The devil and the deep blue sea

Legal responses to climate change adaptation in Australian coastal communities

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The dilemma

- Limit development in vulnerable areas and face costly backlash from developers

or

- Allow development and risk potential future liability
Regulatory and legal issues

1. Planning to adapt to impacts of CC on future development
2. Legal mechanisms for requiring/promoting retreat or retrofitting of existing infrastructure
3. Liability and compensation issues for exposed property
1. Planning to adapt to impacts of CC on future development

Fragmented legal regime for coastal management - between states, between councils
State planning instruments

- Queensland Draft Coastal SPP
- Victoria State Planning Policy Framework (Managing coastal hazards and the coastal impacts of climate change)
- NSW Policy Statement on Sea Level Rise
  - Qld & Vic 0.8m SLR projection by 2100; NSW 0.9m
  - Plan for combined effects of tides, storm surges, coastal processes and local conditions
  - Consider the range of sea level rise projections over the life of an asset and how the asset can be located or designed to avoid or minimise any associated impacts.
  - Victoria - apply precautionary principle to planning and management decision-making when considering the risks associated with climate change.
Need for national consistency

The committee recommends that the Australian government consider the benefits of adopting a nationally consistent sea level rise planning benchmark and, if so, whether this can be done on a statutory basis or otherwise.

Recommendation 4.76, H Reps Standing Committee on Climate Change, Water, Env & Arts, Managing our coastal zone in a changing climate, October 2009
Sea level rise in the courts

- Growing body of litigation, but few broad lessons
- Large variation across jurisdictions based on planning instruments and laws (state and local), institutions involved
- Explicit reference to CC in planning instrument = must consider in development assessment
- No explicit reference - courts will examine broader statutory framework e.g reference to public interest, principles of ecologically sustainable development etc
Sea level rise in the courts

- Victoria - strong emphasis on precautionary principle
- *Gippsland Coastal Board v South Gippsland SC, VCAT* (5 August 2008)
- *...rising sea levels are to be expected. The range of impacts may well be beyond the predictive capability of current assessment techniques.*
- *In the face of such evidence, a course of action is warranted to prevent irreversible or severe harm*
- *...There is a longer term risk of intergenerational liability that ... should be avoided ...*
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Retreat or relocation

- No provisions mandating retrofit/alteration of properties (cf pool fence laws)
- Only one local authority has policy of planned retreat
  - Byron Shire Council - any development (including structures to protect existing development) requires development approval
- DA only granted to temporary structures
Retreat or relocation

- *Byron Shire Council v Vaughan* 1 Feb 2010 (40342 and 40344 of 2009)
- Council obliged to monitor, repair and maintain the interim beach stabilisation works
- *because* under its own development consent, *it had undertaken to do so*
- *Court did not say* council owed general duty to protect property owners
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Compensation issues

- Byron SC v Vaughan
  - Open to Vaughans to bring claim for damages in Supreme Court for losses incurred
Multiple state instruments
Multiple courts
Multiple local authorities
Multiple developers