a sand dune adjacent to a beach)", or "other objects or material prescribed by the regulations (other than rocks, concrete, construction waste or other debris)" on a beach, or a sand dune adjacent to a beach to mitigate the effects of wave erosion on land.<sup>15</sup> It is important to note that a public authority can already place rocks and other material on a beach or sand dune without development consent for the purpose of flood, storm or coastal erosion emergency works under cl.129 of the State Environmental Planning Policy (Infrastructure) 2007.

#### **Requirements for ECPWs**

The requirements for ECPW to be placed in reliance on the new provisions of the CPA are lengthy and detailed. ECPW materials must be placed:<sup>16</sup>

- q in accordance with a certificate that authorises the work;
- q by or on behalf of a landowner to reduce the impact or likely impact from the erosion on a building being lawfully used for residential, commercial or community purposes;

Q when erosion is occurring or is imminent, or it is reasonably foreseeable (because of proximity to the erosion escarpment) that beach erosion is likely to impact on a building being used for the purposes mentioned above;

Q by or on behalf of the landowner in accordance with any emergency action subplan that applies to the land concerned; and

Q if before 21 September 2011, in compliance with any requirement adopted by the minister (minister's requirements) and published in the *Gazette* before 1 January 2011, as well as in accordance with the regulations.

ECPWs must be maintained in accordance with the Act. ECPWs can only be placed once on a parcel of land and can only remain in place for 12 months unless they are subsequently approved, or approval is pending, under the development consent provisions of the EPAA. The works must be removed and the land restored.<sup>17</sup>

The above requirements are strict, making it very difficult for some landholders to protect their land in emergency conditions. For example, works for the protection of land (as opposed to a building) cannot be ECPWs. The requirement for a certificate may unduly hinder landholders facing emergency conditions where protection works are required urgently. In order to obtain a certificate, applications must be made and a statutory fee paid. Certificates may then be granted subject to conditions. There are no statutory timeframes on the granting of certificates. There is no merit appeal against failure to grant a certificate or in relation to conditions imposed.

This concern has been reinforced by the further requirements for ECPWs set out in a consultation draft of the Minister's Requirements for ECPWs.<sup>18</sup> The draft Minister's Requirements set out very detailed provisions for protection works to proceed as ECPWs under the CPA (that is, without development consent). These include:

Q for the erosion to be imminent, the distance between the building and the erosion escarpment must be less than 10m, as certified by a surveyor or authorised officer;

Q the location must be included in Schedule 1 of the Minister's Requirements;

Q there must be no existing protection works, unless certification is obtained from an engineer that the existing works will provide less protection than the proposed works;

Q fenced or signed dune restoration areas must not be disturbed, unless written approval is obtained from the relevant authority;

Q vegetation must not be disturbed, other than grass or other non-woody vegetation on public land, unless prior written approval is obtained from the public authority managing the area; and

Q works can only be placed during a period of beach erosion when a senior police officer advises that the area is not unsafe for placing the works and an engineer certifies that the escarpment has a low likelihood of failure.

Detailed requirements then follow for the type of sand and construction requirements.

In summary, not only must the detailed technical, locational and other criteria mentioned above be met and a certificate be obtained, but a person may also need to obtain written approval from relevant public authorities, engage a surveyor to prepare a survey, engage an engineer to prepare a certification as well as obtain written advice from a senior police officer and an engineer. Given these steps, it is questionable whether these ECPW provisions will actually be of use to many people facing imminent erosion conditions such as a severe storm.

#### **ECPWs on adjacent public and private land**

ECPWs can be placed on public land without permission where a person has been granted a certificate under Division 2 of the Act to place and maintain ECPWs on their own land, subject to conditions such as avoiding damage to assets and vegetation on public land. The person can also place ECPWs on adjacent private land but only if a lease, easement, right-of-way or other interest in land has been obtained.<sup>19</sup>

#### **Orders to remove materials and structures**

A coastal authority can order the removal of materials deposited on a beach (other than ECPWs), or restrain or order the removal of a structure, if it is of the opinion that they are likely to cause increased erosion, unreasonably limit public access to the beach/headland, or pose a risk to public safety.<sup>20</sup> Developers and owners of coastal land will need to be aware that these provisions are wide and could apply to protection works installed many years ago, before the CPA amendments were passed. Stop work orders can also be issued.<sup>21</sup> On the same grounds, a coastal authority can order the removal, alteration or repair of ECPWs.<sup>22</sup> The administrative costs of preparing and giving orders can be recovered by a coastal authority.<sup>23</sup> Failure to comply with the orders attracts a penalty of \$495,000 in the case of a corporation and \$44,000 for each day the offence continues, and \$247,500 in any other case and \$22,000 for each day the offence continues.

#### **Councils to levy annual charges for coastal protection services**

Under the *Local Government Act* 1993 (LGA), councils are permitted to levy an annual charge for coastal protection services on a parcel of rateable land that benefits from

the services. These include CPWs constructed by or on behalf of the owner or occupier of the parcel of land or jointly by the owner/occupier and a public authority or council. Charges may relate to maintaining and repairing CPWs or managing the impact of the works.<sup>24</sup>

Draft coastal protection service charge guidelines have been published.<sup>25</sup>

#### **Review of the Infrastructure SEPP discussion paper**

In line with amendments to the CPA, the discussion paper<sup>26</sup> proposes an amendment of the Infrastructure SEPP with regard to long-term coastal protection works to reduce coastal erosion of properties by property owners, for example, seawalls, revetments, groynes and beach nourishment. These will be development “permitted with consent”.

Works required for coastal protection and hazard reduction by property owners are “complying development” if they are of low or minor environmental impact and will be in place for no more than five years.

There are conditions attached to each of these types of work, but both must comply with the Best Practice Guidelines for Design and Assessment of Coastal Protection Works, currently being prepared by the Department of Environment, Climate Change and Water (DECCW) and which will be reviewed by the Department of Planning (DoP).

Temporary works for coastal protection and hazard reduction by individuals will be regarded as “exempt development”, but only if the development is temporary minor development (less than 12 months) and complies with the Code of Practice for Emergency and Minor Coastal Protection Works currently being prepared by DECCW and which will be reviewed by DoP.

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#### ENDNOTES

1. Department of Environment, Climate Change and Water, October 2009, available at <http://tiny.cc/09mdb>.

2. Available at <http://tiny.cc/0sm7l>.

3. CPA s.6.

4. CPA s.7.

5. CPA s.10.

6. CPA s.12.

7. *Hansard*, Coastal Protection and Other Legislation Amendment Bill 2010 Second Reading Speech, 25 October 2010.

8. CPA s.55B(5).

9. CPA s. 55B(6).

10. CPA s.55C(b).

11. CPA s. 55C.

12. Available at <http://tiny.cc/wko4z>.

13. CPA s.55K.

14. CPA s.55L.

15. CPA s.55P.

16. CPA s.55P(2).

17. CPA s.55Y.

18. Available at <http://tiny.cc/w8k8z>.

19. CPA s.55Z.

20. CPA s.55ZA.

21. CPA s.55ZB.

22. CPA s.55ZC.

23. CPA s.55ZE.

24. LGA s.496B.

25. Available at <http://tiny.cc/63z1b>.

26. Available at <http://tiny.cc/3w1t9>.

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