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Dear Sirs/Mesdames

**NSW DRAFT COASTAL REFORMS**

We attach a legal submission prepared by junior counsel at NSW Bar on behalf of the Byron Preservation Association Inc.

Yours faithfully

*King & Wood Mallesons*

Encl

29 February 2016

## LEGAL SUBMISSION ON NSW COASTAL MANAGEMENT REFORMS

### 1. Introduction

- 1.1. This submission is made by the Byron Preservation Association (“BPA”) in response to the Government’s call for submissions on its proposed Coastal Management Bill and Coastal Management Manual. This submission addresses various legal issues. A separate submission has been made on other issues about these reforms.
- 1.2. The Byron Preservation Association is a not-for-profit organisation concerned about coastal issues and represents a range of coastal residents in Byron Shire.
- 1.3. Our views stem from decades of firsthand experience by our members of coastal issues, including the impact of erosion, tidal inundation and storm events, and problems that have arisen in the context of the local and state regulatory regimes and responses.
- 1.4. The BPA objects to the draft Coastal Management Bill and the draft Coastal Management Manual proposed, for six key reasons:
  - (a) The proposed legislation inappropriately delegates the specific requirements of coastal protection works to a manual, rather than by an orthodox and accountable method of delegated legislation.
  - (b) The coastal manual permits the draconian and highly controversial coastal management policy of “managed retreat” in circumstances where that policy should not be permitted, and without safeguards.
  - (c) The management objectives proposed in the Bill for coastal vulnerability areas, in effect that modern protection mechanisms only be a last resort and only where it would have no adverse impacts on adjoining land, is practically unworkable and excludes many options that could be effectively deployed.
  - (d) The cost-benefit analysis guidelines in the coastal manual arbitrarily and unfairly disregards loss of property owned by persons not resident in the local government area, rather than measuring the loss at market value along with other property owners.

- (e) The funding considerations in the coastal manual for protection works are inequitable, because they burden frontline coastal residents disproportionately by failing to recognise the benefits afforded to other parts of the coastal community.
- (f) The Office of Environment has foreshadowed that further proposals will be put forward later this year concerning ambulatory title. We do not know the scope of those proposals, but express our concerns below. Ultimately any change to ambulatory title should be advanced as part of the current proposal so that the full operation of the proposed reforms can be examined, and not withheld to be released in piecemeal fashion.

1.5. Each of these topics is addressed in a separate section below.

## **2. Manual not subject to Parliamentary scrutiny**

- 2.1. Our first objection is that the Bill proposes a regulatory regime in which the specific requirements for coastal management programs, and therefore what protective works may be carried out on the coastal zone, is to be governed by a document published from time to time by the Minister, without the usual and orthodox Parliamentary accountability of delegated legislation.
- 2.2. Under the proposed Bill, the coastal management manual is given force by publication by the Minister, who may amend it from time to time: s 21(2), (4).
- 2.3. Ordinarily, statutory rules must be tabled before both Houses of Parliament and either House has the power to pass a resolution disallowing the rule: ss 40-41 *Interpretation Act 1987* (NSW). However, the coastal manual would not be a "statutory rule" within the meaning of that Act: s 20. As such, the normal accountability mechanisms for delegated legislation would not be applicable.
- 2.4. A departure from the orthodox procedure for delegated legislation is inappropriate where the manual may include detailed mandatory requirements and guidance in relation to the contents of coastal management programs: ss 21(2), 15(2). A local council would be required to prepare a coastal management program in accordance with the manual: s 14(1).
- 2.5. There is no basis for vesting in the Minister such extraordinary rule-making power without those rules subject to the ordinary scrutiny mechanisms.

## **3. "Managed retreat" inappropriate and without safeguards**

- 3.1. The BPA strongly objects to the provisions of the coastal manual which permit a "managed retreat" policy to be adopted in a coastal management program.
- 3.2. "Managed retreat" is a highly controversial coastal management strategy. It effectively involves forcing coastal home owners to abandon their homes to the sea without compensation. The proposed manual reflects this, describing "managed retreat" at p 19 as involving, among other things:

- *a decision not to permit protection of private assets that are located in the immediate hazard impact area*
  - *a direction to demolish private assets and to remove any waste, building materials or contaminants.”*
- 3.3. There are three fundamental flaws with the inclusion of this policy option in the proposed coastal manual.
- 3.4. First, the manual expressly instructs councils to consider implementing “managed retreat” in circumstances of *existing development*, rather than only in areas of undeveloped coast. Remarkably, the manual provides at p 18 that councils will need to choose between retreat and protection, treating the two approaches as if they were of equivalent normality:
- “Where there is existing development in a coastal vulnerability area with a high probability of impact from coastal hazards, councils will generally need to decide between a coastal protection response and a managed retreat response, or a combination of the two.”*
- 3.5. Permitting the adoption of “managed retreat” in areas which are already developed is dangerous, radical and grossly unfair. Retreat is a policy which is generally only suitable where there is no existing housing. The reason for that is simple: people have bought property with the reasonable expectation that they will continue to own it. They have not bought “moveable houses” or property to move them to. In contrast, if there is undeveloped land which has not been purchased, a retreat policy is fairer because the owners will have purchased the land with knowledge of the development limitations.
- 3.6. In fact, the previous manual, the *NSW Coastline Management Manual (1990)*, did not accept “managed retreat” as a suitable policy for developed areas. It recognised that while “planned retreat from hazardous coastlines may be viable means of management in undeveloped or partly developed areas ... such an approach becomes increasingly expensive and difficult in more intensely developed areas. In such cases, coastal protection may be the only economically viable and socially acceptable means of management.”

The Minister for Environment has also recognised the fact that “managed retreat” is an extreme policy choice which would generally not be appropriate in New South Wales. In the Second Reading Speech to the *Coastal Protection Amendment Bill 2012*, the Hon Rob Stokes MP said:

*“At this point, it is important to say something about planned retreat. It is a policy that is popular in some parts of the southern parts of the United States where completely ridiculous development that is right on the beach is backed by large expanses of State-owned land. These are not the conditions that predominate on the New South Wales coast. In most cases in New South Wales, there can be nothing planned about planned retreat because there is nowhere to retreat to. There is nothing planned about*

*retreat that expropriates people's homes without recourse or assistance. Planned retreat without anywhere to go is surrender by another name.*"  
(Emphasis added)

- 3.7. If the Government was genuine and serious when it expressed these concerns, then it would not simply allow "managed retreat" to be an equal option among others; rather, it would ensure there are strict safeguards to councils or anyone else choosing to implement such a policy, to ensure it is a management option (if it can be called that) only of last resort.
- 3.8. Apart from unfairness to owners, the result of permitting councils to adopt "managed retreat" is obvious: it will create uncertainty and reduce the value of properties along the coast. "Managed retreat" policies where adopted will no doubt need to be added to s 149 certificates. Those warnings will drastically reduce the value of coastal property.
- 3.9. Similarly, these concerns have been recognised previously by this Government. The Minister for Environment acknowledged the undesirability of "*forcing retreat when it is not the only option*": Hansard, *Coastal Protection Amendment Bill 2012 (Second Reading)*, 12 September 2012. Similarly, in the same speech, the Minister criticised the former Labor government's policy response to the issue on the basis that:
- "it has, unwittingly or not, incubated uncertainty and fear with rhetorical, unreferenced and alarmist claims that, reflected in planning regulations, have undermined community and market confidence, sterilised land resources, and depreciated land values."* (Emphasis added)
- 3.10. The Government should act consistently with its previously articulated position of not implementing policies which would have the very effect it warned against.
- 3.11. The second problem with the "managed retreat" provisions of the manual is that there is no compensation mechanism for owners whose existing homes are to be lost or damaged by reason of that policy being adopted by the State.
- 3.12. In any ordinary situation where the State acquires property, just terms acquisition legislation requires compensation to be paid. At the federal level, the right to have the Commonwealth provide compensation on just terms when it acquires property is so important that it is one of the few rights enshrined in the Constitution. Since the ultimate result and objective of a "managed retreat" policy is the total inundation and loss of property, there is no reason why compensation should not be paid. In the United States, the failure to do so would be unconstitutional as contrary to the takings clause in the Fifth Amendment: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- 3.13. As such, it would be outrageous to permit local councils, the lowest tier of government, to adopt a planning policy which could cause the total loss of real property without any financial redress to the owner.

- 3.14. The third problem is that the manual imposes no safeguards which would limit the adoption of “managed retreat”. It would empower local councils with a wide discretion to implement a policy of forced abandonment of property with major social, economic and natural consequences without any checks and balances.
- 3.15. Where retreat is to be considered, councils should be clearly instructed only to implement such a strategy where other protective methods are inappropriate. The default position should be *protection*, not forced abandonment of homes. The State Government must stay in control of such decisions.
- 3.16. Yet the manual makes no distinction in priority between protection and retreat. Instead, it provides on p 18-19 that managed retreat “is an option” where *any* of the following circumstances exist:
- “• *the benefits of structural protection are low (e.g. only a few properties involved) and/or likely to flow to only a small group of private individuals, and/or*
  - “• *there are significant costs (e.g. to public finances, access and or environmental values) associated with protection of assets in their current location, and those costs are likely to be unaffordable or uneconomic, and/or*
  - “• *there is a high degree of uncertainty of the likelihood and/or types and extent of impacts or benefits of coastal protection works; and/or*
  - “• *state, regional or locally significant development or built assets and infrastructure are absent; and/or*
  - “• *there are significant opportunities to benefit environmental and natural assets, which outweigh any potential benefits to the built environment.”*
- 3.17. These criteria are vague, open to manipulation, and easy to deploy to a particular end. Property owners are entitled to a greater degree of protection of their homes than being subjected to the whims of (often ideologically partisan) local councils. The manual would in effect empower a handful of officials to make decisions with no safeguards which could eviscerate the value of, or destroy altogether, the homes and property of coastal dwellers—all without compensation.
- 3.18. For these reasons, the BPA vehemently opposes the proposed provisions of the manual which permit “managed retreat”. “Managed retreat” should not be permitted where there is existing development, and in any event there should be strict safeguards to ensure it is only an option of last resort. Protective works should be the starting point in developed areas, not forced abandonment of property. To permit councils to adopt such a radical policy, without compensation, would be an outrageous deprivation of property rights and a licence to destroy communities to the detriment of the economic well-being of the State.

#### 4. Unworkable requirements for protection works

- 4.1. We object to the prioritisation of objectives for coastal vulnerability areas, which prescribe an unrealistic approach to protection.
- 4.2. The Bill provides for land to be classified in one or more categories, with each category having different objectives and requirements. The Bill would require councils to give effect to these management objectives in preparing coastal management programs: s 14(3)(b).
- 4.3. There are two fundamental problems with the objectives for areas designated as coastal vulnerability areas as set out in the Bill. First, the objectives require that the management strategy must first involve restoring coastal dunes and vegetation, and only if that is not sufficient can a management approach of engineered protection be deployed. Proposed s 7(2)(f) sets out the prioritisation of management options:
- “(f) to adopt coastal management strategies that reduce exposure to coastal hazards,*
  - (i) in the first instance and wherever possible, by restoring or enhancing natural defences including coastal dunes, vegetation and wetlands, and*
  - (ii) if that is not sufficient, by taking other action to reduce exposure to those coastal hazards, ...”*
- 4.4. However, it should not be incumbent upon owners or required by councils to first implement or experiment with restoration programs before installing protective works. The lived experience of coastal owners, the communal familiarity with the nature of erosion in any particular coastal locale, and existing reports by engineers and coastal scientists, all provide an efficient and accurate basis on which to make decisions about which management strategy is appropriate.
- 4.5. There is no basis for prescribing in advance the particular protective mechanism that is appropriate as a first instance policy choice for every coastal community in the State. The requirement that other management options be available only *“if that is not sufficient”* casts doubt over the extent to which a local authority may choose from the suite of management options available at first instance.
- 4.6. The second problem is that the Bill prescribes as an objective that protective measures other than dune and vegetation restoration must only be undertaken where it would not cause adverse impacts on adjacent land. Proposed s 7(2)(g) sets out this objective:

*“(g) if taking that other action to reduce exposure to coastal hazards:*

...

- (iv) *to avoid adverse impacts on adjoining land, resources or assets, and*
- (v) *to provide for the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by actions to reduce exposure to coastal hazards, ...”*

- 4.7. The problem with this approach is that it is practically unworkable. As any coastal engineer will explain, it pays no regard to the reality of shoreline processes because, ordinarily, implementing coastal protection works *will* cause some impacts on adjoining or nearby land. The key question in modern coastal engineering is how are such impacts minimised and managed in the overall interests of a particular site and its environment. For example, tidal processes which would have flowed onto the land subject to protection may be diverted to the properties on either side of the protected property.
- 4.8. The effect of this requirement is therefore that individuals may be prevented from implementing protective works at all, simply because they cannot protect every other property in that coastal zone from risk. An individual may not be able to avoid those adjacent impacts because they are only able to protect their own property—they cannot build on land which they do not own.
- 4.9. Obviously, a coastal resident should not be required to implement protective works on neighbouring land where those property owners are unwilling to do so themselves. One individual should not be called upon to provide protective works for an entire beachfront.
- 4.10. The solution may be in directing attention to a wider analysis than the traditional lot by lot analysis.
- 4.11. The current objective, framed as requiring no adverse impacts and requiring restoration of any part of the beachfront or adjacent land, is totally impractical and would neuter the ability of residents, towns, cities, and densely populated communities to protect their existing natural resources and built assets.

## **5. Accounting for property loss in cost-benefit analysis**

- 5.1. We object to the way losses are accounted for in the cost-benefit guide in the coastal manual.
- 5.2. First, the manual arbitrarily disregards the losses to private property which is not owner occupied full-time. In Part C, guidance is provided for conducting cost-benefit analysis to assess coastal management options. Table A5.2 specifies how losses for different types of private property are to be accounted for, and provides, among other things:



Property type	Suggested treatment
Improved residential, owner-occupied	Market price for the relevant similar parcel. ...
Improved residential, rental	No economic loss. Any loss of rent at affected properties is likely to be offset by lower vacancy rates and/or higher rental prices at other properties in the LGA.

- 5.3. As framed, the above portion of the manual suggests, bizarrely, that any loss of dwellings which are not owner occupied are not to be regarded as a loss in the cost-benefit analysis. Section 7.1.1 of the manual confirms this is the intention:

*“The damage to, or loss of built assets (such as household property or council-owned assets) may be included in the CBA. Inclusion of such costs is dependent on whether asset owners are located within the LGA. For example, some property owners may reside outside the LGA, and so costs and benefits accruing to these owners are outside the scope of the analysis.”*

- 5.4. There is absolutely no basis for excluding property losses from the cost-benefit analysis for coastal planning purposes merely because the owners of those houses reside outside the local government area. Those owners have purchased property in the local government area. They pay local government rates. They are every part as entitled to be considered as other property owners who reside in the area. The suggestion that they should be excluded is an absurd suggestion, the motivation for which can only appear to be an irrational bias towards investors. Losses of property which is not owner-occupied should be valued at market value.

## 6. Inequitable funding considerations

- 6.1. We further object to the funding considerations proposed in the coastal manual. The central problem is that no-where is there any specific requirement for councils to consider the benefit to the wider coastal community or lots behind the frontline properties that arise from coastal protection works.
- 6.2. Protective works which maintain the shoreline position not only benefit private landowners, but also benefit the public through protection of the environment or other private property and public infrastructure. Roads which run adjacent to frontline properties would be put at risk of inundation where the frontline properties not to be protected. This is the case, for example, at Narrabeen Beach, where there is a six-lane highway as well as sewage infrastructure.
- 6.3. As such, there should be an express requirement for councils to consider the benefits to the wider public from protection works. There is historical legal precedent to support this.

## **7. Further proposals yet to be released**

- 7.1. The Office of Environment has stated on its website that additional elements of the new coastal regulatory framework will be released later for public comment. These apparently relate to further components of the manual and “proposals concerning the effects of coastal erosion on coastal boundaries”.
- 7.2. Without seeing those “further components” of the manual, it is impossible for us to know the extent to which the delegation of details of the regime to the Minister’s publication of the manual is appropriate. The Government should consider submissions in relation to all of the manual and the Bill as a whole, and not close off submissions in relation to the Bill. Why these other, unreleased aspects of the manual have been withheld is not clear.
- 7.3. In relation to further proposals concerning the effects of erosion on coastal boundaries, again that is a matter that ought to be considered as part of the consultation process on the Bill and coastal manual. Those further proposals should not be withheld until a later time.
- 7.4. We do not know what the details of the proposals are, but to the extent that they involve a scenario where coastal owners would not be permitted to protect their property and the result is that the tidal boundary moves with shoreline erosion, so that property owners in effect lose their land, the BPA would regard that as an unacceptable and fundamental attack on basic property rights.

## **8. Conclusion**

- 8.1. For these reasons, the BPA objects to the proposed Bill and coastal manual.
- 8.2. Our members have experienced the effects of coastal issues over many years and we do not support a regulatory regime that would permit management policies which would allow local councils to require coastal dwellers to in effect abandon their homes to the sea without compensation. Such a possibility, countenanced as it is in the manual without any safeguards or only as a last resort, would create uncertainty, unfairly prejudice coastal residents, and cause property values along the coast to plunge. It would damage NSW communities and the natural environment.
- 8.3. We are unaware of the further proposals to be released, but suggest that consultation on the whole package remain open until all proposals have been released to the public.



For and on behalf of Byron Preservation Association Inc.