Claimed property right does not hold water

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Evidence advanced for the proposition that "governments and legislatures cannot ignore the fundamental right of property owners to protect their land from the sea" is reviewed to test the veracity of this bold claim. The origin of this right and the courts' clarification of its limited nature in English common law are explained, the impacts of modern statutes on common law rights are considered and the powers of State Parliaments to enact legislation are examined. By referring to decisions of superior courts and citing current NSW statutes applicable to the construction of coastal protection works, the article concludes that the claimed fundamental property right does not hold water. Coastal landowners are encouraged to recognise NSW shoreline law as it currently exists and challenged to abandon the claim to a right which has long ceased to exist in NSW.

INTRODUCTION

The note in the "Conveyancing and Property" section of this Journal in 2010,[1] which asserted that "Governments and legislatures cannot ignore the fundamental right of property owners to protect their land from the sea" was gravely mistaken about the substance of current law relevant to the shoreline in NSW. As an opinion piece it advocated for private property interests while relevant legislation was before the NSW Parliament,[2] but it is not an accurate commentary on the surviving common law or an impartial review of the legal framework governing the administration of land titles or the management of private property along the coast. Nor does it validly describe of the powers of the NSW Parliament. Importantly and unfortunately for private property owners, but fortunately for the public interests in the coast,[3] all three assertions are incorrect. As I explain below:

- there is no common law right to defend against the sea in NSW, today;
- such a claimed right is not and never was a "fundamental right"; and
- State Parliament has the "widest possible" legislative powers and may ignore property rights.

ORIGIN, NATURE AND EXTENT OF THE COMMON LAW RIGHT TO DEFEND AGAINST THE SEA

The origin of this claimed right was certainly in the Royal prerogative "to provide for the safety and preservation of our realm of England", according to the "declaratory statute 23 Hen 8, c 5" cited by Brett LJ in *Attorney General v Tomline* (1880) 14 Ch 58 at 66, and it derived from a construction of this prerogative as a duty and an interpretation of threats to the realm which construed the sea as an enemy, whose attacks against England must be resisted. Such construction and interpretation was ascribed to Lord Coke in *Isle of Ely* (1609) 10 Rep 141a (by Brett LJ in *Tomline* at 66). This duty of the English Crown was recognised as creating an "imperfect obligation" on the sovereign which gave the subject only an "imperfect right", that was in itself a "correlative right" not a "fundamental right"

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[1] Coleman K, "Conveyancing and Property: Coastal Protection and Climate Change" (2010) 84 ALJ 421 at 422.

[2] *Coastal Protection and Other Legislation Amendment Bill 2010* (NSW).

[3] The public have extensive interests in the coastal zone and particularly land below mean high water mark (MHWM). In addition to the historically recognised public rights to fishing and navigation in tidal waters up to the MHWM, other public interests in the coast include: the use of the foreshore for a range of active and passive recreational pursuits; the use of the coastal waters for paddling, swimming, diving, surfing; the provision of ecological services by foreshore species and the production of a range of seafood. The argument that these public interest uses are likely to be permanently lost through "coastal squeeze" if sea-walls are erected to protect private property and prevent the shoreward recession of the coast, is beyond the scope of this article.

(at 66-67). This right was said to be "imperfect" because it was not enforceable against the Crown, and since "the Crown was not amenable to the jurisdiction of the court" (at 70) a subject could only seek the Crown's action through a petition to the Crown, which the King could grant or refuse. The Crown's duty to defend against the sea was thus operated by the Sovereign at their discretion, and since the time of Lord Coke, only following due process: the return of a writ of ad quod damnum which inquired "what damage it will be to the king or others".[4]

This imperfect duty was subsequently delegated under statute to Commissioners who operated it according to the legislation of the day,[5] and exercised the Crown's power to construct sea defences, where they deemed it necessary: *R v Commissioners of Sewers for Pagham, Sussex* (1828) 8 B & C 355 at 361 (Bayley J). This case was one example of a complaint arising from such Commissioners' work. However, close scrutiny of the case does not yield proof of the conclusive determination of the existence of the "fundamental right" as claimed. This case concerned a landowner's claim for compensation for damage to his land caused by coastal erosion following the re-construction of a groyne by the Commissioners (at 356), and included an application for the court's order of mandamus that the Commissioners be compelled to build new works to protect his land (at 358).

The court found that in re-building the groyne, the Commissioners had acted bona fide (at 361), exercised "an honest discretion" in their work, and done "the very best thing, that under the circumstances, could be done to attain the object they had in mind" (at 359-360). It specifically rejected as a principle of law the landholder's claimed right to compel the Commissioners to construct coastal protection works for his benefit, found that the Commissioners were not liable because they "have done no wrong", and declined to grant the damages or the mandamus order sought (at 361-362). The court determined the case on the basis that the arguments against the Commissioners had failed, and the statement of Bayley J (at 361), "It seems to me that every land owner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose", was therefore not part of the ratio of the decision but obiter. Both Lord Tenterden CJ and Bayley J observed that in the face of the landowner's inability to compel the Commissioners to construct protective works, the only course available was action by the landowner "himself". Bayley J went so far as to say, "But the right that Mr Cousens and each landowner has, is to protect himself; not to be protected by his neighbours" (at 362), but this was neither a question for the court's determination nor the basis for the decision.

Significantly, Lord Tenterden CJ asked an important question (at 360): "Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like?" While he answered the question in the negative saying, "I certainly am not aware of any authority or principle of law which can prevent him from doing so", it does not follow that such an answer, given in 1828, would be the inevitable response to the same question when posed in NSW today.[6] The court's decision in 1828 was not, however, the last word on the nature and extent of the claimed fundamental right to defence against the sea. The matter was further considered by the courts in subsequent proceedings, which clarified the nature and scope of the imperfect right as it operated between two individual landowners.

The Queens Bench determined that one landowner, whose land was protected from the tidal waters by a seawall built on their own land, could not compel a neighbouring landowner whose property was also bounded by tidal waters, to build or maintain such sea defences for his benefit, and found that the neighbouring landowner had no liability for his damages which arose as a result of their failure to defend their land against the sea.[7] That decision was affirmed by Lord Coleridge CJ, Mellish, Brett and Amphlett LJJ in the Court of Appeal in *Hudson v Tabor* [1877] 2 QBD 290.

[4] *Hudson v Tabor* [1877] 2 QBD 290 at 294 per Lord Coleridge CJ.

[5] See *Hudson v Tabor* [1877] 2 QBD 290 at 294 per Lord Coleridge CJ: "beginning with the statute of 6 Hen 6, c 5" (the sixth year of Henry VI's reign began on 1 September 1428).

[6] Parliament's ability to enact legislation to modify or repeal prior common law rights is considered below.

[7] *Hudson v Tabor* (1876) 1 QBD 225 at 233-234.

Lord Coleridge CJ, delivering the judgment of the court, discussed earlier authoritative decisions and the development of the relevant statutes and said (at 294): "And the whole of this procedure is entirely inconsistent with the notion that at common law the frontager could be compelled by action to repair any part of such defences which had been injured 'by the outrageousness of the sea.'"

The claimed right to a defence against the sea was further considered by the Court of Appeal in *Attorney General (UK) v Tomline* (1880) 14 Ch 58, in which an inland landowner sought an injunction to prevent his neighbour from removing shingle from his own land because the shingle bank formed a "natural protection against the sea" and its removal would expose the adjoining land to the "great danger of the sea breaking through" (at 64, 65). The court affirmed the decision of the court below and held that the adjoining landowner was entitled to such an injunction (at 64, 67, 70) because the land in question was still affected by the original Crown duty to protect the realm against the sea, and as a consequence the frontager landowner "cannot be allowed to use the land in such a way as to destroy the natural barrier against the sea". Brett LJ noted (at 65) that the earlier case[8] "is a binding authority upon us to say that there was no obligation on the part of the Defendant to keep up this bank … and … keep the sea out" despite what he acknowledged were potentially disastrous consequences. He further noted (at 65):

> Therefore it comes to a nice point. There is no dominant right of the Plaintiff over the land of the Defendant. There is no obligation on the Defendant to keep the sea out, and therefore the question comes to this, whether one can find any principle upon which, although he is not bound to keep the sea out, yet he must not do an act which will let the sea in. I think there is such a principle, and that is the principle which has been enunciated by the learned Judge, and the principle upon which he has acted.

Thus the very limited and "imperfect" nature of the right, now erroneously claimed as a "fundamental right", has been explicit in English law since at least 1880.

It is likely that work done by English landowners on their own land to build and maintain sea defences was undertaken under common law, and in that sense, the landowners would appear to have had a common law right to do such works themselves. However, while the court acknowledged this right at common law and recognised the need to prevent others from removing sea defences, this recognition did not extend to a right which could compel either the Crown or neighbours to build or maintain sea defences. Further, it is apparent that much of the actual construction of coastal protection works, such as groynes, seawalls and embankments, by the Crown in England has, since the early 15th century, proceeded under the operation of the relevant statute[9] and not under common law.

Later, a line of legal argument developed which reasoned that, because of the enactment of the *Crown Suits Ordinance* (1876), the original Royal duty could be enforced in British colonies against the colonial government of the day, as the manifestation of the Crown.[10] In one such case, *Attorney General (Southern Nigeria) v John Holt & Co Pty Ltd* [1915] AC 599, the Privy Council recognised the Crown's duty and the landowner's right to defend against the sea but decided the matter on other grounds. The court grappled with the question of whether the works undertaken by the company, which included a wall, were artificial reclamation or defences against erosion by the sea, and ruled that under common law the latter were permissible but the former were not (at 615). The court found that the works were reclamation, but observed that a government ordinance made in 1864 permitted defensive works, and concluded that since the reclamation works had been carried out openly, without trespass or "surreptitious acquisition of land" it was "probable" that the Governor had permitted the works "for the time being".

The court recognised the Crown's duty to protect land from "the incursions of the sea", and held that "if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject, but with this duty of the Crown" (at 620). Thus it was the implied government licence to carry out the reclamation works which formed the ratio of the decision, not the common law

[8] *Hudson v Tabor* [1877] 2 QBD 290.

[9] The first such statute is given as "6 Hen 6, c 5" in *Hudson v Tabor* (1877) 2 QBD 290 at 294.

[10] See *Attorney General (Straits Settlement) v Wemyss* (1888) 13 App Cases 192.

right to defend against the sea. Coleman[11] seemed to assert that because the English Royal prerogative included the defence of the realm from the sea,[12] and since the courts recognised British subjects as having a limited right to defend their land against the sea (*AG (Southern Nigeria)* at 620), that right was seamlessly transferred to NSW as a "fundamental right". However, it does not follow logically that, because the court found that an implied licence to reclaim land in Southern Nigeria was consistent with the limited English common law right to defend against the sea, this common law right still exists in NSW today.

Evidence of a right in England then, does not prove the right exists in NSW now

Even if a subject had a right under ancient English common law to protection from the inroads of the sea, the existence of that right in 1828, does not ipso facto prove that such a right exists now in NSW. Similarly, the use of a quote[13] from *AG (Southern Nigeria)* (at 620) does not prove that such a duty and right continue unchanged today, within the complex NSW legal framework. The case for a seamless translation of the "imperfect" duty and right under common law from England at earlier times to contemporary NSW, is not made out but is merely asserted, and without persuasive argument showing the continuity of the claimed common law right,[14] the proposition is not compelling. There are, however, more profound difficulties confronting this claim of a "fundamental right" than the failure to mount this logical argument.

Legislation can modify or extinguish common law rights

To infer that a limited common law right was the only relevant legal principle which ought to be considered by Parliament over 100 years later, ignored the slow but dynamic nature of the common law and the effect of statute law made by former British colonies, now independent nations, on old English common law. Such an inference assumed, erroneously, that the enactment of NSW legislation which governs coastal management[15] and the assessment and approval of development applications,[16] has not affected these common law rights.

Such an argument lay at the heart of proceedings brought in New Zealand, where coastal landholders asserted that their common law private property right to defend their land from coastal erosion continued to exist despite the formal legislative scheme and decision-making processes set up by the *Resource Management Act 1991* (NZ). After an initial hearing by the Planning Tribunal had ruled against the residents, Barker J in the High Court of New Zealand in *Falkner v Gisborne District Council* [1995] 3 NZLR 622 examined whether the Crown's duty and the claimed right under English common law had become part of the law of New Zealand and determined that they had. He concluded that the common law duty and right were applicable in New Zealand "unless affected by a New Zealand statute" (at 623).

Barker J then considered whether this duty and right had been affected by a New Zealand statute, and found that the *Resource Management Act* did affect this duty and right, supplanting the common law with a "comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources" (at 632). Barker J ruled that where pre-existing common law rights are inconsistent with the Act's scheme, those rights will no longer be applicable. Clearly a unilateral right to protect one's property from the sea is inconsistent with the resource consent procedure envisaged by the Act; accordingly, any protection works proposed by the residents must be subject to that procedure (at 632). Further, he said (at 632):

[11] Coleman, n 1.

[12] As asserted by Lord Coke in *Isle of Ely* (1609) 10 Rep 141a according to Brett LJ in *Attorney General (UK) v Tomline* (1880) 14 Ch 58 at 66.

[13] Coleman, n 1 at 422..

[14] Such as that shown in *Cooper v Stuart* (1889) 14 App Cases 286 at 291-292.

[15] *Coastal Protection Act 1979* (NSW).

[16] *Environmental Planning and Assessment Act 1979* (NSW).

> there is nothing in the Act to suggest that the common law right cannot be infringed – quite the reverse. The Act is simply not about the vindication of personal property rights, but about the sustainable management of resources … the governing philosophy of sustainability does not of itself require the protection of individuals' property to be weighed more heavily than the protection of the environment and the public interest generally.

Barker J made plain the relationship between the statute law and the common law when he said "[t]he relevant statute … deliberately sets in place a coherent scheme in which the concept of sustainable management takes priority over private property rights" (at 633).

This power of parliaments to enact statutes which modify or repeal the prior existing common law by the use of "clear and express terms" is well known in Australia and has been confirmed in many authoritative decisions of senior Australian courts.[17]

NSW COASTAL MANAGEMENT IS GOVERNED BY CURRENT STATUTE LAW, NOT CLAIMED COMMON LAW RIGHTS

For the reasons shown below I believe the situation in NSW is substantially the same: if the old English common law duty and right had continued as part of the common law of the colony of NSW, they have been extinguished by provisions of modern statutes enacted by the NSW Parliament. I do not disagree that English property law, which may have included the Crown's duty and the subject's right to defend private property against the ingress of the sea, was imported into the colony as part of the applicable English common law,[18] in much the same way as it had been imported into New Zealand law (at 623). However, it is apparent that, just as in New Zealand, this common law duty and right have subsequently been supplanted in NSW by relevant legislation, whose objects also include the sustainable management of resources,[19] and whose provisions also include relevant rules, plans,[20] policy statements[21] and procedures.[22] Under current NSW law, coastal hazards such as coastal erosion and shoreline recession are managed by local councils using Coastal Zone Management Plans (CZMPs).[23] And the current legislative scheme requires coastal protection works to be consistent with a CZMP, the subject of a development application[24] and environmental impact assessments,[25] and receive local and State government approval prior to construction.[26]

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[17] See, eg *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [30] (fn 44) (Kirby J).

[18] See *Cooper v Stuart* [1889] 14 App Cases 286 at 291 per Lord Watson (delivering the decision of the Judicial Committee of the House of Lords):: "the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. Insofar as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The oft-quoted observation of Sir William Blackstone (1 Comm 107) appear to their Lordships to have a direct bearing on the present case" (Lord Watson then quoted the relevant section of *Blackstone's Commentary on the Laws of England*).

[19] See *Environmental Planning and Assessment Act 1979* (NSW), s 5(a)(i), (vi); *Coastal Protection Act 1979* (NSW), s 3(b).

[20] Such as Local Environment Plans made under *Environmental Planning and Assessment Act 1979* (NSW), Pt 3; or emergency action sub-plans made under *Coastal Protection Act 1979* (NSW), s 55P(4).

[21] Such as State Environment Planning Policy No 71 – Coastal Protection made under *Environmental Planning and Assessment Act 1979* (NSW), s 37(1), see also s 117 for the Coastal Policy of NSW. The *Coastal Protection Act 1979* (NSW) contains many provisions which operate as policy statements: see eg. S 55Q which states that emergency coastal protection works are to remain in place for a maximum of 12 months.

[22] The relevant Acts specify the procedures for a wide range of activities: see, eg procedures for local consent authorities to consider development applications in *Environmental Planning and Assessment Act 1979* (NSW), Pt 4; procedures for considering approval of construction of coastal protection works in *Coastal Protection Act 1979* (NSW), Pt 3.

[23] Prepared under *Coastal Protection Act 1979* (NSW), Pt 4A, s 55B et seq.

[24] See *Coastal Protection Act 1979* (NSW), s 55K(a), (b).

[25] Assessments of environmental impact must be made under *Coastal Protection Act 1979* (NSW), ss 38(1)(c), (d), 39(4)(a), (b), 44(a), (b) to determine if the proposed works are likely to "(a) adversely affect the behaviour or be adversely affected by the behaviour of the sea or an arm of the sea or any bay, inlet, lagoon, lake, body of water, river, stream or watercourse, or (b) adversely affect any beach or dune or the bed, bank, shoreline, foreshore, margin or flood plain of the sea or an arm of the sea

Recent legislative changes which created a new category of "emergency coastal protection works",[27] and exempted such works from the requirement to first obtain a regulatory approval, nonetheless require the issue of a certificate for such works by an authorised officer of the local council or the Director-General. Because such certificates may be refused,[28] or issued subject to conditions, and other statutory provisions, and because such works may be undertaken only once and must ultimately be removed, it is difficult to see how the issue of certificates for such works could be construed as observing, or constituting, a "fundamental right" to defend against the sea. Rather, such a certificate might more properly be seen as a consent for a temporary use which is issued under the statute at, and subject to, the Crown's discretion.

It is the provisions of these modern statutes which are determinative and they define the procedures and rules for the approval, or refusal, of the construction of coastal defensive works in NSW, not the claimed common law property right to defend against the sea. Thus I conclude that, by the enactment of the principal statutes and their amending legislation, the NSW Parliament has created a "coherent scheme" of legislation similar to that created in New Zealand under the *Resource Management Act 1991* (NZ), and hence the original Crown duty and the subject's right, which may have persisted in the common law, have also been extinguished in NSW. As a consequence, the NSW Government has today no common law duty to protect against the inroads of the sea, and the Minister's power to construct coastal protection works such as sea walls, which is operated under the relevant legislation, is now, and has been for many years, discretionary,[29] not mandatory.

As Coleman noted, possession of a power by the Crown does not necessarily impose a duty: but while the cases cited have discussed when powers must be exercised, they offer no authority to support the inference that the Crown, as the NSW Government, now has an inescapable duty to erect sea defences. Further, no logic was offered to explain, and no binding authority was given to show, how that Crown "power" confers on NSW landowners a "fundamental right" to defend against the inroads of the sea.

NOT A "FUNDAMENTAL RIGHT"

Whether ownership of private property provided a "fundamental right" which must be recognised by the NSW Parliament was considered in an application for special leave to appeal in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 by the Full Bench of the High Court of Australia,[30] following a decision by the NSW Court of Appeal.[31] Durham Holdings had held coal leases in an area subsequently declared a National Park. Though the enabling legislation[32] provided for the payment of some compensation for the cancelled coal leases, it was not at full market value, and the company's compensation was set at $23.25 million.

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or any bay, inlet, lagoon, lake, body of water, river, stream or watercourse." Consideration of the likely impacts of coastal protection works on other aspects of the coastal environment are likely to be required under NSW State Environmental Planning Policy 71 – Coastal Protection 2002, cl 8(e)-(n).

[26] See *Environmental Planning and Assessment Act 1979* (NSW) ss 38, 39, 80; *Coastal Protection Act 1979* (NSW), s 55M.

[27] *Coastal Protection and Other Legislation Amendment Act 2010* (NSW), cl [26] inserted *Coastal Protection Act 1979* (NSW), Pt C (ss 55O – 55Z, Emergency Coastal Protection works)

[28] *Coastal Protection Act 1979* (NSW), 55P(4) states that an emergency action sub-plan or a requirement under subs (2) "may specify locations where emergency coastal protection works … must not be placed". It follows that applications for works at specific unapproved locations may therefore be refused.

[29] For example, under *Coastal Protection Act 1979* (NSW), s 55, the Minister may authorise the construction of coastal protection works where he is "of the opinion that" such works "should be carried out"; under s 55M, public authorities must operate a discretion sufficient for them "to be satisfied" that the necessary pre-conditions have been met, before deciding to issue a consent for coastal protection works under the *Environmental Planning and Assessment Act 1979* (NSW). Further, where a development application for coastal protection works has been provided to the Minister for his concurrence, under *Coastal Protection Act 1979* (NSW), s 40(2), the Minister may under s 41, grant it with or without conditions, or refuse concurrence.

[30] The application for special leave followed the company's initial unsuccessful appeal to the Coal Compensation Review Tribunal, interrupted proceedings in the Supreme Court and the Court of Appeal's decision to dismiss the entire matter.

[31] *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340.

[32] *Coal Acquisition Act 1981* (NSW) as amended by *Coal Acquisition (Amendment) Act 1990* (NSW).

The company asserted that its private property rights in the coal leases meant it was due full market compensation of almost $93.4 million for the cancelled leases. It argued that the right to full compensation was a "fundamental right" which Parliament could not overrule. It further argued that due to this "fundamental right" the court should rule the legislation invalid as "unconstitutional". The court considered the company's arguments as to the court's power to invalidate legislation and discussed several decisions of its own and of other senior courts, on the powers of Parliament to affect the existence, nature and extent of common law rights (at [8]-[12], [39]-[66]). It also closely considered the decisions of the New Zealand Court of Appeal from 1984 to 1994, which the company argued provided authority for the proposition that there might be common law rights which "lie so deep that even Parliament could not override them" (at [47]).[33]

The High Court also noted (at [52] per Kirby J) that in its earlier decision in *Union Steamship Co of Australia v King* [1988] 166 CLR 1, "this Court left open the question whether, with respect to a Parliament of a State, there were any common law rights which were so fundamental as to be beyond legislative power". However, the court rejected, by a decision 6:0, the argument that the claimed private property right to compensation at full market value was a "fundamental right" (*Durham*: Gaudron, McHugh, Gummow and Hayne JJ at [14], Kirby J at [57], Callinan J concurred at [79]). The joint judgment affirmed the decision in the court below and quoted it with approval (at [12]): "The [applicant] was unable to point to any judicial pronouncements, let alone a decided case, which indicated that, at any time, that any such principle existed in the common law of England, or of the colonies of Australasia, or of Australia." In his concurring judgment, Kirby J echoed the joint decision, and said (at [52]): "However, the applicant could not point to any case in England, the colonies of Australasia or modern Australia to support its argument that this was the kind of 'fundamental' common law right that 'lay so deep' contemplated by the New Zealand cases."

Since the High Court of Australia ruled that the enabling legislation governed the payment of compensation and the company did not have a "fundamental right" to compensation for its revoked coal leases (at [52]), it is difficult to see how an argument could be made to support the claim that landowners have a "fundamental right" under common law to defend against the inroads of the sea, which continues to exist despite the enactment of relevant legislation by the Parliament of New South Wales. If such an argument can be mounted using sophisticated reasoning, it is evident the article under review did not do so.

STATE PARLIAMENTS ARE NOT BOUND TO UPHOLD CLAIMED PROPERTY RIGHTS

In *Durham* the High Court also considered closely the claim that the NSW Parliament was bound to recognise and protect this claimed property right to compensation (at [7]). The company argued that legislation which was inconsistent with, or did not recognise and protect, the claimed private property right was invalid, because it was beyond the power of the Parliament. The joint judgment rejected the argument and said: "There are numerous statements in this Court which deny that proposition" (at [7]; see also fn 4 for cases cited).

In his detailed concurring decision Kirby J noted that in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9, the High Court had determined that the legislative powers of State Parliaments had been given "the widest possible operation". Kirby J also noted that s 51(xxxi) of the Australian *Constitution*, requiring the Commonwealth's acquisition of private property to be compensated for in "just terms", did not include an "equivalent provision" relating to acquisitions by State governments (*Durham* at [56]). Further, Kirby J observed that it was significant that a 1988 referendum that had sought to insert such a clause into the *Constitution*, had been rejected (at [63]-[66]). Not only can State governments and legislatures deal with private property as they wish through legislative Acts, they have done so repeatedly many times over many years. As Kirby J said

[33] See, eg *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398; *Simpson v Attorney-General (NZ)* [1994] 3 NZLR 667; see others cited in *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [47] fn 91. In *Taylor* it was argued that such a fundamental right would prevent the NZ Parliament from enacting "literal compulsion, by torture for instance".

(at [56]), "so far as the powers of a Parliament of a State of Australia to permit the acquisition of property without the payment of compensation are concerned, a long line of opinions of the Court upholds the existence of that power".

In the light of these decisions of the Court of Criminal Appeal and High Court, Coleman's assertion that "Governments and legislatures cannot ignore the [claimed] fundamental private property right" is manifestly incorrect.

CLAIMS OF PROPERTY RIGHTS ARE NO BULWARK AGAINST RISING SEA LEVELS

Setting aside such claims of fundamental common law property rights as unsupported by NSW law, it is apposite to examine the actual operations of current NSW property law on the title of land bounded by tidal waters, where these lands are adversely affected by either gradual coastal erosion or rising sea levels. Under current NSW property law, when land is affected by the subtractive processes of the gradual and natural shoreward movement of the mean high water mark (MHWM) boundary, due to erosion and/or diluvion, the land lost below MHWM ceases to be real property under the *Real Property Act 1900* (NSW)[34] and is silently transferred into the ownership of the Crown.[35] As a result, the private property interest in land which falls below MHWM is lost,[36] and the Crown's ownership and the public interests in the foreshore, held in trust by the Crown, prevail.[37]

In *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, Bannon J made it clear that real property is not immutable, but is subject to natural processes which may add land to it, or subtract land from it. He said: "[t]he Torrens system is not a guarantee of the permanence of land. In the course of history, land is created and land disappears owing to the movements of nature. The Torrens system only guarantees title to existing land" (at 13,660).[38] This loss of land below MHWM to the sea, and its transfer to the Crown's ownership, occurs irrespective of whether the land in question originally had an ambulatory tidal boundary or a boundary defined by the line of initial survey, also known as a "fixed" boundary (such a "fixed" boundary is not fixed forever). As Bannon J said (at 13,659):

> But where the boundary is a fixed boundary, the title is open to correction or amendment if land is gained or lost by accretion or erosion … The Torrens system was intended to provide certainty as to title, but not to otherwise displace those parts of the law of property dealing with the gaining or loss of title by accretion or diluvion. Defined boundaries make no difference: *Southern Centre of Theosophy Incorporated v South Australia* [1982] AC 706 at 716 at 717.

Thus, under current NSW property law precise measurements of boundaries cannot be relied on as a bulwark against the loss of land to the sea, because registration of a land title does not certify the boundaries,[39] and indefeasibility does not extend to land included in the certificate by a wrong description of boundaries.[40] That errors in boundaries can occur after the issue of the Certificate of Title through the operation of erosion is made clear in *Land Titles Office Practice* (cited by Bannon J at 13,659), which sets out procedures to be used to amend boundaries of land where, following accretion or erosion, the existing title "has become erroneous ex post facto".[41]

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[34] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655 at 13,660.

[35] *Attorney General (UK) v Chambers* (1859) 4 De G & J 55 at 68 (Lord Chelmsford); see also *Mahoney v Neenan* [1966] IR 559 at 565 (McLoughlin J).

[36] *Environment Protection Authority v Leaghur Holdings Pty Ltd* (1995) 87 LGERA 282 at 287 (Allen J).

[37] See *Blundell v Catterall* (1821) 5 B & A 268 at 292-294 (Holroyd J).

[38] This statement of the dynamic nature of land, that a property may have land added to it or subtracted from it by natural processes, has been made in many cases: eg *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260 at 298.

[39] Butt P, *Land Law* (6th ed, Thomson Reuters, Sydney, 2010) p 756, citing *Boyton v Clancy* [1998] NSW ConvR 55-872; *Comserv (No 1877) Pty Ltd v Figtree Gardens Caravan Park* (1999) 9 BPR 16,791 at 16,796.

[40] See *Real Property Act 1900* (NSW), s 42(1)(c); see also *Halsbury's Laws of Australia* (Looseleaf, LexisNexis), Real Property/VI Other /(2)Boundaries, Fences and Encroachments /(B) Boundaries for Land Abutting Water/(I) Tidal Water Boundaries, [355-14000] fn5.

[41] Baalman and Wells, *Land Titles Office Practice* (4th ed, rel 19, 1990) para 7.

Because the law in NSW is as stated by Bannon J, it is incorrect to assert that a section of beach below MHWM is privately owned simply by referring to the original measurements on a land title plan. Any such original measurements are not actually definitive of the position of the relevant boundary,[42] and unless the Certificate of Title shows that the land in question was registered as being below the MHWM, land lost below MHWM passes into the Crown's ownership (at 13,660). Though this situation is anthema to the culture of private property rights, there is no doubt that this is the correct interpretation of NSW law because Bannon J's decision was upheld 3:0 by the Court of Criminal Appeal in *Environment Protection Authority v Leaghur Holdings Pty Ltd* (1995) 87 LGERA 282.. In that decision Allen J said (at 287):

> His Honour [Bannon J] found as fact that the land lost to the sea was lost to erosion which was "gradual and imperceptible" within the meaning of those terms as explained by Lord Wilberforce in *Southern Centre of Theosophy Inc v State of South Australia* [1982] AC 706 at 720 and that the ownership of it reverted, accordingly, to the Crown. He held, further, that the reversion of ownership to the Crown ensued notwithstanding the provisions of the *Real Property Act 1900* (NSW). The correctness of the law in that regard as stated by his Honour, is not challenged.

Thus it is apparent that current property law in NSW does not support the proposition that claimed property rights survive the gradual movement of the receding shoreline. It is this element of current NSW property law, relating to the loss of land due to moving boundaries, together with the statutory provisions relevant to the construction of coastal protection works, which will govern the ability of landowners to respond to the impact of a receding shoreline on their private property under future climate change conditions, not the claimed fundamental common law right.

Hence it is time, in my view, that coastal landowners and private property advocates recognise current NSW property law as it actually is, as determined by senior NSW courts, instead of persisting with a confected claim to a right which was never fundamental and which has long been lost.

PARLIAMENTS SHOULD ACT IN THE PUBLIC INTEREST AND NOT BE CONSTRAINED BY CLAIMED PROPERTY RIGHTS

Despite the rights private property advocates might *want* the law to recognise, a close examination of current NSW law does not support the notion that protecting private property is the paramount consideration for government or legislatures when making laws regarding coastal management[43] during the next few hundred years of rising sea levels.[44] Nor does such an examination support the perverse idea that modern parliaments are bound by and "cannot ignore", modify or repeal old English common law.[45]

Rather, State Parliaments are able to employ a range of legislative and policy responses to address the diverse public policy issues enlivened by climate change, of which the loss of private property is but one concern.

Moreover, it is essential that State Parliaments pursue this complex task without being shackled to outdated, erroneous notions, which have the potential to unfairly advantage some landowners and compromise or destroy the wider public rights, interests and values in our embattled coastal zone.

POSTSCRIPT

The passage of the *Coastal Protection Amendment Act 2012* (NSW) has made further changes to the statutory scheme governing coastal management in NSW. Among other changes, this legislation renamed "emergency" works as "temporary" coastal protection works and made it possible for

[42] *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260 at 284; *Beames v Leader* [2000] 1 Qd R 347.

[43] The diverse objects of coastal management in NSW, spelt out in *Coastal Protection Act 1979* (NSW), s 3, include "(h) to encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise" and "(i) to promote beach amenity". The objects of the Act do not include the protection of private property exposed to coastal erosion or diluvion.

[44] Sea levels are forecast to continue to rise "for centuries" according to IPCC, *Climate Change 2007: The Physical Science Basis, Summary for Policymakers*, contribution of Working Group I to the Fourth Assessment Report of the IPCC (2007) at 12.

[45] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [14], [55], [56].

landowners to undertake construction of protection works on their private property without requiring development consent, and on "public" land under a certificate issued by the relevant authorised officer. However the Act allows consent to use public land, under a certificate, to be refused if the proposed coastal protection works are likely to adversely affect public access. Thus, no old or new common law right to defend against the sea has been recognised or created. While the regulatory framework has been further tweaked, public access to the beach remains the primary consideration, not the protection of private property. This legislation did not therefore negate the arguments above, but exemplified them.