Legal issues for local government in addressing coastal erosion risks

A research report for Clarence City Council

Dr Jan McDonald
18 March 2011

Disclaimer

Contents

Executive Summary

Legal issues associated with development approvals
Liability will not arise solely from the zoning of a coastal hazard area in a way that allows for residential development, because the preparation of planning schemes is regarded as a quasi-legislative function. Local authorities do owe a duty of care, however, when assessing discretionary development applications, to ensure that their decision does not place new or existing properties at risk. The investigations that CCC has undertaken have provided it with a strong information base upon which to make well-informed decisions about planning applications within these overlay areas. Council is equipped with the best knowledge reasonably available to it about the short-, medium-, and long-term risks of climate change on an already vulnerable coastline. The decision to adopt performance-based requirements places an additional burden on Council to satisfy itself of the technical feasibility of the solution proposed, but provided it exercises care in assessing such proposals, development approvals are unlikely to incur liability. A cautious approach to the development assessment is recommended.

Liability for failing to undertake protective works
The factors of knowledge, control, vulnerability and statutory design combined with s41 of the *Civil Liability Act* 2002 (Tas), make it highly likely that Council could elect to take no action at all to protect its coastline from natural forces and would incur no liability for that decision. Council has continued to inform residents of its plans and activities in respect of managing coastal hazards. This creates a political expectation on the part of property owners, but does not change the broad position, except where property owners act in reliance on these undertakings.

Issues associated with undertaking protective works
Once the Council acts, residents and prospective purchasers will rely upon the adequacy of those works. If investment is made in a property in the expectation that it will be protected from long-term coastal hazards, and the property is damaged by those very forces, property owners will seek redress. There is very little risk of liability for deciding to pursue one coastal protection option over another, provided the factors relevant to making a particular choice are well-documented and justified by reference to the mix of cost, effectiveness, environmental impacts etc. Having selected an option, however, Council will need to ensure that works are designed and constructed in a way that guarantees performance in accordance with design standards.

Legislative reform
The following reforms are recommended:

- Amend LUPAA to expressly allow for conditions on a permit imposing time restrictions or event triggers.
- Amend LUPAA to expressly allow for permits to be subject to the condition that the developer provide an indemnity or financial guarantee against any future legal liability.
- Amend the *Local Government Act* 1993 to insert a section equivalent to s733 of the *LGA* 1993 (NSW).
- Amend the LUPAA to require local authorities to provide consistent information about the natural hazards associated with land within their jurisdiction.

1. Introduction

> The issue ... is far closer to many of our hearts than global sustainability or planetary survival – who to sue when the house price falls?[1]

1.1 Context

This report outlines the legal issues for local governments such as Clarence City Council in responding to increased coastal hazards. Clarence City Council has an extensive coastline under its jurisdiction. This coastline is subject, to varying degrees, to the impacts of coastal hazards such as storm surge or tidal inundation, erosion and wave overtopping. Some areas have already experienced significant coastal erosion, with beachfront dwellings exposed to erosion risk. Other areas are currently relatively protected, but are expected to become more vulnerable as a result of sea level rise.

Over the past decade, many local governments around the country – including Clarence - have concerned themselves with the issues of coastal zone protection, particularly in the context of the increased risks posed by climate change. Clarence has commissioned numerous studies, the most extensive of which culminated in the 2009 Climate Change Impacts on Clarence Coastal Areas: Final Report (the 2009 Clarence Report).

That report recommended a range of actions that should be undertaken within 1-2 years, 2-5 years and 5-25 years. The 1-2year recommendations, which were accepted by Council, involve:

- Amendments to the planning scheme to control development in all erosion hazard and inundation hazard zones. Controls would require proposed development to cope with potential erosion or flood heights up to the IPCC's projected "high" scenario for 2100, through pilings, elevating structures etc.
- Short term works where risks are evident and hazards current, including dune nourishment and revegetation along priority beaches (listed as Roches Beach and Cremorne).

The best options for short-term hazard reduction works are being actively investigated and amendments to the planning scheme were prepared, subjected to public comment, and referred to the Tasmanian Planning Commission for final approval.

1.2 Source of liability principles

1. Common law

Most of the principles governing liability for property loss or damage as a result of coastal hazards stem from the law of negligence. This is a body of principles derived from judicial decisions in individual cases. The law evolves as a new case emerges and courts are forced to consider how existing principles should apply to novel circumstances. When confronted with a new scenario, it is therefore impossible to state definitively how the law would apply were the

[1] M Allen, 'Liability for climate change', *Nature*, vol 421, 2003, pp 891-892.

matter litigated, as much will depend on how the Court interprets and applies earlier decisions. At best, we can consider past decisions and predict the likelihood of those cases being followed and applied, or distinguished because of some material difference of fact.

The law of negligence in Australia is in a state of confusion. The justices of the High Court of Australia all adopt different approaches to the question of whether an individual or entity owed a duty of care to others, and there is an increasing trend towards merging the question of duty of care with an analysis of whether the duty has been breached. This confusion is especially pronounced in cases concerning the liability of statutory authorities, including local government, especially where the claim is based upon a *failure* to take action.

Given that there have been no successful cases alleging local government liability for damage arising from a coastal hazard, the principles discussed in this report derive from other decisions with whose facts analogies may be drawn.

2. The Civil Liability Act (Tas) 2000

The 'tort crisis' of the late 1990s and early 2000s triggered statutory revision to negligence principles, especially those governing the liability of public authorities, such as local governments. Importantly, the *Civil Liability Act* 2000 (Tas) (CLA) has made it much harder for public authorities to be found liable for the performance of their public functions. These statutory principles clarify and complement the Common Law principles that form the basis for an action in negligence and the two bodies of law now operate together. In all cases, the CLA provisions override any potentially inconsistent judicial decision.

Of particular relevance to this analysis are the provisions of section 11, which set out the factors to be considered in determining breach of duty and both the existence of a duty of care and breach of any duty owed by public authorities. Section 11 sets out the general principles relevant to showing a breach of duty and largely restate the Common Law position set out in *Wyong Shire Council v Shirt,*[2] often referred to as the "calculus of negligence". It essentially requires evidence that a reasonable person in the position of the defendant would have taken precautions to avoid a significant and reasonably foreseeable risk.[3] In assessing what a reasonable person would have done, a Court must consider the probability of harm occurring, the likely seriousness of the harm, the burden of taking precautions and the net benefit of the activity that exposes others to risk.[4] The burden of taking precautions must whether it would also require similar precautions to be taken to avoid similar risks for which the person may be responsible.[5]

Section 38 contains more detailed provisions that apply specifically to public authorities, including local councils. This section is worth setting out in full, as it offers important guidance to the courts in how to limit the potential liability of such bodies:

---

[2] (1980) 146 CLR 40.
[3] s11(1).
[4] s11(2)
[5] s11(3)

38. Principles concerning resources, responsibilities, of public or other authorities
The following principles apply in determining whether a public or other authority has a duty or has breached a duty in proceedings to which this Part applies:
a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
(b) the reasonableness of the allocation of those resources by the authority is not open to challenge;
(c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate);
(d) the authority may rely on evidence of its compliance with its general procedures and any relevant standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

The operation and application of these provisions to particular risk scenarios is considered in each of the following parts. Part 5 canvasses some options for statutory reform that would protect local governments in their land use planning and coastal management functions.

2. Liability for developments in identified risk areas

Around the country, coastal development is continuing apace. Farmland is being converted to residential development, and previously low-cost, shack-style housing is being replaced with more expensive beachfront residences. While the benefits of beachfront or coastal living are obvious, the risks are not always apparent. Purchasers of high value property may assume that if a development has been permitted, its location must have been found to be free from risk. As a general proposition, there is no liability on any party for the impacts of coastal erosion or inundation as a result of natural forces. The victims of natural disasters and harmful processes are expected to protect their properties or insure themselves against such risks. That said, it is extremely difficult to get cover for storm surge landslip, sea level rise or 'saltwater risks' more generally. This means that as homes and property values are affected, property owners will attempt to seek compensation from other sources.

2.1 The case law on development approvals

Local councils who approve development in areas that they know, believe, or should know to be at potential risk may find themselves in litigation over damage to those properties.

Liability will not arise solely from the zoning of a coastal hazard area in a way that allows for residential development, because the preparation of planning schemes is regarded as a quasi-legislative function. The law is well established that no duty of care can arise in respect of such activities, because they are inherently political in nature.[6] The courts will not intervene in such decisions because it would potentially run foul of the separation of powers and involve the judicial arm of government second-guessing the political arm.

While no duty will arise in respect of preparing a planning scheme, local authorities do owe a duty of care when assessing discretionary development applications, to ensure that their decision does not place new or existing properties at risk. Only one case has made a claim about

[6] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

approving development in a coastal hazard zone and it was unsuccessful, but there have been cases in which local authorities have been held liable for approving development in a location that was inappropriate for other reasons.

In *Armidale City Council v Alec Finlayson,*[7] a developer successfully sued Armidale City Council for approving a subdivision of land that had previously been used as a timber treatment plant and which Council knew to be heavily contaminated. The contamination was not apparent to the casual observer, however, because the land had been covered with a thick layer of gravel. This difference in knowledge placed the Council in a position of "dominating advantage".[8] Moreover, Council had contributed to the risk because it insisted upon the re-zoning to residential over the objections of the State Planning Authority. Finlayson's reliance on the Council's approval as indicating that the land was suitable for residential development was reasonable in the circumstance because Councils were obliged by statute when considering development applications to consider whether the land "... is unsuitable for that development by reason of its being, or being likely to be, subject to flooding, tidal inundation, subsidence, slip or bush fire or to any other risk."[9] In this case, it was the combination of the Council's knowledge of the contamination, the purchaser's ignorance, and the improbability that the contamination would be discovered by reasonable investigations by an unsuspecting purchaser that gave rise to liability.

In *Port Stephens Shire Council v Booth,*[10] Council was held liable for approving a resort development in an area affected by aircraft and defence practice range noise. Council was found to be negligent in approving the development without imposing conditions to ensure that the Australian Standard for noise attenuation was complied with.[11] Council also failed to exercise reasonable care in the issue of s149 certificates advising of any potential risks to the land because the certificate did not communicate adequately the extent of the noise impacts.[12]

In *Wollongong City Council v Fregnan,*[13] a council was held liable in negligence for granting building approval without informing the applicant of a danger of slippage, when the land was in the council's slippage register.

2.2 The importance of timing

Planning decisions will be judged by reference to the state of knowledge that it was reasonable for the council to have known at the time it made the decision. This should probably protect authorities from claims for decisions made many years ago when the risks from climate change were relatively unknown. For example, a claim brought in 1986 by a beachfront property owner whose home was lost to coastal erosion failed to meet this evidentiary test.[14] She claimed Council negligence for approving the development in 1968 and acquiescing to her construction of

---

[7] 1999 FCA 330.
[8] 1999 FCA 330; **51 FCR at 401-2.**
[9] EPAA s90(1)(g).
[10] [2005] NSWCA 323.
[11] para 110.
[12] para 91.
[13] [1983] 1 NSWLR 244
[14] Egger v Gosford Shire Council (189) 67 LGRA 304.

a sea wall to protect her property in 1974, but the NSW Court of Appeal held that the loss of the house to erosion was not reasonably foreseeable at the relevant times.

Recent development approvals are likely to demand a higher level of care because the public awareness and understanding of climate change risks has increased so dramatically in recent years. In 2008, the Victorian Civil and Administrative Tribunal concluded that the risks of land being affected by flooding as a result of sea level rise and related climate change were 'reasonably foreseeable'.[15]

These cases all demonstrate the potential for councils to be held liable for development approvals in respect of land that has a feature that limits its development capability. In each case, the local authority had specific information about the suitability of the site for the proposed development and the feature that imposed some limitation was not readily apparent to the purchaser. The Council was therefore in a position of advantage over the purchaser/applicant. It is now worth considering how this case law might apply to development approvals in areas subject to either the Inundation or Sea Level Rise and Storm Surge overlay.

2.3 Application to Clarence City Council Planning Decisions

The first point to make about the applicability of the case law outlined above is that every case involved risks that were not immediately obvious to the lay applicant. The risks of coastal erosion, on the other hand, are both obvious and in some cases starkly evident. The evidence of erosive forces may be less apparent once beach nourishment takes place, but it would at least be arguable that a lay inquirer should be more aware of the risks of coastal hazards than the plaintiffs in the cases cited above.

In determining an application for a development permit under the *Land Use Planning and Approvals Act 1993* (Tas), a planning authority is required to further the objectives of the Tasmanian resource management and planning system.[16] These objectives relevantly include:
(b) [providing] for the fair, orderly and sustainable use and development of air, land and water, and
(e) [promoting] the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.
The objectives refer to the need to sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations and avoiding, remedying or mitigating any adverse effect of activities on the environment.

The objectives of the planning process in support of the objectives of the planning system include:
(c) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land; and
(f) to secure a pleasant, efficient and safe working, living and recreational environment for all Tasmanians and visitors to Tasmania; and
(i) to provide a planning framework which fully considers land capability.

---

[15] *Gippsland Coastal Board v South Gippsland Shire Council (No2)* [2008] VCAT 1545 at [43]
[16] *Land Use Planning and Approvals Act* 1993 (Tas), s51.

The obligation to consider land capability makes clear that the susceptibility of a site to long term destructive influences is a relevant consideration in the planning approvals process. Together, these sets of objectives show that planning authorities must consider the ability of the land to sustain future development and safeguard human safety, as well as considering the economic impacts of development in inappropriate areas.

The current Clarence Planning Scheme provides that for areas within the Inundation Overlay, development is discretionary and permit applications must include a report essentially demonstrating that the development can withstand a 1 in 100 year event without causing unreasonable risks to users of the property or the property itself. Specific decision requirements require that mitigation measures be sufficient to ensure the protection of habitable buildings both now and with the cumulative impact of sea level rise.

Development applications within the Sea Level Rise and Storm Surge Overlay must show a range of things, including that the hazard risk can be mitigated through structural or siting methods to avoid damage to or loss of buildings; that development will not increase the level of risk of hazard for adjoining or nearby properties or public infrastructure, that the need for future remediation is minimized and the health and safety of individuals is not placed at risk. The decision requirements do not stipulate a specific solution to these considerations. Rather, the applicant is given the scope to develop the most appropriate acceptable solutions to assessed risks.

The investigations that CCC has undertaken – including the 2009 Clarence Report – have provided it with a strong information base upon which to make well-informed decisions about planning applications within these over areas. Council is equipped with the best knowledge reasonably available to it about the short-, medium-, and long-term risks of climate change on an already vulnerable coastline. The decision to adopt performance-based requirements, rather than stipulate specific building, set-back, or design solutions places an additional burden on Council to satisfy itself of the technical feasibility of the solution proposed, but provided it exercises care in assessing such proposals, development approvals are unlikely to incur liability. A cautious approach to the development assessment is recommended.

There is some concern that approving any development application in vulnerable areas signals a long-term intention that these areas will be fully supported and serviced by council infrastructure. Given that long-term decisions have yet to be made about protection along sections of coast like Roches Beach, there is some risk associated with creating these expectations. In *East Gippsland Shire Council v Taip,*[17] the Victorian Civil and Appeals Tribunal overturned the approval of a development that was designed to be above projected flood and inundation levels under climate change. The Tribunal held that protection of the individual development would be insufficient if the whole area were to become unviable – for example, due to the flooding of underground services and drainage, and the blockage of pedestrian and vehicular access. The VCAT was especially concerned that the Council's planning framework for Lakes Entrance had not taken climate change impacts into account. The VCAT held that:

[17] [2010] VCAT 1222, 28 July 2010.

> ...from the current understanding of the impacts to Lakes Entrance ... without intervention, the development will be subject to conditions that may well lead to it being unviable for occupation. The resultant economic cost would be to those future owners and quite possibly the wider community. It is hardly fair or equitable to see this as a balanced outcome for intergenerational equity.[18]

Taip was not a case in which liability was imposed. Rather, it was a case in which potential liability was avoided by the Court's refusal of the development until a comprehensive climate change adaptation plan for Lakes Entrance was prepared and decisions made under it. The VCAT is unique in the country for taking this kind of precautionary approach to planning for the coastal impacts of climate change and it is not suggested that the Tasmanian Tribunal would take a similar approach. Rather the case is mentioned to show that Courts are considering not only the suitability of the protections built into development approvals for the specific proposal, but the broader planning context in which that development will take place. If Council is confident that one way or another, it will protect these vulnerable coastal areas, it is not likely to be held liable for development approvals that are based on the best information available at the time and that meet the specific decision requirements of the various overlays.

More will be expected of Councils as more becomes known about the potential future exposure of an area. Clarence Council is in a fairly strong position in this respect, as it acted to amend its planning scheme as soon as it became aware – via the 2009 Clarence Report – of what changes were required. Current amendments to the planning scheme, as modified by the Tasmanian Planning Commission must now be applied to new development applications.[19] For areas now located within expanded Overlays, Council's development assessment needs to be rigorous, thorough ad well-supported by the relevant science.

A window of potential exposure is the decisions made between the release of the draft findings of the Clarence Report and the conclusion of the planning scheme amendment in 2011. During that time, Council had knowledge of the increased risks to which certain areas were subject, but had not yet amended its planning scheme to reflect those risks. It is not known what strategies Councils planning department adopted to ensure that development applications assessed during that period took account of the new information about coastal hazards.

The 2009 Clarence Report also recommends that some consideration of climate change impacts be considered for any land below 10m and/or within 500m of the coast,[20] but does not suggest this be done. The requirements attaching to properties located within the Inundation and [now] Coastal Hazard Overlays do not apply elsewhere. It is not known how, if at all, Council implements this recommendation in its broader development assessment process. Council should also be aware of the small risk that a major event, combined with climate change impacts, could affect development beyond the overlay areas and lead to some exposure to liability.

2.4 Options for managing risks arising from such approvals

Exercise reasonable care

[18] Ibid, ¶90
[19] s51(3)(a) LUPA.
[20] 2009 Clarence Report, p49.

As noted above, the best course of action to manage the risks arising from development approval in hazard-prone areas is to base such decisions firmly on the best available information about the relevant risks, including the technical feasibility and effectiveness of mitigation strategies. This will demonstrate that Council has acted with reasonable care and therefore complied with its legal duty. In such cases, no legal liability will arise.

Indemnities from developer
To this author's knowledge, the CCC Planning Scheme is unique in that the SLR and SS overlay also has a Specific Decision Requirement that the developer should indemnify against future actions arising from the effects of sea level rise and storm surge activity. It is understood, however, that the requirement was struck down by the Planning Appeal Tribunal the first time it was attempted to be used. The Tribunal's decision was not appealed, so the validity of its reasoning has not been tested, but the requirement has not been imposed again.

On this basis, Council should advocate for legislative amendment that would safeguard the validity of such indemnity clauses. This is taken up in Part 5 below.

Expansion of planning criteria
The following Planning Criteria apply to development assessment in coastal hazard areas under the 2010 NSW *Coastal Planning Guideline: Adapting to Sea Level Rise*:

1. Development avoids or minimises exposure to immediate coastal risks (within the immediate hazard area or floodway).
2. Development provides for the safety of residents, workers or other occupants on-site from risks associated with coastal processes.
3. Development does not adversely affect the safety of the public off-site from a change in coastal risks as a result of the development.
4. Development does not increase coastal risks to properties adjoining or within the locality of the site.
5. Infrastructure, services and utilities on-site maintain their function and achieve their intended design performance.
6. Development accommodates natural coastal processes including those associated with projected sea level rise.
7. Coastal ecosystems are protected from development impacts.
8. Existing public beach, foreshore or waterfront access and amenity is maintained.

These are very similar to those set out in the SLRSS Overlay but that list may be worth expanding when the Planning scheme is next revised.

Require developer to protect land
Another strategy with which to manage the risks of granting development approval is to require the installation and maintenance of beach/dune protection works as a condition of development approval. Such a strategy is not preferred over an indemnity, however because of the risks associated with ad hoc coastal protection works or differing designs and quality. Requiring property owners to install and maintain their own works will create new duties on council to ensure that such works do not have adverse impacts on surrounding properties and public recreation areas. If Council fails to monitor, inspect, and enforce wall maintenance, it risks incurring liability for damage done as a result of faulty or deficient works.

Time-bound or trigger-bound permits
Another option to consider is the possibility of trigger or time-bound development permits. These are supported in the NSW Coastal Planning Guideline in circumstances where the development will only meet the planning criteria for a finite period of time. The Guidelines suggests this may be especially suitable for existing development. An example of a trigger point could be the recession of the erosion escarpment to a specified distance from the lot boundary. Time limited consents would operate for a defined period of time, but could allow for renewal option if conditions at the end of the period still provide for safe occupation.

3. Liability for failure to act

Local authorities are more likely to avoid liability if they simply decide not to take protective beach works than if they undertake such works but damage nonetheless ensues. The law of negligence draws a critical distinction between expecting parties to exercise care when acting, and expecting that they will take action in the first place. The foundation for not imposing a duty to take affirmative action lies in the concept of causation – one is responsible for creating or materially increasing a risk of harm to another, but not for failing to prevent something they had no role in bringing about.[21]

3.1 Will having the power to undertake protective works give rise to the duty to exercise those powers?

Private individuals and private bodies are generally not obliged to go out of their way to take positive action to protect others from harm – there is no "good Samaritan" principle in the law of negligence. There are circumstances, however, in which the law will impose a duty to act. Persons in special relationships, such as parent-child, employer-employee, teacher-pupil, or doctor-patient, owe a duty to act by virtue of that special relationship.

In the case of local authorities, these circumstances may arise because of some obligation imposed by statute or because the overall conduct of the council made it reasonable for a class of people to expect Council to take positive action. Community expectation that Council *should* take action will not, of itself, give rise to a duty to act. Similarly, evolving understanding and knowledge of the risks of climate change will affect the level of skill and care expected of a council, but this alone will not impose a duty to act where none would otherwise exist.

The *Local Government Act* 1993 (Tas) confers powers on Councils to engage in a range of activities for a variety of public purposes. Section 20 of the LGA provides that:

20. Functions and powers

(1) In addition to any functions of a council in this or any other Act, a council has the following functions:

(a) to provide for the health, safety and welfare of the community;

(b) to represent and promote the interests of the community;

(c) to provide for the peace, order and good government of the municipal area.

[21] *Stuart v Kirkland Veenstra* [2009] HCA 15,per Crennan & Kiefel JJ. ¶127.

(2) In performing its functions, a council is to consult, involve and be accountable to the community.
(3) A council may do anything necessary or convenient to perform its functions either within or outside its municipal area.

These provisions are expressed as powers not duties to act. There is established case law, however, that in limited circumstances, the conduct of the holder of statutory power may find itself under a legal duty to exercise those powers. What are those circumstances and how might they arise in the context of coastal hazards?

There is no single principle or clear set of principles by which an authority might be found to owe a duty to exercise its statutory powers.[22]

The Clarence Report ventures that:

> "[i]f a council assumes a special measure of control over the risk of danger in relation to climate change, which may be inherent in its general powers and functions as a public authority, it may then owe a duty of care to take reasonable steps to avoid any act or omission that could create or increase a foreseeable risk of injury or damage regarding climate change impacts. As knowledge and awareness of climate change grows, in the future it may become reasonable for councils to be obliged to undertake a growing number of actions and precautions in relation to climate change effects.[23]

The assumption of control over a situation has been recognized as a critical indicator of the existence of a duty to take positive action. But there have been no cases in which this measure of control has been found to arise solely by virtue of the general powers or functions of a public authority. The conferral of a statutory power to act is a necessary but not sufficient condition of finding a duty.[24] Similarly, the foreseeability that harm will ensue if powers are not exercised will not suffice.[25] All the circumstances must be examined, including the terms, scope and purpose of the statutory framework must be analysed to determine whether it establishes a relationship between the authority and a class of persons, *in all the circumstances.*[26]

The powers conferred by the LGA are very broad and local authorities have finite financial resources. A court would recognise the breadth of public purposes for which a council is empowered to Act and the choices and trade-offs inherent in that range of functions and almost certainly conclude that the existence of broad powers alone will not of itself create any duty to undertake beach nourishment or other protective works.

Control and vulnerability

The leading case in which a statutory authority was held to owe a positive duty to exercise its statutory powers involved a casual waterside worker who was exposed to asbestos in the 1960s.[27] Years later, he developed mesothelioma and his widow brought an action against the Stevedoring Industry Finance Corporation, the statutory authority whose predecessor (the Stevedoring Industry Authority) had broad power over dockside conditions. In that case, the High Court of

---

[22] Ibid, at ¶131.
[23] 2009 Clarence Report, p18
[24] *Stuart v Kirkland-Veenstra* [2009] HCA 15 Gummow, Hayne and Heydon JJ, ¶112.
[25] Ibid.
[26] Ibid, citing *Graham Barclay Oysters v Ryan* (2002) 211 CLR 540 at 596-597
[27] *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999) 200 CLR 1

Australia found that the Authority owed a duty to waterside workers, even though it was not their employer. The following factors were considered central:

- The SIA's actual or constructive knowledge of the risks to workers of working in clouds of asbestos dust
- The SIA's ability to control the risk of harm (either by requiring protective clothing or changing practices to reduce the asbestos dust) and their control over where and when the plaintiff performed his work
- The powerlessness and vulnerability of the workers, caused by their casual employment conditions and risks of having their registration suspended
- The consistency of the duty of care with the terms, scope and purpose of the statute.[28]

These factors are unlikely to combine to create a duty of care on the part of Council to undertake coastal protection. Firstly, Council's ability to "control" a natural process – storm-induced erosion – is limited. Even if it devoted vast resources to elaborate protective works, it is still possible that a freak event could inflict damage. In any event, Council's ability to control is not exclusive: avenues still exist for individual property owners to also undertake protective works on their own properties. This is in contrast to the position in Byron Shire, NSW, where the Council's declared policy of "planned retreat" means that all development applications for works to protect beachfront properties from dunal erosion are rejected. While many property owners may feel vulnerable, they have the same awareness of the obvious erosion risk as does Council (albeit without the technical detail). They also have the power, subject to financial resources and compliance with council approval processes, to protect their own properties.

The *Civil Liability Act* 2002 (Tas) contains provisions relevant to this issue. Their operation is made complicated by inaccurate drafting, but the effect of those provisions is to further reduce the likelihood of a duty of care arising (or a finding that such duty has been breached). The provisions relate to claims based on an alleged breach of statutory duty "in connection with the exercise of or failure to exercise a function of the authority". The term "breach of statutory duty" has a specific meaning in Tort Law, but it does not appear to be used in that sense in the CLA. Rather, the CLA appears to be referring to breaches of duty that are based on the exercise or non-exercise of statutory duties or powers.[29] The Act provides that an act or omission (including a failure to exercise powers) "does not constitute a breach of statutory duty [sic] 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*".[30]

This standard sets the bar for reasonable conduct quite low, especially given the wide range of local authority responses to climate impacts – from no action or consideration at all, to extensive preventive measures. The conduct of the authority is assessed in the broader context of what functions the authority was exercising, the resources available to it, the competing demands on those resources and the burden of taking precautions to avoid similar risks of harm. The

[28] Ibid, at 24-25 [44]- [46], 38-39 [91]-[93], 40-41 [100];
[29] CLA, s37, 40.
[30] CLA, s40(2)

availability of a measure that could have prevented a risk does not itself create a presumption of liability, as the cost of that action and equivalent actions must also be evaluated against the authority's resources. This means that more demanding standards may be applied to wealthier councils, but overall, the standard expected of local authorities is fairly low.

When the factors of knowledge, control, vulnerability and statutory design are considered in conjunction with s41 CLA, it appears highly likely that Council could elect to take no action at all to protect its coastline from natural forces and would incur no liability for that decision.

Before leaving these general principles, two other judgments deserve mention because they appear to be relevant to the question of coastal protection but are both distinguishable in important respects. In *Pyrenees Shire Council v Day,*[31] the local authority was held to owe a duty to residents and neighbours of a property to ensure that its faulty fireplace was repaired or removed. Council had previously inspected the fireplace and deemed it unsafe. It had sent letters sent to the property owner directing the repair, but failed to follow up on them. The duty arose in that case because council had already begun to exercise its powers (by conducting an inspection and writing a letter) and was therefore obliged to follow through:

> A public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers.[32]

This case would be relevant to a situation in which Council decides to undertake protective works, and they are either poorly done or poorly maintained. That situation is discussed in Part 4 below.

The 2010 case of *Byron Shire Council v Vaughan* in the NSW Land and Environment Court was widely reported as saying that local governments around the country are under a duty to construct, maintain coastal protection works. The decision was not in fact a formal judgment but a Consent Order – agreed by the parties and certified by the court. It therefore has limited value as a legal precedent. In any event, the case had very specific facts that gave rise to the obligation to repair. The Vaughan's claimed Byron Shire Council was obliged to repair a deficient protective wall adjacent to the Vaughan's beachfront property. The Consent Order endorsed the Vaughan's claim, but a careful reading of the Order shows that this was because Council itself had specifically undertaken to monitor, maintain and repair interim beach protection works, in the form of a development consent it had issued to itself in 2001.

The Council had sought unsuccessfully to argue either that the consent was invalid because its own officers had failed to follow up on certain conditions or that the Council's subsequent policy of Planned Retreat for Belongil Beach overrode it. In the Consent Order, the Court affirms the invalidity of both of these arguments. The Order also leaves open the option of the property owner seeking damages in the Supreme court of New South Wales. Again, this does not establish any kind of precedent that beachfront property owners will be entitled to sue in negligence for

---

[31] (1998) 192 CLR 330.
[32] Ibid, per Gummow J at 391-2.

council's failure to erect or maintain beach protection works, because it is limited to the circumstances of the Council's failure to comply with its own development consent.

3.2 Will approving development in coastal hazard areas create duty to protect those developments?

The 2009 Clarence report states that:

> As it stands, Council has no clear statutory obligation to protect established private property that becomes at risk from changed conditions, provided the original approval for development was consistent with the then prevailing Planning Scheme and that the Scheme was prepared with due regard to the known circumstances at that time.[33]

In fact, the duty to take protective measures is separate from the question of whether the authority should have approved a development in the first place. The issue of liability for approving development applications in coastal hazard areas is considered in Part 2 above. Even if Council were held liable for such development approval, this in itself would not give rise to a legal duty to protect homes placed at risk. The remedy for an action in negligence is monetary damages for loss suffered, not an order to prevent or repair damage.

3.3 Will advising of intention to protect certain areas create duty to do so?

Council has continued to inform residents of its plans and activities in respect of managing coastal hazards.[34] Since 2006, it has also publicly signalled its commitment to undertaking short-term hazard reduction works on Roches Beach and Ocean Beach.[35] This unquestionably creates a political expectation on the part of property owners, and it is understood that Council has no intention to renege on these undertakings. For the sake of completeness, however, it is worth considering whether such statements give rise to a legal duty to act on them.

Such a public statement of intention does not change the broad position outlined above, except where property owners act in reliance on these undertakings by Council. For example, residents might be able to show that the decision to buy a home or invest in renovations to a property was made in light of Council statements that it would protect those properties through dune nourishment. Others could potentially show that they had decided not to sell their properties in the belief that they would be protected. In both cases, they could argue that they relied on the Council's undertakings and would be financially adversely affected if those promises were not honoured. Whether such reliance was reasonable, given that the statements clearly refer to short-term hazard reduction, rather than long-term fortification or protection, is highly arguable.

The 2009 Clarence Report recommends that Council undertake all recommended protective works for the next 25years – at public expense – to give property owners an opportunity to make decisions about the long-term future of their property. This recommendation has not been

---

[33] 2009 Clarence Report, pp18-19

[34] Letters to ratepayers dated 12 September 2005, 18 May 2006,

[35] CCC, Media /release, Coastal Protection at Roches Beach, 4 April 2006, letter to ratepayers dated 18 May 2006, and 17 October 2006, 17 December 2010.

accepted by Council and could not be relied on as evidence of any broader undertaking to take such measures.

3.4 Will advising of intention to protect some areas create duty to protect others?

Council has undertaken a range of studies over the past 6 years examining the risks to its coastline. Its decision to prioritise the protection of Roches Beach is guided by the findings of these studies, all of which highlight that area's vulnerability to further erosion. A decision by Council to expend resources in protecting Roches Beach may create an expectation in the minds of some residents of other areas that their foreshore will also be protected, when required. In the absence of any other factor, it is highly unlikely that it would create a legal duty for Council to undertake such protection. Decisions concerning the allocation of resources to one issue or area over another are influenced by financial, economic, social or political factors and courts are traditionally reluctant to second-guess these political decisions. This position is strengthened by s43 of the CLA, which provides that the fact a public authority exercises a function in one situation does not of itself indicate any duty to exercise the function in particular circumstances or in a particular way.

4. Legal issues for local governments associated with undertaking coastal protection works

The 2009 Clarence Report identifies "significant numbers of properties at risk under current conditions" at Roches Beach/Lauderdale, Cremorne, Bicheno Street at Clifton Beach, and South Arm Road at South Arm Neck.[36]As noted in Part 3, Council is unlikely to owe any legal duty to actively undertake works to protect these properties. In strictly legal terms, it could probably allow the weather and the sea to exert their natural forces on the coastline and property owners are unlikely to have any action against them if they fail to act.

If Council makes the decision to take action, however, it then owes a clear duty to undertake works with reasonable care:

> There is one settled category which I would have thought covered this case: it is the well-known category "when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered."[37]

Once the Council acts, residents and prospective purchasers will rely upon the adequacy of those protective works and make their own decisions accordingly. If investment is made in a property in the expectation that it will be protected from long-term coastal hazards, and the property is damaged by those very forces, property owners will seek redress.

There are five circumstances in which liability could potentially arise as a result of undertaking protective works:

---

[36] 2009 Clarence Report, p50.
[37] McHugh J in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, per McHugh at ¶62.

1. if a lower level of protection is selected because of competing cost, aesthetic and recreational considerations
2. if protective structures fail within performance parameters, due to inadequate design
3. if protective structures fail due to poor construction or due to a storm event beyond the original design parameters;
4. if structures are not replaced or repaired;
5. if the construction or operation of protection structures produces unintended consequences for neighbouring properties.

4.1 The choice of protective works

Council has commissioned several expert reports investigating the options available for protecting the beaches identified in the 2009 Clarence Report as most vulnerable. The options for coastal protection range from temporary beach and dune nourishment using sand scraping, to the construction of a series of groynes and rock walls. Several factors will inform the selection process, including cost, technical difficulty and likely effectiveness, aesthetics, off-site impacts and expected lifespan of the works.

Costs of any protection works are high. The number of properties currently at risk is relatively low, which means that expensive options are far less cost-effective on a cost-per-property basis than they will be by 2050. Even a temporary solution such as raising the dune along Roches Beach by 1m and revegetating the raised dune is estimated to cost about $1.3milion or $68000 per dwelling protected.[38] The type of nourishment that would be needed to bring the hazard lines clear of all properties taking into account sea level rise projections would take the per-dwelling costs considerably higher.[39] The construction of groynes would retain beach sand and minimize the need for additional nourishment, but carry significant financial and aesthetic disbenefits. The Report estimates that groynes for the whole of Roches Beach and Roches Beach North would cost $4.5m, which is the equivalent of $237000 per dwelling now or $40000 per dwelling affected in 2050.[40]

These are extremely high costs-per-dwelling for the general Clarence ratepayer base to bear, even if that ratepayer also uses Roches Beach for recreational purposes. Moreover, even if council chose to undertake works that protected properties for a 100 year ARI event, there is still a significant risk of those levels being exceeded – 39% over 50 years and 63% over a 100 year period.[41] If a particular measure fails, it will always be possible to claim that more could have been done; it is conceivable that Council's entire budget could be expended on elaborate fortification works along its vast coastline.

Council has a multitude of other public functions and responsibilities and must make decisions about where and how to allocate resources. Others in the City could justifiably question why their rates should be used to subsidise the property values of beachfront property owners. The decision

[38] Ibid.
[39] 2009 Clarence Report, p57.
[40] Ibid.
[41] Ibid, p12.

on which option to take is therefore a fundamentally political one as it involves prioritization in the allocation of resources across public functions and questions of fairness across residents. The 2009 Clarence Report seems to support beach-scraping and dune-raising as temporary options that are consistent with the current recreational and aesthetic expectations of beach users, but such an approach may have limited effectiveness should a severe storm event occur.

A court will seldom second-guess a decision to select one form of works over another, where that decision is guided by professional advice and competing budgetary demands. The *Civil Liability Act* 2002 (Tas) explicitly states that the reasonableness of an Authority's allocation of resources available to exercise its functions is not open to challenge and that the functions to be exercised by the Authority must be viewed in the context of *all* of Council's activities.[42] It further provides that the fact that a risk of harm could have been avoided by doing something differently does not of itself affect liability for the way it was done.[43] Even taking action following an erosion event – such as emergency beach protection works - will not of itself constitute evidence of negligence.[44]

The effect of these provisions is that there is very little risk of liability for deciding to pursue one coastal protection option over another, provided the factors relevant to making a particular choice are well-documented and justified by reference to the mix of cost, effectiveness, environmental impacts etc. The pros and cons of each option need to be clearly laid out, including estimated effectiveness, lifespan, costs of construction and maintenance, aesthetics, impacts on recreational values, and the risk of creating new hazards. The reasons for selecting one option should then be made clear (example only: "Although, x option would provide guaranteed protection for 1-in-y year events, the cost per dwelling protected cannot currently be justified within the Council's broader budget allocations and competing demands on limited resources ....The choice of z option offers Council and residents a solution that on current estimates should afford protection for the next 1-3 years, which will enable Council to work with the community to develop a shared funding model for consideration of more extensive works in the future").

Once a final decision is made about which option to pursue, it is also advisable to contact affected residents to explain the course of action selected and the limitations of such a measure. Aside from this being good communication practice generally, it will limit expectations about the long-term effectiveness of the chosen strategy and the likelihood of other publicly-funded measures being implemented in the future.

4.2 Failure due to poor design

The risk remains that the preferred option fails to perform in accordance with its own performance parameters, due to defective design. It is Council's practice to outsource the design and construction of major infrastructure but as the works are undertaken on Council's behalf, Council will be exposed to liability as if it did them itself. Council will not be able to argue that it relied upon the expertise of its consultants because the works are ultimately the Council's own works. If the design is found to be unfit for purpose, Council's only recourse will be to claim

[42] s38
[43] s12(a).
[44] s12(b).

against the contractors or join them as co-defendants. Council should ensure that its contract of engagement guarantees that Council will be indemnified in the event of liability.

4.3 Failure due to poor construction
The issues relating to defective construction are very similar to those discussed above for faulty design, because Council will also outsource the construction work. The only difference is the potential for Council to be held liable separately either for failing to inspect the construction or for failing to detect problems during inspection.

4.4 Failure due to poor maintenance or replacement
Once works have been constructed, Council must ensure that they are maintained so as to prevent them from falling into disrepair and creating their own hazards. In *Vaughan v Byron Shire Council*, the Consent Order between the parties acknowledged the possibility that the property owner Vaughan could bring an action in the Supreme Court of NSW in respect of the damage caused to his property by the Council's failure to maintain and repair the wall adjoining his property. The case does not make clear whether liability could have been made out had it not been for the Development Consent that the Council granted itself that obliged it to monitor and repair the wall. If the damaged structure is actually creating or exacerbating coastal hazards, it is likely that a Court would hold that Council owed a duty to affected property owners to repair it.

Short-term protective works will simply cease to be effective as coastal forces increase in severity. Yet the construction of such temporary works may be misinterpreted by some residents. They may lead to an expectation that, having been initiated, works will be maintained, reinstated or upgraded once their initial lifespan has elapsed. Courts in these cases may find that councils have exercised sufficient control over the risks to create an expectation – and hence a legal duty - that they will continue to protect landowners' interests. It would be unfair if, having weighed up the options Council elected to undertake one-off temporary works, only to find itself compelled to maintain that protection indefinitely. In order to avoid this possibility, Council needs to take every opportunity to clarify the scope of its undertakings – in terms of expected lifespan and decommissioning. On-going communication with property owners about the scope of the work is essential, combined with media statements designed to reach non-residents who may be considering investing in the area.

4.5 Unintended negative impacts
Detailed modelling of the operation of various protective works to ensure that they cause no adverse impacts is an integral part of their design. It is therefore highly unlikely that the risk of unintended consequence will eventuate. If it does, Council will be liable as it would be for failure of the works themselves due to defective design, discussed in 4.2 above.

Alternatively it might be argued that the works have created a public nuisance for which affected property owners would be able show special damage that enables them to sue. Public nuisance is a tort of strict liability and all that must be shown is an act "which materially affects the reasonable comfort and convenience of the life of a class of the public."[45] Liability is imposed on the creator of the nuisance and anyone who fails to end a nuisance on emanating from their land

[45] *Wallace v Powell* [2000] NSWSC 406, per Hodgson CJ

or land under their control. In order to sue, a property owner must show that they suffered damage over and above that experienced by the wider community. Suing in public nuisance has advantages over negligence because it is not necessary to prove that the Council was somehow at fault.

5. Suggestions for legislative reform

The foregoing analysis suggests that it is unlikely that Council could be held liable in respect of granting development approvals in coastal hazard areas, or undertaking, or declining to undertake coastal protection works. The difficulty is that protection from liability can never be guaranteed and will only be established after the event. Any path the Council decides to pursue therefore necessarily carries some risk, even though it believes itself to have exercised reasonable care throughout.

There are important ways in which council could be protected from liability but these require the amendment of state legislation. Suggestions are outlined below.

5.1 Permit local authorities to impose time-bound or trigger-bound approvals

The *Land Use Planning and Approvals Act* 1993 (Tas) is silent on the scope of planning authorities to issue development permits for a specific time period or until a specific trigger point is reached. In the absence of an express authority to do so, such permits may be struck down by the Appeal Tribunal. An approach of this sort will be very unpopular with the development industry who will argue that a time-bound approval will unfairly devalue the property. The contrary view is that they provide the Council with flexibility to enable uses of land for a period during which Council knows that land to be safe.

Recommendation: Amend LUPAA to expressly allow for conditions on a permit imposing time restrictions or event triggers.

5.2 Permit local authorities to seek indemnity or financial guarantee from developer

The first time CCC attempted to act on the provision in its SLR & SS overlay to require an indemnity from a developer, it was struck down by the Appeals Tribunal. While the risks of being held liable for granting a development approval are not high, it is still important that Councils have the option of protecting themselves against future exposure. Requiring an indemnity or financial guarantee from a developer will force them to assume the risks of the venture from which they stand to profit. This would better facilitate the operation of market forces because developers would be forced to internalise the cost of development risks, instead of transferring them onto the approving authority.

Recommendation: Amend LUPAA to expressly allow for permits to be subject to the condition that the developer provide an indemnity or financial guarantee against any future legal liability.

5.3 Statutory exemption from liability

Another approach is to amend the *Local Government Act* 1993 to insert a provision along the lines of s733 of the NSW *Local Government Act* 1993. This would provide local councils with comprehensive protection in respect of actions taken and decisions made in respect of land subject to a range of risks, provided they can demonstrate compliance with the relevant manual, guideline or code of practice. The provision is detailed but self-explanatory, and worth setting out here in full:

733 Exemption from liability-flood liable land, land subject to risk of bush fire and land in coastal zone

(1) 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 being flooded or the nature or extent of any such flooding, 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 flooded or the nature or extent of any such flooding.
(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.
(2A) 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 being subject to the risk of bush fire or the nature or extent of any such risk, 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 subject to the risk of bush fire.
(3) Without limiting subsections (1), (2) and (2A), those subsections apply to:
(a) the preparation or making of an environmental planning instrument, including a planning proposal for the proposed environmental planning instrument, or a development control plan, or the granting or refusal of consent to a development application, or the determination of an application for a complying development certificate, under the *Environmental Planning and Assessment Act 1979* , and
(b) the preparation or making of a coastal zone management plan, or the giving of an order, under the *Coastal Protection Act 1979* , and
(c) the imposition of any condition in relation to an application referred to in paragraph (a), and
(d) advice furnished in a certificate under section 149 of the *Environmental Planning and Assessment Act 1979* , and
(e) the carrying out of flood mitigation works, and
(f) the carrying out of coastal management works, and
(f1) the carrying out of bush fire hazard reduction works, and
(f2) anything done or omitted to be done regarding beach erosion or shoreline recession on Crown land, land within a reserve as defined in Part 5 of the *Crown Lands Act 1989* or land owned or controlled by a council or a public authority, and
(f3) the failure to upgrade flood mitigation works or coastal management works in response to projected or actual impacts of climate change, and
(f4) the failure to undertake action to enforce the removal of illegal or unauthorised structures that results in erosion of a beach or land adjacent to a beach, and
(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 emergency coastal protection works authorised by a certificate under Division 2 of Part 4C of the *Coastal Protection Act 1979* , and
(g) any other thing done or omitted to be done in the exercise of a council's functions under this or any other Act.
(4) Without limiting any other circumstances in which a council may have acted in good faith, a council is, unless the contrary is proved, taken to have acted in good faith for the purposes of this section if the advice was furnished, or

the thing was done or omitted to be done, substantially in accordance with the principles contained in the relevant manual most recently notified under subsection (5) at that time.
(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:
(a) a manual relating to the management of flood liable land, or
(b) a manual relating to the management of the coastline, or
(c) a manual relating to the management of land subject to the risk of bush fire.
The notification must specify where and when copies of the manual may be inspected.
(6) A copy of the manual must be available for public inspection, free of charge, at the office of the council during ordinary office hours.
(7) This section applies to and in respect of:
(a) the Crown, a statutory body representing the Crown and a public or local authority constituted by or under any Act, and
(b) a councillor or employee of a council or any such body or authority, and
(c) a public servant, and
(d) a person acting under the direction of a council or of the Crown or any such body or authority,
in the same way as it applies to and in respect of a council.
(8) In this section:
"coastal management works" includes the placement and maintenance of emergency coastal protection works.
"coastal zone" has the same meaning as in the *Coastal Protection Act 1979* , and includes land previously in the coastal zone under that Act and land that adjoins the tidal waters of the Hawkesbury River, Sydney Harbour and Botany Bay, and their tributaries.
"manual" includes guidelines.

An exemption provision of this sort can only be meaningful if it is accompanied by the development of hazard management manuals of the kind referred to in s733(5). While this would require an initial investment of resources to develop, it would assist local authorities around the state in setting standards for development in and protection of coastal (and other) hazard areas. The Commonwealth is currently developing a set of national planning guidelines for coastal development, and these could easily be used as the basis for such a manual, as could the NSW equivalents.

Recommendation: Amend the *Local Government Act* 1993 to insert a section equivalent to s733 of the *LGA* 1993 (NSW).

5.4 Improving public access to information about coastal and other hazards

There is considerable variation across the state and country in what information a prospective purchaser or developer can access about a property or area. Some authorities believe in wide dissemination of, and web-based access to, information, while others may be concerned about the potential impacts on property values that such information might have. Setting statutory standards for the type, quality and format of information available to the public about risks to land – standards with which all authorities must comply – would remove any of the political resistance to doing so.

Recommendation: Amend the LUPAA to require local authorities to provide consistent information about the natural hazards associated with land within their jurisdiction.