

That Sinking Feeling

Climate Change &
Coastal Communities

State Government
Responsibilities to Plan for
Adaptation

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Coasts & Climate Change

- Rising sea levels
- Coastal zone erosion
- Inundation
- Disease
- Increasing number and intensity of coastal storms
- Pressures on Infrastructure
- *Increasing unpredictability of coastal processes*

Planning for the Coastal Impacts of Climate Change – Role of State Government

Legislation and Policy-making

- Coastal Protection Act 1979
- Coastline Hazard Policy 1988
- Coastline Management Manual 1990
- Coastal Policy 1997
- SEPP Coastal Protection 2002
- Coastal Zone Management Manual ?

Planning for the Coastal Impacts of Climate Change – Role of State Government

Development Assessment

- Environmental Planning & Assessment Act 1979, Part 3A
- SEPP (Major Projects) 2005, Schedule 2(1)
 - Landfill, mining, extractive industry, marinas, subdivision, tall buildings.
- Significant Coastal Development determined by Minister for Planning

Planning for the Coastal Impacts of Climate Change – Role of State Government

- Matters for Consideration
- Minister must consider:
 - the Director-General's report on the project and related reports, advice & recommendations
 - Advice from the relevant Minister if the proponent is a public authority, and
 - The findings or recommendations of a Commission of Inquiry (if one is held).

Planning for the Coastal Impacts of Climate Change – Role of State Government

- Matters for Consideration
- Objects of Planning Law – ESD
 - *Gray v Minister for Planning* (2006)
 - DG's report failed to consider carbon emissions from exported coal – failure to consider ESD
 - *Walker v Minister for Planning* (2007)
 - DG's report failed to consider climate change flood risk
- Wednesbury Unreasonableness

Planning for the Coastal Impacts of Climate Change – Liability of State Government

Failure to introduce adequate regulation:

- Political questions non-justiciable
 - *Massachusetts et al v EPA* (2005)

Negligence:

- Local Government Act 1993, s 733(2) does not apply to Minister for Planning
- Civil Liability Act 2003, s 5F
- Minister for Planning exempt from liability for “obvious risk”.

Common Law Liability of State Government for the Coastal Impacts of Climate Change

Elements of negligence

- The defendant owed the plaintiff a duty of care, requiring the defendant to adhere to a certain standard of conduct;
- the defendant breached that duty;
- the plaintiff suffered loss;
- the loss was caused by the defendant's breach of duty; and
- the loss suffered by the plaintiff was not too remote, that is not only was it caused by the negligence, but was also reasonably foreseeable

Duty of Care

Existence of duty of care depends on 'salient factors', including:

- Degree and nature of control exercised by authority over risk of harm that eventuated;
- Vulnerability of those who depend on proper exercise by authority of its powers; and
- Consistency between asserted duty of care & terms, scope & purpose of statute. *Perre v Apand* (1999)

Breach of Duty

- Did the conduct involve a reasonably foreseeable risk of harm to the plaintiff?
- What was the magnitude and probability of the risk?
- What is a reasonable response to the risk, considering the expense, difficulty and inconvenience of alleviating action and any other conflicting responsibilities the defendant may have? *Wyong S/C v Shirt* (1980).

Causation of Damage

- Risk of damage must have been a reasonably foreseeable consequence of negligence: *MIM v Pusey* (1970)
- essentially a question of fact to be answered by ordinary common sense and experience: *March v Stramare P/L* (1991)

Scenario

- Rezoning and Subdivision of Beachfront Land
- Minister for Planning consent authority
- Climate Change Flood Risk not specifically investigated
- IHAP and DG note climate change flood risk
- Minister grants consent
- Flooding and property damage ensue
- Negligence action brought against Minister
- Applying High Court tests – arguable that Minister is liable

Planning for the Coastal Impacts of Climate Change – Policy Options

- Update Coastal Planning Regulations
- Reconstitute the NSW Coastal Council
- Integrated Natural Hazard Planning legislation
 - Flooding
 - Landslip
 - Bushfire
 - Coastal Inundation

