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Ms Santina Camroux, 3 March 2014
Coastal and Natural Resources Policy Branch
NSW Department of Planning and Infrastructure,
GPO Box 39, Sydney 2001

Dear Ms Camroux,

Re request for submissions on advice to councils on how buyers of coastal properties should be informed about coastal hazards.

I have reviewed the draft Planning Circular and FAQ sheet on exhibition on the Department's website and I wish to offer the following comments:

1/ Clarification of the distinction between 'current' and 'future' exposure to coastal hazards

I wish to express qualified support for the clarification of the distinction between 'current exposure to a coastal hazard' and 'future exposure to a coastal hazard' described by the draft Planning Circular.

I certainly agree that notices of exposure to coastal hazards should be expressed clearly in terms in which 'future exposure' is not capable of being incorrectly interpreted by a reasonable person as referring to 'current exposure'. Note my insertion of the phrase 'reasonable person'. This is important because no amount of careful wording will prevent confusion arising in the mind a person who is not reasonable or who has a limited grasp of English. The quarantining of notice of 'current exposure' to only s 149 (2) planning certificates should however go a long way to preventing any such confusion.

I agree with the statement that 'future exposure' is different to the probability of an event occurring. However I submit that the Circular ought to urge Councils to exercise caution in the use of any kind of 'average' figure in defining the likely occurrence of the hazard of coastline recession in particular. For example, beach erosion does not occur at an average annual rate and use of any average has the potential to understate the magnitude of the hazard and may mislead readers to be believe it is a constant, rather than episodic, process.

While I agree that land within the 'immediate coastal erosion area' is properly described as having a 'current exposure to a coastal hazard', land and especially buildings on areas to the landward of the 'immediate *erosion* area' are also at risk and have a 'current exposure to a coastal hazard' as will be described in the next section of this submission. Thus this section of the Circular needs, in my view, some further clarification.

I note that three terms, 'tidal inundation, coastal inundation and coastal flooding' are used in the introduction to the Circular without any definition of these terms, or reference to a source which might define them. The NSW *Coastline Management Manual*[1] cited 'coastal inundation' as an identified coastal hazard, which pertains to the flooding of coastal land by ocean waters, usually associated with the storm surge produced by severe storms. Tidal inundation is cited as a coastal hazard in s 4 Definitions of the *Coastal Protection Act 1979* (NSW) but the term is not defined. Does this term refers to areas of land above MHWM which are periodically flooded by tidal waters during the higher monthly spring tides in the normal tidal range i.e. not lands which are only affected by storm surge? If this is what is being referred to the relevant advice ought to report that Tide Tables will indicate when monthly spring tides will occur and their forecast heights. The term 'coastal flooding' is not cited as a coastal hazard by either the *Act* or the *Manual* and the precise definition of 'coastal flooding' is not clear to me. Does this mean the flooding of coastal land ie fresh- / rain- / storm-water flooding over areas identified as being within the coastal zone? Is this somehow distinct from 'flooding' on land not within the coastal

[1] Public Works Department, *Coastline Management Manual* (NSW Government, 1990).

zone? To avoid confusion I would recommend these terms be defined somewhere and the Circular point to the source of the definition.

2/ Other identified hazards should be specifically included

The draft Circular refers to coastal hazards as including 'coastal erosion, tidal inundation, coastal inundation and coastal flooding' but does not refer to other hazards identified in s 4 Definitions of the *Coastal Protection Act 1979* (NSW) particularly the hazards (b) shoreline recession, (c) coastal lake or watercourse entrance stability, (e) coastal cliff or slope instability and (g) erosion caused by tidal waters, including the interaction of those waters with catchment flood waters.

Why the draft Circular includes only a subset of statutorily identified coastal hazards is not explained and it is my submission that all the natural hazards specified in s 4 of the *CP Act 1979* as being 'coastal hazards' ought to be cited, and / or a reference made to 'coastal hazards as defined by s 4 of the *CP Act 1979'*.

Though the draft Circular's reference to only a limited number of coastal hazards through the use of the term 'include' is perhaps only 'shorthand', it is confusing because the sentence is able to be read as meaning that references to coastal hazards in this circular refers to (only) those hazards cited.

Moreover, while the term 'coastal erosion' is used in the draft Circular it is perhaps more appropriate to use the term 'beach erosion' since this is the term used for this hazard in the Act.

It is particularly concerning that there is no reference in the draft Circular to either the hazard of 'land slip', 'subsidence'[2] or specifically to 'Slope and cliff instability hazard' a coastal hazard identified in the *Coastline Management Manual* (NSW Government, 1990) at page C.21 *et seq.* and cited as (e) 'coastal cliff or slope instability' in s 4 of the *Coastal Protection Act 1979* (NSW).

In my opinion, this is an unfortunate omission because this latter coastal hazard, which could be characterised as either 'land slip or as 'subsidence', has the potential to pose significant risks to the safety and integrity of buildings through the undermining of foundations and to the environment, including coastal waters, through the compromising of key service infrastructure such as sewerage lines. This hazard, the mass movement of substrate materials, is an important hazard to identify in s 149 certificates as either a current or future hazard because its effect is manifest on coastal properties before

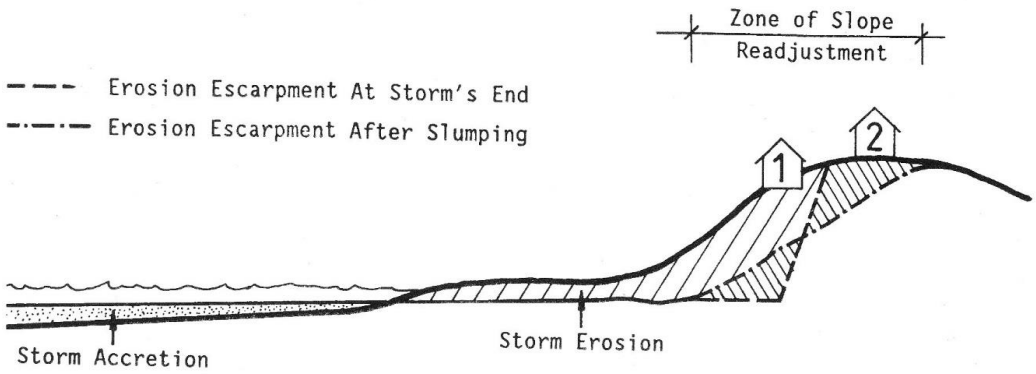

Figure C7.1 Loss of Houses Due to Beach Erosion and Collapse of Erosion Escarpment

[2] The *Environmental Planning and Assessment Regulation 2000* (NSW) Schedule 4, Clause 7 refers to both 'land slip' and 'subsidence' as hazards posing a risk to development.

the erosion escarpment created by coastal erosion reaches potentially affected coastal properties. See the position of House 2 in Figure C7.1 shown above.

Though typically the slumping or other mass movement which constitutes this hazard occurs after a storm which creates an erosion escarpment,[3] the mass movement occurs in advance of ie to the landward, of the erosion escarpment.

Thus this hazard will effect structures on coastal properties before the erosion escarpment will. Significantly, this hazard operates to the landward of the 'immediate coastal erosion area' (see diagram above) and thus the statement on page 2 of the circular that 'land within an immediate coastal erosion area … would be land with 'a current exposure to a coastal hazard' is not entirely correct. While this is true for the hazard of beach erosion, additional areas to the landward of this 'immediate coastal erosion area' have a 'current exposure' to the related, though separate, hazard of cliff and slope instability and as such these areas ought also to be the subject of an appropriately worded statement in a s 149 (2) planning certificate.

The width of the area subject to the hazard of cliff and slope instability will vary from location to location and depends on a number of factors. Identification of areas where there is either a current or future exposure to risks from this coastal hazard is possible, but requires councils to carry out assessments of the nature of the substrate material(s), the extent of weathering of these materials, the presence and extent of groundwater and seepage, and the likely gradient of eroded substrate materials, to define the likely stability of particular slopes under storm conditions and ascertain the extent of the 'zone of slope readjustment' in each location.[4]

Developments on sand dunes are especially vulnerable to this coastal hazard, but, as the Manual describes, developments located on coastal bluffs and cliffs may also be at risk from this hazard.[5]

Hence it is my submission that it is essential that local councils carry out the necessary site assessments of locations potentially adversely affected by 'slope and cliff instability' before finalising their hazard policies or updating their s 149 (2) or s 149 (5) Planning Certificates.

I further submit that the draft Circular should be amended to explicitly refer to the hazard of 'slope and cliff instability' and direct councils to include advice of a current exposure to this hazard, where it applies, in s 149 (2) and advice re future exposure to this hazard in s 149 (5) planning certificates.

3/ Guiding principles need re-consideration / amendment

I am not at all comfortable with the first of the proposed guiding principles set out on page 2 of the draft Circular, which states that

> 'if the information [about exposure to future coastal hazards] is not sufficiently accurate, complete and reliable, as supported by a competent process of assessment, then the information should not be included in a section 149 (5) planning certificate.'

This statement appears to be quite contrary to the 'pre-cautionary principle' which states that

> '… if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation …'[6]

[3] See NSW Government *Coastline Management Manual* (1990) pages C -21.
[4] See NSW Government *Coastline Management Manual* (1990) pages C -21 – C 26.
[5] Ibid, pages C -21 – 22.
[6] s 6 (2)(a) of the *Protection of the Environment Administration Act 1991* (NSW)

The management of the coastal zone having regard to, and consistently with, the principles of ecologically sustainable development is required by numerous provisions in key NSW legislation.[7]

Plainly most coastal hazards have the potential to create serious environmental damage and perhaps flooding is the only hazard which might be described as 'reversible'. Giving notice to landowners of a future exposure to a coastal hazard, without full scientific certainty, would therefore be quite consistent with the precautionary principle. Further, giving such notice via s 149 (5) planning certificate would constitute a reasonable measure for preventing environmental degradation, which should not be postponed until full scientific certainty is achieved, as the draft Circular currently proposes.

Thus it appears that the statement made in the first guiding principle of the draft Circular is contrary to the 'precautionary principle', inconsistent with existing law and must to be amended.

It is my submission that the first 'guiding principle' regarding s 149 (5) certificates in the Circular quoted above should be deleted. A better approach would be to amend the second 'guiding principle' to delete reference to 'sufficiently reliable' since this is an undefined, entirely subjective term which begs the questions: sufficient for what? sufficient for whom? Further it invites contestation as to whether reliable information is 'sufficiently reliable'! Plainly, if the information is reliable the information should be included on a s 149 (5) planning certificate, but reliability is not threshold test for the precautionary principle and its use creates a higher threshold than is necessary or appropriate.

It is my submission that the Circular should recommend to councils that where the council chooses to exercise the option of issuing a s 149 (5) planning certificate they include advice of a future exposure to a coastal hazard on a s 149 (5) planning certificate where there are 'reasonable', though not yet certain, grounds that the property in question may be affected by a specified future coastal hazard. That advice ought to indicate when, on the information currently available, it might be reasonably concluded that the future exposure is likely to commence. The notion of 'reasonable' grounds as the threshold test is appropriate, since the term 'reasonable' is well understood as a quasi-legal concept by local councils and its use is certainly preferable to the woolly term 'sufficiently reliable'.

The third guiding principle should be likewise amended to read 'If the information provides reasonable grounds to do so, then the council etc'

Further, I am concerned that on page 2, the draft Circular attempts to assert 'adverse property market and other [insurance ? financing ?] impacts' as being crucial factors that councils ought to have regard to when issuing optional s 149 (5) planning certificates. This approach is also inconsistent with the objective of ecologically sustainable development mandated by legislation, which clearly states that 'ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes'.[8] This concept, sometimes expressed as the 'principle of integration'[9] requires that all relevant factors are considered rather giving primacy or veto power to any single factor such as 'adverse property market impacts'.

The notions implied by the draft Circular that councils should consider withholding relevant information in a s 149 (5) planning certificate in order to 'avoid adverse property market and other impacts' and the implication that there is a 'need' to do so are most inappropriate. There is no such

[7] The operation of statutory functions by NSW ministers, government agencies and local councils in accordance with the principles of ecologically sustainable development is required by several legislative provisions: see ss 3 (b), 37A, 38, 39, 44, 57A of the *Coastal Protection Act 1979* (NSW), ss 5 (a) (vii), 79B, 112D, 112E, 115H, of the *Environmental Planning and Assessment Act 1979* (NSW); ss 7, 8, 82, 89 of the *Local Government Act 1993* (NSW). The principles of ESD also apply under many other Acts.

[8] See s 6 (2) of the *Protection of the Environment Administration Act 1991*(NSW)

[9] See BJ Preston 'Principles of Ecologically Sustainable Development' at < www.lawlink.nsw.gov.au/ >

'need' and the movements of property markets cannot and should not be second-guessed by council officers when properly performing their statutory functions.

It might be argued that having regard to 'adverse property market impacts' is a valid economic consideration which needs to be integrated, but consideration of such a factor by a council staff member, unless supported by actual documentation by a qualified valuer, would be highly subjective, purely speculative and would invite the partial performance of a statutory role.

Even if such documentation of likely adverse property market impacts were to be provided to a council officer, this would still need to be integrated into their consideration of whether and how to issue advice on the s 149 (5) planning certificate and could not, in accordance with the principles of ESD, operate to veto such advice.

In reality it is entirely appropriate for the property market, insurers and financiers, to take into account information about the current or future exposure of certain properties to coastal hazards when determining property valuations, insurance premiums and / or the terms of contracts for finance. That is, market responses should, properly, follow the provision of relevant information, rather than the decision of what is relevant information, or the provision of relevant information, being tailored to avoid, prevent, forestall or otherwise manipulate market responses.

It is my submission that no counter-balancing is required at all. Council should disclose relevant information on future exposure to coastal hazards where there are reasonable grounds to do so, and should not second-guess market impacts under any circumstances. Further, as argued above, information on future exposure to coastal hazards could and should be given without full scientific certainty where there are reasonable grounds for concluding that the property, the subject of the s 149 (5) planning certificate, has a future exposure to an identified coastal hazard. Thus this whole paragraph ought to be deleted.

4/ The Circular should provide 'model clauses' for use by councils in their planning certificates.

The Circular's purported aim is to meet the need to 'improve the way councils disclose coastal hazard information' but recommends that Councils seek legal advice on the wording to include in s 149 (2) or s 149 (5) planning certificate, noting that the circular 'does not constitute legal advice'.

In my view this is a missed opportunity to genuinely 'improve' communications with landowners, or prospective landowners, and to ensure that information about coastal hazards is communicated consistently by all local councils along the NSW coast.

Reliance on councils obtaining their own legal advice re the wording of their s 149 (2) or s 149 (5) Certificates does not 'improve' council communications: it is a recipe for more inconsistency in the communication of these matters.

It seems strange that on the one hand the Department's Circular contains 'model clauses' which councils could apply to their Planning certificates, as appropriate to local circumstances, while on the other hand 'suggests that councils seek their own legal advice on the specific wording to be included on s 149 (2) and s 149 (5) planning certificates'. If it good enough to have a Standard Instrument for Local Environment Plans, which include 'model' zones and permissible land-uses, it seems completely inconsistent for the Department to fail to provide legally robust model clauses whose use in s 149 Certificates is mandatory.

Further one wonders why have a Planning Circular re s 149 Certificates which purports to provide advice by a central agency to local councils to reduce or eliminate confusion, when that advice says in effect 'get your own legal advice', thereby creating scope for inconsistent advice and widely divergent clauses which produce more confusion, while obliging councils to incur avoidable legal costs?

This major inconsistency in the thrust of the advice contained in the Circular is further emphasised by the reference in the box on page 3 of the Circular to an as yet unmade s 117 Direction which it is said will 'ensure … consistency in application of coastal hazard certificates along the coast by councils'. In my view this s 117 Direction ought to have been prepared and exhibited as part of the public consultation on the proposed changes to s 194 (2) and (5) Planning Certificates.

5/ The Circular should report relevant generic legal principles which apply

The draft Circular is also a missed opportunity for providing consistent information to councils regarding relevant legal principles which apply when landowners, or prospective landowners, seek information about the existing NSW law applicable to land affected by coastal hazards in particular.

In my submission that Councils would be well served by advising landowners, or prospective landowners, that:

i/ There is no common law 'right' to defend against the sea through the construction of coastal protection works.[10] This common law 'right', if it ever existed in NSW, has been effectively repealed by the scheme of legislation which requires all permanent works to be the subject of a development consent.[11] Management of the coast, coastal hazards and the approval of development in the coastal zone operates under current statute law,[12] not under common law 'rights'.[13] There is no 'right of support' for land affected by coastal erosion or shoreline recession that mandates the construction of sea defences.[14]

ii/ The construction of any 'temporary' coastal protection works on public land, ie land below MHWM, under recent amendments to the Act,[15] does not occur under a property 'right' but under statutory provisions which require a Certificate, effectively a temporary 'licence', which may be issued subject to conditions or, under certain conditions, be refused.[16] Construction of 'temporary' coastal protection works said to be on private land, ie land above MHWM, does not occur under a common law property 'right' either, but under the relevant statutory provisions.[17]

iii/ There never was a 'right' of landowners to compel adjacent landowners to construct coastal protection works to protect their land, even in England.[18] Thus there is no legal obligation or Crown duty on the NSW Government or local councils to approve or to build coastal protection works to defend private property.[19] Approval for such works is discretionary, not mandatory, and this has been so since the relevant legislation came into force.[20] Councils and the Crown are not liable for the loss

[10] John R Corkill, 'Claimed property right does not hold water' (2013) 87 *Australian Law Journal* 49-58.
[11] Ibid, 53. See *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632 (Barker J).
[12] *Environmental Planning and Assessment Act 1979* (NSW), and *Coastal Protection Act 1979* (NSW).
[13] John R Corkill, 'Claimed property right does not hold water' (2013) 87 *Australian Law Journal* 49, 53.
[14] The right of support under s 177 of the *Conveyancing Act 1919* (NSW) does not apply to acts of omission, such as a refusal to construct a supporting seawall. See Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (LexisNexis, 2011) 256 [33780.5]. Young et al cited as authority *Piling v Prynew; Nemeth v Prynew* [2008] NSWSC 118, [62]-[63].
[15] made by the *Coastal Protection Amendment Act 2012* (NSW).
[16] See ss 55T and 55P (4) of the *Coastal Protection Amendment Act 2012* (NSW).
[17] See ss 55O and 55R of the *Coastal Protection Amendment Act 2012* (NSW). Under s 55VC temporary works have a time limit of two years. The word 'right' does not appear anywhere in the legislation in relation to either permanent or temporary coastal protection works.
[18] *Attorney General (UK) v Tomline* (1880) 14 Ch 58, 65 (Brett LJ).
[19] Ibid.
[20] E.g. under s 55 of the *Coastal Protection Act 1979* (NSW) the Minister may authorize the construction of coastal protection works where he or she 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

or damage to private property caused by coastal hazards, which are properly viewed as matters beyond their control.[21]

iv/ Land is not permanent and unchanging.[22] Coastal land exists in a dynamic environment and may have areas of land added to or subtracted from it by natural processes.[23] All land is affected by natural processes,[24] and is subject to the operation of the laws of physics.[25]

v/ Though Council is obliged to report current exposure to coastal hazards under s 149 (2) and future exposure under s 149 (5) Planning Certificates, the legal maxim *caveat emptor* - 'Let the buyer beware' - applies and the onus is always on the landowner to detect any faults, defects, hazards or risks in the land, either obvious or latent, before entering into a contract to purchase the land.[26] Further, a failure by the landowner to exercise this onus sufficiently to detect any such fault, defect, hazard or risk does not expose either the vendor, Council or the State government to any legal liability.[27]

(In the case of private property owners who have bought properties in Byron Shire located on erosion prone lands such as Belongil, since 1988 they had had more than adequate notice via the relevant planning certificates that the land is the subject to coastal hazards and the policy of 'planned retreat' applies through the relevant planning instruments, including the current DCP Part J, to the land so bought. Those landowners who bought land at Belongil prior to 1988 but after the publication of the *Byron Bay – Hastings Point Erosion Study* in 1978, had the opportunity to conclude, if they had conducted adequate due diligence, that their land was, or could be, affected by coastal erosion and shoreline recession. Landowners who bought land at Belongil prior to 1978, are nonetheless subject to *caveat emptor*.)

vi/ All land below MHWM is owned by the Crown, as the NSW Government,[28] unless the Certificate of Title expressly shows that the land title included an area which was below MHWM at the time of its registration under the *Real Property Act 1990* (NSW).[29] It is not possible to credibly assert that

been provided to the Minister for concurrence, under s 40(2) of the *Coastal Protection Act 1979* (NSW) the Minister may under s 41, grant it with or without conditions, or may refuse concurrence.

[21] See s 733 (3) of the *Local Government Act 1993* (NSW) as amended in 2010 which explicitly provided exemption from liability for (f2) anything done or omitted to be done regarding beach erosion or shoreline recession on Crown land, land within a reserve as defined in Part 5 of the *Crown Lands Act 1989* or land owned or controlled by a council or a public authority, and (f3) the failure to upgrade flood mitigation works or coastal management works in response to projected or actual impacts of climate change. Exemption from liability is only available where councils act 'in good faith'. See the discussion of 'in good faith' below.

[22] In *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, at 13,660 Bannon J said: 'The 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…'

[23] *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260, 298 (Gibson J); *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706, *; 1 All ER 283, 287 (Lord Wilberforce).

[24] In *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706, 1 All ER 283, 287, Lord Wilberforce said: 'The doctrine of accretion, in other words, is one which arises from the nature of land ownership from, in fact, the long-term ownership of property inherently subject to gradual processes of change.'

[25] Physics is the study of matter and energy and their interaction. The laws of physics are fundamental laws of nature which include the Newtonian laws of motion, the law of gravity, and the law of conservation of mass and energy. See Andrew Z Jones < http://physics.about.com/od/physics101thebasics/p/PhysicsLaws.htm >

[26] Peter Butt and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011), 80.

[27] Provided they act 'in good faith', Councils have a wide exemption from legal liability under s 733 (3) of the *Local Government Act 1993* (NSW). See the courts' view of what is 'in good faith' below.

[28] *New South Wales v Commonwealth* (1975) 135 CLR 337, at 407 [44], [45] (Gibbs J).

[29] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J). See for example the land title of Sydney Harbour considered in *Verrall v Nott* (1939) 39 SR NSW 89, which stated that the land title pertained to all land below MHWM. In that case the court held, at 98, that the boundary of the land title was the MHWM which 'varies as the high water mark varies', and was not the MHWM at the time of registration.

land below MHWM, such as the inter-tidal beach, is or has become privately owned based on measurements of land above MHWM made at the time of original survey,[30] because registration of land under the *Real Property Act 1900* (NSW) does not certify the boundaries[31] and because indefeasibility of title does not extend to specific measurements on the Certificate of Title.[32] It is well known that the boundaries of land titles may need to be corrected where they become erroneous 'ex post facto'.[33]

vii/ Natural boundaries, such as MHWM, have the highest precedence,[34] and prevail over metes and bounds descriptions.[35] Natural boundaries are distinct from the 'artificial boundaries' created by connecting survey points, which have been described as 'imaginary lines'.[36] When the MHWM crosses a property boundary originally defined by survey, the prior boundary is supplanted by the boundary formed by MHWM and the property acquires an ambulatory boundary.[37] Hence so-called 'fixed' boundaries are in fact not fixed forever and, under the circumstances above, they "make no difference'.[38]

viii/ Land lost to the sea through gradual erosion and / or sea level rise (aka 'diluvion') ceases to be 'land' as defined by s 3 of the *Real Property Act 1900* (NSW) when it falls below MHWM,[39] and is 'lost' by the prior registered proprietor.[40] The ownership of that part of a land title which falls below MHWM reverts to the Crown, as the NSW Government, and forms part of the bed of the sea.[41]

ix/ Land lost to coastal erosion cannot be 'reclaimed' through informal, unapproved works.[42] 'Property may be lost in the absence of a licence to protect it'.[43] Reclaimed lands formed by the deposition of fill below MHWM whether approved or unapproved belong to the Crown, not to the adjoining

[30] *Southern Centre of Theosophy Inc v South Australia* (1982) AC 706; [1982] 1 All ER 283, 287 (Lord Wilberforce); *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J). See the discussion of this in John R Corkill 'Ambulatory boundaries in NSW – real lines in the sand' (2013) 3 (2) *Property Law Review* 67, at 77-79.

[31] Peter Butt *Land Law* (6th ed Thomson Reuters, Sydney 2010), 756 [20 20]. Butt cited as authorities for this statement *Boyton v Clancy* (1998) NSW ConvR 55-872 and *Comserv (No.1877) PL v Figtree Gardens Caravan Park* (1999) 9 BPR 16,791, 16,796.

[32] See LexisNexis *Halsbury's Laws of Australia* 355 Real Property/VI Other/ (2) Boundaries, Fences and Encroachments/ (B) Boundaries for Land Abutting Water/ (I) Tidal Water Boundaries at [355-14010].

[33] ie 'from a subsequent event' Peter Butt and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011), 219. See *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J). See also Kevin Nettle and Helen Cunningham (eds), *Baalman and Wells' Land Titles Office Practice* Vol.1 Release #19, July 1990 (Lawbook, 4th ed, 1990) at 7 [7].

[34] *Small v Glen* (1880) 6 VLR 154, 162; *Donaldson v Hemmant* [1901] 11 QLJ 35, 41 (Griffith CJ); *National Trustee v Hassett* [1907] VLR 404, 412 (Cussen J); *Beames v Leader* (2000) 1 Qd R 347, 358.

[35] *Attorney General (NSW) v Wheeler* (1944) 45 SR (NSW) 321, 330 (Jordan CJ).

[36] Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) at 26-7.

[37] *McGrath v Williams* (1912) 12 SR (NSW) 477; *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J). See the discussion of this in John R Corkill 'Ambulatory boundaries in New South Wales – real lines in the sand' (2013) 3 (2) *Property Law Review* 67, at 79.

[38] *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260, 298 (Gibson J); *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706; 1 All ER 283, 287 (Lord Wilberforce); *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,659 (Bannon J).

[39] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J)

[40] *Southern Centre of Theosophy Inc v South Australia* (1982) AC 706; [1982] 1 All ER 283, 287 (Lord Wilberforce); *Environment Protection Authority v Leaghur Holdings PL* (1995) 87 LGERA 282, 287 (Allen J).

[41] *Environment Protection Authority v Leaghur Holdings PL* (1995) 87 LGERA 282, 287 (Allen J).

[42] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,658-9 (Bannon J).

[43] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,662 (Bannon J).

landowner.[44] The placement of earth or rock fill or objects such as tyres below MHWM, in an attempt to halt erosion or 'reclaim' land, constitutes the pollution of coastal waters and is a criminal offence.[45]

x/ No compensation is payable by either Councils or the Crown, for the loss of a part of a land title to the sea, either under common law[46] or under current NSW statute law,[47] because the land so lost is not 'acquired' by the Crown,[48] and because it is no longer 'land' which constitutes real property.[49]

You will observe that these principles are supported by detailed footnotes citing authoritative decisions of the courts or published articles, including two articles by me, in peer reviewed law journals which demonstrate the veracity of these statements of legal principle.[50]

If the Department is unable to accept these statements as accurate summaries of the relevant legal principles, or is unwilling to report them to councils via the Circular, it would be prudent for the Department to support the request for the Registrar General to refer a stated case and associated questions on precisely these matters to the NSW Supreme Court, so as to obtain genuine resolution of any lingering uncertainty. (A copy of the request to the Registrar General to refer a 'stated case' to the NSW Supreme Court is available and will be provided under separate cover.)

The referral of a 'stated case' to the NSW Supreme Court has a number of advantages:

a) it allows the NSW Government, through the Registrar to nominate the issues and questions for the court's determination, rather than a private landowner as the plaintiff;
b) the outcomes of the case would have wide application to councils along the NSW coast and avoid the need for serial litigation involving local councils or the Department on these matters;
c) the outcomes would assist the Department in the preparation of soundly based advice to its Minister, to local councils and landowners;
d) the proceedings do not require a respondent and hence would not involve a contested hearing;
e) there is no risk of an adverse order for a respondent's costs;
f) the costs of the proceedings would thus be minimised and would be borne by the NSW Government.

Further, a ruling by the Supreme Court declaring the relevant law would be published, resolving any lingering uncertainty, providing a transparent basis for future policy- and/or law-making and would put these matters beyond question by residents who persist with fallacious arguments.

In my view it would be imprudent and unhelpful of the Department to do nothing, and allow disputes over the relevant legal principles to be thrashed out in a series of expensive, narrowly based legal

[44] *Trafford v Thrower* (1929) 45 TLR 502, (Eve J); *Attorney General of Southern Nigeria v John Holt & Co* (1915) AC 599, 615 (Lord Shaw).
[45] See *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655 13,662 (Bannon J).
[46] *Re Hull and Selby Railway Co* (1839) 5 M&W 327, 151 ER 139, 141 (Alderson B); *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260, 295-6 (Gibson J); *Attorney General (Southern Nigeria) v John Holt & Co* (1915) AC 599, 614 (Lord Shaw); *Southern Centre of Theosophy Inc v South Australia* [1982] AC 706; 1 All ER 283, 287 (Lord Wilberforce).
[47] *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
[48] When land is 'lost to the sea' the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) are not triggered because no proposal to acquire under s 11 is necessary.
[49] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J). See the discussion of this in John R Corkill 'Ambulatory boundaries in New South Wales – real lines in the sand' (2013) 3 (2) *Property Law Review* 67 – 84, at 79-82.
[50] A copy of the first article, John R Corkill 'Claimed property right does not hold water' (2013) 87 *Australian Law Journal* 49-58 is appended to this submission. The second article, John R Corkill 'Ambulatory boundaries in New South Wales – real lines in the sand' (2013) 3 (2) *Property Law Review* 67 – 84, is the subject of a publication licence and cannot be supplied directly. It may be purchased for $40 from Reuters Thomson. See < http://sites.thomsonreuters.com.au/journals/2013/12/20/property-law-review-update-december-2013/ >

challenges which waste Councils' and the Department's time and money and which paralyse effective planning processes.

Thus as an adjunct to this submission I request that the Department review the submission requesting the Registrar General to refer a stated case to the NSW Supreme Court and further request that the Director General write to the Registrar General and to the appropriate NSW Cabinet members: the Minister for Finance and Services (includes Land Titles), the Minister for the Environment, and the Minister for Local Government, in support of the request.

6/ The reference to 'in good faith' when providing advice should be amended

The draft Circular includes the statement that 'Councils should be aware of the indemnity from liability afforded them by the EP&A Act if they provide advice in 'good faith'.' This appears to be an error since the only reference to 'in good faith' advice under the *Environmental Planning and Assessment Act 1979* (NSW), is s 145B Exemption from liability - contaminated land, a provision which appears not to relate to a draft Circular on coastal hazard notifications. If there is a relevant provision in the *EP & A Act 1979* (NSW) which relates to coastal hazards this should be specified.

Usually a reference to a Council obtaining an indemnity from legal liability, provided the council acts 'in good faith', refers to s 733 of the *Local Government Act 1993* (NSW) and where this relates to the provision of information or advice relating to coastal hazards, this refers in particular to s 7333 (3) of the *LGA 1993*.

It is my submission that it would be appropriate for the Circular to point out that when providing advice and information 'in good faith' in s 149 (2) or (5) planning certificates, councils cannot ignore relevant information available to it and sustain a claim to have acted 'in good faith'.[51]

Significantly, the issue of what constitutes action in good faith was considered carefully by the Federal Court of Australia in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) where the court considered that the term meant more than a state of mind or an absence of dishonesty and observed that there was authority in other decisions[52] for the notion that acting in good faith 'may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence.'[53]

The court considered that actions 'in good faith' required 'reasonable caution and diligence' and concluded 'it would be wrong to assume' that the use of the term in the relevant legislation operated to leave a council liable 'only in respect to dishonesty'.[54] Subsequently, the court held that 'the statutory concept of "good faith" with which the legislation in this case is concerned calls for more than honest ineptitude' and found that to act 'in good faith' councils are obliged to make a 'real attempt' to access relevant information.[55]

[51] *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1983] FCA 408; (1993) 116 ALR 460, at [34].

[52] *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1983] FCA 408; (1993) 116 ALR 460, at [28] the court cited *Siano v Helvering* (1936) 13 F Supp 776, 780; *Lucas v Dicker* (1880) 6 QBD 84, 88; *In re Dalton (A Bankrupt)* (1963) Ch 336, 354-5; *Rumsey v R* (1984 5 WWR 585, 592-3; *Wilde v Spratt* (1986) 13 FCR 284, 292; at [29] *Consul Development Pty Limited v DPC Estates Pty Limited* [1975] HCA 8; (1975) 132 CLR 373, 412-3.

[53] *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1983] FCA 408; (1993) 116 ALR 460, at [27] (Gummow, Hill and Drummond JJ).

[54] *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1983] FCA 408; (1993) 116 ALR 460 at [30]. The legislation under consideration was s 528A of the *Local Government Act 1919* (NSW) the predecessor provision to s 733 of the *Local Government Act 1993* (NSW).

[55] *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408; (1993) 116 ALR 460 at [34].

Hence it would be appropriate for the Circular to point out that to sustain a claim of acting 'in good faith' when preparing s 149 (2) or (5) planning certificates councils are obliged to make a 'real attempt' to access relevant information and a defence of 'honest ineptitude' will not suffice.

7/ The FAQ sheet accompanying the draft Circular is misleading and needs to be amended

The documentation on exhibition in relation to the proposed Planning Circular includes an *Update on coastal hazards and planning certificates - Frequently Asked Questions*, which includes on page 2 the question 'Why is the Government no longer recommending benchmarks for councils?'

Regrettably the answer provided is not accurate and could be construed as being misleading.

The answer states that the SLR planning benchmark was repealed 'after a review of the adequacy of the science behind them' by the Chief Scientist and Engineer, Professor Mary O'Kane and infers that her report justified the repeal of the benchmarks. This is not in fact what the report said at all.

The CSE Report did NOT provide any technical basis for the inference that the SLR planning benchmarks were doubtful, erroneous or unreliable, nor did the report find that the science behind them was in any way inadequate. The CSE Report concluded that the planning benchmarks were justifiable based on the available evidence, and said:

> The way the science has been used to date to determine benchmarks for sea level rise in NSW **is adequate**, in light of the evolving understanding of the complex issues surrounding future sea levels.[56] (emphasis added)

This omission of Professor O'Kane's important conclusion is thus a serious misrepresentation of the results of her report and appears to be a deliberate distortion to justify a different, perverse conclusion.

As the drafters of the Circular really ought to know, the real reasons behind the repeal of the sea level rise planning benchmarks were purely political, not scientific or technical and in my view it is improper of the Department of Planning and Infrastructure to perpetuate this misrepresentation of the science behind the SLR planning benchmark as being somehow 'inadequate', via its website.

Despite the planning benchmark having its original in a formal request from local government sector for State Government advice, some people in Government, or with influence within government, were opposed to the use of the SLR planning benchmark and so a political campaign was mounted to overturn them, which involved deliberately distorting what the CSE Report actually said. This distortion and the phoney campaign to undermine the credibility of the sea-level rise planning bench marks based on the purported uncertainty was thus overt political 'spin'.

It is my submission that the repetition of this misleading characterisation of Professor O'Kane's report as implying doubt in the adequacy of the science behind climate change, and the quantum of sea level rise projections as unreliable, has no place in the FAQ associated with the Planning Circular.

To correct this slight, I recommend a serious edit of the Answer provided, viz: in dot 1 – full stop after 'future sea level rise', and delete any reference to NSW CSE. In dot 2 delete 'The report noted'; and insert after '100 years' "and the IPCC 2013 Summary for Policy Makers reported at p 23, that there is increased confidence in projections of global mean sea level rise', then I would recommend that the word 'widely' be deleted.[57] In dot 3 I recommend that 'It found' be deleted.

[56] Mary O'Kane, *Assessment of the science behind the NSW Government's sea level rise planning benchmarks* (NSW Government, Chief Scientist and Engineer, 2012), at 6.

[57] The IPCC *Climate Change 2013 The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report (AR5) of the Intergovernmental Panel on Climate Change – Summary for Policymakers*

Rather than refer to the 2012 CSE Report disparagingly, it would be more appropriate in this 2014 *Update* (?) to refer to, and perhaps even reproduce, the summary of projected changes in global mean sea level provided by IPCC *Climate Change 2013 Summary for Policymakers* in Table SPM.2 at p 21, as shown below.

		2046 - 2065		2081 - 2100	
	Scenario	**Mean**	***Likely* range**	**Mean**	***Likely* range**
Global Mean Sea Level Rise (m)	RCP2.6	0.24	0.17 to 0.32	0.40	0.26 to 0.55
	RCP4.5	0.26	0.19 to 0.33	0.47	0.32 to 0.63
	RCP6.0	0.25	0.18 to 0.32	0.48	0.33 to 0.63
	RCP8.5	0.30	0.22 to 0.38	0.63	0.45 to 0.82

Then it would be appropriate to include the third dot point, as modified by deleting 'It found'.

A minor amendment is also needed

A minor amendment is also necessary to the third question, second dot point, on page 1 which refers to 'sea level rise forecasts up to 100 years from now'. This statement implies forecasts to 2114. Though some councils *may* have been using forecasts up to that date, I sincerely doubt that because forecasts up to 2114 are not in the published literature. Thus I suspect this statement is not correct. IPCCs projections for 'the latter part of the 21st century' – a term correctly used on page 2 – extend to 2100, and this date ought to be used. I recommend that the words '100 years from now' be deleted and the date '2100' be inserted instead.

Thank you for considering this submission.

I would appreciate being sent an acknowledgment of the receipt of this submission and receiving further advice in due course, as to how the points made in this submission have been taken into account in finalising the Circular and associated documents.

Yours sincerely,

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(2013) provided at page 21, a 'likely range' of projections for four scenarios in two time bands (2046-2065) and (2081-2100). The lowest projections of global mean sea level rise for the latter part of the 21st century (2081-2100), 0.26 – 0.55 m (mean 0.40m), refer to one mitigation scenario which leads to a low forcing level. The highest projections for this same period 0.45-0.82m (mean 0.63m) refer to a scenario with very high greenhouse gas emissions. (See the explanation of the RCP scenarios on p 27.) If the basis of the claim that "projections vary widely" is a comparison of the lowest projection of the mitigation scenario with the highest projection of the high emissions scenario this is not appropriate since the two sets of projections are based on entirely different scenarios reflecting outcomes at opposite ends of the mitigation policy response spectrum. The use of the term 'widely' is imprecise and is pejorative in that it is not used in the IPCC's discussion of these matters and again unjustly infers a level of uncertainty not reported by IPCC or justified by its most recent report.