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Shifting sands for councils on responsibility for past projects

Kevin Roche

Two successful cases against Byron Shire put onus on local authorities for past works. Byron Bay in northern NSW, home to one of Australia's most iconic pieces of coastline, has long been the poster child for disputes in the coastal zone.

In recent times, the newly proposed NSW Coastal Management Bill and the recent east coast low that affected Sydney's northern beaches have drawn much of the attention in the coastal space, but this may not be the case for much longer.

After almost 10 years of prolonged court activity, two Supreme Court litigation cases involving the Byron Shire Council were finally resolved by court orders last week. Both of these cases relate to engineering works on the coast. Despite no admission of liability by council, both involved substantial financial settlements to the plaintiffs and orders against council in one of the cases.

The first case concerned a group of Belongil Beach property owners who were seeking compensation for financial loss in relation to the council's historical works in front of the Jonson Street carpark. They were awarded \$2,750,000 including costs.

The second case involved another group of Belongil Beach property owners who successfully claimed an undisclosed amount of compensation related to injunction orders that were won in the Land and Environment Court in February 2010 following a May 2009 storm.

According to Angus Jackson from International Coastal Management, the cause of all the problems in Byron dates back to 1964, when the structure was first built by the council. In 1975 the initial structure was then added to with finger groynes, further trapping sand that benefited the main beach while starving Belongil Beach.

Jackson states: "The artificial headland and groynes at Jonson Street that were constructed by the council were designed to not only protect the carpark but also to widen Main Beach on the updrift side. The groyne effect causing erosion along the beaches on the downdraft side (Belongil) has been well documented since at least the 1978 Public Works Department report. "

Larger beach widths provide natural protection from storm events. Evidence filed in the court indicated the impact of the Jonson Street engineered structure was significant enough to cause the loss of more than 20m to 25m of beach width.

What makes these court orders so interesting and significant is the statutory authority, in this case Byron Shire Council, did not receive legal impunity (exemption of liability) from its earlier actions from more than 50 years ago.

As Karen Coleman from King & Wood Mallesons, the lead solicitor on the Byron litigation cases since their inception, stated: "The court case against the council was based on well-established legal authority in Australia that a council has a duty to protect its residents from a danger it creates by prior use of its statutory powers, in this case the building of the wall to protect the town."

2

As part of the resolution, the court has ordered council to allow property owners to retain any existing protective works adjacent to the Belongil properties in their current form or as repaired.

The property owners will now be in a position to submit applications that will enable them to undertake lawful protective works at their own cost under current legislation.

The council's legal services co-ordinator , Ralph James, was quick to point out that despite the significant changes to NSW state planning regulations within the Coastal Protection Act and State Environmental Planning Policy, "the resolution agreement does not provide the property owners with greater or different protection than currently exists" .

While technically this may be correct, the reality is far different. These court orders should now be recognised as a pre-existing legal duty that cannot be ignored by council and should inform all subsequent efforts to use their statutory powers, including the Draft Coastal Zone Management Plan for Byron Shire.

These orders will effectively restrict the options the council has to exercise its statutory powers. On the one hand this has been a win for the property owners, with their individual property rights being recognised by the court.

The owners had sued on the basis the council had a duty to protect residents of Belongil Beach from the danger it had created. On the other hand it highlights the complex legal issues that surround the coast.

As Coleman stated: "This case concerned a legacy issue arising from the impact of the manmade structure protecting Byron's township. The impacts of that structure according to our evidence threatened a natural dune along Belongil that is 6000 years old and which also protects the wetlands behind it. These aspects have been ignored in many quarters."

Last year the Land and Environment Court declined to grant an interim injunction sought by a community action group because of the greater risk to the environment if the dune were allowed to fail.

At the coast we have a very complicated intersection of various aspects of the law, environmental policies and beliefs, social and recreational values and political will. We are not dealing with a pristine coastline — it has been severely affected by development over generations.

We need laws that are adaptable and flexible enough to deal with these legacy issues without lengthy court cases, as these problems will not go away.

People will continue to migrate to the coast, leading to large concentrations of population, property and infrastructure that may already be at risk to natural coastal processes and/or man-made impacts, as has been shown by recent events in NSW.

Kevin Roche is chief financial officer and group economist at Risk Frontiers at Macquarie University.

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