
Coastal Management and Protecting the Public Interest: Recent NSW Land and Environment Court Decisions

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Impacts of coastal erosion bring into conflict public rights to enjoy Australia's beaches and the personal interests of those endeavouring to protect private property. Coastal protective structures can serve to protect land and property, but potentially at the cost of adversely impacting on beach use and coastal processes. In New South Wales (NSW), s 27 of the Coastal Management Act 2016 (NSW) (and previously s 55M of the Coastal Protection Act 1979 (NSW)), seeks to thread a path between these two often competing interests. It identifies assessment criteria where the public interest could be affected by the construction of coastal protection structures. In so doing, it prioritises the rights of the public consistently with the internationally recognised principles of the "Public Trust Doctrine". In 2018, the NSW Land and Environment Court for the first time considered the application of s 55M, affirming the key role of s 55M in protecting the public's right to use and occupy public beaches.

INTRODUCTION

Australia is one of the most urbanised and coast-dwelling populations in the world¹ with more than 85% of Australians living within 50 kilometres of the sea.² It is thus almost inevitable that rights and interests in our shoreline (especially when that shoreline is under threat from coastal processes) are a contentious issue. This is particularly so when the expectations of private property owners to build on and protect their land come into conflict with the public's rights and expectations to use and enjoy beaches.

As outlined in Thom,³ in other common law jurisdictions, the principles of the "Public Trust Doctrine" (PTD) provide a framework for balancing these competing interests. At the heart of the doctrine is that:

- (1) certain natural resources are held by the government "in trust" for current and future generations; and
- (2) the government has an affirmative ongoing duty to safeguard the preservation of those resources for the benefit of the general public.⁴

Thus, the doctrine supports "the community's expectation that the State will protect the free use and amenity of public lands".⁵

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¹ Australian Government, *Our Natural Environment* <<https://www.australia.gov.au/about-australia/our-country/our-natural-environment>>.

² GF Clark and EL Johnston, *Australia State of the Environment 2016: Coasts*, (Commonwealth of Australia. Department of Environment and Energy, 2016) <<https://soe.environment.gov.au/theme/coasts>>.

³ Bruce Thom, "Climate Change, Coastal Hazards and the Public Trust Doctrine" (2012) 8(2) *Macquarie Journal of International and Comparative Environmental Law* 21, 21.

⁴ Richard M Frank, "The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future" (2012) 45 *U.C. Davis Law Review*, 665, 667.

⁵ Andrew R Beatty and Samantha J Marshall, "Coastal Adaptation – Towards a Statutory Reconciliation of Private Rights and Public Interests" (Proceedings of the 4th Practical Responses to Climate Change Conference: "Climate Adaptation 2018: Learn, Collaborate, Act", Melbourne, 8–10 May 2018).

Coastal protection laws in New South Wales (NSW) seeking to protect the public's rights to access and use the beach were recently considered in Land and Environment Court proceedings concerning proposed seawall developments at Byron Bay. This article explores the way in which these proceedings support the principles of the PTD.

APPLICATION OF THE PUBLIC TRUST DOCTRINE TO COASTAL LAND

The fundamental feature of coastal land is that it is dynamic.⁶ Looking forward, sea-level rise and increased frequency of extreme events will likely exacerbate impacts on land in proximity to the beach.

The natural beach is not a fixed structure in time and place. Variability in form, composition and position provide circumstances where generalisation on management processes and practices is not easy.⁷

There are two principles embedded in the PTD: the first is government ownership of certain natural resources (commonly described as “public trust land”); and the second is a government duty to preserve those assets for public use. Application of the first principle in the context of a dynamic coastline raises issues as to what is or should be considered “public trust land” and how concepts of “land ownership” can be applied in the context of a dynamic coastline.⁸ In the United States, the PTD is⁹ a recognised separate common law principle¹⁰ and its application in the coastal context has been codified. Coastal “public trust land” is generally considered to be land below the “tideline”,¹¹ or the dry sand area of beaches between the high-water mark and the vegetation line.¹² For instance, Art 2 of the Californian Public Resources Code provides:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.¹³

In Australia,¹⁴ there has been significant academic discussion¹⁵ concerning property rights and mechanisms to provide for flexible property boundaries adaptive to the movement of the coastal shoreline. These

⁶ The dynamic nature of coastal land in New South Wales is recognised in the objects of the *Coastal Management Act 2016* (NSW) – see s 3(g).

⁷ B Thom, “Chapter 29: Future Challenges in Beach Management as Contested Spaces” in D Jackson and A Short (eds), *Sandy Beach Morphodynamics* (2019, in press).

⁸ Thom, n 3; Thom, n 7.

⁹ Note, in at least the Hawaiian context, this codification is seen as complementary to but not supplanting the primacy of the public trust doctrine. See discussion in KC Ede, “He Kānāwai Pono no ka Wai (a Just Law for Water): The Application and Implications of the Public Trust Doctrine in Water Use Permit Applications” (2002) 29 *Ecology Law Quarterly* 283.

¹⁰ See *Illinois Central Railway v Illinois*, 146 US 387 (1892) as discussed in JL Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention” (1970) 68 *Michigan Law Review* 471. See also the unfolding case of *Juliana v United States* (D OR, Case No 6:15-CV-01517-AA, 12 August 2015).

¹¹ “Public trust lands, generally speaking are those lands below navigable waters, with the upper boundary being the ordinary high water mark. Tidelands, shorelands or navigable lakes and rivers, as well as the land beneath the oceans lakes and rivers are usually considered public trust lands.” Coastal States Organisation, Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the management of land waters and living resources of the coastal states, June 1997.

¹² See *Mathews v Bay Head Improvement Association*, 471 A 2d 355, 363 (NJ, 1984) as cited in Michael C Blumm and Aurora P Moses, “The Public Trust as an Antimonopoly Doctrine” (2017) 44 *Boston College Environmental Affairs Law Review* 1.

¹³ Cal Public Resources Code, ch 3 §§ 30210, 30211 (1976) (emphasis added).

¹⁴ For other jurisdictions see James G Titus, “Rising Seas, Coastal Erosion, and the Takings Claus: How to Save Wetlands and Beaches without Hurting Property Owners” (1998) 57(4) *Maryland Law Review* 1297; David Takacs, “The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property” (2008) 16 *New York University Environmental Law Journal* 711; Sorell E Negro, “Built Seawalls: A Protected Investment or Subordinate to the Public Trust?” (2012) 18(1) *Ocean and Coastal Law Journal* 89.

¹⁵ See Zada Lipman and Robert Stokes, “That Sinking Feeling: A Legal Assessment of the Coastal Planning System in New South Wales” (2011) 28 *EPLJ* 182; Thom, n 3; Tayanah O'Donnell and Louise Gates, “Getting the Balance Right: A Renewed Need for the Public Interest Test in Addressing Coastal Climate Change and Sea Level Rise” (2013) 30 *EPLJ* 220; Beatty and Marshall, n 5; Tayanah O'Donnell, “Coastal Management and the Political-Legal Geographies of Climate Change Adaptation in Australia” (2019) 175 *Ocean and Coastal Management* 127.

include concepts such as rolling easements,¹⁶ compulsory acquisitions and temporary licences,¹⁷ and re-examinations of the definitions of the shoreline and mean high-water mark along with the application of the common law doctrine of erosion and accretion. Understandably, discussion of rights to coastal land in the context of altering property ownership and/or property boundaries is contentious.¹⁸ A recent article by Tayanah O'Donnell in *Oceans and Coastal Management* highlights how current assumptions preferencing the sanctity of private property rights “pervade, dissuade, and undermine” coastal land-use management policies.¹⁹

The second core principle of the PTD, namely the role of the State in protecting public access to and use of beaches, is, however, less controversial (at least in New South Wales). The responsibility of the State to protect and maintain public access to and use of the beach is at the heart of the new planning controls established by the *Coastal Management Act 2016* (NSW) (*CMA*), the new *State Environmental Planning Policy (Coastal Management) 2018* (NSW) (*Coastal SEPP*), and the new NSW Coastal Management Manual 2018.²⁰

COASTAL MANAGEMENT AND COASTAL PROTECTION WORKS IN NEW SOUTH WALES

The object of the *CMA* as stated in s 3 is to: “manage the coastal environment of New South Wales in a manner consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State”. The Act details thirteen specific objects including:

- (b) to support the social and cultural values of the coastal zone and maintain public access, amenity, use and safety;...
- (g) to recognise that the local and regional scale effects of coastal processes, and the inherently ambulatory and dynamic nature of the shoreline, may result in the loss of coastal land to the sea (including estuaries and other arms of the sea), and to manage coastal use and development accordingly;...
- (i) to encourage and promote plans and strategies to improve the resilience of coastal assets to the impacts of an uncertain climate future including impacts of extreme storm events.²¹

From a planning perspective, the *CMA* seeks to achieve these objects through planning controls established by the *Coastal SEPP* and the implementation of Coastal Management Programs (CMPs) developed by local Councils.²² Additionally, in the case of coastal protection works, specific constraints apply under s 27 of the *CMA* which sit alongside the development controls under the *Environmental Planning and Assessment Act 1979* (NSW) (*EPAA*).

While coastal protection works such as seawalls and/or groynes can “fix” the position of the beach, they may do so at the cost of occupying coastal land and altering coastal processes. There is potential for serious adverse consequences on the resilience of adjoining beach and dune areas, and even on lands behind the wall.

¹⁶ Under a rolling easements ownership of coastal lands changes with sea levels; as the sea rises, the land consumed by it (at a certain tidal marker) is transferred to the State. See O'Donnell and Gates, n 15.

¹⁷ See, eg, presentations by Allan Young (Planning Services Leader EMM Consulting) at the 2017 and 2018 NSW Coastal Conferences.

¹⁸ For example, K Coleman, “Conveyancing and Property: Coastal Protection and Climate Change” (2010) 84 ALJ 421; J Corkill, “Ambulatory Boundaries in New South Wales: Real Lines in the Sand” (2013) 3 PLR 67; Thom, n 3, 34–36, discussed in more detail in Thom, n 7.

¹⁹ O'Donnell, n 15.

²⁰ A brief summary of these coastal reforms is provided in J Pain, “Current Environmental Challenges in the Land and Environment Court: Focus on Coastal Planning and Development and Inland Water Resources” (Planning and Environment Seminar, University of New South Wales, 7 March 2019).

²¹ *Coastal Management Act 2016* (NSW) ss3(b), 3(g) and 3(i).

²² The *Coastal Management Act 2016* (NSW) s 12, requires the development of CMPs by local councils: “to set the long-term strategy for the co-ordinated management of land within the coastal zone with a focus on achieving the objects of [the CMA]”.

Cumulatively, armouring shorelines may threaten the environment and the resources that have drawn people to the coasts to begin with, as well as the public rights in common resources that the state has a duty to protect.²³

Where “coastal protection works” are identified in a certified CMP,²⁴ they may be undertaken by a *public authority* without the need for development consent.²⁵ In this way, the NSW coastal management regime provides a pathway for coastal protection works whose impacts and benefits have been assessed in a wholistic manner in consultation with the community in the CMP development and certification process. Coastal protection works proposed by private property owners need development consent.²⁶ In determining whether to grant consent, and upon what conditions, the consent authority²⁷ is required to:

- (1) take into consideration the usual constraints on development under the planning regime codified in s 4.15 (previously s 79C) of the *EPAA*, that is the terms of applicable Environmental Planning Instruments (such as the relevant Local Environmental Plan and the *Coastal SEPP*) and any Development Control Plan, including the likely impacts of that development, the suitability of the site for the development, any submissions made in accordance with the *EPAA* or the regulations, and the public interest; and
- (2) have regard to the specific requirements of s 27 of the *CMA* (previously s 55M of the *Coastal Protection Act 1979* (NSW) (*CPA*)).

Section 27(1) of the *CMA* provides:

Development consent must not be granted under the *Environmental Planning and Assessment Act 1979* to development for the purpose of coastal protection works, unless the consent authority is satisfied that:

- a. the works will not, over the life of the works:
 - i. unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland, or
 - ii. pose or be likely to pose a threat to public safety, and
- b. satisfactory arrangements have been made (by conditions imposed on the consent) for the following for the life of the works:
 - i. the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works,
 - ii. the maintenance of the works.”

[Section 55M(1) of the now repealed *CPA* was in identical terms but for the inclusion of the word “development” at the commencement of s 27(1)].

RECENT CASE LAW

While litigation over development rights in the coastal zone is not new, the recent decision of Preston CJ in *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (Proceedings) is the first time the provisions of s 55M (now s 27 of the *CMA*) have been judicially considered.

While at one level these cases are a very traditional application of planning law, they are noteworthy because they:

²³ S Negro, “Built Sea Walls: A Protected Investment or Subordinate to the Public Trust?” (2012) 18 *Ocean and Coastal Law Journal* 89, 126.

²⁴ “Coastal protection works” means: “(a) beach nourishment activities or works, and (b) activities or works to reduce the impact of coastal hazards on land adjacent to tidal waters, including (but not limited to) seawalls, revetments and groynes”. *Coastal Management Act 2016* (NSW) s 4; *State Environmental Planning Policy (Coastal Management) 2018* (NSW) cl 4(2).

²⁵ *State Environmental Planning Policy (Coastal Management) 2018* (NSW) cl 19(2)(a)(i).

²⁶ *State Environmental Planning Policy (Coastal Management) 2018* (NSW) cl 19(1).

²⁷ Under the current regime a Sydney district or Regional Planning Panel (with a coastal expert on the Panel) is the consent authority for “coastal protection works carried out by a person other than a public authority, other than coastal protection works identified in the relevant certified coastal management program” (see *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) Sch 7 cl 8A; *Environmental Planning and Assessment Act 1979* (NSW) s 4.5(b), Sch 2 cl 20). Under the previous regime (repealed by the *State Environmental Planning Policy (Coastal Management) 2018* (NSW)) the NSW Coastal Panel was the consent authority where there was no certified coastal zone management plan (*State Environmental Planning Policy (Infrastructure) 2007* (NSW) cl 129A (repealed)).

- demonstrate how s 27 of the *CMA* seeks to preserve public rights to access and use the beach (consistent with the principles of the *PTD*); and
- show how the Court has sought to grapple with the difficult issue of assessing the environmental impacts of existing unapproved coastal structures.

There is an extensive history of litigation concerning development rights for protective structures at Belongil Beach in Byron Bay, NSW.²⁸ The Proceedings specifically related to works proposed to existing seawalls detailed in three of nine development applications lodged in late 2017 on behalf of six owners of beachfront land at Belongil Beach.²⁹ To complicate matters, three of the six property owners lodged two development applications which covered both “minor works” (all six), and “major works”. The latter involved extensive works (essentially an orderly demolition and reconstruction of the wall to an assumed original state). The former called for more modest works to the crest of the existing wall or to the visible outer rock layer of the wall. Due to the location of the seawalls, some of the works were integrated development and landowner’s consent was also required from Council and/or Crown Lands. The Coastal Panel failed to determine all nine of the development applications within the statutory timeframes and so nine separate proceedings were commenced in the Land & Environment Court (LEC) in 2017–2018. Following conciliation conferences, consent orders were ultimately negotiated and entered for six of the applications (the “minors”).³⁰ In this way all applicants obtained development consent for certain works to the existing seawalls to be carried out under an agreed management plan. However, the three “major” applications relating to the most substantial works proceeded to a joint hearing before the LEC.

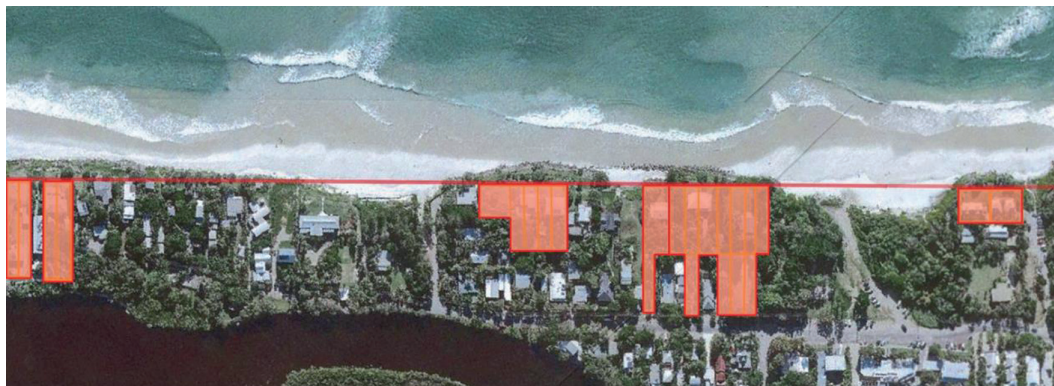
Figure 1 identifies the six properties at Belongil Beach that were the subject of the development applications for coastal protection works. The red horizontal line indicates the seaward boundary of private land where it adjoins public land. The seawalls slope back towards the private land, approximating a steep dune slope. Much of the seawalls are not visible in the image, as substantial portions are usually buried beneath the sand. The exposed rocks seaward of the red line form part of the upper/outer portion of the seawall. When the beach sand level lowers due to erosion, more of the seawall structures become uncovered and extend further into public land due to their slope.

²⁸ See, eg. *Scott v Byron SC* (Unreported, Land and Environment Court of New South Wales, Assessor Hussey, No 10513/96, 21 November 1996); *Wengarin Pty Ltd v Byron Shire Council* (1999) 9 BPR 16,985; [1999] NSWSC 485; *Byron Shire Council v Vaughan* [2002] NSWCA 158; *Parkes v Byron Shire Council* [2004] NSWLEC 92; *Van Haandel v Byron Shire Council* [2006] NSWLEC 394; *Byron Shire Council v Vaughan* [2009] NSWLEC 88; *Vaughan v Byron Shire Council (No 2)* [2009] NSWLEC 110; *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [2016] NSWSC 169, (3 March 2016); *Ralph Lauren Pty Ltd v Byron Shire Council* [2010] NSWLEC 207; *Vaughan v Byron Shire Council* [2011] NSWSC 824; *Vaughan v Byron Shire Council* [2012] NSWSC 75; *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [2012] NSWLEC 274; *Positive Change for Marine Life Inc v Byron Shire Council (No 2)* [2015] NSWLEC 157; *Ralph Lauren 57 v Byron Shire Council* [2016] NSWSC 169; *Siddle v NSW Transitional Coastal Panel* [2018] NSWLEC 1383; *Watson v Transitional Coastal Panel* [2018] NSWLEC 1680; *Rettenmaier v Transitional Coastal Panel* [2018] NSWLEC 1678; *Ralph Lauren Pty Ltd v Transitional Coastal Panel* [2018] NSWLEC 1679; *Stewartville Pty Ltd v Transitional Coastal Panel* [2018] NSWLEC 1681; *Trewern v Transitional Coastal Panel* [2018] NSWLEC 1682; *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345; [2018] NSWLEC 207. An analysis of the implications of these “waves” of litigation is provided in Miguel F Frohlich et al, “Towards Adaptive Coastal Management: Lessons from a ‘Legal Storm in Byron Shire, Australia’” (2019) 179 *Ocean and Coastal Management* 104909.

²⁹ The timing of the lodgment of the development applications was important as the applicants (as part of a larger group of landowners) had, as a consequence of protracted litigation in the NSW Supreme Court (commenced in 2010 – *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [2016] NSWSC 169, (3 March 2016), extracted concessions from Council regarding the provision of land owner’s consent and access for works and a restraint on Byron Shire Council requiring the removal of works where a development application was lodged prior to 12 August 2017.

³⁰ *Siddle v NSW Transitional Coastal Panel* [2018] NSWLEC 1383; *Watson v Transitional Coastal Panel* [2018] NSWLEC 1680; *Rettenmaier v Transitional Coastal Panel* [2018] NSWLEC 1678; *Ralph Lauren Pty Ltd v Transitional Coastal Panel* [2018] NSWLEC 1679; *Stewartville Pty Ltd v Transitional Coastal Panel* [2018] NSWLEC 1681; *Trewern v Transitional Coastal Panel* [2018] NSWLEC 1682.

FIGURE 1. Image of section of Belongil Beach identifying relevant private properties and property boundaries



THE PROCEEDINGS

The Proceedings involved three merits appeals (heard together) against deemed refusals of development consent for “coastal protection works” primarily on public beachfront land on Belongil Beach near Byron Bay in northern NSW. The assessment of the three development applications (MAP TO BE INCORPORATED) was complicated by the fact that:

- the proposed works essentially involved the replacement of significant portions of existing structures adjacent to and seaward of the properties;
- the properties were not contiguous;
- depending upon the sand level at the time (ie whether the beach was in an eroded or accreted state) some of the structure of the proposed works could be buried under sand and not visible to the public. However, it was agreed that the structures would be mostly exposed when the beach was significantly eroded;
- the existing structures were substantial, and their footprint occupied a significant portion of public space. The relevant sections of the walls (when “repaired”) were up to +7.7 m AHD³¹ high (noting that the base of the wall was assumed to sit at -2 m AHD – giving a total maximum height for one of the structures of 9.7 m). They occupied a footprint (primarily or wholly on public beachfront land, depending on the application) of up to 17 m by, depending on the length of each property’s sea frontage of 39.7 m, 61 m or 105 m;
- due to the existing structures’ occupation of public land, landowner consent to the lodgment of the development applications was required from Crown Lands and/or Byron Shire Council before the applications could be determined;
- there were many interested parties including Crown Lands and Byron Shire Council (as affected landowners and managers), and 70 public submissions;
- the existing structures had never been the subject of a formal development assessment or the grant of any formal planning consent; and
- although the three applications were separated by other properties (as shown on the map), they formed part of a 1-km line of individual seawall structures along the Belongil beachfront. These existing structures varied in composition (rocks, concrete and other materials), condition and risk to public safety, with some gaps and an inconsistent alignment.

The Court held that the three development applications could not be approved because the Court (as the consent authority) was not satisfied of the following *mandatory pre-requisites*:

³¹ AHD or Australian Height Datum is the official national vertical datum for Australia.

- that “the proposed works will not, over the life of the works, unreasonably limit or be likely to unreasonably limit public access to or use of the beach” (s 55M(1)(a) of the *CPA*);³² and
- that “the proposed development will not impede or diminish, where practicable, the physical, land-based right of access of the public to or along the coastal foreshore” (cl 88(3)(a) of the *Byron Local Environmental Plan 2014 (NSW) (BLEP)*).³³

In making this determination the Court was required to consider whether the “reasonableness” of impacts on public access were to be assessed relative to a status quo established by the existing unapproved structures, or against the situation if no walls were on the beach.

Preston CJ made the following factual findings in the assessment of the proposals’ impact on public access to and use of the beach:

- (1) The proposals in fact limited public use: “The proposed works necessarily limit public access to and along, and public use of, the parts of the beach on which the works will be physically located. The public cannot walk along, sit on or otherwise use those parts of the beach on which the works will be physically located.”³⁴
- (2) The spatial footprint of the proposals was significant: “By reason of their size and extent, the resultant repaired sea wall in front of each of the land owners’ properties will result in the alienation of significant parts of the public land of the beach and a concomitant limiting, impeding or diminishing of public access to and use of the beach.”³⁵
- (3) The public access, occupy and use the beach seaward of the three properties.³⁶
- (4) The impact on access and use was likely, given the proposed 30-year life of the works, to continue for a long time.³⁷
- (5) Construction of the works would further limit public access and use (during construction).³⁸
- (6) The repaired sea walls would also limit public access to and use of the beach other than the parts of the beach on which the sea walls are physically located (particularly during periods of high tide or storm events).³⁹
- (7) “[T]here are no reasons of practicability that would preclude the land owners designing, locating and constructing coastal protection works so as not to impede or diminish the physical, land-based right of access of the public to or along the coastal foreshore, as required by cl 88(3)(a) of *Byron LEP 1988*”.⁴⁰

In determining that these impacts were “unreasonable” Preston CJ had regard to two important matters:

- (1) The unlawfulness of the existing works

Based on the principle expressed in *Kouflidis v Salisbury City Corp*⁴¹ that “the unlawful user of the land should gain no advantage from having established an unlawful use” the Court concluded that the status quo (being the existing unapproved structures) was *not* the determinant of the reasonableness of the impact (emphasis added):

The assessment of the degree and significance of the limitation, impediment or diminishment of public access to and use of the beach, and of any unreasonableness of such limitation, is to be undertaken without regard to the existing sea walls and the extent to which they limit, impede or diminish public access to or use of the beach. The existing sea walls are not lawful. No development consent has been sought or

³² Now *Coastal Management Act 2016* (NSW) s 27(a)(i).

³³ *Byron Local Environmental Plan 2014* (NSW).

³⁴ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [117]; [2018] NSWLEC 207.

³⁵ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [122]; [2018] NSWLEC 207.

³⁶ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [123]; [2018] NSWLEC 207.

³⁷ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [124]; [2018] NSWLEC 207.

³⁸ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [125]; [2018] NSWLEC 207.

³⁹ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [126]; [2018] NSWLEC 207.

⁴⁰ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [131]; [2018] NSWLEC 207.

⁴¹ *Kouflidis v Salisbury City Corp* (1982) 29 SASR 321, 324; 49 LGRA 17.

obtained for the carrying out of the existing sea walls on the beach in front of each of the land owners' properties. By law, the sea walls should not exist on the beach.

In this case, the land owners' argument that the repaired sea walls will not result in any additional limiting, impeding or diminishing of public access to or use of the beach beyond the limitation, impediment or diminishment caused by the existing works, and hence that the limitation caused by the repaired works cannot be considered to be unreasonable, is based on and seeks to take advantage of the unlawful existing works and use. It is to be rejected.⁴²

(2) The objects of the *CMA*

The unreasonableness of the limitation on public access to or use of the beach is also shown by the inconsistency with the objects of the Coastal Protection Act. The objects of the Coastal Protection Act include in s 3(d) "to promote public pedestrian access to the coastal region and recognise the public's right to access" and in s 3(i) "to promote beach amenity."⁴³

In addition to the Court's finding that s 55M(1)(a) (and 88(3)(a) of the *BLEP*) precluded the grant of consent, the Court found that:

- the cumulative impacts of the proposed works provided further reason to refuse consent because if consent were to be granted, it would prove difficult for the relevant consent authority to refuse other similar applications resulting in a continuous length of coastal protection works on public land the cumulative impact of which would be significant and unacceptable⁴⁴; and
- a grant of consent was inappropriate because it would regularise and make permanent the existing unlawful works on the public beach:

There is no realistic prospect that the works would ever be removed. ... The likely approval of other coastal protection works in front of properties on Belongil Beach, along with the approval of the proposed works in front of the land owners' properties, will make almost inevitable a coastal protection solution that incorporates the various approved works on the beach. The current unacceptable exclusion of public access to and use of the beach would therefore be perpetuated.⁴⁵

CONCLUSION

Coastal land is valuable to both private landowners and the public. Consistent with the principles of the PTD, the public expects the State to preserve and protect public rights to safely access and use the beach. The construction of coastal protection works (such as seawalls) can diminish beach space available for public use (either by its occupation of land, contribution to erosion impacts or creation of a barrier to safe access). The *CMA* requires consent authorities to prioritise public rights when making decisions regarding coastal protective works. Coastal protective works must either form part of a CMP that has been the subject of public consultation and accords with the requirements of the guidelines under the Act or, in the case of private works, must not pose a threat to public safety or unreasonably diminish public access to and use of the beach (s 27 of the *CMA*). The NSW Land and Environment Court has confirmed the public good effect of the *CMA*. It demonstrated the very high bar to the permissibility of the private use of a public beach for the purposes of private property protection. In addition, the new coastal legislation, *Coastal SEPP* and Manual in NSW provide a pathway through the CMP process for the community and local councils to be involved in determining coastal management and protection pathways at the local level and the maintenance of valued coastal assets such as beaches.

⁴² *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [127], [129]; [2018] NSWLEC 207.

⁴³ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [130]; [2018] NSWLEC 207.

⁴⁴ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [143]; [2018] NSWLEC 207.

⁴⁵ *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* (2018) 235 LGERA 345, [144]; [2018] NSWLEC 207.