2021

Will private property rights 'trump' public rights to use coastal land, under climate change conditions?

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Tanberg, *The Age* (Melbourne) 20 February 2014, 3.

Will private property rights 'trump' public rights to use coastal land under climate change conditions?

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Dissertation submitted for the award of
Doctor of Philosophy (PhD) in Law.

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Version 5.25
Post-examination Version, incorporating revisions required by Examiners
As approved by Head of Postgraduate Studies
[22 December 2021]

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I acknowledge that I have read and understood the University's rules, requirements, procedures and policy relating to my higher degree research award and to my thesis.

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(signed) John Robert Corkill OAM

(date) 22nd December 2021

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Abstract

Many coastal land titles in New South Wales are already at risk from shoreline recession and more will become affected, as local impacts of global climate change, specifically higher sea levels and more extreme weather events, produce more erosion and inundation of coastal lands. This thesis explores the claimed private property 'right' to defend against the sea to protect private land from coastal erosion, and the risks this poses to the public rights to use the foreshore and coastal waters for bathing, surfing or navigation, in the foreseeable future, as coastal lands experience 'coastal squeeze', due to rising sea levels and fixed seawalls. This term from biological and tourism contexts, is applied to these public rights and likely impacts on future social, economic and ecological uses of coastal lands as they are squeezed, are discussed and illustrated using original diagrams. The problem is thus defined: claimed private property rights conflict with existing public rights, competing for priority use of the foreshore. As a step towards ascertaining whose rights would prevail in future conflicts, the thesis examines these competing rights and investigates which rights are dominant in current law. Guidance is sought from the courts and NSW legislature as arbiters of similar prior conflicts. Senior appeal court decisions and statutory provisions in five fields of law applicable to coastal lands in this jurisdiction are reviewed, and their relative status under current law is established. However it is posited that a future government could adopt a policy to reverse the status quo, but to do so would need to obtain the legislature's support for enabling legislation. Hence to estimate possible future events a diverse range of potential responses by a future government to emerging conflicts over competing rights, are identified. A suite of philosophical views which may influence future government policy on whose rights *should* prevail, are canvassed. Criteria, on ethical land management and successful public policy, drawn from relevant literature, are used to assess the merits of these potential responses. Using these assessments and three political criteria, the responses most likely to be pursued are identified. With a credible forecast of the likely policy environment of the future, the question, 'will private property rights trump public rights to use coastal lands under climate change conditions?' is answered in the negative.

[=379 words]

Acknowledgements

Completing this thesis was made possible by the love and support of Tigerlily and Margaret, and my brothers and sisters. I gratefully acknowledge the guidance provided by my supervisors at UoW Greg Rose, Clive Schofield and at SCU Nikki Rogers, Greta Bird, Jen Nielsen, Bee Chen Goh and Bill Boyd. I also wish to thank Rodger Tomlinson, Bruce Thom, Jim Gallagher, and Peter Helman for their encouragement. I greatly appreciate the aid and assistance generously provided by all of you.

Preface

The origins of this thesis lie in the early 1990s when I attended a field trip to Byron Bay, as a non-government member of the Coastal Committee advising the NSW Minister for Planning. As part of a tour of sites of concern, council staff invited us to walk along Belongil Beach, to see rusting wrecked car bodies strewn along the toe of the dune, by adjoining landowners, in a desperate attempt to control erosion of the beach. As we walked the white water rushed up, narrowing the area between the wave and the wrecks where we could keep our shoes dry, interrupting our musings on whether the car bodies were a good idea, and should remain in place. When the committee reconvened we agreed to advise Council that the wrecks were dangerous to beach-using residents and tourists and should be removed by whomever had placed them there. However with the first IPCC report recently published,[1] and more coastal erosion forecast, the discussion ranged widely, beyond the local example, and a suite of questions were raised by members, around which there were no clear or obvious answers.

- What 'rights' if any do landowners have to defend their land from coastal erosion?
- Do boundaries 'fixed' by original survey persist below tidal waters?
- If land is lost to the sea, is compensation payable to the owner, as in the US? By whom?
- Do State governments or local councils have a 'duty' to defend land against the sea?
- Are governments or councils legally liable if they do not defend land against the sea?
- What means of defending land from coastal erosion would be effective and appropriate?

At the next committee meeting it was reported that the car bodies had been removed, but answers to the questions raised in our discussion were never reported, and events moved on. However uncertainty about the answers to these questions persisted, despite 'coastal' enquiries.[2] This led to the federal Minister being advised in 2011 that 'the effect of rising sea levels on real property and local government liability' were climate change impact research priorities.[3]

I responded to that advice by deciding to prepare this thesis: to answer those decades-old questions about the legal effects of climate change impacts on coastal land in New South Wales.

1 Intergovernmental Panel on Climate Change (IPCC), *Climate Change: The IPCC Scientific Assessment.* Report prepared for IPCC by Working Group 1 (Cambridge University Press, 1990).
2 See Resource Assessment Commission (RAC) *Coastal Zone Inquiry – Final Report*, (AGPS, 1993), the reviews of beach management in NSW reported in Coastal Council NSW, *Annual Report* 1998-99, 78-9; the report of Standing Committee on Climate Change, Water, Environment and the Arts, House of Representatives, *Managing our coastal zone in a changing climate* (Commonwealth Parliament, 2009).
3 Commonwealth Coasts and Climate Change Council, Report to Minister Combet (2011), s3.IV Liability.

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"If by your art, my dearest father, you have
Put the wild waters in this roar, allay them.
The sky, it seems, would pour down stinking pitch
But that the sea, mounting to the welkin's cheek[4],
Dashes out the fire..."

Miranda, daughter of Prospero.
William Shakespeare, The Tempest (1623) Act I, Scene ii,

Chapter I - Conflict over competing rights

Introduction to the thesis

At the core of this thesis is my recognition that the claimed private property right to defend against the sea, conflicts with – and poses a direct threat to - public rights of access to the foreshore and coastal waters, due to 'coastal squeeze', a phenomenon explained below. My aim in this dissertation is to apply my understanding of the natural processes at work on coastal lands and factor in the effects of global climate change, to anticipate local future conditions for coastal management. Further, I want to explore the merits of the competing private and public 'rights', consider the utility of prior approaches to resolving future conflicts, and to develop possible government policy responses to manage these impacts and these conflicts.

In the first chapter I introduce my primary research question, ground my enquiry into 'property' in the jurisdiction of New South Wales, and explain key terms and phrases employed. I illustrate the problem of competing rights, outline the issues involved, and identify crucial contextual elements, before describing the approach and methods used in seeking to answer this question.

In Chapter II I canvass the literature on property, real property and private property rights, and consider other views on the nature and extent of public property and public rights. This allows me to identify where the ambit of private property rights claimed by coastal landowners intersects, and potentially conflicts, with public rights to access the foreshore and coastal waters.

Seeking guidance on how my central research question might be answered, I turn to earlier decisions of society's arbiters of conflicts, and note the relative weight attributed to competing private and public rights by the courts in Chapter III and the NSW legislature in Chapter IV.

Further, in Chapter V, I consider other current philosophical approaches relevant to the topic which might influence or determine how this question is answered in the future. Then, from the literature reviewed, I derive criteria for assessing possible responses.

[4] welkin: Archaic: the sky; vault of heaven. Delbridge et al (eds) above n 4, 1982.

Recognising that a future NSW government policy would be central to any answer to the primary research question, in Chapter VI a range of positions as potential government responses to increasing conflict between competing rights are considered. In Chapter VI a suite of policy initiatives which might address, resolve or avoid entirely, future conflicts are explored.

Using criteria drawn from the literature I evaluate the merits of these potential responses in Chapter VII. With the results of this analysis I consider factors influencing their 'likelihood' in Chapter VIII and generate an informed answer to the primary research question.

Part A – The problem of conflicting rights

1. Introduction to Chapter One

In Part A of this chapter I introduce my topic, identify the problem being addressed – conflict over competing rights - and outline how I came to adopt this as the focus of my research. I explain the key terms which constitute the primary research question, outline the nature and scope of claimed private property rights, and public rights of access to the foreshore and coastal waters. I explain my use of 'trump' and how adopting this term informed my research method. I also clarify what likely changes to future global climate conditions are pertinent to my topic, and canvass the extent of their possible impacts on coastal environments and settlements in New South Wales. And, using my original figures I illustrate the process of 'coastal squeeze' which, under certain conditions, constitutes a real threat to the survival of longstanding public rights.

In Part B, I provide a rationale for my research and explain why understanding the effect of rising sea levels on real property and its boundaries is both important and pressing. I describe state of the literature as limited, 'confused' or silent on key these issues. I report the problem created by rising sea levels and greater coastal erosion, due to changes in global climate, which confronts coastal landowners and managers, and the general public. I note that the increasing rate of sea level rise and caution that adverse impacts of higher, and stormier, seas may be under-estimated. I then outline why my research is significant and contributes to the 'storehouse of knowledge'.

In Part C I outline my objectives for my research and state the research perspectives adopted in the stages of my enquiry. In Part D, I introduce my methodology and research methods, and describe the methodology adopted in undertaking my research, in four designated stages.

1.1 Introducing the primary research question

The primary research question which forms the topic of my dissertation is: Will private property rights 'trump' public rights to use coastal lands, under climate change conditions?

This question is comprised of a series of phrases which refer to other larger concepts, wherein these phrases indicate key terms which have specific, and perhaps layered, meanings. Hence, as preliminary steps in introducing my topic I decode these terms, explain the ambit of their meaning, and note their relevance to the primary research question, in sections which follow. However before looking closely at the component parts of the question it is appropriate to make some general introductory observations on the scope and orientation of the question as a whole.

1.2 Introductory observations

Initially it is apparent that in its formulation, the question recognises that private property rights and public rights constitute juxtaposed, and hence competing, interests in coastal land, and suggests that in the future, one party's rights may be found superior, negating the other's claims. Hence its focus is the likely relationship between these conflicting 'rights' to use coastal lands and waters, in the future, under climate conditions affected by anthropogenic global warming.

Vital to understanding my approach to this question are several broad, if obvious, observations. At face value, this unusual rhetorical question raises uncertainty and invites speculation. In popular culture such a question might more commonly be found in contemporary sports commentary: as in 'Will the Cats defeat the Tigers in the grand final,[5] if the rain continues?' Framed like a sporting contest, the two sets of rights – private property rights and public rights – are juxtaposed as opposing teams competing for dominance. They might be seen as rivals, or may be portrayed as evenly matched. But are they? What do we know about their prior form?

Certainly the idea that there is a struggle between opposing camps looming in the near future is pertinent, and so too is the implication that the weather, or the climate, will create a challenging context for that struggle. But the parties with competing 'rights' to use coastal land are not contesting annual sporting titles, but the long-term ownership of land titles. So though apt to an extent, the sports analogy can be taken only so far before it appears contrived. But it raises an important point: can the future be predicted at the present time with any confidence?

[5] The AFL grand final on 24 October 2020 pitted Geelong FC, the Cats, against Richmond FC, the Tigers. See < https://www.afl.com.au/news/519503/afl-s-grandest-prize-beckons-for-tigers-cats-in-historic-decider >.

Hence the question is hypothetical. It seeks an answer now, about the relationship between private property rights and public rights at some unspecified future time. However, rising sea levels and conflicts over 'rights' to use coastal land, are not hypothetical, but real and imminent. Nonetheless, this future orientation poses methodological challenges. How can one confidently, meaningfully, predict the future? I explain my approach to this conundrum below.

Implied in this question is the idea that 'the public' have 'rights'. But who are 'the public'? And what 'rights' do they have? To answer these and other questions, such as 'what private property rights?' it is necessary to ground the question in a jurisdiction where property and rights exist in law, as a matter of practice. Based on my location and experience, I have chosen the State of New South Wales.[6] By locating my enquiry in this State, I aim to shift the focus of the primary research question from 'theoretical' rights in a generalized context and refocus on 'actual' rights related to land in this jurisdiction, available under its legal framework. Hence 'the public' are principally New South Wales residents but includes interstate and international visitors to this State. In this thesis 'a member of the public' means, generally speaking, anyone in a public place in only a personal capacity: not someone performing a commercial or official role.

One further important observation is that the primary research question impliedly accepts the Intergovernmental Panel on Climate Change's (IPCC) conclusion that climate change is real.[7] Also accepted are forecasts of the impacts these changes will have on south-eastern Australia.[8]

This thesis does not aim to contest these scientific conclusions, cited below, but adopts them as starting points from which to explore their likely future implications, in law and public policy.

2. Understanding key terms and phrases of the question

I next explain the key terms and phrases which constitute the primary research question.

2.1 Nature and scope of claimed private property rights

In this section I provide an overview of private property rights relevant to coastal landowners, and identify the 'rights' claimed by some landowners, which are contested.

[6] Rather than include the geographic limitation of 'in New South Wales' in the thesis title as a starting point, I have preferred to make it clear that a focus on a jurisdiction is methodologically necessary in order to undertake an informed discussion of current applicable law, and rights available under that law.
[7] Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report* (Cambridge UP, 2013) 'AR5 Summary for Policymakers', 2.
[8] See A Barrie Pittock, *Climate Change: The Science, Impacts and Solutions* (CSIRO, 2nd ed, 2009), 112.

Private property 'rights' are, generally speaking, the social conventions by which owners control and use for their benefit, objects, ideas and other things.[9] In this thesis the 'private property' interest[10] under consideration is 'real property': land and buildings in coastal New South Wales. Hence 'private property rights' refers to the 'rights'[11] exercisable by the registered proprietor of the land title, ie by the landowner, over the 'real property' they own. Well known and uncontested private property 'rights', and their limits, are discussed in the next chapter.[12]

However there are also private property rights claimed by some landowners, which if exercised, would threaten the public's rights to access the foreshore and coastal waters, in the future.

In particular, these claims are that landowners have private property rights that:
a) allows them to build seawalls or other structures to defend against the sea;
b) obliges the government to 'protect' them from the sea, with a duty to build defences;
c) entitles them to be paid compensation for land lost to the sea;
d) are dominant, and paramount considerations "which legislatures cannot ignore".[13]

The basis for these claimed rights is scrutinized in Chapter II, since their existence is contested. Further, whether and how other, uncontested private property rights, operate in the area focused on by this thesis – the foreshore – is also examined.

2.2 What 'trump' means in this thesis

In this dissertation, 'trump' means to win by exercising a superior value, or to be dominant. The notion of 'trumps' in card games[14] has been translated into a legal context by Dworkin, as a

[9] The term 'things' is enormously broad and includes tangible objects, intangible phenomena and abstract ideas. The scope of the 'thing' owned, and the subject of a private property interest, is conceptually unbounded. See the discussion of this in Chapter II.
[10] The term 'private property' applies more broadly than to land.
[11] Some writers have described the private property interests in a thing as more than simply 'rights', and noted other social relationships arising from 'ownership'. See section 4 Chapter II.
[12] While these rights apply to the private ownership of most things, some additional rights are only available to land-owners in particular geographic situations. See section 5 Chapter II.
[13] The phrase was used in Karen Coleman, 'Conveyancing and property: Coastal Protection and Climate Change' (2010) 84 *Australian Law Journal* 421. This view is further discussed in section 5 Chapter II.
[14] In the card games of Bridge, Euchre and Five Hundred, when one suits is nominated as 'trumps' the Jack of that suit becomes the Right Bower, the second-highest card after the Joker, and the Jack of the suit of the same colour becomes the Left Bower, the next highest card and nominally a 'trump', for that hand. The lowest card in the suit nominated as trumps overplays any higher cards in another suit, during the tricks played from that hand. By using a card of the suit nominated as trumps to overplay a higher card of another suit, a player is said to 'trump' the other card and so wins the trick. Hence originally a noun, it is often used as a verb. See Delbridge, et al (eds), above n 4, 1874.

metaphor for the superiority of rights or principles over social goals or policies,[15] and has been employed by other writers, to connote a clear and 'uncontestable' win over other claims.[16]

Because this term aptly describes the posture of some private property rights advocates, who seek to exercise claimed private property rights as paramount considerations in government decision-making, I considered its use to frame the question was relevant to the claims being examined. The idea of trumps also suggested a key step in my research, which I describe below.

2.3 Nature and extent of public rights of access

The phrase 'public rights to use coastal land' refers to three explicit public rights. The first two, the rights to navigate and to fish, are rights under English common law from before time immemorial,[17] recognized by New South Wales courts[18] and the third is a public right of pedestrian access to and along the foreshore recognized by modern statute.[19]

Public rights

The right to access and navigate on tidal waters is an ancient public right available to any member of the public under English common law,[20] recognised by NSW courts.[21] Because it is a public right on tidal waters,[22] also known as 'coastal waters'[23] it also applies to the foreshore.[24] See Figure 1 below. The public right of navigation includes subsidiary rights to anchor, and to land a boat on the foreshore.[25] Though now regulated, it is posited that it has not been extinguished,[26] and continues today, subject to compliance with the applicable regulations.[27]

[15] See Ronald Dworkin: *Taking Rights Seriously* (1978) and Dworkin 'A Trump over Utility' (1981) in MDA Freeman, (ed) *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008), 659.
[16] Marett Leiboff and Mark Thomas *Legal Theories in principle* (Thomson Lawbook, 2004), 130-132.
[17] *Blundell v Catterall* (1821) 5 B & Ald 268, 305; 106 ER 1190, 1203 (Bayley J).
[18] That English law, including common law rights, came to the colony of New South Wales during colonisation was recognised by the courts. See *Cooper v Stuart* (1889) 14 App Cases 286, 291 (Lord Watson). See also Catriona Cook et al, *Laying Down the Law*, (Lexis, 7th ed, 2009), 35.
[19] Section 3 (d) *Coastal Protection Act 1979* (NSW). One object of the Act is 'to promote pedestrian access to the coastal region and to recognise the public's right to access.'
[20] See *Blundell v Catterall* (1821) 5 B & Ald 268, 294; 106 ER 1190, 1199 (Holroyd J).
[21] *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSW LR 391, 393 (Powell J).
[22] Tidal waters includes the sea, rivers and creeks influenced by the tide, and all 'arms of the sea'.
[23] 'Coastal waters' refers to tidal waters within three nautical miles (3 nm) seaward of the base-line of the low water mark, and is defined under Commonwealth *Coastal Waters (State Title) Act 1979* (Cth).
[24] The foreshore is defined as the land between high water and low water marks, intermittently covered by water during a natural tidal cycle. See *Re Hull and Selby Railway Co* (1839) 5 M&W 327, 332; 151 ER 139. See also *Mellor v Walmesley* [1905] 2 Ch 164, 177 (Romer J) where it is made explicit that in law 'seashore' has the same meaning as 'foreshore'. This area is sometimes referred to as the 'wet beach'.
[25] *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSW LR 391, 393 (Powell J)
[26] See Bernard Walrut, 'The public rights to use the sea and rivers' (2003) 20(6) *Environmental and Planning Law Journal* 423-444. I discuss Walrut's article and the survival of the public right of navigation in Section 8 of Chapter II below.
[27] *Marine Safety (General) Regulation 2009* (NSW) made under the *Marine Safety Act 1998* (NSW).

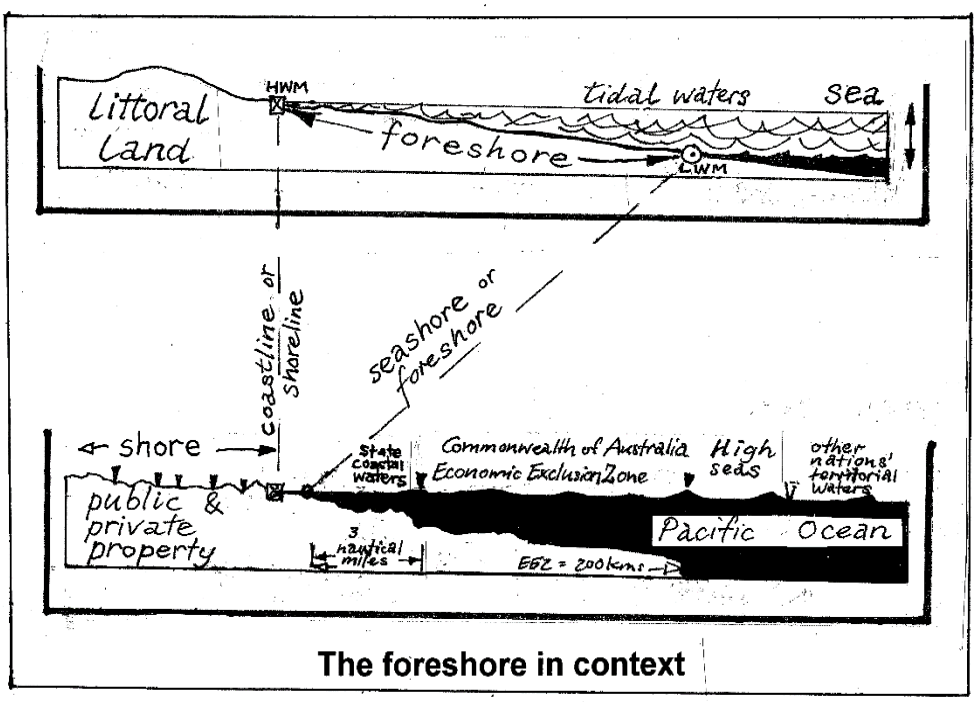


Figure 1 – The foreshore of New South Wales in context

The public right to take fish from tidal waters is also a longstanding public right, which includes the right to enter the foreshore for the purpose of fishing.[28] In New South Wales this ancient public right has also been affected by modern legislation[29] and regulation.[30] In some places the right to fish has been suspended permanently,[31] but it continues to apply broadly elsewhere.[32]

The third public right - of access to the foreshore - is a product of legislation[33] which codified the prior common law right access to, and along, the foreshore into statute law.[34] Since European settlement, diverse public uses of the foreshore,[35] and a suite of wider public interests in the beach, and other inter-tidal areas[36] have developed. These will be discussed in Chapter II.

[28] *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190, 279, 284-5; 1194-6 (Best J).
[29] See *Fisheries Management Act 1994* (NSW).
[30] See *Marine Safety Regulation 2016* (NSW).
[31] Due to 'closures' of certain defined areas or the creation of 'no-take' zones under the *Fisheries Management Act 1994* (NSW).
[32] The survival of the public right to fish in NSW was discussed Warwick Gullett, 'Up the creek and out at sea: the resurfacing of the public right to fish' (2006) 146 *Maritime Studies* 1-11. I consider Gullett's article and the impact of legislation on the public right to fish in Section 8 of Chapter II below.
[33] See the statement of Objects inserted into the *Coastal Protection Act 1979* (NSW) in 2002.
[34] On a steep coastline the foreshore may be short and rocky, but on a gently inclined sandy beach, the foreshore may be many metres wide.
[35] Beyond traditional uses of launching a boat, or fishing, public use of the foreshore now includes a suite of recreational activities, some, like beach volleyball, are more active than others, beachcombing.
[36] Public interests in beaches and other inter-tidal areas includes their scenic value, passive recreational value, and ecological functions as habitat for species of conservation or economic significance.

Coastal lands

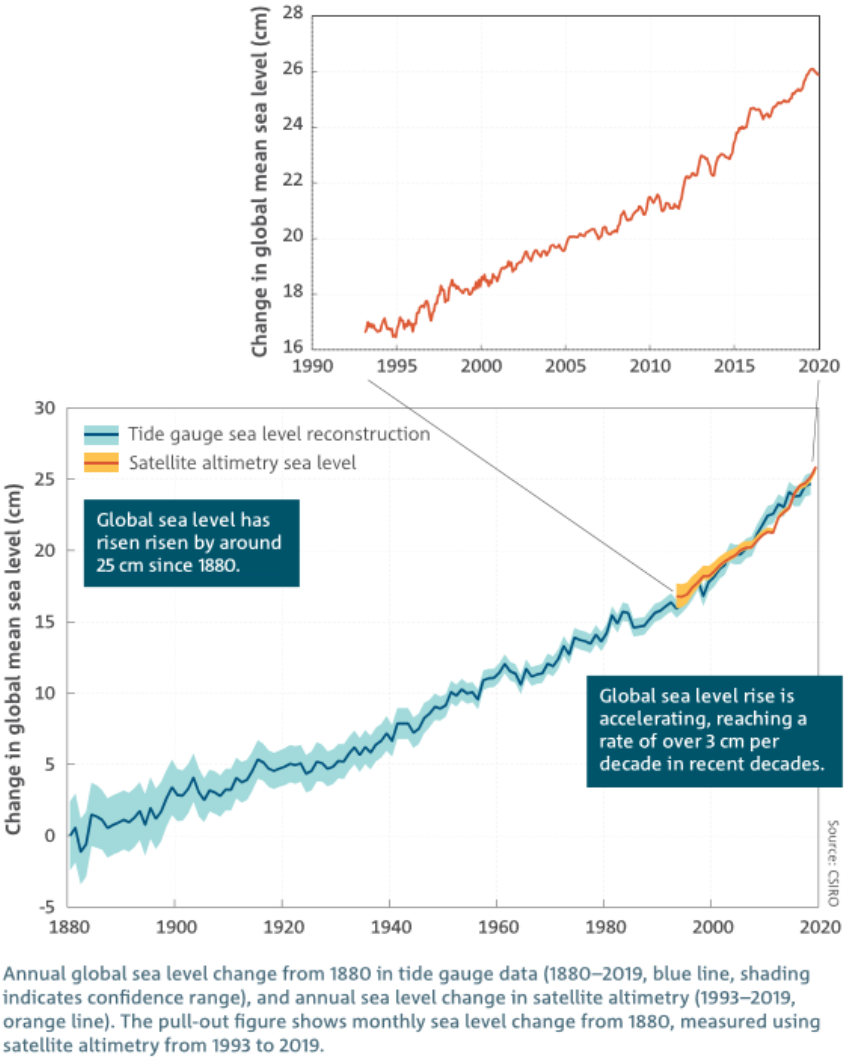
Under English common law public rights applied narrowly, to the foreshore and coastal waters, even if they were privately owned.[37] However in many places in New South Wales, where coastal lands were reserved from sale,[38] they remain publicly owned and public rights to enter and use them also apply generally to them.[39] Thus, when I refer to 'coastal lands', I include the foreshore, seabed and sub-soil of the coastal waters, and adjacent land above the high-water mark (HWM), in public ownership. Where I include privately-owned land adjoining the foreshore in a broader reference to coastal lands, this is made clear.

In this thesis I explore the public's capacity to enjoy these rights to use coastal land, if land-owners seek to exercise private property rights over the beach and build seawalls to protect their land, in response to climate change impacts. Seawalls' adverse environmental impacts, which threaten sandy beaches, where many public rights and interests are focused, [40] are explained in Section 3.3 below.

2.4 Likely 'climate change conditions' in the future?

The phrase 'climate change conditions' refers to changes in global climate due to anthropogenic global warming, described by the Intergovernmental Panel on Climate Change (IPCC),[41] of which increased storminess and higher relative sea levels[42] are most relevant to this thesis. Researchers posit that additions to volume and thermal expansion of oceanic waters are key drivers of higher sea levels,[43] and note that sea levels are already rising.[44] Recent data indicate that in south-east Australia, the rate of sea-level rise has almost doubled (see Figure 2).[45]

[37] SA Moore, *A History of the Foreshore and the Law relating thereto* (Stevens & Haynes, 1888), 653-5.
[38] under legislation which preceded the *Crown Lands Act 1989* (NSW).
[39] Albeit subject to any governing Plan of Management made under the *Crown Lands Act 1989* (NSW), the *Crown Land Management Act 2016* (NSW) or the *National Parks and Wildlife Act 1974* (NSW).
[40] See BG Thom, 'Beach protection in NSW: new measures to secure the environment and amenity of NSW beaches (2003) 20(5) *Environmental and Planning Law Journal* 325, 331.
[41] IPCC, *Climate Change 2013*, above n 7.
[42] Relative sea-level can be affected by a range of factors include changes in land elevation due to isostatic responses of geographic uplift post-deglaciation, or deformation of basins following inundation, volcanic and seismic activity, tectonic movements and increases in ocean volume due to deglaciation inputs and thermal expansion of warmer oceanic waters. See Kurt Lambeck et al, 'Paleoenvironmental Records, Geophysical Modeling, and Reconstruction of Sea-Level Trends and Variability on Centennial and Longer Timescales' in John Church et al (eds) *Understanding Sea-Level rise and Variability* (Blackwell, 2010) 62, 66-7, 84-88.
[43] See Gary T Mitchum, et al, 'Modern Sea-Level-Change Estimates' in Church et al (eds) above n 42, 122.
[44] Global sea level has risen about 20 cms since 1870 and about 17 cms in Australia between 1842 and 2002 according to John A Church et al 'Sea-level rise' in Peter W Newton (ed) *Transitions - Pathways Towards Sustainable Urban Development in Australia* (CSIRO Springer, 2008) at 192. See also National Tidal Centre / Bureau of Meteorology *The Australian Baseline Sea-level Monitoring Project, Annual Sea-level Data Summary Report, July 2007 – June 2008* (Australian Government, 2008) cited in



Annual global sea level change from 1880 in tide gauge data (1880–2019, blue line, shading indicates confidence range), and annual sea level change in satellite altimetry (1993–2019, orange line). The pull-out figure shows monthly sea level change from 1880, measured using satellite altimetry from 1993 to 2019.

Figure 2 – Changes in global mean sea level (from BOM CSIRO, 2020)

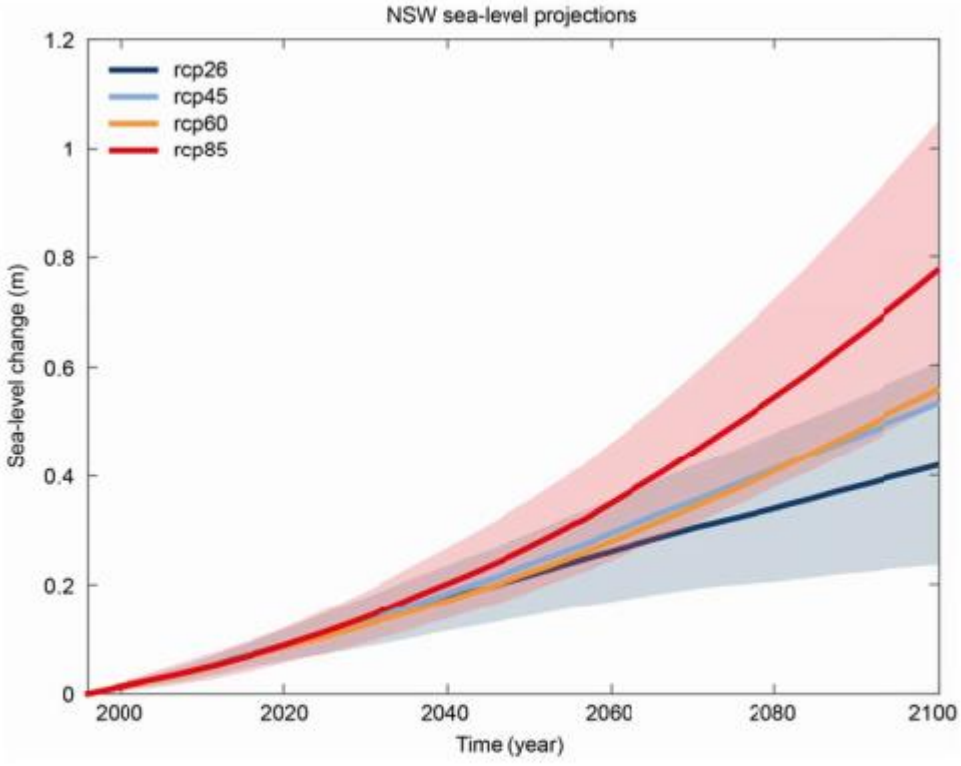
There are a range of predictions for the height of future sea level.[46] It is clear that mean sea level will rise substantially over the next hundred years,[47] and will continue to rise for centuries.[48]

Australian Government, *Climate Change Risks to Australia's Coast – A first pass national assessment* (Department of Climate Change, 2009), 25, n 20.

[45] The rate of sea level rise has risen from 1.7 mm per year in the previous century, to 3.2 mm per year, over the last twenty years. See Bureau of Meteorology / CSIRO *State of the Climate Report (2020)* Oceans, Sea level, 13. See also the findings in H-O Pörtner et al (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC, 2019) 10, par A.3.1., that the rate of global mean sea level rise in the period 2006–2015 has been two and a half times the rate for 1901–1990, a rate of rise stated with high confidence and thought to be 'unprecedented over the last century'.

[46] IPCC *Climate Change 2013:* above n 7, 21, predicted a rise in sea level of 26 - 82 cms by 2100. It noted that under higher emissions scenario RCP8.5 (CO_2 700 – 1500 ppm), projected rise in sea level would increase up to 3m over pre-industrial levels, 26. Will Steffen *Climate Change 2009: faster change and more serious risks* (Australian Government, 2009) reported that a rise of up to 1.4m by 2100 had been projected by Stefan Rahmstorf, et al 2007. Other authors postulate greater increases depending on the rate and extent of ice melt in major ice sheets: eg E Rignot argued that increases could be up to 3m and J Hansen estimated that increases could be up to 5m by 2100, in Pittock, above n 8, 88.

A recent projection of future sea level along the NSW coast[49] using the range of IPCC future emissions scenarios is shown in Figure 3 below.



Sea Level Rise Projections Relative to the Coast, Averaged Along the New South Wales Coast, from 1996 to 2100 (Relative to 1986-2005 Mean) for each RCP Scenario

Note: The central values are given for each scenario and the *likely* range (66% confidence limits) given for the unmitigated greenhouse gas emission scenario (RCP8.5) and the strong mitigation scenario (RCP2.6). For the two intermediate scenarios (RCP4.5 and RCP6.0) only the central values are shown (for clarity).

Figure 3 – Sea Level Rise Projections (Figure 11 from Glamore et al (2016)

IPCC's forecasts of greater storminess indicate more storm activity, longer, more intense storms and an increase in the frequency of 'extreme events'[50], with research suggesting 1 in 100 year storm events, may reoccur at intervals of 40 years, or sooner.[51] These forecasts indicate many areas of land along the NSW coast will likely undergo significant erosion and increasingly frequent inundation by tidal waters.[52] Other scientists posit that, due to higher sea levels and

[47] J Church and N White 'A 20th Century acceleration in global sea-level rise' *Geophysical Research Letters* (2006) 33:L01602 cited in Australian Government, above n 44, 25, fn 19.
[48] See IPCC *Climate Change 2013*, above n 7, 26. See also Lambeck et al, above 42 x, 62.
[49]: WC Glamore, PF Rahman, RJ Cox, JA Church and DP Monselesan, *Sea Level Rise Science and Synthesis for NSW, NSW Office of Environment and Heritage's Coastal Processes and Responses Node - Technical Report* (NSW Government, 2016) p 20.
[50] See IPCC *Climate Change 2013*, above n 7, at 21.
[51] John A Church, et al, 'Sea-level rise around the Australian coastline and the changing frequency of extreme sea-level events' (2006) 55 *Australian Meteorological Magazine* 253, 258. More recently the IPCC *Special Report on the Ocean and Cryosphere*, above n 45, 20 par B.3, reported that extreme sea-levels of 1 in 100 year events 'are projected to occur frequently (at least once per year) … by 2050.
[52] Church, et al, above n 44, 191.

greater coastal erosion, in some places a trend of shoreline recession will become apparent.[53]

These then are the climate change conditions of the future being contemplated in this thesis. This concludes my introduction of key terms. I next explain the problem being addressed.

3. Identifying the problem

In this next section I identify the problem of conflicting rights by describing the factors which, in combination, threaten the survival of the public right of access to and along the foreshore.

3.1 Rising seas mean a receding shoreline

The higher sea levels and increased storminess forecast by the IPCC, are likely to create more frequent severe erosion events,[54] and increase the incidence and rate of shoreline recession,[55] the long term trend of landward movement of the shoreline, defined by the line of Mean High Water (ie MHWM), due to rising sea levels and repeated inundation and erosion.[56] It primarily affects low elevation land constituted of 'unconsolidated sediments', where the real property most at risk from its impacts are residential buildings constructed on erodible sand dunes.[57]

The impact of shoreline recession to date has been masked in many places by the cushioning effect of the strip of coastal lands reserved from sale and dedicated for public purposes. The dunes and beach system within these coastal Reserves have borne the brunt of the landward recession of the shoreline, such that in many places, the extent of the dunes have been seriously diminished and many Reserves are now a fraction of their original width of 100 feet (30.4m).[58]

This masking of the trend of shoreline recession will end however, when the land in a coastal Reserve is wholly eroded away by the sea. Elsewhere, in places where there were no coastal lands reserved from sale, these impacts are already being experienced.[59]

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[53] Roshanka Ranasinghe, David Callaghan and Marcel Stive, 'Estimating coastal recession due to sea level rise: beyond the Bruun rule' (2012) 110 *Climatic Change* 561-574.
[54] See Pittock above n 8, 108-114. See also Roshanka Ranasinghe and Marcel Stive 'Rising seas and retreating coastlines' (2009) 97 *Climate Change* 465-468.
[55] ECF Bird 'Present and Future Sea Level: The Effects of Predicted Global Changes' in Doeke Eisma *Climate Change Impact on Coastal Habitation* (Lewis Publishers, 1995), 36; Andrew D Short and Colin D Woodroffe *The Coast of Australia* (Cambridge UP, 2009), 273; Australian Government, above n 44, 35, 69.
[56] Shoreline recession is cited as a coastal hazard in NSW Government, *Coastline Management Manual* (1990) Appendix C3.
[57] See Australian Government, above n 44, 75 – 79, 34.
[58] At Woolli on the Clarence coast, the width of the coastal reserve has been reduced from 100 feet (~30m) at time of original survey, to less than 2 metres in 2018.
[59] For example at Wamberal, and Collaroy, on Sydney's northern beaches, where episodes of beach erosion have undermined beach-side houses. See Carrie Fellner, 'These homes should never have been

a) A zone of instability will move landward

One likely result of increased shoreline recession is that more coastal residences, especially those situated on remnant sand dunes, will be affected by the advance of a zone of instability, which could compromise or destroy building foundations.[60] Located immediately landward of the coastal erosion escarpment, land in this zone is prone to slumping. (See Figure 4 below.)

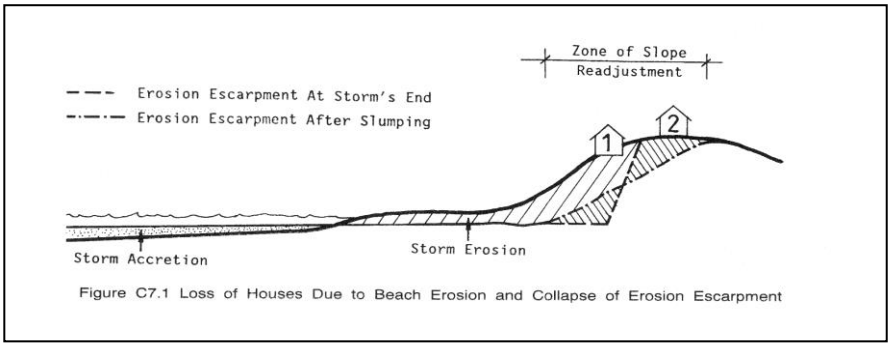


Figure 4 – the zone of instability Figure C7.1 from NSW Government, CMM

Residences affected by this hazard are likely to become unsafe for continued occupation. Hence in some places, development consent requires a 20m set back from the erosion escarpment.[61]

b) The ambulatory boundary of MHWM will move with the shoreline

As shoreline recession progresses landowners will observe the land seaward of their property boundary erode, and eventually be lost to the sea. Then the tidal waters will begin to encroach on and erode their land as their original surveyed boundary, becomes more frequently inundated on the high tide. When this occurs the ambulatory boundary[62] formed by the line of mean high water will move with the shoreline and the MHWM will replace the original boundary.[63]

As sea-level rises and shorelines recede, it is likely that, during storms, erosion and inundation will damage or destroy infrastructure, utility services, and both public and private land.[64] These foreseeable progressive impacts on coastal land are shown in the Figures 5.1 – 5.4 below.

built', *Sydney Morning Herald,* (Sydney), 18 July 2020, at < https://www.smh.com.au/national/nsw/those-homes-should-never-have-been-built-the-40-year-saga-behind-wamberal-beach-erosion-20200718-p55dao.html >.

[60] NSW Government, *CMM,* above n 56, C-5 refers to a 'zone of slope readjustment' in which buildings are at hazard of collapse (see Figure C7.1).

[61] See for example Byron Shire Council's *Development Control Plan – Part J Coastal Erosion Lands* – (adopted August 2018) section J2.1, prescriptive measure 1, page J4.

[62] The term 'ambulatory' means 'capable of walking': see Delbridge, et al, above n 4, 53.

[63] See the discussion of the primacy of the tidal boundary in John R Corkill, 'Ambulatory boundaries in New South Wales – real lines in the sand' (2013) 3 (2) *Property Law Review*, 67-84.

[64] Australian Government, above n 44, 35; A Barrie Pittock, above n 8, 108-114; John Sheehan, 'Destroying Coastal Land Values' (2009*) Australia and New Zealand Property Journal* 257-262; See also Roshanka Ranasinghe and Marcel Stive 'Rising seas and retreating coastlines' (2009) 97 *Climate Change* 465-468.

Figure 5.1 Coastline at time of first survey

- position of MHWM at time of 1st survey
- Crown foreshore = MHWM to low water mark
- Crown reserve = MHWM + 100 feet (~30.48m)
- property boundary defined at time of survey

- Lot 'X' = land title registered under
  - Real Property Act 1900 (NSW)

- The 'beach' included land above MHWM

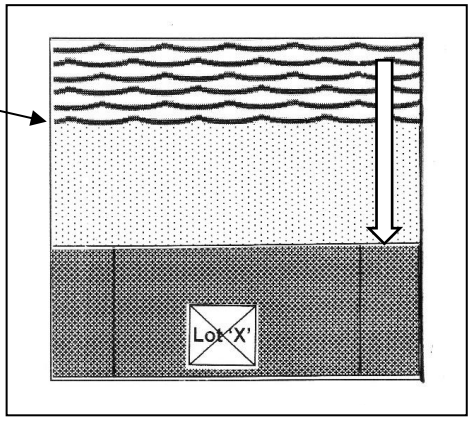


Figure 5.2 Changes by gradual erosion

- two processes of change are in operation: increased coastal erosion and higher sea levels.
- Crown reserve narrows < 100 feet (30.48m)
- minor erosion restored over weeks /months, HWM fluctuates around mean position.
- episodes of major erosion and minor accretion create a net trend of shoreline recession.
- where coastal compartments have negative sediment budget, MHWM moves landward.

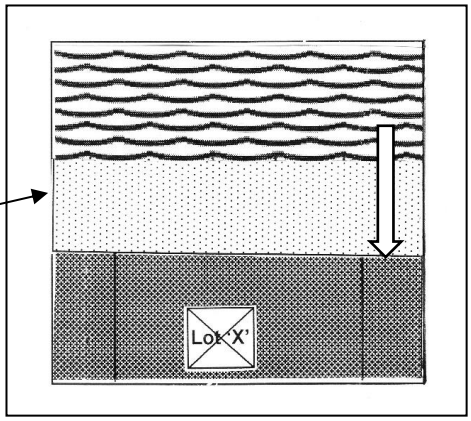


Figure 5.3 - Changes by perceptible jumps?

- noticeable changes or 'perceptible jumps' in the position of MHWM become evident.
- more frequent severe events leave little time for accretion before next erosion event.
- foreshore shortens, steepens, trends landward.
- Crown reserve < 50 % of 100' (30.48m)
- clusters of storms may produce defined landward trend of MHWM.

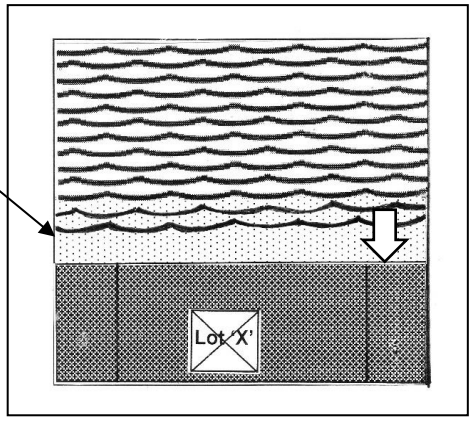
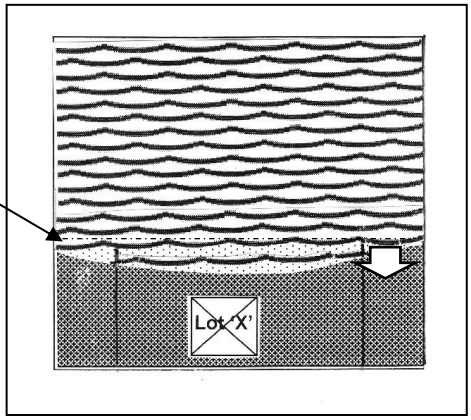


Figure 5.4 MHWM crosses line of 1st survey

- position of MHWM following a stormy period: a series of severe events over weeks / months
- MWHM crosses boundary defined by survey.
- foreshore made very narrow and steep.
- Crown reserve wholly eroded: lost to the sea.
- trend of shoreline recession is evident.



These adverse impacts will affect all States, however in NSW between 40,800 and 62,400 residences have been identified as at risk from a sea level rise of 1.1m and the storm surge of a 1: 100 year storm.[65] The extent of coastal erosion risk in NSW was further assessed in 2017[66], identifying large areas at risk on the north, metropolitan and south coasts. See Figure 6 below.

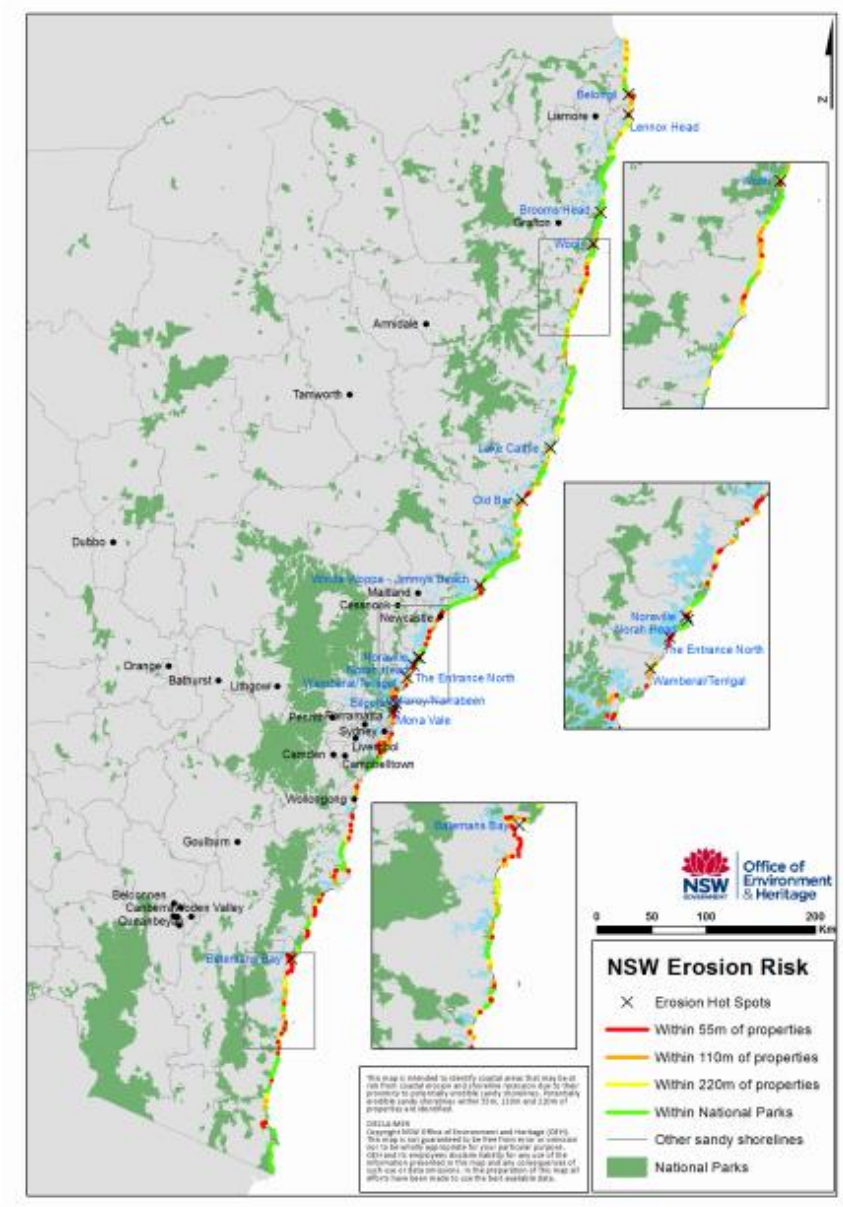


Figure 8 N pen-coast shorelines located in close proximity (i.e. 55, 110, 220 m) to pl within National Parks. The locations of nominated erosion hot spots are shown. Appendix B provides a breakdown of this map for each coastal LGA.

Figure 6 – NSW Erosion Risk (Figure 8 from EOH, 2017)

[65] Australian Government, above n 44, 77. This assessment estimated the value of the residential buildings at risk in New South Wales as between $12.4 billion and $18.7 billion, in 2009. Sea-level rise vulnerability assessments have been prepared for many council areas. Eg John Hudson, et al, *High resolution terrain mapping of the NSW Central and Hunter coasts for assessments of potential climate change impacts – Final Project Report* (NSW Planning, 2008). Councils have also identified lands at risk from coastal hazards in maps of 'vulnerable lands', prepared under cl 12 *SEPPCM 2018* (NSW).

[66] NSW Office Environment and Heritage, *Coastal Erosion in New South Wales – Statewide Exposure Assessment* (NSW Government 2017) p 16.

3.2 Coastal landowners want to protect their land

Once they understand this situation most coastal landowners would be justifiably alarmed.

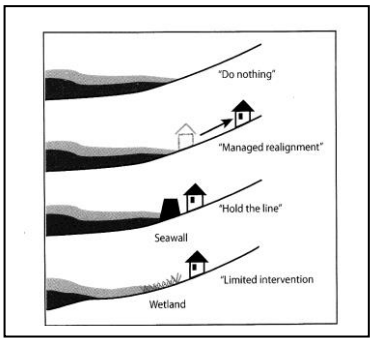
a) Landowners' private property concerns

Some may wonder what impact the moving MHWM will have on the land title of their real property. Relying on original survey measurements, landowners may assert ownership of the same area of land as always and declare that their property boundaries remain 'fixed' where they have always been.[67] Based on these assumptions they may believe that they have, or will, come to own part of the foreshore, and thus have a private property right to exclude the public.[68]

If they confront the reality of their situation, many landowners adversely affected by shoreline recession would consider what they could do to forestall the inundation or prevent the eventual loss of their land. If they conflated assumptions about their 'fixed' boundaries with a claim of a private property right to 'defend' their private land, some landowners may seek to build a sea-wall on their original boundary,[69] and try to 'reclaim' their land by depositing fill behind it.[70] Were they to consult the literature on managing coastal hazards, concerned landowners would realise that their predicament has been anticipated and their options are circumscribed.

b) Four macro policy options

Four major options or broad approaches have been identified, and while the names vary, the substance of the responses are equivalent. As shown in Figure 7,[71] below, they are:



i) do nothing (ignore);

ii) retreat (relocate, managed realignment)

iii) defend (protect, hold the line) and,

iv) adapt (accommodate, limited intervention).

Figure 7 – Four broad approaches

[67] See BG Thom, above n 40, 342.
[68] This was one of the concerns expressed by Byron Shire Council in its submission no.43, to the House of Representatives' Standing Committee on Climate Change, Water, Environment and the Arts Managing *Our Coastal Zone in a Changing Climate – the time to act is now* (2009), 147.
[69] The core issue of whether a land title boundary created by line of survey can survive permanent inundation by tidal waters is addressed in Chapter II, below.
[70] Land reclamation, through the deposition of fill requires development consent. Land 'reclaimed' by fill is usually held to be owned by the Crown, not the adjoining landowner under common law rules.
[71] From Wade Hadwen, et al, *Information Sheet - Managed adaptation options* (NCCARF 2012).

Faced with these options, some landowners may dismiss the 'do nothing' and 'retreat' options. Many would consider their capacity to adapt and perhaps modify their home and investigate the feasibility of obtaining any approvals needed for the necessary works. Other landowners may not be able or may not wish to explore the 'adapt' option, and so, hoping it would protect them from the sea, may choose 'defend', and seek to build a seawall.

However, building a privately owned seawall is no small undertaking. In New South Wales, seawall proposals require detailed documentation for review in the development control process,[72] and consent authorities for such works usually consider development applications for seawalls[73] in the context of the local coastal management planning instrument,[74] prepared under relevant Guidelines.[75] Similarly, proposals by a public authority to build a seawall to implement a coastal management plan, or program, require extensive studies, modelling and consultation, before approval can be granted.

c) Legal liability for coastal works

Where the council, in its capacity as a consent authority, decides to construct a seawall, or grant consent to a private landowner to do so, subject to whatever conditions are considered necessary, the council would be exempt from any legal liability,[76] if it acted in good faith.[77]

In contrast, private landowners acting as of 'right' would not be exempt from legal liability. Landowners who seek to 'reclaim' land or build a seawall without approval, risk prosecution for a breaches of relevant Acts, and invite liability for damages in proceedings brought by other landowners who allege their land has been adversely effected by the nuisance of increased erosion or flooding, caused, or made worse, by the fill, or the structure.[78]

Hence, the options available to landowners to respond to shoreline recession are not extensive, and since they rely the relevant authority's approval, they are not at the landowner's discretion.

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[72] See the example of the information required for a development application for three seawalls at Belongil Beach, in Byron Shire, at < https://www.environment.nsw.gov.au/topics/water/coasts/coastal-management/framework/transitional-arrangements/coastal-development-applications >.
[73] Where a coastal management plan has not yet been prepared seawall proposals are considered under transitional arrangements, made under cl 7 Schedule 3 of the *Coastal Management Act 2016* (NSW).
[74] Such as a coastal management plan are made under the *Coastal Protection Act 1979* (NSW) or a coastal management program made under the *Coastal Management Act 2016* (NSW).
[75] Guidelines for preparing CMPs are set out in NSW Government, *Coastal Management Manual Part A*, available at < https://www.environment.nsw.gov.au/topics/water/coasts/coastal-management/manual >.
[76] Council's exemption from legal liability is available under s 733 *Local Government Act 1993* (NSW).
[77] The leading case on 'acting in good faith' is *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408; (1993) 116 ALR 460, at [34].
[78] Such a case was *Egger v Gosford Shire Council* (1989) 67 LGRA 304

d) Landowner claims and rhetoric

Realizing that approval for their preferred option - public funding to construct a seawall to protect their private property - may not be possible, even in the long term, and privately funded seawalls face significant hurdles, some landowners have sought to convince, or coerce, councils to accede to their demands, and approve public funds to build a defensive structure, through rhetoric and legal threats.[79] Hence a slew of assertions have been made, including claims of a landowner's private property rights to: defend against the sea, be protected from the sea by the government, claims of council liability for damages 'caused' by not protecting private land, and claims for compensation for land lost to the sea. These claimed private property rights and their asserted paramountcy are examined in Chapter II.

What some landowners may not realize, because of their exclusively private focus, is that constructing a seawall on a receding shoreline, as sea levels rise, poses a real threat to the public right of access to and along the foreshore, due to the phenomenon known as 'coastal squeeze'.

3.3 The threat of 'coastal squeeze'

The term 'coastal squeeze' was coined by Doody,[80] for a phenomenon also recognised by others.[81] It is said to occur when a substantial structure, such as a road or seawall, designed to withstand storm surges and the action of large waves, is built behind a natural coastal environment, such as a muddy tidal bank, or a sandy beach, to 'protect' the adjoining land. However, such structures obstruct retreating natural eco-systems. Over time, as seas rise and erosion increases, the beach or bank in front of the seawall steepens as it is gradually eroded away, until no beach or bank is visible, even at the lowest tide.[82]

As a result, the ecological and social communities dependent on the inter-tidal area are 'squeezed' between the immobile sea-wall and rising seas. The term has been used by biologists to describe the impacts of rising seas and receding shorelines on the bio-diversity of rocky inter-tidal zones,[83] on mangrove flats,[84] tidal marshes and wetlands,[85] and by economists who refer to

[79] See for example Mallesons Solicitors 32 page letter to Byron Shire Council < insert date >.
[80] JP Doody, "Coastal Squeeze': an historical perspective' (2004) 10(1/2) *Journal of Coastal Conservation* 129-138.
[81] See ECF Bird, 'Present And Future Sea Level: The Effects of Predicted Global Changes' in Doeke Eisma (ed), *Climate Change Impact on Coastal Habitation* (Lewis Publishing, 1995). See also AD Short and Colin D Woodroffe, *The Coast of Australia* (Cambridge University Press, 2009) 273.
[82] R Silvester *Developments in Geotechnical Engineering: Coastal Engineering* (Elsevier, 1974) 143, quoted in OH Pilkey and HL Wright III, 'Seawalls versus beaches' (1988) SI 4 *Journal of Coastal Research* 41, 44.
[83] AC Jackson and J McIlvenny, 'Coastal squeeze on rocky shores in northern Scotland and some possible ecological impacts' (2011) 400 *Journal of Experimental Marine Biology and Ecology* 314; Nigel I

a squeeze for coastal tourism.[86] Bird's sketches[87] (see Figure 8. below) showing likely impacts on mangrove-fringed coasts, are the best illustration of 'coastal squeeze' in the literature.

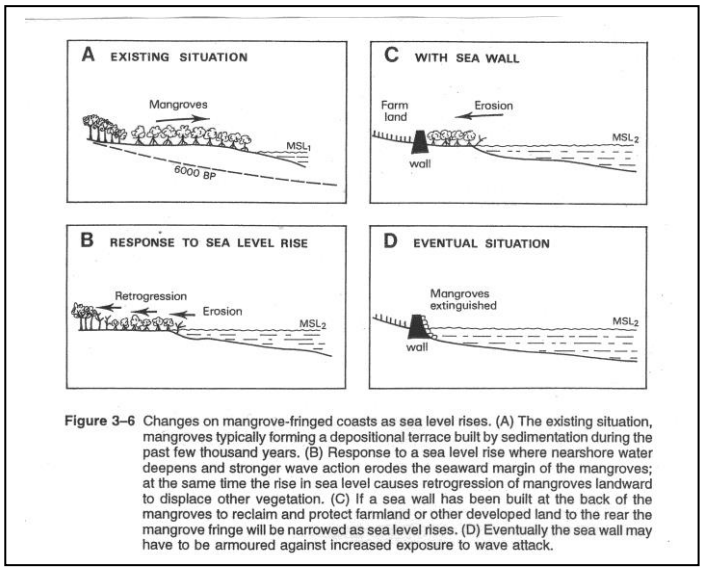

Figure 3–6 Changes on mangrove-fringed coasts as sea level rises. (A) The existing situation, mangroves typically forming a depositional terrace built by sedimentation during the past few thousand years. (B) Response to a sea level rise where nearshore water deepens and stronger wave action erodes the seaward margin of the mangroves; at the same time the rise in sea level causes retrogression of mangroves landward to displace other vegetation. (C) If a sea wall has been built at the back of the mangroves to reclaim and protect farmland or other developed land to the rear the mangrove fringe will be narrowed as sea level rises. (D) Eventually the sea wall may have to be armoured against increased exposure to wave attack.

Figure 8. Changes to mangrove fringed coasts as sea level rises. ECF Bird (1995)

Significantly, Bird forecast that 'Where sea walls have been built, however, tidal mudflats, like salt marshes and mangroves, will be reduced and eventually obliterated by the rising sea.'[88] Bird's focus on farmland and mangroves, illustrated only one situation where coastal squeeze could operate in New South Wales. Another involves a migrating marsh or beach approaching a major road. (See Figure 9)[89] below.

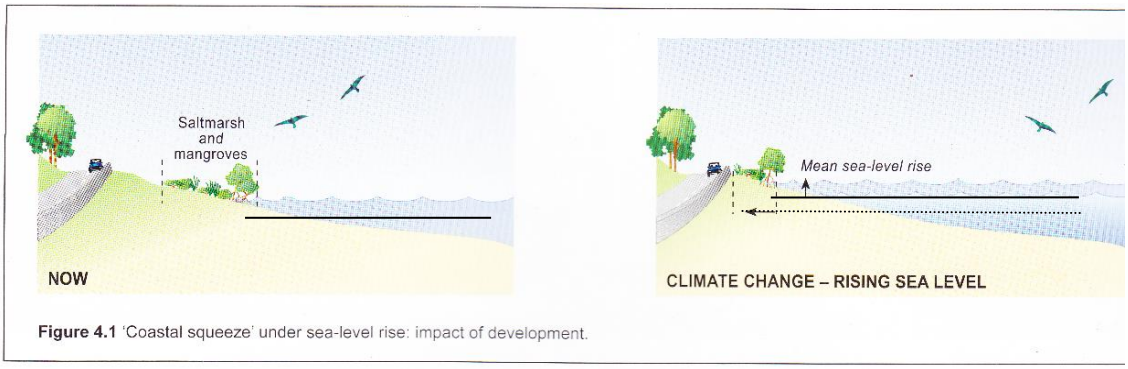

Figure 4.1 'Coastal squeeze' under sea-level rise: impact of development.

Figure 9. 'Coastal squeeze' under sea level rise (from Aust Govt, 2009)

Pontee, 'Reappraising coastal squeeze: a case study from north-west England' (2011) 164 (3) *Proceedings of the ICE-Maritime Engineering* 127.

[84] Bird, above n 80, 49. In New South Wales, mangroves and other inter-tidal areas provide key habitats for a suite of molluscs, crustaceans, birds, and many fish species of economic value.

[85] James G Titus, 'Rising Seas, Coastal Erosion, and the Takings Clause: How to save wetlands and beaches without hurting property owners' (1998) 57 *Maryland Law Review* 1279-1399, at 1316.

[86] Christine Schleupner, 'Evaluation of coastal squeeze and its consequences for the Caribbean island Martinique' (2008) 51(5) *Ocean & Coastal Management* 383-390.

[87] Bird, above n 80, Figure 3-6, 48.

[88] Bird, above n 80, 49.

[89] Figure 4.1 'Coastal squeeze' under sea level rise, Australian Government, above n 44, 52.

A more typical example in NSW, however, would be a seawall built to protect residential or commercial buildings, with native dune vegetation and sandy beaches being squeezed.

a) 'Coastal squeeze' in New South Wales

In this section I extend the concept of 'coastal squeeze' to recognise that, as well as species and eco-systems, the public right of access along the foreshore, could also be 'squeezed', and extinguished. To show this, I explain 'coastal squeeze' by depicting in my diagrams the key eco-system at risk in New South Wales: sandy beaches.[90] See Figures 9.1 – 9.10 below.

To illustrate major changes to coastal lands over some years, an appropriate reference profile of the coastal landforms under discussion was needed. For this, I have adopted the shape of the dune and beach systems shown in Coastal Dune Management.[91] (See Figure 10.0 below).

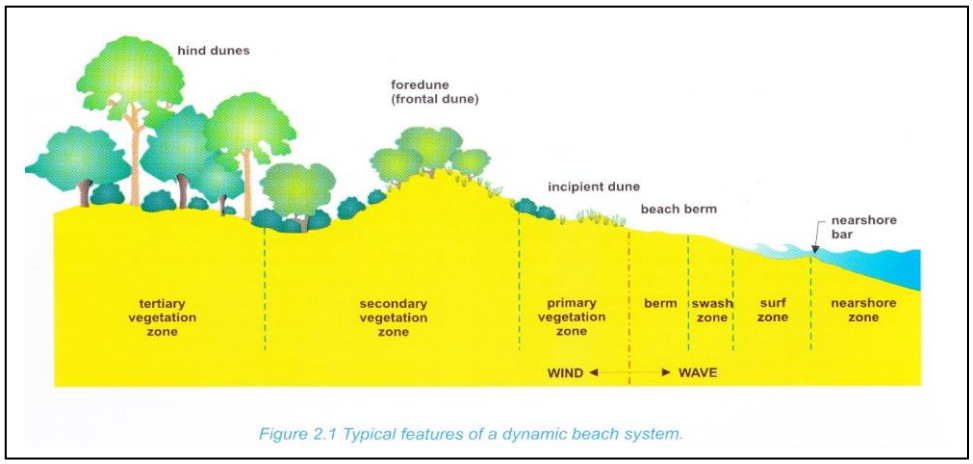

Figure 10.0 reference profile: Typical features of a dynamic beach system

By extending the dune landward, I created a suitable base-line profile. See Figure 10.1 below.

[90] AC Brown and A McLachlan, 'Sandy shore ecosystems and the threats facing them: some predictions for the year 2025' (2002) 29 (1) *Environmental Conservation* 62-78, See also Omar Defeo, et al, 'Threats to sandy beach ecosystems: a review' (2009) 81 (1) *Estuarine, Coastal and Shelf Science* 1-12. Regarding the threat to beaches in New South Wales, see Thom (2003) above n 40, Australian Government, above n 44, 35.

[91] NSW Government, *Coastal Dune Management – A Manual of Coastal Dune Management and Rehabilitation Techniques* (DLWC 2001), hereafter (*CDM*). See original Figures 7 & 9.

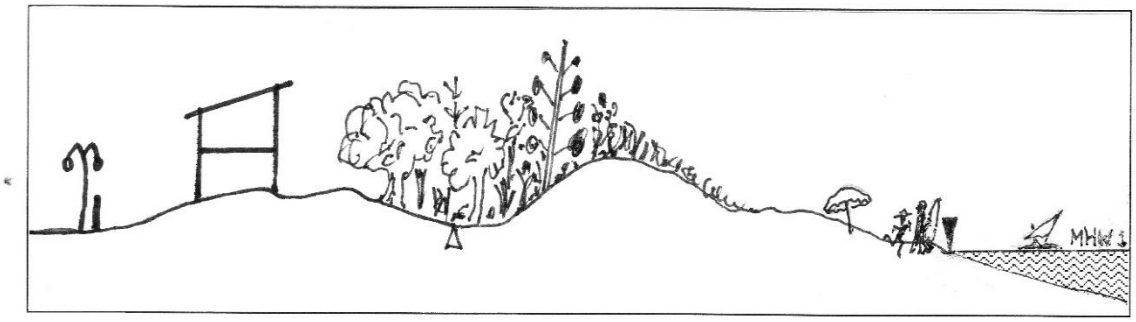

Figure 10.1 Baseline transect across coastal lands: beach & dune systems, at MHWM 1

With a single high fore-dune remaining behind the incipient dune and beach berm, the profile of Figure 10.1 reflects coastal dune systems, circa 1990. The baseline position of mean high water (MHW) is shown by ▼ and the landward boundary of the Crown reserve[92] is denoted as △.[93]

Over some decades, due to the combined effect of higher sea level (MHW2) and increased erosion under storm conditions, the shape of beach berm in the beach profile, has changed. Sediment has been transported off shore to form nearshore bars, and the MHWM has moved landward.[94] (See Figure 10.2)

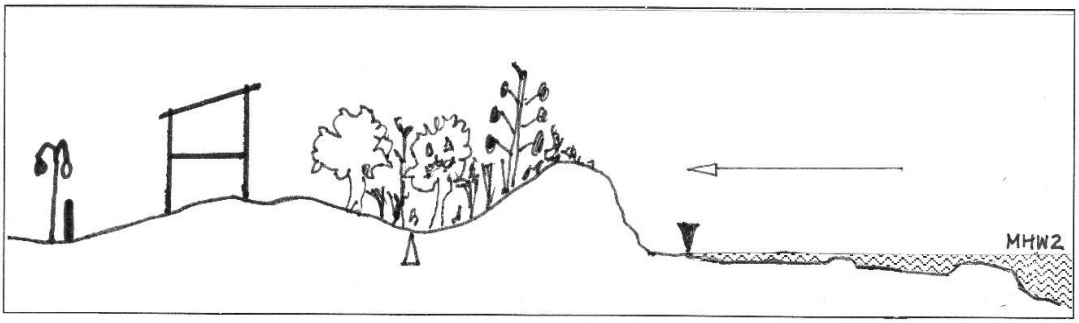

Figure 10.2 progressive impacts of coastal erosion and sea level rise at MHWM 2

However, in many locations in New South Wales coastal processes gradually re-deposit most of the eroded sediments back on shore when favourable winds, and lower wave energy allow dunes and beaches to gradually accrete, or 'recover'.[95] When this occurs the beach berm profile

[92] The strip of land measured 100 feet wide, (~30.4m) from the HWM at the time of original survey was reserved from sale and retained for public purposes due to Crown instructions and colonial regulations. See the discussion of this in section 3 of Chapter IV below. A large portion of the coastal reserve has been eroded away in the time between original survey and this baseline, circa 1990. In many locations, the natural dunes and beaches were extensively disturbed or destroyed in the 1960s and 1970s, by coastal sandmining, when floating dredges and bulldozers scoured the coast for heavy minerals.

[93] One coastal vegetation type at risk from coastal squeeze in New South Wales is littoral rainforest, which includes species such as hoop pine, coastal brushbox, tuckeroo, palms, and figs into a complex suite of plants, often surrounded by drier coastal woodlands or heaths.

[94] NSW Government, *CMM*, above n 56, B-28, C-4.

[95] NSW Government, *CMM*, above n 56, B-28.

changes again, and the location of the MHWM gradually moves seaward. (See Figure 10.3)

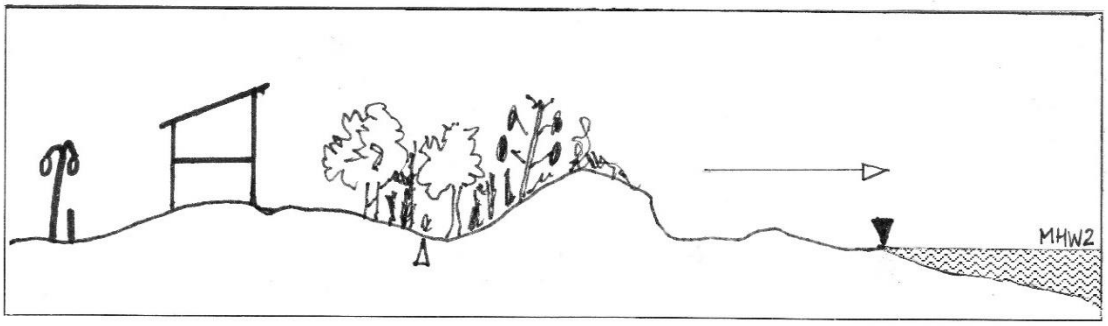

Figure 10.3 natural cyclical processes rebuild beach and dune profile at MHWM 2 (accretion, 'recovery')

This borrow and pay back of sediment is known as the 'sediment budget'[96] of a beach or coastal compartment.[97] It was believed that these natural cyclical processes of erosion and deposition were roughly in equilibrium, in most locations.[98] However, subsequently, closer study of local coastal processes has shown that in some locations the volume of sediment redeposited on shore is less than the volume of eroded sediment.[99] Some sediments are lost on-shore into dunes, and under storm conditions some sediments are lost off-shore in deeper waters. Other sediments in the surf zone are carried alongshore by in-shore currents, often into the up-current sediment compartment.[100] Unless this lost sediment is replaced with an equivalent volume from down-current, the sediment budget will be in deficit, and the beach will likely undergo recession.[101]

In a typical storm, when coastal waters are elevated above natural predicted height due to barometric and climatic conditions a storm tide or storm surge may be generated.[102] Under these conditions, erosion typically occurs above, and landward, of MHWM, creating a 'storm bite' or erosion scarp at the back of the beach, in the adjoining dune.[103] (See Figure 10.4)

[96] See Chapman, et al *Coastal Evolution and Coastal Erosion in New South Wales* (Coastal Council of NSW, 1982) 169 – 171. The term is defined as 'an accounting of the rate of sediment supply from all sources (credits) and the rate of sediment loss to all sinks (debits) from an area of coastline to obtain the net sediment supply loss', in NSW Government, *CMM* (1990), above n 56, 45.
[97] A 'coastal compartment' is typically an embayment, with defined boundaries, being "the rear of the beach, the seaward limit of the active zone and usually at either end by headlands and rock reef". See Chapman et al, above n 96 169. See Schedule 1 of the *Coastal Management Act 2016* (NSW).
[98] See the discussion of this in *Egger v Gosford Shire Council* (1989) 67 LGRA 304,
[99] Short and Woodroffe, above n 80, 18.
[100] Ibid.
[101] NSW Government, *CMM* (1990) above n 56, see Appendix C3 – Shoreline recession hazard, C7 – C9.
[102] Ibid. See Appendix B4 – Elevated Water Levels, B12.
[103] Ibid. Appendix C3 – Shoreline recession hazard, C8 – C9.

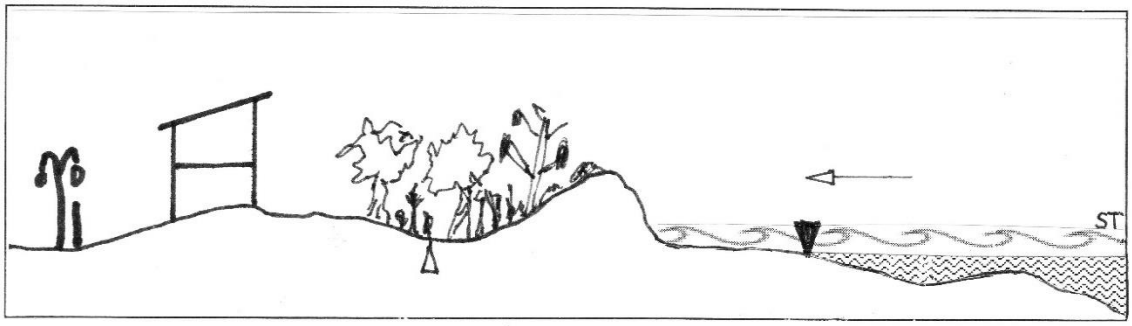

Figure 10.4 major erosive impacts on beach and dune profile during storm surges above MHWM 2

If there are a series of storms producing a sequence of erosive events without intervening periods of beach recovery,[104] these impacts will be pronounced, and major changes to the beach and dune profile and the position of MHWM will become evident.[105] (See Figure 10.5)

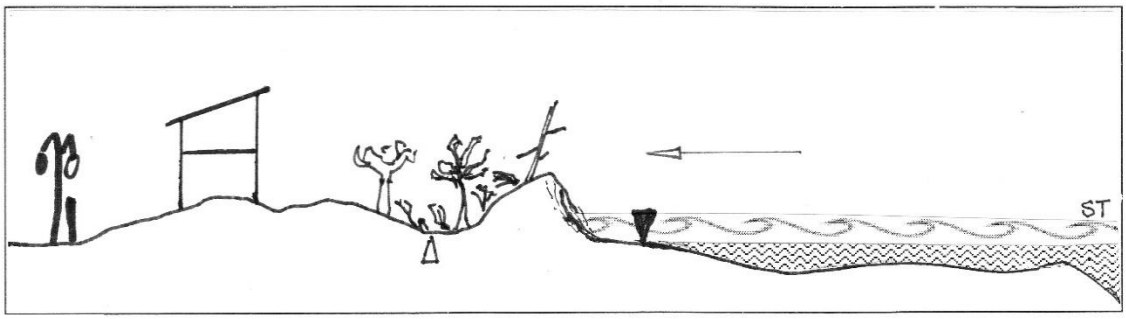

Figure 10.5 further major impacts may occur in subsequent storms before beach has 'recovered'

Where landowners become concerned about the receding shoreline affecting their real property, they may try to arrest the erosion and protect their land, by building a seawall and 'nourishing' the beach. In the following illustration a temporary seawall has been constructed from sand-filled geo-textile bags, and the beach 'nourished' by artificially depositing sand in front of the seawall.[106] See Figure 10.6 below.

However, these works would be likely to adversely affect remnant native vegetation and restrict or deny public access to and along the foreshore while works were under way.[107] Further, beach

[104] Four tropical cyclones Dinah, Barbara, Elaine and Glenda, and a series of five east-coast lows affected the south-east Queensland from January until July 1967, creating flooding, and major erosion impacts on beaches and dunes. See Gold Coast City Council, Griffith University Centre for Coastal Management leaflet, *History of coastal storms on the Gold Coast* (GCCC 2011). See also J Callaghan, and P Helman, *Severe Storms on the East Coast of Australia 1770 - 2008* (GU CCM, 2008)

[105] See Gold Coast City Council, Griffith University Centre for Coastal Management leaflet, *Beach erosion: Coastal processes on the Gold Coast* (GCCC 2011).

[106] This would have been permissible under the *Coastal Protection Act 1979* (NSW). While the position of MHWM would move, the position of the boundary would not.

[107] Temporary closure of the beach would be necessary to allow excavators to position rock fill safely.

nourishment is itself potentially problematic[108] and provides only a temporary buffer to erosion.[109]

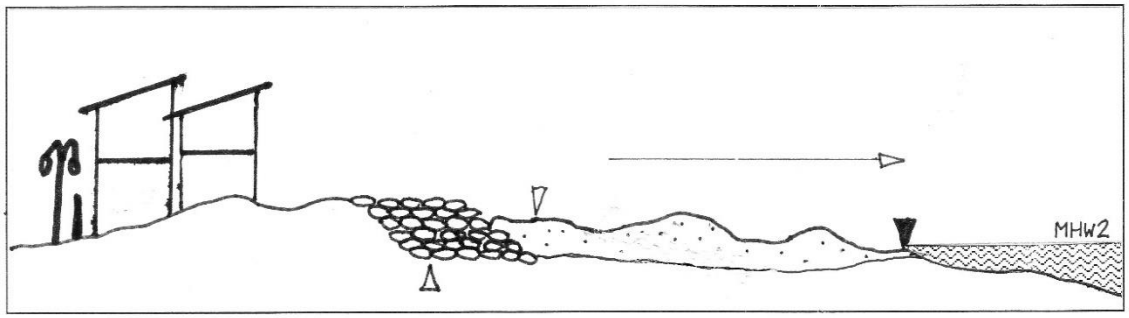

Figure 10.6 'temporary' seawall built to 'halt' erosion: beach artificially nourished

The impacts of seawalls have been closely scrutinized in the United States literature and recognised in relevant Australian engineering Guidelines.[110] When a seawall is built, erosion at its toe and ends typically increases, under storm conditions, because the wall reflects the wave energy, rather than absorb it.[111] As erosion and sea level rise progress, it is probable that the buffer of the nourished beach would be severely eroded, any remaining beach would be steeper, and the nearshore waters would be deeper.[112]

The squeeze of the intertidal area would be evident at high tide, because little or no beach would remain uncovered. (See Figure 10.7)

[108] Finding a source of sand, impacts on benthic organisms, odour and cost all present problems.

[109] In the US, experience indicates that nourished beaches last about five years before they too are wholly lost, and further nourishment is required. See Orrin H Pilkey and Rob Young, *The Rising Sea* (Island Press, 2009), 166. More frequent erosive events, due to global climate change, would be likely to further reduce the 'life' of nourished beaches.

[110] See National Committee on Coastal and Ocean Engineering (NCCOE) of the Institute of Engineers Australia, *Climate Change Adaptation Guidelines in Coastal Management and Planning* (Engineers Australia, 2012), 39. See also NCCOE of the Institute of Engineers Australia, *Coastal Engineering Guidelines for working with the Australian coast in an ecologically sustainable way* (Engineers Australia, 2nd ed, 2012) 29 -47.

[111] There is a high level of agreement in the literature that after a seawall is built, further erosion will result, in the short to medium term. See Silvester, above n 81, 143, quoted in Pilkey & Wright, above n 81, 44: 'Walls of vertical or sloping character (revetments) have been used for many decades as a purported protection in an erosive situation. It is unfortunate that they have, in the main, promoted further erosion" …'The sea-bed profile in front of the wall will steepen and deepen until subsidence of one section will occur during a particularly bad storm' and 'Tests have indicated that beaches in front of walls will recede to the point of being non-existent due to the action of standing waves resulting from reflection'.

[112] See Pilkey and Young, above n 108, 165: 'The beach will continue to erode after a seawall is placed behind it to protect a building. Over time, the beach will inevitably become narrower and narrower until it disappears altogether'. See also Sorell E Negro, 'Built Seawalls: A Protected Investment or Subordinate to the Public Trust?' (2012) 18 *Ocean and Coastal Law Journal* 89 – 126.

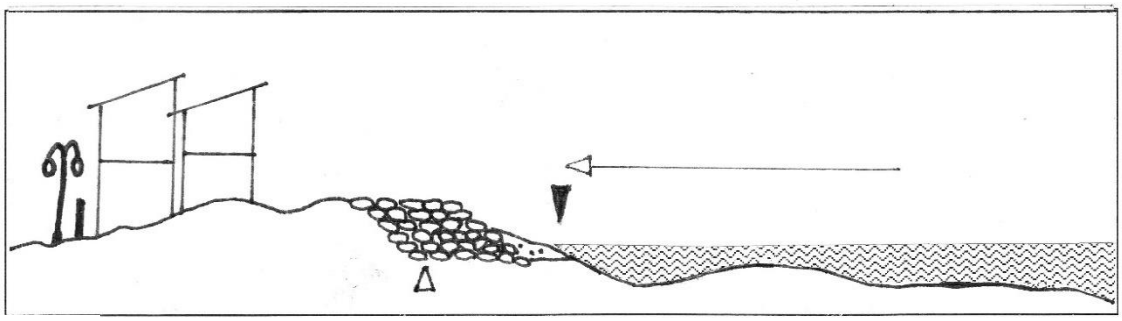

Figure 10.7 Nourished beach eroded: beach squeezed between seawall and shoreline

If a second or third major storm occurs soon after the first erosive event, before any re-deposition of sand and subsequent beach 'recovery', it is probable that the beach will undergo further erosion and will be squeezed out of existence.[113] See Figure 10.8.

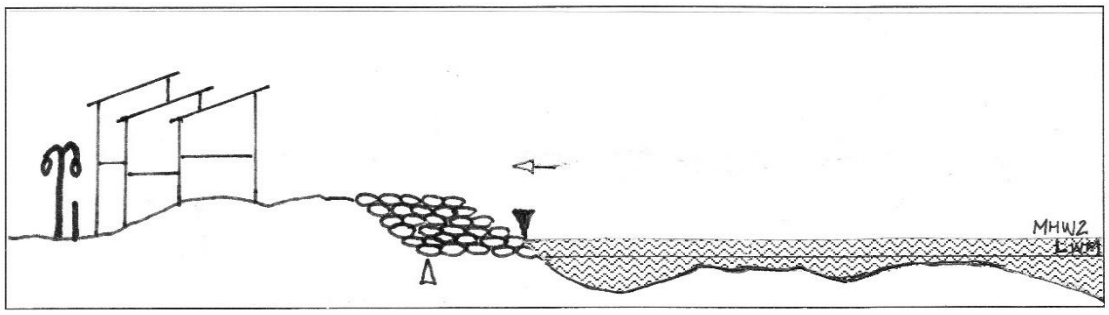

Figure 10.8 Temporary seawall after storm series: sand buffer exhausted, beach wholly lost

Thus it is clear that together, rising sea levels, private property rights and ad hoc seawall construction, constitute a physical threat to the future existence of sandy beaches and dune systems, and pose a plausible threat to the public right of access to and along the foreshore.

b) Post-squeeze impacts

However, the loss of the sandy beach would not be the final impacts of rising seas, receding shorelines and the rampant exercise of private property 'rights', on coastal settlements. Due to the loss of the beach in front of the seawall, its buffer effect would also be lost and with the deepening of nearshore waters, in storms the seawall would be exposed to direct wave action.[114]

High velocity currents from big seas would create additional scouring along its toe and flanks,[115] which could undermine the wall's foundation, and allow materials to slump.

[113] Diana Mitsova and Ann-Margaret Esnard 'Holding Back the Sea: An Overview of Shore Zone Planning and Management' (2012) 12 *Journal of Planning Literature* 446, 450. Bird, above n 80, uses the term 'obliterates'.
[114] Pilkey and Young, above n 108, 166.
[115] This is known as the 'flanking effect' in the United States. See Pilkey and Wright, above n 81, 57

Wave attack could also displace any movable materials, lower wall crest height and weaken its structural integrity.[116] Under extreme conditions, which exceed its design parameters, the seawall could 'fail' if a section of wall slumped, allowing large waves to overtop it, flooding the landward side of the wall, generating major damage and destruction.[117] (See Figure 10.9)

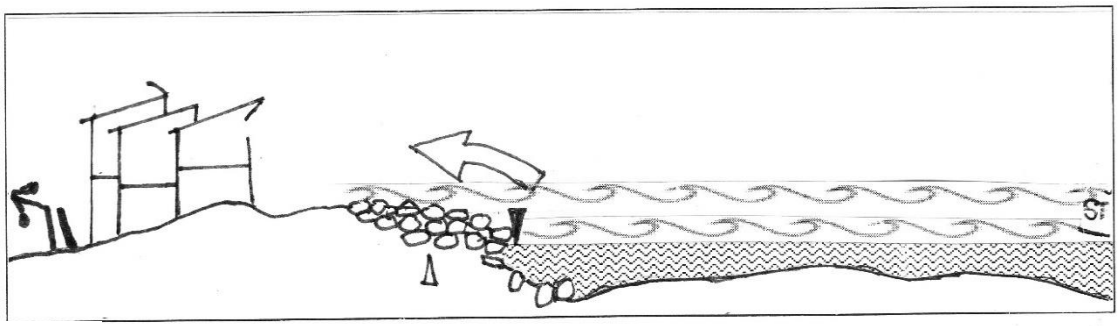

Figure 10.9 Temporary seawall 'fails' under conditions which exceed design criteria, during extreme events

If coastal landowners refuse to accept restrictions on their land use, due to coastal hazards, they may apply political pressure to demand the government fund and build even larger, 'permanent' structures in an attempt to protect residential and commercial premises.[118] See Figure 10.10.

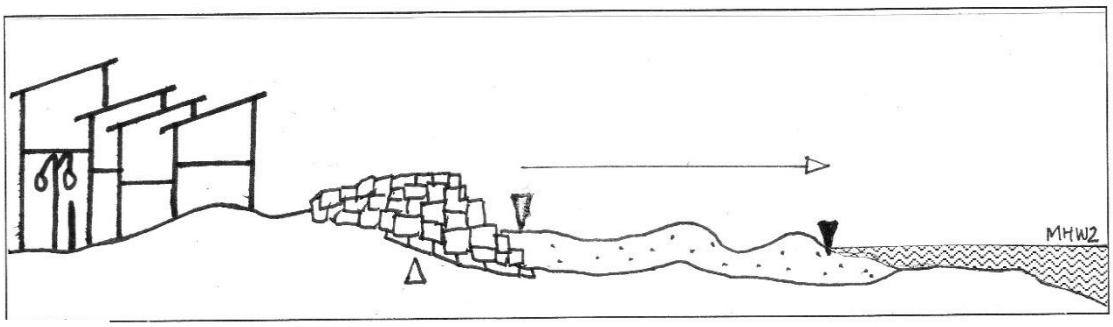

Figure 10.10 Seawall structure requires major upgrade to withstand higher sea levels and greater storminess

Even if larger structures were built, however, it is likely that the effects of coastal squeeze would soon re-emerge. See Figure 10.11 below.

[116] Silvester, above n 81.
[117] Pilkey and Young, above n 108, 166-7.
[118] Either the complete rebuild of the structure or a substantial upgrade to extend the toe of the wall and increase the wall crest height. As noted above, reclamation works would move the location of the MHWM but under common law rules would not move the location of the property boundary.

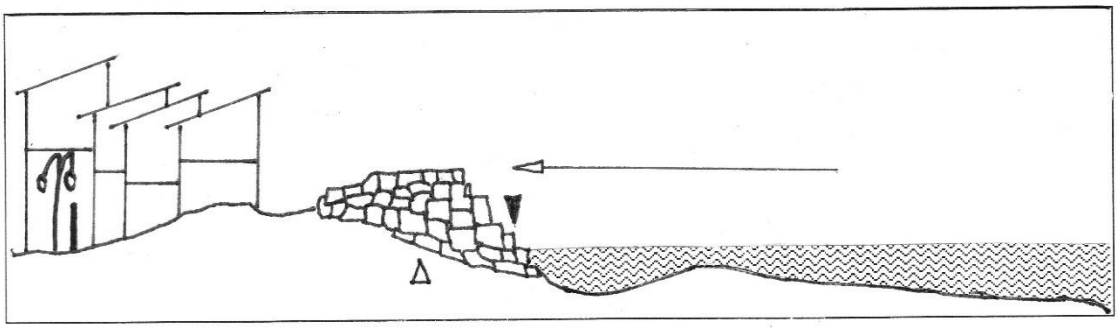

Figure 10.11 Seawall after storm series: sand buffer exhausted, nourished beach wholly lost

c) Seawalls create a false sense of security

Investment in seawalls may, however, lead to landowners developing a "false sense of security" regarding their premises' exposure to coastal hazards.[119] Believing that they are 'protected' from storms and rising seas, landowners may commit additional funds to develop adversely affected land at risk from inundation, erosion, or shoreline recession.[120] Thus there is a serious danger that when, not if, a storm tide higher than the design parameters is experienced, and the seawall fails, and flooding results, the extent and cost of the damage to new development will exceed the cost of damage likely had the seawall never been built.[121]

Under these circumstances any public funds invested may prove to have been wasted. The public cost of seawall construction, to protect public infrastructure and perhaps private property, could only delay, but ultimately would not prevent, damage or loss from extreme storms. The value of recent private investment in at-risk properties would be reduced by damage, or potentially, totally lost. However, all this damage and loss would be avoidable, if areas at risk from coastal hazards were not further developed, and some of the available public funding was directed to assisting existing development to relocate to new sites in areas not at risk.

More public investment to increase wall crest height to prevent overtopping might be called for, but the costs of upgrading seawalls for centuries,[122] may be prohibitive, and ultimately futile.[123] Being locked into a cycle of escalating costs for building and maintaining defensive structures, and catastrophic losses due to extreme storms, would be a serious post-squeeze impact.

[119] This "false sense of security" is well recognised in the literature on coastal management. See for eg Australian Government, above n 44, 152.
[120] Ibid.
[121] Ibid.
[122] Sea level rise is forecast to "continue for centuries" see IPCC *Climate Change 2013*, above n 7, 26; Pittock, above n 8, 125, discussed the potential for ice sheet disintegration and concluded that if the Greenland and West Antarctic ice sheets 'more or less completely melted' the world could experience 'sea level rise of up to 10 to 12 metres lasting for millennia'.
[123] This was the conclusion of coastal management authorities in the UK considered by JAG Cooper and J McKenna, 'Social justice in coastal erosion management: The temporal and spatial dimensions' (2008) 39 *Geoforum* 294-306. I discuss Cooper and McKenna's article in section 7 of Chapter V below.

d) Avoiding 'the squeeze'

A more feasible option for managing the impacts of coastal erosion and shoreline recession, would be to 'retreat' ie relocate threatened buildings and land uses away from areas exposed to these hazards.[124] Without impeding structures, sandy beaches would be able to migrate landwards as the shoreline retreats, without being 'squeezed' out of existence. (See Figure 10.12)

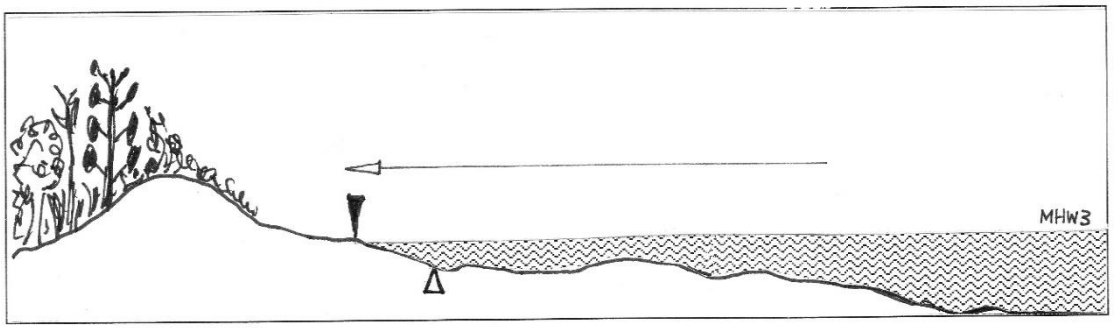

Figure 10.12 Avoiding the squeeze: dune and beach systems migrate landward as sea levels rise

Though this would be ideal where this is feasible, it would not be feasible everywhere. In some, perhaps many, locations no new structure would be needed: the abutments of existing roads and building foundations will ensure that, as seas rise, coastal squeeze will continue to tighten.[125] Hence in such locations retreat may not be feasible. However, it may be different for houses built on sand dunes: retreat may prove to be the only feasible option in the medium term.

As illustrated above, rising seas, receding shorelines, assertions of dominant private property rights and ad hoc seawall construction constitute real threats to sandy beaches, continued public access and the safe use of coastal lands and waters. But they are not inevitable. These threats and their likely impacts could be minimized or avoided through appropriate public policy initiatives developed for that purpose. A range of such measures are considered in Chapter VI.

3.4 When competing rights conflict, whose rights would prevail?

In the previous sections the threats to public access rights were identified, their causes recognised and some, at least, future circumstances anticipated. In this concluding section of

[124] This option of 'retreat', and other options of 'adapt' and 'defend', were considered in the NSW Government, *CMM*, above n 56, 25, Appendix D3 Planned retreat; and the Australia Government, above n 44, 152. Areas prone to coastal hazards, at present and in the future, have been identified and the risks assessed by many local councils when preparing Coastal Management Plans, under the *Coastal Protection Act 1979* (NSW) and or the *Coastal Management Act 2016* (NSW), for the sections of 'coastal zone' within their local government area.
[125] See Short and Woodroffe, above n 80, 273-4.

Part A I make explicit other elements of the competition and conflict between private property rights and public rights which constitute parts of 'the problem'.

As indicated above, the overlap of private property rights and public rights to coastal land is focused on the foreshore, and there are conflicting claims over ownership of land below mean high water mark (MHWM), based on assumptions about the nature and location of real property boundaries. Hence, a crucial factor in minimizing the conflict between private property rights and public access rights is establishing the location of the boundary between privately owned land and publicly owned land. This can be achieved by applying existing rules of property law regarding the movement of natural boundaries of land: the doctrine of accretion.***[126]***

Leaving ownership aside, there is also an explicit competition for priority use of the foreshore. The divergent interests of the competing rights would prescribe entirely different priority land uses, for this area and there appears to be little scope for co-location, and multiple use. It is not possible to build a seawall on a public beach, to protect adjacent privately owned land and retain public access to and use of the foreshore, or beach in front of the wall.[127] Large rocks and waves breaking onto a short beach are also not conducive to safe public swimming or surfing. Building seawalls on eroding sandy beaches would likely obliterate beaches, extinguish beach access and reduce or destroy the amenity of the adjacent coastal waters.[128] So it is apparent that the priority uses of the foreshore preferred by private and public interests would be physically incompatible.

Logically, allowing the public ownership of the foreshore to be lost, or public access rights to and along the foreshore be extinguished would not be in the public interest. Hence it can be seen that private property rights, and assertions of their dominance, conflict with the public interest.

Private property rights and public access rights also compete for theoretical dominance. Some private landowners assert that their property rights are superior to public rights and sometimes claim them to be effectively paramount and immutable, a binding obligation which 'cannot be ignored'.***[129]*** As the next chapter explains, such beliefs conflict with modern theory of property and property rights in liberal democratic societies such as New South Wales.

Further, demands for focus and priority by private landowners insisting on claimed private property 'rights' compete for the time, focus and priority of coastal managers responsible for

[126] The operation of the doctrine of accretion is discussion in Chapter II.
[127] See *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207, [116] – [133] (hereafter *Ralph Lauren PL v NSW TCP* [2018]).
[128] Pilkey and Young, above n 108, 165-6.
[129] See Coleman, above n 13, 422.

preparing plans and programs for managing coastal lands and resources. Should these plans and programs be designed to satisfy private land owners, or to serve the wider public interest?

Finally, private and public rights compete for finite State and local government resources: agency staff time and money. Demands for public resources to be made available to address private property concerns, directly conflict with priorities for expenditure for public purposes. Were private property rights to be trumps, would there be increased calls for public funding? Should public funds be allocated to achieve public interest, or private property objectives?

All these dimensions of the competing interests of private property rights and public rights are thus implied in my discussion of the conflict between them. Having made them explicit, the primary research question might be concisely restated: whose rights would prevail?

Part B – Rationale for my research

I next outline the rationale for my thesis and flag the significance of my research. Further, I describe my personal research perspectives and explain my decision to pursue this research.

4. Its focus is a matter of public interest concern

A core part of my research rationale is that its focus is a matter of public interest concern. It addresses a national coastal research goal identified by the Commonwealth Coasts and Climate Change Council: the effect of rising sea levels on real property and local government liability.[130] However my thesis does not canvass these matters in every State, but focuses on New South Wales.

A larger matter of public interest concern is the survival of the public rights of access to and along the foreshore, to fish or other purposes, and to safely swim, surf or navigate in the state's coastal waters. The tidal waters, sandy beaches, rock platforms and headlands of the NSW coast constitute important places in contemporary society, for a range of social purposes and cultural uses, of intangible value. These public rights of free access, the amenity of coastal lands, the suite of public interests in, and the diverse public uses of, the foreshore and coastal waters, which have developed around them, provide a range of ecosystem services,[131] and support a

[130] Commonwealth Coasts and Climate Change Council, above n 3, See s 3. IV *Liability for local government*, < http://www.environment.gov.au/climate-change/adaptation/australias-coasts/coasts-climate-change-council-advice#2 >
[131] Will Steffen, et al, *Australia's Biodiversity and Climate Change* (CSIRO Publishing, 2009), 17-19.

range of economic activities of very considerable economic value.[132] If many of our beaches were to disappear, not only would it affect how and where people socialise, and change contemporary culture, this could impact on local economies dependent on visitors seeking to surf, enjoy the beach, or go boating, with knock-on impacts on state and national economies.

5. The literature is limited, uncertain, silent, or erroneous

Another part of my rationale emerged as I began my research and realised that there was a gap in the literature. Published commentary on the effects of moving real property boundaries on land title, and on landowners' private property rights, in the United States of America is extensive and complex, but since these commentaries cite the constitutions and legal codes of States in the US and decisions of US courts they have limited relevance to New South Wales.

Regrettably, commentary on these matters in New South Wales is limited and relevant literature on the extent of private property rights in Australia is sparse. One early work left open the possibility of the foreshore becoming privately owned due to 'fixed' property boundaries,[133] a subsequent National Coastal Inquiry heard concerns about impacts of private property rights on public access to the beach,[134] but its Report[135] did not address or resolve these concerns, allowing uncertainty to persist. A later article[136] claimed landowners had extensive common law private property rights, but did consider the effect of legislation or recent cases.[137]

Several publications have pointed to the impacts of rising seas on real property,[138] but their focus has been on other matters,[139] not a close scrutiny of landowners' claims of dominant private property rights. Hence research providing some clarity on these particular matters, and the application of relevant elements of law in New South Wales, is needed to fill this gap.

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[132] Economic sectors reliant on coastal resources include tourism, fishing, boating, dive and surf industries. A detailed consideration of economic impacts is beyond the scope of this thesis. But see the *AIMS Index of Marine Industry 2018* (AIMS 2018) at < https://www.aims.gov.au/aims-index-of-marine-industry >.

[133] Thom, above n 40.

[134] These concerns were raised in a submission made by Byron Shire Council, (Submission no. 43, 10).

[135] House of Representatives Standing Committee, above n 2.

[136] Coleman, above n 13, 421-2.

[137] *Environment Protection Authority (NSW) v Saunders* (1994) 6 BPR 13,655 and *Environment Protection Authority (NSW) v Leaghur Holdings PL* [1995] 87 LGERA 282. These cases are discussed in section 8 of Chapter III.

[138] Tim Bonyhady, 'Swimming in the Streets: The Beginnings of Planning for Sea Level Rise' (2010) in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010); Richard Kenchington, Laura Stocker and David Woods (eds), *Sustainable Coastal Management and Climate Adaptation – Global Lessons from Regional Approaches in Australia* (CSIRO 2012); Justine Bell, *Climate Change & Coastal Development Law in Australia* (Federation Press, 2014).

The state of the literature commenting on the NSW situation and my contribution to it are further considered in Chapter II.

6. The problem's footprint is large, and growing…

Another part of the rationale for this topic is that its geographic scope, ie its 'footprint', is already large, and the both the number of land titles, and the area of 'real property', adversely affected as climate conditions change is likely to substantially increase in the future. A preliminary national study of potential impacts of sea level rise and storm surge on coastal land was published in 2009, Climate Change Risks to Australia's Coast.[140] Using criteria of a 1.1m sea level rise and storm surge from a 1 in 100 year event, it identified between 157,000 and 247,600 residential properties likely to be adversely affected nationally,[141] with New South Wales the state most seriously adversely affected. [142] While these estimates of the extent of economic vulnerability are alarming enough, this is not a final assessment of such impacts. Since rising seas are predicted to continue for centuries,[143] with effects which may last millennia,[144] it is highly unlikely that sea level will peak at 1.1m above 1990 levels.
Thus the number of land titles to which the results of my research apply, will continue to grow.

7. Time may be shorter than expected

Also part of my rationale is a suspicion that less time may be available than expected to understand and appropriately respond to forecast climate change impacts, such as higher sea levels. That is, the inundation of coastal lands due to a sea level rise, and the recession of the shoreline in vulnerable locations, may occur before residents and government are prepared. There is therefore, a danger of coastal communities under-estimating the level of risk they face. I conclude that the need to practically apply my research may become acute before too long.

Predicting when sea levels will reach the reference line of 1.1m above 1990 base-line used by the Commonwealth,[145] is not the focus of the thesis, nor is it necessary to make such a prediction in order to establish a valid basis for this thesis. The IPCC has determined that sea-levels are rising, the rate of rise is increasing, and predicts sea level exceeding 1 metre above

[139] Eg Public authorities' liability was the focus in Zada Lipman and Robert Stokes, 'Shifting Sands – The implications of climate change and a changing coastline for the private interests and public authorities in relation to waterfront land' (2003) 20(6) *Environmental and Planning Law Journal* 406-422.
[140] Australian Government, above n 44.
[141] Australian Government, above n 44, 71, with a replacement value in $2008 of between $41 billion and $63 billion. For an outline of methodology see 79.
[142] Australian Government, above n 44, 75. Other states were also found to be significantly exposed to risk from 1.1m sea-level rise and a 1: 100 year storm.
[143] See IPCC, *Climate Change 2013*: above n 7, 26.
[144] Ibid 27.
[145] Australian Government, above n 44, 46.

base-line in the decade after 2100.[146] Nonetheless, it is possible that sea level exceeds 1.1m above 1990 base-line sooner than predicted.[147] This concern of 'running out of time', when developing public policy, has been recognised in the literature,[148] and its specific contribution to my research rationale is a personal imperative to not (further) delay.

8. My contribution to current knowledge

In this section I outline how my research may usefully contribute to current knowledge.

I aim to extend the concept of 'coastal squeeze' beyond its prior use in understanding changes in coastal bio-diversity[149] and tourism viability,[150] to show how 'coastal squeeze' poses a real and growing threat to continued public access to and along the foreshore of New South Wales. I also aim to resolve the uncertainty about whose rights are dominant at present, by clarifying the nature and extent of those rights, and assessing their likely future status.

I contribute new knowledge regarding the operation of the law of property, as it applies to coastal land titles, at present, by explaining the effect of the interaction of surviving common law rules, with relevant recent case law and current statute law, in New South Wales.[151]

Further, by applying this knowledge to plausible future scenarios, under foreseeable conditions, I hope to contribute to the planning of the future management of coastal lands in NSW. My summary of the common law doctrine of accretion, which makes explicit its modes of operation, and relevance to rising sea levels will, I hope, contribute new insight into, and supplement current knowledge of, existing principles of law.

Another useful contribution to current knowledge may be made by my marshalling of feasible public policy initiatives, some borrowed, some original, which a future State government might adopt, to respond to the impacts of a receding shoreline or conflicts between competing rights.

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[146] IPCC, *Climate Change 2014 Synthesis Report AR5 – Summary for Policy Makers*, (IPCC, 2014) 11.
[147] Indeed the IPCC's *AR5 Report* acknowledged that higher values for its predictions of sea level "could not be excluded", due to uncertainty about the rates and models of melting ice.
[148] Kelly Levin, Benjamin Cashore, Steven Bernstein and Graeme Auld, 'Playing it Forward: Path Dependency, Progressive Incrementalism and the "Super Wicked" Problem of Climate Change' (Yale, 2010), 6 <http://environment.research.yale.edu/documents/downloads/0/2010_super_wicked_levin_cashore_bernstein_auld.pdf >
[149] See Jackson and McIlvenny, above n 82.
[150] See Schleupner, above n 85.
[151] See Corkill, 'Ambulatory', above n 63.

Part C – Research objectives and perspectives

In this part I outline my research objectives and describe the research perspectives adopted in my staged approach to answering my primary research question.

9. Objectives of the research

Through my research and the completion of this thesis, I have sought to achieve a number of inter-related objectives, described in the following sections.

One primary objective is to identify and highlight the real threats to public rights of access to the foreshore and coastal waters posed by rising seas and ad hoc construction of seawalls, by private landowners trying to protect their land. These threats are to the survival of sandy beaches, to the public rights of access and, due to the physical hazards created by such structures, to the public safety of people enjoying their public rights of access,[152] and indirectly, to coastal economies. By highlighting these threats I hope to alert the public, public-interest non-government organisations, and coastal managers in local and State government, and inform their discussions about public policies and management actions that might minimize or avoid conflicts over competing rights in the future.

A second key objective of my thesis is to clarify 'uncertainty' about the effect of rising sea levels on the land title of real property, under current NSW property law, and thus provide a sound basis for developing public policy responses to global climate change's local impacts.

A necessary contributing objective is to investigate public rights of access, and private property rights, and assess their strengths and weaknesses, and their relative weight, at the present time. A subsequent objective is to apply my knowledge of the competing rights to answer the primary research question: whose rights will prevail, in the future.

Moreover, by critically examining the basis for claims of a Crown duty to protect, and of superior private property rights, I hope to inform coastal managers and assist them in responding appropriately to the demands and threats of private landowners and empower them to prepare plans and implement management programs for coastal lands which are principally

[152] Though it is not the focus of the thesis, I recognize that ad hoc construction of seawalls and a consequent diminution or loss of safe public access to the beach and the change in the amenity of that locality that this would produce, may also create adverse social impacts and economic shocks. See section 8.2 in Chapter VI below.

directed towards serving the public, not private, interests. My research thus aims to help clear the log-jam in decision-making created by uncertainty over claims of superior private property rights, so that the coastal management planning, and the development of appropriate public policy responses to climate change impacts, can proceed without further delay. Removing this uncertainty and overcoming the delays caused requires a robust appraisal of the merits of the arguments and a final analysis of whose rights would prevail. Hence a secondary objective of my research is to test the practical reality of theoretical claims that have been made.

10. Research perspectives

I approach this research as a person who has sought to advocate for and defend 'the public interest' in its various forms. I recognize that important natural features and a key element of the public interest – public access to the foreshore and coastal waters - are at risk of being lost, and my natural response is to investigate how best to protect these invaluable public interests. However, though the thesis is focused on human use, it is clear that other species which rely on intertidal areas during their lifecycles, are also at risk of being squeezed, unless they can migrate inland. Hence, I approach this anthropocentric topic, appreciating that climate impacts on humans are but the 'tip of the iceberg' of impacts on species, habitats and biodiversity.

Since I seek solutions to issues of real world consequence, which have practical application and utility for wider society, the key perspective informing my research methods is pragmatism.[153]

Kennedy quoted Dean Roscoe Pound's definition of pragmatism as "the adjustment of principles and doctrines to the human condition they are to govern rather than to assumed first principles," and noted that its methods involve "the marshalling of facts, the balancing of interests and the weighing of values" to reach a conclusion which can "accomplish justice".[154] Moreover, since the thesis discusses impacts on natural ecosystems and operation of current environmental law, but does so from 'within the established legal framework, using existing legal vocabulary',[155] it would be apt to characterize my perspective as 'eco-pragmatism'.[156]

[153] Walter B Kennedy, 'Pragmatism as a Philosophy of Law' (1925) 9(2) *Marquette Law Review* 63-77. Kennedy saw pragmatism as a legitimate philosophical perspective with which to approach legal research, since it involves seeking "a practical solution".
[154] Ibid 64, 66.
[155] Keith Hirokawa, 'Some Pragmatic Observations About Radical Critique in Environmental Law' (2002) 21 *Stanford Environmental Law Journal* 225, 265.
[156] Ibid 267. Hirokawa discussed the view of pragmatism in Daniel Farber's *Eco-pragmatism: Making Sensible Environmental Decisions in an Uncertain World*, (Uni Chicago Press, 1999). See also Nicole Rogers, 'Where the Wild Things Are: Finding the Wild in Law' 183- 191, in Peter Burdon, (ed), *Exploring Wild Law – The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011).

Hence these methods - assembling facts, considering diverse interests and carefully assessing their value - have been adopted in undertaking the research needed to answer the primary research question. Though it underpins this chapter, pragmatism also imbues other chapters.

Consistent with this pragmatic approach, my methods of enquiry are not limited to those of a single philosophical framework. Where a suitable methodology existed with which to pursue my enquiry it made sense pragmatically to adopt or adapt it. However where no formal methodology was available I have devised one. Hence, diverse sources of law and legal commentary have been drawn on to develop plausible responses, identify relevant criteria with which to assess their merits, and frame methods of analysis appropriate for the tasks defined. I state these pragmatic decisions about methodology explicitly next in Part D.

First however it is appropriate to briefly identify the research perspectives adopted when undertaking my research in defined stages. I describe the methodology of these stages in the next part, but to illuminate the research perspectives being employed it is useful to state here the goals of the analysis being undertaken in these stages of analysis:

Stage 1/ ascertain the current relationship between competing private and public rights;
Stage 2/ anticipate future circumstances and potential responses by a future government;
Stage 3/ evaluate the merits of these potential responses using appropriate criteria;
Stage 4/ forecast the future by assessing which response would be most likely to be adopted.

In Chapter II I pursue a doctrinal research perspective,[157] since I enquire into the roots of property law, its development in New South Wales and examine key concepts in contemporary law and society, regarding private property rights and public rights. Further, I examine where the boundary lies, both physically, and conceptually, in current NSW property law. Questions of what is within and what is outside accepted legal doctrine,[158] and how the boundary is defined, are core doctrinal methods, and applying them to coastal land is the focus of the thesis. The doctrinal method is thus apt for the tasks of Chapter II, and underpins Chapters III and IV.
I pursue my research from a positivist perspective[159] in the next chapters, focusing on recent and current case law (Chapter III) and statutes (Chapter IV) to make an assessment of the law in New South Wales as it currently stands. By examining relevant primary sources I am able to

[157] See Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 (1) *Deakin Law Review* 83-119, 101. They cited the 1987 Pearce Committee's report which characterized 'doctrinal research' as encompassing "a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty, and perhaps, predicts future developments."
[158] The core legal doctrine being examined is the doctrine of accretion. I discuss this in Chapter II below.
[159] That is describing the relevant law 'as it is'. See Leiboff and Thomas, above n 16, 139.

understand the current relationship between competing rights and answer secondary research questions as a positivist, as an interim step towards answering the primary research question.

I adopt a largely pragmatic perspective in Stage Two to devise methodologies for answering a policy question about the future.[160] I report in Chapter V the selections from the literature which I believe are most relevant, and of most practical assistance to the research task being pursued. From these sources I pragmatically select criteria with which to assess the merits of the potential public policy responses of a future State government, to conflicts over use of coastal lands.

My research perspective shifts in Chapter VI when describing these potential responses. First I adopt the common law tradition to estimate future court rulings, by applying relevant common law rules.[161] I then adopt a reform-oriented approach[162] to other responses, since I apply ideas from various sources to explore how the law of property might operate in the future.

I return to a pragmatic policy analysis mode in Stage Three in Chapter VII, to evaluate these responses' merits by assessing each potential response across two sets of criteria. In this way I identify the potential response which would have greatest merit.

In Chapter VIII I complete the Stage Four of my policy analysis by making overtly political assessments of which response a future NSW government would 'most likely' adopt. This shift into a reform oriented perspective is necessary because in practice public policy decisions are essentially political decisions.[163] I then return to doctrinal research mode,[164] to provide a reasoned answer to the primary research question.

[160] This is consistent with the 'policy analysis' type of legal research, which Minow described as 'present a problem, canvass alternatives, propose an evaluative scheme or method, recommend preferred solution.' See Martha Minow 'Archetypal Legal Scholarship – A Field Guide' *AALS Workshop for New Law Teachers* (AAL 2006) 34-5, quoted in Hutchinson and Duncan, above note 156, 103.
[161] Cook, et al (eds), above n 18, 73-82.
[162] According to the Pearce Committee report cited in Hutchinson and Duncan, above n 156, 101, reform-oriented research… 'intensively evaluates the adequacy of existing rules and … recommends changes to any rules found wanting'.
[163] See Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 4th ed, 2007), 6.
[164] Predicting 'future developments' is an element of doctrinal research according to the Pearce Committee's report, cited in Hutchinson and Duncan, above n 156, 101.

Part D – Methodology

11. Overview of the methodology

On the face of it, answering a question about any circumstances in the future faces considerable methodological obstacles. How can one conduct research to foretell the future? A simple idea suggested a process that might lead to a credible hypothetical answer about future 'rights'. I reasoned that I needed to know how private property rights and public rights related to each recently, and currently, in order to be able to frame an appropriate answer about the future. Thus the idea of a staged trajectory for my research crystallized. I provide a short overview of these stages next and a more detailed description of them in subsequent sections of this Part.

In the first phase of my research I examine the recent and current relationship between competing private property rights and public rights, as a stepping stone to exploring their likely relationship in the future. I reasoned that whatever the results of this first stage of my research were, it was not certain that any current dominance would continue into the future unchanged. Though a future State government could continue the current relationship, it could theoretically, seek to reverse the status quo, as a matter of public policy. Thus I theorized that notwithstanding their current status, either private property rights or public rights could be 'trumps' in the future, depending on the social and political goals, and mandate, of a future NSW government. Further stages of analysis are thus required to scope the range of the potential responses by a future government to conflicts between competing rights and to assess their merits, and likelihoods.

Hence in a second stage of analysis a range of potential responses are framed, and relevant philosophical approaches which could influence a future government's policy on whose rights should prevail are identified, and suitable criteria for assessing their merits are adopted, in preparation for later stages of analysis. As the final step in this stage, the actions proposed under each potential response by a future government are elaborated.

In the third stage, these potential responses by a future government and the public policy actions involved are evaluated to ascertain which response would best satisfy the criteria selected.

A fourth stage, preparing to answer the primary research question, is then possible. The results of and insights from the merits assessment are applied to identify the response a future State government is 'most likely' to adopt. With the benefit of these analyses, the likely policy environment of the future may be forecast, framing a credible, coherent answer.

12. Research methods employed

The research methods used are suitable for my enquiry of the current relationship between competing rights, but they are also useful for enquiring into their likely future relationship, in an attempt to solve the specific legal problem: whose rights will prevail when they come into conflict over access to coastal lands in the future? Hence my research is in the form characterized by Hutchinson and Duncan[165] as 'problem-based doctrine research',[166] and the 'internal method' of doctrinal legal research described by Lucy,[167] is the principal method employed. I identify and obtain the law relevant to conflicts between competing rights and interpret and analyze these legal sources.[168] Standard approaches to judicial interpretation[169] and settled rules of statutory interpretation[170] are used to ascertain the meaning of key words and phrases,[171] to understand the scope and operation of legislative provisions. I apply logical deductions, and inductive reasoning from my position 'in the legal system', in order to answer my research questions about the relationship between competing rights under current law[172]

I then explore potential responses to future conflicts between competing 'rights', by applying this doctrinal knowledge to hypothetical future circumstances, and referring to relevant analogies, to forecast likely future results or effects, in more reform-oriented writing.[173] Thus in Chapter V the 'external method' described by Lucy, is used to look outside the law for concepts from 'philosophy, political theory and economy'[174] with which to explore how the legal framework might develop in the future to address conflicts between competing rights. Hence the thesis aims to be more than a positivist report on current law in this jurisdiction.

Having provided an overview of my staged methodology and research methods, I next describe in detail the methodological elements of the four stages of my research.

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[165] Hutchinson and Duncan above n 156, 83 - 119.
[166] Ibid 106.
[167] William Lucy, 'Abstraction and the Rule of Law' (2009) 29(3) *Oxford Journal of Legal Studies* 481, cited in Hutchinson and Duncan, above n 156, 114.
[168] Hutchinson and Duncan, above n 156, 110. See my identification and discussion of relevant case law in Chapter III and applicable NSW statutes in Chapter IV.
[169] Principally, discerning the *ratio* of the decision from other *obiter* comments, in the majority of the judgements of appellate courts. Cook et al, above, n 18, 79.
[170] See Elizabeth Ellis, *Principles and Practice of Australian Law* (Lawbook, 3rd ed, 2013) 219-256; Michelle Sanson, *Statutory Interpretation* (OUP, 2012); Cook et al, above n 18, 167-310.
[171] If needed, further guidance on the meanings of the rulings of the court, or the operation of statute law, will be provided by legal dictionaries, legal services and learned discussions in published law journals.
[172] These methods are the hallmarks of the internal method according to Christopher McCrudden, 'Legal Research and the Social Science' [2006] *Law Quarterly Review* 632, 633, cited in Hutchinson and Duncan, above n 156, at 115.
[173] Hutchinson and Duncan, above n 156, 108.
[174] Lucy, in Hutchinson and Duncan, above n 156, 114-5.

13. Stage One – Ascertaining current relationship

In this section I explain the methodology I employ in the first stage of my investigation of the current relationship between competing rights.

13.1 Framing pertinent secondary research questions

As a result of analyzing the interests of private landowners adversely affected by shoreline recession, I identified a suite of issues. These were concerns about:
a) the nature, and the location, of their real property boundary,
b) what might be done to stop the erosion and forestall or halt shoreline recession;
c) what the ultimate result might be, if their land is subject to more erosion and inundation
d) whether the government has a duty to protect private land, by managing coastal hazards;
e) their continued long term ownership of land as it becomes eroded and or flooded
f) eligibility for payment of compensation if their 'real property' were wholly lost to the sea.

From these concerns I developed a suite of secondary research questions whose answers could ground an understanding of their current relationship, and possible future relationship.[175]

Accepting that seas are rising and shorelines receding, these questions are:

- where will the boundary of private land, affected by these coastal hazards, be located?
- who owns land when it becomes covered by tidal waters ie < MHWM??
- do landowners have a private property 'right' to build seawalls to defend against the sea?
- are governments duty bound to construct defences against the sea?
- will governments be liable to pay compensation for private land 'lost' to the sea?

Answers to these questions are provided in section 9 of Chapter IV below.

13.2 The search for evidence of 'trumps'

A simple methodology for exploring these secondary research questions was adopted. I formed two hypotheses: based on the two possible answers: 'Yes, Private property rights would trump public rights' and 'No, Public rights trump private property rights'.[176] I reasoned that if either proposition were correct, it would be apparent from the records of our society's two arbiters of conflicts over competing rights, the courts and the state Legislature. I posited that since 'trump' cards are instantly recognizable, and achieve uncontestable wins, evidence of rights acting as 'trumps' would also be obvious in the records of the resolution of prior conflicts between

[175] Guiding research questions are considered useful, see Hutchinson and Duncan, above n 156, 109.
[176] Ibid 108. Doctrinal researchers may use 'test hypotheses'.

competing rights. Consequently, I undertook to search the primary sources of law for evidence of rights acting as trumps, which could assist in answering the primary research question.

13.3 Reporting the results of research on current relationship

The results of my search for 'trumps' and research into the relationship between competing rights, under current NSW law, are reported at the end of Chapter IV. With the benefit of a review of relevant cases and statutes, an assessment of the relative weight of competing rights, as at 2020, is then possible. That assessment of their current relationship concludes Stage One.

14. Stage Two – Anticipating the future

In this section I outline the method for considering other factors which may affect the nature of the relationship between private property rights and public rights, in the future.

14.1 Moving from existing law to possible future scenarios

Having understood the nature of the current relationship between these competing rights at the end of Stage One, I reasoned that it was not inevitable that current institutional arrangements would continue indefinitely. However ascertaining their current relationship allows me to explore their likely future relationship, by framing potential responses by a future State government as either maintaining or overthrowing the status quo.

To develop a credible answer about their future relationship other factors – apart from climate change – that may be in play, and influential, in the future would need to be considered. Three crucial factors with the potential to affect or determine their future relationship were identified:

i] the rulings of future courts on specific cases which have wider application;
ii] the policy of a future State government; and
iii] the attitude and co-operation of the legislature in the Parliament of New South Wales.

An existing methodology for estimating future courts' rulings is available. It is possible to estimate the decisions of future courts by using the common law tradition and applying existing legal rules. While this approach could achieve a high degree of certainty where existing law is applied to well-known situations, it could also assist in estimating future rulings of the court where existing elements of law would be applied to novel circumstances.

Though methodologies such as the Delphi method,[177]exist in the social sciences, for research institutions to assess the effect of past government policy,[178] estimate the likely content of future government policy and build a consensus on what future government policy should be, based on expert opinion, which could be adapted to forecast the electoral appeal of future government policy based on the views of beach users and coastal residents, or to estimate the level of a future legislature's co-operation in enacting government policy,[179] use of these expert or consultative approaches for these tasks in a doctoral thesis poses practical difficulties.[180] Moreover their use is unnecessary given I can make estimations of these matters myself which are adequate for the purposes of the thesis, by using a diverse set of scenarios.[181]

I outline the methodology adopted for framing a suite of potential future government policy responses to conflicts between competing rights in the next section, and I explain how I estimate these potential responses' appeal to electors and legislators in section 15.3 below.

14.2 The central roles of a future State government and the legislature

The policy of a future State government of New South Wales, if enacted by the legislature, is perhaps the most crucial factor, because it has the capacity to determine the nature of the relationship between private property rights and public rights, in the future, through legislation.

It is clear that it is the NSW government which has the central role in affecting the exercise of private property rights or public rights in the future. The State's jurisdiction and powers relate directly to real property,[182] coastal management and coastal navigation.[183] Moreover, the State's

[177] HA Linstone and M Turoff 'Introduction', in HA Linstone and M Turoff (eds) *The Delphi method: Techniques and applications* (2002): 4-12

[178] R Adam Manely, 'The Policy Delphi: a method for identifying intended and unintended consequences of educational policy', 11(6) *Policy Futures in Education* (2013) 755-768, 755.

[179] Ibid 4. Linstone and Turoff advise that Delphi technique requires a researcher to 'sculpt' its application to the desired subject area, as an important preliminary step in its use. Hence they admit that the technique is not a 'neatly wrapped package sitting on the shelf, ready to use'.

[180] There financial and time costs in the many sub-processes involved in such consultative processes, which include: recruiting and briefing suitable participants or experts, formulating and issuing an initial questionnaire, seeking and collating the results of initial feedback from participants, distributing feed-back to participants, issuing a refined questionnaire for a second, third (or fourth) round of consultation, collating and reporting further feedback, and analysing feedback, in order to produce an answer. See Manely, above n 178, 755.

[181] The IPCC has created projections of future GHG emission levels by adopting a suite of scenarios describing national government policy responses. See IPCC, *Special Report on Emissions Scenarios* by Working Group III IPCC (Cambridge University Press, 2000) (IPCC SRES, 2000).

[182] British colonies in Australia were unwilling to cede control of property law to the new Commonwealth, and the relevant statute in New South Wales, the *Real Property Act 1900* (NSW) was enacted shortly before federation. See the discussion of this in Simon Evans, 'Property and the Drafting of the Australian Constitution' (2001) *Federal Law Review* 6.

legislative powers have been held to be extensive and effectively unlimited.[184] Hence, a policy adopted by executive government, about whose rights should prevail in the future, would be potentially determinative, but would not be enough by itself. The legislature's co-operation in enacting relevant legislation, would be essential if the policy were to become law. For these reasons, whatever the status quo, if the legislature enacted legislation which repealed existing statutes and created new statutory processes, a future State government could, in theory, determine a new relationship between private property rights and public rights of access.[185] Without such an intentional reversal however the status quo would likely continue.

However, without a majority of support in the Legislative Council, announcements of policy to reverse the status quo by a government controlling only the Legislative Assembly, would have no effect at law. Hence the attitudes of the Members of the Legislative Council (MLCs), and the level of their co-operation in enacting the legislation necessary to implement the government 's policy, would be vital factors in the success of any government policy response.

14.3 Framing potential responses by a future government

I reasoned that the scope and nature of potential responses to conflicting rights would be finite. A future government could pursue either of two propositions as their public policy goal: privilege private property rights or protect public rights of access. However, I realized that this is not the full scope of the responses available. A potential response by government could be inaction, due to unwillingness to address these matters, or its inability to convince the legislature enact their policy and change existing statute law. Hence a failure to act, and the courts adjudicating conflicts between competing rights, is possible and worth considering.

Another response that a pragmatic future government might pursue, is also plausible: attempt to do both – protect both private property rights and public rights. Thus four future pathways were initially identified: do nothing, privilege private, protect public, or attempt to do both.

I observed however that these responses could be pursued to varying degrees and decided to include a modest and more robust version of each, as potential variations. However, I concluded

[183] The management of coastal lands and waters were formally delegated to the States, under the 'offshore constitutional settlement' by Commonwealth legislation, *Coastal Waters (State Powers) Act 1980* (Cth) and *Coastal Waters (State Title) Act 1980* (Cth).
[184] See *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399, Kirby J at [56].
[185] It would be unlikely that Regulations by themselves, could achieve an effective reversal of the status quo. Legislation would be required to amend or repeal the common law, and existing statutes.

that postulating different intensities in the courts' responses would be inappropriate since they would follow existing precedents[186] and their rulings would likely be within a narrow band.

Thus using the IPCC's approach of defining plausible future scenarios for emissions reductions based on stated government policies[187] seven theoretically possible, potential responses by a future State government to conflicts between competing rights were identified, as shown in Figure 11 below.

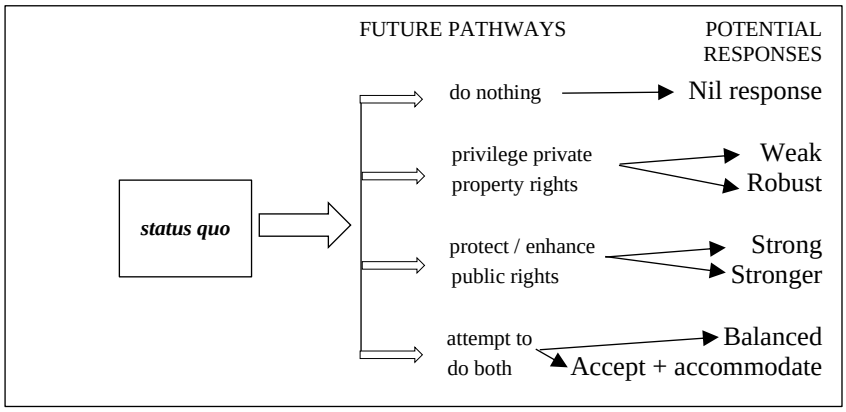

Figure 11. Decision pathways and potential responses

The characters of these seven potential responses reflect differing policies on the core concerns of adversely affected private landowners, identified in Part A above:

a] the nature and location of the real property boundary,

b] the ownership of land below tidal waters,

c] the 'right to defend',

d] the government 'duty to protect',

e] any right to compensation, and

f] level of public funding available.

By framing them in this way, and by constraining their scope to six key concerns, I generate a limited but diverse set of potential government responses likely to cover most eventualities. These responses are described in Chapter VI and are summarized in Table 4 of Chapter VI.

14.4 Selection of relevant literature which may be persuasive

The next step in this stage is to consider philosophical views in the literature which could

[186] Exercising the principle of *stare decisi.* See Cook et al, above n 18, 73 – 75.
[187] IPCC, above n 176, 3-4.

influence key government Ministers and cross-bench Members of the Legislative Council, on whose rights should prevail, and which of these responses should be adopted.

My research into secondary sources which could shape legislators' attitudes, and future public policy directions identified a polarized literature on property theory. I reasoned that I should canvas views which discuss the management of coastal hazards' impacts on coastal lands, across this spectrum, from pro-private property rights to pro-public rights.[188]

The works selected for close review were thus chosen to reflect these diverse perspectives. The public interest views considered highlight the existence and antiquity of 'public property' in coastal land,[189] designate an ethical framework for private ownership of land,[190] suggest how exercising private property rights over land might best be done,[191] and identify potential directions for the future development of local laws on 'real property'.[192] Eric T Freyfogle views are especially useful due to his focus on the future ethical management of land, which recognizes its innate character and condition,[193] and contributes to social goals.

In contrast Coleman's article presents one landowner's perspective on the primacy of private property rights in New South Wales,[194] when governments develop policies to address the impacts of climate change on coastal lands. Cooper and McKenna's review was also identified as relevant since it explores a novel private landowner perspective and assesses the validity of landowners' calls for 'social justice' in decisions about coastal management in the UK.[195] These works are considered more closely in Chapter V.

15. Stage Three – Evaluating the merits

Having generated a suite of potential responses by a future NSW government to conflicts between competing private and public rights, and stated an intention to evaluate their merits in

[188] The consideration of a range of views including 'opposing and incompatible perspectives' is consistent with pragmatism's practical approach to problem solving. See Hirokawa, above n, 155, 252.
[189] See Joseph L Sax, 'The Public Trust doctrine in Natural Resource Law: Effective Judicial Intervention' (1969-1970) 68 *Michigan Law Review* 471-566; JL Sax, 'The Public Trust doctrine in Tidal Areas: A Sometime Submerged Traditional Doctrine (1970) 79 *Yale Law Journal* 762 763-4; JL Sax, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (1980) 14 *University of California Davis, Law Review* 185-194. See also Rose, above n 237, 713.
[190] See Freyfogle, 'Ethics', above n 183, 639 - 640.
[191] Gregory Alexander, et al, 'A Statement of Progressive Property' (2008) 94 *Cornell Law Review* 743-4.
[192] See eg Thom, above n 316, 38-40.
[193] Eric T Freyfogle, 'Ownership and Ecology' (1993) 43 *Case Western Reserve Law Review* 1269-1297. I focus on Freyfogle's work in s 6 Chapter V below.
[194] Coleman, above n 13, 422.
[195] Cooper and McKenna, above n 123.

order to estimate which response would be most likely to be adopted by a future government, a necessary next procedural step is to nominate criteria against which they are to be assessed.

In this section I explain the derivation of evaluation criteria from the literature, introduce the criteria adopted for evaluating the merits of the seven potential responses, and outline how they will be applied in assessing the merits of each potential response, in stage three of my analysis.

15.1 Derivation of evaluation criteria

In my review of the literature, I found no ready-made set of criteria with which to evaluate the merits of theoretical models of future government policy affecting the ownership and use of coastal land, or their likelihood of success. However, the literature suggested methods of assessing diverse options and developing feasible analysis about likely future events by consulting participants, or panels of experts, using the Delphi method.[196] This approach was explored but the time and cost of the extensive sub-processes involved,[197] made it impractical.

However, a key step in its method, 'sculpting' the technique to develop 'a relevant application to the desired subject area',[198] suggested that identifying useful criteria myself to meet my specific purposes, was an approach which was plausible, practical and feasible. Hence it became clear that seeking others' views on suitable criteria for my purposes was also unnecessary.
I concluded that I could draw on the relevant literature and pragmatically identify appropriate criteria myself with which assessments might be made of the merits of these potential responses.

Several ideas offered a useful framework. First, practical criteria suitable to the assessment task being contemplated would be needed. Second, the subject's complexity warranted using multiple criteria: one set to assess the merits of the responses in their decisions about the future use of coastal lands; and another to evaluate their substance as public policy as an analogue of their likely success as government policy. Third, assessing the merits of these potential responses may not be enough to frame a credible answer to my research question. Criteria would be required for the final stage of analysis, to assess which response would be 'most likely' to be adopted by a future government.

[196] See HA Linstone and M Turoff 'Introduction', in HA Linstone and M Turoff (eds) *The Delphi method: Techniques and applications* (2002): 4-12. The Delphi method was originally developed to make estimates of future events.
[197] See the outline of the many sub-processes involved in consultations, in Manely, above n 178, 755.
[198] Linstone and Turoff, above n 196, 4.

Identifying the assessment criteria myself is justified by my pragmatic approach, because it works:[199] the criteria selected suit the task at hand[200] and are plausible because they relate to key issues discussed in the literature.

15.2 Criteria adopted

From my review of the literature on private property rights and the ethical management of land the works of Eric T Freyfogle appeared highly relevant. Several of his articles,[201] nominate specific criteria which he asserts ought to be considered by an ethical landowner when making decisions about the future use of land. Though Freyfogle's focus is on the individual landowner's ethical conduct in their land management, they are certainly relevant and applicable at a larger scale, to governments making decisions about the future use of land. Hence from Freyfogle's work I adopted five criteria, as hallmarks of ethical land management. Before using land, ethical landowners would consider the:

a] land's physical condition,
b] social community of people potentially affected by their decision,
c] ecological community which inhabited that land,
d] effects of the land use over some lengthy period time, and
e] ways this land use might contribute to a wider social good.[202]

To estimate the likely success of these potential responses by a future government, I reasoned that they would also need to be assessed against criteria for 'successful public policy'. Again since no ready-made set of criteria were available to evaluate their merits as public policy, I resolved to pragmatically develop a relevant set of criteria myself, by drawing on published discussions of the impact of government decisions.[203] From this literature, a short list of key attributes for successful public policy was identified: a clear public interest rationale, was

[199] A pragmatic approach seeks to 'solve real problems' and develop 'answers to practical questions' rather than identify theoretical principles. They are "free to consider a variety of ideas, approaches and solutions without committing to particular theoretical foundations, such that "all relevant ideas become useful to the resolution of a dilemma". See Hirokawa, 'Some Pragmatic Observations on Radical Critique in Environmental Law', (2002) 21 *Stanford Environmental Law Journal* 225-281, 251-2.

[200] The adaptation of existing theories and principles to account for 'the contextual needs that make the inquiry important', in solving practical problems, is a hallmark of a pragmatic jurisprudence. Hirokawa, above n 15, 250.

[201] Frefogle's writing is extensive. See Eric T Freyfogle, 'Ethics, community, and private land' (1996) 23 *Ecology Law Quarterly* 631 – 66; see also Eric T Freyfogle, 'Property and Liberty' (2010) 34 *Harvard Environmental Law Review* 75 – 118.

[202] Eric T Freyfogle, 'Eight Principles for Property Owners in the Anti-Sprawl Age' (1999) 23 (3) *William and Mary Environmental Law and Policy Review* 777-799.

[203] For eg see JAG Cooper and J McKenna, 'Social justice in coastal erosion management: The temporal and spatial dimensions' (2008) 39 *Geoforum* 294-306.

timely, cost-effective, minimized disruption, and credible because it relied on expert opinion and applied best practice.

Consequently, five criteria for assessing responses' merits as 'public policy' were adopted:

a) its justifying rationale: how well does the response support a 'greater public good',
b) its timeliness: was it timely? How well did the response consider the effects of time?
c) its cost-effectiveness: the utility, level and value of any public spending required;
d) its potential disruption: whether incidental costs, unintended impacts or outcomes, delays, difficulties or uncertainty might be generated in its implementation, and
e) the credibility of the response with the public, and other stakeholders,[204] given relevant expert opinion in published research, and best practice in coastal management.[205]

Hence the merits of each potential response will be assessed using two sets of five criteria: the hallmarks of ethic land use decision making; and indicators of sound public policy. Additional criteria for ascertaining which response would be 'most likely' are stated in section 6.1 below. The derivation of these criteria from the selected literature, and their use to evaluate potential responses, are further explained in Chapter V.

15.3 Estimating how each potential response might play out

Assessing the merits of the potential responses of a future government by evaluating their likely satisfaction of the criteria selected, lies at the core of Stage Three of my research project. However this assessment requires an estimation of how the potential responses outlined above may play out in the future. Hence estimating the future events is a key step in this stage of my analysis. However, in my research I encountered no ready-made methodology for such a task.

Though the IPCC's predictions of likely future climate conditions are available, no guidance is available for estimating other key elements under consideration: the policy direction of a future government, the difficulty of implementing their coastal management policies, their effectiveness in managing climate change impacts or resolving conflicts between competing uses, or the

[204] As well as beach-using non-resident members of the public, and beachfront landowners, other stakeholders would include coastal science researchers, experts in coastal processes, natural resource or risk management, local council staff and other managers of coastal Crown lands. See Rachel Baird and Donald R Rothwell (eds), *Australian Coastal and Marine Law* (Federation Press, 2011) 56 -58.

[205] Such as the IPCC's publications, and the findings of scientific researchers. Best practice in coastal zone management would require an integrated co-ordinated approach applying the principles of ESD. Best practice in coastal management planning is presently described in the NSW Government, *Coastal Management Manual Parts A & B* (2018) and reference documents it cites, such as the Coastal Council of NSW, *Coastal Design Guidelines* (NSW Government, 2003).

level of public support they may engender. So pragmatically, I have adopted my own approach for estimating future events. I describe the methods employed in this complex task next.

When making mental estimates of future events I actively speculate on the diverse ways a specific scenario might play out in the future, and the ideas - which shape the future possibilities at the foundation of these estimates - arise in me. These ideas are reflected upon and relevant factors further considered in subsequent iterations of internal analysis, to generate plausible estimates of likely future outcomes. Thus they are the creative output of my intellect when imagining future circumstances which cannot be proven at this time.[206] Reflecting on the making of these estimates, I recognized that several elements form the core of my approach. I draw on my familiarity with public policy on NSW coastal management,[207] understanding of legislative procedures[208] and political processes,[209] and apply the knowledge and insights developed through my academic research.[210] I consider relevant analogies and use legal reasoning to draw conclusions about logical consequences.[211] My aim is to generate credible estimates, based on appropriate assumptions, about likely future scenarios, that are realistic, and nuanced, not exaggerated. Hence these estimates are the syntheses of my skills, experience and knowledge, applied imaginatively but plausibly, to the policy or scenario being considered.[212]

I have sought to make these estimations in general rather than specific terms. I prefer to indicate outcomes that may occur, or are likely, or very likely to occur, rather than certain occurrences. Where there are reasons to be less confident in making estimates I am explicit about this.

15.4 Assessment of potential responses against criteria

Evaluating the merits of potential responses by a future government. involves making qualitative assessments of their likely satisfaction of the ten selected criteria, by making informed,

[206] This is consistent with the description of doctrinal research as involving 'rigorous analysis and creative synthesis' by the Council of Australian Law Deans, *CALD Statement on the Nature of Research* (2005) quoted in Hutchinson and Duncan, above n 156, 105.
[207] As a non-government member of the ministerial advisory body, the NSW Coastal Committee (1990-98), and as a member of the statutory body, the Coastal Council of New South Wales (1999 – 2003).
[208] In 1990 I worked as liaison officer to NSW Parliament for the state's conservation groups. In 1991 I sought the disallowance of a Regulation, drafted special legislation and successfully lobbied for its enactment as the *Endangered Fauna (Interim Protection) Act 1991* (NSW). See Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Allen & Unwin, 1993) 90 -103. I later successfully sought a new Bill (No.2) to amend the *Coastal Protection Act 1979* (NSW) in 1998, and drafted amendments to the Act in 2002. In 2015 I critiqued the Bill for the *Coastal Management Act 2016* (NSW).
[209] I was Secretary of *The Greens NSW* 1994-5, and media co-ordinator in the 1995 NSW Legislative Council election campaign, in which the first Greens MLC was elected. Later I was *The Greens* candidate in the NSW seat of Lismore in 1999 and 2003, and in the federal division of Page in 2001.
[210] Elements of my research have been published in peer reviewed law journals. See Corkill, above n 63.
[211] These are some of the tools of doctrinal legal research. See Hutchinson and Duncan, above n 156, 111.
[212] This has been described as 'a unique blend of deduction and induction'. See CALD, in Hutchinson and Duncan, above n 156, 105.

albeit subjective judgements, like those used in estimating future events, described above.

To do this I employ a blend of deductive and inductive reasoning to assess each response against each criterion, using my personal reflections on likely answers to the focus questions designated for each criterion, described in sections 8 and 9 of Chapter V and my observations of the advantages and disadvantages of these responses made in Chapter VI.

When making these assessments I will aim to apply these criteria consistently across all seven potential responses, based on four considerations:

i] whether it is foreseeably possible that the criterion could be satisfied by that response;
ii] if so, in what ways, to what extent and how well;
iii] whether the satisfaction of a criterion might be logically indicated, or contra-indicated, in the substance of a potential response, and
iv] whether there are foreseeable obstacles to satisfying the criterion under that response.

Where I am uncertain about the application, impact or satisfaction of a criterion by a potential response, I am explicit about that uncertainty.

Based on my assessments, I award a raw score for each of these responses' satisfaction of each criterion, in the range of 0.0 to 1.0. This process of scoring potential responses against the nominated criteria is described next.

15.5 Scoring merits assessments

As noted in s 15.2 Chapter I, ten criteria will be used to assess the merits of seven potential responses. These assessments involve posing the focus question for each criterion and drawing on the existing elements of property theory and law[213] to develop, by using internal processes of deductive and inductive reasoning which integrate the four considerations above, hypothetical but realistic answers to them, upon which judgements are then made about the response's likely performance against that criterion. Based on those appraisals, which note relevant correspondences with these existing elements of property theory and law, I assign a score for the response's likely satisfaction of each criterion. In this task I use the standard multi-criteria scoring model often used in personnel recruitment to compare competing applicants,[214] or in

[213] Relevant elements of property theory are discussed in Chapters II and V, instructive decisions of the courts on the operation of property laws, are considered in Chapter III, and current applicable statutes are examined in Chapter IV, below.
[214] See 'Rating Scales for Government Selection Panels' at < https://www.selection-criteria.com.au/ratingscales.shtml >.

other project selection tasks,[215] where raw scores are awarded against criteria, which are then 'weighted' for overall importance,[216] and subsequently aggregated to produce a final score.

Using this method, and my deliberated assessment of each response, raw scores of a maximum of 1.0 will be awarded for full satisfaction of each criterion, and raw scores of 0.9 – 0.1 will be awarded for lesser degrees of satisfaction.[217] See Table 1. below.

Raw Score	**Level of satisfaction of criteria**	0.5	Basic satisfaction
1.0	Full satisfaction	0.4	Partial satisfaction
0.9	Very good satisfaction	0.3	Minor satisfaction
0.8	Good satisfaction	0.2	Low satisfaction
0.7	Moderate satisfaction	0.1	Very low satisfaction
0.6	Fair satisfaction	0.0	Nil satisfaction

Table 1. - Assessment raw scores for satisfaction of criteria

The raw scores of each potential response, cited in brackets in each sub-heading, are collated in Table 6, section 11 Chapter VII. These raw scores against all criteria are then 'weighted', that is adjusted, by assigning greater 'weight' or numeric value to two of the ten criteria - 'physical characteristics' and 'public interest rationale' – based on my view of their relative importance.

I determined that how well the land's 'physical characteristics' would be taken into account by the response was the criterion of highest importance, due to the profound physical impacts possible on coastal land due to coastal hazards, likely to exacerbated by climate change, and the very high physical risks to people and real property if they are ignored.

I adopted the articulation by government of a coherent 'public interest rationale' as a second highly important criterion because it would explain subsequent actions, be crucial for obtaining public support and justify committing the expenditure of very large sums of public funds.

To simplify the weighting process each response's scores against these two criteria will be weighted x 1.0, and all other raw scores against the other eight criteria will be weighted x 0.8. These weighted scores are then aggregated to produce a weighted final score (see Table 6).

[215] See Anne DePianter Henriksen and Ann Jensen Traynor, 'A Practical R&D Project-Selection Tool', (1999) (46(2) *IEEE Transactions on Engineering Management* 158-170, 168.
[216] Ibid 163. Weighting of criteria typically considers overall importance but may factor in other considerations, such as risk. See Steve Walton, 'The Importance of Weighting Selection Criteria' at < https://www.fenchurch.com.au/resources/How-to-weight-selection-criteria.pdf >.
[217] Indications of likely high and low scores are stated for most criteria, in Chapter V.

These scores will allow comparisons of the response's merits across the criteria, and their final weighted scores will indicate a ranking of their capacity to satisfy these criteria (see Table 7 – Ranking of potential responses by merit, in s. 15 of Chapter VII).

However identifying the response with greatest theoretical merit does not mean that it would be 'most likely' to be adopted by a future government.

16. Stage Four – Preparing to answer

To foresee the likely policy environment of the future, to frame a credible context in which the primary research question can be practically answered, a final stage of assessment is needed to identify the potential response 'most likely' to be adopted by a future NSW government.

16.1 Moving from 'greatest merit' to 'most likely'.

This assessment of likeliness is needed because a future government's decision on the response it would adopt would be a political, not an academic, decision. Hence it is necessary to move beyond a technical assessment of merits. While key ministers would likely consider the results of a departmental merits assessment of potential responses, and their advantages and disadvantages, the ministers would probably employ overtly political considerations to canvas their political feasibility, when deciding which response the government would adopt.

These political calculations would seek to gauge:
i) its difficulty; in justifying it, enacting the necessary legislation and implementing it, and
ii) the overall cost of implementing the response; and
iii) the level of political 'kudos'[218] or electoral advantage likely to gained by the government.

In Chapter V I explain how these considerations were adopted as key criteria for conducting a final political assessment of each response's 'likeliness' and note their correspondence with elements of the property theory, and property law, examined in Chapters II, III and IV. I note that in government, assessing responses against these factors would require detailed reports, and multiple agencies' work, but for the purposes of this thesis I use insights about the difficulty, cost and electoral appeal of responses, drawn from the assessments made in Chapter VII.

16.2 Applying insights from these results

These political considerations by key ministers would likely integrate insights on each potential response made in the merits assessment, particularly the successful public policy criteria.

[218] 'kudos': n. glory, renown: Delbridge et al, (eds) above n 4, 984.

Considerations of difficulty would include: difficulty in articulating a public interest rationale, in obtaining public and legislative support to enact the response, and in its timely implementation given the disruption likely to be caused by the response. Politically, 'timely' would mean within the four year electoral cycle of New South Wales. Appraisals of cost-effectiveness of public spending would be simplified to focus on overall cost. Responses with low or moderate overall cost, or staged costs, would be preferred politically, since they would not overcommit public funds or compete for funding with other policy areas. Estimates of the kudos the government might gain with voters would likely consider the strengths of the public interest rationale justifying the response, potential for creating disruption and make overt political calls about its likely public credibility, its electoral appeal in key electorates. Political estimates of these kinds would likely use a simple ratings scale: very low, low, moderate, high, very high.

Hence political calculations of difficulty, overall cost and electoral appeal would make the adoption of some potential responses by a future government, more likely than others.

By identifying the response most likely to be adopted, a credible forecast can then be made of the likely policy environment of the future, in which an answer to the primary research question might be stated, about the relationship between competing rights in the future.

16.3 Answering the primary research question

Having identified the likely policy environment of the future, as a plausible context, I will be able to state a coherent answer to the primary research question. The method for arriving at this answer will be principally deductive logic. Based on my conclusions about their current relationship, and the likely policy environment of the future, I will be able to frame a plausible answer about their likely relationship in the future. In order to be coherent, the answer ought to agree or disagree with the proposition in the primary research question, and state the reasons for the conclusions reached, with any necessary qualifications.

This completes the description of my proposed methodology and concludes Chapter I.
In this chapter I introduced the topic, defined key terms, illustrated the problem, and set out my research perspectives, objectives and methodology. In Chapter II the meanings of 'property' and the nature of private and public rights in New South Wales are examined.

"All forms that perish other forms supply,
(By turns we catch the vital breath and die)
Like bubbles on the sea of matter borne,
They rise, they break, and to that sea return."

Alexander Pope, *An Essay on Man* (1732 -34)

Chapter II – Property and rights: private and public

Introduction to Chapter II

In this Chapter I develop the ideas outlined in my introduction and examine the key concepts that comprise my primary research question.

In Part A I describe the concept of 'property', its various meanings and usages, and report the difficulties encountered by theorists in developing a sound definition of 'property'. I canvas meaning of 'property', define key terms employed, and clarify my focus as 'real property'. Two little known but applicable vestiges of English common law and an obscure but relevant meta-principle of property law are described since their application to real property is highly relevant. An overview of the literature is presented to demonstrate its enormous diversity and to situate the works I have selected for closer review within the literature on property.

In Part B I provide an overview of modern thinking on 'property' and ownership. I describe the nature and extent of private property 'rights' available to landowners in New South Wales and distinguish rights which can be identified as settled law, from *claimed* private property rights. This material is presented to establish the nature of property and property rights as socially constructed, not god given, to situate my own review of claimed rights within the norms of the property theory literature, and to make explicit the theoretical positions from which I proceed.

In Part C I trace the key ideas about public property in land from early civil law texts, describe their evolution into common law 'public rights' and outline the scope of current public rights to access coastal lands and waters, in this jurisdiction. In Part D I report my conclusions.

Part A – Conceptualizing 'property'

In this Part I outline the difficulties of defining 'property', provide an overview of relevant literature, and describe key concepts in current property theory which are largely agreed. I explain my use of key terms and focus my discussion on 'real property' before noticing two relevant surviving elements of earlier land law.

1. Defining 'property'

The term 'property' has a range of meanings in its contemporary usage.[219] Some meanings have continued from early use,[220]while others have become lapsed in common usage but survive in legal parlance. [221] Subsequently new applications of the term have developed.[222]

1.1 The evolution of the term

As will be shown below, the term 'property' is understood to have a legal meaning as the 'legal or equitable interests' in a thing, not the thing itself. Other uses of the term abound however. Using 'property' to refer explicitly to the object of property, while technically incorrect, is not new. Writing in 1913, an eminent American jurist noted the 'looseness' in the use of the term and distinguished its confusing non-legal usage by laymen, 'to indicate the physical objects to which various legal rights, privileges, etc relate', and its proper usage to 'denote the legal interest (or aggregate of legal relations) appertaining to such physical object'.[223] I discuss Hohfeld's contribution to property theory in s 4 Chapter II below.

Historically, a distinction has been made between 'personal property'[224] and 'real property' being land and buildings, including interests in land such as easements or a *profit a prendre.*[225] The origin of this distinction is remote,[226] and in contemporary usage the distinction has been blurred or lost. The ambit of things which can be the subject of 'property', or legal interests, has however developed substantially during the 19th and 20th centuries.[227]

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[219] See Delbridge et al (eds) above n 4, 1413.
[220] referring to 'an essential or distinctive attribute or quality' of an object or thing, is not the meaning considered in this thesis.
[221] Delbridge et al (eds), above note 4, 1413, see definition 8.
[222] Stuart Banner, *American Property A History of How, Why, and What We Own* (Harvard UP, 2011).
[223] Wesley N Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16, 21-22. To emphasize how confusion had persisted on this point Hohfeld quoted a statement on this distinction in a case from 1856: "In a strict legal sense, land is not 'property', but the subject of property. The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it'. 'It denotes a right over a determinate thing'. 'Property is the right of any person to possess use, enjoy, and dispose of a thing'. Selden J in *Wynehamer v People* 13 NY 378, 433…"
[224] Peter Butt and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis Butterworths, 4th ed, 2011), 438. Personal property includes chattels, being movable possessions: see Butt and Hamer, above n 207, 86-7. 'Chattels real' include leasehold interests in land and annuities deriving from such interests. 'Chattels personal' include all other forms of personal property.
[225] Butt and Hamer, above n 207, 466. Fr 'a right to take' something off another person's land.
[226] It is said to lie in the 'causes of action' available to the lawful owner to recover possession of them. Originally, in English common law, proceedings to recover 'property in land' were known as a "real action" (*actio realis*), while proceedings to recover personal property were known as "personal action" (*action personalis*). 'And so property recoverable by the real actions came to be called "real" property.' Peter Butt, *Land Law* (Lawbook, 6th ed, 2010) 94 [5 17].
[227] It includes tangible things of monetary value such as cash, stocks and bonds, and intangible things such as outstanding loans and debts, appointed positions in statutory offices and streams of revenue or

1.2 The search for an essential definition

As these various uses show, reporting an essential definition of 'property' is not straight-forward,[228] and may remain elusive.[229] Various attempts at stating a key definition compete, but there is no consensus on a definition which reflects all property's nuances.[230]

A principal emphasis in 'property' theory is the idea that property is the relations between people regarding a thing, not the thing itself.[231] The nature of these relations are the subject of dispute among theorists, since some writers posit a moral, and legal 'right' to own a thing,[232] while others contend that what constitutes property varies, and includes interests in a thing less than a 'right' to 'own'.[233] Thus it appears 'property' is a flexible, abstract social concept.[234]

In mainstream property theory, 'property' as a concept, is also said to be 'de-physicalized' because the physical characteristics of the owned thing are not determinative: it is the abstract relations between people regarding the thing, which constitute property.[235] Some writers posit that to qualify as property, the relations regarding a thing need to be of an exclusive nature, where only one person has that relation.[236] Others theorise that it is possible that several, even many, people can simultaneously have similar or varying relations, or interests, regarding a thing, such as an area of land, and each relation qualifies as 'property'.[237]

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income, and less tangible materials capable of ownership, such as 'intellectual property' the exclusive title to which has been secured through the registration of patents or the assertion of copyright. More recently the scope of 'property' has developed to include news, sounds and music, and wavelengths. See Banner, above n 205, (news) 73-93, (sounds and music) 109-129, (wavelengths) 202-219.

[228] One attempt by Walter Hamilton, cited in Edwin Robert Anderson Seligman and Alvin Saunders Johnson (eds) *Encyclopedia of the Social Sciences* (Macmillan, 1937) posited that property is nothing more than 'a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth', quoted in Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730, 738.

[229] In *The Right to Private Property* (Clarenden, 1988) Jeremey Waldron noted that some have argued that 'the concept of property defies definition', cited in Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012).

[230] See discussion of the difficulties in defining 'property' in Alexander and Peñalver, above n 229, 1.

[231] Numerous articles have made this as a preliminary point. See for eg Hohfeld, above n 223, 22.

[232] See discussion of Locke's view on private property in Alexander and Peñalver, above n 229, 39.

[233] Anthony M Honoré, 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 124 – 126.

[234] Hohfeld, above n 223, 30.

[235] See the discussion of this in Brendan Edgeworth, 'Post-Property? : A Postmodern Conception of Private Property' (1988) 11 *University of New South Wales Law Journal* 87, 97. See also the analysis in Nicole Graham, *Lawscape: Property, Environment, Law* (Routledge-Cavendish, 2010) 134-159.

[236] Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730, 734-5. Merrill cited Felix Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357, 374.

[237] See Carol M Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property' (1986) 53(3) *University of Chicago Law Review* 711-781. Other sources are cited by John Page, 'Towards an Understanding of Public Property', in Nick Hopkins (ed) *Modern Studies in Property Law* (Hart Publishing, 7th ed, 2013) 195, 195.

Another key idea is that 'property', as an essentially social construct, requires social consent.[238] Without agreement in a social context, by either explicit acknowledgement or acquiescence, an individual's claim to own a thing as their (private) property may be met with a similar claim by other persons, rendering the initial claim, and all claims of property, as continually contested. Thus, property conceptualized without social context and consent from others renders claims of property pointless.[239] The innately socially nature of property rights is further explored below.

In the absence of a definition, a metaphor often employed by theorists to describe the various interests, or property, in a thing is the 'bundle of rights'.[240] This idea has been further developed as a 'bundle of sticks', where each interest is represented by a metaphorical 'stick'.[241] This metaphor has not been accepted as adequate however by many scholars.[242]

A closely related concept in the literature is 'ownership', since it is said that to own a thing encapsulates fully, the 'property' in that thing.[243] Honoré found multiple social relations, such as uses or values, often described generically as 'rights', applied to a thing which is owned.[244] These are social relations because they are between people, about the thing. The identification of the existence of these interests, uses, values or rights does not create a stable definition of 'property' however, but does contribute to understanding the concept of 'ownership'.[245] While a person possessing a combination of these interests is said to be sufficient for ownership,[246] such is the flexibility of 'property' that it is not necessary to possess all these interests, and the lack of one or more of them would not inevitably deny ownership of a thing.[247]

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[238] Claims of ownership do not derive validity from a person merely claiming a thing. To constitute it as their property, requires that their claim be agreed to by others. Hohfeld, above n 223, 30, described the relations as being four pairs of reciprocal relations: right, privilege, power, immunity.

[239] Crawford Brough Macpherson, 'The Meaning of Property' in CB Macpherson, (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) 1-13

[240] See JE Penner, 'The "Bundle of Rights" Picture of Property' (1995-6) 43 *University of California, Los Angeles Law Review* 711;

[241] See Alexander and M Peñalver, above n 229, 2-3.

[242] See Henry E Smith, 'Property is Not Just a Bundle of Rights' (2011) 8(3) *Economic Journal Watch* 279-291.

[243] See the definition offered by the American Law Institute in its 1936 Restatement of property as 'the totality of rights, powers, privileges and immunities which one could have with respect to a "thing" are complete property in [the] thing', quoted in Denise R Johnson, 'Reflections on the Bundle of Rights' (2007) 32 *Vermont Law Review* 247, 252. See also Anthony M, Honoré, above n 216.

[244] Honoré, above n 216, refers to some relations as 'rights' but describes others as 'incidents' of ownership.

[245] Ibid 108, nonetheless he posits that 'ownership is provisionally defined as the greatest possible interest in a thing which a mature system of law recognizes…' (emphasis in the original).

[246] Holding an interest, or property, in land, such as a right to harvest would not designate ownership. Nor does the exclusive possession and use of land, since these are usually available to a leaseholder.

[247] Honoré, above n 226, 124-128. For eg the holder of a lease over 'real property' enjoys many incidents of ownership such as the rights to possess, use, manage, income but would not normally be described as the owner, but rather the lessee has a form of contract with the lessor, who is in fact the owner.

What is achieved by re-combining various disaggregated interests, is property and ownership in various forms,[248] but not a definition of 'property'.[249] This inexactness has led to other attempts to define property, including seeing it as a concept which is 'descriptive' or 'prescriptive'.[250] However this approach's utility is doubted, because its wide scope would encompass 'virtually every civil, political and economic right', and make property 'practically meaningless'.[251]

A further innovation was the idea that property has 'denotative' and 'connotative' meanings.[252] Denotative meanings are characteristics which when combined denote or indicate the meaning of property. [253] 'Connotative' meanings represent the 'evaluative, ideological and political' messages implied by or associated with property. These messages are sensitive to the period in which they occur, and are socially constructed since they 'like all meanings, are negotiated, influenced and modified by debate, struggle and power' in contemporary society, despite the view that property has 'a timeless, Platonic form, above and beyond the grubby terrains of politics and economics'.[254] Thus for Edgeworth, through the use of terms which 'indicate' meaning as appropriate, a single definition of 'property' is side-stepped as inappropriate, and 'property' is seen as having multiple layered meanings related to its use. That property has varying meanings in legal and cultural domains is a distinctive quality noted in the literature.[255]

Hence, despite its existence for millennia, the diverse social relations possible regarding a thing have frustrated attempts to define 'property'. Though some theoretical elements are agreed, other elements are contested,[256] and what constitutes owning a thing remains 'a conundrum.'[257]

2. 'Property' and 'property rights' in this thesis

It is clear therefore that 'property' has diverse applications and multiple meanings, and confusion may result from its inexact use. I next explain my use of the term in this thesis.

[248] See Henry E Smith, 'Property', above n 225, 279-291.
[249] Penner, above n 223, 714, described the 'bundle of rights' as 'no explanatory model at all' which is 'little more than a slogan.'
[250] Macpherson, 'The Meaning of Property', above n 222.
[251] Edgeworth, above n 218, 90.
[252] Ibid 89. Edgeworth asserted that the 'modern concept of property … embraces the values of an exclusivist, productivist, individualist and capitalist culture'.
[253] Ibid. According to Edgeworth there is 'an irreducible consensus: that property is (a) exclusive; (b) commodifiable; (c) objective … and (d) individual'.
[254] Ibid.
[255] See Margaret Davies, *Property: Meanings, History, Theories* (Routledge, 2007), 23 – 49.
[256] See Davies, above n 238, 7-8.
[257] See Page, 'Towards', above n 235, 195, 204.

2.1 The meanings of 'property' in this thesis

The term 'property' is used in a range of ways, some of which are consistent with formal legal usage, while others reflect modern usage. For the most part, I use 'property' to mean a stake, an equitable interest or legal right in, or claim to, a thing of value capable of being owned; and 'property in…' to refer to a legal interest in a thing, which is less than ownership, but still capable of legal recognition.[258] I avoid using 'property' to mean only legal interests in a thing held by a private individual, as if all 'property' were 'private'. Where I refer specifically to privately-held legal interests in a thing, I use the term 'private property'.

2.2 The focus on 'real property'

The principal focus of the thesis however, is not 'property' in things generally, at a high level of abstraction, but rather property in coastal lands affected by tidal waters, and the effect in property law, of the physical impacts of natural forces of wind, wave energy and higher sea levels on 'real property' and 'private property rights'. Fortunately, 'real property' is clearly defined as 'land and buildings as a physical entity'.[259] I use this term to refer to land titles registered under the *Real Property Act 1900* (NSW) and any associated buildings. Similarly, I use 'coastal land' to mean both privately- and publicly-owned land in the coastal zone.[260] And I refer to land and buildings owned by persons or corporations, not the State or public authorities, as 'privately-owned' or 'private land'.[261]

Where I refer to land held by the Crown, as the State government, public agencies or authorities, I use the terms 'publicly owned' or 'public land'. This includes coastal land dedicated for public purposes under *Crown Lands Acts*, the *National Parks and Wildlife Act 1974* (NSW), the *Local Government Act 1993* (NSW) and land below MHWM,[262] submerged by tidal waters.[263]

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[258] See Butt and Hamer, above n 207, 468-9.

[259] '…as distinct from personal property. Technically, 'real property' includes intangible interests in land, such as easements and *profits a prendre*. Though 'real estate' is often used as a synonym, it is a narrower term since it does not include intangible interests in land. Butt and Hamer, above n 207, 491.

[260] The 'coastal zone' is defined under s 5 of the *Coastal Management Act 2016* (NSW). Relevant /management areas' are defined by maps attached to the *SEPP (Coastal Management) 2018* (NSW).

[261] Importantly 'land', though broadly defined under s 3 *Real Property Act 1900* (NSW) does not include 'the bed of the sea or tidal waters below high water mark, and … land below high water mark in tidal estuaries (unless otherwise stated on the certificate of title)'. See *Environment Protection Authority v Leaghur Holding Pty Ltd* (1994) 6 BPR 13,655, 13,660, (Bannon J).

[262] *New South Wales v Commonwealth* (1975) 135 CLR 337, 486 (Jacobs J). Land below MHWM is 'vested in the Crown unless it can be deduced that some grant of land was intended to apply to land below high water mark'.

[263] Submerged land can be registered as 'real property', however title to these lands is usually held by an agency of government. See for eg the bed of Sydney Harbour, defined under the *Sydney Harbour Trust*

Though submerged lands are publicly owned, they may also be the subject of lesser private interests.[264] I reserve the term 'public property in land' for the range of legal and equitable interests held by the public or the State on behalf of the public, in lands of all tenures.

2.3 A plurality of 'property' in land

The narrow use of 'property' to refer exclusively to only 'real property' in private ownership has been criticized as obscuring other 'property' in land, not privately owned.[265] In New South Wales, there are various forms of property in land and a 'plurality' of types of 'real property'.[266]

Though 'common property' may evoke memories of 'commons',[267] game or fisheries,[268] it still has current applications as: reserves of Crown land;[269] jointly-owned facilities in strata development;[270] and land co-owned by several persons, as a 'tenancy in common'.[271]

With a broad view it is possible to identify a range of 'public property' in New South Wales, which includes all publicly-owned lands and natural resources, and lesser legal interests held by the public, or a public authority on their behalf, in private land.[272] This includes lands which are the geographic focus of this thesis: the foreshore, tidal waters, seabed, submerged lands, adjoining beaches and reserved coastal lands, which remain publicly owned.
Other forms of 'public property' in land, are further considered in Part C below.

Land Title Act 1909 (NSW) considered in *Verrall v Nott* (1939) 39 SR (NSW) 89. The registered proprietor was then the Maritime Services Board, as agent of the NSW government.

[264] It has been the policy of the NSW government to issue leases over land below MHWM, being parts of the bed of navigable waters, for the construction of oyster beds, privately owned marinas, wharves or piers, rather than alienate the submerged land and convey the land title into private hands.

[265] Carol M Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems' (1998-1999) 83 *Minnesota Law Review*, 129, 132. Page, 'Towards', above n 235, 195.

[266] John Page, 'Reconceptualising property: Towards a sustainable paradigm' (2011) 1 *Property Law Review* 86-96.

[267] In England, 'common property' was jointly-owned by a limited number of commoners: See David J Seipp, 'The Concept of Property in the Early Common Law (1994) 12 *Law and History Review* 29-91.

[268] The term 'common property' when used to refer to other natural resources, such as non-exclusive fisheries, or wild game, often meant the fish or game not yet caught.

[269] 'Commons' are held and managed by trusts constituted under the *Commons Management Act 1989* (NSW). Land and fixtures, being 'real property', and other physical assets or legal interests attached to the 'common' are formally designated as 'trust property'. See Division 4, s 24.

[270] 'Common property' under the Strata Schemes (Freehold Development) Act 1973 (NSW) includes the building's external walls and windows, driveways, yards, entrances, stairwells, hallways, laundry, utility connections, not part of individual strata lots. It is held by the owners' corporation. See < http://rgdirections.lpi.nsw.gov.au/faqs/strata_scheme/common_property >. Other NSW statutes also apply: see: *Strata Schemes (Leasehold Development) Act 1986; Strata Schemes Management Act 1996; Strata Schemes Management Regulation 2010; Strata Schemes (Freehold Development) Regulation 2012; Strata Schemes (Leasehold Development) Regulation 2012*.

[271] See Butt and Hamer, (eds), above n 207, 575.

[272] See John Page, *Property Diversity and its Implications* (Routledge, 2017) 37 -69.

2.4 Current regulatory framework

The 'real property' and 'private property rights' the focus of this thesis, exist and operate in the legal framework overarched by the *Constitution Act 1902* (NSW) for the State of New South Wales. Laws governing registration of land titles and legal interests in real property[273] and the registration of easements and covenants over real property[274] are State based.[275] As will be shown in section 6, the exercise of private property rights to use and develop privately-owned land are regulated under modern State-based statutes[276] and management of coastal land occurs within a complex statutory framework where other laws[277] also apply, may limit or prohibit land-uses,[278] or impose a duty on landowners.[279]

The public property and the public rights available to members of the public in New South Wales are also governed by State-based legislation[280] and the exercise of public rights of access to and use of publicly owned coastal resources are managed through State-based Regulations.[281] This complex statutory framework and the operation of current NSW statutes in five fields of law are described in detail in Chapter IV.

That concludes the definitions of 'property' and 'property rights' used in this thesis. I next outline the scope of the literature on property and identify relevant discourses within it.

3. The literature on 'property'

The literature on 'property' and private property rights has developed over centuries,[282] and many later works refer to earlier authoritative texts.[283] In the twentieth century the literature has grown massively and spans the range of meanings and contexts of 'property' within the paradigm of contemporary liberal democratic capitalist society.[284] This literature encompasses

[273] The *Real Property Act 1900* (NSW).
[274] Under s 88 the *Conveyancing Act 1919* (NSW).
[275] The States retained principal power over 'property', except on Commonwealth land. See Evans, above n 177, 125-7.
[276] The principal statute of which is the *Environmental Planning and Assessment Act 1979* (NSW).
[277] especially the *Coastal Management Act 2016* (NSW).
[278] Eg pollution control regulations made per *Protection of the Environment Operations Act 1997* (NSW).
[279] Eg to eradicate a 'biosecurity risk' under the *Biosecurity Act 2015* (NSW).
[280] *Crown Land Management Act 2016*, *National Parks and Wildlife Act 1974*, *Marine Estate Management Act 2014* (NSW)
[281] Eg *Crown Land Management Regulation 2018*, *Marine Estate Management Regulation 2017* (NSW).
[282] Perhaps the earliest civil law authority cited is the Institutes of Gaius (c 160 AD) which was updated by the *Institutes of Justinian* (533 AD). Civil law concepts in modern property law are discussed below.
[283] See John Locke, *The Second Treatise on Civil Government* (first pub 1690, Blackwell, 1948) and William Blackstone, *Commentaries on the Laws of England* (first pub 1765, 12th ed, 1978).
[284] See Macpherson, above n 222, 1-13; see also Jonnette Watson Hamilton and Nigel Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory', in Aileen McHarg et al (eds) *Property and the Law in Energy and Natural Resources* (OUP, 2010) 19-59.

many diverse approaches, and themes,[285] some of which do not relate to my research question.

Pragmatically, outlining all the fields of debate in modern property theory is not necessary here, but I note property's diverse applications next, and outline four relevant discourses within this literature, as a prelude to identifying works most relevant to my primary research question.

3.1 Overview of literature on 'property'

Much legal writing explores 'property' at a highly theoretical level, which attempt to identify the essential qualities at its core conceptually,[286] discuss its meaning(s),[287] or define its rules.[288] Other writers critique its assumptions and justifications,[289] or extend its limits.[290] Other writing on property, focused on the application of modern property concepts in practice, is also diverse.

The historical development of property law in the US has been described by Banner, who outlined the scope of modern private property interests including, 'intellectual property' protected by patents and copyrights;[291] musical sounds, fame, wavelengths and body parts.[292]

3.2 Discourses in contemporary 'property theory'

The relevant literature on 'private property' in land and resources is extensive. Its themes include historical sources of property concepts,[293] the personal,[294] and social purposes that private ownership of land serve,[295] and arguments for reform of 'property' and property law.[296]

[285] These themes were considered under three broad groupings by Davies, above n 238.
[286] See Hohfeld above n 221. Hohfeld scheme of 'jural relations' is discussed in section 4 of this Chapter.
[287] See Thomas Grey '*The Disintegration of Property'* in JR Pennock and JW Chapman eds Nomos XXII Property (1980) cited in Alexander and Peñalver, above n 229, 2.
[288] See Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 (6) *Harvard Law Review* 1089-1128.
[289] See for eg John A Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2010)89(4) *Nebraska Law Review* 739-818; Jeanne L Schroeder, 'Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property (1994) 93 *Michigan Law Review* 239-41,
[290] Robert J Goldstein, 'Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law' (1998) 25 *Boston College Environmental Affairs Law Review* 347-430.
[291] Banner, above n 205, 23 – 24.
[292] Banner, above n 205, sound (109 - 129), fame (130-161), wavelengths (202- 219), body parts (247).
[293] See Davies, above n 238, 49 – 84. See also Robert P Burns, 'Blackstone's Theory of the "Absolute" Rights of Property' (1986) 54 *University of Cincinnati Law Review* 67-86, discussed below.
[294] See discussion of Hegelian property theory in Alexander and Peñalver, above n 229, 57 – 69. See also Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957;
[295] See Utilitarian property theory in Alexander and Peñalver, above n 229, 11 – 34. See also Freyfogle 'Ethics', above n 201, 638, 'property ownership… could help a people achieve all manner of economic, social and political ends'.
[296] See Graham, above n 235.

The literature on the theory of private property rights over land is also diverse, with many theories,[297] diverse meanings',[298] and purposes of private property in land,[299] in use. Though they are not mutually exclusive, and are sometimes interwoven, in this section I outline some contemporary discourses on property relevant to my topic and identify the authors selected for closer review within them. I consider these authors more closely in Chapter V.

3.2.1 Meanings discourses

One key discourse in the literature examines the meanings of 'property' and private property rights.[300] Among a diversity of views, some authors note the nebulous, flexible definition of 'property',[301] and characterize it as 'empty'.[302] Others assert that 'private property' in land has personal,[303] ideological,[304] or political meanings,[305] while some or propose its re-thinking,[306] to reflect valid interests in land unrecognized in mainstream views of 'real property'.[307]

In this discourse Carol Rose critiques the assumption that 'property' *means* 'private property', advocates remembering and recognizing 'public property', and challenges the dominant but erroneous view of property in the USA, as quintessentially 'private'.[308] Rose cites past and current examples of public property, and publicly-owned real property,[309] critiques the assumption that natural resources are always better managed by private owners,[310] and frames a pluralistic view of real property, where sole private ownership of land is only one of many forms:[311] a view shared by others.[312]

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[297] See the exposition of theories of property Alexander and Peñalver, above n 229, 11 – 80.
[298] See the diverse meanings of 'property' discussed in Davies, above n 238, 23-48. See also the discussion of connotative and denotative meanings of property in Edgeworth, above n 218, 89.
[299] See the discussion of utilitarian theories of the purposes of private property in Alexander and Peñalver, above n 229, 11-34, the review of Hegelian theories which see the purpose of property as developing 'personhood', at 57-69, and recount of Aristotelian theory that the purpose of property is human flourishing, at 80 -101.
[300] See Davies, above n 238, 23-48.
[301] Kevin Gray, 'Property in thin air' (1991) 50 (2) *Cambridge Law Journal* 252- 307.
[302] See views on the 'meaninglessness' of property by Alain Pottage, 'Instituting Property' (1998) 18 *Oxford Journal of Legal Studies,* 331-334, discussed in Graham, above n 235, 155-7.
[303] See Hegel's formulation of property, as manifesting the owner's personality: G Hegel *Philosophy of Right* (1896), discussed in Alexander and Peñalver, above n 229, 57 – 69; see also Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957.
[304] Edgeworth, above n 218, 89.
[305] Macpherson, above n 222, 1-13.
[306] Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harvard Law Review* 281.
[307] See discussion of this in Crawford Brough Macpherson, 'Liberal-Democracy and Property' in CB Macpherson (ed), *Property: Mainstream and Critical Positions* (Uni of Toronto Press, 1978) 199-207.
[308] Rose, above n 237.
[309] Carol M Rose, 'Crystals and mud in property law' (1988) 40(3) *Stanford Law Review* 577-610.
[310] Carol M Rose, 'Property as storytelling: Perspectives from game theory, narrative theory, feminist theory' (1990) 2 *Yale Journal of Law and Humanities* 37.
[311] See also Carol M Rose, 'A Dozen Propositions, above n 1448, 265.

Rose's review of the history of the custom and law regarding ownership of the seashore and seabed in the USA, and her characterization of submerged lands as 'inherently public property' which should not be alienated into private hands [313] are valuable contributions to this discourse. Rose's wider view which places private property in land and associated property rights claims in context, as part, rather than the totality, of property theory and property law is most useful. Page has pursued this approach[314] describing 'public property' in Australia in various guises.[315]

Rose's emphasis on 'inherently public property' is directly relevant because potential responses by government to climate impacts and conflicts between competing rights will affect whether many beaches, important publicly-owned social, ecological and economic assets, can survive.

3.2.2 'Rights' discourses

The origin and nature of private property rights over land is the subject of much scholarly writing. Some authors in this discourse assert that the 'right to exclude' is the 'core' private property right,[316] but others contest this, cite *contra* examples of property without the right to exclude.[317] Some writers rebut libertarian and natural rights theorists' claims about private property's origins,[318] challenge the idea of pre-social private property rights over land,[319] assert the social origin of property and the dynamic nature of property rights,[320] and emphasize that 'property is a creature of the law'.[321] This is most relevant because it justifies abandoning 'natural rights' claims and adopting 'social utility'[322] as the basis for exploring one potential policy response: privileging private property rights.

Babie's[323] definition of 'property' in modern liberalism,[324] his summary of the idea of private property being socially created,[325] involving a variety of social relations,[326] by which society

[312] Eg Page, 'Reconceptualising' above n 249.
[313] Rose, 'Comedy', above n 235, 713-723.
[314] Page, 'Reconceptualising', above n 269, 86-96; Page, 'Towards' above n 235.
[315] Page, *Property*, above n 270, 40.
[316] Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730.
[317] John A Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2010) 89(4) *Nebraska Law Review* 739, under Scots common law 753-9, and the 2003 Act, 778-85.
[318] See the rebuttal of Miller's portrayal of 'absolute' property rights in Robert J Burns, 'Blackstone's Theory of the "Absolute" Rights of Property' (1986) 54 *University of Cincinnati Law Review* 67-86.
[319] Epstein's libertarian view of 'pre-social' property is reviewed in, 'Owning', above n 310, 286-292.
[320] Freyfogle, 'Ethics', above n 201, 638.
[321] Freyfogle, 'Property', above n 201, 84.
[322] Ibid 108.
[323] Paul Babie, 'Climate Change and the Concept of Private Property', (2010) University of Adelaide Law School Research Paper No. 2010-003 < http://ssrn.com/abstract=1539294 >. Later included in Rosemary Lyster, ed, *In the Wilds of Climate Change Law*, (Australian Academic Press, 2010).

confers specific property rights on the owner,[327] are a useful part of this 'rights discourse. His overviews of the choices involved in private property,[328] and its moral context,[329] given its use often impacts on others,[330] are also apposite and form part of the ethical discourses outlined below. Further, the critical analysis underpinning his claim that, due to the acts of choice and their external impacts, private property is a primary driver of climate change,[331] is persuasive.

In this rights-led discourse some theorists and landowners believe that private property rights are dominant, and immutable.[332] Thus Coleman's perspective, asserting landowners have an ancient 'right to protect' their land from the sea, despite modern laws, fits within this discourse. I discuss the veracity of these claims and posit a basis for refuting them in Chapter V below. Landowners' calls for 'social justice' and public intervention in protect their private land, also fall within this discourse, but Cooper and McKenna's review of the merits of these calls[333] is part of the critical discourses outlined below.

Private rights aside, 'rights' discourses also recognise public rights.[334] Hence the work of Joseph Sax, [335] David Slade,[336] James Titus[337], and others.[338] on protecting public rights to use coastal lands and waters under the 'public trust doctrine', are located within these 'rights' discourses. Much of this literature is focused on the United States of America, where a key issue is a

[324] Ibid 5. Babie notes that private property 'involves the creation, conferral and protection over choice and control over goods and resources' and traces the history of this idea to Jeremy Bentham, citing *The Theory of Legislation* (1802) vol 1, 113.
[325] Babie, above n 323, 5 -7, 13-18. Babie specific rejects the ideas that property rights are 'absolute' in the sense that they cannot be remoulded by the legislature, and 'a gift of the creator'.
[326] Ibid 5. Babie cites the four types of jural relations – rights, privileges, powers and immunities – identified by Hohfeld. See Hohfeld, above n 223. Hohfeld's analysis is discussed below.
[327] Babie, above n 323, 5-6. Babie cites the work of Honoré, above n 216, and discusses the 'bundle of rights' metaphor for the de-aggregation of 'property rights'. Honoré's incidents' are also discussed below, in section 4, and their operation in practice in this jurisdiction is examined in section 5 below.
[328] Babie, above n 323, 7-8, adopts the term 'choice architecture' and cites the work of RH Thaler and CR Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008).
[329] Babie, above n 323, 15-18, 24 discusses the work of Singer, Underkuffler, Radin and others.
[330] Babie, above n 323, 14, 18-21.
[331] Ibid 1, 9, 30.
[332] Karen Coleman, 'Coastal Protection and Climate Change' (2010) 84 *Australian Law Journal* 421.
[333] Cooper and McKenna, above n 123.
[334] See for eg Sax, above n 189; Carol M Rose, 'A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation' (1996) 53 *Washington and Lee Law Review* 265;
[335] See Sax, above n 189.
[336] David C Slade, 'Lands, Waters and Living Resources Subject to the Public Trust Doctrine' in DC Slade, (ed) *Putting the Public Trust to Work: The application of the public trust doctrine to the management of lands, waters, and living resources of the coastal states*. (CSO, 2nd ed, 1997).
[337] James G Titus, et al, 'Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea' (1991) 19 *Coastal Management* 171-204; See also Titus, above n 84.
[338] Madeline Reed, 'Seawalls and the Public Trust: Navigating the Tension between private property and Public Beach Use in the face of Shoreline Recession' (2009) 20 *Fordham Environmental Law Review* 305-339; Negro, above n 111; Michael C Blumm, 'The Public Trust Doctrine and Private Property: The Accommodation Principle' (2010) 27(3) *Pace Environmental Law Review* 649-667.

citizen's 'right' to compensation, under the 'takings' clause of US Constitution.[339] However this literature, though extensive, is of limited relevance to New South Wales.[340] Thus, while many US writers' contributions on property theory applied to land are highly relevant at an 'in principle' level, other writing on the practice and effect of property law, based on US federal or state jurisdictions, are not. Ascertaining what is relevant to our jurisdiction has been challenging, but the works of Margaret Davies,[341] and John Page[342] have greatly assisted.

Several writers have suggested this doctrine could apply in New South Wales,[343] and although it has not been overtly recognised in this jurisdiction,[344] I explore this possibility in Chapter V.

3.3.3 Critical discourses

There are many critical views on 'property' in discourses on property theory applied to land.[345] One thread in these discourses critiques the commodification of land,[346] and cites the dephysicalization of the 'property' concept,[347] seen in many owners' failure to consider their land's natural attributes and wider values when deciding its future use, as a cause of land degradation.[348] 'Property', 'property law' and the operation of 'market forces' in modern western societies are also critiqued for failing to take into account the special qualities and ecological features of land, and their non-economic values, when its 'valued', its ownership changes or decisions are made about its use.[349] Further, this critique observes that the

[339] Eg Richard A Epstein, 'Littoral Rights under the Takings Doctrine: The Clash Between the *Ius Naturale* and Stop the Beach Renourishment' (2011) 6 *Duke Journal of Constitutional Law and Public Policy* 37.
[340] This is due to fundamental differences in the legal frameworks created by the Constitutions of the United States of America and Commonwealth of Australia. See the discussion of this in Chapter V.
[341] Davies, above n 238.
[342] John Page, 'Towards', above n 235, 195-215; Page, above n 255.
[343] Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 13 *Environmental and Planning Law Journal* 329-338; Tim Bonyhady, 'An Australian Public Trust' in S Dover (ed), *Environmental History and Policy: Still Settling Australia* (Oxford University Press, 2000); Bruce Thom, 'Climate Change, Coastal Hazards and the Public Trust Doctrine' (2012) 8 (2) *Macquarie Journal of International Comparative Environmental Law* 21-41; See also Paul Stein, 'Ethical Issues in Land-Use Planning and the Public Trust' (1996) 13 *Environmental and Planning Law Journal* 493-501.
[344] See the discussion of this in section Chapter V.
[345] Davies, above n 238, 5 -18. See also Graham, above n 235, 15-16.
[346] Freyfogle, 'Ethics', above n 201, 645; Graham, above n 235, 112, 134-159.
[347] See Graham, above n 235, 134. If 'the 'thing' is removed from the property concept, so that property is understood as solely relations between persons, this dephysicalises the concept of property.
[348] Freyfogle, 'Ethics', above n 201, 648-9; Graham, above n 235, 191-2.
[349] Freyfogle, 'Ethics', above n 201, 649.

'dephysicalisation' of land as 'property' increases its 'commodification'[350] in the market economy, as though all land was (always) 'fungible'.[351]

Some critical theorists notice in modern property thinking about land use, a weakening, or severing, of links with earlier notions associated with 'real property', views of what is 'proper'? or 'appropriate'? and ideas of 'propriety', 'proprietor' and 'properties' of land,[352] that alienates owners from the land and community, and strip 'real property' of its special attributes.[353] This narrow highly abstract view of land as commodity, has led to the observation that the concept of 'property' in land, ie 'real property' now exhibits an essential 'placelessness'.[354]

The effects of the dephysicalisation of property on the uses of land and natural resources are much discussed in this discourse.[355] Too often landowners see their land as one homogenous unit, pursue unrealistically intensive uses,[356] exceed the land's carrying capacity,[357] and create impacts which adversely affect nearby lands.[358] Thus the concept of 'dephysicalising' real property describes some landowners' thinking, and explains observable phenomena: the division, commodifying and degrading of land.

Though it is focused on rural lands, this critique and its warnings about the dangers of landowners ignoring land's physical attributes are highly relevant and have direct application to decision making about the future use of coastal lands affected by physical hazards.

The critical review of claimed property rights is also part of these diverse critical discourses. Hence the review of calls by UK landowners for social justice in coastal management decision making, prepared by Cooper and McKenna is a significant contribution to these discourses. I explore their analysis, its relevance in this jurisdiction and derive relevant assessment criteria from their conclusions in Chapter V.

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[350] Freyfogle, 'Ethics', above n 201, 645; Graham, above n 235, 113.
[351] Ie able to be readily exchanged or substituted. See Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, discussed in Alexander and Peñalver, above n 229, 66-7; See also Freyfogle, 'Ethics', above n 201, 643; Graham, above n 235, 27, 66.
[352] See Freyfogle, 'Ethics', above n 201, 638; Freyfogle, 'Ownership', above n 193, 1270; Carol M Rose, *Property and Persuasion,* (Westview Press, 1994) 58; Margaret Davies 'The Proper: Discourses of Property' (1998) 9 *Law and Critique* 147-73, discussed in Davies, above n 238, 25-39.
[353] Freyfogle, 'Ethics', above n 201, 649; Graham, above n 235, 44.
[354] Graham, above n 235, 5, 160-1.
[355] See Graham, above n 235, 7-8, 181-2. Freyfogle, 'Ethics', above n 201, 643.
[356] Eric T Freyfogle, 'Private Rights in Nature', in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield, 2011) 272.
[357] Freyfogle, 'Ethics', above n 201, 646-7.
[358] Freyfogle referred repeatedly to processes which degrade land as 'land ills'. See Eric T Freyfogle, 'Owning Nature Responsibly' in Kelly Barth (ed) *Imagination and Place: Ownership,* (Lawrence, KS: Imagination and Place Press, 2010) 158, 168; Graham, above n 235, 191-2.

3.2.4 Ethical discourses

Rejecting the trend of 'dephysicalisation' as inevitable, some writers in ethical discourses seek to re-conceptualize 'property' in what they see as its 'proper' context[359] and propose rethinking the idea of 'real property' as a special case, from an ethical viewpoint, which recognizes the special attributes and properties inherent in that land,[360] respects the other species present,[361] and accepts the responsibilities and obligations which arise from 'ownership'.[362]

Importantly ethical theorists offer practical suggestions for landowners, property theorists, and lawmakers to take, to remedy social and ecological ills created by commodification of land.[363] These ethical discourses have cohered around an 'Earth jurisprudence' which moves beyond the anthropocentric view of land as commodity, to an eco-centric view of land as 'community'.[364]

Freyfogle's ideas of natural limits to land use and an ethical approach to decision-making, and their use as criteria to assess the merits of potential responses, are considered in Chapter V. Further, the application of these ideas to landowners' and legislators' decisions about the future use of coastal lands is postulated in several potential responses, in Chapter VI.

3.3 Other literature relevant to the primary research question

In addition to published works in the discourses in the property literature outlined above, a diverse range of other publications are relevant to my primary research question.

Highly relevant to my topic are works on the history of property law in New South Wales,[365] which record the struggle for public access to the coast,[366] and describe the retention of power

[359] For eg see Rose, 'Crystals', above n 309.
[360] Eric T Freyfogle, 'The Particulars of Owning' (1999) 25 *Ecology Law Quarterly* 574, 580-1; see also Freyfogle, 'Owning the land: Four contemporary narratives' (1998) 13 *Journal of Land Use and Environmental Law* 279-307.
[361] See Alexander, et al, above n 191, 744.
[362] See discussion of owners' moral responsibility for property choices in Babie, above n 323, 18-24.
[363] The use of a re-thought 'do no harm' rule, and tailoring of property rights to reflect the land's natural features, are two important suggestions, see Freyfogle, 'Eight', above n 202, 791-2. See also Graham, above n 233, 193-202.
[364] See Cormac Cullinan, 'A History of Wild Law', in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield, 2011) 13. See also Nicole Graham, 'Owning the Earth', in Burdon (ed) 259- 269; Freyfogle, 'Private Rights', above 356, 270-278.
[365] See Andrew R Buck, *The Making of Australian Property Law* (Federation Press, 2006); Butt, above n 209, Louise Tiffany Daley, *Men and a River* (A & R, 1981).
[366] See Caroline Ford, 'The Battle for Public Rights to Private Spaces on Sydney's Ocean Beaches, 1854-1920s' (2010) 41 *Australian Historical Studies* 253- 268; C Ford, *Sydney Beaches – A History* (NewSouth, 2014); Douglas Booth, *Australian Beach Cultures – The History of Sun, Sand and Surf* (Frank Cass, 2001); Leone Huntsman, *Sand in our souls: the beach in Australian history* (MUP, 2001).

over property law by Australian States at Federation.[367] Useful, contextually, are works which discuss the implications of the development international law on the sea,[368] and the institutional transformation of coastal law brought about by the 'Off-Shore Constitutional Settlement'.[369]

Particularly relevant are scientific reports on changes in global climate,[370] which discuss likely climate change impacts globally,[371] and on eastern Australian coasts,[372] and promote active management of the coast under these conditions.[373] Also relevant are assessments of legal issues arising from climate change which acknowledge shoreline recession's effect on the private property rights of coastal landowners, as real and significant.[374]

The literature on how rising seas would affect private property rights in New South Wales is limited and contested. Early commentary by Gordon identifying a trend of shoreline recession in NSW, suggesting sea-level rise as a likely contributing factor,[375] is highly relevant. His later paper on the history of the mean high water mark (MHWM), questioning its suitability as the boundary between private and public lands,[376] and recommending rolling easements to protect public access is also relevant. However, his limited review of common law decisions contributed to the uncertainty on questions of law rather than resolving them.[377]

Lipman and Stokes' article, which raised concerns about the impacts of a receding shoreline on privately-owned coastal land and on public authorities, is also relevant but is sadly erroneous.[378]

[367] See Evans, above n 177, 6.
[368] See Donald R Rothwell, 'The International Legal Framework', 21-44, in Baird and Rothwell (eds), above n 189.
[369] Marcus Haward, 'The Australian offshore constitutional settlement' (1989) 13 (4) *Marine Policy* 334-348; Pat Brazil, Offshore Constitutional Settlement 1980 - A Case Study in Federalism (2001) Occasional Paper Australian National University 5 April 2001. See also Rachel Baird, 'The National Legal Framework', 48-54, in Baird and Rothwell (eds), above n 189.
[370] See IPCC *Climate Change 2013,* above n 7.
[371] Pittock, above n 8.
[372] John A Church, et al, 'Sea-level rise around the Australian coastline and the changing frequency of extreme sea-level events' (2006) 55 *Australian Meteorological Magazine* 253-260; Roshanka Ranasinghe, and Marcel Stive, 'Rising seas and retreating coastlines' (2009) 97 *Climatic Change* 465-468. See Australian Government, *Climate,* above n 44; see also NSW Office Environment and Heritage, *Coastal Erosion in New South Wales – Statewide Exposure Assessment* (NSW Government 2017)
[373] State of New South Wales, *Coastal Management Manual* Part A (OEH, 2018) ISBN 978-1-76039-968-9, and Part B (OEH, 2018) ISBN 978-1-76039-967-2. See also Kenchington et al, above n 137.
[374] See Bell, above n 137; Bonyhady, above n 137.
[375] Angus D Gordon, 'A tentative but tantalizing link between sea-level rise and coastal recession in NSW Australia,' in GI Pearman (ed) *Greenhouse Planning for climate change* (CSIRO 1988): 121-134.
[376] Angus D Gordon, 'Highwater Mark - The Boundary of Ignorance' (2001) (Paper presented at 11th NSW Coastal Conference, Newcastle, 13-16 November 2001).
[377] Gordon's noting of the fluctuating shoreline and his critique of a lack of a 'repeatable' boundary did not recognise the MHWM boundary's ambulatory nature, or the common law rule that its position is where it is located from 'time to time'. See *Scratton v Brown* (1825) 4 B & Cr 485, 498-9; (Bayley J).
[378] Zada Lipman and Robert Stokes, 'Shifting Sands – The implications of climate change and a changing coastline for the private interests and public authorities in relation to waterfront land' (2003) 20(6) *Environmental and Planning Law Journal* 406-422.

The doctrine of accretion's ability to move a coastal boundary is discussed,[379] but the authors did not describe the doctrine in depth, cited cases which lacked authority,[380] and did not consider appeal decisions which ruled emphatically on the ownership of land below MHWM.[381] Whether a right to compensation existed was not examined, and the authors focused on the issue of whether public authorities' had a 'duty of care' to protect private land from coastal erosion, and their potential liability for damages.[382] They found that 'no clear guidance' was available, suggested matters would continue to be decided on an ad hoc basis, but nominated criteria the court would likely use when deciding if a duty of care existed.[383] Significantly they concluded that the exemption from liability provided in the *Local Government Act 1993* (NSW) was not total, requiring councils to act in 'good faith', but observed the *Civil Liability Act 2002* (NSW) would make bringing actions against a local council 'considerably more difficult'.[384] They identified 'no hard and fast rule' when a council will incur liability, and urged the legislature to further narrow the liability of public authorities.[385] Their case study of Collaroy/ Narrabeen beach, exploration of council's potential liability in three scenarios and concern that erosion-prone sites would be further developed, repeating past errors, are also relevant.

Commentary by Thom,[386] and by Coleman,[387] on a right to protect against the sea are relevant, but regrettably also failed to consider these key decisions. I disagreed with Coleman's claims,[388] since her claims were contradicted by English common law, then current NSW statutes and misunderstood the ambit of State legislatures' power.[389] Subsequently I discussed errors in recent reports, sources of uncertainty regarding the ownership of land below tidal waters, and drew on the *EPA* cases to explain the law governing ambulatory boundaries in NSW.[390] On the issue of compensation for lands lost to the sea, raised by others,[391] I concluded that, based on

[379] Ibid 411. See also the authors' brief discussion of erosion in their second paper, Zada Lipman and Robert Stokes, 'That sinking feeling: A legal assessment of the coastal planning system in New South Wales' (2011) 28 *Environmental and Planning Law Journal* 182-200, 187-8.
[380] The quote from Zelling J preferring 'public policy' over rules of property law was from the *SCOTI* judgement set aside as wrongly decided, and the conflicting decisions cited were not by senior courts. *Warringah Council v Franks* [1999] NSW LEC 65, was decided by a sole judge of the LEC and *Scott v Byron Council* (1996) NSW LEC 10513 of 1996 was decided by Commissioner Hussey.
[381] The case of *EPA (NSW) v Saunders* (1994) 6 BPR 13,655 and NSW Court of Criminal Appeal's decision in *EPA (NSW) v Leaghur Holdings Pty Ltd* [1995] 87 LGERA 282, discussed in Chapter III, were also not considered in their second article, Lipman and Stokes, above n 338.
[382] Lipman and Stokes, above n 337, 411-4.
[383] Ibid 414-5. They were: statutory powers, proximity, control, knowledge, vulnerability, reasonableness.
[384] Ibid 417.
[385] Ibid 422.
[386] Thom, above n 40.
[387] Coleman, above n 13, 421.
[388] John R Corkill, 'Claimed property right does not hold water' (2013) 87 *Australian Law Journal* 49-58.
[389] Our positions were described as opposed in Thom, above n 316, 37.
[390] Corkill, 'Ambulatory', above n 63, 67-84.
[391] Lipman and Stokes, above n 337, 411; Thom, above n 40, 358.

my analysis of statutes and a key case,[392] no liability for such compensation exists in NSW. [393]

O'Donnell discussed the potential for conflict between public interests and coastal landowners as sea level rises,[394] described one landowner's resistance to council's coastal management,[395] and outlined the challenges of climate change adaptation.[396] However her focus on legal geography is not relevant to the questions of property law examined in this thesis.
More relevantly, a recent court decision[397] refusing consent for a seawall in Byron Bay, due to its adverse impact on public access to the beach, was discussed by Sack et al[398] and me.[399]

The literature on the development and evaluation of public policy is also highly relevant and extensive,[400] though much of it is focused on the United States[401]. Most useful to my elaboration of a future government's potential 'public policy' responses, and evaluation of their merits, is a key source which addresses the development of 'public policy' in Australian contexts.[402]

This concludes my brief overview of the relevant literature. I consider selected authors more closely in Chapter V below. I next consider modern concepts of property theory.

Part B – Private property and private property rights

In this Part I, I outline major contributions to modern thinking about property and ownership, and then employ them to ascertain the private property 'rights' current available to NSW landowners in practice. I then briefly notice that two elements of prior English land law, not encapsulated by modern property theory, persist nonetheless and relevantly apply to privately

[392] *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399, is considered in Chapter III.
[393] Corkill, 'Claimed', above n 347, 79-81.
[394] Tayanah O'Donnell and Louise Gates, 'Getting the balance right: A renewed need for the public interest test in addressing coastal climate change and sea level rise' (2013) 30 *Environmental and Planning Law Journal* 220.
[395] Tayanah O'Donnell, 'Legal Geography and Coastal Climate Change Adaptation: The Vaughan Litigation' (2016) 54(3) *Geographic Research*, 301 – 312.
[396] Tayanah O'Donnell, 'Coastal management and political-legal geographies of climate change adaptation in Australia' (2019) 175 *Ocean and Coastal Management*, 127 – 135.
[397] *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207.
[398] Ballanda Sack, Timothy Allen and Bruce Thom, 'Coastal Management and Protecting the Public Interest: Recent Land and Environment Court Decisions' (2020) 37(1) *Environmental and Planning Law Journal* 128 – 135.
[399] John R Corkill, 'Landowners' Appeal of Seawalls Refusal Unsuccessful', (2020) 37 (3) *Environmental and Planning Law Journal* 322 – 337.
[400] Eg Justine Bell and Mark Baker-Jones, 'Retreat from retreat: the backward evolution of sea-level rise policy in Australia, and implications for local government' (2014) 19 *Local Government Law Journal* 23-35; Marcus Haward, 'Institutional design and policymaking down under: developments in Australian & New Zealand coastal management,' (1995) 26(2) *Ocean & Coastal Management* 87-117. APSC, *Tackling Wicked Problems: A Public Policy Perspective* (Australian Government, 2007).
[401] See for eg Megan Higgins, 'Legal and Policy Impacts of Sea Level Rise to Beaches and Coastal Property' (2008) 1 (1) *Sea Grant Law and Policy Journal* 43-64.
[402] Althaus et al, above n 163.

owned real property in New South Wales.

4. Modern conceptualizations of 'private property rights'

In the next sections I outline two views in modern property theory, which have shaped the conceptual framework in which property and especially 'real property' exist and operate. These articles are included because they expose key concepts regarding the origin and nature of private property rights underpinning modern property theory in western liberal societies, as socially constructed, not God-given, and able to be modified, not absolute or immutable.

4.1 Hohfeld's 'jural relations'

The work of American jurist Wesley Newcomb Hohfeld,[403] provided an important foundation for modern understandings of how property and property rights operate in then contemporary western liberal-democratic capitalist societies. Hohfeld explained the character of these legal interests as essentially incorporeal, due to their necessarily abstract nature,[404] and he carefully described these 'fundamental legal relations' as more than either rights or duties, positing a schema of 'jural relations' which operated as opposites, or as correlatives.[405] His schema is reproduced below in Table 2.

(Jural	rights	privilege	power	immunity
(Opposites	no-rights	duty	disability	liability
(Jural	right	privilege	power	immunity
(Correlatives	duty	no-right	liability	disability

Table 2. – Hohfeld's pairs of jural relations (1913)

Hohfeld's schema was predicated on the notion, not examined in detail, that these jural relations were, as abstract legal interests between people, socially constructed. He made plain however the essentially social context of these jural relations through a comprehensive examination of their operation in a second article, [406] in which he characterized some rights or claims as being held by a person against a single other person (paucital relations),[407] while other rights or duties applied to 'a very large and indefinite class of people' (multital relations).[408]

[403] Hohfeld, above n 223, 30.
[404] Hohfeld, above n 223, 24; 'incorporeal', 3. Law without material existence, but existing in contemplation of law, as a franchise. Delbridge, et al (eds), above n 4, 892.
[405] Hohfeld, above n 223, 30.
[406] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.
[407] Hohfeld, above n 406, 718, Hohfeld made it plain that a paucital right or duty could be held by 'a person (or group of persons)' and could avail 'against a single person (or single group of persons)'.
[408] Ibid, 718. Hohfeld noted however, at 719 fn 22, that while multital relations operate against people 'in general' they do not necessarily apply to 'all persons', since there may be some persons to whom 'leave and licence' has been given, and disparaged use of the phrase "against all the world" as inappropriate.

This conceptualisation of 'property rights', as essentially a series of mutual relationships between people and hence socially constructed, has formed the bedrock of many later discussions of property within modern liberalist philosophical frameworks.[409] At its core is the idea that persons other than the claimant owner, have essential roles to play in the social construction of 'private property', in acknowledging a claim, acquiescing or contesting it. Hence claims of god-given immutable property rights which existed before society are rejected.

4.2 Honoré's 'incidents of ownership'

Understandings of 'property' as a diverse range of social relations was further developed by Anthony Honoré,[410] who described available criteria for identifying the interest called 'ownership' and the 'actual owner' recognized by the liberal concept of 'property'[411] and defined a scheme of legal interests, termed 'incidents of ownership', in which some, but not all, interests were said to be 'rights'.[412] See the summary in Table 3 below.

Incident of Ownership	Description
(i) The right to possess[413]	A right to exclusive control and a claim that others ought not to interfere with the thing without permission.
(ii) The right to use[414]	A right to personal enjoyment of the thing owned.
(iii) The right to manage[415]	The right to decide "how and by whom the thing owned shall be used".
(iv) The right to income[416]	A right to derive income earned by the thing owned.
(v) The right to capital[417]	A right that "consists in the power to alienate the thing and the liberty to consume".
(vi) The right to security[418]	An indefinite right to remain the owner provided the owner is solvent.
(vii) The incident of transmissibility[419]	The ability to pass on the ownership interests *ad infinitum.*
(viii) The incident of absence of term[420]	Continuity of the property interest independent of any determinant time period or happening.
(ix) The prohibition of harmful use[421]	Any use which harms others in society is forbidden.
(x) Liability to execution[422]	Liability for the ownership interest to be removed if certain actions are taken, e.g. insolvency or judgment for payment of a debt.
(xi) Residuary character[423]	The notion that when lesser interests come to an end, the content of those interests will revert back to the owner.

Table 3. – Honoré's 'Incidents of Ownership' (1961)

[409] See Babie, above n 323, 5. See also Stephen R Munzer, *A Theory of Property* (1990) critiqued by Penner, above n 223, 724.
[410] Honoré, above n 216.
[411] Ibid 112.
[412] Ibid 113.
[413] Ibid.
[414] Ibid 116.
[415] Ibid.
[416] Ibid 117.
[417] Ibid 118.
[418] Ibid 119.
[419] Ibid 120.
[420] Ibid 121.
[421] Ibid 123.
[422] Ibid.
[423] Ibid 126.

Honoré's work provided an important basis for further discussion of 'property rights' because, as well as positing a complete scheme of already recognized legal interests, he described their conditions of operation and outlined their limits.

Significantly, Honoré discussed 'the Liberal concept of ownership', asserting that these "standard incidents of ownership do not vary from system to system …. but … remain constant from place to place and age to age".[424] He examined the subtleties of the operation of these incidents in combination, introducing the notions of an 'absolute owner', "full ownership", various forms of "split ownership",[425] and the concepts of greater and lesser interests.[426]

Further, Honoré questioned the term 'absolute' ownership, contrasting different approaches under liberalism and socialism and observed how, using limitations on the standard incidents of ownership, via policy or regulation, the State could achieve varying effects in social control.[427] In so doing, Honoré showed that private property is culturally contingent, and can be politically manipulated. Thus, as essentially social and cultural constructs, 'private property rights', vary across jurisdictions. Further, whatever 'private property rights' are in theory, what matters are the private property rights that exist in practice, in reality. To examine what actual private property rights exist over private land, it is necessary therefore to apply property theory to land in a specific jurisdiction and examine the rules of property law applicable to that land.

I apply Honoré's incidents of ownership in the next section, to identify the private property rights available *in practice* in this jurisdiction.

5. Private property rights in contemporary New South Wales:

In this section I outline the private property rights available *in practice*, to landowners under current NSW law, describe other rights available and contest some claimed 'rights'.

5.1. Settled 'private property rights'

Since Honoré identified legal interests already recognised by liberal concepts of property, the 'incidents of ownership' he described[428] are settled elements of property theory. I next apply these incidents to land ownership in New South Wales, to describe the ambit of the 'standard' private property rights available to landowners in this State, under current law, in 2021.

[424] Honoré, above n 226, 109.
[425] Ibid 110-112.
[426] Ibid 124-5.
[427] Ibid 144-7.
[428] Ibid 108.

Though not all incidents are directly relevant to coastal lands, I adopt a comprehensive approach to this analysis to ascertain whether the ambit of these agreed private property rights includes other 'rights' claimed to be "fundamental" rights, and to establish how these theoretical incidents operate *in practice*, in New South Wales. This approach is necessary to establish whether and how any private property rights or incidents of ownership have been modified by NSW statute law, and to assess their comparative weight against public rights.

Using the incidents described by Honoré as a guide, a suite of uncontested private property rights over real property in New South Wales may be identified.

(i) the right to possess a thing

The 'right to possess', and exclude others, is often cited as the 'core' private property right,[429] but it is affected by other 'rights' and social conventions. As Honoré observed, powers of entry onto private land without the owner's consent are available to many officials.[430] In New South Wales this includes police, local council staff,[431] EPA officers,[432] emergency service workers,[433] and utility service providers.[434] Other social conventions in this jurisdiction permit someone to enter private land and knock on the dwelling's front door if they do so for a lawful reason.[435] Hence, landowners have the right to exclude, but others may lawfully enter their land without their consent. Further the right to possess does not create a 'right' to dwell.[436]

To obtain exclusive possession, a coastal landowner could seek to construct a fence along the boundary to their land to prevent public access to the beach above MHWM,[437] and prosecute trespassers on 'their' privately owned land.[438] However for trespass to be proven it would be essential to show the boundary's actual location,[439] but if its location were asserted using measurements, or survey lines, the case may fail if that boundary has been overtaken by the

[429] Honoré, above n 226, 114. Honoré described it as 'one essential element of ownership'.
[430] Ibid.
[431] Under s 191 of the *Local Government Act 1993* (NSW).
[432] Under s 196 of the *Protection of the Environment Operations Act 1997* (NSW).
[433] Fire brigade officers have a power of entry under s 23 the *Rural Fires Act 1997* (NSW) and ambulance officers who have an explicit, or implied, invitation to enter private land are generally exempt from personal liability for trespass under s 67I of the *Health Services Act 1997* (NSW).
[434] There may be an implied or explicit easement over private land, including over strata title buildings, for access to the services by the utility provider's employee or contractor, for maintenance or repairs.
[435] This legal defence is acknowledged by s 4 (1) of *Inclosed Lands Protection Act 1901* (NSW).
[436] See the 'right to use' below.
[437] Local council approval may be required for a new fence, and may specify the fencing type permitted.
[438] Such trespass actions were the cause of the proceedings in *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260. The case is further considered in Chapter III.
[439] Liability for trespass involves entry (without lawful excuse) onto private land without the owner's consent, or remaining on the private land when asked to leave. See s 4(1) the *Inclosed Lands Protection Act 1901* (NSW). In NSW legal actions for trespass may be brought by the landowner, or by the police.

MHWM.[440] Without an obvious, boundary recognizable by the public, the 'right to possess', or 'right to exclude others' while theoretically operable, would be inconclusive in practice.

(ii) right to use

The 'right to use' identified by Honoré,[441] is extensively regulated when it applies to land in New South Wales. While some land-uses are permissible without consent,[442] and decisions about them remain the landowner's, certain land-uses are prohibited in some zones.[443] For many other land-uses a public authority's consent under the relevant legislation, is required[444] and a landowner cannot make lawful decisions to pursue those uses under a 'property right'. Similarly, the 'private property right' to use land does not entitle the owner to use it for dwelling.[445] Under current law development consent is required for some forms of temporary accommodation,[446] and to construct and occupy a dwelling.[447]

Further, as well as planning controls over zoned lands under Local Environment Plans, use of coastal land has been constrained by state planning instruments for decades.[448] This requirement to obtain consent for, or prohibition on, certain uses of land, greatly narrows the ambit of an owner's 'right to use'.

(iii) right to manage

Honoré's right to manage[449] has also been limited in its application to land, by modern statutes, and landowners' capacity to manage their land is constrained by many regulations. For example managing land for water capture and storage,[450] is constrained by the need to obtain an approval

[440] See *EPA v Saunders* (1994) 6 BPR 13,655. This case is discussed in Chapter III.
[441] Honoré, above n 216, 116.
[442] See s 4.1 *EPAA 1979* (NSW). See the development activities 'permissible without consent' in the Land Use tables of the *Standard Instrument (Local Environmental Plans) Order 2005* (NSW).
[443] See s 4.3 *EPAA 1979* (NSW).
[444] See s 4.2 *EPAA 1979* (NSW).
[445] Not every allotment of land has a dwelling entitlement. A minimum lot size of 40ha is required in rural zones. LEPs may stipulate minimum lot sizes in other zones. The construction of a dwelling requires development consent under s 4.2 *EPAA 1979* (NSW).
[446] Use of privately owned land as a caravan park and or camping area is regulated by *State Environmental Planning Policy 21 – Caravan Parks 1992* (NSW). Under this SEPP consent is required for these uses. See < https://www.legislation.nsw.gov.au/#/view/EPI/1992/204 >.
[447] Dwellings are not among the land-uses permissible without consent in any land-use zone under the *Standard Instrument (Local Environmental Plans) 2006* (NSW). Dwellings are permissible with consent in some land use zones eg Rural Zones RU1 – RU6, and in Residential Zones R1 – R5, but prohibited in other zones eg. Environmental Protection Zone E1, Tourist Zone SP3, Recreation Zones RE1 and RE2, Business Zones B1 – B8, and Industrial Zones IN1 – IN4.
[448] See *State Environmental Planning Policy (SEPP) 14 - Coastal Wetlands*, was introduced in 1985.
[449] Honoré, above n 216, 116.
[450] Harvestable 'rights' to capture and store 'overland flow water' ie rainfall run-off is governed by ss 53 of the *Water Management Act 2000* (NSW)

to construct a dam[451] and limits on the volume of rain that can be harvested into storages.[452] Similarly landowners' ability to 'manage' the fuel loads on their land through the use of fire,[453] are limited by the conditions of the Fire Permit, including the giving of Notice.[454]

The 'right' to manage has been particularly affected by current law controlling 'biosecurity risks'. Like its predecessor,[455] the *Biosecurity Act 2015* (NSW) creates a duty on a land-owner, to 'prevent, eliminate or minimize a biosecurity risk', such as noxious weeds, on their land.[456] The Act allows an authorized person to direct landowners to manage their land in a specified way, to reduce a bio-security risk, such as by eradicating noxious weeds.[457] Failure to discharge a biosecurity duty, or to comply with mandatory orders or directions, is an offence, for which penalties apply.[458] Further, an authority may enter private land to control noxious weeds, without the owner's knowledge or consent,[459] and recover its costs in controlling weeds on that land, from the owner.[460] Thus the *Biosecurity Act 2015* (NSW) has converted part of the landowner's 'right' to manage land, into an enforceable 'biosecurity duty' to manage land in particular ways.

There is no 'right to manage' coastal lands affected by coastal hazards. Landowners are subject to the coastal hazard management strategies and emergency action sub-plans developed by local councils as part of their coastal zone management plans or coastal management programs.[461] Consent is required for many other uses, and may be refused in some circumstances.[462]
Where private land includes areas of native vegetation recognized as threatened ecological communities,[463] or as 'critical habitat' for fauna such as koalas,[464] the 'right' to manage those areas is also tightly constrained in order to achieve the designated conservation purposes.[465] Hence in New South Wales, the private property right to manage is limited by statute law.

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[451] Building a dam requires a 'water supply work approval': s 90 *Water Management Act 2000* (NSW).
[452] 'Harvestable rights orders' regulate the size of the storage and volume of water captured under s 53 of the *Water Management Act 2000* (NSW).
[453] The *Rural Fires Act 1997* (NSW) applies to privately owned lands, and lighting of fires in the 'bush fires danger period' – usually 1 October to 31 March - requires notice to be given, pursuant to s 86 (1) and the landowner to hold a permit under s 89.
[454] The Act provides that the requirements for Notice may be prescribed by the Regulations. Clause 33 of the *Rural Fires Regulation 2013* (NSW) specifies the notice and to whom it must be given. Fire Permits usually also specify the timing of, and preparation needed for, hazard reduction burns.
[455] The *Noxious Weeds Act 1994* (NSW) [repealed].
[456] See ss 21, 22 *Biosecurity Act 2015* (NSW), see also s 26 & Schedule 1 relating to weed control.
[457] See s 65 *Biosecurity Act 2015* (NSW).
[458] See ss 23, 25, 58, 138 *Biosecurity Act 2015* (NSW).
[459] See s 98 *Biosecurity Act 2015* (NSW).
[460] See s 76, 104 *Biosecurity Act 2015* (NSW).
[461] See s 12 *State Environment Planning Policy (Coastal Management) 2018* (NSW), [hereafter *SEPP (CM) 2018* (NSW)].
[462] See s 14 *SEPP (CM) 2018* (NSW).
[463] under s 4.5 of the *Biodiversity Conservation Act 2016* (NSW).
[464] Under *State Environment Planning Policy (SEPP) 44 – Koala Habitat protection.*
[465] Preparation of a koala management plan is required for core koala habitat, under s 9(1) of *SEPP 44*.

***(iv)* right to income**

The right to the income earned by or from the thing owned is a major benefit of ownership,[466] and its exercise is a core purpose of owning land. But this is the right of the owner to receive the income generated from the use of a thing they own, if that use is legally permissible. It does not create a right to generate income from land. Theoretically this right exists in New South Wales, but it is closely linked to the 'right to use', considered above. In practice, in many places, commercial or industrial use of coastal land to generate income, are permissible only with development consent.[467] However, in some NSW coastal settlements private homes have been converted to commercial purposes for holiday lettings, without obtaining development consent for the changed use. AirBnB and other accommodation websites have created a new, lucrative source of income for landowners,[468] disrupted the accommodation 'market' and created social impacts in residential areas, which have led to calls for commercial letting to be regulated.[469] Further, landowners' private property 'right to income' does not include income from minerals or other resources below the surface of their land.[470]

Thus NSW landowners have an uncontested right to the income from the lawful use of their land *in theory*, but in practice the ambit of this right has been greatly narrowed by statute law.

***(v)* right to capital**

Honoré's 'right to capital'[471] includes "the right to alienate the thing and the liberty to consume", but this incident's operation over land in New South Wales is not straightforward, and not well understood by some landowners. Certainly the ability to alienate land by sale, or by bequest upon the owner's death are well recognised, as is an owner's ability to use their land as collateral, and raise new capital by borrowing against the security of the land's tenure and value. These are very valuable private property rights in modern societies and economies.

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[466] Honoré, above n 216, 117-118.

[467] Land uses or activities which cannot proceed under a landowner's 'right to use' because they are prohibited or require development consent are described in the land use tables for specified Zones, in the adopted planning instrument, usually a Local Environment Plan made under *EPAA 1979* (NSW).

[468] See media release Simon Richardson, Byron Shire Mayor, 'Byron Shire to start issuing fines for unauthorised holiday letting', 5 October 2018 See < https://www.byron.nsw.gov.au/Council/Media-centre/Media-Releases/Byron-Shire-to-start-issuing-fines-for-unauthorised-holiday-letting >.

[469] See Byron Shire Council 'Short term holiday letting' < https://www.byron.nsw.gov.au/Council/Media-centre/Media-releases/Short-term-holiday-letting >

[470] Mineral resources were not always reserved by the Crown in many original land grants, but since 1861 they have subsequently been reserved by the Crown in the creation of the land title. See Butt, above n 209, 16-17. Section 282 of the *Mining Act 1992* (NSW) requires a mining lease holder to pay royalty to the Crown for the recovery of 'publicly owned minerals.' Income from mining is accrued by the holder of the mining lease under the *Mining Act 1992* (NSW).

[471] Honoré, above n 216, 118.

The "liberty to consume" element of this right has its most relevant application to chattels, and to edible produce such as crops and domestic animals. The liberty of owners to consume crops or livestock produced on their land has been undisputed for centuries. Likewise the liberty of an owner to destroy a chattel if they choose, has been long recognised in practice, and legal theory. However extending this 'right' to destroy land is deeply problematic, as discussed below.

(vi) right to security

The 'right to security' – to remain the owner, if solvent[472] – has special application to real property, since security of tenure is a principal reason why people buy land for residential use. This right has been at the core of property theory and English law since the 17th century,[473] when the common people insisted on a 'right' to be free of the arbitrary confiscation of their property by the Crown in the Grand Remonstrance,[474] and later, in the Great Rebellion.[475] Subsequently, this right was embodied in the Constitution of the United States of America.[476]

There is no doubt that this right exists and operates currently in this jurisdiction through the indefeasibility of titles created under the *Real Property Act 1900* (NSW). This right is important to landowners: without it they could not borrow against their land, because financiers would not make loans on assets they could not recover on default of the loan. However, Honoré's qualification "provided the owner is solvent" limits its ambit, to reflect other incidents of ownership: the right to capital and liability to execution, discussed below.

The right to security of ownership of coastal land is also affected by the laws of physics and the operation of natural processes, as are the land titles themselves. Current law recognizes that 'land' is not permanent. 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.[477]

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[472] Ibid 119.

[473] Moore, above n 37, 310. The people of England protested against the Crown's repeated attempts to seize privately owned lands along the sea coasts, and the banks of the tidal reaches of the River Thames, on the basis of an asserted Royal prerogative in 1641. Moore, 212 – 281, detailed the court actions by Elizabeth I, from 1571 until the death of Charles I in 1649, in which the Crown attempted to seize ownership of land.

[474] Moore, above n 37, 310. Moore quoted Article 26 of the Grand Remonstrance which objected to the "taking away of men's rights under colour of the King's title to land between high and low water marks…"

[475] Ibid. Charles' failure to heed the explicit warnings made by the English people in this document led to the clash between Parliament and the Crown, known as the Great Rebellion, and his execution in 1649.

[476] Part of the Fifth Amendment to the US Constitution, made in 1791, was to insert a constitutional guarantee of compensation if the State compulsorily acquired a citizen's property. See Alexander and Peñalver, above n 229, 156 – 182.

[477] *EPA v Saunders* (1994) 6 BPR 13,655, 13,660. See s 8 Chapter III.

Further, he ruled that the land title of several allotments had been effectively extinguished:

> … in spite of the Certificates of Title … there was no land in the subdivision extending beyond High Water Mark as depicted in Mr Gibson's surveys …as at the date of the two notices. Those Certificates of Title need to be corrected pursuant to s 42 of the *Real Property Act 1900*. [478]

Moreover, under current NSW law ownership of lands lost to the sea reverts to the Crown.[479] Thus the 'right to security' recognizes the continuing ownership of a coastal allotment by its registered proprietor, but does not create a 'right' for the land to continue to exist in perpetuity. The landowner's right to security is therefore limited by natural processes and physical factors.

Hence an owner's solvency does not secure the ownership of land indefinitely. It is a qualified 'right', limited by other incidents, and though key in theory, in practice it has major weaknesses.

(vii) the incident of transmissibility

There is no doubt that the right to 'transmit' the ownership interests in real property by sale, gift or bequest exists in New South Wales, both in theory and in practice,[480] subject to the operation of other incidents of ownership. Because land is often perceived to be 'permanent', this right has special significance when the thing owned is real property. Under this right, title to some private lands has been passed on over generations.

However, if ownership of land is lost, through insolvency, execution, or permanent inundation, this property right would also be lost.

(viii) the incident of absence of term

Closely related to transmissibility is the incident of "absence of term". According to Honoré, under this incident the owner of a thing has a private property right to remain the owner indefinitely and notwithstanding the occurrence of other events (eg a general election).[481] This incident allows a landowner to enter into a lease with another person for the occupation and use of their land, for a specified period, but retain ownership. It ensures that when the lease expires the ownership of the land is undisputed and the landowner may peacefully regain possession. Though leaseholders obtain lawful access, possession and use of the land, the temporary nature of the incidents acquired does not confer ownership of the land, due to a limiting term in the

[478] Ibid. Reference to s 42 may be a typographic error. The Registrar General's power to correct errors on the Register is available under s 12 of the *Real Property Act 1900* (NSW), see esp. s 12(1)(d).
[479] as the State of New South Wales: see *EPA v Leaghur Holdings PL* [1995] 87 LGERA 282, 287.
[480] Sale and transfer of ownership of land is governed by ss 52A - 68 of the *Conveyancing Act 1919* (NSW). See Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (LexisNexis, 2011), 86 - 126, [31001] – [31246].
[481] Honoré, above n 216, 122.

lease. The leaseholder's legal interests in the land, limited by the terms of the lease, would extinguish when it expired. The absence of term is therefore vital to preserving ownership.

In practice however, a 'term' of twelve years applies to the ownership of vacant real property in New South Wales.[482] If land has been abandoned by the owner and then occupied by another, after 12 years, if other conditions are met,[483] the occupier may apply for possessory title.[484]

Hence the theoretical 'right' to remain the owner indefinitely "notwithstanding other events" under this incident, is limited in practice by current statute law and by physical reality. It does not apply to land which ceases to be 'real property' due to its submergence by tidal waters.[485]

(ix) the prohibition of harmful use

Honoré's incident of ownership 'prohibition on harmful use',[486] is not, as he acknowledged, a property 'right' as such. Under Hohfeld's scheme, it is better characterized as a correlative of a privilege, a no-right, or its opposite, as a duty which arises from owning things.[487]

From a position of fairness, a person who does not want others to harm their things, has a moral duty to not harm the things owned by others, through harmful use of things they own. Without this prohibition, unrestrained harmful uses of things by their owners would create social conflict, reduce the value of things, and mean the inevitable loss of property through harm. This incident applies to all own-able things, but its application to real property limits the 'right to use' land, to non-harmful uses.[488] Further it prevents owners exercising their 'right to consume or destroy' over their land, because this would likely harm their neighbours and their land.[489]

Due to their potential to adversely affect others, a landowner cannot undertake destructive, degrading or offensive uses of land in New South Wales, eg excavation, mining, use of chemicals or poisons, waste incineration and discharge into watercourses, as of 'right.' Such uses may be prohibited in specified zones,[490] need an approval authority's consent,[491] or be

[482] Butt, above n 209, 897, [22 04].
[483] Ibid 901 – 908, [22 13] – [2224].
[484] Ibid.
[485] See the discussion of this in Section 4.1.b below.
[486] Honoré, above n 216, 123.
[487] Ibid 130.
[488] Ibid 123.
[489] by changing its appearance, affecting its attributes, reducing its economic value, creating related costs or diminishing their neighbours' enjoyment of it.
[490] Land-uses permissible without consent, permissible only with consent, and prohibited in each zone are described in the Land Use Tables of LEPs made under the *Standard Instrument (Local Environmental Plans) Order 2006* (NSW).
[491] Under s 4.2 *EPAA 1979* (NSW).

subject to specified conditions.[492] Some potentially harmful landuses are unlawful unless a licence for that use is obtained, and conditions to reduce harm, or risk of harm are observed.[493] Hence in this jurisdiction many uses of land under a claimed property right would be unlawful.

Particularly problematic are landowner's actions intended to protect their land from destruction, such as building a seawall, which may potentially harm adjacent lands. While proponents may claim their seawall is beneficial because it protects their land, they often fail to recognise that such works are likely to increase erosion on nearby lands.[494] It is because this potential to cause unintended harm to other lands is recognised, that in New South Wales building defences against rising sea levels cannot proceed lawfully as a 'private property right' and requires a detailed application, development approval, and compliance with consent conditions.[495]

Hence the prohibition on harmful uses is not limited to those *intended* to be harmful, but applies to all land uses which may, or will, have a harmful effect in practice.

(x) liability to execution

Honoré's incident, 'liability to execution', [496] is also not a property 'right'. It is the reciprocal of another person's right to capital, their right to be paid money owed to them. The obligations to pay underpinning this liability may also be framed as a duty under Hohfeld's scheme,[497] which is unavoidable morally if the landowner has used their land as collateral, to borrow money. As Honoré noted, without this liability to execution "the growth of credit would be impeded" and owners would be able to 'defraud' their creditors.[498] This incident therefore acts as a practical limit to the owner's private property 'right to capital' when creating a mortgage over their land. In New South Wales this incident commonly applies when the mortgagor landowner defaults on repayment of a loan and the mortgagee forces the sale of the real property. Laws governing the registration of mortgages over land,[499] foreclosure of loans,[500] and the forced sale of real property to recover outstanding debts [501] give effect to this incident in this jurisdiction.

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[492] Conditions on consent may be imposed by a consent authority under s 4.17 *EPAA 1979* (NSW).
[493] See ss 42 - 63 *Protection of the Environment Operations Act 1997* (NSW). Under s 63 a licence holder is required to comply with conditions on an environmental protection licence. It is an offence under s 64 to fail to comply with conditions.
[494] The construction of seawalls will have the effect of increasing erosion on both the publicly owned foreshore in front of the wall, and adjoining unprotected private lands. See the discussion of this in Chapter I.
[495] See *State Environmental Planning Policy (Coastal Management) 2018* (NSW).
[496] Honoré, above n 216, 123.
[497] Ibid.
[498] Ibid.
[499] See s 41 *Real Property Act 1900* (NSW). See also Young et al, above n 437, 480, [41140].
[500] See s 101 *Conveyancing Act 1919* (NSW), ss 61 and 62 *Real Property Act 1900* (NSW).
[501] See ss 57, 58 *Real Property Act 1900* (NSW). Young et al, above n 437, 515 – 521 [41690] – [41710.45].

As Honoré also observed, liability to execution, when applied to real property is sometimes considered as extending, in theory, to a liability to taxation, based on the value of the land.[502] In this jurisdiction, liability for 'tax' applies in practice in several ways. Under current law, the levying of rates on land by local authorities is authorised,[503] and where rates remain unpaid and debt has accrued, the authority may force the land's sale to recover the debt.[504] Land tax is also payable annually on lands which are not a principal residence or used for primary production.[505] A form of tax is also levied via stamp duty, based on the real property's value, payable by purchasers, to the State, when ownership changes.[506]

However, 'liability to execution' has another application where an owner's rights are irrelevant. In theory, and in practice, in New South Wales, though solvent, privately-owned land may be compulsorily acquired by a state or local government authority, for a specific public purpose,[507] eg managing the coastal zone.[508] When this occurs the acquiring authority must to give notice to the owner of the intention to acquire[509] and pay 'just terms' compensation.[510]
Note that compensation is paid under the Act's provisions not a private property 'right'.[511]

(xi) residuary character

The last of Honoré's incidents - residuary character - is the owner's right to recover the lesser legal interests in a thing, when those interests cease. [512] This right to regain control over a thing after an agreement with another person to allow their temporary use of the thing ceases, has special application to land. It entitles the landowner to recover possession, use and income from land, or the discharge of a mortgage over the land, once these temporary interests legally cease.

This right to recover lesser legal interests when they expire, still operates in New South Wales. An explicit agreement that the tenant will give 'vacant possession' of the premises to the owner, or their agent, when the agreement ends on a specified date, is a standard condition of most leases of land and buildings.[513] Where a tenant fails to vacate by the due date, it is this 'right to

[502] Honoré, above n 216, 123-4.
[503] See ss 494 *Local Government Act 1993* (NSW).
[504] See s 569 *Local Government Act 1993* (NSW).
[505] See s 7 of the *Land Tax Management Act 1956* (NSW).
[506] See ss 8, 12 of the *Duties Act 1997* (NSW).
[507] See s 5 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW). See also s 186 *Local Government Act 1993* (NSW).
[508] See Object (l) of s 3 of the *Coastal Management Act 2016* (NSW).
[509] See ss 11, 12 *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
[510] See ss 10(1), 54, 56(2) *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
[511] See *Durham Holdings PL v New South Wales* (2001) 205 CLR 399, [29] - [31] (Kirby J).
[512] Honoré, above n 216, 126.
[513] See Clause 17 of the Standard form of the *Residential Tenancy Agreement* (NSW Fair Trading, 2016)

recover' which underpins a landowner's legal action to seek an order from the court for the tenant to deliver vacant possession, or to instruct a court officer to evict the ex-tenant.[514]

Highly pertinent were Honoré's observations that 'the difficulty is' that the reacquisition of lesser interests by the owner is a series that "may be continued", and that as a future step in the series, the State "may acquire" the owner's interest in land when that interest determines.[515] Though he raised it as a "mere expectancy",[516] this next step applies now in New South Wales. In practice in this jurisdiction, the series continues when land falls below MHWM and ceases to be part of the 'real property' due to its erosion or inundation by tidal waters.[517] An owner's interests in that land, for residential or other uses, are deemed to cease when they become impossible, due to changed physical conditions, and its ownership reverts to the State.[518]

Thus, this incident of ownership works both ways for the owners of real property.[519] Paradoxically, it preserves landowners' long term private property rights, but provides another means by which, despite their solvency, they may involuntarily lose ownership of their land.

5.2 Summary of 'standard' private property rights

It is clear that all Honoré's incidents of ownership are present and apply to coastal land to some degree, and a suite of 'private property rights' are available to landowners, in New South Wales. However, the ambit of the lawful exercise of some 'rights' is, in practice, quite limited. Moreover, it is plain that ownership consists of more than 'rights', and also entails liabilities, obligations or duties to others. These reciprocal social relations have special application to real property, where neighbours possess the same private property rights, or where a tenant or mortgagee may have a lesser, but nonetheless legal, interest in their land. Landowners who expect others to respect their private property rights thus have a moral duty to comply when others pursue their claims of private property rights against them. Without mutual reciprocity, the social benefit of private property rights would be limited. Further, even where their existence is uncontested, some 'private property rights' when related to land, are subject to socially approved exceptions, whether the owner consents or not.

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[514] A landlord would need to obtain an 'order for possession' against the tenant under s 102 *Residential Tenancies Act 2010* (NSW) which, if not obeyed, would allow the NSW Civil and Administrative Tribunal to issue a 'warrant for possession', per s 121 *RT Act 2010* (NSW) for execution by the Office of the Sheriff within 28 days. See < https://www.tenants.org.au/resource/warrants-possession-tenancy >

[515] Honoré, above n 216, 128.

[516] Ibid.

[517] See *EPA v Saunders* (1994) 6 BPR 13,655, 13,660.

[518] *EPA v Leaghur Holdings Pty Ltd* [1995] 87 LGERA 282, 287.

[519] While they have a private property right to regain ownership of lesser legal interests in their land when these interests expire, landowners have a corresponding duty, like that of a tenant, to surrender any legal interest in land below MHWM, when their interests in that land are deemed by law to have ceased.

5.3 Additional private property rights

As well as 'standard' rights, other common law property rights are available to landowners. If their 'real property' is bounded by tidal waters[520] landowners are said to have littoral rights.[521]

The right to claim ownership of new land

These rights include a right to claim ownership of new land formed against their existing land under the doctrine of accretion, described below. This private property right is not available to all land-owners however since it only arises *in relation to* some titles to 'real property' due to the land's geographic attributes, ie a natural boundary formed by tidal waters or 'the bank'.

The doctrine of accretion

The right to claim ownership of new land is a surviving element of civil law rules of property[522] which govern the movement of natural boundaries formed by permanent bodies of water.[523] These rules were adopted and refined by English common law courts during the 19th century and became known, collectively, as the 'doctrine of accretion'.[524] Under this doctrine the legal boundary to real property formed by the bounding waterbody changes to reflect changes in the position of the water's edge, provided two conditions are met: the change is gradual, and is brought about by 'natural forces'.[525] Under its rules, the ownership of new land formed against existing land, by the gradual deposition of sediment by the bounding water, or by a fall in the water level, is awarded to the adjoining landowner.[526] Thus landowners have the right to claim the 'new' land, which they could expect would be recognised by law.

However the doctrine is 'double-sided' [527] and works "both ways".[528] As well as modes of addition, land may be subtracted via the same gradual natural processes: erosion and diluvion.[529]

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[520] 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 [355-1405]

[521] See *Attorney General of the Straits Settlement v Wemyss* (1888) 13 App Cas 192, 196. See also Richard A Epstein, 'Littoral Rights under the Takings Doctrine: The Clash Between the *Ius Naturale* and Stop the Beach Renourishment' (2011) 6 *Duke Journal of Constitutional Law and Public Policy* 37.

[522] The doctrine of accretion is similar to the right of livestock owners to claim ownership of any progeny. See John Burke, (ed) *Jowitt's Dictionary of English Law*, (Sweet & Maxwell, 2nd ed, 1977), 18-19.

[523] Butt, above n 209, [2 47] 33-4.

[524] The term 'doctrine of accretion was first used in *Foster v Wright* (1878) 4 CPG 438, 447, by Lindley J. See also *Hindson v Ashby* [1896] 2 Ch 1, 13, 14.

[525] Butt, above n 209, [2 47] 34. *Gifford [Rex] v Yarborough* (1828), 5 Bingham 163; 4 ER 1087. See also *Southern Centre of Theosophy Incorporated v South Australia* (1982) AC 706; [1982] 1 All ER 283, discussed in s 7 of Chapter III.

[526] Re *Hull and Selby Railway Co* (1839) 5 M&W 327, 151 ER 139. See also Urquhart Forbes and Henry John Coulson, *The Law Relating to Waters*, (Bradbury Agnew & Co, 2nd ed, 1902) 29.

[527] The term 'double-sided' was used in *Attorney General of Southern Nigeria v John Holt & Co Ltd* (1915) AC 599 by Lord Shaw at 614; and in *Southern Centre of Theosophy Incorporated v South Australia* [1978] 19 SRSA 389, 392 (Walters J).

Hence, while there is a right to claim new land, under Hohfeld's scheme, a landowner would have 'no-right'[530] to claim to own land lost to these natural processes, and there would be a correlative 'duty' to accept its loss. The doctrine's subtractive modes of operation are poorly understood, but highly relevant to the future use of coastal land as sea levels rise. Hence as a common law concept, its scope extends beyond the meaning of 'accretion' in geography.[531] Modern statutes[532] have modified the operation of the doctrine's modes of addition, but have not addressed its subtractive modes. Their future operation under climate change conditions are therefore especially relevant to the thesis topic, and will be considered in later chapters.

This link between geographic attributes and the existence of additional private property rights is a rare surviving example of land's physical nature affecting the scope of the property in, and property rights available to the owner. There is no 'placelessness' for the real property in littoral land.[533] Without evidence of 'place' and possession of the vital geographic attribute, a water boundary, claims by landowners under this right would not succeed. Thus the additional property rights available under the doctrine of accretion, are 'geographically contingent'.

5.4. Contested claims of 'rights'

Extraneous to the private property rights recognised by Has settled property law,[534] coastal landowners in New South Wales, have claimed private property rights that:

a) allow them to build seawalls or other structures to defend against the sea;[535]

b) creates a 'duty' on the State to 'protect' them from the sea with defensive structures;[536]

c) entitles them to be paid compensation for land lost to the sea;[537]

d) are dominant, and paramount considerations "which legislatures cannot ignore".[538]

However, I seriously doubt that these claimed rights exist in law: hence they are not further considered here as among the private property rights recognized by current property theory. Following my review of relevant common law in Chapter III and current statute law in Chapter IV, in s 9 of Ch IV I state my conclusions on the existence of these claimed rights.

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[528] In *Williams v Booth* (1910) 10 CLR 341, Isaacs J discussed the doctrine's operation and said at 352, '… but the rule must work both ways, if at all.'
[529] See *Southern Centre of Theosophy Inc v South Australia* (1982) AC 706; [1982] 1 All ER 283, 287.
[530] Hohfeld, above n 223, 30.
[531] See Corkill, 'Ambulatory', above n 63, 78.
[532] See s 55N *Coastal Protection Act 1979* (NSW); s 28 *Coastal Management Act 2016* (NSW).
[533] See Graham, above n 235, 5-8.
[534] Honoré sought to describe "what ownership is" and the standard incidents of ownership which are constant in liberal conceptions of 'property', and other systems. Honoré, above n 216, 105, 109.
[535] Coleman, above n 13, 421.
[536] Ibid 422.
[537] This claim is based on US courts' rulings that loss of land to the sea is a 'taking' of private property which warrants the compensation of the owner under the Constitution of the United States of America.
[538] Coleman, above n 13, 422.

6. Vestiges of prior land law still apply

Though the English land laws originally applicable to New South Wales have undergone major modification since self-government began in 1856, to adapt them to colonial conditions,[539] it is appropriate to notice two vestiges of English land law, which still apply to real property today.

a] the 'doctrine of tenure'

The first is the doctrine of tenure, which holds as a tenet of property law that all title to land has its origin in the Crown as the 'original owner'.[540] Under this doctrine, landowners' title to land is legitimate where a line of lawful conveyance of title exists, at the origin of which is a valid grant of land by the Crown.[541] This doctrine continues to apply in New South Wales, where, through the adoption of Torrens title, all land titles are created by the State, and relevant details of the interests in land are recorded in the register of land titles maintained by the State.[542]

b] the principle of escheat

The second element, the 'principle of escheat',[543] is linked to the doctrine of tenures.[544] Originally, 'escheat' referred to title to land reverting to its original owner, the Crown,[545] if a landowner died without heirs or intestate, or was convicted of an offence punishable by death.[546] However, despite the report that it is largely extinguished,[547] I posit that it continues to apply in New South Wales where coastal land is eroded or submerged by tidal waters and part of the land title falls below MHWM.[548] It is under this common law principle, that the ownership of that part of the real property once above, but now below, MHWM reverts to its original owner, the Crown, as the State of New South Wales.[549] I conclude that it is this principle of escheat

[539] See Andrew R Buck, *The Making of Australian Property Law* (Federation Press, 2006) 47-85.
[540] See LegalOnline *The Laws of Australia*, Real Property > Principles of Real Property > Doctrine of Tenure [28.1.410], [28.1.460]. See also LexisNexis Halbury's Laws of Australia 355 Real Property (I) Introduction (I) Historical Foundation of Real Property in Australia (E) Doctrine of Tenure [355-70].
[541] LegalOnline *The Laws of Australia*, Real Property > Principles of Real Property > Doctrine of Tenure [28.1.200].
[542] Butt, above n 209, 83-4.
[543] See LegalOnline *The Laws of Australia*, Government > Executive > Executive Authority > Executive Powers, Immunities and Proprietary Prerogatives > Proprietary Prerogatives [19.3.800] [19.3.810].
[544] LexisNexis *Halbury's Laws of Australia* 355 Real Property (I) Introduction (I) Historical Foundation of Real Property in Australia (E) Doctrine of Tenure [355-75]. See also Butt, above n 209, 83-7.
[545] Delbridge et al (eds), above n 4, 593.
[546] Butt and Hamer, (eds), above n 207, 213. See also 'attainder', 40.
[547] Butt, above n 209, 84-5, concluded that 'the only remnant of the doctrine of escheat appears to be under Commonwealth legislation.' For reasons I make plain, I disagree.
[548] As indicated by the court's use of the phrase 'reversion of ownership to the Crown' in *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287. See s 8 of Chapter III below.
[549] See the discussion in Chapter III below of *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655 and Environment Protection Authority v Leaghur Holdings PL [1995] 87 LGERA 282.

which gives legal effect to Honore's incident of ownership of 'residuary character', under which the private interest in coastal land may lapse or 'revert' without the owner's consent.

This concludes my exposition of private property, private property rights and their limits, in New South Wales. I turn next to public property and public rights in coastal lands and waters.

Part C – Public property and public 'rights'

In this Part I examine the key concepts of public property and public rights to use coastal lands and waters, as they apply in this jurisdiction.

7. The civil law legacy

Several key concepts from Roman civil law provided a foundation for English property law through their adoption into the common law of England.[550] The *Institutes of Justinian* (c 533 AD),[551] are often cited as the source of these concepts, but they sought to update earlier texts including the *Institutes of Gaius* (c 160 AD)[552] and *Codex Theodosianus* (c 438 AD).[553]

Three elements of civil law that are central to modern notions of public rights have their origin in an often quoted section of Justinian's *Institutes.*

> …the following things are by natural law common to all - the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally: for these are not, like the sea itself, subject to the law of nations. On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein. The seashore extends to the limit of the highest tide in time of storm or winter. … Again, the public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently everyone is free to build a cottage upon it for the purposes of retreat, as well as to dry his nets and haul them up from the sea.[554]

Over the centuries since, these civil law concepts have been adapted by English common law,[555] or modified by modern statutes,[556] providing the philosophical basis for modern public rights.[557] These concepts are considered next.

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[550] In *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260, Palles CB said, at 276 the case ' … presents a typical instance of a principle of the Roman civil law being introduced into, and becoming part of, the English common law as to real property.' Gibson J concurred with this legacy at 295, 298-9.

[551] See *Attorney General (Southern Nigeria) v John Holt & Coy Ltd* [1915] AC 599, 613 (Lord Shaw); *Svendsen v State of Queensland* [2002] 1 Qd R 216, 221, (Demack J).

[552] See Max Radin, 'The New Gaius' (1935) 24 *California Law Review* 304-

[553] DM Walker *Oxford Companion to Law* (Clarenden Press, 1980) at 237.

[554] This text from *Institutes of Justinian*, Book 2, title 1.1-5, translated by J.B. Moyle, was quoted at length by Demack J in *Svendsen v State of Queensland* [2002] 1 Qd R 216, 221.

[555] For eg the upper limits of the 'seashore' or 'foreshore' has been modified in English common law, and in other jurisdictions including New South Wales, and is defined as the average high water mark on ordinary, or medium tides, or mean high water mark. In other jurisdictions, such as Queensland high

***a)* public property**

The first persistent concept: the idea that some lands, other natural resources and specifically 'the sea and consequently the seashore',[558] are 'common to all', and cannot be permanently appropriated for exclusive private use.[559] It formed the foundation for later legal concepts, such as the *jus privatum* and *jus publicum*,[560] the 'public trust doctrine' revived by Sax,[561] 'inherently public property' explored by Rose,[562] and reserving some lands from private acquisition.[563]

***(b)* access to the sea and seashore**

The second concept the right to access the seashore. The text is explicit: 'No one therefore is forbidden access to the seashore…' Further this right of public access extends more broadly, to '…the sea itself', adjoining coastal waters, and 'all rivers and harbours'. This is the foundation of the public right to access the foreshore and to navigate over tidal waters.

***(c)* a 'right to fish'**

The third surviving concept is an explicit 'right to fish'. The *Institutes* text referred to 'rivers and harbours' and was explicit that 'all persons have a right to fish therein', but the stated liberty to dry nets and 'haul them up from the sea' shows that the right to fish extended to tidal waters. This civil law concept did not easily translate into English law, where many ancient grants included lands below HWM, which created a private right of fishery for the landowner.[564] A 'right to fish' did emerge in English common law however,[565] and applied in British colonies.

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water is defined as 'mean high water at spring tides'. In the United States an average of all high water marks over 19 years is used to calculate the 'mean high tide line'.

[556] For eg fishing by members of the public in tidal waters is still widely permissible in New South Wales, but it is prohibited within many ports, and other areas declared 'closed' by regulation.

[557] specifically the public right of navigation, and the public right to fish. See *Blundell v Catterall* (1821) 5 B & A 268; 106 ER 1190. The right to dry nets was later considered a local custom rather than part of the common law: see *Gann v Free Fishers of Whitstable* (1865) 11 HL Cas 192; 11 ER 1305

[558] Usefully the text quoted provided an unambiguous definition of 'the seashore' as extending 'to the limit of the highest tide in time of storm or winter.' This landward limit is well above and landward of the line of MHW, and is analogous to highest storm tide, in modern tidal heights.

[559] Though the quote states 'everyone is free to build a cottage upon it for the purposes of retreat', this is likely a reference to a temporary use, particularly during stormy weather, as are the other uses cited: not to a property 'right' to make a 'free selection' of the foreshore with a view to permanent residency.

[560] See David C Slade, *Putting the Public Trust Doctrine to Work* (Coastal States Org. 2nd ed, 1997), 6-9.

[561] See Sax, above n 189.

[562] Rose, 'Comedy', above n 235.

[563] and permanent dedication for public purposes e.g water supply catchments, National Parks.

[564] The ability of the English Crown to grant private fisheries was curtailed by Magna Carta, and a public right to fish has long been recognised in English Common law. See Stuart A Moore and Hubert Stuart Moore, *The History and Law of Fisheries* (Stevens & Haynes, 1903), 32-36.

[565] Ibid 35.

8. Public property in New South Wales

For the purposes of this thesis, 'public property' in New South Wales refers to the legal interests in coastal lands held by the general public, or by the government on their behalf.

8.1 Corporeal public property

It has been said that all manifestations of property are 'incorporeal'[566] since they refer to the 'abstract legal relations' applying to own-able things. However the term 'corporeal public property' has persisted to indicate legal interests in a thing, such as land, held by the public, where those interests are so special or extensive as to justify public ownership of the thing.[567] This encompasses 'publicly owned' lands and premises specifically dedicated for public use. Thus 'public property' may be land registered as 'real property', such as public hospitals, public schools, roads and highways, sporting grounds, owned by specific public authorities in the public interest ,or areas of un-alienated Crown land such as national parks, state forests or Crown reserves and 'an inchoate miscellany' of other types of Crown land.[568] Carol Rose described some lands, including beaches and foreshores, as 'inherently public property'.[569]

8.2 Incorporeal public property

Similarly, 'incorporeal public property' refers to legal interests in a thing held by the public, where those interests do not justify the thing, or the land containing it, being publicly owned.[570]

That there could be 'public property' in privately owned land[571] has not been widely considered, it has been suggested, because theorists focused on 'private property' have not recognized it.[572] To remedy this restrictive approach requires an ability to 'see it', that involves an awareness that other species of property in land exist, and a willingness to identify them.[573] There are many

[566] Hohfeld, above n 223, 23-4.
[567] See Page, 'Towards' above n 235, 197. Corporeal 'public property' would also include the large swathes of Crown owned land designated as leasehold land, and land and resources owned by the State government , see Page, above n 235, 201.
[568] such as 'permissive occupancies, travelling stock routes and 'paper' roads', owned by a government agency or vested in a Minister of the Crown or a Ministerial corporation. See also Page, '*Property*', above n 255, 40, Table 2.1.
[569] See Rose, 'Comedy', above n 235, 722.
[570] See for example the use of these terms in Page, 'Towards', above n 235, 197-200.
[571] Such as covenants restricting impacts on views or easements for public access
[572] Indeed, according to CB Macpherson, there has been a pervasive trend 'by many property writers' to misuse the terms and treat the concepts of 'property' and 'private property' identically, as if no distinction were possible or necessary. See Macpherson, above n 222, 2.
[573] Carol M Rose, 'Seeing Property' in *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, 1994) 267.

examples of public rights or interests as 'incorporeal public property' in private land.[574] In some jurisdictions a public right of access over private land exists for recreational purposes or as a thoroughfare between public spaces.[575]

In New South Wales a general right of access does not exist, however privately-owned land may be subject to a public right-of-way or an easement for access which is registered over the land title.[576] Other incorporeal 'public property' in privately-owned land include water supply catchments, mineral resources,[577] or areas of significant native vegetation and fauna habitat which do not depend on public access.[578]

Features such as gardens, fountains, murals, statutes or monuments on private land, which can be enjoyed from nearby public areas, [579] are also a kind of 'public property'.[580] Ways to protect public property in privately-owned land are further considered in later chapters.

That concludes my focus on public property. I next address public rights to use coastal lands.

9. Public rights to use coastal lands and waters

The arrival of English common law in New South Wales is briefly explained next as a preface to my examination of current public rights to access and use coastal land and waters.

9.1 Public 'rights' were transported to British colonies

[574] Eg the State's ownership of native fauna under the *National Parks and Wildlife Act 1974* (NSW) and the protection of Threatened Species habitat under the *Biodiversity Conservation Act 2016* (NSW).

[575] Jurisdictions which provide a public right of access over private land include Sweden, where there is 'right to roam', Scotland, where the right of access has long existed under Scots law now codified as a right of 'responsible access', under the *Land Reform (Scotland) Act 2003* (Scot), and England where the right of access, though customary in many places, has been given statutory recognition by the *Countryside and Rights of Way Act 2000* (UK). See Alexander and Peñalver, above n 229, 4. See also Page, 'Reconceptualising', above n 249, 93-94.

[576] Easements for public access across private land may employ an 'easement in gross' under Schedule 4A or an easement under Schedule 8, for a 'right of carriage way' a 'right of foot way' or a 'right of access' under s 88B *Conveyancing Act 1919* (NSW).

[577] The land title of real property usually explicitly reserves to the Crown, as the agent for public, the underground mineral resources, which can be re-allocated by the Crown as another species of 'private property', as an exploration or mining licence, within or underlying privately-owned land.

[578] Positive covenants to protect such natural features may be created per s 88BA *Conveyancing Act* 1919 (NSW) or required as a condition of a development consent issued under the *EPAA 1979* (NSW).

[579] See for eg Nicholas Blomley, 'Flowers in the Bathtub: boundary crossings at the public private divide' (2005) 36 *Geoforum* 281-296. Though Blomley explores the extension of private gardens onto public space outside residences, illustrating a private encroachment on public space, his example works both ways. Members of the public may view, enjoy and relate to elements of privately owned gardens such as scent, shade or produce from gardens or trees, or close encounters with birds and other wildlife.

[580] Sites or items of Aboriginal cultural heritage significance may occur on privately owned land, but they warrant a more exclusive term, 'cultural property'.

The transplantation of English common law rights and rules regarding property generally and 'real property' in particular, to distant lands through English colonization, through the 'silent operation of constitutional principles'[581] was explained in Blackstone's much quoted statement.

> "It hath been held that, if an uninhabited country be discovered and planted by British subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony." [582]

Though it is now accepted that Australia was inhabited,[583] this transplantation of English law into British colonies transported common law public rights to New South Wales,[584] as was later confirmed by the British Imperial Parliament.[585] Thus English law, including rules of common law, applied to the extent appropriate in the 'infant colony', until new local laws developed. This rosy view of the smooth reception of English law into the colony as a 'birthright', is however troubling,[586] since only the 'birthrights' of Englishmen were recognised.[587]

9.2 Contemporary public 'rights'

As outlined above, two public rights over 'public property' in the foreshore have been recog--nized by the common law courts: the public right of navigation, and public right to fish.[588]
A third right of public pedestrian access to coastal lands has subsequently developed and been incorporated into NSW legislation. These rights are explained below.

(a) public right of navigation

[581] *Cooper v Stuart* (1889) 14 App Cases 286, 293 (Lord Watson).
[582] William Blackstone, *Commentaries on the Laws of England* (first pub 1765) vol 1, 107, quoted in *Cooper v Stuart* (1885) 14 App Cases 286, 291 (Lord Watson). See the discussion of the arrival of the common law in Australia by Catriona Cook et al, *Laying down the law* (LexisNexis, 7th ed, 2009) 34-5.
[583] The doctrine of *terra nullius* was overturned by the Full Court of the High Court of Australian in *Mabo and others v. Queensland* (No. 2) [1992] HCA 23; (1992) 175 CLR 1 FC
[584] *Cooper v Stuart* (1889) 14 App Cases 286, 293 (Lord Watson). Though the court did not cite Blackstone's principle, in an early case in New South Wales, *(Mary) Lord v Commissioners for the City of Sydney* [1859] 12 Moo PC 473; 14 ER 991, 1000, the court did employ the phrase 'an infant colony', but relied on English rules of law to interpret the terms of the grant of land, citing 'Mr Chancellor Kent, … Commentaries (Ed. 1840), part 6, Lect. 52, p. 438', (Sir John Coleridge).
[585] The *Australian Courts Act 1828* (6 Geo 4, c 83) included a provision that all laws and statutes in force in England on 25 July 1828 applicable to the conditions in New South Wales were deemed to be in force there. See Margaret Davies, *Asking the Law Question* (LexisNexis, 3rd ed, 2008) 35.
[586] This view is troubling when seen from a contemporary perspective, because at the time that these laws were transplanted into the colony, as an Englishman's 'birthright', the rights of indigenous peoples were overlooked, ignored or traduced by the military administrators of the penal colony, and then by many free settlers. This occurred despite the specific direction to the contrary, noted above.
[587] Insights into the attitudes of colonial administrators and the resistance by local aboriginal people to colonization may be gained from Eric Willmot, Pemulwuy: *The Rainbow Warrior* (Matilda, 1987).
[588] In *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190, Best J, at 284-5; 1196, acknowledged a 'right to fish' when he quoted part 1, cap. 8, p 11 of Hale's treatise *De Jure Maris* "The King's right of propriety, or ownership, in the sea, and soil thereof, is evidenced principally by these things that follow; first, the right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the Crown".

The public right of navigation,[589] has its roots in the customary use of boats for transport, freighting goods to market, and fishing.[590] At common law, this right extends over all tidal waters,[591] and includes the foreshore, being land between high- and low-water mark.[592]

In the New South Wales colony's early days, since there were few roads and many settlements were only accessible by boat, coastal navigation was commonplace, and free settlers navigated the harbour and coastal waters under the public right recognised by English common law.[593]

Navigation has since been recognised by the court in New South Wales as an extensive public 'right' which allows a 'subject' to pass freely over tidal waters in any direction, at any time.[594] It 'carries with it all rights necessary for the full use and enjoyment of the rights of convenient passage', but it 'must be done for a reasonable purpose and in a reasonable way'.[595] Further, the public right of navigation is limited by geography and facilities,[596] 'paramount' over the public right to fish,[597] and can only be abrogated by statute,[598] not by a construction of the terms of a land grant, or by the exercise of a delegated general authority.[599]

[589] 'navigate' is defined as verb (t) 1. To traverse (the sea, a river, etc.) in a vessel, or (the air) in an aircraft; 2. to direct or manage (a ship, aircraft, etc.) on its course; 3. to pass over (the sea, etc.) as a ship does; and 'navigation' as noun 1. the act of or process of navigating; 2. The art or science of directing the course of a ship or aircraft; see Delbridge et al (eds) above n 4, 1188.

[590] Henry Bracton, the Chief Justice of England during the reign of Henry III, and his seminal work *De Legibus et Consuetudinibus Angliae* (c. 1260) were cited in *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190, by counsel for the defendants, at 272; 1192, as the earliest English authority on public rights to use the sea and sea-shore and Bracton's dicta were discussed at 281-2; 1195 (Best J), 291; 1198-9 (Holroyd J), 308; 1204-5 (Bayley J), 312; 1206 (Abbott CJ). In *Rowland v Environment Agency* [2005] Ch 1, [2004] 3 WLR 249, [2003] EWCA Civ 1885, Gibson LJ at [3] noted that the public right of navigation over the River Thames had existed from 'time immemorial', ie before 1189.

[591] In *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190. Holroyd J at 289-290;1198 cited the plea "that, by the common law of England, all the King's subjects had a right, not only to traverse the ocean in every direction, as well for commerce, trade and intercourse, as for every other lawful purpose."

[592] See *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190, 291; 1198 (Holroyd J).

[593] See Ian Hoskins, *Coast – A History of the New South Wales Edge* (NewSouth Press, 2013) 183-236.

[594] *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSW LR 391, 393 (Powell J). See also the ruling that it 'is a common law right, inherent in all her Majesty's subjects, to use the surface of all navigable waters, both by day and night, by every kind of vessel, for private advantage or pleasure, as well as public convenience,' in *Peltier v Darwent* (1870) NSWR 133, 150 (Hargraves J).

[595] These include 'the rights to pass and to ground and to anchor, … loading and unloading and completing repairs; or 'waiting till the wind and weather, or probably also the season, permits the vessel to leave'. *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSW LR 391, 393.

[596] The court noted that 'the rights of all vessels are not coextensive', observing that while a small boat could 'go up to the farthest point she can reach', a ship had no right 'to get to a place where large vessels are not accustomed to go, and where there is no accommodation for mooring and unloading them'. *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSW LR 391, 393-4.

[597] *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192; 11 ER 1305. See also *Anon* (1808) 1 Camp 517; 170 ER 517 and *McInsley v Gilley* (1907) 7 WLR 22 cited by Walrut, above n 26, 427.

[598] *Mayor of Colchester v Brooke* (1845) 7 QB 339; 115 ER 518; *Wood v Esson* (1883) 9 SCR 239.

[599] *York Bros (Trading) Pty Ltd v Commissioner of Main Roads* [1983] 1 NSW LR 391, 398.

Though public navigation had utilitarian origins, in the 20th century recreation boating became popular. However, it is not a separate category of the public right. That the purpose of navigation was irrelevant was clarified by courts in England,[600] and New South Wales.[601]

i] Modification by modern statute law

Public navigation in the colony remained unregulated until early 19th century statutes sought to protect the travelling public's safety by regulating commercial navigation[602] in the coastal waters of New South Wales.[603] These laws were updated during the life of the colony,[604] and after Federation by the State of New South Wales.[605]

The regulation of navigation in NSW coastal waters was reviewed and updated in the 1990s.[606] The *Marine Safety Act 1998* (NSW),[607] *Marine Safety (General) Regulation 2009* (NSW)[608] and the *Regulations for Preventing Collisions at Sea 1972*,[609] (as amended)[610] are the principal current statutes.

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[600] In *Blundell v Catterall* (1821) the purpose of accessing the sea was much discussed, and Best J said 'The universal practice of England shews the right of way over the sea-shore to be a common law right. All sorts of persons who resort to the sea, either for business or pleasure, have always been accustomed to pass over the unoccupied parts of the shore….' *Blundell v Catterall* (1821) 5 B & Ald 268, 106 ER 1190, 1194. That the purpose was not a factor qualifying the public right was affirmed by Abbot CJ, at 1206, who said '… the waters of the sea are open to the use of all persons for all lawful purposes…'

[601] The wide scope in the purpose of public navigation coastal waters in this State, was affirmed in *Peltier v Darwent* (1870) where Hargrave J ruled that 'the public right of navigation is a common law right, inherent in all her Majesty's subjects, to use the surface of all navigable waters, both by day and night, by every kind of vessel, for private advantage or pleasure as well as public convenience'. *Peltier v Darwent* (1870) 9 NSWR 133, 150. See the discussion of this by Walrut, above n 26, 428.

[602] creating minimum standards for passenger vessels. These included requirements for seaworthiness, essential lifesaving equipment e.g. life-boats and life-jackets and later, standards of competence for masters and crew. Vessels were also required to operate with lights illuminated after dusk.

[603] such as the *Shipping Act 1825* (NSW) and the *Steam Navigation Acts* of 1847 and 1850 (NSW). The English statute 3 Wm 4 No.6 (1832) also applied in the colony of New South Wales until 1871.

[604] Eg the *Navigable Waters Protection Act 1862; Steam Navigation Act 1871* (NSW).

[605] Eg *Navigation Act 1901* (NSW); *Navigation and Other Acts (Validation) Act 1983* (NSW). A treatment of the history of the regulation of commercial navigation in the coastal waters of New South Wales is beyond the scope of this article. But see M *Richards North Coast Run: Men and Ships of the New South Wales North Coast* (Turton and Armstrong, 3rd ed, 1996) See also publications listed at the Australian National Maritime Museum < http://www.anmm.gov.au/site/page.cfm?u=1474 >

[606] For e.g. the *Maritime Services Act 1935* (NSW) was substantially amended by the *Ports and Maritime Administration Act 1995* (NSW).

[607] Other statutes also apply eg *Marine Pollution Act 1987* (NSW); *Marine Parks Act 1997* (NSW); *Marine Pollution Act 2012* (NSW); *Ports and Maritime Administration Act 1995* (NSW).

[608] Other regulations apply e.g. *Management of Waters and Waterside Lands Regulations 1972* (NSW); *Marine Parks (Zoning Plans) Regulation 1999* (NSW) *Marine Pollution Regulation 2006* (NSW) *Marine Parks Regulation 2009* (NSW); *Ports and Maritime Administration Regulation 2012* (NSW).

[609] These Regulations derive from earlier rules of sailing. See Tom Lochhaas, 'Rules of the Road for Sailboats' at < http://sailing.about.com/od/lawsregulations/ss/Rules-Of-The-Road-For-Sailboats.htm > See also Robby Robinson *The International Marine Book of Sailing* (McGraw-Hill, 2009). The rules were refined as international rules for international waters under the *Convention on the International Regulations for Preventing Collisions at Sea 1972*, (COLREGS) adopted 20 October 1972, Entry into force 15 July 1977. See < http://www.imo.org/About/Conventions/ListOfConventions/Pages/COLREG.aspx >

These regulations are summarised in the *Boating Handbook* (NSW RMS, 2012)[611] and knowledge of them is required to pass the necessary test[612] to obtain a marine safety licence.[613] These statutes regulate navigation in various ways, outlined below.

Under the Act operators must be licensed,[614] vessels must be registered,[615] bear a maker identification plate, and be equipped with safety equipment,[616] However some vessels and operators are exempt from these registration requirements.[617] The Act also provides for limits on a vessel's speed in parts of the state's coastal waters and the Minister has power to designate areas 'no wash' zones, and regulate the mooring or use of vessels by posting a Notice.[618]

Current regulations also empower the Minister to specify areas of coastal waters as off-limits to navigation by the public for a 'special event', by issuing a Notice which declares an exclusion zone,[619] permanently,[620] or for a specified period.[621] Disregarding any Notice and entering an exclusion area is an offence, and penalties apply.[622]

ii] Has the public right to navigate survived?

Whether the right of navigation has survived regulation is not immediately apparent. As a rule of statutory interpretation, the courts require Parliament to express a clear intent to amend or repeal a common law rule. But since the relevant Act does not explicitly repeal the right of navigation, closer analysis is needed to ascertain whether this statute has impliedly repealed it.

Thus these Regulations have the status of international law. They have been refined as 'international racing rules' by the International Sailing Federation, for all competitions held under their auspices. See < http://www.sailing.org/documents/racingrules/index.php >

[610] These COLREGS, with the addition of special NSW rules, were adopted for use in NSW coastal waters. See cl 5 and Schedule 2 of the *Marine Safety (General) Regulation 2009* (NSW).

[611] Boating Handbook (NSW RMS, 2012), 30. See < http://www.maritime.nsw.gov.au/sbh/index.html >.

[612] Applicants must complete a General Licence Boating Safety Course and pass a test to qualify for a 'boat driving licence'. See < http://www.maritime.nsw.gov.au/rec_boating/boatingsafety.html#hl >

[613] Marine safety licences issued under s 29 *Marine Safety Act 1998* (NSW) include as (e) 'boat driving licence'. It is an offence under s 63 to operate a power-driven recreational vessel without such a licence.

[614] See s 63 Marine Safety Act 1998 (NSW) [hereafter *MSA 1998* (NSW)].

[615] Under s 49 *MSA 1998* (NSW) all vessels operated in the State's waters are required to be registered, except those vessels of a class exempted under regulations made under s 50(3). Thus any commercial vessel, power-driven vessels that are powered by an engine with a power rating of 4.0 kilowatts or more (greater than 5hp), any power-driven or sailing vessel of 5.5 metres or longer, every vessel subject to a mooring licence (includes marina berths) and personal watercraft (PWC), are required to be registered.

[616] See Regs 43 and 84*Marine Safety (General) Regulation 2009* (NSW) [hereafter *MSGR 2009* (NSW)].

[617] Under cl 61 of the *MSGR 2009* (NSW) vessels with an engine power rating of < 4.0 kilowatts (5hp), any power-driven or sailing vessel < 5.5 metres, vessels not subject to a mooring licence or using a marina berth, 'passive craft' being a vessel that does not have an engine and is < 4 metres long or a canoe, kayak, surf ski or rowing shell of any length, are exempt.

[618] See s 11 *MSA 1998* (NSW).

[619] See s 12 *MSA 1998* (NSW).

[620] Parts of Sydney Harbour are permanently declared sail-board and wind-surfing exclusion areas.

[621] Exclusion areas in parts of Sydney Harbour are routinely declared for major public events.

[622] under s 11 (4) *MSA 1998* (NSW).

Before looking at the legislation's effect, it is useful to notice that the right of navigation has three discernible elements. The first is a right to cross the foreshore for the purpose of navigating tidal waters. The second is a right to use any or 'every kind of vessel' convenient for that purpose. The third more extensive element, a right to go anywhere one's vessel is able to reach safely, for any purpose, at any time, is the essence of this public right, in my view.

On one view, statute law has greatly limited the common law public right of navigation.
It might be said that the first element of the right has been repealed because members of the public cannot lawfully navigate the state's coastal waters without a marine safety licence, and they commit an offence if they do. Thus, it is 'licence holders' who may navigate on coastal waters, and they do so with a licence issued under statute law, not as a common law public right. Further, it may be argued the second element has been repealed since not any vessel will do. Only vessels which are registered and comply with the regulations may be used, since it is also an offence to operate an unregistered vessel in the coastal waters of the State. It could also be argued that the third element, the freedom to choose one's course, has been overridden by regulations which proscribe courses to be taken under stated circumstances, prohibit entry into 'closed waters' or mooring in prescribed locations. It may be said that together these statutes so limit the public right of navigation, that the ability to navigate anywhere, at any time has been effectively curtailed. Hence in highly regulated waterways such as Sydney Harbour, it might be argued, the public right of navigation in common law, has been extinguished by regulation.

Alternatively, a strong two limbed case could be argued that, despite the restrictions imposed by regulations, the essence of the public right of navigation survives. The first limb lies in analyzing the statutes to ascertain whether their effect is comprehensive. The second limb requires assessing whether, if relevant regulations are complied with, vessel operators are still free to choose any course they deem safe, at any time, in accord with the third element of the public right.

A review of the historical legislation in New South Wales shows that no provision which expressly repealed the public right of navigation has been enacted. However, the law regulating personal water craft (PWC), demonstrates Parliament's ability to regulate public navigation to such a degree that it may occur only within statutory limits.[623] The regulation provided by the

[623] Operators of personal water craft (PWC) must undergo special training, hold a PWC marine safety licence, and a 'behaviour label' must be applied and visible at all times. PWCs may not enter 'exclusion zones' and must comply with restrictions which apply in the PWC 'restriction zone'. PWCs may not be operated in an 'irregular manner,' ie circles and jumps within 200 metres of the shore and may not be used between sunset and sunrise, see cl 36 - 39 *MSGR 2009* (NSW).

current legislation is not comprehensive however, since some vessels are exempt from the requirement for registration, their operators do not require a licence,[624] and operating powered vessels below 10 knots does not require vessel or operator to be licensed.[625] It follows that if the public right of navigation has been impliedly repealed for larger more powerful vessels, by weight of regulations, it survives for smaller craft, which are exempt from regulation. Further, when the public right of navigation is reduced in highly regulated waterways such as Sydney Harbour, this loss is usually temporary and ceases when the statutory Notice lapses. Permanent loss of the public right of navigation in ports, regulated waterways and prohibited areas is limited, and does not affect other areas of coastal waters where restrictions do not apply.

A second limb may also be argued. Given the Act and regulations do not indicate a legislative intention to repeal the public right of navigation but merely regulate it, it may be said that if a vessel is registered, the operator licensed and regulations are observed, the third element of the public right is still available. A licensed vessel operator may choose whatever course is safe and appropriate and go anywhere, anytime - subject to prevailing conditions.

I concur with Walrut[626] that the public right of navigation has persisted. Small craft remain unregulated and operable under the public right, and if the operators of larger registered vessels are licensed and avoid waters controlled by regulations or Notices, they can still choose their own course, within the limits of safety, in accordance with this ancient public right.

(b) public right to fish

The public right to fish has its roots in English customs[627] which began before time immemorial.[628] Since ancient times, the means of fishing in England, commercially and for sustenance, varied widely, and included fixed engines, stake weirs, stake nets set during high water and recovered at low water, curtain nets set by boat and recovered by beach hauling, and

[624] Hence non-motor i.e. sailing vessels <5.5m long, boats powered by engines of 4KW or less, paddle powered boats and 'passive craft' do not need to be registered. See Cl 61 *MSGR 2009* (NSW). These are craft most likely used by the public under the common law right.
[625] See cl. 76 *MSGR 2009* (NSW).
[626] The survival of the public right of navigation was considered in Walrut, above n 26, 433.
[627] In *Blundell v Catterall* (1821) 5 B & Ald 268; 106 ER 1190, Best J, at 284-5; 1196, acknowledged a 'right to fish' when he quoted part 1, cap. 8, p 11 of Hale's treatise *De Jure Maris* "The King's right of propriety, or ownership, in the sea, and soil thereof, is evidenced principally by these things that follow; first, the right of fishing in the sea, and the creeks and arms thereof, is originally lodged in the Crown".
[628] *Blundell v Catterall* (1821) 5 B & Ald 268, 305; 106 ER 1190, 1203 (Bayley J). 'Before time immemorial' was given as being before the commencement of the reign of Richard I, on 6 July 1189, according to Sir Matthew Hale, *The History of the Common Law* (1739) quoted in Margaret Davies *Asking the Law Question* (Thomson Lawbook, 3rd ed, 2008) 46, 48.

crab or lobster traps.[629] Sustenance fishers gathered shellfish[630] or used thrown nets, hand lines or fixed line poles.[631] Hence it is likely that convicts used traditional English fishing measures.

Fisheries resources were considered a commons[632] which the public could access,[633] and landing a fish conferred ownership, converting what was 'common property' into 'private property'.[634] Common law rules regarding exclusive private fisheries over tidal waters were not applied in the colony because, since land titles below MHWM had not been granted by the Crown, they were not appropriate to the condition of the colony.[635]

Thus fishing in the colony's coastal waters,[636] proceeded under common law[637] until the first Fisheries Act of 1865,[638] to regulate professional fishermen, and protect immature fish.[639]

i] Modern law on fishing

The public right to fish was affected by further legislation in the 19th and 20th centuries,[640] and laws regulating fishing were last updated by the *Fisheries Management Act 1994* (NSW). Under this Act commercial fishers were required to obtain and operate under a licence,[641] use approved fishing methods and report catches.[642] This Act also introduced share management fisheries,[643] and fisheries management plans.[644]

[629] See Moore and Moore, above n 529, 96, 168, 202.
[630] In *Bagott v Orr* (1801) 2 Bos & P 479; 126 ER 391, the defendant argued successfully that the public right to take fish included the taking of sea-fish and shell-fish from the foreshore.
[631] See Moore and Moore, above n 529, 96.
[632] The public right to fish was described as 'a common of fishery' and as 'a public common of pischary' in *Blundell v Catterall* (1821) 5 B & Ald 268, 294, 298; 106 ER 1190, 1199-1200, 1201 (Holroyd J)
[633] Hale's statement in *De Jure Maris* (c 1667) that '…the common people of England have regularly a liberty of fishing in the sea or creeks and arms thereof, as a public common of piscary …' was quoted in Moore and Moore, above n 529, xxxix.
[634] See Walrut, above n 26, 430-431. Walrut cites several cases on the conversion of fish as common property into private property on their capture, see eg *Young v Hichens* (1844) 6 QB 606, 115 ER 228.
[635] Walrut, above n 26, 439 observed that 'private fisheries … definitely did not make the journey to Australia'.
[636] Historical accounts of 'plentiful' fish being caught on Norfolk Island in 1790 were cited by Tim Bonyhady *The Colonial Earth* (MUP, 2000) 17, fn 9. See also Hoskins, above n 558, 93.
[637] Although the colonists discovered fish traps in the estuaries and observed Aboriginal people fishing. See Hoskins, above n 558, 57-61.
[638] *Act to Protect the Fisheries of New South Wales 1865* (NSW)
[639] Hoskins, above n 558, 156.
[640] the *Fisheries Acts* of 1867; 1881; 1883; 1894; 1902; 1910, *Fisheries and Oyster Farms Act 1935* (NSW). The last Act was amended in 1938, 1942, 1957, 1960, 1963, 1968, 1970, 1978, 1979, 1982, 1984, 1985, 1987, 1988, 1989. See Acts As Made at < http://www.austlii.edu.au/au/legis/nsw/num_act/ >
[641] See s 103 *Fisheries Management Act 1994* (NSW) [hereafter *FMA 1994* (NSW)].
[642] See s 121 *FMA 1994* (NSW).
[643] See Part 3, ss 41 – 101 *FMA 1994* 1994 (NSW)
[644] See ss 56 – 65 *FMA 1994* (NSW)

More recently members of the public have come within the legislation's purview.[645] Recreational fishers must pay a fee[646] and hold a receipt[647] to fish in the state's waters.[648] Fishing is however subject to size restrictions and bag limits. [649] Significantly, the Act exempts people younger than 18 years old, adults supervising young people, Aboriginal people or holders of certain pensioner concession cards from the need to hold a licence.[650]

Though traditional private fisheries in tidal waters do not exist in New South Wales, some areas below MHWM are subject to a private interest such as an oyster lease.[651] In other areas of the State's coastal waters no public right to fish survives due to regulations which prohibit all fishing. By declaring an area of waters a 'fishing closure',[652] an 'aquatic reserve',[653] or part of a 'no-take' zone in a marine park[654] the regulation overrules the common law, and the public right to fish is suspended in that area, for the duration of the closure. A permanent 'closure' would extinguish the public right to fish in that area.

ii] Has the 'right to fish' survived regulation?

Whether the public right to fish has survived the storm of legislation enacted in New South Wales is an important question, which I consider next.

It might be argued that the need to hold a fishing licence, size restrictions, bag limits and the closure of certain waters by fishing regulations, have impliedly repealed the public right to fish, and fishing now occurs within the statutory framework of the Act and regulations.

Conversely, it could be said that the relevant statutes do not state an intention to repeal the public right to fish, and much of the law is concerned with regulating commercial fishing, not the public right. While current legislation now requires a person to pay a fee and hold a fishing

[645] The requirement for fishing fees was introduced by the *Fisheries Management Amendment Act 1997* (NSW) The principal legislation was further modified by *Fisheries Management Amendment Acts* in 2000, 2001, 2004, 2006, 2008, 2009. See NSW Acts as Made, "F".
[646] See s 34C *FMA 1994* (NSW). It is an offence under s. 34J (1) *FMA 1994* (NSW) to take fish without having paid a fishing fee.
[647] A person is guilty of an offence under s 34J (2) *FMA 1994* (NSW) if they cannot produce the receipt for their fishing fee when asked to do so by an authorised officer.
[648] However, s 38 *FMA 1994* (NSW) recognises a 'right to take fish' from certain inland waters.
[649] Taking undersize fish is prohibited by cl 11 and 'bag limits' are set under cl 13 *FMGR 2010* (NSW).
[650] See s 4C (2) *FMA 1994* (NSW).
[651] Both an 'aquaculture permit' under s 144, and an 'aquaculture lease' under s 163 *FMA 1994* (NSW), are required to operate an oyster lease.
[652] under s 8 *FMA 1994* (NSW).
[653] Pursuant to s 194 *FMA 1994* (NSW).
[654] Fishing in a 'sanctuary zone' of a marine park is prohibited under Cl 1.11 of the *Marine Estate Management (Management Rules) Regulation 1999* (NSW).

licence, a deeper analysis reveals that the public right to fish is expressly recognised.[655] Further, there are significant exemptions from the requirement to hold a licence.[656] It might also be argued that where coastal waters are not 'closed', the public right to fish continues.

Whether the public right to fish has survived fisheries legislation has been considered by Walrut,[657] and others, notably Gullet,[658] and Kailis,[659] whose views I briefly consider next.

Gullet reviewed the origin, nature and extent of the public right to fish and described several ancillary rights.[660] He considered the impact of fisheries legislation, Aboriginal land grants and recognition of native title, on the public right to fish and discussed decisions of the High Court of Australia[661] and Federal Court,[662] which found that the public right to fish continued to exist in northern Australia.[663] He concluded that the public right to fish had thus 'resurfaced'.[664]

Since Gullet's article, the public right to fish was further considered by the Federal Court[665] and the High Court of Australia.[666] The impact of these cases was reviewed by Kailis, who explored the survival of the public right to fish following the enactment of fisheries legislation, between 1989 and 2007, and discussed possible unintended consequences of these recent decisions.[667] He considered the implications of the fisheries legislation in every jurisdiction in the light of these High Court decisions, and observed that the *Fisheries Management Act 1994* (NSW) did

[655] Section 38 *FMA 1994* (NSW) recognizes a 'right to fish' in inland waters.
[656] People under 18, adults helping someone under 18, Aboriginal people and certain concession holders.
[657] Walrut, above n 26, 423-444.
[658] Gullett, above n 32, 1-11. Gullet also considered Walrut's views at 3.
[659] George Kailis, 'Unintended Consequences? Right to Fish and the Ownership of Wild Fish' (2013) 11 *Macquarie Law Journal* 99-123.
[660] Gullett, above n 32, 4-5. Gullett outlined the statutory interpretation needed to determine 'the degree to which the public right to fish, or ancillary rights' had been affected by legislation, observing that this required a case by case approach, in each jurisdiction, to ascertain 'what is left of the public right'.
[661] *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314; *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1; Risk v Northern Territory (2002) 210 CLR 392;
[662] *Yarmirr v Northern Territory* [No.2] [1998] 82 FCR 533; *Yarmirr v Commonwealth* [1999] FCA 1668; *Arnhemland Aboriginal Land Trust v Director of Fisheries (Northern Territory)* (2000) 170 ALR 1; *Director of Fisheries (Northern Territory) v Arnhemland Aboriginal land Trust* [2001] FCA 98; *Lardill Peoples v Queensland* [2004] FCA 298; *Gumana v Northern Territory* (2005) 141 FCR 457; *Gawirrin Gumana v Northern Territory* (No. 2) [2005] FCA 1425
[663] See eg *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, 330 (Brennan J).
[664] Gullet, above n 32, 1. See title, Abstract.
[665] See *Gumana v Northern Territory of Australia* (2007) FCA FC 23; *Commonwealth of Australia v Akiba obh Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCA FC 25,
[666] See *Northern Territory v Arnhemland Aboriginal land Trust* [2008] HCA 29; (2008) 236 CLR 24; 41 [107] (Heydon J), 60 [154] (Kiefel J); *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 concerning the ability of native title holders and grantee owners, under NT Land Rights legislation, to control certain areas of coastal waters and fisheries resources, and exclude commercial and recreational fishers from some northern Australian waters.
[667] Kailis, above n 624, 119.

not contain an express declaration of ownership of wild fish; has, as one of the Act's objectives, to 'share the fisheries resources of the State'; and omits any general prohibition of access.[668]

Kailis noted the introduction of fees and licences for some recreational fishers,[669] but concluded that the public right to fish had not been wholly abrogated in New South Wales.[670] I concur. Though regulation is extensive, [671] it is not comprehensive, and there is no clear legislative intent to extinguish it.[672] Hence the public right to fish survives in many places, for now.

(c) Public right of access

Under English common law the public right of access to the foreshore was founded on the water based rights of public navigation, and fishing.[673] Following transport of these public rights to the colony of New South Wales, public use of the foreshore and especially beaches, developed a local character since, the beach itself and much of the adjacent land were not privately owned.[674] With the arrival of free settlers, the colony's beaches were often used by pedestrians, horses or horse-drawn vehicles under the public right of way over the foreshore, as a 'public highway'.[675]

Further, due to high summer temperatures, day picnicking and camping on coastal lands and bathing or swimming in the coastal waters of the colony became popular.[676] Though attempts were made to prohibit public bathing during daylight hours,[677] these laws were openly defied.[678] The use of coastal waters by members of the public for bathing became a celebrated element of local culture in New South Wales.[679] Thus public access to and use of the foreshore for a suite of recreational uses became common practice on many of the colony's beaches.[680]

Following the institution of responsible government in New South Wales in 1856,[681] many areas of coastal lands were reserved from sale and dedicated for public purposes, and some private

[668] Ibid 116.
[669] Ibid 117.
[670] Ibid 117-118.
[671] Fishing in NSW in both tidal ad non-tidal waters is governed by the *FMA 1994* (NSW) and the *Fisheries Management (General) Regulation 2010.* (NSW).
[672] Kailis, above n 624, 117.
[673] In *Blundell v Catterall* (1821) 5 B & Ald 268, 289-290; the court held that public rights of navigation and fishing were 'rights upon the water, not upon the land'.
[674] The reservation and dedication of coastal lands for public purposes are discussed in Chapter IV.
[675] Until the construction of railways and public roads and the advent of motor vehicles in early 20th century. See eg Maurie Ryan and Robert Smith *Time and Tide Again* (Northern River Press, 2001), 7.
[676] Ford, above n 325, 13, 22-3.
[677] Ibid 49-51.
[678] Huntsman, above n 325, 57 – 59, 68 - 70.
[679] Ibid 70 – 74.
[680] Ford, above n 325, 110 – 118. Huntsman, above n 325, 82 – 92.
[681] A bi-cameral parliament for New South Wales sat for the first time in 1856, to provide 'responsible self-government'. See < https://www.parliament.nsw.gov.au/about/Pages/1856-to-1889-Responsible-government-and-Colonial-.aspx >. See also Paul Finn, *Law and Government in Colonial Australia* (OUP, 1987) 39.

lands were acquired by the government to allow public access to the beach. Subsequently public uses extended to these Crown lands, inland of the common law boundary of MHWM.[682] The creation of these reserves and history of public uses are discussed in Chapter IV.

i] Statutory recognition

After over a century of public campaigning, public rights to access and use coastal lands became more widely recognised.[683] The *Crown Lands Act 1989* (NSW) continued the dedication of land for public purposes[684] and encouraged 'public use and enjoyment of appropriate Crown land'.[685] In 2002 a right of public pedestrian access to coastal land, was incorporated into the *Coastal Protection Act 1979* (NSW), via the insertion of the phrase, 'to promote pedestrian access to the coastal region and to recognise the public's right to access', as one of the objects of the Act.[686]

This statutory right is for pedestrian, not vehicular, access to coastal lands. Public access to the foreshore is often provided through other lands owned by the State government, managed by a local authority, dedicated for public purposes.[687] In some places public access to the beach is via an easement created over private land for that purpose.[688] In many places, safe public access along the foreshore is naturally limited by local geographic features such as cliffs.
The use of vehicles on NSW beaches, as if on a public highway, is not permissible as a public right, and is either regulated or prohibited. [689] In some locations motor vehicular access,[690] horses and horse-drawn vehicles, are permitted,[691] but elsewhere this is restricted.[692]

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[682] Crown policy from 1828 until 1840 was to reserve a strip of land 100 feet from the line of MHW.
[683] See Bonyhady, 'An Australian', above n 316, 258-271, Ford, 'The Battle', above n 325. See also Booth, above n 325.
[684] See s 10 (e) *Crown Lands Act 1989* (NSW) [hereafter *CLA 1989* (NSW)].
[685] See the Guiding Principle (c) s 11 *CLA 1989* (NSW).
[686] See section 3(d) *Coastal Protection Act 1979* (NSW).
[687] This may be unalienated Crown land or land titles previously registered under the *Real Property Act 1900* (NSW) but subsequently acquired by the Crown or by local councils and dedicated for public use.
[688] See *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act* [2013] NSW LEC 216 (Craig J).
[689] Motor vehicle use on the foreshore requires the use of only formal vehicle beach access points, observance of certain off-limits areas, such as dunes and bird nesting areas, the use of only vehicles registered under the *Road Transport Act 2013* (NSW), the driver being licensed, a maximum speed limit of 30 kph and a general right of way non-vehicle beach users. See for eg < http://www.richmondvalley.nsw.gov.au/page/Economic_Development/Tourism/Beaches_4WDs_and_Dogs/ >.
[690] If regulations are observed. This includes use of only formal vehicle beach access points, observance of off-limits areas, such as dunes and bird nesting areas, use of only registered 4WD vehicles, the driver being licensed, a maximum speed of 30 kph and a general right of way for non-vehicle beach users. See < http://www.richmondvalley.nsw.gov.au/page/Economic_Development/Tourism/Beaches_4WDs_and_Dogs/ >
[691] While riding horses along the beach may constitute pedestrian access, horse-drawn vehicles would not. Use of horses on beaches is usually either prohibited or regulated by local councils like 4WD vehicles and/ or dogs, with their use being permissible in only designated areas. See Regulation (g) at < http://www.richmondvalley.nsw.gov.au/page/Economic_Development/Tourism/Beaches_4WDs_and_Dogs/ >
[692] In Tweed Shire this is only permissible on certain sections of beach, and is restricted to only a limited number of licensed drivers, with permits from the local council. A Beach Vehicle Permit may be issued

Recognition of this public right of pedestrian access to the beach has been made less explicit with the repeal of the *Coastal Protection Act 1979* (NSW), however ss 27 and 28 of the *Coastal Management Act 2016* (NSW) continue to protect this important statutory public right.[693]

This concludes my exposition of property and rights, private and public.

10. Conclusions

My aim in this chapter was to explain key terms, including 'property' and examine the nature and extent of private property rights and public rights, to use coastal land, in New South Wales. From this initial review emerges a clearer picture of those rights under discussion. From these expositions several working conclusions may be drawn.

It is apparent that common law public rights to access the foreshore and coastal waters have a venerable jurisprudence and have applied in New South Wales since the time of colonization. Public use of coastal lands and waters continue to have great social and economic significance.

Private property rights however are more recent conceptualizations, which have evolved over time. Liberal property theory is beset with problems defining property and its purposes, and morally justifying the origins of private property in land, in post-colonial settings such as New South Wales. Some ideas about private property rights have been overtaken by modern property theory, while other views on rights in other jurisdictions, have limited relevance to New South Wales. Nonetheless private ownership of coastal land also has great social and economic value.

Thus it is apparent that, whatever the theory, the private or public rights available in practice are created and limited by the laws applying to real property in that jurisdiction, which is likely to be a combination of surviving common law rules and current statutes and regulations.

Having clarified what is meant by private property rights and public rights in this jurisdiction, in the next two chapters I report the weight attributed to these rights by the courts and legislature.

to fishers, or to enable disability access to the beach. Some beaches are seasonally closed. General public access and commercial beach tours are prohibited. See < http://www.tweed.nsw.gov.au/Parking >

[693] Sections 27 and 28 *Coastal Management Act 2016* (NSW) reproduce ss 55M -55N of the *CPA 1979*. Approval of coastal protection works, and landowners' applications to claim ownership of new land formed on their boundary under the doctrine of accretion, may not be approved if the works, or the extension of land title, would limit public access to the foreshore or poses a risk to public safety.

"I walked beside the evening sea
And dreamed a dream that could not be;
The waves that plunged along the shore
Said only: "Dreamer, dream no more!"

George William Curtis (1824-92)
'Ebb and Flow'[694]

Chapter III – The Courts' responses

Introduction to Chapter III

To address the future-focused question - 'Will private property rights trump public rights and interests in coastal land under climate change conditions? - two sources of guidance were identified: the courts and the legislature. In the next two chapters I outline the material I have selected from these arbiters of conflicting rights, relevant to the topic.

In this Chapter I consider court decisions on past disputes between these competing rights, which refer to an element of the primary research question. Cases on public rights, private property rights, location of property boundaries and ownership of coastal lands are considered. However, before examining them, it is apt to first state what constitutes 'the court' for the purposes of this chapter; and outline the relevance of the cases selected.

Part A. 'The court' as an arbiter of societal conflicts

1. Defining 'the court'

For the purposes of this thesis I use a generic definition of 'the court'. I adopt the usual meaning as 'the place where the law is judicially administered, the decision-maker or decision–makers who comprise the court' and generally as 'a body or organ of the judicial system of a state'.[695] Hence the definition of 'the court' is well understood.

Considered below are decisions of courts in England, New South Wales and New Zealand. Senior English appeal court cases are reviewed, however a recount of the history of English courts is not needed here since other accounts are available.[696] Decisions of the Land and Environment Court and the Supreme Court of New South Wales sitting as the Court of Criminal

[694] in Edmund Clarence Stedman (ed) *An American Anthology* (1787 - 1900).
[695] Butt and Hamer (eds), above n 207, 141.
[696] Harold Potter, *An Historical Introduction to English Law and its Institutions* (S & M, 2nd ed 1943).

Appeal are also considered, but a history of these courts is also not possible here.[697] Decisions of the High Court of Australia,[698] and the High Court of New Zealand[699] are also considered. I explain my selection of these cases next.

2. The relevance of the cases selected

Though many cases were found relevant to the primary research question, due to limits on space only eight cases were selected for inclusion in this chapter. All are decisions of senior courts on questions of law in appeals of matters previously determined by a lower court or tribunal. Three 19th century cases are considered briefly, and five 20th century cases are considered in depth. Each case has been selected for closer review and analysis in Part B below, because of their direct relevance to an element of the primary research question.

In *Blundell v Catterall* (1821)[700] where the issue was whether a public 'right to bathe' existed, the court usefully described the public rights to use the foreshore and coastal waters and considered the claimed right's impact on the plaintiff landowner's private property rights. In *Hudson v Tabor* (1876, 1877)[701] and *Attorney General (UK) v Tomline* (1880)[702] the appeal courts addressed whether, at common law, a landowner had a private property right to defend their land, or compel others to defend it, against the sea.

The 20th century cases also directly address key elements of the research question. In *Attorney General (UK) v McCarthy* (1911)[703] the location of the legal boundary of land adjoining tidal waters, was a key issue and the court resolved a lingering uncertainty about the nature and location of the boundary between private land and public land.

The decision of the Privy Council in *Southern Centre of Theosophy Inc v South Australia* [1982][704] is of unimpeachable authority as the highest appeal court in the English legal system. Most usefully, the court comprehensively stated the common law rules governing the movement of natural boundaries, and ownership of land below tidal waters, known as the 'doctrine of

[697] But see NSW Government Justice, 'History of New South Wales Courts and Tribunals' < www.courts.justice.nsw.gov.au/Pages/cats/history/history.aspx >
[698] See section 71 of the *Australian Constitution, (1901)* (Cth). For the history of the High Court of Australia see < http://www.hcourt.gov.au/about/history-of-the-high-court >.
[699] The High Court of New Zealand hears appeals from lower courts, but its position in the judicial hierarchy of New Zealand is not equivalent to the High Court of Australia. For the history of the High Court of New Zealand see < https://www.courtsofnz.govt.nz/the-courts/high-court/history >.
[700] *Blundell v Catterall (*1821) 5 B & A 268; 106 ER 1190.
[701] *Hudson v Tabor* (1876) 1 QBD 225, and *Hudson v Tabor* (1877) 2 QBD 290.
[702] *Attorney General v Tomline* (1880) 14 Ch 58.
[703] *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260.
[704] *Southern Centre of Theosophy Inc v South Australia* (1982) AC 706; [1982] 1 All ER 283.

accretion'. The original decision[705] is also directly relevant because the court applied existing rules of law to novel circumstances to resolve the protracted conflict between the parties.

The two cases brought by the NSW Environment Protection Authority[706] are directly relevant to multiple elements of the research question but have not been discussed by other writers. The lower court rejected the landowner's claimed right to defend against erosion by the sea, applied common law rules to determine the location of the boundary to the lots in question, and ruled on the ownership of land below tidal waters. These findings, confirmed by the Court of Criminal Appeal, provide authoritative statements of the relevant law in New South Wales.

The High Court of New Zealand's decision in *Falkner v Gisborne DC*[707] also focused on a key issue: landowners' claim that their private property rights to defend their land against the sea exists despite the legislation governing the management of the coast in New Zealand. Though not a binding precedent in this jurisdiction, the court described the legal principles under which legislation may overrule common law property rights. Its reasoning has wider application where analogous circumstances exist.

The final case, *Durham Holdings v Minister,*[708] a decision of the High Court of Australia, also addressed a key claim: the existence of common law 'right to compensation' for private property acquired by the State; and illuminated the New South Wales legislature's power to enact laws affecting property rights.

Having explained their relevance, in the next Part I describe and discuss these cases and outline how they assist in answering the primary research question.

Part B. Nineteenth century cases

During the early 19th century, the courts made several key decisions[709] which clarified and explicated elements of the doctrine of accretion[710] as it applied to tidal waters.[711] However limited space prevents an in-depth review of these cases here, and others deserve focus.

[705] *Southern Centre of Theosophy Inc v South Australia* [1978] 19 SASR 389 (Walters J).
[706] *Environment Protection Authority of NSW v Saunders* (1994) 6 BPR 13,655, and *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282.
[707] *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (Barker J).
[708] *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399; 177 ALR 436.
[709] Notably *Rex v Yarborough* (1824); 107 ER 668 and *Gifford v Lord Yarborough* (1828), 4 ER 1087; which clarified that new land that formed against existing land by accretion or deposit of alluvion, belonged to the owner of the existing land, not the Crown; and *Re Hull and Selby Railway Co* (1839)

The first case I consider closely concerned, on the face of it, was a dispute between private property rights and public rights to access the foreshore but was actually a commercial dispute.

3. *Blundell v Catterall* (1821)

This case[712] was brought by the lord of the manor, who possessed an exclusive private right of fishery in the tidal waters of the river Mersey, using nets staked to the seabed.[713] He objected to the nearby hotel, conducting a business which involved hotel guests crossing the foreshore, being his private property, with horse-drawn bathing machines, to bathe in the sea. [714] The defendant's counsel argued that the privately-owned foreshore was affected by a public right of access along it, but the evidence showed that the bathing machines did not use land customarily used as a public highway,[715] that they disturbed the owner's quiet enjoyment of his property,[716] and that no consideration had been offered for the inconvenience.[717]

The court examined the authorities and the majority agreed that there were long-established customs, and common law rights of public access to and use of the foreshore for fishing and for navigation, but held that these rights were 'rights upon the water, not upon the land'. [718] Further, the majority did not agree that the public right of access to foreshore carried with it a right to trespass on private property, [719] and they found that there was no common law right to bathe.[720]

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151 ER 139, which ruled that the relevant rule of law worked both ways, to add and subtract land, through the processes of sediment transport and change in the level of the bounding water body.

[710] The term 'doctrine of accretion' was first used in *Foster v Wright* (1878) 4 CPD 438, 447 (Lindley J).

[711] The common law rules on land boundaries formed by tidal waters were first cited, in Latin, by the author known as Bracton, in *De Legibus et Consuetudinibus Angliae*, circa 1256, and were first applied to tidal waters in the case *Anon* (1348) 22 Lib Ass fo 106, pl 93, also cited as the Yearbook case (22 Ed III, 93) circa 1348. Hale cited this case in *De Jure Maris et Brachiorum Ejusdem* c. 1667 (Cap IV.II.2) and in *Attorney General (NSW) v Merewether* (1905) 5 SR (NSW) 157, 161, it was recognised as 'the earliest authority referred to' (Simpson CJ).

[712] *Blundell v Catterall* (1821) 5 B & A 269; 106 ER 1190 [hereafter *Blundell v Catterall* (1821).]

[713] These were cited as 'stake nets' *Blundell v Catterall* (1821) 304; 1191.

[714] *Blundell v Catterall* (1821) 269; 1191. The defendant, Catterall, was a servant of the hotel.

[715] The landowner argued that it was not the public's use of the foreshore as a highway which was at issue, and asserted that the defendant's use was 'for other purposes than as a general public highway', *Blundell v Catterall* (1821) 269, 289; 1191, 1198.

[716] Ibid 268, 268; 1190.

[717] Ibid 279; 1194, (Best J). At 390, 1207, Abbott CJ held that '… where one man endeavours to make his own special profit by conveying persons over the soil of another, … it does not seem to me that he has any just reason to complain, if the owner of the soil shall insist upon participating in the profit, and endeavor to maintain his own private right…'

[718] Ibid 301; 1202 (Holroyd J).

[719] It was significant in the court's view that the foreshore was privately owned, not held by the Crown, and that the public right to fish had been extinguished by the long-practiced exclusive right of fishery. *Blundell v Catterall* (1821) 288-9 (Holroyd J); 1197-8.

[720] Ibid 304 (Holroyd J), 310 (Bayley J), 312 (Abbott CJ); 106 ER 1190, 1203, 1205, 1206.

In a separate judgment however, Best J disagreed. He noted that Hale had cited a 'general right' of the subject 'to the sea and its shores' of which the public right to fish was an example.[721] He found 'the existence of a universal custom in favour of a public right of way over the sea shore' and characterized it as the 'right of free passage'. [722] He held that 'the interruption of free access to the sea is a public nuisance',[723] but did not explicitly rule that a public right to bathe existed. The case's headnotes noted Best J's dissenting opinion 'on the ground that the public have a right to use the sea-shore for bathing'.[724]

a. Clarification of the relevant law by the court

Several matters were clarified by this case: the origin of public rights in the foreshore in the civil law, its development in English common law; the nature of these public rights; and the operation of the *jus publicum* and the *jus privatum.*

The origins and development of public rights in the foreshore

The judges acknowledged the Roman civil law as the source of authority for public rights in the foreshore and coastal waters,[725] and they discussed its modification in English law by writers,[726] including Bracton,[727] Callis,[728] and Hale.[729] After considering authoritative English cases the court held that English common law had adopted different rules to those of the civil law. Two members of the court referred to tests employed in determining whether a claimed common law right was able to be recognised as lawful,[730] or actually existed.[731]

The nature of the public rights

Several insights into the nature of the public rights can be gained from these proceedings. From the case report, it seems there was no dispute that a common law public right of way existed

[721] Ibid 284; 1196.
[722] Ibid 280; 1194-5.
[723] Ibid 287; 1197 (Best J).
[724] Ibid 268.
[725] *Blundell v Catterall* (1821) 278 (Best J), 290 (Holroyd J).
[726] Ibid 282 (Best J), 291-4 (Holroyd J), 307-8 (Bayley J), 312 (Abbot CJ).
[727] Sir Henry Bracton, *De Legibus et Consuetudinibus Angliae* (c 1260)
[728] Robert Callis, *Upon the Statute of Sewers 23 Henry VIII c 5* (1622) (first pub 1647, 4th ed 1824).
[729] Sir Matthew Hale, *De Jure Maris et Brachiorum Ejusdem* (c 1667, first pub 1786); *De Portibus Maris* (c 1670, first pub, 1786); *The History of the Common Law of England* (first pub 1739).
[730] Best J quoted Lord Kenyon in *Ball v Herbert* (1789) 2 D & E 253, 'Common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the universal and immemorial usage throughout the country,' *Blundell v Catterall* (1821) 279; 1194.
[731] Holroyd J quoted Buller J's approach: 'Then the question is, whether in our books, or on records, that right is established for which the defendant contends. … whether or not that has been adopted by the common law, is to be seen by looking into our books, and there it is not to be found.' *Blundell v Catterall* (1821) 301; 1202.

along the foreshore, as a 'public highway', even if the foreshore was privately owned.[732] This public right was argued as a defence to the alleged trespass, but the plaintiff insisted that he objected to use of horse-drawn bathing machines on part of the beach not used as a highway.[733]

The landowner accepted public use of the foreshore as a highway but did not accept that the public had a right to use any part of the foreshore in any way they pleased, or that the nearby hotelkeeper could profit from its use, since this trampled on his private property rights. The court found clear evidence of long-established customs across the realm which provided a foundation for the public rights.[734] Best J agreed and expressed his view, based on Hale's authoritative text,[735] that there was a general public right to use the sea.[736] However, the court rejected a 'general right of using or appropriating the soil of the sea-shore'.[737]

The nature of the 'jus publicum' and the 'jus privatum'

Two legal concepts relevant to privately-owned coastal land in England were clarified by the court. These concepts referred to the private and public rights in the foreshore, where land below the high-water mark had been granted by the Crown to a subject as private property.

The *jus publicum* were the public rights of navigation over, and of fishing in, tidal waters,[738] which applied up to the line of the high-water mark. These public rights were said to be held 'in trust' by the Crown, who was duty bound to protect them while the foreshore was held by the Crown, and to ensure their operation could continue if the land was granted to a subject. [739] The *jus privatum* were the private property rights which existed in the privately owned foreshore (and or other areas of land submerged below the low water mark, such as oyster grounds).

Together these terms created a conceptual scheme where it was possible for two separate layers of 'rights' to exist over the foreshore and submerged lands.[740] The dominant 'right' was the 'use' right available to members of the public to pass freely over the waters, which overlaid the

[732] *Blundell v Catterall* (1821) 269; 1191. Typically use of the foreshore by carriages occurred on a falling tide, when large flat areas of hard sand might be left uncovered by the tidal waters for some hours.
[733] *Blundell v Catterall* (1821) 289; 1198.
[734] The majority found that the public rights of navigation and of fishing were 'rights upon the water not upon the land', and held that the right to navigation existed 'for the purposes of commerce, trade and intercourse' or for 'any lawful purpose'. *Blundell v Catterall* (1821) 285 (Best J), 298 (Holroyd J), 304 (Bayley J), 311 (Abbott CJ); 119, 1201, 1203, 1206.
[735] Hale, *De Jure Maris*, above n 704.
[736] and its use by the public for navigation or fishing were two specific examples of this general right. *Blundell v Catterall* (1821) 284, 1196 (Best J).
[737] *Blundell v Catterall* (1821) 299; 1201 (Holroyd J).
[738] See *Blundell v Catterall* (1821) 298; 106 ER 1201, (Holroyd J).
[739] *Blundell v Catterall* (1821) 287; 1197 (Best J).
[740] Ibid.

'private' right in the soil acquired by the landowner, directly or indirectly, from the Crown. This conceptual scheme reconciled the Crown's duty to maintain the public's rights 'in trust' with the reality that early Crown grants had transferred large areas of the English coast into private hands.[741] However the *jus publicum* and *jus privatum* have had no application in New South Wales, since the Crown retains ownership of the foreshore and adjacent submerged lands.[742]

b. Views on the relative weight of private and public rights

Since the proceedings were based on a purported conflict between competing rights, several very useful statements regarding the relative weight of private and public rights were made.

Discussing the private ownership of the foreshore, Best J observed that originally the land was held by the King, and 'the public had a right of way over it'. He held that 'the King's grantee can only have it, subject to the same right', [743] and quoted Lord Hale's *De Jure Maris*.[744]

> The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected for public use.[745]

Further Best J said

> In all countries, it has been matter of just complaint that individuals have encroached on the rights of the people. … The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours. [746]

He thus held that public rights to use the foreshore prevailed over private property rights.[747]

Abbot CJ also addressed the issue of the relative weight afforded by the court to private property rights and public rights. He considered the argument that 'public convenience' provided a rationale for recognizing a public right to bathe, but was not inclined to agree that a 'general right' of access to the sea, or a specific 'right to bathe' existed and he queried how such rights could be consistent with the private rights and uses of private property.[748]

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[741] See Moore, above n 37, 653.
[742] The terms continue to have currency in the United States of America, however, where some states have granted lands down to the line of low water, creating a *jus privatum,* but retain the public right to access and use the foreshore, as a *jus publicum*. See Slade, above n 525, 6-7, 217-9.
[743] *Blundell v Catterall* (1821) 276; 1193 (Best J).
[744] Hale, above n 704, 22.
[745] *Blundell v Catterall* (1821) 276; 106 ER 1193 (Best J).
[746] Ibid.
[747] *Blundell v Catterall* (1821) 287; 1197.
[748] He said 'Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof, is one of the distinguishing characteristics of the law of England.' *Blundell v Catterall* (1821) 313; 1206.

This statement indicated that though specific public rights were dominant, they did not prevail totally in the sense that private property rights ceased to exist or operate, and showed the considerable weight afforded private property rights by the court, and the importance of private property in the English legal system. Further, as the court's narrow approach made clear, the existence of these common law public rights did not permit any and all activity by members of the public. Thus the court signaled that the weight attributed to both private property rights and public rights were closely balanced, and neither should be so heavily weighted as to outweigh the other. The dominant impact of public rights on private land was explained by Abbott CJ:

> Every public right to be exercised over the land of an individual is *pro tanto,* a diminution of his private rights and enjoyments, both present and future, so far as they may at any time interfere with or obstruct the public right. [749]:

He thus acknowledged that public rights had priority, but reiterated that they should be exercised with 'due regard', since they diminished the highly valued rights and enjoyment of private landowners. Thus it is apparent that at that time greater weight was attributed by the courts, to public rights to use the foreshore than to private property rights over the same area.

Two rulings by the Queen's Bench were especially instructive as to the nature and extent of the private property rights available to an English coastal landowner. I consider these cases next.

4. *Hudson v Tabor* (1876) and (1877)

In *Hudson v Tabor* (1876) 1 QBD 225 the court determined that one landowner, Hudson, whose land was protected from the tidal waters by a seawall built on his land, could not compel a neighbour, Tabor, whose property was also bounded by tidal waters, to build or maintain sea defences for his, that is Hudson's, benefit,[750] and found that Tabor had no liability for damages to Hudson's land if Tabor failed to defend his land against the sea.[751] The decision was affirmed on an appeal, in *Hudson v Tabor* (1877)[752] where, having discussed earlier authoritative cases and the development of the relevant statutes, Lord Coleridge CJ said

> 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". [753]

Hence the court held that a coastal landowner had no private property right of protection from the sea. However this was not the last word on this claimed right.

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[749] *Blundell v Catterall* (1821) 315-6; 1207 (Abbott CJ).
[750] *Hudson v Tabor,* [1876] 1 QBD 225, Cockburn CJ for Mellor and Quain JJ at 234.
[751] Ibid 233.
[752] The Court of Appeal comprised Lord Coleridge CJ, Mellish, Brett and Amphlett, L JJ. *Hudson v Tabor,* [1877] 2 QBD 290, at 294.

5. *Attorney General (UK) v Tomline* (1880)

The claimed right to be protected from the sea was further considered by the Court of Appeal[754] when an inland landowner sought to prevent his neighbour from removing shingle from his own land, because the shingle bank formed a 'natural protection against the sea' and the inland landowner feared that its removal would expose his adjoining land to inundation and damage.[755] The appeal court affirmed the original decision and held that the adjoining landowner was entitled to an injunction,[756] because the land in question was still affected by the Crown duty to protect the realm against the sea. It ruled that the frontager landowner 'cannot be allowed to use the land in such a way as to destroy the natural barrier against the sea'.[757] Brett LJ cited the decision in *Hudson v Tabor* [1877] 2 QBD 290, as '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',[758] despite potentially disastrous consequences. He summarised the state of the law thus:

> 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. [759]

This ruling, rejecting the claimed 'right', determined the matter conclusively in English common law. Hence the "imperfect" nature of the claimed private property right to be protected from the sea, said to be a "fundamental right",[760] has been long explicit in English law.

I next consider five modern cases which rule on the location of the shoreline boundary, who owns land below MHWM, and claimed private property rights compatibility with statute law.

Part C. Twentieth century cases

Questions regarding the operation of the doctrine of accretion remained unresolved however[761] until the law was clarified in an Irish case determined in 1911, discussed below. More recent decisions which clarified the nature of public and private property rights and the law on ambulatory boundaries, applicable to coastal lands, are then considered.

[754] *Attorney General (UK) v Tomline* (1880) 14 Ch 58 [hereafter *AG v Tomline* (1880)].
[755] The 'great danger of the sea breaking through' *AG v Tomline* (1880) 64-5.
[756] Ibid 64 (James LJ), 67 (Brett LJ), 70 (Cotton LJ).
[757] Ibid 70 (Cotton LJ).
[758] Ibid 65.
[759] Ibid.
[760] See Coleman, above n 13, 421.
[761] These questions included whether the doctrine applied if the boundaries of the land could be identified; whether and how the doctrine was affected by changes brought about by human engineering.

6. *Attorney General (Ireland) v McCarthy* (1911)

This case was the culmination of proceedings against a landowner, McCarthy, over ownership of accretions to land adjoining the foreshore in Ireland,[762] who had installed stakes to mark his boundary and prosecuted those who trespassed over the dunes above high water mark.[763] The Attorney General objected to McCarthy's claim to own the accretions[764] and, after a case in 1910 where the jury found in favour of McCarthy,[765] brought an appeal to the Kings Bench.[766]

A principal ground for the appeal was the Attorney General's assertion that the accreted lands could not be claimed by, or awarded by the Court to, McCarthy, as the adjoining landowner (in accord with the general rule) because the common law doctrine of accretion did not apply if the original boundaries could be ascertained.[767] However, it was also alleged that McCarthy's claim and conduct adversely affected public interests, by excluding the public from the foreshore.[768] Characterized thus, McCarthy's conduct was a serious challenge to public rights under English common law, for members of the public to access the foreshore, for navigation and fishing.[769]

That there was no such challenge became apparent when McCarthy denied that he claimed to own the foreshore, ie land between high and low water mark', disavowed that he had ever excluded the public from the foreshore, admitted that he had only brought proceedings for trespass over his land above mean high water line, and said he was 'within his rights'.[770] The court canvassed prior cases for their relevance, clarified the common law regarding the location of the boundary between land and sea, and rejected the Crown's claim finding for McCarthy.

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[762] Lying between the villages of Ardroe and Inch, known as Inch Strand, which faces Dingle Bay, and the tidal waters of the North Atlantic Ocean.

[763] As part of its case the Crown alleged that the stakes "assisted" 'the recession of the sea …' and formed 'accretions' which were owed by the Crown due to their location below "the former line of ordinary high water … being a cliff further inland than the existing line of ordinary high water". See *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, 261 [hereafter *AG v McCarthy* (1911)].

[764] The Attorney General sought to deny McCarthy's claim by arguing that it amounted to a claim of "title to what had been part of the bed of the sea, and, therefore, vested in His Majesty the King by his Royal Prerogative and in the right of his Crown." He also argued that the land in question had never been relevantly granted by the Sovereign, but this ground failed when Letters Patent were produced, which showed that "the lands in question down to the actually existing ordinary high water mark" had been granted by Charles II, to a subject, Arthur Earl of Anglesea on 26 June 18th year of his reign" (c 1678). It was also asserted that the accretions extended beyond the area shown in a Landed Estates Court Conveyance of 1867, and the Letters Patent's original grant of land. See *AG v McCarthy*, (1911) 261.

[765] This led to an order by Dodd J "that the land above, viz., to the landward side of the line … of the high water mark is not in His Majesty the King, but is in the defendant as owner of the adjoining land'. See *AG v McCarthy* (1911), 274-275.

[766] The appeal was heard by three judges of the Kings Bench, Palles CB, Gibson and Boyd JJ.

[767] *AG v McCarthy* (1911), 263.

[768] Further, he argued that the stakes were "an injury to the public', and sought their removal. Ibid 264.

[769] See *Bagott v Orr* (1821) 2 Bos & P 479; 126 ER 1391; Hale, above n 704.

[770] *AG v McCarthy* (1911), 269-270.

In the next sections I consider relevant observations of members of the court[771] on the history and operation of the doctrine of accretion, the important clarification of law they provided, and the court's views on the relative weight of private property rights and public rights.

a. The history and operation of the doctrine of accretion as clarified by the court

The *McCarthy* case was significant because it acknowledged the doctrine of accretion's origin in Roman civil law,[772] traced its reception into English common law,[773] noticed its earliest recognition by English courts,[774] and reviewed the authoritative cases in its development.[775] Palles CB, lamented that the case

> shows … the length of time during which the application of a principle of law most clearly determined by our highest legal tribunal can remain confused and unsettled ….[776]

referred to cases he saw as immaterial,[777] or peripheral,[778] and denied the appeal based 'solely' on the decision in *Gifford v Yarborough* (1828)[779] which he said

> establishes, as against the Crown, the absolute right of the owner of lands adjoining the sea to any accretion thereto which accrues by the gradual and imperceptible action of "alluvion"; and I hold that, after that determination, it is not competent to us, or to any Court, to hold that this right is conditional upon the non-existence of marks sufficient to designate the former high-water mark.[780]

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[771] Judgments were given by Palles CB, 276 – 294, and Gibson J, 294 - 300. Boyd J, at 300, concurred.
[772] Palles CB cited, at 277, the *Institutes of Justinian*, lib. ii; tit 1, ss 20-21 as the relevant source.
[773] Bracton's adoption of this doctrine of civil law and his modification of it in his work *De Legibus et Consuetudinibus Angliae* (c. 1268) was discussed by Palles, at 277, 286 and by Gibson J at 295. The doctrine's recitation in subsequent law texts: Rolls Abridgement, Comyn's Digest, Callis (Broderip's Edition) and Blackstone's *Commentaries*, were cited by Palles CB at 286. The treatment of the relevant law by Chief Justice - later Sir Matthew - Hale in his treatise *De Jure Maris* (c 1667) was outlined by Palles CB at 278 – 281, and was averted to briefly by Gibson J at 299.
[774] Two cases considered by Palles CB, 279 - 280, were the *Abbott of Ramsey* (43 Edw III Exchq, c 1370) and the *Abbott of Peterborough* (begun 23 Edw III, c 1349, decided 41 Edw III, BR Rot 28, c 1368).
[775] Palles CB briefly considered *Anon*, 22 Ass 93 before he considered in depth *Rex v Yarborough* (1824) 3 B & C 91; the finding of the House of Lords in *Gifford v Yarborough* (1828) 5 Bing 168, and in *Re Hull and Selby Railway Co* (1839) 5 M & W 327. He then considered the 'unhelpful' decision of Lord Chelmsford in *Attorney General (UK) v Chambers* (1859) 4 DG & J 55, 45 ER 22, which expressed doubt that the doctrine of accretion applied when the boundaries were known, a matter which, the court ruled, had been clarified many years before by the Privy Council in *Gifford v Yarborough* in 1828.
[776] *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260, 276.
[777] *AG v McCarthy* (1911), 289. *Scratton v Brown* (1825) 107 ER 1140; (where an estate in the sea-shore is said to be a movable freehold), *Ford v Lacy* (1861) 158 ER 429; (deemed not relevant); *Attorney General (UK) v Reeves* (1885) 1 TLR 675, (recessions of the sea); *Mercer v Denne* [1904] 2 Ch 534, (land was added by accretion…); and *Mellor v Walmesley* [1905] 2 Ch 164, (deemed not relevant).
[778] See Palles' comments on "the instructive judgment of Lord Lindley" in *Foster v Wright* (1878) 4 CPD 438, *Rex v Yarborough* (1824), *Gifford v Yarborough* (1828) and *Re Hull and Selby Railway Co* (1839), that they "do not seem ... to bear directly upon the question here …" *AG v McCarthy* (1911), 290 - 293.
[779] *Gifford v Lord Yarborough* (1828), 5 Bingham 163; 2 Bligh NS 147; 1 Dow & Cl 178; 4 ER 1087
[780] *AG v McCarthy* (1911), 284 (Palles CB).

Gibson J noted the Attorney General's two contentions that the property boundary could be ascertained, and therefore the doctrine of accretion did not apply, but doubted that the original boundaries could be ascertained. Assuming that they could be, he addressed the two questions of law which he nominated as requiring the court's adjudication:

> (1) assuming that the original boundaries are ascertainable and ascertained, is the principle of accretion by insensible alluvion thereby excluded? (2) assuming that the accretion, or the portion accrued, before the date of the defendant's instrument of title, are not included in such instruments, is title in the Crown thereby established?[781]

He also briefly traversed the authorities before commenting on a key difficulty

> What is the unit or measure of time for "gradual and imperceptible"? What is the base to which the addition is to be made, and what is to be the method of observation? Is the increase latent at the end of a week or of a month (*Rex v Yarborough* (1824), or for longer periods?

Gibson did not answer the first two questions, but observed that the dictum that "latent increase is where no one can perceive how much is added at any moment of time" was so broad it "would, literally understood, apply to all increments save those caused by sudden convulsion or avulsions." He contrasted the doctrine's reliance on 'imperceptibility' with "modern methods of scientific measurements" which might enable the rate of progress to be ascertained.[782]

On the third question Gibson concluded that

> "gradual and imperceptible" must be understood, according to our Common Law, as referring to the faculties of average humanity, and to the transactions of every-day life. The question is peculiarly one for a jury, and, indeed, the contrary has not been argued.[783]

Discussing *Re Hull and Selby Railway* (1839) 5 M&W 327, Gibson J observed that "it would seem that the original coast-line was ascertainable, or, at least, that the then coast-line had moved a considerable distance inland," noted that it "would have been plainly impossible to affirm that the coast-line had always remained the same"[784] and cited well-known examples.[785] Gibson J then made a general statement of the law: 'There is no distinction between gradual and imperceptible addition and gradual and imperceptible subtraction.'[786] Further, he rejected the claimed disqualification of the doctrine if boundaries were known, and asserted its unity.

[781] Ibid 294.
[782] *AG v McCarthy* (1911), 296.
[783] Ibid.
[784] He held that "A conclusive presumption that it had never been altered would have been a legal fiction wholly opposed to truth and fact." *AG v McCarthy* (1911), 297 - 98.
[785] 'In some districts the sea has receded, leaving places (for example Sandwich), once ports, now far removed from the water; elsewhere the mainland, as at Shankill and Wicklow, has been eroded and washed away. In both classes of case the original boundaries can be fixed.' *AG v McCarthy* (1911), 298.
[786] Ibid.

> Whether the original boundaries of the lands were fixed by natural objects, or by constructions, such as sea-walls. Martello towers, &c., or by measurements and maps, or by the testimony of faithworthy old witnesses, the principle governing the ownership of alluvion growing by imperceptible process of nature is the same. The Ordnance Survey, in determining boundaries, can hardly be supposed to have had the effect of depriving the subject of alluvial rights as against the Crown. [787]

Gibson J explained the process by which accretions were awarded to the adjoining landowner:

> In our law, each insensible addition attaches itself to the principal land, and though in result, the aggregate of additions may show a substantial enlargement of the original territory, this cannot displace retrospectively the ownership of the previous minute accruing accretions. [788]

He observed that it 'operates for or against the Crown as well as for or against a private owner', and found against the Crown's claim to own the accretions formed against McCarthy's land.[789] This settled a question which had long been uncertain.[790] Thus an 'ancient qualification'[791] was extinguished in a series of cases,[792] which relied on *Gifford v Yarborough* (1828).[793]

b. Views on the relative weight of private and public rights

The court did not explicitly address the relative weights of private property rights and public rights in Ireland at that time. Nonetheless several relevant facts offer potentially useful insights. Initially this case alleged that McCarthy's assertion of his private property rights conflicted with public rights to use the foreshore, and was contrary to law. That public rights of access were likely to prevail over a claim of private property in the foreshore was recognised by McCarthy's denial that he had ever claimed to own any part of the foreshore. Thus it seems that in early 20th century Ireland the Crown, landowners and many members of the public, understood that the public rights of access prevailed over any claimed private property right in the foreshore.

The nature of the right to claim accretions were discussed by Gibson J. He said

> If the words "gradual" and "imperceptible" relate to the process or progress of alluvion, and not to the result after a substantial or defined space of time, and if the right is inherent in and an essential attribute of the property, resulting from natural law, in consequence of the local situation - an accessory to the principal estate of land - a right founded on justice, arising from the risks to which

[787] Ibid.
[788] Ibid.
[789] Ibid 299. At 300 Boyd J concurred, noting a similar but case decided in 1896, re *Hickson's Estate*.
[790] Since the unsettling ruling of Lord Chelmsford in *Attorney General (UK) v Chambers* (1859) 4 De G & J 55; 1843-60 All ER 559, 45 ER 22.
[791] William Howarth 'The Doctrine of Accretion: Qualifications Ancient and Modern' (1986) *The Conveyancer* 247-256.
[792] *Foster v Wright* (1878) 4 CPDM 438, *Hindson v Ashby* [1896] 2 Ch 1, *Attorney General (Ireland) v McCarthy* [1911] 2 IR 260, *Brighton and Hove General Gas Co. v Hove Bungalows Ltd* [1924] 1 Ch 372, *Attorney General (Southern Nigeria) v John Holt and Co Ltd* [1915] AC 599.
[793] *Gifford v Lord Yarborough* (1828), 5 Bingham 163; 2 Bligh NS 147; 1 Dow & Cl 178; 4 ER 1087.

> the land is exposed, and recommended by public policy - does the ascertainability of the original basal line exclude the right?[794]

However he characterized this right as a 'public right', not a private property right. He said

> We have to deal with public rights, not rights founded on a contract as between landlord and tenant, where it might be a question whether an accretion outside the limits of the holding was to be dealt with as belonging to the landlord or as attached to the holding in the same way as an encroachment would be.[795]

Thus the case upheld McCarthy's claimed ownership of accretions formed against his land, under the doctrine of accretion, but did not defeat public rights of access over the foreshore. As a result of this decision a key issue in English common law was settled and an important precedent was established, which would be followed in later cases.

I consider next decisions of the court where this common law precedent from Ireland formed an important part of the *rationes decidendi.* The first are a decision, an appeal, and a second appeal to the Privy Council, in a dispute over the location of the boundary of a lake in South Australia. The second set of cases are criminal prosecutions of landowners for polluting tidal waters in New South Wales, where the property boundary's location and ownership of the land below tidal waters were central issues.

7. *Southern Centre of Theosophy Inc v South Australia* (1978), (1979) and (1982).

These three cases concerned the ownership of accretions formed against land which was bordered by a large, inland, tidal lake, Lake George, in South Australia, leased by the Southern Centre of Theosophy Incorporated (SCoTI) from the State of South Australia.[796] The case began in the SA Supreme Court,[797] was then appealed[798] to the Full Bench of the SA Supreme Court,[799] and the subject of a further appeal to the Privy Council, who granted the appeal, set aside the appellate court's decision, awarded costs against the State and restored the original decision.[800]

The development of relevant law by the Supreme Court of South Australia, the Privy Council's declaration of the whole of the doctrine of accretion, and these courts' views on the relative weight of public and private property rights are considered in the next sections.

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[794] *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, 296.
[795] Ibid.
[796] *Southern Centre of Theosophy Inc v South Australia* [1978] 19 SASR 389, 390-1 (hereafter *SCOTI v SA* [1978]).
[797] *SCOTI v SA* (1978) 19 SASR 389 (hereafter *SCOTI v SA* (1978)).
[798] *South Australia v Southern Centre of Theosophy Inc* [1979] 21 SASR 399.
[799] The bench consisted of King CJ, Zelling and Wells JJ.
[800] *Southern Centre of Theosophy Inc v South Australia* (1982) AC 706; [1982] 1 All ER 283, 293 (hereafter *SCOTI v SA* [1982]).

i. Development of the doctrine of accretion by the Supreme Court

The original proceedings centred on the ownership of accretions which had formed along the shore of Lake George.[801] The lake was not naturally connected to the sea, but after a channel was dug in 1913 it was intermittently subject to tidal influence, and when a new channel was cut in 1963, the lake became 'almost constantly' subject to the tides and tidal currents.[802]

Walters J reviewed the then leading case on lakes, *Trafford v Thrower* (1929) 45 TLR 502 and ruled that because Eve J's comments were *obiter,* the case was not a binding authority.[803] He found that the doctrine of accretion did apply to lakes[804] and cited several cases for his ruling.[805]

Walters J found 'that change, in a practical sense, has been slow, gradual and imperceptible in its progress',[806] preferring the plaintiff's marine geologist's evidence that longshore drift, created by actions of wind and current in the lake, has tended to build up the alluvion on the fringes of the lake'.[807] Further, Walters J recognised the 'action of the wind' in driving sand into the water was one of the causes of accretions formed 'the operation of nature'. [808]
Windswept sand was not held to be a specific cause of accretion capable of recognition by the common law, but was recognized as 'partly' contributing to the accretion on the lake's margin. By so reasoning Walters J accepted 'the action of the wind' as an agent of accretion which fell within the doctrine.[809] Thus it was the evidence which led to an important finding - that 'these factors' had produced 'a natural change' in the foreshore - before Walters J concluded that since the change had been 'slow, gradual and imperceptible in its progress, it met the test of the doctrine of accretion.[810] As a consequence, Walters J found in favour of the plaintiff.

This decision might have been a logical step in the development of the doctrine of accretion, but the Full Court of the South Australian Supreme Court reversed the decision on three grounds

[801] *SCOTI v SA* (1978) 391.
[802] Ibid.
[803] *SCOTI v SA* (1978) 395.
[804] Ibid 397.
[805] Ibid 395-6. Walters J referred to *Williams v Booth* (1910) 10 CLR 341, where 'the High Court seem to have left open the question …'; *Attorney General of Southern Nigeria v John Holt & Co Ltd* [1915] AC 599 where 'the Privy Council applied the doctrine of accretion to land described as "facing a lagoon" ' and quoted, at 395-6, from Angell's *Treatise on the Law of Watercourses* (6th ed. 1869) Ch.2 par 59.
[806] *SCOTI v SA* (1978) 394.
[807] Ibid 397
[808] Ibid. "…partly by longshore drift, partly by the action of the wind on the sandhills … and the transport of that sand to the body of water in the lake, and partly by retreat of waters from the body of the lake resulting from the construction of channels from the lake to the shores of Rivoli Bay."
[809] Ibid.
[810] Ibid.

which do not warrant detailed discussion here.[811] A further appeal to the Privy Council was mounted by the Centre, where Walters J's recognition of the action of wind and windswept sand as falling within the doctrine of accretion, was affirmed. I consider this ultimate appeal next.

Southern Centre of Theosophy Incorporated v South Australia [1982]

In this appeal the same evidence was tended: some accretions had formed on the shores of Lake George through the deposition of alluvion by the tidal waters, some were the result of human action and some had been 'caused, or mainly caused, by windswept sand'.[812]

The Privy Council's decision first recited the facts of the case tendered in evidence[813] then addressed two subsidiary questions of law.[814] It considered if any legislation prohibited the doctrine of accretion's application to lakes and concluded that, since there was not, 'the question is one of common law'.[815] Consequently it considered relevant precedents. *Trafford v Thrower* (1929) 45 TLR 502 was considered but the court held that the facts regarding Lake George in South Australia, were different to the Norfolk Broads.[816] The court clarified that the *ratio* of Eve J's decision was that the claimed accretion had been 'liberally assisted' by the dumping of fill.[817] Thus the case was an authority for the doctrine's requirement for 'natural processes' to operate and no authority on its application to lakes generally.[818] The court found the case distinguishable and held that *Trafford* did not bind the court.[819] It cited two United States cases[820] as authority for finding that the doctrine did apply to lakes, and Lake George,[821] and held that the doctrine also applied to leased land.[822] The court stated the doctrine of accretion's rules,[823] quoted the decisions in *AG v McCarthy* (1911)[824] and *AG v John Holt & Co* [1915][825] and cited other cases

[811] *South Australia v Southern Centre of Theosophy Incorporated* (1979) 145 CLR 246. The Full Court held that since the boundary had been measured and was shown on a map and the 'perpetual lease contained a covenant to fence' which indicated a 'fixed rather than an ambulatory boundary' the doctrine of accretion did not apply. Further, government policy was to reserve a strip of land along 'the water's edge'. See the rebuttal of these grounds by the Privy Council in *SCOTI v SA* [1982] 289.
[812] *SCOTI v SA* [1982], 284.
[813] *SCOTI v SA* [1982], 285-6 (Lord Wilberforce).
[814] *SCOTI v SA* [1982], 286.
[815] Ibid.
[816] Ibid.
[817] Ibid 286-7.
[818] *Trafford v Thrower* (1929) had been used as the precedent justifying an amendment to the Crowns Lands Act in 1931. See the discussion of this in Chapter IV.
[819] *SCOTI v SA* [1982], 287. Since Eve J, 'even if right', did not cite any 'authority or reason based on principle'. As a decision of the highest English common law court, this ruling has great authority.
[820] *SCOTI v SA* [1982], 287. The cases cited were *Banks v Ogden* (1864) 69 US 57 and *Lamprey v Metcalf* (1893) 53 NW 1139 (Supreme Court of Minnesota).
[821] *SCOTI v SA* [1982], 287.
[822] Ibid.
[823] Ibid 287-8.
[824] *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, 298, quoted in *SCOTI v SA* [1982], 288.
[825] *Attorney General of South Nigeria v John Holt & Company* (1915) AC 599, 612.

as authorities.[826] It then addressed the 'three special arguments' favoured by the Full Court, and ruled that the doctrine was not excluded by the terms of the lease.[827]

The court then addressed the facts of the case, and noted accretions 'caused by human action (other than the deliberate action of the claimant)' were 'within the doctrine of accretion'.[828] Weighing the evidence regarding accretion formed by windswept sand, the court considered whether a valid basis existed for the doctrine to be held not to apply, but found none.[829] The court did not try to identify the accretions that were attributable to the 'waters of the lake' or 'the wind'[830] but rather considered them as part of a wider category of 'natural causes', and concluded that the doctrine could be applied to accretions largely 'brought about by wind force, but presumably to a minor extent by water'.[831] It reasoned that to not recognize such application would be inconsistent with the doctrine's rule recognizing accretions caused by human acts.[832] Thus no new rule was created: the court adapted an existing rule, used higher-level considerations of 'natural causes', and applied it to the facts of the case.[833] Hence the Privy Council upheld the appeal, set aside the Full Bench's decision[834] and restored Walters J's decision.[835]

ii. Views on the relative weight of private and public rights

I next focus on passages in the decision which refer to private property rights, long-term ownership of land, boundaries of real property, and lack of compensation for land lost to the sea.

The nature of long term ownership of land;

In the Privy Council's decision, Lord Wilberforce, was straightforward about the origin of the doctrine of accretion and its relevant application to the land under consideration. He said it

> … is a doctrine which gives recognition to the fact that where land is bounded by water, the forces of nature are likely to cause changes in the boundary between the land and the water… 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.[836]

[826] *SCOTI v SA* [1982] 288-9. These were *Secretary of State for India v Foucar & Co* (1933) 50 TLR 240; *City of London Land Tax Commissioners v Central London Railway Co* [1913] AC 364; *government of the State of Penang v Ben Hong Oon* [1971] 3 All ER 163, [1972] AC 425; *Baxendale v Instow Parish Council* [1981] 2 All ER 620.
[827] *SCOTI v SA* [1982], 290.
[828] Ibid.
[829] Ibid.
[830] *SCOTI v SA* [1982], 290. The court noted that 'it may be impossible in practice'.
[831] Ibid.
[832] Ibid.
[833] Ibid.
[834] *SCOTI v SA* [1982], 292-3.
[835] *South Australia v Southern Centre of Theosophy Inc v South Australia* (1978) 19 SASR 389.
[836] *SCOTI v SA* [1982], 287.

Thus Lord Wilberforce made it plain that land is subject to natural processes, which 'are likely' to change the land over the long term, and indicated a landowner's expectation of 'permanent' land would ignore this fact. This is relevant to the discussion of private property rights because coastal land is often mistakenly characterized as a static asset, and private property rights have been invoked to 'protect' the land from any changes by natural forces. This declaration of the law makes it plain that - because land is inherently subject to change by natural forces - the idea of a private property 'right' to protect it from such change, does not make sense logically.[837]

The nature of property boundaries

The court reviewed the authoritative cases which clarified the doctrine's application to property boundaries[838] and Lord Wilberforce was unequivocal about their changeable nature. He said

> When land is conveyed, it is conveyed subject to and with the benefit of such subtractions and additions (within the limits of the doctrine) as may be take place over the years… where land is granted with a water boundary, the title of the grantee extends to that land as added to or detracted from by accretion, or diluvion, and that this is so whether or not the grant is accompanied by a map showing the boundary, or contains a parcels clause stating the area of the land, and whether or not the original boundary can be identified. [839]

Lord Wilberforce discussed the decision in *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, that "… it makes no difference whether the original boundaries are fixed by natural objects, or by constructions, or by measurements and maps. The principle governing the ownership of alluvion growing by imperceptible process of nature is the same…"[840] and found the claim that private land continued to exist below the tidal waters unsustainable. Referring to the boundary of the lease and a covenant requiring it to be fenced, he said:

> If on the other hand the land were to shrink, it is absurd to suppose that the tenant was obliged to maintain the fence in the water of the lake.[841]

Hence the court affirmed the decision in *McCarthy* (1911) that an original boundary may be legally modified by a gradual change in the position of the bounding water line.

[837] This would displace the private property right to claim, and be awarded, ownership of accretions.
[838] *SCOTI v SA* [1982], 287. Considered were *Tilbury v Silva* (1890) 45 h D 98 (Kay J); *Mercer v Denne* [1904] 2 Ch 534, [1904-7] All Eng Rep 71, and *Re Hull and Selby Railway co* (1839) 5 M & W 327.
[839] *SCOTI v SA* [1982], 287-8.
[840] *SCOTI v SA* [1982], 288, citing Gibson J in *AG (Ireland) v McCarthy* (1911) 2 IR 260, 298. Though Wilberforce quoted Gibson J as saying it makes 'no difference', Gibson stated that there 'is no distinction between gradual and imperceptible addition and gradual and imperceptible subtraction.
[841] *SCOTI v SA* [1982], 289.

The lack of compensation for land lost

The court also made another important statement on the effect of changes in the boundary of privately owned 'real property'. Lord Wilberforce declared

> If part of an owner's land is taken from him by erosion, or diluvion (i.e. advance of the water) it would be most inconvenient to regard his boundary as extending into the water; the landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously water, it is only fair that the landowner's title should extend to it.[842]

Thus the court found a landowner could involuntarily lose part of their land, and no remedy or compensation was available other than the converse process of gaining land.[843] Discussing the rationale for this rule, Lord Wilberforce opined that a 'more realistic explanation' for its existence was 'in recognition of the fact that a riparian property owner may lose as well as gain from changes in the water boundary or level.'[844] Thus the court acknowledged the ability to claim ownership of newly formed land was a private property right, but one which worked both ways.

I next consider two decisions from the jurisdiction of New South Wales, where a finding of criminal liability for pollution depended on proof of the ownership of land, and the doctrine of accretion as described in *SCOTI v SA* [1982] was applied to determine the location of the property boundary and the ownership of allotments located below MHWM.

8. *EPA v Saunders* (1994) and ***EPA v Leaghur Holdings Pty Ltd* [1995]**

Two cases, in which the Environment Protection Authority of NSW (hereafter 'the EPA') brought criminal prosecutions against a landowner, Mr Saunders and his company, Leaghur Holdings PL, for polluting the River Clyde's tidal waters with rubber tyres[845] are especially relevant. In the initial criminal proceedings Saunders was convicted, but the company was not.[846] The EPA appealed against the failure to convict the company,[847] but Court of Criminal Appeal upheld the original decision.[848] The courts' decisions explained the operation of the doctrine of accretion, the nature of 'real property' and the law regarding ownership of land below mean high water mark. I discuss the significance of these cases next.

[842] *SCOTI v SA* [1982], 287.
[843] *SCOTI v SA* [1982] 291. The court discussed the King's Bench's decision to recognize gradual gain of land, by recession of the sea, in *R v Lord Yarborough* (1828) 3 B&C 91; 107 ER 668.
[844] *SCOTI v SA* [1982] 291.
[845] The case was brought under s 27A of the *Clean Waters Act 1970* (NSW) in the NSW Land and Environment Court in its Class 5 jurisdiction before Bannon J. The tyres had been placed on the foreshore by Saunders, in an attempt to arrest the erosion of the shore.
[846] *Environment Protection Authority (EPA) of NSW v Saunders and Leaghur Holdings Pty Ltd* (1994) 6 BPR 13,655. To prevent confusion the case is given hereafter as *EPA (NSW) v Saunders* (1994).
[847] the case was heard in the NSW Court of Criminal Appeal, before Allen, Sully and James JJ.
[848] *Environment Protection Authority v Leaghur Holdings Pty Ltd* [1995] 87 LGERA 282.

a) Clarifications of law

The main matters clarified were the definition of 'real property', ownership of land below MHWM, impact of the ambulatory boundary, and effect of the statute law on the common law.

The ownership of land below MHWM

The first clarification of law concerned the ownership of the lots in the subdivision. Bannon J observed that '[i]n the course of time, the shoreline has changed … due to steady erosion' and he cited as evidence for this conclusion the lots' purported location in the sub-division.[849] Bannon J noted that based on these surveys, 'much of the reserve', all of some lots, and parts of some lots created by the subdivision, '… now lie below the High Water Mark'.[850] He considered the law of real property in some detail, the lack of evidence from witnesses as to 'any sudden avulsion', 'the time frame over which erosion has occurred … the position of the high water mark as depicted in the surveys made at different times' and the evidence of the aerial photographs, before concluding that the affected lots had been gradually eroded away.[851]

Bannon J rejected 'Mr Saunders' statement regarding king tides causing erosion' and relied on Jacobs J's declaration[852] that the foreshore was vested in the Crown under common law.[853] Bannon J discussed the Torrens system of land registration, distinguished a case on the ownership of land below the waterline where a river was the boundary,[854] and quoted the *Land Titles Office Practice,* '… 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…'[855] He then stated the relevant law.

> While it is open to the Crown to grant title to the bed of a river, a grant [of land] defined by metes and bounds as set out in a Certificate of Title is not to be presumed to be a grant of the bed of a tidal river, or of land elsewhere below High Water Mark. 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 gain or loss of title by accretion or diluvion. Defined boundaries make no difference. *Southern Centre of Theosophy Inc v State of South Australia* 1982 AC 706 at 716, 717.[856]

Having found that the erosion had been gradual and imperceptible, Bannon J noted how the law would operate under different circumstances.

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[849] This included aerial photographs (Exhibit D), a survey made in 1988 (Exhibit H), two surveys made in 1991 and 1992 (Exhibit K), and another made in 1993 (Exhibit G).
[850] *EPA (NSW) v Saunders* (1994) 13,658.
[851] Ibid 13,659.
[852] *New South Wales v The Commonwealth* (1975) 135 CLR 337, 486.
[853] *EPA (NSW) v Saunders* (1994) 13,659.
[854] *Lanyon Pty Ltd v Canberra Washed Sands Pty Ltd & Another* (1966) 115 CLR 342; 40 ALJR 363 in which the court found the boundary to be the line of *ad medium filum.*
[855] *Baalman and Wells, Land Titles Office Practice* 4th ed, par 7, in *EPA (NSW) v Saunders* (1994) 13,659.
[856] *EPA (NSW) v Saunders* (1994) 13,659.

> If the property delineated by metes and bounds had been lost by a sudden intrusion, no doubt the owners would have been entitled, subject to any environmental law, to attempt to reclaim their properties by building sea walls and groynes.[857]

In so observing Bannon J did three things: contrasted gradual imperceptible erosion with a sudden intrusion, to explicate the operation of the doctrine of accretion; acknowledged that the former landowner was 'entitled' to attempt to recover their suddenly inundated or eroded land; and confirmed that reclamation of suddenly 'lost' land was subject to statute law.[858]

Further, he put the loss of ownership of lots below MHWM beyond doubt when he ruled that

> … in spite of the Certificate of Titles …. There was no land in the subdivision extending beyond high water mark … Those Certificates of Titles need to be corrected pursuant to s.42 of the Real Property Act, 1900.[859]

This finding of fact - that no lots existed below MHWM - was significant because the logical result was that the company could not be 'the occupier' of these lots if they did not exist, and hence could not be held to be liable for prosecution for pollution emanating from those lots.

The definition of 'land' as 'real property'

The second clarification related to the definition of 'land' as 'real property'. Bannon J found that

> the definition of "land" under s 3 of the *Real Property Act 1900* (NSW) was not intended to affect the bed of the sea, or tidal waters below High Water Mark, or 'land below High Water Mark in tidal estuaries (unless otherwise indicated on the Certificate of Title).[860]

and held that such land 'is vested in the Crown', unless there was evidence of a grant of land below HWM.[861] In thus stating the law, with its caveat, Bannon J reflected a key presumption underpinning judicial interpretation of statutes and deeds created by the Crown: that the words of the instrument are to be read narrowly, and evidence of the author's intention is required for any wider interpretation to apply.[862] He made it clear that real property was not immutable, but was subject to natural processes which may add, or subtract land from it. He 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

[857] *EPA (NSW) v Saunders* (1994) 13,659.
[858] The sudden nature of the intrusion or loss of land was the crucial factor. Under the doctrine, legal boundaries do not move suddenly if the bounding water line suddenly moves. The doctrine's vital condition of gradual, imperceptible movement is not satisfied and the boundary remains where it was.
[859] *EPA (NSW) v Saunders* (1994) 13,660. While s 42 was cited, it is s 12(d) of the *Real Property Act 1900* which empowers the Registrar-General to correct errors to the Register. It is possible that this discrepancy is a typographic error.
[860] *EPA (NSW) v Saunders* (1994) 13,660.
[861] Ibid.
[862] Ibid.

> guarantees title to existing land, the subject of the Certificate of Title, being land within the State of New South Wales... [863]

Importantly he did not find that land below HWM could not be 'real property'. He ruled that if it were to be registered as 'real property' under the *Real Property Act 1900* (NSW), evidence of a valid grant would be required, and the fact that the lot was, or included, land below HWM would need to be shown on the Certificate of Title.[864] Without this evidence the court would presume land below MHWM was owned by the Crown. The result of Bannon J's decision is that, unless there is evidence to the contrary, if land which was once above MHWM comes to lie below MHWM, it is no longer part of that 'real property' and is owned by the Crown.

The precedence of the ambulatory boundary

Bannon J's decision further clarified the law regarding the precedence of property boundaries. Saunders claimed his original boundary, defined by survey, survived despite evidence that it had been overtaken by the high water mark.[865] Bannon J did not accept this claim and concluded that '… in spite of the Certificate of Titles... there was no land in the subdivision extending beyond High Water Mark'.[866] These declarations that the original boundaries had been lost to the sea, that many lots had acquired a MHWM boundary, and the ambulatory boundary of MHWM prevails over the original boundaries, thus clarified the operation of current property law:[867] However the Environment Protection Authority did not accept that the company should escape liability for the pollution and appealed the decision to acquit the company Leaghur Holding PL.

EPA v Leaghur Holdings PL **[1995][868]**

The Court of Criminal Appeal affirmed Bannon J's declarations of law on the effect of the doctrine of accretion,[869] noted that '… the relevant land had been lost to the sea, becoming part of the bed of the sea …' and found that Leaghur Holdings PL, 'did not own the land so taken

[863] *EPA (NSW) v Saunders* (1994) 13,660. 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. See also *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, 298 (Gibson J).
[864] See for example the registration of the bed of the Sydney Harbour, being land below mean high water mark, under the *Real Property Act 1900* (NSW) discussed in detailed in *Verrall v Nott* (1939) 39 SR 89.
[865] See *EPA (NSW) v Saunders* (1994) 13,657. 'Mr Saunders pointed to the water and told the Prosecutor's surveyor, Mr P Gibson, that the land under the water was his'.
[866] Ibid, 13,660.
[867] Ibid, 13,659. Bannon J used the term 'fixed boundary', but this term is ambiguous because it is capable of being interpreted as implying permanence, or immutability, rather than simple immobility.
[868] *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282.
[869] Ibid, 284. Allen J noted the evidence 'showed there had been extensive loss of the land to the waters of Bateman's Bay', to the extent that '[a]ll the front row of lots were lost' and '[m]uch of the second row of lots was also under water.'

back by the sea' and hence could not be held liable for the pollution as 'occupier' of the lots.[870] Allen J observed that Bannon J

> found as a fact that the land lost to the sea was lost by 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.[871]

As a result of this legal fact, the charges against Leaghur Holdings PL were dismissed.[872]

It is fortunate that the doctrine of accretion's application where the former property boundaries can still be ascertained has been settled in law, since gradually rising seas' inundation of littoral lands is likely to become commonplace over the next century, as global climate changes.

b. Views on the relative weight of private and public rights

Bannon J did not explicitly refer to the relative weight of public or private rights. However from the facts and result it is apparent that in this case the public interest prevailed over claimed private property rights. The landowner's claimed right to defend his land against the sea did not prevail over the law protecting (the public interest in) the quality of the state's tidal waters.

Private property may 'revert' to public ownership

However, two findings did relate directly to coastal landowners' private property rights. Bannon J ruled and the appeal court agreed that under current law, when land is affected by subtractive processes, ie gradual erosion or diluvion, the land lost below MHWM ceases to be part of the 'real property' registered under the *Real Property Act 1900* (NSW).[873] As a result, private property rights over any land below MHWM are lost,[874] and ownership of the land lost below MHWM is 'silently transferred' to the Crown.[875] This loss of land below MHWM to the sea, and its transfer to the Crown occurs irrespective of whether the land title originally had an ambulatory tidal boundary, or a boundary defined, or 'fixed', by survey. Bannon J said

> 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

[870] Ibid, 287.
[871] Ibid.
[872] Ibid, 290.
[873] *EPA (NSW) v Saunders* (1994) 13,660.
[874] *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287 (Allen J). See also *Attorney General (UK) v Chambers* (1859) 4 De G & J 55, 68 (Lord Chelmsford); *Mahoney v Neenan* [1966] IR 559, 565 (McLoughlin J).
[875] *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287. See also *Blundell v Catterall* (1821) 5 B & A 268, 292-4 (Holroyd J).

> 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, 717.[876]

Hence it is clear that private property rights do not extend to a landowner taking 'any' actions they deem necessary to 'preserve' their land's boundaries as 'fixed' at time of first survey.

With the benefit of these rulings, it would be incorrect to assert that a section of beach below the mean high water mark is privately owned simply by referring to original survey measurements on a plan,[877] because the measurements may not actually define the position of the boundary.[878] Indeed the nature of the legal property boundary may change from a boundary originally defined by survey to a natural boundary formed by the mean high water mark of tidal waters, converting a static boundary into an ambulatory boundary.[879]

The effect of an ambulatory boundary on private property rights are limited however. The transfer of ownership only applies to that land which falls below MHWM, not the whole parcel, and does not affect the property owner's registration as the proprietor of the land title. Further, because registration of a land title does not certify the boundaries[880] a change in the boundaries does not require a change in the land title's registration. This continuous incremental transfer of the ownership of land that comes to lie below MHWM, does not affect the landowner's indefeasibility of title because the landowner's primary position as the registered proprietor of the land title to lands above MHWM, remains unaffected. Thus the indefeasibility conferred by the statute does not extend to land included in the certificate by a wrong description of boundaries, or where the description of boundaries later becomes erroneous.[881] Though loss of land to the sea is unthinkable to some, there is no doubt that under current NSW law a surveyed boundary does not survive the gradual movement of the receding shoreline. [882] Further, it is clear that, as sea levels rise, some land titles will be wholly lost below the tidal waters, and the owners' private property rights will be overridden by the Crown's ownership of the bed of the tidal waters, and public rights to access and use the foreshore and tidal waters.

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[876] *EPA (NSW) v Saunders* (1994) 13,659. Such a 'fixed' boundary is not fixed forever.
[877] Ibid 13,660.
[878] Ibid. See also *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, 284 (Palles CB); *Beames v Leader* (2000) 1 Qd R 347.
[879] *EPA (NSW) v Saunders* (1994), 13,660.
[880] Butt, above n 209, 756, [20 20]. Butt cited *Boyton v Clancy* (1998) NSW ConvR 55-872 and *Comserv (No.1877) PL v Figtree Gardens Caravan Park* (1999) 9 BPR 16,791 at 16,796.
[881] See s 42(1)(c) of the *Real Property Act 1900* (NSW). See also 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, [355-14000] fn5. That errors in boundaries can occur after the Certificate of Title is issued, through erosion, was stated by the *Land Titles Office Practice* (Baalman and Wells, 4th ed, rel 19, 1990) cited by Bannon J at 13,659, which describes procedures to amend legal boundaries where the title 'has become erroneous ex post facto' (see paragraph 7).
[882] Bannon J's decision was upheld in *EPA v Leaghur Holdings PL* (1995) 87 LGERA 282, 287.

The transfer of land which falls below MHWM from private to Crown ownership might be seen to place greater legal weight on public rights. However, the converse operation of the doctrine is also possible: if accretions occur or sea-level falls a reciprocal transfer of land from the Crown to private ownership would be recognised. While these clarifications of law assist landowners whose lands have benefitted from accretion, they have adverse impacts for the owners of land affected by gradual erosion or diluvion, and the private property rights available to them.[883]

The nature and extent of the private property rights of coastal landowners and the effect of modern statute law on these rights was closely examined in the next case.

9. *Falkner v Gisborne District Council* [1995]

This 1995 decision of the High Court of New Zealand[884] directly addressed the conflict between the private property rights claimed by beachfront landowners at Wainui Beach, on New Zealand's North Island, and the effect of the *Resource Management Act 1991* (NZ) [hereafter *RMA 1991* (NZ)]. Erosion of the beach had been managed by public authorities for many years, but when the seawalls proved ineffective in preventing further erosion, the Council proposed to remove them.[885] Local residents opposed the structures' removal[886] before the Planning Tribunal unsuccessfully,[887] then mounted an appeal to the High Court of New Zealand asserting that: the Crown had a common law duty to 'preserve' the realm against the sea; and landowners had a common law private property right to defend their land from the sea.[888]

Though the appeal failed, the court made several rulings on landowners' private property rights.

a. Clarification of the relevant law

The case clarified whether a Crown's duty to defend against the sea existed, the extent of landowners' private property rights, and the effect of statute law on common law rights.

[883] See *EPA v Saunders* (1994) 6 BPR 13,665, and *EPA v Leaghur Holdings PL* (1995) 87 LGERA 282.
[884] *Falkner v Gisborne District Council* [1995] 3 NZLR 622.
[885] See the history of the location and the works recited in the decision of Sheppard PJ in See *Gisborne District Council v Falkner* [1994] NZPT 270.
[886] See *Gisborne District Council v Falkner* [1994] NZPT 270, Sheppard PJ.
[887] See *Gisborne District Council v Falkner* [1994] NZPT 270. The Court granted an order sought by the Council: 'That the works done by the residents in the winter of 1992 on Wainui Beach were not authorised under section 330 of the *Resource Management Act* as emergency works.'
[888] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, at [*3].

The Crown's duty to 'preserve the realm' from the sea

The existence of a Crown duty to 'preserve the realm' and a corresponding private property right to defend, or be defended from the sea, were central issues in the proceedings.
Barker J examined the Crown's duty to preserve "the realm" against attacks by the enemy, the sea,[889] and 'the corresponding right of citizens to protect their properties' from the sea.[890] He noted the imperfect nature of the duty 'in that it cannot be enforced' and agreed that the 'right' had been 'overtaken by developments in the law of private nuisance.'[891] He also noted that the Tribunal had 'accepted that the duty was part of English common law' and found that the 'duty and right' had become part of the law of New Zealand. Barker J agreed and concluded that the duty and right were applicable in New Zealand, 'unless affected by a New Zealand statute'.[892]

The court then considered the nature of the Crown duty, reviewed the authorities[893] and noted that this 'duty'[894] did not aim to protect private interests. Barker J said

> … it is clear that the underlying premise of the duty is that it is in the interests of the general public to protect land from encroachments of the sea. It is not exclusively for the benefit of frontagers to the sea…[895]

Barker J noted that references to "larger public purposes" and "general safety of the public"[896] indicated that the duty was oriented toward public rather than private interests. He said

> It would be wrong to frame the duty in terms of an absolute, positive duty on the Crown to construct and maintain sea walls, if such construction and maintenance be not in the wider public interest (for example, if it would cause greater damage to other areas of the coastline, or if it were geographically impracticable). [897]

The court recited the history of dealings between residents and authorities, and the residents' claim that levying landowners to pay for protective works gave rise 'a statutory duty' on the council to continue the protective works, but observed there had never been a 'guarantee of permanent protection' and the council 'was unwilling to enter into further commitments'.[898] Barker J noted 'the futility' of the works, that their 'essentially temporary nature was signaled

[889] The origin of this characterization of the sea as 'the enemy' lies in comments made by Lord Coke in *Isle of Ely* (1609) 10 Rep 141a cited in *Attorney General v Tomline* (1880) 14 Ch 58, 66 (Brett J). See the discussion of the survival of this claimed right in NSW in Corkill, 'Claimed', above n 347, 49-58.
[890] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, at [*11]
[891] Ibid [*15]
[892] Ibid.
[893] *Halsbury's Laws of England* (4th ed) vol 6, par 319; Coulson & Forbes *The Laws of Waters* (6th ed, 1952) p 44; *Hudson v Tabor* (1877) 2 QBD 290, 294; *Board of Works for Greenwich District v Maudslay* (1870) LR 5 QB 397, 401-402; *Attorney General v Tomline* (1880) 14 Ch 58;
[894] 'framed by Lord Coleridge as a "right", and by Cockburn J as a "power", in *Board of Works for Greenwich District v Maudslay* (1870) LR 5 QB 397, 401-402.
[895] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 628 at [*19].
[896] *Board of Works for Greenwich District v Maudslay* (1870) LR 5 QB 397, 401 (Cockburn CJ).
[897] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 628 [*19].
[898] Ibid [*20]-[*21].

… 20 years ago',[899] and did not agree that the *Soil and Rivers Control Act 1941* (NZ) created a Crown duty to build and maintain seawalls.[900] The 'imperfect nature of the duty' and its enforceability in New Zealand were canvassed, but the idea was dismissed as 'academic'.[901]

The extent of landowners' private property rights,

The nature of the common law right claimed by the private landowners was examined,[902] but Barker J disagreed that a citizen's 'right' was properly described in absolute terms. He said

> …such an approach manifests a narrow nineteenth century preoccupation with proprietary rights, out-of-keeping with the more holistic policy concerns of sustainability and environmentalism popular today. [903]

Further, he agreed that recent developments in the law of nuisance would apply, and held that

> [a]ccordingly, it can no longer be safely asserted that frontagers to the sea can construct artificial protective barriers, irrespective of the consequential damage to the foreshore and to other properties.[904]

The court rejected the claim that the landowner's property rights continued to exist notwithstanding the enactment of relevant legislation,[905] and held that the Act's effect was to limit some common law private property rights and extinguish others.[906] It also rejected the argument that loss of land to the sea was an unlawful seizure of private property without compensation contrary to the common law,[907] and prohibited by the *Bill of Rights Act 1990* (NZ).[908]
Barker J then included *obiter* criticisms of the "managed retreat" policy and the compensation scheme then in place, noted the policy's 'seemingly insensitive application', the scheme's limited effectiveness,[909] and recommended an improvement. In a prompt to the legislature, he quoted an extract from the *Coastal Protection Act 1949* (UK) which authorised the payment of compensation for loss or damage to land caused by coast protection works, as model provisions

[899] Ibid [*21].
[900] He said '… there is nothing in the Act stating that the erection and maintenance of sea walls or other protective barriers is mandatory, wherever land is affected by erosion'. Ibid [*21]-[*22].
[901] Ibid 629 [*24]. The court contemplated an action under the *Crown Proceedings Act 1950* (NZ).
[902] *Halsbury's Laws of England* (4th ed) vol 6, para 321: 'At common law a subject might erect groynes or such other defences as were necessary for the protection of his land on the sea coast, even if such erections have the effect of rendering it necessary for his neighbor to do the same …'
[903] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 630 at [*25]-[*26].
[904] Ibid [*26].
[905] Ibid 631 [*28].
[906] Ibid [*29].
[907] Ibid 633 [*34]-[*35].
[908] Ibid [*35]-[*36]. Barker J ruled that the statutory scheme took 'priority over private property rights' and disagreed that erosion of land by the sea amounted to a 'seizure' by the Crown.
[909] Ibid [*36]-[*37]. That the relevant provision, s 85, was not readily adaptable to the situation; that the compensation provisions were 'notoriously opaque'; and excessively restrictive. He said, 'I for one never encountered anybody who mounted a successful claim … though I knew of several attempts'.

which might be 'helpful', if incorporated into New Zealand law.[910]

It is significant that Barker J made this recommendation because, having ruled on the questions of law, further judicial comment was unnecessary. It appears he did so because the evidence showed the adverse impacts of the Council's policy of 'managed retreat' on the viability and marketability of the residents' properties, [911] and the possibility of a lose-lose outcome. There was, he noted, a distinct prospect of the residents 'losing their homes without compensation and without the ability to erect coastal protection works.'[912]

The effect of statute law on the common law

That private property rights existed, despite the intention of legislation, was the key premise behind the proceedings, according to Barker J.[913] He considered whether the 'duty and right' had been affected by the *RMA 1991* (NZ) saying it 'comes down to an exercise in statutory interpretation'. He began by noting the 'legislative background'. He said

> … the statutory implementation of integrated planning and environmental regimes represents a clear policy shift towards a more public model of regulation, based on concepts of social utility and public interest. Private law notions such as contract, property rights and personal rights of action have consequently decreased in importance.[914]

He cited the *Coastal Protection Act 1949* (UK) as an example of a statute affecting the common law, ruled there was 'nothing in principle to prevent a duty sourced in the Crown's prerogative power, or an established common law right being overridden or restricted by statute',[915] and dismissed the claim the rights were 'saved' by s23 of *RMA 1991* (NZ).[916] Barker J noted that the Act had 'repealed 59 enactments and amended many others' and quoted its long title as 'An Act to restate and reform the law relating to the use of land, air and water'. After noting that the Act's purpose, 'promotion of sustainable management' as defined in s 5, was paramount, Barker J found that the Act did affect the 'duty and right', and had supplanted the common law.[917] He explained the interaction of the statute law and common law, thus

> … 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

[910] Ibid [*37] – [*38]. See s 19(1) – 19(3) of the *Coastal Protection Act 1949* (UK).
[911] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 633 [*36].
[912] Ibid 634 [*38].
[913] Ibid 625 [*11].
[914] Ibid 631 [*28].
[915] Ibid [*29].
[916] Ibid [*30]. He said the savings section 'cannot be invoked to protect a right or rule of law which, upon proper construction of the statute as a whole, would otherwise impliedly be restricted or abolished.'
[917] Ibid 632 [*31]-[*32]. ...with a 'comprehensive, interrelated system of rules, plans, policy statements and procedures, all guided by the touchstone of sustainable management of resources.'

> inconsistent with the resource consent procedure envisaged by the Act; accordingly, any protection works proposed by the residents must be subject to that procedure.[918]

He was explicit about the effect of statutes and the weight of private and public interests.

> …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.[919]

Further, he made plain that the statute law had replaced the common law. 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. [920]

Thus the High Court clarified that in New Zealand, a citizen's private property rights in coastal land were limited by the *RMA 1991* (NZ), and rejected the claim that private property rights continued to exist despite the Act. The court did not rule that the landowners had no private property rights, but found their rights did not include rights to defend their real property against the sea, to require their neighbours to erect defences for their benefit, or to compel the Crown or Council to erect and maintain sea defences. The court held that if they had existed, these rights had been extinguished by the legislation. However, other property rights were undisturbed.[921]

b. Views on the relative weight of private and public rights

Since it involved a contest between landowners' claimed rights and the public law, this decision made several important statements on the nature, extent and weight of private property rights. The private property rights claimed by the residents were plainly stated, but the public rights likely to be affected were not argued by Council's lawyers or noted in the court's decision. However, it is possible, even likely, that wider considerations of public interest, beyond administering public law and managing coastal hazards, were behind Council's decision to discontinue the foreshore protection scheme. Considerations may have included: the need to ensure public safety, and preserve public rights to access and use the foreshore, the (f)utility of the works, and other public interest priorities competing for limited public funding. It is unsurprising that the tribunal and court decisions do not mention public rights, and other

[918] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632 [*33].
[919] Ibid [*34].
[920] Ibid 633 [*35].
[921] Though the matter was not canvassed in the proceedings, presumably the landowners' remaining private property rights would include, if the physical circumstances arose in the future, the right to claim ownership of any accretions of land which form against their private land above HWM.

elements of the public interest except in passing,[922] because they did not bear directly on the questions of law nominated for the court's adjudication by the appellant.

The weight of private property rights in formal decision making

Barker J also addressed the question of the weight private property rights should have in a consent authority's decision-making. The landowners had argued that their property rights were the primary consideration when public authorities decided whether to rebuild the seawalls,[923] and that their property rights were so important that any council decision which did not recognize them was *ultra vires.*[924] However Barker J did not agree. He observed that

> 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.[925]

Thus, by recognizing, but not according them priority, Barker J rejected the claim that private property rights were pre-eminent in New Zealand's legal framework for managing its coasts.

Though not a binding precedent in this jurisdiction, this case provided very useful guidance in answering my research question, because an analogous comprehensive scheme of legislation which supplants prior private property rights, has been enacted in New South Wales.[926]

Next, a key decision on the claimed common law right to compensation and the NSW legislature's power to amend common law property rights is examined.

10. *Durham Holdings Pty Ltd v State of New South Wales* (2001)

Further clarification of NSW law regarding claims of paramount private property rights and State Parliaments' powers were provided by the High Court of Australia in *Durham Holdings Pty Ltd v New South Wales* (2001),[927] after a series of earlier unsuccessful legal actions. [928]

[922] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 628 [*19].
[923] Ibid 632 [*33].
[924] Ibid.
[925] Ibid 632-3 [*34].
[926] See my discussion of the analogous application this decision to New South Wales in John R Corkill 'Claimed property right does not hold water' (2013) 87(1) *Australian Law Journal* 49, 53-4.
[927] *Durham Holdings Pty Ltd v State of New South Wales* [2001] HCA 7; (2001) 205 CLR 399; 177 ALR 436; 75 ALJR 501, before Gaudron, McHugh, Gummow, Hayne, Kirby and Callinan JJ. Though the date of this decision is 2001, earlier proceedings were heard in the 20th century. See cases cited below.
[928] These included an appeal to the Coal Compensation Review Tribunal, interrupted proceedings in the Supreme Court, and a decision of the NSW Court of Appeal, *Durham Holdings PL v State of New South Wales* [1999] NSWCA 324; 47 NSWLR 340, which dismissed the entire matter.

The facts of the case were as follows. Durham Holdings PL had held coal leases in coal reserves under state-owned land that were revoked when the area was dedicated as a National Park.[929] The enabling legislation[930] provided for the payment of $23.25 million as compensation for the cancelled coal leases, not its market value,[931] while the company asserted it had a right to the payment of compensation at their full market value of $93.4m.[932] The company argued that the court should rule the Act invalid[933] because the 'arrangements' for compensation were beyond legislative authority, and the 'right' to "just" or "properly adequate" compensation was 'such a "deeply rooted right" it restrained the legislative powers of the New South Wales Parliament'.[934]

The court considered the company's arguments on the court's power to invalidate legislation and discussed its and other courts' decisions on Parliament's power to affect common law rights.[935] It read closely the NZ cases which the company argued supported the proposition that there might be rights which "lie so deep that even Parliament could not override them".[936] However the court disagreed, ruling that the Act governed the matter, not common law. It rejected the application, affirming the Court of Appeal's decision.[937]

a. Clarification of the relevant law by the court

This decision's clarification of whether a 'fundamental' right to compensation existed, its statement on the mutable nature of private property rights and description of State legislatures' extensive powers to affect private property rights, are described next.

The existence of a 'fundamental' right to compensation

The decision of Gaudron, McHugh, Gummow and Hayne JJ restated the plaintiff's claim as: 'whether or not the right to receive "just" or "properly adequate" compensation is such a "deeply rooted right" as to operate as a restraint on the legislative power of the New South Wales Parliament'.[938] However, they found that there was no supporting authority for the claim,

[929] *Durham Holdings Pty Ltd v State of New South Wales* [2001] HCA 7, [4] (Gaudron, McHugh, Gummow, and Hayne JJ). [hereafter *Durham v NSW* [2001].
[930] *Coal Acquisition Act 1981* (NSW) as amended by the *Coal Acquisition (Amendment) Act 1990* (NSW).
[931] *Durham v NSW* [2001] [5] (Gaudron, McHugh, Gummow, and Hayne JJ).
[932] Ibid. Or precisely, $93,397,327.
[933] Ibid [6]-[7] (Gaudron, McHugh, Gummow, and Hayne JJ), [39] (Kirby J).
[934] Ibid [12] (Gaudron, McHugh, Gummow, and Hayne JJ).
[935] Ibid [8]-[12] (Gaudron, McHugh, Gummow, and Hayne JJ), [39]]-[66] (Kirby J).
[936] See e.g. *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, at 398; *Simpson v Attorney-General (NZ) (Baigent's Case)* [1994] 3 NZLR 667, and others cited in *Durham v NSW* [2001] [47] (Kirby J). See fn 91. In *Taylor* it was argued that such a fundamental right would prevent the Parliament of New Zealand from enacting "literal compulsion, by torture for instance".
[937] *Durham v NSW* [2001] [1]-[14] (Gaudron, McHugh, Gummow, and Hayne JJ), [15]-[78] (Kirby J).
[938] Ibid [12] (Gaudron, McHugh, Gummow, and Hayne JJ).

affirmed the New South Wales Court of Appeal's decision, and quoted it with approval.[939] Kirby J concurred.[940] Thus the court rejected the claim that a common law private property right to compensation at full market value existed in Australian law, expressly negating the claim it was a "fundamental right".[941] By holding that 'any' compensation payable was governed by the relevant statute, not the claimed private property 'right', the court rejected the idea that the claimed right was in any way 'absolute'. Indeed, it ruled that no evidence had been advanced which could form the basis for such a claim.[942] Thus there can be no doubt, and the issue may be described as 'settled' law in Australia.

The nature and extent of private property rights

The company characterized its claimed private property right to receive "just" compensation, in absolute terms, as a "fundamental" right which was paramount, and limited Parliament's action. However, the majority of the court did not accept this characterization of the right.[943] Kirby too rejected it, and cited as a precedent, the Queensland government legislation to deprive Queensland Aboriginal people of their "native title" – a species of legal property.[944] Thus common law private property 'rights' are not absolute, or immutable, but amenable to change or repeal by legislation. They persist only to the extent that they are not affected by the statute law.

The scope and extent of powers available to the state Parliament

The High Court considered closely the company's claims that the NSW Parliament was bound to recognise and protect this claimed property right to compensation,[945] and that legislation which did not recognise and protect this claimed right was invalid, because it was beyond the power of the Parliament.[946] The joint decision the Court rejected this argument, and said '[t]here are numerous statements in this Court which deny that proposition.'[947]

While Kirby J agreed that there was a convention for governments to provide compensation if they acquired a citizen's private property, he rejected the argument that the NSW government

[939] Ibid.
[940] Ibid [52] (Kirby J).
[941] Ibid [14] (Gaudron, McHugh, Gummow, and Hayne JJ), [57] (Kirby J).
[942] Ibid [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.'
[943] *Durham v NSW* [2001] [12] (Gaudron, McHugh, Gummow, and Hayne JJ).
[944] He held that the subsequent decision of the High Court in *Mabo v Queensland* (1988) 166 CLR 186 upholding it as valid legislation, was an authoritative decision which 'bars the way of the applicant's arguments'. *Durham v NSW* [2001] [52] (Kirby J).
[945] Ibid [7] (Gaudron, McHugh, Gummow, and Hayne JJ).
[946] Ibid.
[947] Ibid. See fn 4 for those decisions.

was obliged to follow this convention.[948] He made it clear that State legislatures were able to deal with private property through legislative acts, and had done so many times before.[949] Further, he dismissed the claim of a constitutional right to compensation on 'just' terms if the State acquired private property, noting that s 51 (xxxi) of the Australian Constitution, required the Commonwealth to provide 'just terms' compensation if it acquired private property, but did not include an 'equivalent provision' relating to State governments. He found it significant that a 1988 referendum to insert such a clause into the federal Constitution, had failed.[950]

Thus the court ruled that not only were State Parliaments not bound by common law rights, but these legislatures' powers were extensive, and included a power to legislate to acquire private property with, or without, "just" compensation. On this point too, the company's case failed.

b. Views on the relative weight of private and public rights

Since it focused on questions of private property rights when they are affected by actions of government pursuing public policy goals, the court's decision provided more than mere views. It directly commented, and ultimately ruled on the nature and extent of private property rights more generally and the weight which should be afforded them in the decision making process.

The nature and extent of private property rights

These rulings above, indicated that there were limits to private property rights, under both the common law and under statute law. It held that because they are not 'absolute', but socially constructed, private property rights are amenable to modification or repeal by legislation.

The court placed no weight on claims that private property rights were so significant as to negate the legislation and were beyond Parliament's reach, because no evidence was tendered supporting these claims, and a clear line of authority existed to the contrary. As a result, it rejected these claims, and upheld the Court of Appeal's decision to dismiss the matter. The court did not find that the company had no property rights, but the rights it had were prescribed by the legislation and not by a claimed common law right to compensation at full market value.

[948] Ibid [55] (Kirby J). No obligation to do so existed under the Commonwealth Constitution, or international law. He noted that in *Union Steamship Co PL v King* (1988) 166 CLR 1, 9, the High Court had determined that state Parliaments' legislative powers had "the widest possible operation"
[949] Ibid [56] (Kirby J). He said '…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.'
[950] *Durham v NSW* [2001] [63] (Kirby J). He discussed the relevance of this at [64]-[66].

The cases considered above are summarized in Table 4 below.

Cases examined (in order)	Court / Jurisdiction	Outcome
Blundell v Catterall (1821) 106 ER 1190	Kings Bench United Kingdom	Found that public rights to use the foreshore and tidal waters existed; but rejected claimed right to bathe (using bathing 'machine').
Hudson v Tabor (1876) 1 QBD 225, and (1877) 2 QBD 290.	Queens Bench Court of Appeal United Kingdom	Held that a landowner has no private property right to compel a neighbour to build defences to protect land from the sea: found neighbour was not liable for any damages due to inaction.
Attorney General (UK) v Tomline (1880) 14 Ch 58	Court of Appeal United Kingdom	Affirmed landowner has no right to compel a neighbour to keep the sea out; but found that the neighbour is obliged not to… 'let the sea in'.
Attorney General (Ireland) v McCarthy (1911) 2 IR 260	Kings Bench United Kingdom as final appeal court for Ireland	Ruled that the location of a property boundary may move under the doctrine of accretion even if the boundary's original location is known. Accretions formed above MHWM belong to the adjoining landowner, not the Crown.
Southern Centre of Theosophy Inc v South Australia (1978) 19 SASR 389	Supreme Court of South Australia	Found that the natural processes able to move a real property boundary under the doctrine of accretion included deposits of wind-swept sand.
Southern Centre of Theosophy Inc v South Australia [1982] 1 All ER 283	Privy Council UK as final appeal court for South Australia	Overturned SA Supreme Court's Full Bench decision; restored Walter J's original decision; recited relevant common law property rules regarding the movement of natural boundaries.
EPA v Saunders (1994) 6 BPR 13,655	Land and Environment Court of NSW	Applies common law property rules re location of real property boundary; finds no real property below MHWM, hence land not owned by company; convicts Saunders, acquits company
EPA v Leaghur Holdings Pty Ltd [1995] 87 LGERA 282	Court of Criminal Appeal of NSW	Affirmed L&EC decision: recited common law rules re property boundaries and transfer of ownership of land below MHWM to the Crown.
Falkner v Gisborne District Council [1995] 3 NZLR 622	High Court New of Zealand	Rejected claims that: Crown in NZ had a duty to protect private land under NZ law; landowners have a right to defend against the sea. Ruled that private property rights are amenable to modification or repeal by statute law.
Durham Holdings Pty Ltd v State of New South Wales (2001) 177 ALR 436	High Court of Australia as final appeal court for New South Wales	Rejected claims that a common law or a constitutional 'right to compensation' exists in NSW; ruled that compensation, if any, is governed by NSW legislation; State Parliaments have extensive powers to modify or repeal private property right.

Table 4 – Summary of cases considered and their results

Part D. Discussion

11. Observations on the cases considered

All the cases examined above were decisions by senior courts which clarified or developed relevant elements of the common law, and or ruled on the effects of applicable statute law on common law rights. While these modern cases of *McCarthy*, *SCOTI v SA*, and *Falkner* are persuasive analogies, but not binding on NSW courts, the declarations of law in the *EPA v Leaghur* and *Durham* cases constitute authoritative precedents of the highest standing which other courts in this jurisdiction are bound to follow, under the principle of *stare decisis.*

Generally speaking, where cases involve the operation of legislation, and its effect on common law rights, the courts have held statute law to be superior and governing the relevant matter(s), not the common law. This reflects a core principle of the legal system in New South Wales (and other nations with a Parliamentary democracy) that the legislature is the ultimate law-maker. Hence it is often said Parliament makes the law and the courts declare it. These declarations of law thus apply this principle underpinning statutory interpretation: where there is an apparent contradiction between 'rights' under common law and the operation of statute law, unless a Bill of Rights or a constitutional right exists, the court will usually find that the legislation prevails and the common law has been limited, modified or repealed.

As the cases above illustrate, the effects of the courts' rulings are that private property rights are not 'absolute' in the sense of being immutable, but rather are amenable to modification or repeal by 'clear terms' expressed in statutes enacted by the legislature. Since the mid-19th century an individual's private property rights have been seen as social constructs which rely on the explicit or implicit recognition in laws enacted by the legislature. That private property rights were not sacrosanct but contingent, has been well known since Blackstone's time.[951]

Claims that private property rights are 'paramount', hold the primary position when determining rights to use coastal lands, and constrain decision-makers in their decision making were not accepted by the court. Indeed, the court has found that no basis for such a significant claim, and doubted that one might exist,[952] holding that private property rights should be considered by decision-makers, as one of many considerations, but should not be afforded undue weight.[953]

[951] William Blackstone's *Commentaries on the Laws of England,* (1st pub, 1765) recognised the legislature's power to authorize the acquisition of private land for a public purpose (see vol 2, 2-11).
[952] In the *Durham* cases, both the Court of Appeal and the High Court of Australia noted that there were no 'judicial pronouncements, let alone a decided case' in 'England, the colonies of Australasia or modern Australia, to support its argument' for a fundamental right to compensation.
[953] *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 632-3 [*34] (Barker J).

The substance of common law private property rights has been read narrowly by the courts, and in the cases above some rights claimed were found to not exist.[954] Each case ruled on the claims made, but together they indicate landowners' tendency to overstate their property rights.[955]

The issue of 'public rights' was only apparent in three cases, each distinctive due to their facts.

In *Blundell v Catterall* (1821) the public right of way over the foreshore was claimed as a defence, and a public right of bathing was asserted. However while the court, and apparently the plaintiff, were prepared to accept that a public right of way along the foreshore, as a public highway, existed, this right did not extend to other uses of the plaintiff's private property. Though the majority of the court held that there were common law public rights to access the foreshore for navigation and for fishing, they did not accept that a 'right to bathe' existed. Thus no established public right was overturned by the court when it reached this decision.

In *Attorney General (Ireland) v McCarthy* (1911) the Attorney General charged that the adjoining landowner McCarthy had interfered with the public's access to the foreshore. McCarthy disavowed any interference with public use of the foreshore and any claim to own land below the high water mark, so this was not an issue at final hearing, and the case turned on evidence of McCarthy's title extending "down to the water", ie high water mark. From the particulars of this case however, it is clear that both parties regarded the public rights to access and use the foreshore as paramount, and that by the end of the 19th century, this was settled law.

Those cases that have involved a public authority as one of the parties have highlighted the inexact fit of a public authority, charged with specific functions, with the more general role of trustee for public rights and interests. In some cases, the public authority's argument has been clothed in a public interest rationale, obscuring a secondary, more economic, motivation.[956]

[954] No right to build defences against the sea (*Falkner v Gisborne DC)* [1995]; no right to compel neighbour to defend against the sea (*Hudson v Tabor* (1877); no right to own land below HWM (*EPA v Saunders* (1994); no right to compensation for land lost to the sea (*SCOTI v SA* [1982]; no 'fundamental' right to "full" compensation (*Durham v NSW* [2001); no right to exclude the public from the foreshore (ie land between high and low water marks) (*AG (UK v McCarthy* (1911).

[955] The unwillingness of the court to define more private property 'rights' accords with the principle of *numerus clausus.* See Brendan Edgeworth 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32 *Monash University Law Review* 387.

[956] See for eg *Hill v Lyne* (1894) 14 LR NSW 449. In this appeal of the valuation of the land being acquired by the Crown, the Crown's prerogative ownership of all lands below the high water mark of tidal waters was recognised, contrary to the vendor's assertion of his 'right' to dredge.

In others, public rights and interests have remained in the background as part of the rationale for certain decisions,[957] or were no more than implied.[958] Further, in *Southern Centre of Theosophy Inc v South Australia*, the potential for conflict between genuine 'public interests' and the interests of a State government with a larger corporate and economic agenda may be seen.[959]

Usually, in cases where private property rights have been adversely affected by the exercise of public rights, the landowner has been the plaintiff and members of the public the defendants. Private landowners can usually easily prove their private property interests in the land, quickly obtain standing before the court, and gain the advantage of nominating the grounds of the action, the nature of the proceedings and the court in which an application might be heard.

Where members of the public are the plaintiff they gain the advantage of nominating the grounds for the action, but they face a challenge in establishing their public interest in the land in question, in order to gain 'standing' before the court. Public interest plaintiffs face many other challenges including the time commitment and the financial costs involved in such proceedings and often must overcome other hurdles including adverse impacts on their health, livelihood, family relations, and employability and potential political consequences.

When the courts have recognised private property rights as prevailing over public rights they have required clear evidence of Parliament's express intention to modify the relevant public rights to achieve 'larger' goals of private and public 'good'. When interpreting statutes the courts have adopted a presumption that public rights are affected, modified or repealed only to the extent explicitly indicated by the legislature. Where the extent of effect is ambiguous in the statute, the court presumes that the effect, modification or repeal extends only so far as necessary to achieve the 'larger' goal. The corollary of this presumption is that the public rights continue to exist where, or are restored when, the effect of the statute does not apply.

12. A summary of judicial responses

The responses to conflicts between private property rights and public rights over use of lands by common law courts have largely depended on the questions nominated by the plaintiff for adjudication, and the arguments advanced by the parties. Judges cannot consider theories or

[957] It is likely that the council's decision to not continue to maintain coastal defensive structures to protect private property at Wainui Beach Gisborne, at issue in *Falkner*, was based on important elements of the public interest, such as the public right of access to and use of the foreshore, potential risks to public safety which might arise, and the cost of the works – which were deemed 'futile' - to the public purse.
[958] The essential public interest at issue in *EPA v Saunders* (1994) was the protection of the water quality of the River Clyde, and the statutory prohibition on their pollution, unless duly licensed. The hazard to the public right of navigation across tidal waters created by the use of car tyres was not an issue.
[959] The State of South Australia gained no extra revenue for the larger area of the lease and had a policy, albeit latent in this situation, of reserving land along the water's edge.

propositions not argued before them, and must consider only the evidence adduced in the proceedings. In this way judicial responses to conflicts between competing rights have been, and will continue to be, reactive rather than proactive or innovative.

Though largely bound by precedent, judges are able to apply and develop existing rules of common law, as appropriate, to address new circumstances: though in doing so must demonstrate a carefully reasoned, logical approach if the decision is to survive an appeal. Judges use extant rules of construction when they interpret and apply legislative provisions, and may refer to the intention of the legislature, or where this is absent or ambiguous, may consider the relevance or adaptability of existing common law rules when other guidance is not available.

Generally speaking, judges are well acquainted with philosophical approaches and theories of property and have been prepared to indicate their relevance where this is appropriate but, as a rule, do not employ or apply philosophies or theories of property as the basis for their decisions. Where a philosophy such as 'sustainability' lies at the core of the legislative provisions being considered, as in the *Falkner* case, or forms a part of the common law, as the 'public trust' does, it will be given weight by the courts because it has, in those instances, the force of statute law.

As the cases above illustrate, the judicial view has been, and currently is, that public rights to use coastal lands and waters have greater weight at law, and private property rights should yield.

In this chapter I considered the weight attributed to competing rights by the courts. In the next chapter I report responses of a second arbiter, the NSW legislature.

The western tide crept up along the sand,
And o'er and o'er the sand,
And round and round the sand,
As far as the eye could see,
The rolling mist came down and hid the land:
And never home came she.

Charles Kingsley, *The Sands of O'Dee* (1848)

Chapter IV – Statutory responses to conflicts

Introduction to Chapter IV

In this chapter I explore the responses to conflicts between private property rights and public rights made by the legislature of New South Wales via its enactments of statutes. Initially it was titled 'Parliamentary responses', but as my research progressed I realized that a narrow focus on Parliament would preclude consideration of relevant early Crown Instructions regarding coastal lands in New South Wales, issued before responsible government began in 1856.[960] Further, it would preclude sub-ordinate legislation, not enacted by the Parliament. Hence I adopted the broader title 'Statutory responses' so these matters could be considered.

In Part A I briefly describe the legislature of New South Wales and provide an overview of statute laws selected for their potential guidance in answering the primary research question.

In Part B I consider five fields of law which are relevant to the use of coastal lands or conflict between competing private and public rights: Crown lands ownership and management; compensation for acquisition of property by the State; coastal lands protection and management; environmental planning; and public use of coastal waters. In each field I report on statutory provisions which recognize private property rights or public rights, acknowledge conflict between competing rights, address or resolve competing claims; or which indicate the weight of private and public property rights.

In Part C I discuss these statutory responses and the indications they give of the relative weight attributed by the legislature to private property rights and public rights. I then summarise the statutory responses made by the legislature, answer my secondary research questions and state my conclusions on which set of competing rights is dominant under current law in 2020.

[960] The *New South Wales Act 1823* (UK) constituted the first legislature for the colony. The seven member Legislative Council first met in 1824. A bi-cameral Parliament was not constituted until 1856. See < http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/HistoryFirstLegislature >.

Part A. Introduction: the legislature and relevant statutes

1. The legislature of New South Wales.

This chapter is focused on NSW statutes because the legislature is acknowledged in liberal democracies, as the supreme law-making body.[961] In New South Wales, the legislature consists of the Sovereign, the Legislative Assembly and Legislative Council.[962] Government is formed by the political party with most Members of the Legislative Assembly,[963] but a majority in both chambers is required to enact Bills.[964] The legislature's powers enable it to enquire into matters of public concern,[965] and resolve disputes between competing rights by creating administrative procedures, which deal with conflicts of interests, with legislation.[966] It also has a supervisory role over statutory rules made under an authorizing Act, by the Governor on a Minister's advice,[967] since a rule or instrument made by the Governor can be 'disallowed' by a motion carried by either chamber.[968] A range of instruments thus come within the legislature's purview.[969] However I do not intend to summarise here the arrangements which govern these chambers, or detail the procedures for enacting legislation, since other texts are available.[970]

What is relevant to clarify here is the legislature's crucial role in law-making, as distinct from the government's role. My focus on the legislature is apposite because in the last thirty years the government has not had a majority in the upper house,[971] and has needed the support of cross-bench Members of the Legislative Council (MLCs) to pass its legislation.[972]

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[961] See Catriona Cook, et al (eds), *Laying Down the Law* (LexisNexis, 7th ed, 2009) 173 -175.
[962] S 3 *Constitution Act 1902* (NSW) cites 'the King with the advice and consent' of these chambers.
[963] See 'How Parliament Works', < https://www.parliament.nsw.gov.au/about/howparliamentworks/Pages/How-Parliament-Works.aspx >.
[964] See s 8A *Constitution Act 1902* (NSW). Bills supported by both chambers require the assent of the Governor and their provisions commence on the dates specified.
[965] Committees may be formed by a motion of the chamber to inquire into any relevant matter. See *NSW Legislative Assembly, Practice, Procedure and Privilege,* Chapter 26 Committees, Standing Order 315.
[966] Enactment of legislation is a primary role of the legislature. See s 5 *Constitution Act 1902* (NSW).
[967] See for eg the authorisation of Regulations by s 9.25 *Crown Land Management Act 2016.*
[968] under s 41 *Interpretation Act 1987* (NSW). A 'disallowance' motion must be brought within 15 sitting days of notice being given of the rule or regulation coming into effect. See Standing Order 116, in *Consolidated Standing and Sessional Orders—New South Wales Legislative Assembly – 57th Parliament, 2019.* See the list of 'Motions to disallow statutory rules and regulations since 1995' at < https://www.parliament.nsw.gov.au/lc/pages/statistics-of-the-legislative-council.aspx >.
[969] Section 3 *Interpretation Act 1987* (NSW) defines 'instrument' as including both 'statutory rules' and 'environmental planning instruments. 'Statutory rules' are defined by s 3 of the *Subordinate Legislation Act 1989* (NSW) as including 'regulations, by laws, rules or ordinances'.
[970] See the Standing Rules and Orders for the Legislative Assembly and Legislative Council adopted under s 15 *Constitution Act 1902* (NSW).
[971] The last State government to have a majority in the Legislative Council was the Wran / Unsworth Labor government in the 48th Parliament 1984-1988. See the lists of Members of the Legislative

This support has not always been forthcoming and government Bills have been amended or rejected by the upper house.[973] Thus the statutes of recent Parliaments have reflected the legislature's intentions, not necessarily the government's.[974] This history demonstrates that, though a future government's policy on whose rights *should* prevail is central, what is also crucial is support for that position by cross-bench MLCs. If a future government were to win a majority in both chambers, cross-bench MLCs' role would be diminished and the executive's decisions simply implemented by the legislature. However, this is unlikely since proportional representation favours the election of minor parties to the Legislative Council.[975]

2. Overview of the statutes selected .

The main criterion adopted for selecting statutes relevant to conflicts between competing rights is their thematic link to coastal land in New South Wales. A suite of statutes, grouped as five fields of law are examined. I provide an overview of the principal statute then focus on key parts, in accordance with standard practices in statutory interpretation.[976]

The first set of statutes relate to the management of coastal Crown lands in New South Wales.[977]
The second group relate to the construction of structures to protect land in the State's coastal zone from the sea and the management of coastal hazards affecting lands of all tenures.[978]
The third field includes environmental planning, land-use regulation, development control and the creation of strategic planning instruments to protect the public interest.[979]
A fourth category focuses on statutes governing acquisition of private land by public authorities, payment of compensation, and creation of easements for public purposes over private land.[980]
The fifth encompasses statutes which create private interests in the state's coastal waters.[981]

Council in previous NSW Parliaments in 'Party composition in Legislative Council since 1978' at < https://www.parliament.nsw.gov.au/lc/pages/statistics-of-the-legislative-council.aspx >.

[972] See for eg the *Game and Feral Animal Control Act 2002* (NSW).

[973] In the 55th NSW Parliament, the Coalition government's planned repeal of the *EPAA 1979* (NSW) was thwarted by cross-bench and opposition MLCs. See Planning Bill 2013.

[974] In the 50th NSW Parliament the Greiner Coalition government did not have a majority in either chamber and the Parliament enacted the *Endangered Fauna (Interim Protection) Act 1991* (NSW).

[975] No NSW government has had a majority in the Legislative Council since 1988. The number of minor party and independent MLCs has increased since 1988. See 'Party composition in Legislative Council' at < https://www.parliament.nsw.gov.au/lc/pages/statistics-of-the-legislative-council.aspx >.

[976] See Michelle Sanson, *Statutory Interpretation* (OUP, 2012) 161 - 171; Elizabeth Ellis, *Principles and Practice of Australian Law* (Lawbook, Thomson Reuters, 3rd ed, 2013) 227 – 229.

[977] Considered are early Crown policy, colonial statutes and modern Acts, with a focus on the *Crown Lands Act 1989* (NSW) and the *Crown Land Management Act 2016* (NSW).

[978] The *Coastal Protection Act 1979* (NSW) and the *Coastal Management Act 2016* (NSW).

[979] Considered are the principal statute, the *Environmental Planning and Assessment Act 1979* (NSW) and planning instruments, including *LEPs* and *SEPPs*, made under this Act as sub-ordinate legislation.

[980] The *Land for Public Purposes Acquisition Act 1880* (NSW), *Roads Act 1993* (NSW), the *Land Acquisition (Just Terms) Compensation Act 1991* (NSW) and the *Conveyancing Act 1919* (NSW).

[981] The *Marine Safety Act 1998* (NSW), *Crown Land Management Act 2016* (NSW), *Petroleum (Offshore) Act 1982* (NSW), and *Fisheries Management Act 1994* (NSW).

In the first field I trace the historical origin of the policy of reserving Crown land for public use and the statutes which continued this policy as law. In other fields I focus on current statutes since space does not permit a detailed account of their development. Where longstanding Acts have recently been replaced,[982] I adopt a 'snap shot approach', describing elements of the statutory framework relevant to private or public rights over coastal lands, under the former statute, and under current law as at mid-2020. I then discuss the indications of the weight attributed by the legislature, to competing rights, and any evidence of rights acting as 'trumps'.

Part B. Relevant Statutes in five fields of law

In this Part I outline provisions in NSW statutes which relate to private property rights or public rights in coastal lands. Prior and current Acts, and statutory instruments are considered.

3. Crown lands

In this section I trace the history of laws governing the ownership and use of coastal lands, and highlight the weight attributed to competing rights by the Crown, and by the legislature.

3.1 Relevant statutes

18th century Crown policy

The earliest statute relevant to public use of coastal lands in New South Wales[983] would appear to have been Instructions issued by the British Colonial Secretary under the Crown's authority,[984] to Governor Brisbane,[985] to reserve 'lands in the neighbourhood of navigable streams or the sea coast' for public purposes,[986] so that public uses

> 'should, as far as possible, be anticipated and provided for before the waste lands of the Colony are finally appropriated to the use of private persons…'. [987]

[982] The *Coastal Protection Act 1979* (NSW) was replaced by *Coastal Management Act 2016* (NSW), and the *Crown Lands Act 1989* (NSW) was replaced by the *Crown Land Management Act 2016* (NSW).
[983] See Peter Cabena, *Victoria's Water Frontage Reserves – An Historical Review and Resource Appreciation* (Department of Crown Lands and Survey Victoria, 1983), 14-20. Prior to 1851 Victoria was part of the colony of New South Wales. The earliest evidence of this policy identified by Cabena, were written Royal Instructions to the Governor of the British colony of Nova Scotia, in 1719.
[984] See Cabena, above n 960, 16, fn 14.
[985] Ibid. Issued in 1825, the instructions included reserving 'lands in the neighbourhood of navigable streams or the sea coast' for public purposes.
[986] Ibid.
[987] Ibid. Cabena cited as authority *Historical Records of Australia* v.10 p 434, Earl Bathurst to Sir Thomas Brisbane.

These Instructions applied a Crown policy which had been in use in other Crown colonies, but the widths of lands to be reserved under this Crown policy varied between colonies.[988]
In 1826 similar Instructions were issued to Governor Darling[989] and the policy was proclaimed in a public notice in the *Sydney Gazette and New South Wales Advertiser*

> "The government will further reserve to itself all land within One Hundred Feet of High Water mark on the Sea Coast, Creeks, Harbours and Inlets."[990]

It is not surprising that this policy was adopted because a controversial case over the ownership of coastal land was decided in England in 1824,[991] and confirmed on appeal in 1828.[992] Thus the Crown policy of retaining ownership of coastal lands to allow public use, was confirmed.[993]
This policy remained in force in the 1830s,[994] during the colony's exploration by early settlers[995] and was affirmed in 1840,[996] but was rescinded by the Colonial Secretary in 1841.[997]

Following Surveyor General Thomas Mitchell's advice to the Colonial Secretary that "the reservation of the Shore may indeed be considered an important public purpose," the policy was reinstated in 1843, 'not as a universal principle' but at the Governor's discretion.[998] Hence due to its intermittent application,[999] the pattern of land release in the colony was not uniform: some parcels of coastal land abut a Crown reserve, while others are bound by MHWM.[1000]

This policy of reserving coastal lands from sale and dedicating them for public purposes was subsequently pursued in New South Wales after the institution of colonial self-government in

[988] Ibid 14. Cabena noted that Royal Instructions issued to the Governor of Nova Scotia in 1719, sought the reservation of 'at least two hundred yards distant from the sea or harbour'.
[989] Ibid 16.
[990] *Sydney Gazette and New South Wales Advertiser*, 22 August 1828. Cabena, above n 960, 16.
[991] See *Rex v Yarborough* (1824) 3 B&C 91; 107 ER 668. The case was remarkable because it resulted in coastal land thought to be held by the King, being successfully claimed by a subject.
[992] See *Gifford v Lord Yarborough* (1828), 5 Bingham 163; 2 Bligh NS 147; 4 ER 1087.
[993] The policy was published in August 1828.
[994] In 1831 the Crown policy was amended to reserve coastal lands from sale unless required for 'commerce or navigation'. See Cabena, above n 960, 16.
[995] Ibid 17. It appears that the Crown intended to prevent similar private claims of land in the colonies, and maintain Crown control over strategically important, or commercially valuable locations, in the 'new' land gained through colonization.
[996] Ibid 18. Cabena cited the Surveyor-General Circular 40/289, SA Perry to Assistant Surveyor Townsend, 7.8.1840. PRO Series 97/1.
[997] Ibid. Cabena reported that the policy was put in abeyance 'when new land regulations were received from England.'
[998] 'whenever it may be thought necessary'. Cabena, above n 960, 18. According to Cabena, the policy's application in Victoria after 1851, was different, with large areas of coastal land being reserved.
[999] Initially, from 1825-1841, in abeyance (1841-1843), then discretionary application (1843 ->).
[1000] The application of the policy of reserving land 100 feet from high water mark to a grant of land made in 1829 and re-granted in 1840 was the central issue in *Attorney General (NSW) v Dickson* (1904) AC 273. The Privy Council ruled that the re-grant in 1840 had included the land 'down to the water's edge'. See also *McGrath v Williams* (1912) 12 SR (NSW) 477, where the evidence was that the original Crown reserve had been wholly eroded away, and the Crown grant of land had been made in 1843.

1856, in the *Crown Lands Alienation (Public Purposes) Act 1861* (NSW), in response to public statements asserting a public right of access to the beaches and coasts of New South Wales.[1001] As well as authorizing its sale, the Act authorized the reservation of Crown land from sale and dedication for a range of 'public purposes'.[1002] Subsequently, calls to reserve lands for recreational purposes, were repeatedly made.[1003] Under this Act, coastal lands reserved from sale by the Crown, when adjoining lands were sold, were subsequently gazetted as dedicated for public purposes, while other reserved lands were sold, or leased to adjoining landowners.[1004] The Act also afforded the Governor discretion in removing the reservation of Crown land from sale.

> 'The Governor may with the like advice rescind any reservation of water frontage on the sea coast or any bay inlet harbour or navigable river or land adjoining such frontage contained in any Crown grant either wholly or to such extent and subject to such conditions or restrictions as shall be deemed advisable … on payment of an adequate money consideration … not less than the minimum upset price per acre...[1005]

However explicit constraints on this discretion were also stated

> …nothing contained in this clause shall empower the Governor to grant any land below high-water mark or to interfere with any land used as a public thoroughfare or with any land set apart and dedicated for any public purpose.[1006]

In this prohibition on granting lands below MHWM, the colony's responsible government formalized earlier Crown policy and codified the common law as it then stood in England.[1007]

Provisions for reserving and dedicating Crown land for public purposes were included in the *Crown Lands Act 1884* (NSW)[1008] and the post-federation *Crown Lands Consolidation Act 1913* (NSW).[1009] Note that in the period between these statutes, the power to dedicate lands for public purposes had passed from the colony's Governor, to the Minister. Important policies for public access to and use of Crown lands were reiterated in a new statute, enacted in 1989.

[1001] Ford, 'The Battle', above n 325, 262.
[1002] including for 'public health recreation convenience or enjoyment'. See section 5 *Crown Lands Alienation Act 1861* (NSW). See 'Acts as Made' at < http://www.austlii.edu.au/au/legis/nsw/num_act/ >
[1003] Ford, above n 325, 257, quoted a letter from Waverley Council to Secretary of Lands, 7 April 1864.
[1004] Ibid 256. Ford noted the subsequent struggle of the NSW government to retain control over an area of foreshore reserve adjacent to private landowners, at Nelson's Bay (now Bronte Beach).
[1005] See section 12 *Crown Lands Alienation (Public Purposes) Act 1861* (NSW).
[1006] Section 1 *Crown Lands Alienation (Public Purposes) Act 1861* (NSW).
[1007] Consequently, unlike in England, in New South Wales few, if any, land grants included land below the high water mark. As a result, the operation of the *jus publicum* over the *jus privatum* in coastal lands, under the English common law, was made wholly unnecessary in the colony.
[1008] Section 104 provided that 'The Governor may by notice in the Gazette reserve or dedicate Crown Lands …. for the public interest for any …public quay or landing-place …. or other institution for … public health or recreation convenience or enjoyment… public baths or … other public purpose.
[1009] Section 24 stated uses for which the Minister's dedication of Crown lands would be in the public interest. Relevantly, it referred to land for '…permanent common … public health or recreation convenience or enjoyment … public baths or for any other public purpose.'

Crown Lands Act 1989 (NSW)

The *Crown Lands Act 1989* (NSW) replaced the *Crown Lands Consolidation Act 1913* (NSW) with a modern statute and new regulations streamlined Crown land administration procedures.[1010] It recognized public rights of access to and use of the foreshores, in its objects,[1011] and Guiding Principles.[1012] Powers to dedicate or reserve Crown land for public purposes,[1013] and to manage them, were updated.[1014] The forms of Crown tenure offered were clarified and the 'right to convert' Crown leasehold lands into freehold title was reduced. The sale[1015] or lease[1016] of Crown land was permitted under certain conditions, and the 'care, control and management' of Crown reserves were vested in local councils.[1017] Consequently, many coastal Crown reserves were included in councils' strategic vegetation mapping, estuary management plans, reserve management strategies or coastal management plans.[1018] Other coastal reserves[1019] were the subject of development proposals.[1020] However the *CLA 1989* did not readily permit private use of Crown lands dedicated for public purposes.[1021]

Crown Land Management Act 2016 (NSW)

Recently, the law governing Crown lands was again revised with the passage of a new statute,[1022] which continued many provisions in the former Act,[1023] modified several 'problematic' provisions,[1024] and created new provisions.[1025] While a comprehensive review of

[1010] *Crown Land Regulations 1990* (NSW).
[1011] See s 10 (e) the reservation or dedication of Crown land for public purposes and the management and use of the reserved or dedicated land,'*Crown Lands Act 1989* (NSW) [hereafter *CLA 1989* (NSW)].
[1012] See s 11(c) *CLA 1989* (NSW) 'that public use and enjoyment of appropriate Crown land be encouraged'.
[1013] See s 80, for power to dedicate land, and s 87 *CLA 1989* (NSW) re powers to reserve land.
[1014] See section 11, Principles and ss 112 - 116 *CLA 1989*, re plans of management or Crown land.
[1015] Sections 75, 76, 77 *CLA 1989* (NSW).
[1016] Sections 41 – 44AA *CLA 1989* (NSW).
[1017] Sections 75 – 77 *CLA 1989* (NSW).
[1018] Eg Tweed Coast Regional Crown Reserve Plan of Management 2008; Tweed Shire Council *Coastal Zone Management Plan*
[1019] Eg Fingal Head, Tweed Shire and Broken Head Reserve, Byron Shire.
[1020] Many development proposals were highly controversial. See Independent Commission Against Corruption *Report of Inquiry into North Coast Land Dealings* (ICAC, 1990).
[1021] See *Friends of King Edward Park Inc v Newcastle City Council* (No 2) [2015] NSWLEC 76 [hereafter *FoKEPI v NCC* [2015].
[1022] The *Crown Land Management Act 2016* (NSW) [hereafter, *CLMA 2016* (NSW)].
[1023] For eg the authority to grant leases, and licences over Crown land continued, albeit under updated conditions. See ss 5.16 – 5.20 and ss 6.21 – 6.28 *CLMA 2016* (NSW).
[1024] It appears that the new Act's provisions regarding changes of purposes and approval of activities on Crown land dedicated for public purposes, were intended to overcome the legal obstacles to permitting new commercial uses of public parks and reserves, highlighted in the *FoKEPI v NCC* [2015] case. The court found against the Minister's approval of a proposed development of the King Edward Headland Reserve in Newcastle, on the basis that the public recreation reserve could not be developed for a purpose which excluded the public.

all its provisions is not necessary here, the Act provided many indications of the weight attributed by the legislature to competing rights over coastal land.[1026] I next describe those provisions which refer to public rights of access, public interests in coastal lands, private ownership of land, or affect private property rights.

Relevant provisions

Like its predecessor, this Act includes a statement of Objects and 'principles of Crown land management' to guide its implementation.[1027] The Objects encompass many public interests,[1028] and intend that Crown land management be "for the benefit of the people of New South Wales."[1029] These principles recognize diffuse, non-use elements of the public interest,[1030] and seek to encourage 'public use and enjoyment of appropriate Crown land'.[1031] Another part of the statutory framework, the Crown land management rules,[1032] also include public access,[1033] and other elements of the public interest among matters for which rules may be made. [1034]

Private interests are accommodated[1035] in provisions governing the sale[1036] of, and leases, licences and special holdings over, Crown lands.[1037]

The Act restates the Minister's powers to dedicate and reserve Crown land 'for one or more purposes specified in the notice',[1038] but this statement of power lacks the former emphasis on 'public purposes'.[1039]

[1025] The Minister has wide discretionary powers to deal with Crown land. See s 5.3 *CLMA 2016* (NSW).
[1026] The Fifty-Sixth Parliament of New South Wales (May 2015 – February 2019).
[1027] See s 1.3 Objects, and s 1.4 Principles of Crown land Management, *CLMA 2016* (NSW).
[1028] The objects require 'environmental, social, cultural heritage and economic considerations to be taken into account' See s.1.3(c) *CLMA 2016* (NSW).
[1029] See s 1.3 (d) *CLMA 2016* (NSW). Further, object (e) aims 'to facilitate use of Crown land by Aboriginal people of New South Wales because of the spiritual, social, cultural and economic importance of land' to them.
[1030] See 'environmental protection' in s 1.4 (a), and the conservation of natural resources (including water, soil, flora, fauna and scenic quality) in s 1.4 (b), and the use and management of Crown land and resources 'in such a way' that they 'are sustained in perpetuity' in s 1.4 (e) *CLMA 2016* (NSW).
[1031] See s 1.4(c) *CLMA 2016* (NSW). Note the qualification 'appropriate' Crown land.
[1032] See s 3.15 *CLMA 2016* (NSW) 'Crown land management rules'.
[1033] See s 3.15 (5) (i) *CLMA 2016* (NSW) 'public access to, and the use (including by the Aboriginal people of the State) of, dedicated or reserved crown land'.
[1034] See s 3.15 (5) (h) *CLMA 2016* (NSW) 'environmental standards or considerations', and s 3.15 (5) (k) compliance with heritage requirements' and 'other requirements for the protection of dedicated or reserved Crown land.'
[1035] See s 1.4 (f) *CLMA 2016* (NSW). Private, commercial uses of Crown lands are now possible under s 1.4 (d) 'that, where appropriate, multiple use of Crown land be encouraged…'.
[1036] See s 5.3 (3) re Minister's power, and ss 5.9 – 5.15 *CLMA 2016* (NSW).
[1037] See ss 5.16 – 5.20 (leases); ss 5.21 – 5.28 (licences); ss 5.29 – 5.32 *CLMA 2016,* (special holdings).
[1038] See s 2.3 Minister may dedicate Crown land, and s 2.8 may reserve Crown land, *CLMA 2016* (NSW).

Moreover, Crown lands already dedicated and reserved for public purposes, may be added to,[1040] or subtracted from,[1041] re-dedicated or reserved again,[1042] but not sold,[1043] and the purposes for which they are managed may be extended, altered or removed.[1044]

When operating their powers however, the Minister must, at relevant times, be satisfied their actions are 'in the public interest'.[1045] Highly relevantly, a new provision declares that the dedication or reservation of Crown land … for 'use by members of the public does not:

> (a) prevent its use for commercial purposes,
> (b) prevent fees being charged of its use, or
> (c) entitle members of the public to have unrestricted access to the land…'[1046]

The Act provides for private land being acquired for public purposes[1047] using an existing statute,[1048] and allows dedicated or reserved Crown lands to be managed by a non-council manager, such as a corporation,[1049] with extensive powers to control public access and use.[1050] A 'community engagement strategy' is required to inform the public about dealings in Crown land,[1051] and documents relevant to its management must be publicly available.[1052] Also relevant are provisions which continue existing private interests in Crown land, leases, licences or special holdings,[1053] and create new private interests.[1054] However leases and licences over Crown land are limited in scope and extent,[1055] often temporary,[1056] and may be revoked.[1057]

[1039] Under savings and transitional provisions of the new Act, dedications and reservations of Crown lands made under the prior statute continued in force, and plans of management then current continued to have effect. See Schedule 7 clause 17 (1) and (2) *CLMA 2016* (NSW).
[1040] See s 2.4 and s 2.9 *CLMA 2016* (NSW).
[1041] See s 2.7 Revocation of dedication and s 2.11 Revocation of reservation, *CLMA 2016* (NSW).
[1042] See s 2.6 *CLMA 2016* (NSW).
[1043] See s 5.3 (5) *CLMA 2016* (NSW).
[1044] See section 2.14 – s 2.16 *CLMA 2016* (NSW).
[1045] The public interest test applies to the Minister's powers to dedicate Crown land under s 2.3 (2)(b), to reserve lands per s 2.8 (2)(b); for additional purposes s 2.14 (2)(b); altered purposes per s 2.15 (2)(b); grant a 'relevant interest' in Crown land per s 18 (2)(c); or a secondary interest, under s 2.19 (2)(a) *CLMA 2016* (NSW).
[1046] See s 2.17 *CLMA 2016* (NSW).
[1047] See s 3.28A, s 4.2 *CLMA 2016* (NSW).
[1048] The *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
[1049] See s 3.3 *CLMA 2016* (NSW). Others able to be appointed as Crown land manager are Local Aboriginal Land Councils, a body corporate under the *Native Title Act 1993* (Cth), a statutory land manager, an association, a body corporate constituted under another Act, or the head of a government sector agency.
[1050] See ss 3.24 – 3.31 *CLMA 2016* (NSW). S 9.25 (2) authorizes Regulations for (a) use and enjoyment of Crown land; (f) charging fees for entry; (g) the closure of Crown land to the public and other persons.
[1051] See sections 5.4 – s 5.8 *CLMA 2016* (NSW).
[1052] Most notices require publication in the Gazette, see for eg s 2.3 (1) notice of the dedication of Crown land, while a copy of other documents is to be published on the Department's website: eg Plans of Management, under s 3.40 and community engagement strategies under s 5.5 (5) *CLMA 2016* (NSW).
[1053] See *CLMA 2016* (NSW) Schedule 7 Savings and transitional provisions, cl 5 (2) Continued persons.
[1054] Leases may be granted by the Minister over Crown land under s 5.17, licences may be granted under s 5.22 and special purposes holdings may be granted under s 5.30 *CLMA 2016* (NSW).
[1055] See s 5.17 *CLMA 2016* (NSW): a dealing in land 'is a lease even if exclusive possession of the land is not conferred' and s 5.22: a dealing 'is a licence even if exclusive possession of the land is conferred…'

The Act also authorizes easements[1058] for private[1059] or public purposes,[1060] for public access,[1061] conditions of sale,[1062] public positive covenants to protect public interests in Crown land,[1063] or other land.[1064] Easements affect owners' rights slightly,[1065] but not outside the easement area.[1066]

Also relevant to competing private and public interests in coastal land are provisions which permit the Minister to withdraw Crown land from a holding, for public purposes,[1067] protect public interests in Crown lands from prohibit pollution or contamination,[1068] authorize an order to stop an activity 'that poses a threat to public safety or the environment',[1069] and impound animals trespassing on Crown land.[1070] Relevant too are provisions on 'unauthorised use' of Crown land;[1071] improper use of vehicles;[1072] and those authorizing removal of 'persons' from Crown land through a Court order,[1073] or by a Crown land manager's employee.[1074]

Authorized officers have extensive powers, to enter and search leased Crown land,[1075] private land,[1076] and over vehicles.[1077] 'Things' seized from Crown land may be returned,[1078] or retained

[1056] While a lease over Crown land may be issued for a maximum term of 100 years under s 5.16, a lease over a specified part of the bed of tidal waters, to permit the construction of a private jetty is limited to a maximum period of twenty years, under Crown policy, but may be renewed repeatedly.
[1057] Licences may be revoked by the Minister, without compensation. See s 5.23 *CLMA 2016* (NSW).
[1058] See s 5.47 *CLMA 2016* (NSW).
[1059] Though easements generally require the burdened landowner's consent, (see s 5.48) the Minister may create easements without their consent to enable access or 'to preserve or protect' the Crown's interest in the land, see s 5.49 *CLMA 2016* (NSW).
[1060] Local councils may seek the creation of easements over Crown land to allow the council to 'enter Crown land and carry out work' such as the construction and maintenance of water supply, sewerage and stormwater drainage. See s 5.50 *CLMA 2016* (NSW).
[1061] See s 5.51 *CLMA 2016* (NSW). An easement for public access 'confers on the public a right to enter the land and carry on any activity' other than a 'prescribed activity'. See s 5.51 (4) *CLMA 2016* (NSW).
[1062] See s 5.11 and s 5.12 *CLMA 2016* (NSW). Under s 5.11 (2) the Minister may include 'any conditions the Minister determines' to a contract of sale or an application to purchase Crown land.
[1063] See s 5.56 (1) *CLMA 2016* (NSW). See also s 88D of the *Conveyancing Act 1919* (NSW).
[1064] Covenants may be created over other land under s 88E of the *Conveyancing Act 1919* (NSW). See s 5.56 (2) *CLMA 2016* (NSW). A covenant created under s 5.56 'extends to any separate lots created by a subsequent subdivision of the land'. See s 5.56 (3) *CLMA 2016* (NSW).
[1065] since the Minister's consent is required to erect any structure, See s 5.52 (1) *CLMA 2016* (NSW).
[1066] A landholder may recover damages from a person using an easement for public access who damages their property. See s 5.52 (4) *CLMA 2016* (NSW).
[1067] A holding may be a lease, licence or special holding. See s 7.8 *CLMA 2016* (NSW).
[1068] '… or any waters in, on or under the land'. See s 9.3 *CLMA 2016* (NSW). The Act allows the making of restoration orders 'to prevent, control, abate or mitigate' harm to Crown land, make good damage and 'prevent the continuance or reoccurrence of the offence'. See s 11.11 *CLMA 2016* (NSW).
[1069] See s 9.18 *CLMA 2016* (NSW).
[1070] See s 9.24 *CLMA 2016* (NSW).
[1071] See s 9.2 *CLMA 2016* (NSW).
[1072] See s 9.6 *CLMA 2016* (NSW).
[1073] See s 9.11 *CLMA 2016* (NSW).
[1074] See s 9.12 *CLMA 2016* (NSW).
[1075] These powers extend to Crown land, land 'subject to land use restriction', such as a public positive covenant, and to any other land, in order to gain access to Crown land or land 'subject to land use restriction'. See s 10.15 (1) *CLMA 2016* (NSW).

by the Crown.[1079] Compensation is authorized for the State's acquisition of 'property',[1080] under some provisions,[1081] but is not available for other actions.[1082] Three miscellaneous provisions also address private property rights. The first denies claims title to Crown land based on adverse possession,[1083] a second excludes minerals from land sold or leased,[1084] and a third restates the limits on rights over land bounded by lakes, rivers or roads.[1085]

Regulations authorized by the Act for the 'care control and management' of Crown lands,[1086] may include their 'use and enjoyment'[1087] entry fees,[1088] closure to the public,[1089] and commercial use.[1090] Hence the *Crown Land Management Regulation 2018* (NSW)[1091] is also relevant. It limits public access;[1092] allows lands dedicated for public use to be 'set aside' for certain uses,[1093] authorizes entry fees,[1094] states conditions of entry,[1095] and prohibits some activities.[1096]

I next consider the indications of the relative weight attributed to competing private and public rights or interests, by the legislature through relevant provisions in this field of law.

3.2 Indications of relative weight

Instructions to the colony's Governors and later statutes demonstrate the Crown's and legislature's intention that public rights, public purposes and other public interests have priority over private interests in NSW coastal lands. This priority was restated in many statutes over decades, but the public interest did not 'trump' private interests altogether, since these statutes

[1076] Authorised officers may take a range of actions upon gaining entry. See s 10.17 *CLMA 2016* (NSW).
[1077] See s 10.26 *CLMA 2016* (NSW).
[1078] See 10.29; seized things must be returned, see s 10.30; or certified as unable to be returned, see s 10.31; or may be returned on the court's order, see s 10.32 *CLMA 2016* (NSW).
[1079] A seized thing may be forfeit per s 10.33, or dealt with by the Crown per s 10.34 *CLMA 2016* (NSW).
[1080] See s 2.24 *CLMA 2016* (NSW).
[1081] For compensation re native title interests, see s 8.12; to make good damage sustained in gaining entry, 'unless the occupier obstructed or hindered' the authorised officers, see s 10.22 *CLMA 2016* (NSW).
[1082] Eg actions of Crown land managers, see s 3.46; or licence revocation, s 5.23 (2) *CLMA 2016* (NSW).
[1083] See s 13.1 *CLMA 2016* (NSW).
[1084] See s 13.2 *CLMA 2016* (NSW).
[1085] See s 13.3 (1) and (2) *CLMA 2016* (NSW), s 13.3 (3) restated the negation of the doctrine of accretion over non-tidal lakes, introduced in 1931, and restated in s 172 (4) *Crown Lands Act 1989* (NSW).
[1086] See s 9.25(1) *CLMA 2016* (NSW).
[1087] See s 9.25 (2)(a) *CLMA 2016* (NSW).
[1088] See s 9.25 (2)(f) *CLMA 2016* (NSW).
[1089] See s 9.25 (2)(g) *CLMA 2016* (NSW).
[1090] See s 9.25 (2)(h) *CLMA 2016* (NSW).
[1091] made under s 9.25 *CLMA 2016* (NSW). See *Crown Land Management Regulation 2018* (NSW) at http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_reg/clmr2018290/ [hereafter *CLMR 2018* (NSW)].
[1092] See Regulation 5 *CLMR 2018* (NSW).
[1093] Regulation 6 *CLMR 2018* (NSW).
[1094] Regulation 7 *CLMR 2018* (NSW).
[1095] Regulation 8 *CLMR 2018* (NSW).
[1096] Regulations 9 and 13 *CLMR 2018* (NSW).

also permitted Crown lands sale or lease.[1097] Further, statutory powers to reserve and dedicate Crown lands for public purposes, and manage them in the public interest show the significant weight attributed by the legislature over decades to public rights and interests in coastal lands.

The primacy of public rights under the *CLA 1989*, was demonstrated in a 2015 case, where the court found the private use of a park permitted by the Minister, was not properly authorized.[1098] Hence public use of land dedicated for public recreation did 'trump' private interests in the park.

However the legislature's enactment of the *CLMA 2016* (NSW), ostensibly to manage the State's Crown lands in the public interest,[1099] explicitly permits commercial uses of public reserve land which exclude the public,[1100] that were impermissible under the *CLA 1989*.[1101] Further, provisions authorizing non-council managers' control and management of Crown land[1102] create significant concessions to private interests,[1103] which may be a precursor for the sale of some privately-managed Crown lands to private corporations.

Provisions which confer wide ministerial power and discretion to add, amend or delete purposes for dedicated Crown lands,[1104] allow their use by private interests,[1105] and 'set aside' parts of such lands for 'certain uses',[1106] overcome legal and administrative difficulties in permitting commercial use of Crown lands dedicated for public use, highlighted in the *FoKEPI* decision.

Other evidence of a shift in emphasis can be seen in provisions which permit a Crown land manager to charge an entry fee,[1107] restrict or suspend public access,[1108] and remove persons from Crown land[1109] and hence limit 'public rights' to enter and use coastal Crown reserves. Thus it would appear that in the *CLMA 2016* (NSW) and its Regulations,[1110] the legislature increased the weight it attributed to private interests and uses of coastal Crown lands and

[1097] See for ss 36 – 40 *CLA 1989* (NSW) re sale of land; ss 41 – 44E re leases, and ss 45 – 50 re licences.
[1098] *See FoKEPI v NCC* [2015].
[1099] See s 1.3 Objects of the *CLMA 2016* (NSW), and s 1.4 Principles of Crown land management.
[1100] See s 2.17 *CLMA 2016* (NSW).
[1101] Such as *FoKEPI v NCC* [2015]. Other provisions which overcome the obstacles to private commercial use of public lands identified in the *FoKEPI* case are s 3.33 which allow a plan of management to be prepared for uses and purposes 'in addition to the purposes for which it is currently dedicated or reserved'; and s 3.38 which allow land to be used for purposes specified in the plan of management, additional to the purpose for which the land is dedicated or reserved.
[1102] See ss 3.24 – 3.31 *CLMA 2016* (NSW).
[1103] Non-council Crown land managers have powers to enter into leases, licences and easements and with the Minister's consent can exercise the Minister's functions. See ss 3.26 and 3.27 *CLMA 2016* (NSW).
[1104] See sections 2.3 – s 2.16 *CLMA 2016* (NSW).
[1105] See s 2.17 *CLMA 2016* (NSW).
[1106] See s *CLA 1989* (NSW), Reg 6 *Crown Land Management Regulation 2018* (NSW).
[1107] See s 9.25(2) (f) *CLMA 2016* (NSW).
[1108] See s 9.25(2) (g) *CLMA 2016* (NSW). See also Reg 5 *Crown Land Management Regulation 2018* (NSW) 'Public Access to Dedicated or Reserved Crown Land'.
[1109] See s 9.11 and s 9.12 *CLMA 2016* (NSW).

diminished the weight of public rights by limiting public access and use through regulation. The new Act makes ministerial decisions to allow temporary commercial use of Crown land permissible, and administratively simple, but a 'public interest' test still applies. Where private use of dedicated Crown lands, or parts of Crown lands, are permitted, public uses may continue elsewhere on the land at that time, or when that part is not in private use. Thus in the *CLMA 2016* (NSW), the legislature intended that private uses of Crown lands dedicated for public use would be permissible, but would co-exist with public use, as far as possible.

I conclude, from my review of this field of law, that public rights to use Crown lands have had priority over private interests for decades, but have not 'trumped' all private interests. The new *CLMA 2016* (NSW) increased the private interests in Crown land, by permitting private use of some land dedicated for public use. However these private uses do not 'trump' public rights entirely, since public use continues elsewhere and revives when the private use concludes.

4. Coastal lands protection and management

I next look for evidence of private property rights' ability to 'trump' public rights in coastal lands in a second field of law: the management of land in the State's coastal zone.

4.1 Relevant statutes

This field of law is especially relevant since the regulatory framework originally created by the *Coastal Protection Act 1979* (NSW), as amended[1111] and substantially continued by the *Coastal Management Act 2016* (NSW),[1112] governs the management of all lands in the 'coastal zone'.[1113]

Coastal Protection Act 1979 (NSW)

The *CPA 1979* (NSW)[1114] was originally directed towards broad public interest objectives.[1115]

[1110] S 9.25 *CLMA 2016* (NSW) authorizes the making of regulations for the management of Crown land.
[1111] [Hereafter *CPA 1979* (NSW).] The *CPA 1979* was amended in 1998, 2002, 2010 and 2012. Relevant amendments are discussed in the following sections.
[1112] [Hereafter the *CMA 2016* (NSW).]
[1113] Section 4 *CPA 1979* (NSW) defined the 'coastal zone' as: 'a) the area within the coastal waters of the State as defined in Part 10 of *the Interpretation Act 1987* (including any land within those waters), and (b) the area of land and the waters that lie between the western boundary of the coastal zone (as shown on the maps outlining the coastal zone) and the landward boundary of the coastal waters of the State, and (c) the seabed (if any) and the subsoil beneath, and the airspace above, the areas referred to in paragraphs (a) and (b).
[1114] For Hansard reports of the passage of the Bill see the Index to New South Wales, *Parliamentary Debates* Legislative Assembly, *First Session of the Forty-Sixth Parliament 1978-79.* Vol. 141-146.

It had five parts,[1116] and unusually, was administered by two ministers.[1117] Its provisions set out arrangements for a new public authority,[1118] procedures for the Minister's concurrence' in approving development in the coastal zone,[1119] and for authorizing public expenditure.[1120] Privately and publicly owned lands fell within the 'coastal zone' defined by the Act, and the provisions requiring ministerial concurrence,[1121] applied to all lands in the coastal zone. The Act authorized the construction of seawalls and other structures, but 'works' were only part of the Act's scope. The focus of the protection was the coastal environment, not 'private property'.

That the government intended to protect the coastal environment from the adverse impacts of development, was made plain by Minister Ferguson's Second Reading Speech. He said

> "experience has shown conclusively that our beaches and coastline cannot be taken for granted, and that careless development and misuse can endanger a fragile, natural system."[1122]

He explained the problem being addressed by the Bill: the government's recognition of a "serious long term erosion trend" and the threat posed by heavy seas to dwellings in some locations "because they were built too close to the shoreline".[1123] The minister emphasized that his role was to ensure expert coastal engineering advice was considered by public authorities when assessing development applications in hazardous areas.[1124]

The Act authorized the Coastal Council to recommend land for purchase by the State government if required,[1125] but did not refer to private property rights at all. The minister's

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[1115] These were "to constitute the Coastal Council of New South Wales and to specify its functions; to make provisions relating to the use and occupation of the coastal region; and to facilitate the carrying out of certain coastal protection works." See the explanatory note *Coastal Protection Act 1979* (NSW).
[1116] Part 1 encompassed Preliminaries, Part 2 constituted the Coastal Council of New South Wales; Part 3 provided for Use of the Coastal Zone; Part 4 related to Carrying out of Works in the coastal zone by the Minister; and Part 5 General, authorised the making of Regulations. A lengthy Schedule 1 cited the Central Mapping Authorities map-sheet numbers which contained lands designated as within the 'coastal zone'. Additional Parts were added by subsequent amending legislation, discussed below.
[1117] Part 2 by the Minister for Planning and Environment, and Parts 3 and 4 by the Minister for Public Works. See Acts as made: at < http://www5.austlii.edu.au/au/legis/nsw/num_act/cpa1979n13237/ >.
[1118] The Coastal Council of New South Wales, see ss 6 – 35 *Coastal Protection Act 1979* (NSW).
[1119] See ss 36 – 53 *CPA 1979*. The Minister's concurrence role was triggered, under s 38(1), if the Minister formed the opinion that, as advised from time to time by the Minister to the public authority, the development or the use or occupation may, in any way (c) adversely affect the behaviour or be adversely affected by the behaviour of the sea or an arm of the sea …. or (d) 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 …..
[1120] Funds were able to directed to a diverse range of works "for the preservation, protection, maintenance, restoration or improvement of the coastal zone", or any part of it. See s 55 *CPA 1979* (NSW).
[1121] '… development which may "adversely affect the behaviour or be adversely affected by the behaviour of the sea…" see s 38 *CPA 1979* (NSW).
[1122] See New South Wales *Parliamentary Debates*, Legislative Assembly, 20 February 1979, 2096-7.
[1123] Ibid.
[1124] Ibid. Areas such as "… dunes and erodable lands adjacent to the open coast."
[1125] See s 28 (2) (c) *CPA 1979* (NSW). This provisions indicates that the legislature foresaw the potential need to acquire private land, where this was necessary for public purposes.

references to rights concerned rights of appeal and rights of local governments.[1126] Concluding his speech Minister Ferguson noted that the 'basic aim' of the legislation was "to protect the public" from development approvals which could be "multimillion dollar disasters".[1127]

The *CPA 1979* was amended several times, however the history of the amending Acts cannot be recounted here, so I provide a snapshot of the Act, as amended, prior to its recent repeal,[1128] focusing on key elements of its statutory framework relevant to competing rights. I then consider how these elements have been continued or reworked in the *CMA 2016.*

Objects of the Act

Though the Act's purposes were stated on its introduction, objects were first inserted,[1129] in 2002. [1130] The objects aimed to guide and direct the Act's administration, assist the court in interpreting key provisions, and recognized diverse public and private interests in the coastal zone through an over-arching object,[1131] and eight supplementary objects. Two objects related to competing rights.[1132] Object 3 (d) "promote public pedestrian access to the coastal region and recognise the public's right to access",[1133] made clear the legislature's intention that "public access" be encouraged and facilitated, and extended to the larger area of "the coastal region", as defined.[1134] Further, by using "recognize" the legislature clearly intended that the common law public right be 'visible' and prominent in the statutory framework, and unmodified by the Act.

In contrast, no object referred to protecting private property or private property rights *per se*. Indeed, object (e) providing for the "acquisition of land" for public purposes,[1135] was the legislature's clearest indication of the puisne status of private property 'rights' relative to the

[1126] See New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 February 1979, 2098 (Mr Ferguson). First he advised that the legislation did not affect "the rights of appeal of a person against the decision of an approving authority", a statutory procedural right to an appeal. Second, he dismissed the proposition advanced by Members of the Opposition that the Act would "override the rights of local government", noting that public authorities such as local government still had a major role to play.
[1127] Ibid 2103.
[1128] On 3 April 2018, by s 35 of the *Coastal Management Act 2016* (NSW). See < http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/repealed_act/cpa1979210/notes.html >
[1129] as a new s 3 of the *CPA 1979* (NSW).
[1130] by the *Coastal Protection Amendment Act 2002* (NSW). See New South Wales, *Parliamentary Debates* Legislative Assembly, 20 March 2002, 811 (Mr Aquilina).
[1131] This goal was "to provide for the protection of the coastal environment of the State for the benefit of both present and future generations."
[1132] See s 3 (d) and (e) *CPA 1979* (NSW).
[1133] Use of the word "pedestrian" was deliberate, since it unequivocally excluded use of recreational vehicles such as dune buggies and motorbikes. See *Recreational Vehicles Act 1983* (NSW) and *Recreational Vehicles Amendment Act 1988* (NSW) both repealed.
[1134] See s 4 Definitions *CPA 1979* (NSW).
[1135] See s 3 (e) *CPA 1979* (NSW), 'to provide for the acquisition of land in the coastal region to promote the protection, enhancement, maintenance and restoration of the environment of the coastal region.'

wider public interest in the coastal zone's ecologically sustainable management. By authorizing future acquisitions of private land to enable the Act's successful implementation, the legislature clearly intended that this public purpose continue to prevail in the future.

The Act's objects were augmented by two new objects,[1136] in 2010.[1137] Their inclusion did not affect private or public rights, but signaled the government's and legislature's concerns about climate impacts on coastal management and coastal areas most at risk from extreme storms.

Coastal hazard management via CZMPs

The 2002 amendments also mandated the preparation of coastal zone management plans (CZMPs) to manage coastal hazards,[1138] and other public interests in privately and publicly owned coastal land.[1139] Relevant procedures to complete these plans, described in the *Coastline Management Manual* (1990),[1140] were also authorized.[1141] Further, coastal protection works were required to be consistent with a CZMP,[1142] the subject of a development application,[1143] environmental impact assessments,[1144] and receive local and state government approval.[1145] These provisions show it was the legislature's intention that local councils manage coastal hazards through strategic planning, not landowners under a claimed private property right.

Modification of the common law doctrine of accretion

Significantly, two new provisions modified landowners' private property rights. The first, section 55M, limited a landowners ability to obtain a development consent for coastal protection works by prohibiting a consent authority from granting approval if the works were likely to

[1136] See s 3 (h) 'to encourage and promote plans and strategies for the adaptation in response to coastal climate change impacts, including projected sea level rise', and s 3 (i) 'to promote beach amenity'.
[1137] by the *Coastal Protection Amendment Act 2010* (NSW).
[1138] Coastal hazards were to be addressed when preparing a CZMP under s 55C (1) (d) *CPA 1979* (NSW).
[1139] See s 55C (1) (a) protecting and preserving beach environments and beach amenity, (b) works for the protection of property affected or likely to be affected by beach erosion, (c) maintenance of public access to the beach, (e) the management of estuary health, (f) impacts from climate change, and (g) arrangements for maintaining any coastal protection works proposed.
[1140] New South Wales Government, *Coastline Management Manual* (PWD, 1990) ISBN 0730575063.
[1141] Councils were directed to comply with the Manual in a Direction issued per s117 *EPAA 1979* (NSW).
[1142] See s 55K (1)(a) *CPA 1979* (NSW). A breach of a CZMP was an offence.
[1143] See s 55K (1)(b) *CPA 1979* (NSW).
[1144] Assessments of environmental impact were required under s 38(1) (c) and (d), s 39(4)(a) and (b) and s 44(a) and (b) of the *CPA 1979* to determine if the proposed works were likely to '(a) adversely affect the behaviour or be adversely affected by the behaviour of the sea or an arm of the sea … 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 …..' Consideration of likely impacts of works on other aspects of the coastal environment were also required under cl 8(e)-(n) of *SEPP 71 – Coastal Protection 2002* (NSW).
[1145] See ss 38, 39 and 80 of the *EPAA 1979* and s 55M *CPA 1979* (NSW).

'unreasonably limit public access to a beach or headland' or pose a threat to public safety. [1146] The second, s 55N, modified landowners' right to claim ownership of new land formed against their land under the doctrine of accretion,[1147] to protect public access along the foreshore.[1148] The Court,[1149] Registrar-General of Land Titles,[1150] and relevant Minister,[1151] were prohibited from granting landowners' applications claiming ownership of newly-formed land, if the gain of land would not be 'indefinitely sustained', or public access would be restricted or denied.[1152] Thus the private property 'right' to claim ownership of new land was not extinguished but restricted, and if either condition was satisfied, this 'right' would not apply.[1153]

Coastal protection 'works'

The construction of seawalls and other coastal protection structures had been governed by Part 3 of the Act, since the Act's introduction.[1154] Proposed works were usually classified as 'designated development', subject to assessment and approval under the *Environmental Planning and Assessment Act 1979* (NSW), and any approval issued by a local authority for works which could influence or be influenced by the sea, required the relevant Minister's concurrence.[1155] Later following the completion of coastal zone management plans, proposals for seawalls or other works would need to show their consistency with the adopted CZMP.[1156]

The creation of a new category of 'emergency works' in 2010,[1157] which were exempt from requirements for development approval,[1158] was inconsistent with the prevailing policy of integrated coastal zone management and planning, in which public access was a key concern.[1159] Conceived as a way to allow landowners to take urgent action to protect their land from coastal erosion exacerbated by severe storms, these amendments were seen by some coastal residents as

[1146] See s55M (10)(a) *CPA 1979* (NSW)
[1147] Section 55N was inserted in the *CPA 1979,* by the *Coastal Protection Amendment Act 2002* (NSW).
[1148] This modification addressed the issue of conflicting private property rights and public rights identified in the report of the Emergency Beach Management Review. See the discussion of this in Thom, above n 40.
[1149] See s 55N (2) *CPA 1979* (NSW).
[1150] See s 55N (3) *CPA 1979* (NSW).
[1151] The Minister administering the *CLA 1989* (NSW). See s 55N (4) *CPA 1979* (NSW).
[1152] "(a) a perceived trend by way of accretion is not likely to be indefinitely sustained by natural means, or (b) as a consequence of making such a declaration, public access to a beach, headland or waterway will, or is likely to be, restricted or denied." See sub-sections 55N (2) and 55N (4) *CPA 1979* (NSW).
[1153] See s 55N (2) a), b) and s 55N (4) a) and b) *CPA 1979* (NSW).
[1154] See ss 36 – 53 *CPA 1979* (NSW).
[1155] See s 41 *CPA 1979* (NSW).
[1156] See s 55K (1)(a) *CPA 1979* (NSW).
[1157] Clause [26] of the *Coastal Protection and Other Legislation Amendment Act 2010* (NSW) inserted Part C, and new sections 55O - 55Z, Emergency Coastal Protection works, into the *CPA 1979* (NSW).
[1158] The new Part 4C exempted certain emergency coastal protection works from the need to obtain consent under the *Environmental Planning and Assessment Act 1979* (NSW) or other legislation.
[1159] See NSW government *Coastal Policy of New South Wales* (DoP 1997).

tipping the balance between competing rights (back) in favour of private landowners. However the legislation did not create an unfettered private property 'right to defend' against the sea.[1160]

Though a landowner could undertake 'emergency' works, a certificate issued by a council officer,[1161] or the Director-General was required.[1162] Further, approval for 'emergency' works could be refused,[1163] or subject to conditions.[1164] If approved, works could be undertaken only once,[1165] and ultimately would need to be removed.[1166] Thus landowners' ability to construct emergency works was not an unfettered 'right' to build any structure they deemed appropriate. Rather, the certificate might more properly be seen as a licence for a temporary use, issued under the statute at the Crown's discretion, delegated to the relevant authorised council officer.

Importantly these 2010 amendments did not repeal the protection of the public right of access to and along the shoreline provided by section 55N. However, 'emergency' works were re-badged as 'temporary' works in new amendments to the *CPA 1979* introduced in 2012.[1167]

Though public debate on the 2012 Bill elevated expectations among landowners of 'permanent' protection from the sea as a 'right', the amendments did not facilitate this. Only 'temporary' works were authorized,[1168] and no provision used the word 'right'. These amendments continued the deviation from the co-ordinated approach of 'integrated coastal zone management' via CZMPs, and permitted ad hoc construction of temporary structures on private or public land.[1169] However, adverse impact on public access was still recognized as a valid reason for an authorized officer to refuse a Certificate for temporary works on public land.[1170]. Regrettably, amendments permitting unapproved 'temporary' protection works to be built on the beach in certain circumstances,[1171] allowed landowners to co-opt public land and avoid the issue of locating the actual position of their boundary with the public beach.

These amendments created serious legislative and philosophical contradictions: while the Act's

[1160] A 'right' to defend' was claimed some commentators. See for eg Karen Coleman, 'Conveyancing and property: Coastal Protection and Climate Change' (2010) 84 *Australian Law Journal* 421.
[1161] under s 55T *CPA 1979* (NSW).
[1162] See s 55T (2) *CPA 1979* (NSW).
[1163] Section 55P (4) *CPA 1979* (NSW) states that an emergency action sub-plan, 'may specify locations where emergency coastal protection works… must not be placed'.
[1164] Section 55T (3) *CPA 1979* (NSW).
[1165] See s 55S *CPA 1979* (NSW).
[1166] See s 55Y *CPA 1979* (NSW).
[1167] Schedules 1 – 3 of the *Coastal Protection Amendment Act 2012* (NSW) replaced 'emergency' with 'temporary' throughout the *CPA 1979* (NSW), and similarly amended the Regulation and other Acts.
[1168] See ss 55O and 55P *CPA 1979* (NSW).
[1169] See s 55T (1) *CPA 1979* (NSW).
[1170] See s 55T (2A) *CPA 1979* (NSW).
[1171] See ss 55T (1), 55VA, 55VB *CPA 1979* (NSW).

Objects required coastal management to be consistent with the principles of ecologically sustainable development,[1172] ad hoc temporary works on public land, without environmental impact assessment, development consent or ministerial concurrence became permissible.

The 2012 amendments also left private landowners legally liable for increased erosion caused by their 'temporary' works, because the works were unassessed and unapproved. Further, by allowing the life of 'temporary' seawalls to be extended,[1173] the amendments created conditions for beaches and public access to them to be caught in 'coastal squeeze' in the future.

Coastal Management Act 2016 (NSW)

The focus of the law governing coastal land changed with the passage of the *Coastal Management Act 2016* (NSW),[1174] due to its emphasis on management, its re-instatement of a co-ordinated approach, recognition of climate change,[1175] reconstitution of the Coastal Council,[1176] and its brevity. As I describe next, the *CMA 2016* (NSW) provided continuity by reproducing some sections of the *CPA 1979* (NSW), and continuing other sections' operation until conditions were satisfied,[1177] but reworked other elements of the statutory framework.

Objects of the CMA 2016 *(NSW)*

Though wordings differ, many Objects of the *CMA 2016* (NSW) reflect those of its predecessor. Most objects address a diffuse non-use element of the public interest, but objects (b) and (k) in particular address public use,[1178] whilst object (l) authorizes the Coastal Council to identify land for acquisition by public authorities, to further the public purposes stated.[1179] Importantly, by widely defining the foreshore,[1180] the area subject to common law public rights was extended.

The new statute stipulated the protection of diverse elements of the public interest, as manage-

[1172] See ss 37A, 38, 39 44 and 54A *CPA 1979* (NSW).
[1173] See s 55VA(2) *CPA 1979* (NSW).
[1174] A public exposure draft Coastal Management Bill 2015 (NSW) was released in November 2015 for public review with a call for submissions. A revised version was introduced in May 2016.
[1175] See s 3 Objects, s 3(f) *CMA 2016* (NSW).
[1176] See ss 24, 25, 26 *CMA 2016* (NSW).
[1177] Or until the end of 2021. See Schedule 3 Clause 4 Saving of CZMPs, cl 5 General saving, cl 8 Temporary coastal protection works, cl 9 Saving of directions under s 55B(1) *CPA 1979* (NSW).
[1178] See s 3 *CPA 1979* (NSW) Objects (b) 'to support the social and cultural values of the coastal zone and maintain public access, amenity, use and safety'; and (k) 'support public participation'.
[1179] See s 3 (l) *CPA 1979* (NSW) 'to facilitate the identification of land in the coastal zone for acquisition by public or local authorities …to promote the protection, enhancement and restoration of the environment of the coastal zone'.
[1180] Section 4 *CPA 1979* (NSW) defines 'foreshore' as land between highest astronomical tide and lowest astronomical tide. The common law definition of foreshore refers to land between mean high and mean low water marks.

ment objectives for key areas in the coastal zone,[1181] placing the 'public interest' in protecting coastal wetlands and littoral rainforests at the top of the hierarchy of management objectives.[1182] Protecting private land from the sea was not an object of the Act. However, provision was made for this, if authorized by a 'coastal zone emergency action sub-plan'.[1183] Relevantly, as well as including 'public participation in coastal management and planning' in its objects, the *CMA 2016* (NSW) requires public consultation,[1184] and access to public information.[1185]

Modification of doctrine of accretion continued

Highly relevantly the *CMA 2016* (NSW) reproduced the provisions which modified the common law, to prohibit consent for new coastal protection works,[1186] and changes to a water boundary, if they restricted public access.[1187] Hence public access remains the dominant use.

CZMPs evolve into Coastal Management Programs

The *CMA 2016* (NSW) allows local councils to complete CZMPs begun under the previous Act, and authorizes existing CZMPs until 2021,[1188] but requires the development of new instruments, 'coastal management programs' (CMPs),[1189] with actions able to be implemented through the 'integrated planning and reporting framework' of the *Local Government Act 1993*(NSW).[1190]

[1181] Section 6 (2) (a) – (e) *CPA 1979* (NSW) protects various public interest values in coastal wetlands and littoral rainforests. Section 7 includes management objectives: (a) 'ensure public safety (d) 'maintain public access, amenity and use of beaches and foreshores, among other public interest values in coastal vulnerability areas. The management objectives in s 8, for coastal environment areas include: (f) 'maintain and, where practicable, improve public access, amenity and use of beaches and foreshores, headlands and rock platforms'; other public interest values. In s 9 management objectives for coastal use areas include: (2) (a) 'protect and enhance scenic, social and cultural values of the coast', and items (i) – (v) nominate elements of the public interest to be considered in the area's management.

[1182] Section 10 *CMA 2016* (NSW) identifies coastal wetlands and littoral rainforests as the highest of the coastal management objectives.

[1183] See section 15 (1) (e), and s 15 (3) *CMA 2016* (NSW). A 'coastal zone emergency action subplan' may include 'the carrying out of works for the protection of property affected or likely to be affected by beach erosion, coastal inundation or cliff instability'. Note this does not stipulate *private* property, and could include public lands.

[1184] Section 16 (1) (a) *CMA 2016* (NSW) requires consultation with 'the community'.

[1185] See s 19 *CMA 2016* (NSW) requiring public availability of a council's CMP; s 21 (6) requiring the coastal management manual to be available for public inspection; and s 26 (7) requiring the Minister to table a report on a performance audit conducted by the Coastal Council, in each House of Parliament.

[1186] See s 27 (1) *CMA 2016* (NSW). 'Development consent must not be granted' if works (i) 'unreasonably limit public access to or use of a beach or headland; or (ii) 'pose a threat to public safety'. This restates s 55M *CPA 1979* (NSW).

[1187] See s 28 *CMA 2016* (NSW). Modification of doctrine of erosion and accretion: Three authorities were restrained from changing a 'water boundary' if, 'as a consequence, public access to a beach, headland or waterway will be, or is likely to be restricted or denied'. See 28 (2) 'the court', s 28 (3) the Registrar-General; and s 28 (4) (b) the Minister. This section reproduces s 55N *CPA 1979* (NSW).

[1188] See Schedule 3, *CMA 2016* (NSW) clause 4 Saving of coastal zone management plans.

[1189] See sections 12 – 16 *CMA 2016* (NSW).

[1190] See s 21 (3)(g) *CMA 2016* (NSW).

This includes 'emergency' actions to address coastal hazards, if authorized by the *CMP*.[1191] Further, an updated *NSW Coastal Management Manual*, citing new procedures for preparing CMPs,[1192] and a new coastal management SEPP,[1193] considered below, have statutory effect.

Coastal protection works

The *CMA 2016* (NSW) continues provisions on 'temporary' coastal protection works, if works on private land had begun, and notice had been given,[1194] requires an emergency action sub-plan be prepared as part of a CZMP, to address impacts on 'property' under storm conditions,[1195] but does not authorize new 'unapproved' works. Permanent coastal protection works require consent,[1196] but consent must not be granted if the works would "unreasonably limit public access", or "pose a threat to public safety".[1197] Hence, the processes and approvals required for works to protect private land, mandatory before the 2010 amendments, have been restored.

4.2 Indications of relative weight

Both statutes considered contain clear indications of the weight apportioned by the legislature to competing rights. In the *CPA 1979* protection of the coastal environment, public access to the foreshore, and other elements of the public interest in coastal lands, were key objects,[1198] but protecting private land was not. Other provisions which prevented changes in property boundaries,[1199] and required development consent to be refused, if public access or public safety were likely to be reduced, [1200] clearly indicated that public rights of access and use of the beach were dominant over the private property rights of coastal landowners. Further, local councils were designated responsibility for managing coastal hazards and processes were constituted for preparing coastal zone management plans.[1201] These CZMPs were intended to serve the public interest and forestall landowners' ad hoc attempts to protect their private interests.[1202]

[1191] See s 15 (1)(e) *CMA 2016* (NSW).
[1192] See ss 21(1), 21(2) *CMA 2016* (NSW).
[1193] *State Environmental Planning Policy (Coastal Management) 2018* (NSW).
[1194] See Sched 3 *CMA 2016* (NSW), cl 8 Temporary coastal protection works.
[1195] See s 15(1) and 15(3) *CMA 2016* (NSW).
[1196] See s 4.16 *EPAA 1979* (NSW).
[1197] See s 27 (1)(a)(i) and (ii) *CMA 2016* (NSW). Proposals for such works must also demonstrate "satisfactory arrangements have been made" for restoring any land affected by the works, and for maintaining the works. See also s 27 (1)(b)(i) and (ii) *CMA 2016* (NSW).
[1198] See s 3 *CPA 1979* (NSW).
[1199] See s 55M *CPA 1979* (NSW).
[1200] See s 55N *CPA 1979* (NSW).
[1201] The requirement to prepare CZMPs was introduced by a new Part 4A, ss 55A – s 55M, *CPA 1979* (NSW) inserted in 2002.
[1202] For private landowner legal action see *Egger v Gosford Shire Council* (1989) 67 LGRA 304.

The weights attributed to these competing rights by the legislature were adjusted however in amendments to the *CPA 1979* in 2010 and 2012. These amendments did not repeal sections protecting public access and public safety,[1203] but allowed landowners affected by coastal erosion to build 'emergency'[1204] and later 'temporary', works[1205] without the usual approvals,[1206] and permitted private use of the public beach to build such works[1207] if damage to assets, vegetation, and impacts on public safety and public use of the beach were minimised.[1208] Thus the legislature increased the weight it placed on private property rights, but did not abandon public rights of access to the beach. However these amendments created conflicting approaches: the Act mandated ecologically sustainable management through a planned, co-ordinated, strategic approach, managed by local councils, while the amendments permitted ad hoc unassessed and unapproved 'emergency' or 'temporary' works by landowners.

This inconsistency was resolved by the *Coastal Management Act 2016* (NSW) not reproducing the conflicting provisions of the *CPA 1979* (NSW) which facilitated 'temporary' works, though transitional arrangements saved and continued those provisions for works already underway. Otherwise, new 'temporary' works without consent were prohibited. In the *CMA 2016* (NSW) protecting public access, public safety and other elements of the public interest, remain key objects,[1209] but private land protection is not afforded a senior position.

Crucially the *CMA 2016* (NSW) did reproduce key sections of the *CPA 1979* (NSW) which prohibit development consent for works,[1210] and bar the exercise of private property rights to claim ownership of new land,[1211] if public access or public safety would be reduced. Protecting private land in 'emergencies',[1212] and constructing coastal defences are possible under the *CMA 2016* (NSW) but only through an 'emergency sub-plan' adopted as part of a CZMP, if public safety and public access are protected.[1213] Hence by enacting the *CMA 2016* (NSW) the legislature continued the delegation of responsibility for managing coastal hazards to local

[1203] Inserted in 2010, s 55M and 55N *CPA 1979.*
[1204] The 2010 amending Act inserted a new Part 4C 'Emergency coastal protection works', into the Act. See sections 55O – 55Z *CPA 1979* (NSW).
[1205] The *CPAA 2012* (NSW) re-wrote Part 4C to refer to 'Temporary' coastal protection works.
[1206] See s 55O and s 55W *CPA 1979* (NSW).
[1207] See s 55Z (1) *CPA 1979,* inserted by the 2010 amending Act.
[1208] See s 55T (3A) and s 55VB *CPA 1979* (NSW) inserted by the 2012 amending Act.
[1209] See s 3, especially s 3(b) *CMA 2016* (NSW).
[1210] See s 27 *CMA 2016* (NSW).
[1211] See s 28 *CMA 2016* (NSW).
[1212] Through actions approved as part of a 'coastal zone emergency action sub-plan' prepared pursuant to s 15 (1)(e) *CMA 2016* (NSW).
[1213] Consent must not be granted if it is likely the works will unreasonably limit public access to or the use of a beach or headland, or pose a threat to public safety. See s 27(1)(a)(i) and (ii) *CMA 2016* (NSW).

councils through their CZMPs, implemented through coastal management programs,[1214] and de-emphasized the role of individual landowners.

By not continuing provisions which allowed 'emergency' or 'temporary' coastal protection works without assessment or approval, the legislature readjusted the weight attributed to the competing rights, reducing the weight placed on private property rights. By reproducing key provisions from the prior Act, protecting public access and public safety in the new Act, the legislature re-emphasized the importance of public access to the foreshore. Further, by discontinuing provisions for ad hoc works, it re-instated the coordinated approach to coastal management.[1215] Hence the relative weights of competing rights have returned to the levels extant before the 2010 amendments. Under the *CMA 2016* (NSW) public access and public safety are unequivocally dominant, and protecting other public interests in coastal lands,[1216] has priority over private interests in their development.[1217]

I conclude that at present in this field of law, private property rights do not operate as 'trumps'. Rather, the legislature intended that the public right of access to the foreshore, and elements of the public interest generally, be dominant over, and limit private property rights in coastal land. Further, it intended that public rights' dominance continue indefinitely into the future.

The next field of law to be considered is environmental planning and development control.

5. Environmental planning and development control

In this section I examine the statutes of a third field of law, environmental planning, for indications of the relative weight of private property rights and public rights in coastal lands.

A history of the *Environmental Planning and Assessment Act 1979* (NSW)[1218] is neither possible, nor necessary here.[1219] Instead I adopt a positivist approach and canvas the Act's

[1214] See Part 3, ss 11 - s 23 *CMA 2016* (NSW).
[1215] See s 3 Object (h) *CMA 2016* (NSW). See also s 12 which provides that the 'purpose of a coastal management program is to set the long-term strategy for the co-ordinated management of land within the coastal zone, with a focus on achieving the objects of this Act.'
[1216] See s 6(2), s 7(2), s 8(2) *CMA 2016* (NSW).
[1217] See s 10(3) *CMA 2016* (NSW).
[1218] [here-after the *EPAA 1979* (NSW)]
[1219] Thirty-five Acts amending the *EPAA 1979* (NSW) are listed under 'E' in 'Acts as Made' between 1985 and 2017. See AUSTLII < http://www.austlii.edu.au/cgi-bin/viewtoc/au/legis/nsw/num_act/toc-E.html >. However, hundreds of minor amendments to the *EPAA 1979* made as incidental amendments under other legislation since 1980, are shown in the Table of Amending Instruments, in the Notes on the Act. See < http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/epaaa1979389/notes.html >. Hence a recount of all the amendments made to the Act since 1979 is entirely beyond the scope of this thesis.

relevant application in its current form, in 2020. In the following sections I make some observations on the Act's relevance to the topic, outline provisions affecting private and public rights, and discuss the indications of weight afforded to competing rights, in this field of law.

Overview of Environmental Planning and Assessment Act 1979

The regulation of the use of private land was not a new concept when the Act was introduced. Many societies reject the unconstrained use of private land by its owners where this produces adverse effects beyond the land's boundaries. This often involves prohibiting activities on private lands such as abattoirs or tanneries, under municipal ordinance or domestic law, because they create noxious emissions which can adversely affect neighbors and the public. However other off-site impacts from unconstrained uses of private land may conflict with public rights to clean water, a healthy environment, and public safety.[1220]

The *EPAA 1979* (NSW) provides the legislative framework for a modern scheme of development control,[1221] and strategic planning by local councils,[1222] and other authorities,[1223] which applies to private land and many public lands across New South Wales. The Act is premised on the legislature's recognition of landowners' interests in using their land to increase its utility, income and value, which aids the State's economic development,[1224] and its concurrent recognition of the need to protect the public, and public interests in private lands when approval is granted to intensify use or develop land.

The *EPAA 1979* is especially relevant because it governs how the State mediates between these conflicting private and public interests. It does this through statutory processes for identifying, assessing and mitigating potential adverse impacts from private use of land, on public interests, under both its main functions: strategic planning, and development assessment and approval.

[1220] Off-site impacts, which can affect adjoining privately owned lands, public places or public resources such as streams, may include: discharge of waste or contaminated water; noise, including of industrial processes, the volume, sound quality and duration of the noise, hours when noise is made; visual appearance, including height, scale, bulk, exterior cladding, signage, and extent of over-shadowing; generation of increased pedestrian or vehicular traffic; increased risk created by hazards such as fire, mass movement, accidental poisoning, chemical contamination , structural failure or building collapse.

[1221] This involves application of rules regarding which land uses are permissible without consent, require consent, or prohibited, when councils process development applications made by landowners seeking consent for the development or new uses of their private land.

[1222] The preparation of environment planning instruments (EPIs) such as Local Environment Plans (LEPs) are required under s 3.31 *EPAA 1979* (NSW), and procedures for their preparation, standardisation, publication, exhibition and review are included in Division 3.2, ss 3.14 – 3.8 *EPAA* (NSW).

[1223] The Secretary of the NSW Planning Department, or their designate, and any relevant planning panel also function as 'planning proposal authorities', see s 3.32 *EPAA 1979* (NSW).

[1224] See section 5 Objects of *EPAA 1979* (NSW) which specifically aim "(a) to encourage … (ii) the promotion and co-ordination of the orderly and economic use and development of land'.

It would be incorrect to imply that the State government is a neutral arbiter in this mediation between competing interests. The government is very much an interested party because, if landowners benefit from the economic development of their land, the government also profits. Further, the State government is also guardian of key public interests including the seabed, tidal waters, clean air and water, flora fauna, the natural environment, heritage, and responsible for safety from fore-seeable hazards, and the creation of safe residential, commercial and industrial areas. Hence the State has an unavoidable conflict of interest. To overcome this conflict, the Act includes mechanisms for both private interests and public interests to be recognised and considered in the development control processes operated by councils, and consent authorities.

Many amendments have aimed to clarify, modify, include, and delete provisions of the *EPAA 1979*, however none have transformed the Act as significantly as amendments made in 2017 to simply the Act's structure and re-number its sections.[1225] Consequently, the Act's current form differs markedly from its original, though many elements of its statutory framework remain.[1226]

There is a wealth of legal commentary on the operation of the *EPAA 1979*,[1227] and on court decisions on its provisions,[1228] in the literature. However due to space constraints and limited relevance to the topic, a review of these secondary sources cannot be considered here.

In the next sections I consider the relevant provisions of the Act, as numbered in mid-2020.

5.1 Principal statute's relevant provisions

Highly relevant are provisions governing strategic planning,[1229] which delegates to local councils responsibility for preparing environmental planning instruments, to regulate the use and development of land. Particularly relevant are provisions which allow a standard format for planning instruments to be prescribed,[1230] which require councils to recognize and protect

[1225] The *Environmental Planning and Assessment Amendment Act 2017* (NSW) No 60. See the historical Notes, Table of Amending Instruments and Table of Concordance showing the new numbers for prior sections, at < http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/epaaa1979389/notes.html >.
[1226] Such as the use of state environmental planning policies, and local environment plans.
[1227] See for eg Paul Stein, 'Ethical Issues in Land-Use Planning and the Public Trust' (1996) 13 *Environmental and Planning Law Journal*, 493-501; Robert Ghanem and Kirsty Ruddock, 'Are New South Wales' planning laws climate-change ready?' (2011) 28 *Environmental and Planning Law Journal* 17-35; Peter Williams, 'The Curious Case of Property Rights in the NSW Planning System and Its Reluctance to Adopt Transferable Development Rights' (2012) 17 (2) *Local Government Law Journal* 61-79.
[1228] See eg Tayanah O'Donnell, 'Legal Geography and Coastal Climate Change Adaptation: The Vaughan Litigation' (2016) 54(3) *Geographic Research*, 301 – 312.
[1229] See Division 3.1 Strategic Planning Sections 3.1 – 3.46 *EPAA 1979* (NSW).
[1230] See s 3.20 *EPAA 1979* (NSW).

elements of the public interest,[1231] when preparing a local environment plan (LEP),[1232] or considering proposed re-zonings,[1233] and provisions which enable LEPs to be implemented[1234] and legally enforced.[1235] I discuss relevant provisions of the standard LEP in the next section.

Provisions governing consent authorities' assessment, and determination of development applications, within the framework of the LEP, and state policies, are also relevant.[1236] Particularly relevant are provisions for evaluating proposals' potential impacts on public interests,[1237] enabling conditions to be imposed on consents to mitigate them[1238] or protect public interests on private land,[1239] and for refusing consent for inappropriate development.[1240]

While responsibility for flora and fauna are delegated under other legislation,[1241] a key function of the *EPAA 1979* is to ensure consent authorities consider relevant policies and information on conserving threatened species, when they approve the use or development of private land. [1242] Provisions on 'existing uses' of land which pre-date the planning instrument, are also relevant, but do not recognize a 'right', only the 'existing use'. [1243] Other uses require consent.[1244]

Also relevant are provisions authorising the Minister to issue Directions,[1245] to planning authorities to apply government policies when considering proposals to rezone land or plan its

[1231] See s 3.14 *EPAA 1979* (NSW) Contents of environmental planning instruments. Section 3.14 lists many 'public interest' matters which planning instruments may include: see esp s 3.14(1)(a) the environment, (c) open space, public reserve, national parks and other land dedicated for public purposes, (e) trees and vegetation, and (e1) 'protecting and conserving native animals and plants, including threatened species and ecological communities, and their habitats'.
[1232] Section 3.25 *EPAA 1979* (NSW), requires special consultation by a planning authority regarding threatened species.
[1233] See s 3.39 and 3.40 *EPAA 1979* (NSW).
[1234] See ss 3.41 – 3.46 *EPAA 1979* (NSW) regarding preparation of development control plans to implement LEPs.
[1235] See s 3.31 *EPAA 1979* (NSW).
[1236] See Part 4 – Development Assessment and Consent, sections 4.1 – 4.70 *EPAA 1979* (NSW).
[1237] See s 4.15(1) *EPAA 1979* (NSW). See especially consideration of (b) environmental, social and economic impacts, and (e) the public interest.
[1238] See s 4.17 *EPAA 1979* (NSW).
[1239] The NSW government has formal legal proprietorship of the native wildlife, wherever they occur, and current law seeks to protect and conserve native wildlife on all land tenures. See the *National Parks and Wildlife Act 1974* (NSW). It follows logically that to protect native fauna, their habitat must be protected, and so the rationale of this element of the public interest extends to protecting the native vegetation on privately owned land which provides this crucial habitat. Now repealed, *SEPP 46 Protection and Management of Native Vegetation 1995* (NSW) made this link explicit.
[1240] See s 4.16 *EPAA 1979* (NSW).
[1241] See ss 7.1 – 7.21 *Biodiversity Conservation Act 2016* (NSW).
[1242] See s 3.25 *EPAA 1979* (NSW).
[1243] See ss 4.65 – 4.70 *EPAA 1979* (NSW).
[1244] See s 4.66, 4.68 *EPAA 1979* (NSW).
[1245] See s 9.1 *EPAA 1979* (NSW).

future use.[1246] Several current Directions aim to protect elements of the public interest[1247] and public safety.[1248] These Directions are discussed in the next section on statutory instruments.

The Act refers to 'rights' in several places, but they are procedural rights, not 'private property rights'. They include rights of appeal of refusal of integrated development,[1249] an applicant's implied 'right' to appeal a decision on a development application,[1250] and an objector's 'right to appeal' the consent of a designated development.[1251] Noteworthy also are provisions which require objectors to designated development to be given notice of an appeal; which confers on them a 'right to be heard';[1252] and which permit any person to restrain a breach of the Act.[1253] Provisions requiring council to disclose zoning, planning approval, coastal hazards and other public interest constraints on 'planning certificates', are also pertinent,[1254] because they alert prospective buyers to the legal limits on the land's use.

Thus many provisions of the Act refer to public access or other public interests in land, but none recognize private property rights, only private interests. I next review relevant instruments applying to coastal lands, for indications they provide of the weight of competing rights.

5.2 Relevant statutory instruments and their provisions

Several statutory instruments which operate at different levels of the planning framework, are relevant. I first consider the Order prescribing the standard format for Local Environment Plans (LEPs), then review relevant State Environmental Planning Policies (SEPPs), and conclude by noticing relevant Ministerial Directions to local councils.

Standard Instrument Order (SIO) *and* Local Environment Plans (LEPs)

In this section I consider the substance of LEPs prescribed by the meta-instrument, *Standard Instrument Order (Local Environment Plans) 2006.*[1255]

[1246] Policy Directions are listed at < https://www.planning.nsw.gov.au/Plans-for-your-area/Local-Planning-and-Zoning/Policy-Directions-for-Plan-Making?acc_section=current_and_previously_issued_section_9_1_directions >
[1247] See s 9.1 Policy Directions 2.1 Environment Protection Zones, and 2.3 Heritage Conservation.
[1248] See s 9.1 Policy Directions 4.1 Acid Sulfate Soils, 4.2 Mine Subsidence and Unstable Land, 4.3 Flood Prone Land, 4.4 Planning for Bushfire Protection.
[1249] See s 4.52 *EPAA 1979* (NSW) re rights of appeal on Integrated Development.
[1250] See ss 8.7, 8.9 *EPAA 1979* (NSW).
[1251] See s 8.8. See the reference to the objectors 'right of appeal' in s 8.12(1)(a) *EPAA 1979* (NSW).
[1252] See s 8.12(3). See also s 10.10 *EPAA 1979* (NSW).
[1253] See s 9.45 *EPAA 1979* (NSW).
[1254] See s 10.7 (formerly s 149) *EPAA 1979* (NSW).
[1255] The Minister may issue an Order to standardise instruments per s 3.20 *EPAA 1979* (NSW) (Hereafter *SIO(LEP) 2006* (NSW), or the Order.) See < https://www.legislation.nsw.gov.au/#/view/EPI/2006/155a >

When councils prepare updated LEPs after a review,[1256] and allocate land into one of the 'zones' described in the Order, due to its character or location, they are assisted in identifying appropriate land uses and formulating controls by applying the Order's model provisions.[1257] Uses of land are listed in 'land use tables' for each zone in the Order, and in adopted LEPs, under three headings:[1258] permissible without consent, 'only with consent' and 'prohibited'.[1259] Many zones in the Order only prohibit pond-based aquaculture,[1260] while other zones cite uses permissible 'without', and 'only with' consent, and prohibit "any development not specified in 2 or 3 above"[1261] or 'any other development'.[1262] Uses permissible 'without consent' are typically those with low or no adverse environmental impacts.[1263] Other uses and development of land require consent,[1264] and destructive uses of land such as mining may require approvals under other statutes.[1265] Quarrying and industrial uses are prohibited in many zones, or limited to specific zones.[1266] Most relevantly, councils may prepare 'development control plans',[1267] to give effect to a LEP and describe the conditions under which development is permissible.[1268]

Thus these planning instruments control the private use of private land to protect public access and other public interests in that land, and strictly limit landowners' 'right to use'.

State Environmental Planning Policies (SEPPs)

Like other instruments made under the *EPAA 1979* (NSW), SEPPs are a form of sub-ordinate legislation. Because they are made through proclamation, by publication in the government *Gazette*,[1269] SEPPs are not legislated, but they are subject to review[1270] by the legislature. [1271]

[1256] See s 3.21 *EPAA 1979* (NSW).
[1257] A list of 'land use zones' is given in Clause 2.1 *SIO(LEP) 2006* (NSW).
[1258] The planning authority determines which uses are permissible 'without consent' and 'require consent' under s 3.18, and prohibited uses under s 3.19 *EPAA 1979* (NSW). Zone Objectives and Land Use Tables are prescribed by clause 2.3 *SIO(LEP) 2006* (NSW).
[1259] See clause 2.3(1) *SIO(LEP) 2006* (NSW).
[1260] See Zones RU5 Village, residential zones R1- R5, Business zones B1- B8, industrial zones IN1- IN3.
[1261] See Zone RE1 Public Recreation, and E1 National Parks and Nature Reserves. Decisions on prohibited uses are required under s 3.18 *EPAA 1979* (NSW).
[1262] See Zones E2 Environmental conservation, E3, Environmental Living, E4 Environmental management, W1 Natural Waterway, W2 Recreational Waterway, W3 Working Waterway.
[1263] Permissible without consent in Zone E3 are: home industries, environmental protection works, roads.
[1264] As well as 'standard' uses permissible with consent, councils may designate certain activities or developments as permissible in prescribed zones. See clause 2.5 *SIO(LEP) 2006* (NSW).
[1265] Eg *Mining Act 1992* (NSW) or *Water Management Act 2000* (NSW).
[1266] Eg Industrial uses of land are limited to Zones IN1 General, IN2 Light, and IN3 Heavy Industrial.
[1267] See ss 3.42 – 3.44 *EPAA 1979* (NSW).
[1268] See Byron Shire *Development Control Plan, Part J, Coastal Erosion Lands*, adopted 2 August 2018.
[1269] By the Governor, on advice of the Minister administering the Act. See s 3.29 *EPAA 1979* (NSW).
[1270] A motion to disallow an instrument may be moved in either Chamber of the State's Legislature. See s 41 *Interpretation Act 1987* (NSW) Disallowance of statutory rules.

While their amendment is not possible, absence or failure of a motion to disallow them,[1272] signals the legislature's consent.

Three SEPPs sought to protect important elements of public interest in coastal lands. SEPP 14 conserved coastal wetlands,[1273] SEPP 26 protected littoral rainforest[1274] and SEPP 56 governed development of Sydney Harbour's foreshores and tributaries.[1275] Later, SEPP 71 protected 'sensitive' coastal locations.[1276] Recently, a new SEPP was issued to guide coastal management,[1277] which replaced and repealed these SEPPs. I next provide an overview of these SEPPs, outline provisions relevant to private property rights and public interests in coastal land, and discuss the indications they provide of the weight of competing rights, in this field of law.

SEPP 14 – Coastal Wetlands 1985

The introduction of *SEPP 14* followed the NSW government's recognition of the ecological value of coastal wetlands on private land, and the need to effectively control clearing, draining and or filling of them by landowners, to protect the public interest in their ecological values.[1278] The SEPP had two primary elements: accurate maps identifying areas of 'coastal wetland',[1279] and written provisions requiring landowners to obtain local council's consent and the Director's concurrence before clearing, levee construction, draining or filling a 'coastal wetland'.[1280] The SEPP did not prohibit all use of 'coastal wetlands' but required a higher level of assessment.[1281] By declaring these works 'designated development'[1282] preparation and consideration of an environmental impact statement (EIS) was required before consent could be considered.[1283] Further, contravening the SEPP was a prosecutable offence.[1284] By requiring an EIS, council's development consent, and the Director's concurrence for such works, SEPP 14 attributed

[1271] See NSW Parliament, Legislative Assembly, Standing Order 116 – Disallowance of Statutory Rules; Legislative Council Standing Order No. 78 – Disallowance of Statutory Instruments.
[1272] If carried, the motion negates the rule or instrument. See s 41 (2) *Interpretation Act 1987* (NSW).
[1273] *State Environmental Planning Policy 14 – Coastal Wetlands* was made in 1985 [hereafter *SEPP 14*].
[1274] *State Environmental Planning Policy 26 – Littoral Rainforests,* 1988 [hereafter *SEPP 26*].
[1275] *State Environmental Planning Policy 56 – Sydney Harbour Foreshores and Tributaries* 1998 [hereafter *SEPP 56*].
[1276] *State Environmental Planning Policy 71 – Coastal Protection* 2002 [hereafter *SEPP 71*].
[1277] *State Environmental Planning Policy (Coastal Management) 2018* [hereafter *SEPPCM 2018*]
[1278] See Coastal Council of NSW, *Coastal Wetlands* (NSW Government 1985). Section 2 – Aims, objectives of *SEPP 14*, authorize coastal wetlands protection "in the environmental and economic interests of the State".
[1279] using 1:25,000 scale topographical maps, based on aerial photographs, see s 3, Definitions, *SEPP 14.*
[1280] Section 7 (1) *SEPP 14.*
[1281] See the matters for the Director to consider when deciding to issue concurrence, in s 7 (2) *SEPP 14.*
[1282] See s 7 (3) *SEPP 14.* Section 7A also required the consent of council and concurrence of the Director for 'restoration works' in land where the policy applied, but these activities required a 'restoration plan' to be prepared and considered, rather than an EIS. See also s 3.17 and s 4.10 *EPAA 1979* (NSW).
[1283] See cl 7 (3) *SEPP 14.*
[1284] See cl 7(1) *SEPP 14.* Breach of *SEPP 14* was enforceable under s 125 (now s 9.50) *EPAA 1979* (NSW). See for eg *Kempsey Shire Council v Thrush* [2011] NSW LEC 93.

significant weight to the public interest in conserving coastal wetlands on private land, which prevailed over the landowner's private property right to use the wetland.

SEPP 14 was amended many times to clarify definitions, amend its maps and fine-tune its provisions,[1285] but its aim of protecting public interests in private land, while accommodating owners' interests in using their land, to the extent that this was feasible, continued until 2018.[1286]

A similar statutory instrument was adopted three years later to protect the public interest values in another threatened vegetation type, littoral rainforest, where it occurred on private land.

SEPP 26 – Littoral Rainforest 1988

SEPP 26 had a smaller geographic footprint and protected pockets of 'littoral rainforest'.[1287] Like its forerunner, this SEPP used maps to define land within the policy's ambit, and written provisions to control the use or development of land supporting these rainforest remnants.[1288] Further the SEPP extended protection to a buffer area, 100m around the mapped rainforest.[1289] This SEPP also left open future use of the land, if an EIS was prepared and considered for development in the core area,[1290] if council granted consent and the Director or Minister concurred.[1291] Importantly, damage or removal of vegetation protected under the SEPP became an offence.[1292] Thus the public interest in these rainforests prevailed over the owners' interests in their land. *SEPP 26* was amended several times,[1293] but remained in force until 2018.[1294]

A similar scheme was used to protect public interests in lands adjoining Sydney Harbour.

SEPP 56 - Sydney Harbour Foreshores & Tributaries (1998) [1295]

This SEPP also had two parts: maps defining the area of application; and provisions governing

[1285] 16 amendments were made 1985 – 2008. (See http://www.austlii.edu.au/au/legis/nsw/num_epi/toc-S.html)
[1286] SEPP 14 was repealed when the new *SEPP (Coastal Management) 2018* (NSW) commenced on 3 April 2018, though its provisions continued to apply for 12 months after commencement of *SEPP CM 2018*, under cl 21 (3) *SEPPCM 2018*, if preparation of an EIS had already commenced.
[1287] Remnant areas of rainforest near the sea or a coastal lake, including on privately owned land.
[1288] Clause 2 *SEPP 26* stated its aim as being 'to provide a mechanism for the consideration of applications for development that is likely to damage or destroy littoral rainforest areas, with a view to the preservation of these areas in their natural state'.
[1289] See cl 4 (1)(b) *SEPP 26.*
[1290] Clause 6 *SEPP 26* declared worked in the core mapped areas 'designated development'.
[1291] See cl 7 (3) and (4) *SEPP 26.*
[1292] See clauses 3 (1), 7 (1) and 7 (2) *SEPP 26.*
[1293] See < http://www.austlii.edu.au/cgi-bin/viewtoc/au/legis/nsw/repealed_reg/toc-S.html > for the Table of Amendments in the Historical Notes, at the end the SEPP.
[1294] *SEPP 26* was also repealed by *SEPP (Coastal Management) 2018.*
[1295] *State Environmental Planning Policy 56 – Sydney Harbour Foreshores and Tributaries 1998* (NSW).

use and development of coastal lands in the catchment of Sydney Harbour.[1296] It aimed "to co-ordinate the planning and development" of designated lands, and established a "clear set of guiding principles" for this task.[1297] Mostly relevantly, several principles sought to protect elements of the public interest,[1298] and 'public access' featured in six guiding principles.[1299]

Like earlier SEPPs, *SEPP 56* did not prohibit development in the designated areas, but imposed a higher standard of assessment through a 'master plan',[1300] which protected 'public access',[1301] and other elements of the public interest.[1302] It too was also amended,[1303] but remains in force. In 2002, a further SEPP was made to guide decisions on proposals to develop coastal lands.

SEPP 71 – Coastal Protection 2002

This SEPP[1304] also used detailed maps to identify 'sensitive' coastal locations,[1305] and written provisions to protect 'public access'[1306] and public interests.[1307] Further, it directed local councils on how to prepare draft LEPs, and assess development proposals for these locations,[1308] by stipulating matters for consideration.[1309] It also left open the possibility of development consent, where, after a higher standard of assessment, protecting the public interest elements of

[1296] See Section 4 'Lands to which this Policy applies', *SEPP 56.*
[1297] See section 6 Objectives, *SEPP 56*.
[1298] See (d) 'conservation of significant bushland and natural features'; (e) public open space; (f) 'significant natural and cultural heritage … and marine ecological values; (g) 'the protection and improvement of unique visual qualities', (i) 'conservation of items of heritage significance'; (l) 'application of ecologically sustainable development principles'; and (o) 'opportunities for water-based public transport'.
[1299] See clause 7 Guiding Principles: (a) 'increasing public access to, and use of, land on the foreshore'; (b) 'the fundamental importance of the need for land made available for public access, or use, on the foreshore to be in public ownership wherever possible…'; (b1) 'mechanisms to safeguard public access; (c) 'the retention and enhance of public access links'; (d) lands 'availability for public use and enjoyment, and (m) 'provision of public access through' working parts of the harbour 'to the foreshore'.
[1300] See clause 14 Requirement for a master plans. *SEPP 56*. Clause 15A prohibited the sub-division of land 'unless adequate provision' is made for public access and public use.
[1301] See clauses 19 (2) (c) 'foreshore public access and open space', (d) 'pedestrian, cycle and road access', and (k) 'provision of public facilities', *SEPP 56*.
[1302] See s 19 (2) *SEPP 56*, (i) 'heritage conservation', and (m) 'lands reserved under the *National Parks and Wildlife Act 1974'*.
[1303] See the Table of Amendments in the Historical Notes on the SEPP at < http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_reg/seppn56hfat816/notes.html >
[1304] *State Environmental Planning Policy 71 – Coastal Protection 2002* (NSW). [Hereafter *SEPP 71*.]
[1305] See the definition of 'sensitive coastal location' in cl 3 *SEPP 71*. This included lands within the ambit of *SEPP 26*; and lands within 100m of 'coastal wetlands' identified in *SEPP 14*.
[1306] See cl 2 (1) Objects (b) 'protect and improve existing public access' and (c) 'ensure that new opportunities for public access to and along coastal foreshores are identified'.
[1307] See cl 2 (1) Objects, 'to protect and preserve' (d) 'Aboriginal cultural heritage; (e) visual amenity, (f) 'beach environments and beach amenity', (g) native coastal vegetation, (h) marine environment, (i) rock platforms; (j) principle of ecologically sustainable development' and (k) natural scenic quality.
[1308] See cl 7 *SEPP 71*.
[1309] See cl 8 *SEPP 71*.

the site was shown to be possible.[1310] Relevantly, the SEPP recognised the public right of access to beaches and foreshores, and sought to ensure its continuing recognition in local plans.[1311] *SEPP 71* was amended several times,[1312] and repealed in 2018.[1313]

SEPP (Coastal Management) (2018)

Following the passage of the *CM Act 2016*, and extensive consultations, a new SEPP, entitled *Coastal Management*, was proclaimed in 2018, to assist implementation of the *CMA 2016.*[1314] This SEPP also uses maps to identify lands in 'coastal management areas',[1315] and written provisions to control development of specified areas.[1316] Lands previously identified as SEPP 14 Coastal Wetlands and SEPP 26 Littoral rainforest are integrated into one map,[1317] and two new maps were created to identify a 'coastal environment area'[1318] and 'coastal use area'.[1319]

This SEPP continued the requirement for higher level assessment of proposed works in privately owned coastal wetlands and littoral rainforest areas.[1320] Importantly, development controls also apply over 'land in proximity to coastal wetlands and littoral rainforests', where additional requirements must be satisfied if consent were to be granted.[1321] Other controls require consent to be refused unless elements of the public interest are protected in 'coastal vulnerability'[1322] and 'coastal environment'[1323] areas, or considered in a 'coastal use area'.[1324]

Further, the SEPP reproduced the Act's hierarchy of management objectives, where protecting coastal wetlands and littoral rainforests has precedence, and other public interests prevail over

[1310] See cl 11. See also cl 18 - 22, which require consideration of a relevant master plan, in *SEPP 71*.
[1311] See cl 14 Public access, and cl 20 (2) (f) Master Plans, *SEPP 71*.
[1312] See < http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/repealed_reg/seppn71p578/notes.html > for the Table of Amending Instruments.
[1313] *SEPP 71* was repealed by cl 9(c) *SEPPCM 2018*.
[1314] *State Environmental Planning Policy (Coastal Management) 2018*. [Hereafter *SEPPCM 2018*]. This SEPP was made under section 3.29 of the *EPAA 1979,* as amended.
[1315] See clause 6 *SEPPCM 2018.*
[1316] See Part 2 clauses 10 – 18 *SEPPCM 2018.*
[1317] See cl 6 (2) *SEPPCM 2018.* The SEPP advises that at its commencement no map of the 'coastal vulnerability area' had been adopted. See Note at cl 6 (3) *SEPPCM 2018.*
[1318] See cl 6 (4) *SEPPCM 2018.*
[1319] See cl 6 (5) *SEPPCM 2018.*
[1320] Clause 10(1) *SEPPCM 2018* specifies that development consent is required for clearing of native vegetation, marine vegetation destruction, earthworks (including filling), levee construction, draining, and any other development of the land. These works are declared 'designated development' by cl 10 (2) *SEPPCM 2018,* and thus require environmental impact assessment under s 5.7 *EPAA 1979.*
[1321] See cl 11 (1) *SEPPCM 2018.* The consent authority must be satisfied that the proposed development will not significantly impact on (a) the biophysical, hydrological or ecological integrity' of the these vegetation types, or (b) 'the quantity and quality of surface and ground water flows…'.
[1322] See cl 12 *SEPPCM 2018.*
[1323] See cl 13 (1) *SEPPCM 2018.*
[1324] See cl 14 (1) *SEPPCM 2018.*

private land's development.[1325] Significantly, the SEPP provides for the construction of 'coastal protection works' by persons other than public authorities, 'to reduce the impact of coastal hazards on land adjacent to tidal water', but stipulates that they require development consent.[1326] Minor coastal protection works by a public authority, or works 'identified' by a CMP were cited as permissible without consent,[1327] but any other works require development consent.[1328] Usefully the SEPP also included savings and transitional provisions, and relevant 'former planning provisions'[1329] continued to apply to development proposals in preparation.[1330]

From this review of SEPPs it is apparent that controls on private use of land have applied under many state planning instruments, and currently apply, to protect public access and other public interests in private land, limiting landowners' private property right to use.

Ministerial Policy Directions

State government policies may also be given statutory effect by the Minister issuing Directions to councils.[1331] Direction 2.2 *Coastal Management,*[1332] requires an authority, usually the council, to include in planning proposals relevant provisions 'that give effect to and are consistent with' the *CM Act 2016* (NSW), the *Manual,* and current management instruments,[1333] including, the *NSW Coastal Design Guidelines,* which require public access to and along the foreshore in development of coastal land,[1334] and building setbacks to 'address coastal erosion hazards'.[1335]

Moreover, this Direction protects public interests in private land by stipulating that planning proposals must not increase development or intensify use of land affected by 'a current or future coastal hazard,'[1336] or areas of coastal wetlands or littoral rainforest.[1337]

[1325] See cl 18 *SEPPCM 2018.*
[1326] See cl 19 (1) *SEPPCM 2018.*
[1327] These are beach nourishment, placing of sandbags for less than 90 days, or routine maintenance or repairs to coastal protection structures. See cl 19 (2) (a) *SEPPCM 2018.*
[1328] See cl 19 (2) (b) *SEPPCM 2018.*
[1329] Including SEPPs 14, 26 and 71, for 12 months after the *SEPPCM 2018* commenced, on 3 April 2018.
[1330] See cl 21 (3) *SEPPCM 2018.*
[1331] under s 9.1 *EPAA 1979*.
[1332] Ministerial Policy Direction 2.2 Coastal Management (effective 3 April 2018), [hereafter *PD 2.2 CM*]
[1333] See clause (4) *PD 2.2 CM*. These instruments include the *Toolkit*; *NSW Coastal Design Guidelines* 2003, and any current CMP, or CZMP.
[1334] Coastal Council of NSW, *Coastal Design Guidelines for NSW,* (2003), 58, 59. See Objective 'provide improved access to the NSW coast', and Design Guidelines for Natural Edges, especially Guideline 4. 'Provide pedestrian access to and along the foreshore with provision for those with less mobility.'
[1335] Coastal Council, above n 1311. See Guidelines on Setbacks, 11 – 21, especially 12. 'Setbacks should also address coastal erosion hazards such as storm surge… shoreline recession and sea-level rise…'
[1336] See clause (5) *PD 2.2 CM*.
[1337] Clause (6) *PD 2.2 CM*.

5.3 Indications of relative weight of private and public rights and interests

In the principal statute

The *EPA Act's* statutory framework for approving use and development of land recognizes private interests in land, but private property rights are not recognised. This is unsurprising because the Act creates a statutory framework which replaces and overrides prior common law 'rights' exercisable over private land, and creates procedural rights for landowners, and others.

The Act's provisions do not provide any explicit indications of the relative weight of competing rights, since they define statutory processes for strategic planning, development control and other matters. However the Act's processes for decision-making about use and development of land are intended to supplant the owners' decisions in many situations. Clear indications of the weight attributed to public access and public interests are given in the legal instruments which control private use of private land, in order to protect public interests in that land, and effectively limit the 'right to use' to uses 'permitted without consent'. Hence if land is used in these ways under a common law right, this occurs in a statutory context. For all other uses processes of wider consideration and approval are required. Thus the 'right to use' has limited application.

These statutory processes of development assessment and approval are intended to examine the circumstances applying to the proposed use of a particular area of real property, including any public interest in the private land. Generally speaking, these processes aim to assess the weight of the competing rights and interests on the subject land, and appropriately accommodate them. Usually the use or development is permitted, but conditions are imposed on the consent to protect elements of public interest in the land. However, these processes may identify facts or circumstances which indicate the proposed private use is incompatible with the public interests in the private land, and justify consent being refused. Since consent can be refused, it is clear there is no private property 'right' to develop.

In contrast, public access rights and interests are well recognised in the statutory framework. The legislature clearly intended to create statutory processes through which private use of private land could be approved in the future, provided public access, and other public interests in the land, if any, are protected into the future, via conditions of a development consent. However, without compliance with consent conditions protecting an element of the public interest, a landowner cannot lawfully obtain the private benefit of the consent to use or develop their land. It follows that, in this field of law, public interests may have equal or greater priority than private interests, in decisions about the future use of some private land.

Further, the Act requires that state and local government strategic plans recognize and protect public rights and public interests in private land when identifying land for future development. Hence the legislature clearly intended that councils ensure, through their LEPs, that public access to the foreshore, and other public interests, continue to be protected; and that, if they conflict, public rights and interests should prevail over private interests in land, into the future.

Thus under the processes and instruments created by this statute, public interests in and public uses of private land have considerable weight. Indeed, in some circumstances the potential diminution or loss of public interests in land may outweigh the private interests, and prevent the proposed private use. No final conclusion about the dominance of competing rights may be drawn, when private use is denied due to special circumstances applying to the private land, except that the Act foresees circumstances where public interests *may* override private interests. Therefore this statute does not provide evidence that private property rights trump public rights and interests in coastal lands at present, or in the future. The Act does not recognize private property rights, its processes ensure that public rights and interests in private land are protected, and in some circumstances, permit public interests to outweigh an owners' interests in the land.

In the instruments considered

The SEPPs considered above, indicate that the government, and impliedly, the legislature, recognised private land owners' interests in developing their coastal land, and their property 'rights' where appropriate, but did not regard them as dominant. The SEPPs sought to protect the diverse public interests in private lands: but, though dominant, these public interests did not veto all private use or development. The SEPPs held open the possibility of an owner gaining development consent, to use or develop other parts of the land, provided the necessary time-consuming and expensive studies were undertaken, if this did not adversely affect the public interests protected by the SEPP. The SEPPs used existing processes of environmental impact assessment to identify the private and public interests in private lands, and to weigh the landowner's interest in developing their land against the need to protect an element of the public interest in that land. In a typical scenario, consent and concurrence could be issued for development of private land affected by a SEPP, subject to conditions which protected the public interests in the land, if this were feasible.

This 'co-existence' approach, in the Act and the planning instruments, is not consistent with the idea of 'trumps', where one set of rights negate other rights or interests. Hence in this field of law, there are no indications that private property 'rights' prevail over public rights, but clearly

defined circumstances where public rights and interests may outweigh private interests in decisions about the future use of coastal land.

Overall this field of law shows the legislature's sustained intention to create effective administrative processes to allow private landowners to use and develop their land for diverse purposes, provided that any public interests in their private land are identified and protected.

I next consider statutes in which public rights and public interests can prevail on private land.

6. Acquisition, Easements and Compensation

In this fourth field of law private property rights and public interests directly conflict,[1338] when the State government acquires title or use of privately owned land, for public purposes. I consider next statutes in which the legislature's power to authorize acquisition of private land for public purposes, on payment of compensation, has been long established.[1339]

6.1 Relevant statutes

Lands for Public Purposes Acquisition Act 1880 *(NSW)*

An early instance of the legislature creating a statutory power to acquire private land was the *Lands for Public Purposes Acquisition Act 1880* (NSW).[1340] This Act allowed Crown land to be reserved from sale and dedicated for public purposes, but also empowered the colonial government to recover ownership of private land only recently alienated by the Crown, for public purposes,[1341] to create public access to ocean and harbour foreshores.[1342] It mandated the payment of compensation for acquired land,[1343] but no private property "right" was cited.[1344]

[1338] This conflict is both geographic, since coastal land is highly valued and sought after by private and public interests, and philosophic, competing for a paramount moral and legal position.
[1339] William Blackstone, *Commentaries on the Laws of England* (first pub 1765, 12th ed, 1978) discussed the legislature's power to compulsorily acquire private land in Book One, Chapter One, Cap III.
[1340] hereafter *LPPAA 1880* (NSW). See Acts As Made at < http://www.austlii.edu.au/au/legis/nsw/num_act/ >
[1341] S 8 *LPPAA 1880* (NSW) gave legislative power to the Minister to acquire lands from private owners.
[1342] Under this Act, Bondi Beach and Bronte Estate were bought and public recreational reserves at Curl Curl and Cronulla beaches were created. See Caroline Ford, 'The Battle for Public Rights to Private Spaces on Sydney's Ocean Beaches, 1854-1920s' (2010) 41 *Australian Historical Studies*, 253-268.
[1343] Section 10 *LPPAA 1880* (NSW) only provided that an affected owner "shall be entitled to receive such sum of money by way of compensation for the land of which they have been deprived." Similar provisions had been previously been enacted in s 6 *Roads and Streets Act 1833* (4 Gul IV).
[1344] Section 11 *LPPAA 1880* (NSW) stated that the property, as an 'estate or interest' held by a person 'shall be converted into a claim for compensation' against the Minister for Public Works. Subsequent sections of the Act set out the terms and procedures for making, valuing and settling such claims.

Provisions entitling landowners to compensation if their private land was compulsorily acquired by the State for a public purpose, were included in later legislation[1345] and current statutes.[1346]

Land Acquisition (Just Terms) Compensation Act 1991 *(NSW)*

Concern about the compensation the State government paid when it acquired private land, led to the enactment of a requirement for compensation on "just terms". The *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)[1347] enables compulsory acquisition of private land for a public purpose, by 'an authority of the State' authorized by specific legislation.[1348] It requires an authority to adopt a 'proposal to acquire land', notify the owner of the proposed compulsory acquisition,[1349] guarantee compensation of 'not be less than the market value'[1350] and furnish relevant particulars.[1351] Though a landowner may appeal the value of the compensation,[1352] or failure to pay compensation,[1353] no appeal of the decision to acquire the land is possible.

However, it appears that the Act does not apply to private land lost to the sea through gradual erosion or diluvion, under the doctrine of accretion.[1354] Though the State government gains ownership, as the owner of the foreshore,[1355] unless an authority gives notice of an intention to acquire lands lost to the sea, the Act is not activated, and compensation is not payable.[1356]

Included in this field is the statute governing public use of private land, through easements. [1357]

Conveyancing Act 1919 *(NSW)*

Many provisions of the *Conveyancing Act 1919* (NSW)[1358] authorize public use of private land.

[1345] See eg ss 39, 40 *Public Works Act 1912* (NSW), s 477 of the *Local government Act 1919* (NSW); s 4(3) of the *Land Acquisition (Charitable Institutions) Act 1946 No 55* (NSW).
[1346] See eg ss 177 - 206 *Roads Act 1993* (NSW).
[1347] Hereafter the *LAJTCA 1991* (NSW).
[1348] See s 5 *LAJTCA 1991* (NSW).
[1349] See ss 11, 12 *LAJTCA 1991* (NSW).
[1350] See ss 10(1), 54, 56(2) *LAJTCA 1991* (NSW).
[1351] See s 15 *LAJTCA 1991* (NSW).
[1352] See s 66 *LAJTCA 1991* (NSW).
[1353] See s 67 *LAJTCA 1991* (NSW).
[1354] Because no action is taken by 'an authority of the State', and the loss of land occurs due the actions of wind, wave and tide, the Act is not triggered. Under the common law ownership of that part of the land which has fallen below MHWM is 'silently transferred' to the Crown, and no compensation is payable.
[1355] See *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287 (Allen J).
[1356] See *Attorney General (UK) v Chambers* (1859) 4 De G & J 55, 68 (Lord Chelmsford). See the discussion of this in Corkill, 'Ambulatory', above n 63, 80-81.
[1357] easement: A right attached to a piece of land giving the owner or occupant rights over another piece of land, the exercise of which interferes with the normal rights of the owner or occupier of that other land…. See Butt and Hamer (eds), above n 207, 195.
[1358] hereafter *CA 1919* (NSW).

The *CA 1919* (NSW) allows public authorities to create easements for public utilities;[1359] public access;[1360] public authorities' access,[1361] maintenance and repair;[1362] and the protection of elements of public interest such as native vegetation, through the application of positive public covenants over private land.[1363] Easements over a land title may be created with the proprietor's consent,[1364] or may be imposed by the court,[1365] if the court is satisfied it is in the public interest to do so,[1366] the owner can be adequately compensated,[1367] and 'all reasonable attempts' to obtain their consent did not succeed.[1368] Easements and covenants are recorded on the land title and continue to apply if the land is sold.[1369] Further, easements may only be extinguished by the court,[1370] and covenants revoked with the authority's consent,[1371] not by the landowner.

6.2 Indications of relative weight

These statutes clearly indicate that the legislature places greater weight on public rights and interests in coastal lands. The legislature has long recognized private property rights but has not held them to be immutable or paramount, and clearly intended that the public interest, or public purposes, should overrule private property 'rights' if they conflicted. That compensation should be paid to owners for the acquisition of their land for a public purpose, [1372] indicates that the legislature recognizes private property rights, but does not afford them dominance. Moreover, the Act's empowering of future land acquisitions, demonstrates the legislature's intention that the public interest should continue to be dominant over private property rights into the future. Thus, in this field of statute law there is no evidence that private property rights 'trump' public rights or 'public interests' generally. Indeed, key provisions of the *Land Acquisition Act 1991* and the *Conveyancing Act 1919* show that the legislature foresaw the opposite being necessary.

[1359] Section 88A (1B) *CA 1919* (NSW) authorising the creation of easements in gross for public utilities such as gas, water and electricity, and for drainage or sewerage purposes.
[1360] via an easement for 'right-of-way' 'right of carriage way', or 'right of footway', as a 'right to access'; see s 88A (2)-(2A) *CA 1919* (NSW).
[1361] See section 88B *CA 1919* (NSW).
[1362] Section 88BA *CA 1919* (NSW).
[1363] such as a 'public positive covenant' made pursuant to s 88E *CA 1919* (NSW).
[1364] A council is a "public authority" able to impose easements over land under s 88E *CA 1919* (NSW).
[1365] Section 88 K *CA 1919* (NSW).
[1366] See s 88 K (2) (a) *CA 1919* (NSW).
[1367] 'for any loss or other disadvantage that will arise from the imposition of the easement'… See s 88 (2) (b) *CA 1919* (NSW). Such compensation does not include costs which 'may' arise from the easement. Note that no compensation is payable for the creation of an easement with the consent of the burdened landowner or other parties with a registered interest in the burdened land.
[1368] Section 88 (2) (c) *CA 1919* (NSW).
[1369] See s *CA 1919* (NSW).
[1370] See s 89 *CA 1919* (NSW).
[1371] See s 88B (3A) *CA 1919* (NSW), and s 51 *Real Property Act 1900* (NSW).
[1372] The legislature's approach has been recognised by the Court's "presumption" when interpreting statutes, "that parliament does not intend to interfere with vested property rights, and may do so only by the use of 'unequivocal terms incapable of any other meaning'." See Michelle Sanson, *Statutory Interpretation* (Oxford UP, 2012) 202; citing *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552.

7. Private use of coastal waters

The last group of statutes relate to private use of the state's coastal waters.[1373] I outlined the *Marine Safety Act's* effect on public navigation in Chapter Two. I next consider its application in 'closing' coastal waters to allow their private use, and other situations and statutes, where private property rights or interests in the sea-bed or coastal waters, may affect public navigation.

7.1 Relevant statutes

The regulation of public use of NSW coastal waters[1374] and the means of navigation[1375] have changed over time, but I cannot explore these matters here.[1376] Recent legislative changes have located public navigation within the 'marine estate',[1377] in the jurisdiction of the Marine Estate Management Authority and Roads & Maritime Services.[1378]

Major changes have also been made in national and international laws for use of the territorial sea and international waters,[1379] but here the focus is on the coastal waters of New South Wales.

Marine Safety Act 1998 (NSW)

The current primary statute relevant to public navigation is the *Marine Safety Act 1998* (NSW)[1380] which incorporates elements of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012* (Cth).[1381] Other relevant statutes are the *Marine Safety (General) Regulation 2016* (NSW)[1382] and *Regulations for Preventing Collisions at Sea*,[1383] adapted for NSW coastal waters.[1384]

[1373] The State's coastal waters include the tidal waters of the sea, any arm of the sea, estuary, coastal inlet or tidal river or creek up to high water mark. They are sometimes referred to as 'navigable waters'.
[1374] Several early statutes sought to regulate commercial navigation in NSW. See the *Shipping Act 1825* (NSW), *Steam Navigation Acts* of 1847 and 1850 (NSW). See also *Maritime Services Act 1935* (NSW) and *Ports and Maritime Administration Act 1995* (NSW) now repealed.
[1375] See the discussion of the regulation applying to personal watercraft (PWC) in Chapter II.
[1376] But see Mike Richards *North Coast Run: Men and Ships of the New South Wales North Coast* (Turton and Armstrong, 3rd ed, 1996).
[1377] The 'marine estate' is defined as extending to all tidal waters up to highest astronomical tide, and seaward for three nautical miles, in s 6 *Marine Estate Management Act 2014* (NSW).
[1378] See < https://www.rms.nsw.gov.au/maritime/index.html >.
[1379] See Rachel Baird, 'The National Legal Framework', 45-66' and Rothwell, Donald R, 'The International Legal Framework', 21-44, in Rachel Baird and Donald R Rothwell (eds), *Australian Coastal and Marine Law* (Federation Press, 2011).
[1380] Hereafter *MSA 1998* (NSW). Other Acts also apply e.g. *Marine Estate Management Act 2014* (NSW).
[1381] See ss 9A – 9R *MSA 1998* (NSW).
[1382] Other regulations include *Management of Waters and Waterside Lands Regulations 1972* (NSW); *Marine Parks (Zoning Plans) Regulation 1999* (NSW), *Marine Pollution Regulation 2006* (NSW) *Marine Parks Regulation 2009* (NSW); *Ports and Maritime Administration Regulation 2012* (NSW).

Under the *MSA 1998*, the relevant Minister may close certain areas of coastal waters to public navigation,[1385] and create an 'exclusion zone',[1386] if justified by a special event,[1387] or other public purposes, such as channel dredging, harbour or wharf repairs, or bridge works.[1388]

An Aquatic Licence may be issued for private use of a defined area such as for a swimming or sailing race,[1389] though exclusive use may not be required. If exclusive use is approved, the 'closure' occurs by the publication of a relevant Notice in the Government *Gazette*,[1390] and on the NSW RMS website.[1391]

The notice describes the period and area where public navigation is excluded, and contravening the notice is an offence.[1392] Areas of closed or restricted waters are shown on larger scale maps published on the RMS website (see extract in Figure 12). The effect of closure Notices varies widely.

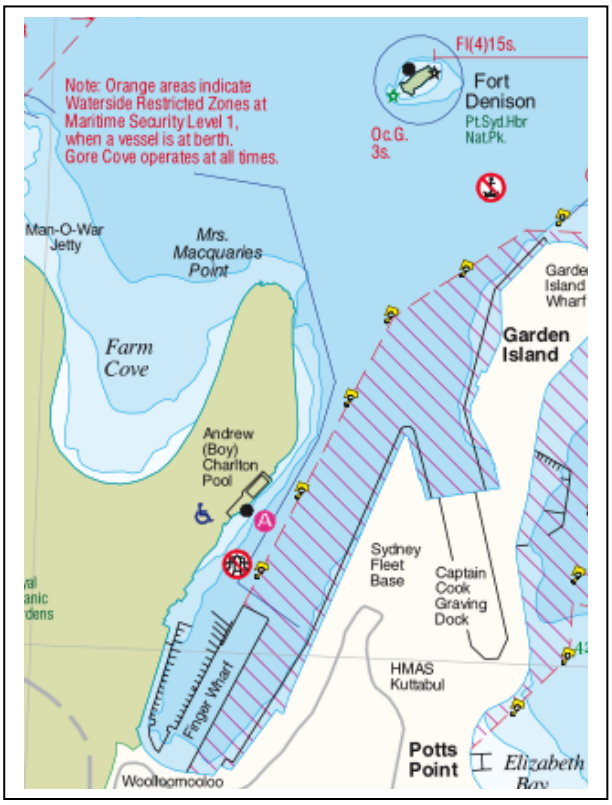

Figure 12 – extract from RMS Map 9d – Port Jackson.

[1383] See Robby Robinson, *The International Marine Book of Sailing* (McGraw-Hill, 2009). The rules were adopted as international rules for international waters under the *Convention on the International Regulations for Preventing Collisions at Sea 1972*, (COLREGS) adopted 20 October 1972, Entry into force 15 July 1977, through the International Maritime Organisation. Thus the Regulations are international law. See < http://www.imo.org/About/Conventions/ListOfConventions/Pages/COLREG.aspx >. These rules were further refined into 'international racing rules' which apply in all competitions held by the International Sailing Federation. See < http://www.sailing.org/documents/racingrules/index.php >

[1384] The *COLREGS 1972*, with some special NSW rules for Sydney Harbour, were adopted for use in NSW coastal waters under cl 5 of the *Marine Safety (General) Regulation 2009* (NSW) made under s 10 *MSA 1998* (NSW). The NSW amended version of the COLREGS are Schedule 2 of the Regulations.

[1385] See s 11 (2A)(f) *MSA 1998* (NSW).

[1386] Under s 12 *MSA 1998* (NSW).

[1387] Eg the public fireworks display focussed on the Sydney Harbour Bridge on New Year's Eve.

[1388] See examples of marine warnings for maintenance works at the NSW Marine Services website.

[1389] See s 18 *MSA 1998* (NSW).

[1390] See s 12(2) *MSA 1998* (NSW).

[1391] See < http://www.rms.nsw.gov.au/maritime/using-waterways/restrictions-closures/index.html >.

[1392] See s 12(5) *MSA 1998* (NSW).

Closures may be permanent and limited in area,[1393] temporary and general,[1394] or apply to a specific type of vessel.[1395] A sail-board exclusion area over Sydney Harbour is an example of greater weight being attributed by the legislature to the public navigation of ferry services and commercial shipping, over recreational sailing, to better serve the public interest.[1396]

All 'closures' aim to avoid risks to public safety which could arise from concurrent use of coastal waters by conflicting private and public interests. Usually, once the reason for temporary public exclusion ceases, and the Notice expires, public navigation in the previously closed area is permissible again. Thus, in the *MSA 1998* the legislature's primary response to potential conflict between private and public rights and uses[1397] of the state's coastal waters, has been to suspend public navigation only where adequately justified, and for the minimum time and extent necessary to ensure public safety. This legislative response more closely resembles an accommodation between competing private and public rights to use coastal waters than evidence of private property rights or interests operating as 'trumps'.

Given title to and power over the seabed and coastal waters within three nautical miles of LWM are held by the State under statute law,[1398] and adjoining lands from LWM to MHWM are held by the State under common law,[1399] it seems unlikely that private property rights could exist in the seabed or tidal waters. However there are several situations where this is possible.
I next consider statutes where there are private interests in, and uses of, lands below MHWM.

Crown Land Management Act 2016 *(NSW)*

One example of such a private interest is a jetty built by a private person or corporation under a lease over part of the seabed, issued by the State government.[1400] Typically while exclusive private domestic use is conferred by the lease, the structure and seabed remain publicly owned.[1401] The lease creates a private interest or 'property' in the submerged Crown land[1402]

[1393] Eg the prohibition of public entry into the waters of the Australian Navy Fleet Base in Sydney Harbour. See Figure 11.
[1394] as in the closure of waters adjoining the Sydney Harbour Bridge for New Year's Eve fireworks.
[1395] Eg the standing exclusion of personal water craft (PWC) from extensive 'PWC exclusion areas'. See Reg 51 *Marine Safety (General) Regulation 2016* (NSW).
[1396] An exclusion zone was justified to overcome the conflict between windsurfers and the ferry service and coastal commercial shipping, due to the long standing rule of navigation 'power gives way to sail'.
[1397] Or conflicts between the public right of navigation and other public interest uses: maintenance of harbours for shipping, efficient public transport services and safety of the general public.
[1398] s 4 *Coastal Waters (State Powers) Act 1980* (Cth), s 4 *Coastal Waters (State Title) Act 1980* (Cth).
[1399] See *New South Wales v Commonwealth* [1975] HCA 58; (1975) 135 CLR 337,
[1400] A lease or licence for use of the seabed may be issued under s 5.17 or 5.23 of the *CLMA 2016* (NSW).
[1401] See the *Terms and Conditions* of the standard RMS Lease for lands under its administration. < https://www.rms.nsw.gov.au/maritime/property-planning/leasing/policy-list.html >

which may be transferable to a new owner of the adjoining land,[1403] and prohibits unauthorized public use.[1404]

However, exclusive rights to use the structure and adjacent waters,[1405] are not perpetual.[1406]

Petroleum (Offshore) Act 1982 (NSW)

Exclusive private use of the seabed and coastal waters is also permissible under the *Petroleum (Offshore) Act 1982* (NSW), when a 'safety zone' is declared 500m around a well or other facility on the seabed in the state's coastal waters, to extract oil or gas, to exclude public navigation.[1407] Private ownership of the seabed is not obtained, only temporary exclusive use of a defined area. That use may be enduring if the consent for the resource extraction is decades long, or unlimited. However, excluding public navigation from 'safety zones' around structures in off-shore locations is a small reduction in the area available for boating, which also serves the wider public interest of ensuring the safety of rigs, rig-operators and the boating public. It is likely that the legislature saw the financial benefits to the State from royalties under the Act as the 'greater public good', outweighing the minimal non-permanent loss of public navigation in 'safety zones'.

Fisheries Management Act 1994 (NSW)

Aquaculture leases for oyster production, are another example of private interests in coastal waters.[1408] Certain private rights are assigned to the leaseholder, over the racks attached to the seabed, but not exclusive possession of the seabed.[1409] Ownership of 'fish' specified in the lease are assigned to the lessee,[1410] but not other fish, so oyster leases are subject to the public right of

[1402] See the licences and leases over the bed of tidal waters for domestic and commercial uses available from the RMS < https://www.rms.nsw.gov.au/maritime/property-planning/leasing/index.html >
[1403] Restrictions may apply to the transfer of leases, see s 5.19 or licences, see s 5.24, *CLMA 2016* (NSW).
[1404] Unauthorised use of private facilities can be enforced by the person or corporation owning the facility, through 'trespass' actions in the Local Court.
[1405] A lease or licence over the seabed for the construction of a jetty or pier usually also includes the exclusive use of immediately adjoining waters, for mooring.
[1406] Leases of submerged lands for jetties require renewal periodically. Domestic waterfront leases are issued for a period of between 3 and 20 years. See RMS *Information Guide – Maritime Property – Establishing a Domestic Waterfront Lease or Licence 2017*, 2. See also s 5.16(1) *CLMA 2016* (NSW).
[1407] See s 120 *Petroleum (Offshore) Act 1982* (NSW) (hereafter *POA 1982* (NSW). This is consistent with Article 60, *United Nations Convention on the Law Of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397, (entered into force November 1994) (*UNCLOS III*).
[1408] Aquaculture leases, for oyster production are issued under s 163 of the *Fisheries Management Act 1994* (NSW) [hereafter *FMA 1994* (NSW)].
[1409] See s 164 (2) *FMA 1994* (NSW).
[1410] See s 164 (1) *FMA 1994* (NSW).

fishing.[1411] Aquacultures permits and leases also typically impose duties and responsibilities on the lessee.[1412] I next explore this reach of law for any indications of rights operating as 'trumps'.

7.2 Indications of relative weight

In these statutes the legislature makes several indications of the relative weight of private rights and the public right of navigation. Though they acknowledge this public right, diverse private interests in and uses of the seabed and coastal waters are also recognized and permissible.

Where a structure is built over submerged land, under a lease or licence, the structure may be privately owned but the State retains title to the land.[1413] Further, even if the structure is privately owned, the operation of private property rights, such as its transfer to another person, may be limited or prevented by the terms of the lease or licence.[1414] For example private use of the seabed for a jetty or oyster lease does not exclude public navigation in adjacent waters,[1415] however private ownership of a jetty denies its use to the public, and allows trespassers to be prosecuted.[1416]

In contrast, public navigation is excluded from 'safety zones' around off-shore resource development facilities, typically for the life of the project.[1417] Exclusive private use of some coastal waters may be approved if the event could conflict with normal public use, in that location.[1418] However, many private uses of the state's coastal waters do not require exclusive use and co-exist with public navigation.[1419] Permanent closures of coastal waters are often due to other priority public uses eg Australian Navy Fleet base in Sydney Harbour, or port operations. When a 'public exclusion area' is declared over certain coastal waters, to enable private use, the public right of navigation is not extinguished, but suspended in a defined area for a period, and on the expiry of the Notice of closure, it revives.[1420] When public navigation is excluded in this way, it is the statutory framework which overrides it, not private property

[1411] See s 164 (3) *FMA 1994* (NSW).
[1412] See s 162 *FMA 1994* (NSW). See also the *Fisheries Management (General) Regulation 2019* (NSW).
[1413] See s *CLMA 2016* (NSW). See also s 164 (3) *FMA 1994* (NSW).
[1414] A licence or lease over a structure attached to a privately owned real property may be transferred to the purchaser of the real property, if due notice is given to RMS and their approval is obtained. Otherwise a new lease or licence may be required. See RMS *Information Guide – Maritime Property – Managing Domestic Waterfront Leases & Licences 2017.*
[1415] See s 164(3) *FMA 1994* (NSW).
[1416] The terms of the licence or lease usually specify the use as domestic use by the lessee, and exclude all public and commercial use. See Clause 4.1 in standard Lease 'Permitted Use'.
[1417] See s 120 *POA 1982* (NSW).
[1418] See the procedure for issuing an Aquatic Licence under s *MSA 1998,* for activities which have the potential to affect public use of navigable waters. See << https://www.rms.nsw.gov.au/maritime/using-waterways/aquatic-events/licences.html >.
[1419] For eg aquaculture leases for oyster production do not prohibit public navigation.
[1420] See s 18 *MSA 1998* (NSW).

'rights'. Further, where private uses of the seabed and coastal waters are permitted, these permits are not perpetual.[1421]

Hence the legislature has accommodated diverse private interests in the seabed and coastal waters through these statutes, but the 'property rights' available are narrow, limited, and usually temporary use rights under the relevant lease or licence, not common law private property rights.

While these statutes indicate that private uses of the seabed and coastal waters have been given weight by the legislature, their operation may or may not affect the public right of navigation. Where possible, private uses co-exist with public navigation, but if exclusive use is justified, the area affected is defined by the Notice.[1422] Hence private use may take priority over public navigation in certain waters, under some circumstances, where the statutory authority permits this, not under any private property 'right', and when the private use expires, the public right of navigation revives. Relevantly, an aquaculture lease for private use of the seabed under the *FMA 1994*, requires the consent of the minister administering the *MSA 1998*, to ensure the leased area is not required for public navigation and its structures are not a danger to public navigation.[1423]

Thus these statutes do not provide evidence of either private property rights operating as 'trumps' over the public navigation, or the public right of navigation preventing limited, temporary private uses of small areas of seabed and coastal waters. They indicate that while concurrent private and public uses of coastal waters are possible, concerns about risks to 'public safety' from conflicting uses is the key factor in decisions to temporarily close coastal waters to public navigation to permit their private use.[1424] Hence in this field of law 'public safety' prevails over the public right of navigation, and the limited private use 'rights' permitted over the seabed and coastal waters.[1425]

This concludes my review of the relevant provisions of statutes in five relevant fields of law. In the next Part I discuss these statutory provisions and their relevance to my research question.

[1421] Section 5.2 (4)(e) *CLMA 2016* (NSW) requires a 'maximum term' for holdings over Crown land.
[1422] The Marine Notice declaring an 'exclusion area' for a 'special event' under s 12 *MSA 1998* (NSW) typically defines the area affected, the means of identifying it, and the time and date of its expiry. See < https://www.rms.nsw.gov.au/maritime/using-waterways/restrictions-closures/marine-notices/index.html >.
[1423] See s 17 *MSA 1998* (NSW).
[1424] See 'How aquatic licence applications are determined' at < https://www.rms.nsw.gov.au/maritime/using-waterways/aquatic-events/licences.html >.
[1425] See ss 11(2)(a), s13, 13A, 14, 15A *MSA 1998* (NSW).

Part C. Discussion

In this Part I make observations on the weight the legislature places on competing private and public rights in the statutes considered, answer my secondary research questions and report my conclusions on the current relationship between competing these rights.

8. Observations

The Crown policy to reserve coastal land from sale to provide for future public purposes, before grants of private ownership were made, established a clear priority for public uses of coastal land in New South Wales from the time of early settlement, which continues today. The historical link between this Crown policy, subsequent legislation by the colonial government, and later New South Wales statutes, indicates the legislature's sustained intention to award public purposes priority in the statutory framework. Private uses of Crown land are recognised in these statutes, but the rights exercisable are statutory rights, not common law private property rights. While the legislature recently adjusted the weight attributed to private interests in Crown land, by permitting previously prohibited exclusive commercial uses, this did not elevate private interests to a position of 'trumps'. Rather they were accommodated in the statutory framework, to co-exist with public rights to access and use Crown lands, where possible, and generate revenue to the State, in the public interest.

The legislature's intention to attribute greater weight to public rights of access, and to public interests generally, over private property rights is evident in statutes governing coastal lands protection and management. Prohibiting consent for protection works on coastal lands,[1426] and modification of a private property right, in order to protect public access along the foreshore,[1427] provide unmistakable indications that this public right is dominant. Diverse public interests also warrant protection,[1428] whereas private land's protection has only secondary status.[1429] Moreover, the claimed private property right to protect against the sea[1430] is plainly incompatible with current law.

The law governing environmental planning and development control, the *EPAA 1979* (NSW), demonstrates the legislature's awareness that owners' use or development of their private land could adversely affect the public, public rights, or the public interest in that land, or nearby land.

[1426] See s 55M *CPA 1979* (NSW) and s 27 *CMA 2016* (NSW).
[1427] See s 55N *CPA 1979* (NSW) and s 28 *CMA 2016* (NSW) discussed above.
[1428] See ss 3, 5.6, 7, 8 and 9 *CMA 2016* (NSW).
[1429] via an 'emergency action sub-plan', prepared under s 15(1) *CMA 2016* (NSW).
[1430] See Coleman, above n 13.

The Act's processes aim to identify and assess the competing private and public interests in private land, and to permit private uses or development only if public safety, public rights, and other public interests in that private land, are effectively protected. Hence the legislature intended that private and public interests in private land co-exist, wherever this is feasible, not operate as 'trumps'. However, protecting public safety, public access and public interests, may, in some situations, require private use of private land to be refused consent. Thus, in rare instances public rights and interests can 'trump' private interests in coastal land. Significantly private property rights are not recognised, and instruments made under the Act explicitly regulate the 'right to use' private land.

Statutes authorizing acquisition, compensation and easements also clearly attribute greater weight to public rights and interests. By authorizing private land's acquisition, and its use for public purposes without acquisition, via easements or covenants, these statutes demonstrate the legislature's intention that public interests in private land prevail over private property rights. While private interests are recognized through compensation, landowners' property rights cannot prevent the State acquiring their private land, or the Court to creating an easement, without their consent.[1431] Hence these statutes offer no evidence of private property rights acting as 'trumps' over public rights and interests, but abundant evidence of the converse. I conclude that in practice, private property rights over coastal lands in New South Wales are weak, limited by definition, and restricted by modern laws.

From the statutes governing use of coastal waters it is apparent that public right of navigation though regulated, is extensive and enduring, but a range of private interests in the seabed and coastal waters, of a limited and often temporary nature, are also recognised. Typically, private rights to use the seabed or coastal waters, created by leases or licences issued under relevant statutes, co-exist with public navigation, unless they restrict normal public use of coastal waters. If exclusive use is required approval may be granted, but public navigation is restored when the private use expires. Thus these statutes show private interests in coastal waters gain temporary priority and affect public navigation in some areas, but do not 'trump' public rights entirely. Further, it is clear that another element of the public interest, public safety, which is dominant.

A common feature of these statutes are processes which recognize the potential for conflict between competing rights, and which aim to identify and protect elements of the public interest in land of all tenures when decisions are made about their future use. Also common are legislatures' intentions that public rights and interests in coastal lands co-exist with private

[1431] See s 11 *Land Acquisition (Just Terms) Compensation Act 1991* (NSW), and s 88K *Conveyancing Act 1919* (NSW).

interests where possible, and that public rights prevail over private property rights if they conflict. However public rights have been narrowly defined, and public uses affect private land only to the extent necessary for the public purpose. Other private property rights are unaffected.

Legislatures have consistently recognized landowners' private interests by authorizing compensation if a public authority compulsorily acquires private land for a public purpose but have not permitted private property rights to prevent the land's acquisition. Further, any compensation is payable under the relevant statute, not as of 'right'. Thus, statutes authorizing compulsory acquisitions and easements over private land for public purposes, clearly demonstrate that private property rights may be overridden if the public interest justifies this. Further, these statutes indicate the legislatures' intention that, under stated circumstances, these public rights, uses and purposes continue to override private interests in land into the future.

9. Conclusions on claimed private property rights

With the benefit of these reviews of relevant common law rules and current statutes it possible to now state my conclusions on the existence of the four private property rights claimed by some landowners, noted in Chapter II, that

a) allows them to build seawalls or other structures to defend against the sea;
b) creates a 'duty' on the State to 'protect' them from the sea with defensive structures;
c) entitles them to be paid compensation for land lost to the sea;
d) are dominant, and paramount considerations "which the legislature cannot ignore".

In the next sections I draw on these primary sources of law to explain the basis for concluding that these claimed rights do not exist under current law in the jurisdiction of New South Wales.

a] Is there a 'right to protect' or defend?

The claim of a 'right to protect' or defend against the sea is based on an outdated view of the sea as an enemy which obliged the King to defend the realm against the invader. [1432]The claim is not well founded since it overlooks relevant court rulings,[1433]the powers of State legislatures,[1434] and the modern laws of this jurisdiction.[1435] Under current law, construction of sea defences can

[1432] This view was ascribed to Lord Coke in *Isle of Ely* (1609) 10 Rep. 141 a, in *Attorney General (UK) v Tomline* (1880) 14 Ch 58, 66 (Brett LJ).
[1433] *Hudson v Tabor* [1877] 2 QBD 290, and *Attorney General v Tomline* (1880) 14 Ch 58.
[1434] The power of the NSW Legislature was reported as having "the widest possible operation" by Kirby J in *Durham Holdings PL v New South Wales* (2001) 205 CLR 399, at [56].
[1435] Eg the *Coastal Protection Act 1979* (NSW); the *Coastal Management Act 2016* (NSW).

only proceed lawfully with development consent, not as a private property right.[1436]

b] A Crown 'duty' to defend?

The claimed duty of the Crown, or State government, to construct defences against the sea, to protect private land has also been overtaken by modern legislation.[1437] While the Crown, as the State government has a power to construct defences, it has no duty or obligation to do so.[1438]

c] A 'private property right' to compensation?

The claimed private property 'right' to compensation for land lost to the sea is also rejected.[1439] In the United States of America, a citizen has a *constitutional* right to compensation[1440] if their property is acquired by government, which includes lands lost below tidal waters.[1441] However this *constitutionally* guaranteed 'right' attached to real property in the US, and related doctrine on "takings", do not apply in the jurisdiction of New South Wales.[1442] Further, section 51(xxxi) of *Australian Constitution 1901* (Cth) does not replicate this right in Australian law.[1443] Section 51 states the Commonwealth's heads of power, not citizens' rights. Sub-section (xxxi) confers power to acquire private property on the Commonwealth government, but imposes a duty to pay 'just terms' compensation when it acquires private property from a citizen, or a State.[1444] In contrast, where private property is compulsorily acquired by a State government, s 51(xxxi) does not apply, and compensation, if payable, is determined by the authorizing State legislation, not as of 'right'.[1445] The claim that a private property right to compensation exists in common

[1436] Corkill, 'Claimed', above n 347, 53-54.
[1437] Construction of seawalls require development consent under s 4.2 *EPAA 1979* and must satisfy the requirements of section 27 *Coastal Management Act 2016* (NSW).
[1438] See Corkill, 'Claimed', above n 347, 52. This issue is considered more closely in Chapter III.
[1439] Ibid 55. For a fuller discussion see Corkill, 'Ambulatory', above n 63, 79-82
[1440] In the US, the right of all citizens to hold property was guaranteed by part of the Fifth Amendment of the US Constitution, made in 1791, which inserted a prohibition on the compulsory acquisition of private property by the State unless 'just terms compensation' is paid at full market value.
[1441] Under the 'takings clause' of the Fifth Amendment. See Joseph L Sax, 'Takings, private property and public rights' (1971) 81 *Yale Law Journal* 149.
[1442] The High Court has ruled that whether compensation is paid for the acquisition of private property by a State, and its quantum, are determined by the statute law, not as of 'right'. See *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399; 177 ALR 436, [31] (Kirby J).
[1443] Section 51 (xxxi) does not create a constitutional obligation which extends from the Commonwealth Constitution to the constitutions of the States or to State government s. See *Durham Holdings PL v New South Wales* (2001) 205 CLR 399; 177 ALR 436, [56], [63] – [64] (Kirby J).
[1444] *Durham Holdings PL v New South Wales* (2001) 205 CLR 399; 177 ALR 436, [56], (Kirby J).
[1445] See *Durham Holdings PL v New South Wales* (2001) 205 CLR 399; 177 ALR 436, [29] – [31] (Kirby J). See also Andrew Macintosh and Jancis Cunliffe, 'The significance of ICM in the evolution of s 51(xxxi) (2012) 29 *Environmental and Planning Law Journal* 297-315.

law despite enactment of modern statutes was rejected by the High Court of Australia. [1446]

Though there may be an expectation or a cultural norm that compensation be paid when a State compulsorily acquires property, it is the statute law which governs payment of compensation, "if any".[1447] Indeed as the High Court declared in *Durham,* the applicant had failed to show a single authoritative precedent in English common law for the claimed private property 'right to compensation'.[1448] Hence it is clear that this 'right' does not exist in New South Wales.

d] Are private property rights dominant?

The claims that 'private property rights' are dominant, and 'fundamental' considerations which legislatures "cannot ignore",[1449] are also rejected. As the statutes above show, there are many instances where the legislature has given public rights enduring precedence: eg by modifying the property rights available to a littoral landowner under the doctrine of accretion, by s 28 *Coastal Management Act 2016* (NSW) to ensure that the public right of access to and along the foreshore is not limited.

Further, as noted above, the decision in *Durham* makes it clear that the power of State legislatures is effectively unlimited. So, rather than claimed rights constituting insuperable limits which Parliament "cannot ignore", what can be seen from the literature, case law and statutes considered above, is that the NSW legislature may 'ignore' such claims and modify or repeal private property rights by statute, if a public interest rationale justifies doing so.

Hence the evidence reviewed shows that these four claimed landowner rights do not exist, and private property rights are not dominant or immutable in New South Wales as claimed.[1450]

10. Answers to secondary research questions

Based on the foregoing analysis of the common law and applicable statute law it is also possible to now answer the secondary research questions identified in Chapter I, as a key step towards answering my primary research question. In this section I restate the questions and furnish concise answers on the operation of current law.

[1446] *Durham Holdings PL v New South Wales* (2001) 205 CLR 399; 177 ALR 436, [14] (Gaudron, McHugh, Gummow and Hayne JJ), [57] Kirby J). Kirby cited the Mabo decision, *Mabo v Queensland* (1988) 166 CLR 186, as a relevant prior decision which had determined the question authoritatively.
[1447] *Durham Holdings PL v New South Wales* (2001) 205 CLR 399; 177 ALR 436, [33] – [35] (Kirby J).
[1448] See *Durham Holdings PL v New South Wales* (2001) 205 CLR 399; 177 ALR 436, [12] (Gaudron, McHugh, Gummow and Hayne JJ), [52] (Kirby J).
[1449] These claims were made in Karen Coleman, above n 13, 422.
[1450] See the discussion of this in Corkill, 'Claimed', above n 347, 54-55.

Q1. Where will the boundary of private land, affected by coastal hazards, be located?

A. As sea-levels rise, the property boundary moves landward, and is located wherever the natural boundary formed by of the line of MHWM is located from time to time, irrespective of any prior boundaries defined by survey.[1451]

Q2. Who owns land when it becomes covered by tidal waters ie comes to lie < MHWM??

A. Title to land below tidal waters reverts to the Crown, as the State of New South Wales, under the common law. A land title, or a plan attached to it, requires amendment if it becomes erroneous after its issue due to effect of the doctrine of accretion to add or subtract land.[1452]

Q3. Do landowners have a private property 'right' to build seawalls to defend against the sea?

A. No. There is no common law right to defend against the sea.[1453] In New South Wales statute law applies and works require development consent within the statutory framework created by the *EPAA 1979*, *LGA 1993* and *CMA 2016.*[1454]

Q4. Are governments duty bound to construct defences against the sea?

A. No. State and local government authorities have powers to build defensive structures, following environmental impact assessment and development approval processes,[1455] but there is no common law duty[1456] which requires the State, or a local council to do so.

Q5. Are governments liable to pay compensation for private land 'lost' to the sea?

A. No. Compensation is not payable because the land is 'taken' by the sea not by action of the State and the relevant legislation is not triggered.[1457] The only compensation available under the common law is the gradual natural gain of land under the doctrine of accretion.[1458] There is no common law right to compensation: statute law provides compensation, if any.[1459]

These answers constitute a substantial basis for concluding that at present, in practice in New South Wales, private property rights are not as extensive or dominant, as has been claimed.

[1451] See *EPA v Saunders* (1994) 13,660 discussed in s 8 Chapter III above.
[1452] See *EPA v Saunders* (1994) 659 (Bannon J) discussed in section 8 of Chapter III above.
[1453] See *Hudson v Tabor* (1876) (1877) *AG v Tomline* (1889) discussed in ss 4 and 5 of Chapter III above.
[1454] See ss 27 and 28 *CMA 2016* (NSW) discussed in section 4 of Chapter IV above.
[1455] See the discussion of statutory controls on coastal protection works in sections 4 and 5 of Chapter IV.
[1456] See *AG v Tomline* (1889) discussed in s 5 Chapter III.
[1457] See the discussion of the operation of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) in section 6 of Chapter IV above.
[1458] See *Attorney General (Ireland) v McCarthy* [1911] 295-6, discussed in section 6 of Chapter III above.
[1459] See the discussion of *Durham Holdings Pty Ltd v NSW* (2001) in section 10 of Chapter III above.

11. Conclusions on current relationship between competing rights

In this section, using relevant case law and current statutes, I draw conclusions about the current relationship between competing private property rights and public rights to use coastal lands.

Current statutes are explicit that many, if not most, uses of land cannot proceed under a land-owner's private property right, and need approval from a relevant authority, or are prohibited. Where public access or another public interest exists in private land, use or development of the private land may be permissible if the public access or public interest can be adequately protected. In this way the legislature intended that private and public interests in land coexist where-ever feasible. However, where the public interest in private land is significant and cannot be adequately protected through mandatory conditions, consent for private use or development of the land may be refused. I conclude that, though theoretically extensive, in practice in this jurisdiction, private property rights over coastal land are weak, narrow by definition, and constrained, or inoperable, under current law.

The case law and early statute law point to public rights of access having been dominant over private property rights in coastal lands for centuries. Both recent decisions of the court and current statutes include unmistakable indications that private property rights do not trump public rights in coastal lands. Moreover, current primary sources indicate that, under certain circumstances, public rights of access, or other elements of public interest, may override private property rights and private interests in coastal land. I conclude that at present public rights and interests are dominant and may 'trump' some private property rights in coastal lands. Lastly, from the provisions of current statutes I conclude that successive legislatures intended this dominance of public rights, and public interests in coastal lands, to continue indefinitely into the future.

These conclusions are useful in assisting me to address the primary research question about their likely future relationship. Having identified the *status quo,* it is reasonable to theorize that in the jurisdiction of New South Wales, private property rights will remain weak and public rights' dominance will continue in the future, unless action is taken to change this relationship. Hence answering the primary research question in the negative would be justified based on the analysis thus far. However, since its important qualification acknowledges the theoretically available option foreshadowed - unless the Legislature enacted laws to change the ongoing dominance of public rights - this theoretical answer of 'No but maybe' is inconclusive.

Consequently, anticipating a future government's policy on whose rights *should* prevail in the future, and the legislature's support for that policy, and making an analysis of the likeliness of

this theoretical possibility of reversing this *stautus quo* being adopted and enacted would be crucial to furnishing an answer to the primary research question which makes sense in practice.

Reversing the status quo, however, would not be the only response available to the government and legislature, likely to generate a definitive answer to the primary research question. I explore a range of potential responses by a future State government in Chapter VI.

In this chapter I reported legislative responses to conflicts between private property rights and public rights, and noted the relative weight attributed to them. Drawing on recent cases and current statutes I concluded that at present private property rights do not trump public rights over coastal lands, and under some circumstances the converse is possible. I also concluded that key factors affecting the future relationship of competing rights would be a future government's policy on whose rights *should* be dominant, and the legislature's support for that policy.

In the next chapter I consider other philosophical sources which could influence a future government's position on whose rights *should* prevail to avoid or resolve future conflicts between competing rights, and future legislators' attitude towards that policy. Further I identify writers and concepts which will assist me in evaluating the merits of potential statutory responses by a future government to such conflicts.

"The tide rises, the tide falls,
The twilight darkens, the curlew calls …
Along the sea sands damp and brown,
The traveller hastens towards the town,
And the tide rises, the tide falls.

Darkness settles on roofs and walls,
But the sea, the sea in darkness calls,
The little waves, with their soft, white hands,
Efface the footprints in the sands,
And the tide rises, the tide falls."

Henry Wadsworth Longfellow
The Tide Rises, the Tide Falls (1879)

Chapter V – Selected secondary sources

Introduction to Chapter V

Given the future orientation of my primary research question 'will private property rights 'trump' public rights to use coastal lands, under climate change conditions?', a shift in perspective is needed to foresee their likely future relationship and frame a coherent answer. Hence in this chapter I pivot from my analysis of the law regarding private property rights and public rights in the past and at present, to re-focus on the future.

To effect this re-orientation, I do four things in this chapter. First in Part A, I explain this pivot, and how I plan to re-focus forward. As the starting point, I recap my conclusions in the last chapter on the current relationship between competing rights, and that this could change in the future. Second, I map out the path ahead, describing the steps needed to move past my present analysis, and develop a credible forecast of their likely future relationship. This includes anticipating relevant issues and likely developments, and identifying the preparations needed to complete my research analysis. Third, given future State government policy and the legislature's support for it could determine whose rights would prevail in the future, in Part B I explain my selection of secondary sources which could shape the direction of future government policy on whose rights *should* prevail, or influence the legislature's support for it. I outline a range of perspectives: some emphasize public rights, while others advocate for private property rights. Fourth, having foreshadowed the suite of potential responses by a future government, to be explored in Chapter VI, in Part C of this chapter I derive criteria from these selected sources, the literature, case law and statutes considered above, to evaluate these potential responses' merits in Chapter VII, and additional criteria to estimate which response would be 'most likely' to be adopted by a future government, and supported by a future legislature, for use in Chapter VIII.

At the end of this chapter the reader will have a clear plan of the steps to be taken in the next chapters to prepare to answer the primary research question at the end of Chapter VIII.

Part A. Pivot, present, prepare

1. Pivoting to re-focus forward

Though my primary research question is future oriented, in the preceding chapters I have focused on past and current law, in order to develop conclusions about the recent and current relationship between competing rights. From my analysis of these primary sources, I have concluded that at present public rights and the public interest generally prevail over private property rights. Moreover, from the provisions of the statutes reviewed, it is apparent that successive legislatures have clearly intended that this dominance of public rights continue indefinitely into the future. Hence based on this analysis it is possible to also forecast their likely future relationship and frame an answer to the primary research question in the negative.

However, these conclusions do not, by themselves, constitute an adequate basis for answering the question: whose rights will prevail in the future? because, in theory at least, it is possible that a future Government could adopt a policy and win the support of the legislature to reverse this status quo by enacting relevant legislation. Thus, to answer, "the public rights, unless a future government and legislature decide that private rights should prevail," is hardly adequate. Consequently, to do more than propose an ambivalent theoretical answer, and furnish a more realistic answer it is necessary to investigate this caveat and ascertain both the likeliness of a future government adopting such a policy and the possibility of implementing it in practice.

This requires more than the foregoing positivist analysis of current law and necessarily involves a pivot and re-focusing of my analysis into the future. However, rather than a narrow focus on the feasibility of reversing the status quo, it is appropriate to explore a range of potential responses available to a hypothetical future government to address increased conflicts between private property rights and public rights over future use of coastal lands. Broadly these options are to: do nothing, protect public rights, privilege private rights, or attempt to do both. (These potential responses are described in the next chapter, VI, and evaluated in Chapter VII.)

This exploration will involve anticipating future events, estimating key policies' likely success in attracting the support of the legislature and electors, and foreseeing the likely practical implications of their implementation. Hence to make sense of this exploration, in the next section I sketch a map of the steps needed to forecast future circumstances and undertake the analysis necessary to enable the articulation of a more coherent, practical answer. This includes an explanation of the preparations necessary to make in this chapter, for taking these steps, in the thesis' concluding chapters.

Since no NSW government has had a majority in the upper house since 1988,[1460] I assume for the purposes of this discussion that the *status quo* of diverse minor party representation in the NSW Legislative Council would continue in the future and a future NSW government would still require the support of cross-bench MLCs to enact new legislation.[1461] Thus I anticipate continued opportunities for the legislature to review, amend, support or reject government Bills. If this assumption did not to apply, and the government held a majority in both chambers, the importance of persuading cross-bench MLCs to support government Bills would be diminished, and the legislature's role would narrow to implementing the Executive government's decisions. Hence part of the re-focus required, to forecast likely future circumstances, will be analysis of the potential for policies adopted by a future government, to be supported by the legislature.

Further, the re-focus towards the future requires that considerations of future circumstances and events in New South Wales reflect the likely risks that global climate change poses for coastal land management,[1462] and recognizes the realities of profound local impacts of rising seas,[1463] and more frequent extreme events, resulting in greater coastal erosion, and more extensive coastal flooding,[1464] and the possibility that these impacts may affect how electors vote.

Having identified these points of focus in the future, I next sketch a road map of how I plan to address them in the remaining chapters of the thesis.

2. A map to the desired destination

I begin my outline of the path ahead with a recap of the progress made in my enquiry so far. At the end of the last chapter, based on the evidence of Chapters III and IV, I found that at present private property rights do not 'trump' public rights to use coastal lands in New South Wales.

I also found that, over many years, legislatures have unmistakably afforded public rights of

[1460] The last to do so was the Wran / Unsworth Labor government during the 48th Parliament, 1984-1988. See Parliament of New South Wales, 'Political party composition of the Legislative Council since 1978.pdf', information paper, Statistics of the Council, Historical Trends < https://www.parliament.nsw.gov.au/lc/pages/statistics-of-the-legislative-council.aspx >.

[1461] Elected MLCs for minor parties, or Independents, are not part of the Opposition, or Government, and hence are seated on the cross benches in the Legislative Council.

[1462] Particularly higher sea levels, greater tidal inundation and more intense and more frequent extreme events. See IPCC, *Climate Change 2014, Summary for Policymakers, Fifth Assessment Report* (AR5) (IPCC, 2014) SPM 2.2, 10.

[1463] IPCC, *Climate Change 2014*, above n 1420, 13. 'Coastal systems and low-lying areas are at risk from sea level rise, which will continue for centuries even if the global mean temperature is stabilized (*high confidence*).'

[1464] See IPCC, *Climate Change 2014*, above n 1420, 14, 'Regional risks and potential for risk reduction', and see especially 'risks in urban areas', 15.

access, and other public interests, dominance over landowners' private property rights, without negating them entirely; and intended this dominance to continue indefinitely into the future. However, I also concluded this relationship between competing rights could, in theory, change if a future legislature changed the necessary laws and institutional arrangements to achieve a future NSW government's policy objective on whose rights *should* prevail, when they conflict.

Exploring the possibility of reversing the *status quo*, among a suite of potential future government responses, is part of the enquiry that lies ahead in Chapters VI and VII. However in this chapter, explanations of and preparations for this exploration and later analyses are needed. Thus the immediate next steps are outlining the key tasks which are required, and making the preparations necessary to undertake them.

One key task is to consider a range of perspectives on property in land and property rights, which could shape the direction of future government policy on whose rights *should* prevail in future conflicts, or influence non-government MLCs' support for that policy. This relevant because as noted above, the direction and scope of future public policy will depend on both a future government's policy, and the legislature's co-operation in enacting it. The content of that policy, and the level of support it attracts, will however, be influenced by prominent voices and views about property and land ownership, within the then contemporary society.

I outline my approach to selecting relevant sources in section A.3 below and define the criteria required for assessing the merits of the potential responses in section A.4 In Part B I consider perspectives which support public rights' continued primacy and other views which favour private property rights over the public interest generally. These secondary sources were introduced and located within current discourses in the literature on property theory and land management, in Chapter II.

In Part C I draw on the property theory, case law and statutes reviewed above, and these selected sources, to identify relevant criteria for evaluating the merits of the suite of potential responses, and ascertaining which would be most likely to be adopted by a future government.

Thus Chapter V has four purposes: i) pivot from the focus on past and current law, to re-focus on future circumstances; ii) sketch the planned next steps to move from analysis of their current relationship, to a position where I can draw credible conclusions on their likely future status; iii) outline a selection of views which could inform or shape the direction and substance of a future government policy, and or influence the legislature's support for it; and iv) identify criteria for undertaking analyses of the suite of potential responses in later chapters.

In the next chapter, VI, as foreshadowed, I describe in more detail the potential responses available to a future government to address future conflicts between competing private and public rights. As well as four basic options (where a future government could: do nothing; protect public rights' dominance; privilege private property rights; or seek to do both) I apply two levels of intensity of implementation. Hence, I consider weak and robust responses privileging private property rights, strong and stronger approaches to protecting public rights, and two different approaches to seeking to do both.

In Chapter VII, I evaluate the merits of these potential responses using the criteria adopted in Part C of this chapter.

In Chapter VIII, I apply insights from my assessments of the responses using these criteria, to ascertain the response considered 'most likely' to be adopted by a future government and supported by a future legislature. With the benefit of these analyses I then draw conclusions about the likely relationship between competing private property rights and public rights to use coastal lands in the future, and frame an answer to the primary research question.

Thus this 'map' shows there are several stages of enquiry and analysis still be conducted. By chapter's end, with relevant perspectives outlined, and criteria adopted for later analyses, the necessary preparations will have been made for key steps in subsequent chapters, so that, in the final chapter, a credible, practical answer may be stated.

3. Exploring relevant secondary sources

In Chapters III and IV, I considered the guidance from the main social arbiters, the court and Parliament, in developing an answer to the primary research question: 'Will private property right 'trump' public rights and interests on coastal lands, under climate change conditions?' In Part B of this chapter I explore a range of views in secondary sources identified in the literature overview, including pro-public rights and pro-private property rights perspectives, which are relevant to this topic, because they address future government policy options for managing coastal lands affected by climate change impacts; and could shape the direction of future NSW government policy on 'whose rights *should* prevail'; or may influence legislators' support for that policy.

Four works were selected to consider more closely: two views focused on public property and public rights and two views focused on private property and private property rights. First I

consider the public trust doctrine, and its possible application in New South Wales. Second I examine the ethical framework for decision making about use of land posited by Freyfogle and its correspondences with the principles of ecologically sustainable development. The third source is an adamant pro-private property rights position espousing a 'right to defend' against the sea. Fourth, I consider a review of private landowners' calls for 'social justice' in coastal management decision making in the UK.

These selected sources discuss useful concepts relating to 'property', 'real property' and coastal land not articulated by the courts or legislature, and reflect debates in liberal property 'theory', critiques of current approaches, and emerging perspectives on 'real property'. They contribute important insights into current property theory's limits and suggest how these competing rights may interact in the future, under anticipated climate change conditions.

As well as possibly influencing a future government, or legislature, these views were selected to illustrate policy responses available to a future government explored in Chapter VI and because they indicate factors which may be key to future decisions about use and management of coastal land. They also raise relevant concerns, suggest qualities to be emulated and highlight pitfalls to be avoided in such decisions. Hence, in Part C below, I draw on these perspectives, and the primary sources considered above, to derive criteria for use in later chapters to assess the merits of the potential responses identified.

4. Deriving criteria for use in later chapters

Initially, it is important to note that what is under consideration in the next chapters is more than decision-making about the future ownership, use and management of coastal land, at the level of an individual landowner. Also explored in Chapter VI are a range of decisions of a future government and legislature, at an institutional level, described as 'potential responses', which could affect many land titles, through legislation and statutory instruments. Such decisions are the substance of public policy,[1465] and warrant assessment as institutional responses.

Hence, two sets of criteria are required. One, to evaluate the merits of these potential responses as approaches to coastal lands management, and another to estimate their likely success as public policy.

[1465] Decisions of government which create, amend or repeal legislation, revoke and update regulations and instruments, initiate new statutory processes, change extant institutional arrangements, allocate staff time and commit public funds' expenditure are 'public policy'. See definitions discussed in Althaus et al, above n 163, 5-11.

I identify these sets of criteria, explain their application and cite authorities in the property theory, case law and statutes, which corroborate their selection in Part C of this chapter below, and use them to evaluate these potential responses in Chapter VII. Using scores assigned for each response's satisfaction of the criteria, I will be able to compare results and state which potential responses have greatest merit.

However, relative merit may not determine whether a future policy response is adopted by Government. Because future government policy and legislation are political decisions,[1466] other factors that may affect which response would be 'most likely' to be adopted by a future government, and supported by the legislature, would also need to be considered. Hence at the end of Part C of this chapter, I identify three criteria with which to ascertain in Chapter VIII, which response a future government would be 'most likely' to adopt *politically*, in the future. Using this analysis I then frame a coherent answer to the primary research question.

Having outlined the pivot required to re-focus on future conditions, sketched a map of the path ahead, and outlined the preparations needed for analyses in later chapters, in the next part I canvass selected views on coastal landuse which, as well as suggesting relevant criteria for the foreshadowed evaluations, could shape the direction and scope of future Government's policy on 'whose rights *should* prevail, if they conflict', or influence the legislature's support for it.

Part B. Relevant perspectives on real property

An overview of the vast literature on property theory, and real property, was sketched in Chapter II. In this Part I consider sources whose approaches to applying property theory to land were selected for closer review due to their direct relevance to one or more elements of the primary research question: private property rights and public rights to use coastal land and or the management of coastal erosion impacts on coastal land.

I first consider several perspectives on public interest uses of coastal lands. I briefly review the US public trust doctrine described by Sax,[1467] and Slade,[1468] consider its application in New South Wales and describe extant legal rules which could constitute a parallel doctrine in this jurisdiction. Then I outline the ethical and ecological responsibilities of landowners, to make decisions about land's use in their physical, social, ecological and temporal contexts, as

[1466] Althaus et al, above n 163, 145, 215; Cooper and McKenna, above n 123, 304.
[1467] Sax, above n 189. Other published works by Sax are also considered.
[1468] Slade, above n 336.

advocated by Freyfogle,[1469] and contrast his ethical framework for decision-making with the principles of ecologically sustainable development.[1470]

In section 6 private property perspectives on coastal land are considered, including Coleman's claims that landowner's have a 'right to protect from the sea', that private property rights prevail over public rights, and remain unaffected by modern law.[1471] I then outline Cooper and McKenna's critical review[1472] of calls by private landowners in the UK for 'social justice' in decisions on coastal lands management and for public intervention to protect their private land, and consider the relevance of this perspective to similar circumstances in New South Wales.

These sources provide ideas and perspectives for elaborating potential responses by a future State government, in Chapter VI, and suggest relevant criteria which may be employed in later chapters. I identify relevant assessment criteria from these and other sources in Part C.

I next look at views on decision-making about coastal land. First I consider public interest points of view, then landowners' perspectives on their 'private property rights'.

5. Public interest perspectives

In this section I present several views on 'public property' and 'public interests' in land. In the first sub-section I consider the public trust doctrine and explore its application in New South Wales. In the second and third sub-sections, ethical and ecological perspectives are considered.

5.1 'Public trust' doctrine

As a long-standing legal principle, the 'public trust doctrine' is, one perspective on 'real property' highly pertinent to answering the primary research question, which could influence future government policy on whose rights to use coastal land *should* prevail. As outlined in Chapter Two, the seashore and other resources were designated 'common' to all in the civil law texts *Institutes of Gaius* (c. 180 AD),[1473] and *Institutes of Justinian* (c. 533 AD),[1474] and this idea, as modified by long customary use in England, provided a legal basis for public rights to

[1469] Freyfogle, 'Ownership', above n 193. Other commentary by Freyfogle are also considered.
[1470] As defined by s 6(2) of the *Protection of the Environment (Administration) Act 1991* (NSW). [*POEAA 1991*]
[1471] See Coleman, above n 13, 421.
[1472] Cooper and McKenna, above n 123. This review is considered in detail in s 7, below.
[1473] See *The Institutes of Gaius* translated by Francis de Zulueta, (Clarenden Press 1946) quoted in *Southern Centre of Theosophy Incorporated v South Australia* (1978) 19 SA SR 389, 393 (Walters J).
[1474] The relevant Latin passage from the *Institutes of Justinian* (bk ii, tit i, s 20) was quoted in *Attorney General of South Nigeria v John Holt & Company* (1915) AC 599, 613 (Lord Shaw).

access the foreshore to fish, and navigate on tidal waters,[1475] which were recognized by English common law courts,[1476] and protected by the Crown.[1477] Through 'constitutional principles' these common law public rights applied in Britain's colonies,[1478] where they were later recognized,[1479] or modified, by the new nation's property laws.[1480]

Hence, despite their common origin, in modern English-speaking nations the property laws of each jurisdiction governing the ownership and use of coastal land and waters, and their use by the public, have developed separately, and to some extent, in parallel, over centuries. [1481]

(a) The public trust doctrine in the United States of America

In the US after their independence from Britain, the Crown's role as trustee of coastal land required for public use, passed to the citizens of each new State,[1482] as authorized by their State Constitutions.[1483] Since property law remained the province of the States in the US, two modes of ownership of coastal land and its use by 'the public', emerged,[1484] as is shown below.

Some US States defined the boundary between land and tidal waters as the mean high water mark (MHWM),[1485] and hold title to the land below tidal waters (tidelands) 'in trust' for 'the people', under the 'public trust doctrine' (PTD), to protect public rights to fish and navigate.[1486] (See Figure 13.1 below).

[1475] Moore, above n 37.
[1476] See the discussion of the modification of civil law rules by English common law courts in *Attorney General v McCarthy* [1911] 2 IR 260, 276-7, (Palles CB).
[1477] Sax, above n 189, 368-9.
[1478] Including colonies in North America, which later formed the United States of America. See the discussion of the operation of these constitutional principles in British colonies, in Chapter II above.
[1479] See the discussion of US courts' recognition of public rights in Sax, above n 189, 476-477. In New South Wales, see the recognition of the public right of navigation in *York Bros (Trading) PL v Commissioner of Main Roads (NSW)* [1983] 1 NSWLR 391, 393-4 (Powell J).
[1480] Including Australia, Canada, New Zealand and the United States of America. See the discussion of the impact of British concepts of property on its colonies in John C Weaver, 'Economic Improvement and the Social Construction of Property Rights', in John McLaren, Andrew Richard Buck and Nancy E Wright (eds) *Despotic dominion: property rights in British settler societies* (UBC Press, 2005) 79-102.
[1481] See Michael C Blumm and Mary Christina Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law* (Carolina Academic Press, 2013), 305-332, for discussion of cases involving the public trust doctrine in India, Philippines, Uganda, Kenya and Canada.
[1482] This history is recounted in Sax, above n 312.
[1483] Several State constitutions pre-date the Constitution of the United States of America, adopted in 1788. See Sax, above n 189, 772; Rose, 'Comedy', above n 235, 115.
[1484] See Slade, above n 336.
[1485] Some States have a mean high tide line (MHTL) as the boundary, defined as the 'average of ordinary high tides over the lunar cycle of 18.6 years.' See Joseph L Sax, 'The Accretion / Avulsion Puzzle: Its Past Revealed, Its Future Proposed' (2009) 23 *Tulane Environmental Law Journal* 305, 347, fn 234.
[1486] Slade, above n 336, 7.

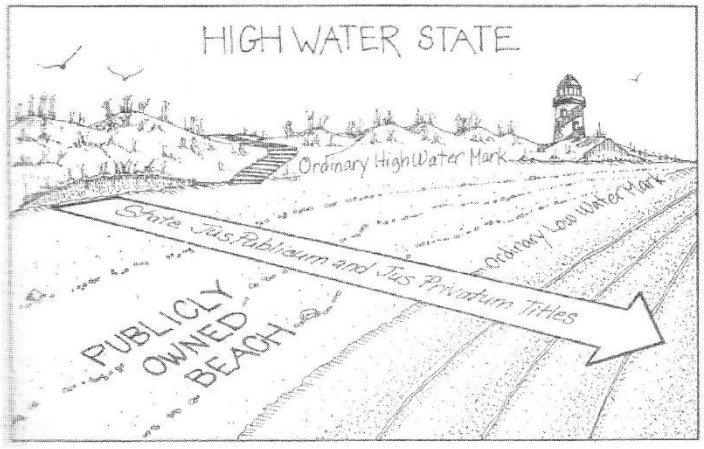

Figure 13.1 Land title and public use rights in a 'High Water State' from Slade et al

Other US States with low water mark (LWM) as the boundary, allow private ownership of the beach,[1487] but public use rights, the *jus publicum*, apply over the foreshore.[1488] (See Figure 13.2.)

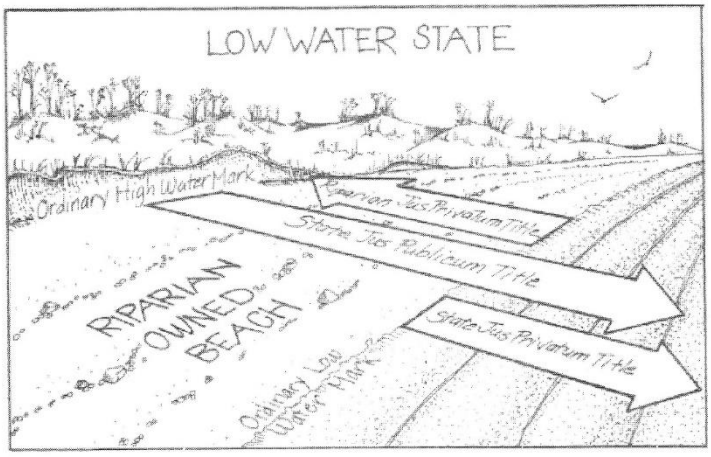

Figure 13.2 Land title and public use rights in a 'Low Water State' from Slade et al

Thus in the US 'the PTD' has a number of elements: relevant State and federal constitutional provisions, provisions in State legal codes, surviving common law rules and relevant US court rulings affecting two core issues: public ownership and public use of coastal land. Some States' constitutions prohibit the sale of 'public trust lands' to ensure public use continues,[1489] while other States permit this if public use is protected by an easement over land title.[1490]

[1487] Slade, above n 336, 7-8. Slade uses the Latin designation of private property as the *jus privatum,* and refers to adjoining landowners as having 'riparian' rights.
[1488] For eg California, New York, South Carolina, and Michigan: See Blumm, 'Accommodation', above n 311, 659. See also Slade, above n 336, 8. See also *Raleigh Avenue Beach Ass'n v Atlantis Beach Club* 879 A2d 112, 124 (NJ 2005) cited in Blumm, 'Accommodation', above n 311, 664.
[1489] Such as Hawaii. See Blumm and Wood, above n 1493, 7.
[1490] Such as New Jersey and Oregon. See Blumm, 'Accommodation', above n 311, 663-5. See also Richard M Frank, 'The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future' (2012) 45 *University of California, Davis Law Review* 665-691.

Further, court rulings on the effect of State-based public trust doctrines on claims of 'takings' of private property by landowners, is a third significant issue in this US PTD jurisprudence, but of limited relevance to this jurisdiction. These primary sources - US federal and state constitutions, state statutory codes and court rulings - are supplemented by legal academic commentary and teaching materials, forming a complex but inherently narrow set of state-based jurisprudences.

Hence, due to their unique constitutional and statutory provisions, and narrow legal precedents, it appears that each coastal State in the US has an endemic 'public trust doctrine',[1491] relating to tidelands.[1492] Despite this diversity, the common feature of these doctrine is to limit or prohibit State government 'trustees' from dealing with 'public trust' lands and resources in ways which prevent their continued public use.[1493]

Though relevant to coastal lands and tidal waters, in the civil law the public trust doctrine also applied to air and running water,[1494] and its application to these natural resources, and to other publicly-owned natural resources have been recognized by US courts,[1495] while new applications of the trust doctrine, have been posited, [1496] including extending it to the planetary environment, atmosphere and global oceans.[1497] However, it is the doctrine's traditional application, the reservation of coastal lands and waters for public use, which is most relevant to the discussion which follows. Indeed this concept could shape a future State Government's policy on coastal lands management, and influence the legislature's support for it, particularly if a local public trust was formally recognized in New South Wales.

In the next section I explore the possibility of that idea being realized.

[1491] Wilkinson described the PTD as complicated and referred to "fifty-one public trust doctrines in this country alone". Charles Wilkinson, 'The Headwater of the Public Trust: Some thoughts on the Source and Scope of Traditional Doctrine' (1989) in Blumm and Wood, above n 1493, 41. Sax described an 'almost anarchic doctrinal diversity from jurisdiction to jurisdiction' in Sax, above n 189, 774.
[1492] See Blumm and Wood, above n 1493, 247.
[1493] See Sax, above n 189, 477; David C Slade, in Blumm and Wood, above n 1493, 11, Blumm, 'Accommodation', above n 311, 661.
[1494] See the *Institutes of Gaius* excerpt cited in Chapter II, quoted in Sax, 'above n 189, 763-4.
[1495] See Blumm and Wood, above n 1493, wetlands, 127, wildlife 195, State parks and public lands 233, and to federal lands 247. See also Blumm, 'Accommodation', above n 311, 657.
[1496] See Sax, 'Liberating', above n 312; Richard J Laxarus 'Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine' (1985) 71 *Iowa Law Review* 631-716; Tim Eichenberg, et al, 'Climate Change and the Public Trust Doctrine: Using an ancient doctrine to adapt to rising sea levels in San Francisco Bay' (2010) 3(2) *Golden Gate University Environmental Law Journal* 243-281.
[1497] Blumm and Wood, above n 1493, 341 – 371.

(b) The PTD's application in New South Wales?

That an enduring tradition of Crown ownership and public use of the foreshore and tidal waters,[1498] and a continuous government policy of reserving coastal Crown lands from sale, and dedicating them for public purposes,[1499] exists in this jurisdiction is evident from the material considered in Chapters III and IV. Further, since the time of self-government,[1500] where deemed in the public interest, NSW governments have resumed privately-owned coastal lands to allow their public use.[1501] However, despite discussion of the doctrine's potential application in New South Wales by Bonyhady,[1502] Stein,[1503] Gordon,[1504] and Thom,[1505] the 'public trust doctrine' has had very limited judicial recognition in this jurisdiction.

This limited judicial recognition is likely due to several factors. It seems from my review of recent cases,[1506] that counsel in these cases have not cited the US PTD or the prospect of a local 'public trust' in their submissions to the court, preferring other more viable legal arguments. This failure to cite the doctrine is likely because the US jurisprudence on the PTD is so diverse, and different constitutional provisions defining States' powers,[1507] and the acquisition of privately property apply in each of the coastal States in the US.[1508] Further, the US States' legal codes on land titles and coastal management do not apply here; and US court rulings on them, which constitute core elements of each state's public trust doctrine, are not authoritative binding precedents in the courts of New South Wales.

[1498] See Ford, above n 325, 25; Huntsman, above n 325, 19; Hoskins, above n 558, 183- 211.
[1499] Ford noted one of the earliest attempts to dedicate coastal lands in Sydney for recreation was at Nelson Bay in 1864. See Ford, above n 325, 29-31. See also Cabena, above n 960, 16.
[1500] The institution of 'responsible government' in the colony of New South Wales began in 1856 with the formation of the first bi-cameral parliament. See < https://www.parliament.nsw.gov.au/about/Pages/1856-to-1889-Responsible-Government-and-Colonial-.aspx >.
[1501] Ford, *Sydney*, above n 325, 32-3, reported the forced resumption of Bondi Park in 1881.
[1502] See Tim Bonyhady, 'A Usable Past: The Public Trust in Australia' (1995) 13 *Environmental and Planning Law Journal* 329-338; and Bonyhady, 'An Australian Public Trust' in S Dover (ed), *Environmental History and Policy: Still Settling Australia* (Oxford University Press, 2000) 258 – 272.
[1503] Paul Stein, 'Ethical Issues in Land-Use Planning and the Public Trust' (1996) 13 *Environmental and Planning Law Journal* 493-501.
[1504] Angus D Gordon, 'Highwater Mark - The Boundary of Ignorance' (2001) (Paper presented at 11th NSW Coastal Conference, Newcastle, 13-16 November 2001), 2-3.
[1505] Thom, above n 316, 36-9.
[1506] Eg *Positive Change for Marine Life Inc v Byron Shire Council (No. 2)* [2015] NSWLEC 157, and *Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel* [2018] NSWLEC 207.
[1507] The powers of States in the US to deal with 'trust land' is summarized in Blumm, 'Accommodation', above n 311, 657 – 663.
[1508] The part of the 5th Amendment to the Constitution of the United States of America, which created a citizen's right to compensation if the State acquires their private property, is known as the 'takings' clause. Neither s 51 (xxxi) *Australian Constitution* or the *Constitution Act 1902* (NSW) creates an equivalent right in Australia.

Hence, because much of the detail of US 'public trust doctrine(s)', ie what is teachable,[1509] is inapplicable to New South Wales, mounting a 'public trust' argument in this jurisdiction based on a US 'public trust doctrine' would be very difficult.

Nonetheless at a higher conceptual level, the PTD's core concepts of enduring public ownership of the foreshore, seabed, and tidal waters as 'trust lands', and protecting their public use in perpetuity, resonate in New South Wales. This resonance has been noticed by Bonyhady, who cited relevant landmark cases,[1510] by Gordon,[1511] Thom[1512] and others[1513] who posit that an endemic parallel doctrine exists in this jurisdiction, encompassing both public ownership of coastal lands and waters, and a government duty to protect their use by the public, which awaits formal judicial recognition.[1514]

(c) A local 'public use' doctrine?

I explore this idea next by identifying existing legal rules in this jurisdiction regarding public ownership, public access, public uses, and other public interests in coastal lands and waters. However first I wish to highlight two factors which distinguish New South Wales from US jurisdictions - the geographic extent of public ownership, and the wider footprint of public uses, of coastal land. To further distinguish this posited endemic doctrine from the US PTD, the phrase 'public use doctrine' is used hereafter to denote the body of statute and case law on public ownership and public use of coastal lands and waters, in New South Wales.[1515]

(i) Public ownership of coastal lands and waters

Due to government policies discussed in Chapter III, summarised below, a larger geographic extent of coastal land remains in public ownership in New South Wales, than in many States in the US. See Figure 14.1 below.

[1509] See Delbridge et al (eds), above n 4, 517. 'doctrine' noun 1. a particular principle taught or advocated. 2. that which is taught; teachings collectively. 3. A body or system of teachings relating to a particular subject. See also DM Walker, *The Oxford Companion to Law*, (Clarenden, 1980) 371, 'doctrines of law: systematic formulations of legal principles, rules, conceptions and standards with respect to particular situations, or types of cases, or fields of the legal order, in logically interdependent schemes, whereby reasoning may proceed on the basis of the scheme and its logical implications.'
[1510] Bonyhady, Usable', above n 316, 329.
[1511] Angus D Gordon, 'Highwater Mark - The Boundary of Ignorance' (2001) (Paper presented at 11th NSW Coastal Conference, Newcastle, 13-16 November 2001), 2-3.
[1512] Thom, above n 316.
[1513] Sack, Allen and Thom, above n 357, 129-130.
[1514] Ibid. Sack et al observe a recent case's concordance with the principles of the 'public trust doctrine' but the PTD was not cited in the case report of arguments presented to, or adopted by, the court in *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207.
[1515] See *Willoughby City Council v Minister Administering the National Parks & Wildlife Act* (1992) 78 LGERA 19, discussed below [hereafter *Willoughby (1992)*].

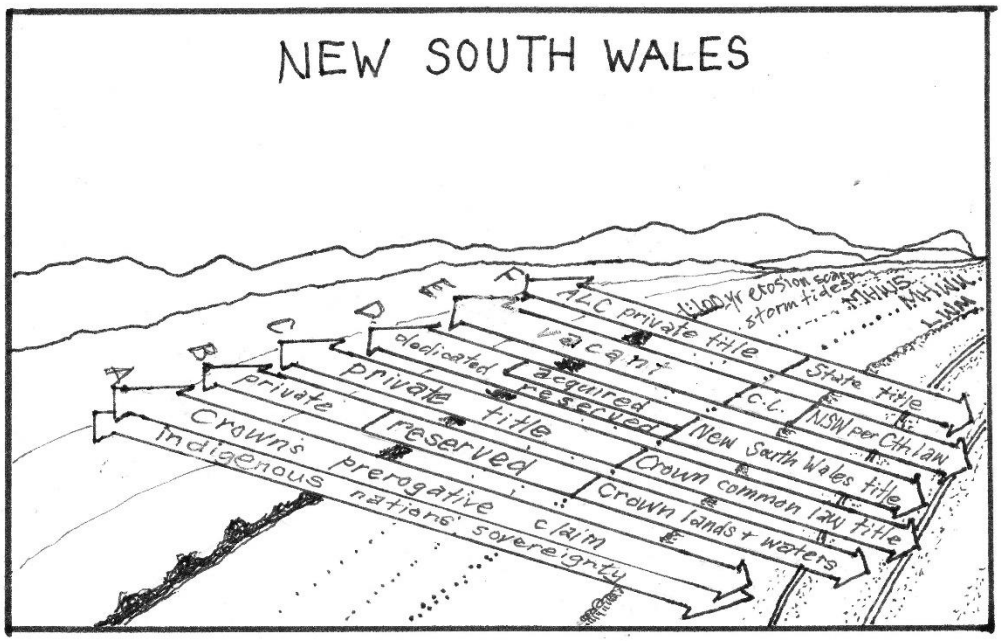

Figure 14.1 Title to coastal lands and waters in New South Wales (1777 – to date)

Prior to colonization, the coastal lands and waters of New South Wales were the sovereign territory of indigenous nations, but these interests were ignored, and the title to all the colony's lands and waters were claimed by the English Crown, an action later justified under the doctrine of *terra nullius*.[1516] English courts recognized the Crown's *prima facie* ownership of the foreshore and seabed,[1517] and the operation of this and other common law rules in the New South Wales colony was confirmed by British statute.[1518]

The reservation from sale of coastal lands above MHWM, when adjoining lands were granted or sold, was required under Crown policy from 1825 - 1840,[1519] but later it became a discretionary policy, where private ownership of coastal land to MHWM was deemed appropriate.[1520] Later, in certain locations, coastal Crown lands above MHWM were reserved from sale under colonial statutes,[1521] and post-Federation their reservation from sale was authorized by statutes of the State of New South Wales.[1522]

[1516] Stuart Banner, *Possessing the Pacific: land, settlers, and indigenous people from Australia to Alaska*. (Harvard University Press, 2009) 24-5. See Arrow A in Figure 13.1.
[1517] See *Kirby v Gibbs* (1667) 2 Keble 294, p 414, and other cases cited in Moore, above n 37, 651.
[1518] *Australian Courts Act 1828* (Imperial British Parliament). See Cook et al, above n 18, 35.
[1519] Under Royal Instructions first issued in 1825 to Governor Brisbane, according to Cabena, above n 960, 16. See Arrow B in Figure 14.1, circa 1825 - 1840.
[1520] Under Royal Instructions issued in 1841, reserving coastal lands from sale became discretionary, and the Governor could grant new land titles bounded by MHWM. See Cabena, above n 960, 18. See Arrow C in Figure 14.1, circa 1840 – 1861.
[1521] The *Crown Lands Alienation (Public Purposes) Act 1861* (NSW), See Arrow D in Figure 14.1.
[1522] Eg s 24 *Crown Lands Consolidation Act 1931* (NSW) [repealed].

Lands below MHWM were originally vested in the Crown under the common law, and their sale or grant was prohibited by colonial legislation.[1523]

However, title to coastal lands and waters underwent dramatic change in the 1970s. The federal Labor government made use of developments in international law[1524] and introduced legislation extending Commonwealth title and powers over the submerged lands and territorial seas around Australia, thus securing federal government control over and revenue from fisheries and off-shore oil and gas resources.[1525] New South Wales and other States objected to the legislation and the then federal Liberal Opposition unsuccessfully opposed it, but the Bill was enacted. The Act's validity was then legally challenged and was publicly disputed by the Opposition in the intervening federal election. However, soon after the election the High Court of Australia found the Act valid and affirmed the Commonwealth government's powers, [1526] creating a quandary for the newly elected Liberal Government who had campaigned for 'States' rights' and publicly remonstrated against federal government over-reach.[1527] The dilemma was finally resolved by a political agreement, the Offshore Constitutional Settlement (OCS),[1528] under which the States agreed to enact legislation ceding to the Commonwealth their ownership and powers over lands below the territorial seas,[1529] and the Commonwealth agreed to confer title and power back to the States,[1530] reserving its exercise of relevant Commonwealth powers.[1531]
Hence since 1979, lands below the low water mark (LWM) are held by the State of New South Wales under Commonwealth law, while it holds title to the foreshore, between MHWM and LWM, under common law,[1532] and to lands above MHWM under relevant State laws.

A further development in 1983 was the enactment of legislation in NSW allowing Aboriginal Land Councils to claim ownership of Crown lands not required for essential public purposes.[1533] Subsequently the *Native Title Act 1993* (Cth) created a process for traditional owners' native title in unalienated lands to be formally recognized. However, since both Acts exclude claims over private freehold land, they do not apply to the land titles at the focus of this thesis.

[1523] See s 12 *Crown Lands Alienation (Public Purposes) Act 1861* (NSW). See Arrow A in Figure 14.1.
[1524] The entry into force of the *United Nations Convention on the Territorial Sea and Contiguous Zone* in 1964 authorised the demarcation of a nation state's territorial waters and its control over natural resources within a 200km economic exclusion zone (EEZ).
[1525] *Seas and Submerged Lands Act 1973* (Cth)
[1526] *New South Wales v Commonwealth* (1975) 135 CLR 337, 486-7, [35] (Jacobs J).
[1527] see Haward, above n 328, 336.
[1528] For detailed discussion of the OCS see Haward, above n 328, and Brazil, above n 328.
[1529] See *Constitutional Powers (Coastal Waters) Act 1979* (NSW).
[1530] See *Coastal Waters (State Powers) Act 1980* (Cth) and *Coastal Waters (State Title) Act 1980* (Cth).
[1531] over marine parks, off-shore resource development, off-shore fisheries, shipping and navigation, ship sourced pollution, and crimes at sea. See Haward, above n 328, 337-8.
[1532] *New South Wales v Commonwealth* (1975) 135 CLR 337, 486-7, [35] (Jacobs J). See Arrow E in Figure 14.1.
[1533] Under s 36(3) *Aboriginal Land Rights Act 1983* (NSW). See Arrow F in Figure 14.1.

As the result of applying common law rules, these policies and statutes, in New South Wales all submerged lands, and large areas of coastal land above MHWM, remain publicly owned.[1534]

(ii) Public use of coastal lands and waters

Like title to land, the means of legally protecting public rights to access and use coastal lands in New South Wales has also changed since colonization. (See Figure 14.2 below.)

Initially, the coastal lands and waters of New South Wales were used by indigenous people, but their customary uses were usurped by the establishment of a British penal colony.[1535] Military and convict use of the foreshore and tidal waters for fishing and transport was recorded,[1536] but it is likely use of the colony's coastal lands and waters by 'the public', mandated by English common law,[1537] began when free settlers started to arrive in 1793.[1538] Later, the public use of coastal lands above MHWM became permissible under the Crown policy which reserved many areas of coastal lands from sale for public purposes.[1539] However from 1841 some privately owned coastal land extended to MHWM, which limited public use to the foreshore.[1540]

Under responsible government many areas of coastal land above MHWM previously reserved from sale, were dedicated for public purposes under colonial *Crown Land Acts*, and some recently alienated lands were re-acquired by the government and dedicated to public use.[1541] Post-federation, other reserved coastal lands were dedicated for public use as 'recreational reserves' under a *Crown Lands Act*, or as nature reserves or national parks.[1542]

Other vacant, undedicated Crown lands were subject to ad hoc public use for many years. Though tidal waters remained available for public use, 'marine parks' were later dedicated over some lands below MHWM,[1543] and their public use was regulated through zoning plans.

[1534] The exception being Commonwealth land, in Jervis Bay. In relation to the public ownership of the bed of Sydney Harbour, see *Verrall v Nott* (1939) 39 SR (NSW) 89; 56 WN 55; 14 LGR 66.
[1535] See Hoskins, above n 558, 51 – 71. See Arrow A in Figure 14.2.
[1536] See historical accounts of fishing cited in Tim Bonyhady, *The Colonial Earth* (MUP 2000) 17, fn 9.
[1537] Public rights to navigate and fish in tidal waters were known as the *jus publicum* in English common law. See Hale, above n 704, Cap VI, quoted in *Blundell v Catterall (*1821) 106 ER 1190, 1193 (Best J).
[1538] See < https://www.parliament.nsw.gov.au/about/Pages/1788-to-1810-Early-European-Settlement.aspx >
[1539] See the Royal Instructions first issued in 1825 to Governor Brisbane, cited in Cabena, above n 960, 16. See Arrow B in Figure 14.2. 1825 – 1840.
[1540] Cabena, above n 960, 18. See Arrow C in Figure 14.2.
[1541] The purchase of Bondi Park in 1881 under the *Lands for Public Purposes Acquisition Act 1880,* was reported by Ford, *Sydney*, above n 325, 31-33. See also Ford, 'The Battle' above n 325, 258-9.
[1542] Under the *National Parks and Wildlife Act 1974* (NSW). Most coastal national parks' boundaries were MHWM. See Arrow D in Figure 14.2, 1979 - 2014.
[1543] Eg Cape Byron Marine Park, under the *Marine Parks Act 1997* (NSW) [repealed].

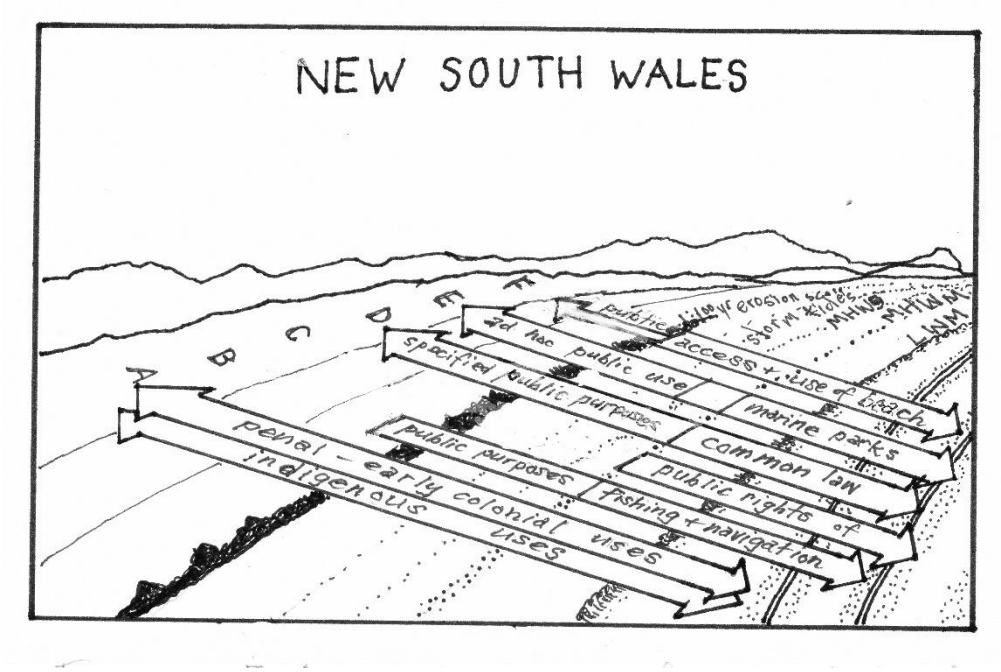

Figure 14.2 Public use of coastal lands and waters in New South Wales (1777 – to date)

More recently the landward boundary of the 'marine estate' has been defined as HAT,[1544] and protected submerged lands may be designated as 'marine parks' or 'aquatic reserves'.[1545]

Further, operation of the *Aboriginal Land Rights Act 1983* (NSW) has led to the use of another means of legally protecting public use of the beach and coastal waters: the creation of easements over vacant Crown land under claim. Though narrow static easements for access are often used, an important further development was the court's creation of an ambulatory easement,[1546] of 30 metres width measured from the MHWM, over vacant coastal Crown land, to protect public use of the beach before it awarded the land to the claimant aboriginal land council.[1547] Through this mechanism, also known as a 'rolling' easement,[1548] public use of beach was guaranteed in perpetuity, even though the land above MHWM ceased to be publicly owned.[1549] Hence it is

[1544] It includes submerged lands in estuaries up to the 'highest astronomical tide'. See s 6 (b) *Marine Estate Management Act 2014* (NSW). See Arrow E in Figure 14.2, 2014 – present.
[1545] 'Marine parks' may be declared under s 23, and aquatic reserves declared under s 34 of the *Marine Estate Management Act 2014* (NSW).
[1546] Ambulatory: capable of walking. See Delbridge et al (eds) above n 4, 53. An ambulatory easement is of a prescribed width from the line of MHWM, and the easement's location moves with the gradual movement of the seaward boundary of MHWM, to maintain the prescribed width.
[1547] See *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act* [2013] NSW LEC 216. See Arrow F in Figure 14.2.
[1548] See James G Titus, *Rolling Easements* (US Environment Protection Agency, 2010), available at < http://papers.risingsea.net/rolling-easements.html >.
[1549] See discussion of this in John R Corkill, '*Coffs Harbour and District LALC v Minister administering the Crown Lands Act* (2013) NSWLEC 216 (Red Rock) and Crown Lands Amendment (Public Ownership of Beaches and Coastal Lands) Bill 2014 (NSW)' (2014) 11 (6) *Native Title News* 147- 151.

clear that in some locations in New South Wales public use of coastal lands above MHWM may extend to lands not held in public ownership.

The early means of protecting public use of coastal lands and waters have been overtaken by a series of later protection measures, in some locations. In other places dedications of land to protect public use pre-date urban development, while elsewhere the onset of urban development has prompted action to protect public use of coastal lands from private encroachments. Hence, unlike US States, in New South Wales the extent of coastal land above MHWM available for public use is not uniform, or limited to publicly-owned land, but varies from place to place (see Figure 14.2 above).

Due to the historical series of policies and actions of government, extensive areas of coastal land and waters in New South Wales are dedicated to public use, or another public purpose, and their public ownership is secured by legislation.[1550] Consequently legal cases in New South Wales have not focused on preserving public ownership of coastal lands, or public access to the foreshore, as in the US.[1551] However, that does not mean that cases relevant to protecting the public use of coastal lands have not been brought in this jurisdiction.

(iii) Existing local legal 'doctrine' re public use of coastal lands and waters

Bonyhady argued that an early case, which thwarted the development of a coal loader on the foreshore of Sydney Harbour,[1552] was an important first step in recognizing the public trust,[1553] and he described a related second case in which the court recognized the Crown's role as trustee of public interests.[1554] Importantly Bonyhady also cited a later case where the court found that National Parks were "held by the State in trust for the enjoyment and benefits of its citizens, including future generations",[1555] and held that "public officers have a duty to protect and preserve national parks",[1556] and should guard against commercial uses which could diminish public access, use and enjoyment.[1557] Hence, to date only rarely has a New South Wales court referred to the 'public trust'.

[1550] See s 5.3 *CLMA 2016* (NSW); s 40, 47I, 47Z, 53, 58N, 149(2) *NPWA 1974* (NSW).
[1551] See for eg *Raleigh Avenue Beach Assn v Atlantis Beach Club* (2005) A.2d 112, discussed in Blumm and Wood, above n 1493, 265 -268.
[1552] *Attorney General (NSW) v Milson* (1891) 12 NSWLR 121, 16 NSWLR 145.
[1553] Bonyhady, above n 316, 334. See also Bonyhady, 'Australian', above n 316, 263-5.
[1554] *Re Sydney Harbour Collieries Co* (1895) 5 Land Appeal Court Reports 243, in Bonyhady, above n 316, 335-6.
[1555] *Willoughby City Council v Minister Administering the National Parks & Wildlife Act* (1992) 78 LGERA 19, (Stein J, hereafter *Willoughby v Minister* (1992).
[1556] *Willoughby v Minister* (1992) 34, cited in Bonyhady, above n 316, 330-1.
[1557] *Willoughby v Minister* (1992) 26-7.

Nonetheless the State's courts have made some important decisions regarding public trust rights and these court rulings form an extensive local jurisprudence on public access to, and public use of, coastal land dedicated for public purposes.[1558] I sketch the ambit of this jurisprudence next.

Cases concerning Crown lands have resulted in court rulings on what constitutes a 'reserve' or park 'for public recreation or enjoyment';[1559] and the permissible 'uses' of land dedicated for 'public recreation',[1560] the operation of a statutory provision,[1561] satisfaction of processes for dedicating land's use,[1562] the validity of a Plan of Management,[1563] and denied consent for private use of land dedicated for 'public recreation' which excludes the public.[1564] Other cases have limited the use of ministerial powers,[1565] and overturned the issuing of a licence for an unauthorized use of a national park.[1566]

Other common law rules in this jurisdiction which might form part of a 'public use doctrine', are well defined. The courts recognize the Crown's ownership of the foreshore,[1567] the public rights to access the foreshore, and navigate on coastal waters,[1568] and the latter's seniority over the right to fish.[1569] Statutes which deny development consent to protect public access,[1570] and court rulings that recognize public access to the beach as an 'essential public purpose',[1571] and create easements to allow public access,[1572] also provide important doctrinal elements. Indeed

[1558] Many relevant matters were considered in *Friends of King Edward Park Inc v Newcastle City Council* (No 2) [2015] NSWLEC 76, (hereafter *FOKEPI* [2015]).
[1559] The principal case, re Randwick racecourse, defined uses of 'public reserve' and 'for the purposes of public recreation', was *Council of Municipality of Randwick v Rutledge* [1959] HCA 63; 102 CLR 54, 88, and 92-93, (Windeyer J), hereafter *Rutledge* [1959] quoted in *FOKEPI* [2015], [223], [224].
[1560] *Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185, 189-90.
[1561] Section 114 (1C) *CLA 1989* (NSW) was closely considered in *FOKEPI* (2015) [244] – [269].
[1562] This was considered by the court in *FOKEPI* [2015] [244] – [280].
[1563] The management plan part permitting private use was ruled invalid. See *FOKEPI* [2015] [270]-[280].
[1564] See for eg *FOKEPI* [2015]. Newcastle City Council's decisions to adopt a Plan of Management and grant a company a lease to develop a private function centre in the King Edward Headland Reserve, which excluded the public, were ruled invalid as the area had been dedicated for 'public recreation'.
[1565] See *Willoughby v Minister* (1992) discussed by Sheahan J in *FOKEPI* [2015].
[1566] See *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710; 73 LGRA 379, cited as the 'Simon University case' in *FOKEPI* [2015] [225] – [233]. The licence for use of part of Sydney Harbour National Park as a university campus, was issued under the *National Parks and Wildlife Act 1974* (NSW).
[1567] See *New South Wales v Commonwealth* (1975) 135 CLR 337, 407 [44], [45] (Gibbs J). See also Gullett, above n 32, 1-11.
[1568] See *York Bros (Trading) PL v Commissioner of Main Roads (NSW)* [1983] 1 NSWLR 391, 402.
[1569] See *Gann v Free Fishers of Whitstable* (1865) 11 ER 1305, cited in Walrut, above n 26, 427.
[1570] See s 55M *CPA 1979* (NSW) [repealed] and s 27 *CMA 2016* (NSW).
[1571] *Coffs Harbour LALC v Minister* [2013] NSW LEC 216, [161] (Craig J). See also *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207 (Preston CJ).
[1572] *Coffs Harbour LALC v Minister* [2013] NSW LEC 216, [163] (Craig J).

the use of easements in New South Wales to allow public access,[1573] parallels their use in the public trust doctrines of the US.[1574]

However, prior court rulings declaring fees to use public lands dedicated for 'public recreation' may only be levied, if 'those profits are devoted to the public purpose',[1575] or maintain or manage the public asset;[1576] and stipulating that exclusive use of land dedicated for 'public recreation' to generate private profits cannot be permitted,[1577] appear redundant, since the *Crown Land Management Act 2016* (NSW) authorizes appointment of corporations as Crown land managers,[1578] and the charging of fees.[1579]

A 'public use doctrine' in New South Wales would include the courts' recognition of the legal priority of public use of the foreshore,[1580] and the ambulatory MHWM boundary's dominance over real property boundaries defined by survey,[1581] and acknowledge that ownership of land which falls below MHWM reverts to the State, as the owner of the foreshore.[1582] Further, an endemic 'public use doctrine' could recognize public 'rights' to sit on community advisory committees,[1583] access relevant information, and participate in decisions which adopt plans of management[1584] determine priorities,[1585] and allocate public funds for managing publicly owned lands, dedicated for public purposes.[1586]

Several important rulings have also been made in decisions on land claims over coastal Crown lands made by Aboriginal land councils under the *Aboriginal Land Rights Act 1983* (NSW). [1587]

[1573] The court created both a static east-west easement for public access to the beach along an existing track, and 'an ambulatory easement for public access landward of the mean high water mark' along the beach, 30 metres wide, running north-south. See Corkill, 'Coffs', above n 1559, 147 – 151.
[1574] See Blumm, 'Accommodation', above n 311. See also Titus, above n 1558.
[1575] *Rutledge* [1959] 92-93 (Windeyer J) 88 – 89, cited in *FOKEPI* [2015], [224].
[1576] *Rutledge* [1959] 92-93 (Windeyer J) 88 – 89, cited in *FOKEPI* [2015], [224].
[1577] *FOKEPI* [2015], [240].
[1578] See s 3.3 *CLMA 2016* (NSW).
[1579] Regulation 7 of the *Crown Land Management Regulation 2018* (NSW), made under s 9.25 *CLMA 2016*, authorizes Crown land managers to charge members of the public fees for entry into Crown lands.
[1580] created by s 55M *CPA 1979* (NSW) [repealed] and s 27 *CMA 2016* (NSW).
[1581] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,659-60 (Bannon J).
[1582] See *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287 (Allen J).
[1583] See s 3.29 *CLMA 2016* (NSW).
[1584] See s 3.33 – 3.36, s 3.40 *CLMA 2016* (NSW).
[1585] Community engagement strategies are required under s 5.4- s 5.8 *CLMA 2016* (NSW).
[1586] Community engagement is required for a State Strategic Plan, under s 12.17 – 12.25 *CLMA 2016* (NSW). See also requirements for public consultation under s. 73A, 69H, 151 F, 188F, 188G *NPWA 1974* (NSW).
[1587] Only areas of 'vacant' Crown lands, not required for any public purpose are claimable by local Aboriginal land councils under the *Aboriginal Land Rights Act 1983* (NSW). See the Red Rock land claim granted in *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act* [2013] NSW LEC 216 (Craig J), discussed below.

In a key decision, *Worimi,* the court ruled that lands below MHWM were not 'claimable Crown land'.[1588] Subsequently many Aboriginal land councils have claimed ownership of 'vacant' coastal Crown land above MHWM, but not the foreshore or submerged land. [1589] In other cases the court has defined what constitutes an 'essential public purpose',[1590] and protected public rights of access to the beach.[1591]

Conclusions

Thus in New South Wales, many legal rules regarding the public use of publicly-owned coastal lands have developed from cases brought under NSW statutes,[1592] decided by NSW and Australian federal courts. Collectively, these statutory provisions and court rulings constitute the core 'teachable' elements of our endemic 'public use' doctrine.

The strength of the US 'public trust' doctrine is its guarantee that public access to and use of the foreshore can continue, when title to land down to LWM is transferred into private hands.[1593] However, the beauty of the 'public use' doctrine in New South Wales is that the foreshore and large areas of coastal land above MHWM remain publicly owned, and due to their dedication for public purposes, their status as 'inherently public property' is not in doubt.[1594] Hence, in NSW disputes over coastal lands have mainly focused on private use, not private ownership.

I conclude that both the US PTD and our endemic 'doctrine' point to the dominant status of public rights in coastal lands, historically and currently. They have potential application for resolving future conflicts, and will inform my framing of potential responses in Chapter VI.

[1588] because they are required for "essential public purposes of recreation and access." See *Worimi LALC v Minister administering the Crown Lands Act* (1991) 72 LGRA 149, 161-3 (Stein J).
[1589] Many proceedings have been brought regarding claims over vacant Crown land under the *Aboriginal Land Rights Act 1983* (NSW) See for eg *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act* [2013] NSW LEC 216 (Craig J) discussed below.
[1590] See *Worimi Local Aboriginal Land Council v Minister administering Crown Lands Act* (1991) 72 LGRA 149, 162-3 (Stein J). See also *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council (Goomallee Claim)* [2012] NSWCA 358; 84 NSW LR 219, [37] (Basten JA).
[1591] *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act (Red Rock)* [2013] NSW LEC 216 (Craig J).
[1592] Eg *Crown Lands Act 1989, Aboriginal Land Rights Act 1983, National Parks and Wildlife Act 1974.*
[1593] Blumm, 'Accommodation, above n 311, 666-7.
[1594] Under s 5.3(5) *CLMA 2016* (NSW) the Minister is not authorized to sell Crown lands dedicated or reserved for a public purposes. However, under s 2.7 and s 2.11 *CLMA 2016* the Minister has powers to revoke dedications or reservations over Crown land, which would allow it to be sold. Sale of national parks estate land would require legislation revoking its dedication under the *NPWA 1974* (NSW).

5.2 Ethical decision making about land

(a) Ethical, ecological perspectives on 'real property'

Another relevant critical perspective on property theory applied to land, insists that landowners should take non-economic considerations into account when making decisions about acquiring and managing 'real property', to address embedded ethical and ecological imperatives.[1595] One prominent advocate of this ethical approach is Eric T Freyfogle.[1596] Though much of his writing relates to the institutions and jurisprudence of the USA,[1597] his ethical critique of the moral justification of private property rights has wider relevance and application.[1598]

Seeing 'real property' as land, in its unique contexts

A key characteristic of this ethical critique is its grounding of the abstract concept of 'property' in the physical, material plane, through repeated references to 'land',[1599] where all land is recognized as inherently situated in its unique contexts: its physical properties, adjoining neighbours and nearby residents, and its biological attributes including other species which inhabit that place.[1600] This ethical approach demands more than a 'snapshot' of the land and incorporates a temporal context,[1601] which recognizes the needs of later generations of landowners, non-owners, and ecological communities, the potential long-term impacts, costs or benefits, and future cumulative ramifications of decisions and actions taken now, to use land and natural resources in certain ways.[1602] These physical, social, ecological and temporal contexts also inform the ethical landowner or manager of the duties and responsibilities, and the concomitant opportunities and limitations, inherent in owning that land.[1603]

These four contexts have highly relevant application to coastal lands affected by coastal hazards, and the need for landowners to consider them in decisions about future use, suggest

[1595] An early advocate of this view, often cited as a forerunner in ethical thinking about land ownership and management, was Aldo Leopold, *A Sand County Almanac* (1st pub 1949, Oxford UP, 1966).
[1596] Freyfogle's early work was writing about water law in the US in the 1980s. See Eric T Freyfogle, 'Water Justice' (1986) *University of Illinois Law Review* 481.
[1597] Many articles discuss the 'takings' clause of the US Constitution, and decisions in the United States Supreme Court, which are inapplicable in New South Wales. See Eric T Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Beacon Press, 2007) 64.
[1598] Freyfogle, 'Ownership', above n 193.
[1599] See Freyfogle, 'Ethics', above n 183; Freyfogle, 'Owning', above n 310.
[1600] Freyfogle uses the ideas of a 'social community' comprised of neighbours, non-owners and future generations, and an 'ecological community' constituted by 'the living things in the non-human world'. See Freyfogle, 'Eight', above n 202, 790; Freyfogle, 'Particulars', above 360, 579-581.
[1601] Freyfogle, 'Ethics', above n 201, 653.
[1602] Freyfogle, 'Ownership', above n 193, 1292.
[1603] Freyfogle, 'Ethics', above n 201, 652; Freyfogle, 'Eight', above n 202, 799.

that they could form useful criteria with which to assess the merits of options for public policy responses affecting coastal land use.

Ethic landownership involves moral choices

Freyfogle's ethical critique of property law provides a moral framework for landowners and managers, where there are right and wrong approaches to making decisions about land use.[1604] In Freyfogle's view, the correct, ethical approach, is to recognize that the special attributes, or features of the land,[1605] provide natural limits to the land's use which should not be exceeded, to prevent potential adverse impacts on its social and ecological communities, and to protect 'sensitive land uses' like threatened species habitat, now and in the future.[1606] Thus he proposes 'tailoring' property rights to fit the attributes of a specific area of land.[1607] An all too common wrong approach, according to Freyfogle, is to overlook the land's particulars, damage or remove sensitive land uses, impose unrealistic expectations about economic yield, overlook adverse impacts on social and ecological communities, or long-term effects and, as a result, degrade land.[1608] This approach, says Freyfogle, is 'morally illegitimate and socially unwise'.[1609]

Freyfogle makes it explicit that in the ethical approach to land management, property regimes and property rights express the moral choices made by people in society, between conflicting rights or interests of members of society.[1610] Using this approach, property norms are developed to avoid harm and to achieve wider social goals.[1611] Since one property norm, the 'do no harm rule' is posited as a key principle for ethical landownership,[1612] how 'harm' is defined is key.[1613] Ethical landowners who observe this rule would also satisfy the norm that one may not use one's property to harm another's.[1614] As Freyfogle noted, it is in landowners' interests to comply with this norm.[1615]

[1604] Freyfogle, 'Ethics', above n 201, 639; Freyfogle 'Property', above n 201, 84.
[1605] Such as its area, aspect, topography, drainage, climate, soil characteristics and vegetation types.
[1606] See the discussion of this in Freyfogle, 'Owning', above n 310, 302-3.
[1607] Freyfogle, 'Particulars', above n 360, 585; Freyfogle, 'Eight', above n 202, 792; Freyfogle, 'Private Rights', above n 356, 276.
[1608] Freyfogle, 'Ethics', above n 201, 645-6; Freyfogle, 'Private Rights', above n 356, 272.
[1609] Freyfogle, *On Private,* above n 1607, 124; Freyfogle 'Property', above n 201, 116.
[1610] Freyfogle, 'Property', above n 201, 84.
[1611] Re-defining and or regulating rights and expectations, rather abandoning them, are two ways society makes changes to its choices between various rights and interests. See Eric T Freyfogle, 'Context and Accommodation in Modern Property Law' (1989) 41 *Stanford Law Review* 1529, 1538.
[1612] Ibid 1539; Freyfogle, 'Property', above n 201, 87; Freyfogle, 'Owning Nature', above n 1480, 164; Freyfogle, 'Private Rights', above n 356, 275.
[1613] Freyfogle, 'Eight', above n 202, 791-2; Freyfogle, *On Private Property',* above n 1607, 111.
[1614] Ibid 110.
[1615] Freyfogle, 'Property', above n 201, 87. Freyfogle quoted the statement of gospel morality used by William Blackstone 3 *Commentaries on the Laws of England* (1st pub 1765) *217-218.

This norm also has a highly relevant application to coastal land. A landowner should not construct defensive structures to protect their land, because the structure will harm their neighbour's land, by increasing the erosive forces affecting it.

The ultimate goal of ethical land ownership and management proposed by Freyfogle, the higher purpose of real property, is to recover and sustain land health.[1616] To do this he said landowners should, ie are morally obliged to, integrate into their decisions to acquire or manage land, the conservation of the natural environment in which the site is located, to sustain vital eco-system functions and the survival, or flourishing, of endemic non-human species in the long term.[1617]

Freyfogle rejected the argument[1618] that private property was all about liberty[1619] and landowners' claimed rights of autonomous action on their private land, and concluded that property is justified by its social utility,[1620] which he said proved its origins in civil society, not as pre-social, individual rights.[1621] He also concluded that since no satisfactory rationale explains why it is morally justifiable for an individual to take a thing everyone could use, keep it as their own, and deny its use to others, the idea of private property is morally problematic.[1622]

The 'social utility' of private ownership of land and property rights, as distinct from their benefits to the owner, were discussed by Freyfogle,[1623] who found that how social purposes and benefits of private land are framed and pursued is rooted in the social utility needs of societies, and the ambitions of their time.[1624] He posited that as well as benefitting landowners,[1625] an ethical property regime ought to benefit society by helping achieve wider social goals.[1626]

[1616] See Freyfogle 'Ownership', above n 183, 1289, 'land health, in perpetuity', 1292;
[1617] Freyfogle, 'Ethics', above n 201, 654; Freyfogle, 'Private Rights', above n 356, 275-7.
[1618] The libertarian argument, of Richard Epstein in *Takings: Private Property and the Power of Eminent Domain* (1985) was considered in several articles.
[1619] See Freyfogle, 'Owning', above n 310, 286-292; Freyfogle, 'Particulars', above n 360, 576; Freyfogle, 'Property', above n 201, 99-102.
[1620] Freyfogle, 'Property', above n 201, 108. See also Freyfogle, 'Ethics', above n 201, 637; Freyfogle, 'Particulars', above n 360, 576.
[1621] The idea of property and property rights arising from 'a pre-social world of nature' was described as 'simply nonsense' in Freyfogle, 'Property', above n 201, 86, who doubted whether humans were ever pre-social and operated only as autonomous individuals. See also Freyfogle, 'Owning the land', above n 310, 301.
[1622] Freyfogle, 'Property', above n 201, 105, 109, 116; Freyfogle, 'Ethics', above n 201, 637; 'Private Rights', above n 356, 273.
[1623] Property functions at economic, civic and personal levels. See Freyfogle, 'Owning the land', above n 310, 296.
[1624] Freyfogle, 'Particulars', above n 360, 169. See also 'Private Rights', above n 356, 273.
[1625] Private property and the ownership of land stimulates individual enterprise and economic growth, encourages investment; provides privacy; divides power within society; and promotes civic engagement by citizens. See Freyfogle, 'Particulars', above n 360, 583. Other individual benefits included 'promoting freedom' and 'access to key resources'. See Freyfogle, 'Property', above n 201, 115.
[1626] Freyfogle, 'Private Rights', above n 356, 277-8.

The ethical basis for a claimed landowner 'right' to develop land to intensify land use and maximize its commercial production was also scrutinized by Freyfogle.[1627] He found that development value of land is conferred by the community, not the owner, and hence development should only proceed with community consent, not as an 'inherent right'.[1628] Since intensive uses often affect land's social and ecological communities by damaging non-economic uses[1629] and creating off-site impacts,[1630] he argued that ethical decisions about intensifying land use should only be made by the community, having regard to all relevant interests, and the common good.[1631] Given that, the interests of others in the land's social and ecological communities also deserve consideration, Freyfogle reasoned that assertions of autonomous individual landowner rights to use land could not be morally sustained.[1632] He concluded that the moral arguments relied on to justify private property in land were not compelling, and unless the institution, and uses of private real property created social benefits, as well as benefits to the landowner, they were 'illegitimate'.[1633] This is a view shared by other ethical theorists.[1634]

Freyfogle also challenged key ideas about private ownership of land underpinning economic theory: the myth of self-interested, economic rationalist, land-owners, who use land to maximize the satisfaction of their individual personal preferences, finding them inadequate.[1635] He extended the purposes for acquiring and managing land beyond those usually recognized, residence, agriculture and commerce, to include partnering with nature to restore land health.[1636] Thus Freyfogle posited that other ethical motives in decision-making about land were also valid.

Relevance

Freyfogle's ethical framework for decision-making about land is relevant because it affirms property's social origins, recaps the history of property as a creature of the law,[1637] rebuts libertarian and natural rights arguments on property's origins, and discounts their usefulness.[1638]

[1627] Freyfogle, 'Owning Nature', above n 1480, 173-4; Freyfogle, 'Eight', above n 202, 795.
[1628] Ibid. See also Freyfogle, 'Owning Nature', above n 1480, 174.
[1629] such as the protection of soils, wildlife habitat, wetlands and natural drainage lines. See Freyfogle, 'Property', above n 201, 84.
[1630] such as noise, dust, smoke, odours, water pollution, increased rainfall run-off and soil erosion, wildfire, damage by escaped livestock, and or feral animals.
[1631] Freyfogle, 'Property', above n 201, 84.
[1632] Ibid 111, 116; Freyfogle, 'Ownership', above n 193, 1287.
[1633] Freyfogle, 'Property', above n 201, 115-6; 'Private Rights', above n 356, 277-8.
[1634] See Babie, above n 323, 18-21; Rose, above n 237.
[1635] Freyfogle, 'Owning', above n 310, 297, 303-7.
[1636] Freyfogle, 'Ownership', above n 193, 1289-90.
[1637] The history of the description of property as a "creature of the law" was outlined in Freyfogle, *On Private Property',* above n 1607, 78. This discourse has included Jeremy Bentham, Benjamin Franklin and others, as Freyfogle acknowledged in 'Property', above n 201, 84-5.
[1638] Freyfogle, *On Private Property',* above n 1607, 86.

Further his analysis of property accords with other scholars' view that private property and property rights generally, and property norms regarding land in particular, have changed in the past, and will – indeed, should - change in the future, to meet society's changing needs.[1639] Importantly, Freyfogle's approach places decision-making about future land use in a moral framework, by identifying what constitutes proper and improper uses of land, arguing that private property *should* serve society's goals, as well as the owners', and contribute to the 'greater good', if it is to be morally justified.[1640]

These conclusions are highly relevant to the coastal lands under scrutiny, and clearly indicate that decisions on future private uses of coastal lands which undermine wider public goals – ie continued public access to and along the foreshore - are not morally justifiable.

Usefully, this approach overcomes the unreality of hyper-abstraction and 'placelessness' of property theory by repeated grounding references to land, emphasizing the crucial physical, social, ecological and temporal contexts in which all land is located.[1641] Further, it undermines the commodification of land by rejecting fixed property rights, asserting that they should be tailored to suit the land, and natural limits should govern future uses of land.[1642] These four contexts are most relevant since they are the domains in which landowners' claims of property rights are situated, where they seek to be exercised, and where adjudications of their ethical merit must be made. Thus owners who ignore these contexts, exercise property rights and land-uses which degrade their land and impact on neighbours and nearby lands, are not acting ethically and their actions and may be seen as 'morally illegitimate'.[1643]

Freyfogle's proposition that to act ethically, those who own and manage land must look beyond private property rights, and allow for the needs of others in current and future social and ecological communities of that land, is a significant point of reference for my discussion of how future conflicts over competing rights to use coastal land might play out. The extension of this ethical framework to law makers, who "are morally obligated to revise property laws over time so that the law enforces only property rights that foster the common good",[1644] is also relevant. Usefully, Freyfogle's critiques of landowners' claims of unilateral natural property rights indicate that such misinformed 'rights talk' is unlikely to lead to the ethical management of

[1639] Freyfogle, 'Ethics', above n 201, 638; Freyfogle, 'Particulars', above n 360, 577.
[1640] Freyfogle, 'Eight', above n 202, 787; Freyfogle, 'Private Rights, above n 356, 277-8.
[1641] Freyfogle, 'Particulars', above n 360, 580; Freyfogle, 'Eight', above n 202, 790; Freyfogle, 'Private Rights', above n 356, 274.
[1642] See Freyfogle, 'Owning', above n 310, 302-3; Freyfogle, 'Particulars', above n 360, 585; Freyfogle, 'Eight', above n 202, 792; 'Private Rights', above n 356, 276.
[1643] Freyfogle, *On Private Property',* above n 1607, 124.
[1644] Freyfogle, 'Property', above n 201, cited in Blumm, Accommodation, above n 311, 655, fn 21.

coastal land in the future. Moreover, his recognition of the social origin and dynamic nature of property and private property rights are key starting points for the discussion that follows.

I draw on this ethical perspective when I identify relevant criteria, in Part C below, and assess the merits of potential responses, in Chapter VII.

(b) Principles of ecologically sustainable development (ESD)

Last in my review of public interest perspectives I briefly consider the principles of ecologically sustainable development (ESD), for several reasons. First, like other perspectives considered, jurisprudence on ESD could influence the development of future government policy. Second, I wish to highlight the relevance of the principle of 'use of economic instruments' as a key means of implementing government policy, to effect change in land use. Third, the integrative principle is highly relevant to the estimations I propose to make of future circumstances, impacts and success of potential public policy responses by a future government, in Chapters VII and VIII.

In the late 1980s and early 1990s ecologically sustainable development (ESD) emerged as a key concept in public policy in New South Wales, and as a core goal shared by diverse sectors of contemporary society. Though its antecedents lie in international law[1645] and national policy development in the early 1990s,[1646] the key milestone in New South Wales was the statement of the principles of ESD in the *Protection of the Environment Administration Act 1991* (NSW).[1647]

Though there is some debate around the number, I posit that there are five principles of ESD:

i] the precautionary principle; (see section 6 (2)(a))

ii] the principle of inter-generational equity; (section 6 (2)(b))

iii] the biodiversity conservation principle; (section 6 (2)(c))

iv] the principle of using economic instruments to achieve environmental protection; (s 6 (2)(d))

v] the integrative principle (section 6 (2).

[1645] See World Commission on Environment and Development, *Our Common Future,* (Oxford UP, 1987) [the Brundtland Report], and UN Conference on Environment and Development (UNCED), *The Rio Declaration on Environment and Development,* Rio de Janeiro, Brazil, 14 June 1992. See also Herman E Daly, 'Towards some operational principles of sustainable development' (1990) 2 *Ecological Economics* 1-6.

[1646] See Commonwealth of Australia, *Ecologically Sustainable Development: A Discussion Paper* (AGPS, June 1990), *Draft National Strategy for Ecologically Sustainable Development – A Discussion Paper* (AGPS June 1992) and *National Strategy for Ecologically Sustainable Development* (AGPS, December 1992).

[1647] See s 6 (2) *POEA Act 1991* (NSW) < http://www.austlii.edu.au/au/legis/nsw/consol_act/poteaa1991485/s6.html >. [Hereafter *POEAA 1991* (NSW).]

Some authors have noted four principles, or have included 'the polluter pays' concept as a principle. However I regard this as one example of the principle of using economic instruments to protect the environment. I posit that the 'integrative principle' is explicit because the Act "requires the effective integration of economic and environmental considerations in decision-making processes".[1648] However it is not relevant or necessary to elaborate these arguments here. What is important to emphasize is that the principles of ESD are part of the *status quo,* and they frame the 'ecologically sustainable use' of land and resources as a core social goal. They indicate how public authorities should consider and take into account all relevant matters when making decisions about publicly owned natural resources, to ensure they are ecologically sustainable. Applying these principles allows, in theory, decision-makers to test whether development proposals are ecologically sustainable, or can be made so with appropriate conditions. Hence the theoretical model of ESD requires the integration of considerations from economic, social, ecological and temporal domains.[1649]

These key principles have been incorporated into other New South Wales legislation, [1650] and embellished by legal authorities. Court decisions on questions of fact, interpretation and operation of statute law,[1651] extra curial writing by leading jurists,[1652] and explorations of ESD themes in academic research and publications[1653] have created a substantial jurisprudence on ESD in New South Wales. Developments in other jurisdictions, have widened the principles' scope of

[1648] See s 6 (2) *POEAA 1991* (NSW).

[1649] The reference to 'intergenerational equity' indicates considerations which take into account factors which could arise, or circumstances which could play out, over periods of multiple decades to centuries.

[1650] New South Wales legislation has directed that the management of many public resources be consistent with the 'principles of ecologically sustainable development' set out in s 6(2) of the *POE Act 1991* (NSW). See for example: s 89 *Local government Act 1993* (NSW), ss 37A, 38, 54A *Coastal Protection Act 1979,* (NSW), s 3 *Water Management Act 2000* (NSW), s 15 *Sydney Harbour Foreshore Authority Act 1998* (NSW), ss 5, 115H *Environmental Planning and Assessment Act 1979* (NSW), ss 3 (2) (c) *Fisheries Management Act 1994* (NSW), ss 198, 220A *Natural Resources Commission Act 2003* (NSW), s 10 (1) (c) *Forestry Act 2012* (NSW). See also s 22 *Marine Estate Management Act 2014* (NSW), s 3 *Coastal Management Act 2016* (NSW), but *contra* ss 1.3(f) and 1.4 *Crown Land Management Act 2016* (NSW).

[1651] See the cases cited in *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234, 246 (Preston CJ).

[1652] See for eg Paul Stein, and Susan Mahony, 'Incorporating Sustainability Principles in Legislation' in Leadbeter, P, N Gunningham and Ben Boer (eds), *Environmental Outlook No. 3. Law and Policy* (1999) 57-75; Brian J Preston, 'Jurisprudence on ecologically sustainable development: Paul Stein's contribution' (2012) 29 *Environmental and Planning Law Journal* 3-15; BJ Preston, 'Water and ecologically sustainable develop-ment in the courts' (2009) 6 *Macquarie Journal of International Comparative Environmental Law* 129; BJ Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9 *Asia Pacific Journal of Environmental Law,* 109; Stephen Estcourt, 'The precautionary principle, the coast and Temwood Holdings' (2014) 31 *Environmental and Planning Law Journal* 288 – 299.

[1653] See Ben Boer, 'Institutionalising Ecologically Sustainable Development: the Roles of National, State and Local Governments in Translating Grand Strategy into Action' (1995) 31 *Williamette Law Review* 307; Jacqueline Peel, 'Ecologically sustainable development: more than mere lip service?' (2008) 12 (1) *Australasian Journal of Natural Resources Law and Policy* 1-34; Guy J Dwyer and Mark P Taylor 'Moving from consideration to application: The uptake of principles of ecologically sustainable development in environ-mental decision making in New South Wales' (2013) 30 *Environmental and Planning Law Journal* 185 - 219.

operation in Australia.[1654] Comprehensive review of the extent of this jurisprudence is beyond the scope of this thesis. Nonetheless the future application of these principles is highly relevant. In the following sections I sketch their relevant application to decision-making about the future use of coastal lands.

(c) ESD principles application to coastal lands

The principles of ESD and the concept of 'ecologically sustainable' use of land and resources, are pertinent since under current law they apply to decision-making about lands in the coastal zone, including public policy responses to adverse climate change impacts. [1655]

Applied at a general level, the precautionary principle should inform policy-advisers and decision-makers that appropriate actions by Governments to reduce global warming and to address forecast climate change impacts should not await full scientific certainty, about the risks of irreversible harm to the environment.[1656] The principle of intergenerational equity, with its future orientation, would require decision-makers to consider the likely impacts of global climate change on the availability of key natural resources to future generations, over decades, or centuries.[1657] Similarly the 'biodiversity conservation principle' would oblige decision-makers to understand likely impacts on coastal species and how eco-systems might be assisted to survive, as climate change becomes acute.[1658]

The fourth principle – use of economic instruments to achieve environmental outcomes – is qualitatively different and especially relevant, since it could be employed by a future government to implement its policy response to climate change impacts. Using economic instruments inappropriate uses of coastal land could be regulated or prohibited, and appropriate uses encouraged through incentives to change behavior, to achieve the preferred policy outcome. The use of economic instruments will be explored in the next chapter.

As well as its use in comprehensive assessments of impacts, costs and overall merits of development proposals, and formulating appropriate consent conditions, the integrative principle also applies to strategic planning decisions to re-zone land to enable its more intensive future use. New planning instruments for coastal management, developed through open

[1654] See the list of legislation incorporating ESD by jurisdiction complied in Peel, above n 1670, Appendix 1.
[1655] See s 3 *Coastal Management Act 2016* (NSW).
[1656] The IPCC reports high degrees of confidence in many analyses, and lower levels of confidence in some aspects of its climate change modelling. See IPCC, *Climate Change 2013,* above n 7, 23-4.
[1657] See the discussion of climate change impacts in Pittock, above n 8, 107 – 128.
[1658] See Will Steffen, et al, *Australia's Biodiversity and Climate Change* (CSIRO Publishing, 2009).

consultative processes, informed by relevant social, ecological and economic studies, which forge community consensus on the goals of future coastal management, identify the actions and funding needed to achieve them, to respond to current and likely future climate change impacts, would reflect the integrative principle in action.

However use of this principle would also be vital in accurately assessing the social, ecological and economic impacts of climate change on current uses of vulnerable land, and in developing a timely, comprehensive, integrated public policy response which cost-effectively addresses those impacts.[1659] Hence this integrative principle guides my estimations, in later chapters, of future circumstances and impacts and informs my assessments of the likelihood of potential responses being adopted by a future government, and attracting adequate support in the legislature.

The principles of ESD currently require decisions about future use of land to consider and protect elements of the public interest, and ensure public resources are used sustainably. They would need to be repealed if the *status quo* were to be reversed to privilege private property rights. However these principles could provide a basis for the government and legislature to adopt a policy to enhance public rights to use coastal land. This is explored in Chapter VI.

Interestingly, the principles of ESD strongly correlate with the elements of ethical decision-making about land identified by Freyfogle. Though he does not embrace economic instruments, Freyfogle's framework aims at environmental protection, and restoration, urges caution, avoiding or minimizing social and ecological impacts and consideration of implications for future generations. Moreover the 'mature reflection' he proposes, would allow all relevant matters to be integrated into any decision.

These modern ideas about 'public property', the purpose of 'property' and property law are very relevant to my discussion of the future use of coastal land in New South Wales, in Chapter VI.

6. Private interest perspectives

In the next sections I consider two articles which could shape future Government's policy on whose rights *should* prevail, to privilege private property and private property rights. The first claims, on behalf of coastal landowners in New South Wales, a private property 'right to protect their land from the sea'. The second reviews calls by landowners affected by coastal erosion, for 'social justice' in coastal management decisions by public authorities in England and Wales.

[1659] IPCC, *Climate Change 2014*, above n 1420, SPM4.1 26. See the European Union's integrated approach in Kenchington et al (eds), above n 137, 60-62.

6.1 Robust private property 'rights'

It is possible that a future New South Wales government could decide that private property rights *should* prevail over public rights to use coastal land, as climate change impacts become apparent. Such a policy was advocated by Karen Coleman in an article,[1660] with which I disagreed in my own article in the same journal in 2013.[1661] I present here a brief exposition of Coleman's arguments as an exemplar of a forceful pro-private property rights point of view.

(a) Claimed private property right

Coleman's key claim was that landowners had a 'right to protect their land from the sea' which 'must be seen as one of the rights in the "bundle" of rights that comprise modern ownership of land.'[1662] It was claimed this was 'an ancient common law right' recognised in the English cases cited, but later decisions which found the claimed 'right' imperfect and its application highly limited,[1663] were not considered. Coleman acknowledged that in England the Crown's defense of land from the sea had been governed by statute since 1427,[1664] but did not explain how the claimed right had survived the enactment of modern statutes enacted by the NSW legislature.[1665] Though Coleman correctly identified the Crown power to erect defences against the sea, no argument was mounted to show how this power created a current legal duty on the State of New South Wales, or justified the claimed private property right to 'protect against the sea'.

It appears that in asserting that this right 'must be seen as one of the rights in the "bundle" of rights´, Coleman made a statement of advocacy, since this claim conflicts with modern property theory which limits the number of sticks in the bundle,[1666] and contrary to modern statutes.[1667]

(b) Private property rights as 'fundamental' rights

Arguably Coleman's most doubtful claim was that the 'right to protect' land from the sea was a fundamental right which '[g]overnments and legislatures cannot ignore.'[1668] This claim

[1660] Coleman, above n 13, 422.
[1661] Corkill, 'Claimed', above n 347-58.
[1662] Coleman, above n 13, 422.
[1663] See the discussion of the decisions *Hudson v Tabor* (1877) 2 QBD 290, 294, and *Attorney General (UK) v Tomline* (1880) 14 Ch 58, in Corkill, 'Claimed', above n 347, 50-51.
[1664] Corkill, above n 347, 51.
[1665] Ibid 52.
[1666] This claimed right was identified by Honore, above n 216, discussed in Chapter II.
[1667] See consideration of relevant provisions of the *Coastal Management Act 2016, Crown Land Management Act 2014,* and the *Environmental Planning and Assessment Act 1979* (NSW), in Chapter IV.
[1668] Coleman, above n 13, 422.

misunderstood the NSW legislature's pre-eminence as the supreme law-making body, its extensive powers to modify or extinguish common law by enacting modern statutes,[1669] and overlooked the provisions of then current legislation,[1670] and an authoritative court decision.[1671] Hence the claim that there are 'fundamental rights' over land, which remain beyond the power of the State's Legislature, was repudiated in my analysis of claimed rights in section 9, Chapter IV, and disputed in my published critique, as contrary to legal norms.[1672]

Coleman's claims demonstrate the erroneous belief of some landowners that their private property rights already are, and in the future *should*, be dominant in the statutory framework.[1673] These propositions inform my description of potential responses by a future government which might privilege private property rights over public rights to use coastal lands, in Chapter VI.

6.2 Social justice argument

Calls for 'social justice' in publicly funded programs for coastal management and associated 'defensive works', to 'protect' private property from further coastal erosion, are rarely heard in New South Wales, but are not unknown in the United Kingdom. In a highly relevant article, Cooper and McKenna[1674] explored "the potential relevance and application of social justice arguments" raised by affected landowners after public authorities discontinued public funding for coastal protection works along the coast of England and Wales, because they were ineffective in preventing further erosion or interrupting the shoreline's recession.[1675]

This review is particularly pertinent because it relates to circumstances in the UK which are analogous to conflicts over coastal land use in New South Wales, which could occur in the future, and describes the same challenges in coastal management under consideration in this thesis: the response of government and landowners to the impact of rising seas, and increased erosion, on privately owned coastal land. Hence it offers views of possible conflicts between private landowners and public rights and interests, arguments which might support preferred outcomes, and how decision-makers might adjudicate competing claims, to resolve conflicts.

[1669] Corkill, 'Claimed', above n 347, 52-54.
[1670] Section 55M of the *Coastal Protection Act 1979* (NSW) prohibited coastal protection works on coastal land if it would 'unreasonably limit public access to or use of a beach or headland' or 'pose a threat to public safety'; and s55N *CPA 1979* denied landowners the right to claim ownership of land formed by accretion if it impeded public access or affected public safety. See discussion of this provision in Section 4 of Chapter IV below.
[1671] *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399; 177 ALR 436. See the discussion of this case in section 10 of Chapter III.
[1672] Corkill, above n 347, 55.
[1673] Coleman, above n 13, 422.
[1674] JAG Cooper, and J McKenna, 'Social justice in coastal erosion management: The temporal and spatial dimensions' (2008) 39 *Geoforum* 294-306.
[1675] Cooper and McKenna, above n 123, 297.

(a) Defining 'social justice'

Cooper and McKenna reviewed the literature on 'social justice', and discovered it was a 'contested concept', with two approaches extant: one focused on equitable 'procedures',[1676] and a second centred on equitable distribution of both costs and benefits of economic development.[1677] Though they noted the related concept of 'environmental justice', it was not further considered.[1678] The authors established that the calls for 'social justice' were based on landowners' perception of the 'fairness of the outcomes",[1679] as distinct from 'fairness' of the decision-making process,[1680] and they posited that 'social justice' could be considered "at different scales", from small group to whole society.[1681]

Before considering the potential application of social justice arguments to coastal erosion, Cooper and McKenna summarized the state of knowledge and experience in managing the coasts of England and Wales, outlined the limited policy options then available ie: (a) intervene to resist coastal erosion; or (b) accept it and adapt; and noted the four options being applied in 'shoreline management plans' (SMPs) in the UK: ie hold the line; retreat the line; advance the line; and do nothing.[1682]

They observed that the social justice argument is advocated "mainly in cases where private property is threatened by coastal erosion" and reported that it "maintains that society should intervene in some way when the property of individuals or groups is threatened by erosion".[1683] They noted that the rationale advanced for this argument was the precedent of earlier publicly-funded works, but they did not accept this argument. They found that building coastal defensive structures was a discretionary power available to public authorities, and apart from 'a few specific instances', there was no binding legal obligation on public authorities in the UK to defend all lands affected by erosion.[1684] They noted that 'social justice' considerations did not form part of the then current decision-making processes for coastal management in the UK,

[1676] Ibid 295. Cooper and McKenna cited A. Dobson, *Justice and the Environment* (Oxford UP 1998)
[1677] Cooper and McKenna, above n 123, 295. Cooper and McKenna cited the work of Miller (1999), Dobson (1999) and Hardin (1987).
[1678] Cooper and McKenna, above n 123, 295. This idea was not raised by adversely affected residents.
[1679] Ibid. This view was expressed in submissions to a government policy paper *Making Space for Water*.
[1680] Cooper and McKenna, above n 123, 297. These calls cited articles in the *European Convention on Human Rights and Fundamental Freedoms* on the protection of private property and private property rights. However the authors noted the Convention permitted private property to be alienated where this was in the public interest, had been lawfully authorized and achieved 'a fair balance between public interests and private rights.'
[1681] Cooper and McKenna, above n 123, 295.
[1682] Ibid 295.
[1683] Ibid 296. They report that "the nature of the intervention, is immaterial to the general argument".
[1684] Ibid 296. Cooper and McKenna cited Pettit 1999, Defra 2003).

which were "overwhelmingly economic in scope", and observed that they were, potentially, much wider than benefits to coastal landowners.[1685]

In their analysis Cooper and McKenna considered different forms of 'public intervention' in these analyses: building (and maintaining) hard defensive structures, or soft engineering options; and compensating private landowners adversely affected by coastal erosion,[1686] but recognized that all these options required public funds.[1687] They contrasted these 'public funding' options with landowners having to "bear the costs of their own misfortune".[1688]

(b) Local level, short-term perspective

In their review of a local level, short-term perspective, Cooper and McKenna rejected the 'crude equality argument', of "if done for one, then done for all", observing that public authorities needed to be able to reconsider public policy, and re-allocate funds to address new circumstances, and would be justified in doing so where there was a 'general good or public interest' rationale for the policy.[1689]

In noting landowners' personal responsibility "to plan for the inevitable", since many areas have been known to be susceptible to coastal erosion for centuries,[1690] Cooper and McKenna rebutted the primary narrative in the 'social justice' argument: that the landowner is an innocent bystander, suffering 'misfortune' due to unforeseen acts of nature, and seemingly illogical changes in public policy made by remote, uncaring public authorities. In contrast, the authors asserted that owners should be aware of the hazards of their land, and have a personal responsibility to avoid risks, not perpetuate them, by remaining in harm's way. They observed that "typically privileged coastal dwellers" enjoy considerable benefits from their coastal real estate, and reside there by their own choice. [1691]

Cooper and McKenna acknowledged major adverse impacts of hard structures,[1692] and soft defences,[1693] on public interest values of the coast, but found assessments of impacts from a

[1685] Cooper and McKenna, above n 123, 296. As well as higher property values accruing to coastal residents, Cooper and McKenna noted that many visitors to the coast come to 'enjoy coastal resources'.
[1686] Cooper and McKenna, above n 123, 297 – 302.
[1687] Ibid 298. Such as the construction of 'hard' works such as seawalls, groynes and revetments, and 'soft' options such as beach nourishment, or acquisition of affected lands by the government.
[1688] Ibid 297.
[1689] Ibid 298.
[1690] Ibid.
[1691] Ibid. The major benefit to the land owner is 'a substantial capital gain … with the value of the property being enhanced due to its protection".
[1692] Ibid. Immediate adverse impacts of hard structures were said to be 'essentially' fiscal since such structures are expensive to construct and require on-going maintenance. Short-term adverse

local, short-term perspective made cursory appraisals of only 'immediate' or short-term costs or adverse effects.[1694] They also explored the 'social justice' argument for landowners to be compensated with public funds, if changes to public policy 'damage' their expectations of public intervention, but they found these calls had no basis in law, since 'the public good prevails'.[1695] They noted potential costs and benefits from any public intervention, and were frank that benefits would mostly accrue to private landowners, while costs, and adverse impacts on 'public interests', would be mainly borne by the public, into the future.[1696] They concluded that landowners who had already benefited from public funding, did not have a 'social justice' argument for more public spending for their private benefit.[1697]

Cooper and McKenna summarized the costs and benefits where 'the principle of public intervention was rejected' and found that if 'the natural sedimentary system is free to adjust to changing energy levels, sediment supply and sea level change with no loss to society as a whole'. But they noted that owners of affected private land would face a short-term, perhaps substantial, financial set-back, 'if they have not made provision for the impending loss'.[1698]

(c) Regional level, long-term perspective

In their review of a regional level, long-term perspective, Cooper and McKenna expanded their consideration of 'social justice' arguments to "broader spatial and temporal scales"[1699] and identified other current and future coastal users whose interests also needed to be considered.[1700]

They also found a range of long-term adverse environmental impacts of hard defensive structures,[1701] and soft defence options,[1702] whose costs to the public were often overlooked or

environmental impacts of loss of scenic quality, loss / difficulty of access (Clayton, 1993) loss of resilience to storm attack and reduction in sediment supply (Pontee et al, 2004) were also reported.

[1693] Soft defences include beach nourishment, but these activities are not free from adverse environmental impacts. Cooper and McKenna reported "impoverished fauna and flora compared to natural beaches (Speybroek et al 2006)", but did not discuss the adverse impacts of the recovery of the sand used for nourishment, or the short life of most nourishment activities, necessitating repeated episodes of nourishment.

[1694] Cooper and McKenna, above n 123, 298. Medium term impacts of "beach narrowing, loss of sediment elsewhere, loss of amenity, loss of natural habitat" … "do not feature in short-term social justice arguments".

[1695] Ibid 300. This conclusion referred to the jurisdiction of the United Kingdom.

[1696] Ibid. Costs would include the costs of construction and ongoing maintenance, which effectively 'lock in' the public purse to pay the costs of unlimited future upgrades.

[1697] Ibid.

[1698] Ibid. Further, they recognised 'additional impacts' of an intangible nature such as uncertainty, stress, loss of community spirit, and mistrust of authorities, and saw the benefits of this approach as preserving beaches, natural coastal landscapes, functioning coastal ecosystems and amenity of the coast.

[1699] Ibid.

[1700] Ibid. These included non-resident coastal users, property owners on adjacent coasts, and future generations of users and residents.

discounted.[1703] Further, they reported that costs of building, maintaining and upgrading coastal defensive structures, could 'lock in' long-term future public funding for works of largely private benefit, limiting the options available for future management of coastal hazards.[1704] The authors acknowledged the 'finite lifespan' of seawalls, that their design limits would likely be exceeded under climate change conditions, and were frank about likely future costs[1705] and environmental impacts,[1706] warning of a 'false sense of security' when developing coastal lands assumed to be 'protected' by a sea-wall.[1707] When they considered the likely consequences 'if the coast is allowed to fluctuate freely' they found 'no long-term adverse impact' on the coastal environment, but 'a direct cost' to landowners affected by erosion.[1708] They found a one-off compensation payment to landowners would not 'solve the problem', and compensation could continue indefinitely, as the shoreline continued to retreat.[1709] The authors concluded that 'defending the coast' was undesirable from financial, recreational amenity and environmental perspectives, and inappropriately encouraged development in unsuitable places,[1710] and posited that at the regional level 'there is a stronger argument for non-intervention'.[1711]

(d) Scale considerations in social justice

Cooper and McKenna found that scale affected social justice, declaring there were 'clearly different perspectives depending on the spatial and temporal scales considered', which had 'implications for sustainability'.[1712] They highlighted the discounting of adverse impacts and costs to the public under a local level short-term perspective,[1713] and emphasized the ethical imperative for including inter-generational considerations, including future costs, in any longer-term perspective of social justice.[1714] Further, they noted that the extent and cost of adverse environmental impacts increased substantially, at larger temporal and spatial scales, and the

[1701] Ibid 301. The adverse impacts of these 'hard' sea defences include narrowing and loss of beaches, the segmentation of the beach into short compartments, 'coastal squeeze', changes in wave patterns and interruptions to natural sediment flows, with 'knock-on effects for areas of human activity'.
[1702] Ibid. 'Soft' defence options of "beach recharge / nourishment" needed to be 'ongoing' and continue indefinitely to maintain an eroding beach, and could generate adverse impacts: reduced ecological value of nourished beaches, unsustainable sources of sand supply; and extraction impacts on source areas.
[1703] Cooper and McKenna, above n 123, 302.
[1704] Ibid 300. They posited that 'the present generation continues to bear the financial (and environmental) cost of the widespread coastal engineering of the Victorian era.'
[1705] Ibid. '… the cost associated with the maintenance of coastal defences will certainly increase."
[1706] Ibid 301. These include: narrowing and loss of beaches, exacerbated sediment loss (erosion), coastal squeeze, interruptions to coastal sediment supply, with a host of 'knock-on effects'.
[1707] Ibid 300-301.
[1708] Ibid 301-2.
[1709] Ibid 301. See estimates of value of lands at risk from climate change in Australian Government, *Climate*, above 44, 71-134.
[1710] Cooper and McKenna, above n 123, 302.
[1711] Ibid. …based on the 'scale of the costs to contemporary society and future generations'.
[1712] Cooper and McKenna, above n 123, 302.
[1713] Ibid.
[1714] Ibid 304.

number of adversely affected non-resident beach users outnumbered the landowners in any 'local level perspective', concluding that at these larger scales, the moral force of social justice arguments was greatly reduced.[1715]

(e) Social justice and sustainability

Relevantly, Cooper and McKenna discussed the relationship between 'social justice' and 'sustainability', observing that initally they thought that 'the two concepts would always be compatible', but that tensions 'have since arisen', due to differences in the temporal and spatial scales used. They asserted that in coastal erosion management 'the two converge at large temporal and spatial scales', where 'social justice arguments lend support to the goal of environmental sustainability'.[1716]

However, they concluded that when framed using small temporal and spatial scales, social justice arguments "oppose" sustainability.[1717] They found the 'social justice' argument strongest at a local level, but it was weakened by 'personal responsibility' factors,[1718] its failure to consider long-term impacts, and substantial environmental and financial costs to the public, and future generations.[1719] The authors also found that 'social justice' considerations could contribute to sustainability, if viewed at longer term and greater spatial scales,[1720] and highlighted the willingness of decision-makers 'not to foreclose options for future generations' as a 'central tenet of sustainability'.[1721] Significantly, they endorsed 'social justice' as a potentially useful concept because it would extend considerations beyond 'the traditional economic and emerging environmental arguments', highlight 'an additional range of considerations', and improve decision-making about coastal management in the UK.[1722]

Cooper and McKenna concluded with an appeal for a 'major change in public attitudes' toward publicly funded sea defences, and an end to the nourishment 'addiction', and called for 'an open and informed discussion' of social justice perspectives, as an aid to 'breaking the cycle of construction and defence followed by yet more construction into which society is often locked.'[1723]

[1715] Ibid 303. "…to the realm of 'ideological intimidation' (Novak, 2000) at worst and wishful thinking at best."
[1716] Ibid 305.
[1717] Ibid.
[1718] Ibid 303.
[1719] Ibid 302.
[1720] Ibid 305.
[1721] Ibid 304.
[1722] Ibid 305.
[1723] Ibid.

Cooper and McKenna's identification of future generations as interested parties who deserve consideration, is relevant, as is their warning of the substantial economic burden on future taxpayers from decisions made to 'lock in' public funding for ineffective structures, into the future. Their conclusion that at large spatial and temporal scales 'social justice' considerations can contribute to the sustainability of decision-making about coastal lands, is also relevant. Most useful is their finding that at micro scales, social justice arguments are inconsistent with sustainability. Their review suggests several criteria suitable for use in assessing the merits of the potential responses by government in Chapter VII, and their likelihood in Chapter VIII.

Having outlined philosophical approaches which could influence future government policy, or legislative support for it, I next identify, in Part C, appropriate criteria for use in later chapters.

Part C. Criteria derived from the literature

In this last Part I derive the three sets of criteria identified in Part A, required for the further analyses needed to evaluate the merits of potential responses as decisions about future use of land, and as public policy in Chapter VII, and to ascertain their likelihood, in Chapter VIII.

7. Decision-making about future use of land

From my review of the literature regarding land management, it became clear that the work of Eric T Freyfogle was extensive, authoritative, and highly relevant to my research area. His ethical approach to decision making about future land use, which emphasizes consideration of the particulars of place, addresses a primary criticism of property theory applied to land: its conceptual 'dephysicalization' of real property, creating a 'placelessness' which enables the commodification, and sadly often the degradation of land.

Further, his many articles reflect a mature analysis, which has investigated and rejected unhelpful claims about property and private property rights and identified and integrated multiple relevant considerations into a coherent ethical framework for making decisions about the future use of land, which recognises the diverse personal and social purposes of owning land, but aims to avoid its degradation.

Using Freyfogle's ethical approach, those making decisions about the future use of private or public land, ought to consider potential impacts and benefits on five matters: the land's physical characteristics and condition; the social community in which it is situated; the ecological community which inhabits it; possible effects over time; and its contribution to key social goals.

Because they comprise an integrated ethical framework for decision making about future land use, I adopt these five considerations as criteria to evaluate the merits of potential responses by a future government to increasing conflicts between competing rights in Chapter VII. In these assessments potential responses will be evaluated by testing whether they are compatible with, and or have adequately considered the land's: i] physical character; ii] social impacts; iii] ecological impacts; iv] effects over time; and v] social value.

Each of these matters is justified by Freyfogle as part of this coherent ethical framework, but importantly they have corresponding justifications as highly relevant considerations, in the property theory, common law rules, case law, statutes and literature considered above.

In the next sections I explain the relevance of each criterion, refer to relevant justifications in these primary and secondary sources which support their selection, and frame focus questions for their use in assessing the merits of the seven potential responses of a future government.

I] physical characteristics. This criterion has been adopted as an essential consideration to ground the discussion in land, overcome the pitfall of 'dephysicalizing' real property, avoid the 'placelessness' of property in land in theoretical discussions, and prevent decisions which will lead to land degradation if they are ignored.[1724] The physical attributes of coastal land are extensive and include its location, size, shape, aspect, substrate, topography, hydrology, boundaries and condition, and especially its vulnerability to physical impacts such as coastal erosion. These attributes, and their significance for future land use, vary from site to site, but all these characteristics are highly relevant facts, which should be taken into consideration in decision about the land's suitability for the proposed future use.[1725]

The adoption of 'physical characteristics' as a relevant criterion which should be considered in decisions about the future use of coastal land is supported by existing common law rules,[1726] case law,[1727] and current statutes,[1728] and commentary in the published literature.[1729]

[1724] Freyfogle, 'Ethics', above n 201, 649; Graham, above n 235, 44 191-2.
[1725] Freyfogle, 'Particulars', above n 360, 585, Freyfogle, 'Ethics', above n 201, 645-6.
[1726] See the outline of the 'doctrine of accretion' in Chapter II.
[1727] the physical effects of the doctrine of accretion on coastal land were core to the decision in *EPA v Leaghur Pty Ltd* (1995) discussed in Chapter III.
[1728] see for eg the duty to consider environmental impacts under s 5.5, the obligation to require and consider an environmental impacts statement (EIS) under s 5.7; the need to declare the presence of 'coastal hazards' in planning certificates under s10.7 *EPAA 1979* (NSW).
[1729] Alexander et al, 'A Statement of progressive Property' (2008) 94 *Cornell Law Review*, 743, 744; Graham, above n 235, 190-3.

Relevant considerations for this criterion would include answers to these focus questions: Have the land's characteristics (including its soil properties, seasonal temperature and humidity ranges, rainfall, wind exposure, aspect, position in catchment; fire history) its carrying capacity and natural limitations, been properly considered?

II] social community. In this ethical framework the impacts of decisions about future land use ought to consider – and where possible avoid - any adverse impacts on the social community.[1730] However, who is part of this social community may be defined narrowly, or inclusively. Freyfogle nominates the typical social community within which most rural landowners are situated as including adjoining neighbours, others downhill, downstream, or downwind, non-owner residents nearby, members of the public, and future generations.[1731]

But for many privately owned coastal lands the social community is more complex and dynamic. As well as neighbours, it includes the managers of adjacent public lands, members of the public, domestic visitors, and often international tourists. Further, since economy activity is a social function, the social community of many coastal lands includes the customers and proprietors of coastal businesses and industries which depend to some extent on public access to and use of coastal lands and waters.

Support for using the consideration of impacts or benefits on the social community as a relevant criterion is found in property theory,[1732] case law,[1733] in current statutes,[1734] and the literature.[1735]

Focus questions for this criterion are: Could there be adverse impacts on neighbours, residents nearby, members of the public, or future generations? What could be done to prevent this?

III] ecological community. In Freyfogle's framework, recognising and minimising any possible adverse impacts on the ecological community using or inhabiting a particular allotment of land is an important ethical duty of landowners. Identifying the ecological community on their lands may be relatively easy for rural residents but more difficult for coastal landowners where, as well as obvious native flora and fauna, the ecological community potentially affected

[1730] Freyfogle, 'Particulars', above n 360, 579-81.
[1731] Freyfogle, 'Property', above n 201, 84-7.
[1732] See Hohfeld, above n 406, 718-9, discussed above.
[1733] The impacts on others in the social community were recognised by the courts in *Blundell v Catterall* (1821), *Hudson v Tabor* (1877), *AG v Tomline* (1880), discussed in Chapter III. See also *Ralph Lauren v TCPNSW* [2018] NSW LEC 207.
[1734] See s 6(2) *POEAA 1991*, which requires 'the integration of social, economic and environmental considerations in decision-making processes', and principle of 'intergenerational equity' defined under s 6(2)(b) *POEAA 1991* as part of the principles of ecologically sustainable development (ESD).
[1735] See Freyfogle, 'Property, above n 84, Rose, 'Comedy', above n 235, Babie above n 18-21.

by their decisions about future land use may include cryptic intertidal invertebrates or seasonally migratory species dependent on the beach or dunes for feeding roosting and nesting sites. For some lands and land uses, the ecological community potentially affected would include species inhabiting adjacent estuarine waters.

Inclusion of this criterion is also justified by other ethical property theorists who recognise the moral responsibility of landowners to respect the 'non-human world'.[1736] Consideration of potential ecological impacts is also supported by the mandatory requirements of current statute law regarding application of the principles of ecologically sustainable development,[1737] also the requirement to consider impacts on threatened species,[1738] the 'duty' of public authorities[1739] and consent authorities to consider potential environmental impacts in their decisions.[1740]

Focus questions for this criterion are: How will the land use approved by this potential response affect those diverse forms of non-human life in coastal land and environs, including native plants and animals, and introduced species? Will it increase or decrease the area of habitat?

IV] temporal factors. Freyfogle identified several ways in which the effects of time might be considered in decision making about future land use. While short-term impacts may be easily recognised, he urged landowners to also consider long term effects, including natural processes and the cumulative impacts of intensive use on land condition and suitability for future use.[1741] This factor is highly relevant to the lands in focus in this thesis, since the long term effects of natural processes, exacerbated by climate change, will create major impacts on coastal lands affected by coastal hazards, potentially rendering them unsafe for continued residential use.

Adopting the consideration of temporal effects as a relevant criterion which to assess the merits of potential government policies on the future use of coastal land is corroborated by the common law rules governing the movement of property boundaries,[1742] recognised in relevant case law,[1743] and by the provisions of numerous current statutes which require it.[1744]

[1736] Alexander et al, above n 1729, 744, Babie, above n 323, 15-24, Graham, above n 235, 183-202.
[1737] See the principles of ESD defined under s6(2) *POEAA 1991*, and especially s6(2)(c) which requires the 'conservation of biological diversity and ecological integrity'. See also s 3 *CMA 2016* which requires coastal management to be consistent with the principles of ecological sustainable development; and Object (a) which requires land managers to protect '…biological diversity and ecosystem integrity and resilience'.
[1738] Under s 3.25 *EPAA 1979.*
[1739] Under s 5.5 *EPAA 1979.*
[1740] Under s 5.7 *EPAA 1979.*
[1741] See Freyfogle, 'Ethics', above n 201, 645-6, 653.
[1742] See the outline of the doctrine of accretion in Chapter II.
[1743] The movement of the high water mark over time was a key issue in *EPA v Leaghur Pty Ltd* (1995).

Useful focus questions for the use of this criterion are: What are the possible long term effects of the potential response? Could any long-term opportunities, adverse impacts or ongoing costs be generated or accumulated over decades or generations?

V] social value. The use of private land so that it does more than satisfy the personal interests of the landowner and contributes to the achievement of wider social goals is essential in the view of Freyfogle,[1745] if private property is to be seen as morally legitimate.[1746] He nominated 'the recovery of land health' as a key social goal which landowners ought to work to achieve through their land use.[1747] Other theorists concur with the general point and suggest worthy alternative social purposes for the private ownership of land which might be pursued.[1748]

Adopting consideration of the responses' social value, in furthering social goals or achieving social purposes through the use of land, as a relevant criterion has support in the case law, where the achievement of social goals was found relevant and binding.[1749] Considering 'social purpose' is also supported by provisions which state the overall social purpose of coastal land management, and a range of important social objectives which land managers should pursue.[1750] More generally, use of this criterion is supported by provisions in current statutes which require public authorities to state the 'public purpose' being achieved when they take action.[1751]

Focus questions for this criterion are: Does the potential response contribute to achieving wider social goals? What is the extent, or value, of this contribution?

I employ these criteria for ethical land management in Chapter VII when I assess the merits of the potential responses to conflicts between competing rights, which could be adopted by a future State government.

[1744] For eg see the 'precautionary principle' under s 6(2)(a) *POEAA 1991,* which requires timely action to prevent foreseeable 'environmental degradation', and the 'principle of intergenerational equity' under s 6(2)(b) *POEAA 1991,* which requires consideration of potential impacts on 'future generations'; see also the need to consider likely future impacts on the environment under ss 5.5, 5.7 *EPAA 1979.*

[1745] Freyfogle, 'Ethics', above n 201, 652.

[1746] Freyfogle, 'Private Rights', above n 356, 277-8.

[1747] Freyfogle, 'Ownership', above n 193, 1289-92.

[1748] Alexander et al, above n 1729,744 propose the overall social goal of 'full social and political participation' within 'a free and democratic society'.

[1749] see *Falkner v Gisborne DC* [1995], *Durham Holdings* (2001), *Worimi LALC v Minister administering Crown Lands Act* (1991), *Minister v NSW Aboriginal Land Council (Goomallee Claim)* [2012].

[1750] See s 3 Objects of the *CMA 2016,* and the purposes of Crown land management in s *1.3 CLMA 2016.*

[1751] To dedicate or reserve Crown land, see ss 2.3, 2.8 *CLMA 2016*; to refuse an Aboriginal land claim, see ss 36(1)(c), 36(5)(b) *ALRA 1983*; to acquire private land, see ss 5, 11-12 *LAJTCA 1991;* and create easements over private land, see ss 88A, 88B *CA 1919.*

However, a second set of criteria are required to assess their merits as 'public policy'. I discuss the identification of suitable criteria for this task next.

8. Successful 'public policy'

Though a ready-made set of criteria suitable for assessing the merits of policy options as 'successful public policy' were not identified in the literature reviewed, approaches to and factors involved in developing public policy are cited in the *Australian Policy Handbook.*[1752] This text, and the literature it canvasses, suggest several key considerations which would be appropriate to adopt as criteria with which to assess the potential responses' merits as 'successful public policy'.

To supplement this source, and to ground its generic, in principle advice on public policy development in assessing the merits of policy options for future coastal management, I intend to also refer closely to the review by Cooper and McKenna,[1753] discussed above.

Since Cooper and McKenna described the decisions of public authorities in the UK which constitute public policy, discussed the history of the public policy on coastal management in the United Kingdom since the 19th century, [1754] and made some observations on the substance of the decision making processes on coastal management in the UK,[1755] their review also suggests criteria suitable for assessing the potential responses' merits as 'successful public policy'.

Drawing on their review, the norms of public policy development outlined by Althaus et al, the property theory, case law, statutes and literature canvassed above and my personal observations of government policy initiatives over many years, I was able to identify, pragmatically, a set of criteria relevant to the merits of public policy, which suit my purposes. It is apparent that public policy is successful when it is clearly justified, timely, cost-effective, least disruptive, and credible. Hence, I have adopted these five qualities as appropriate criteria for evaluating the merits of the suite of potential policy responses as public policy.

In the following sections I describe the criteria selected, refer to corroboration for its selection as an assessment criterion in the literature, case law and statutes considered, and outline how a potential response might rate well or poorly against the criterion. Relevant focus questions to

[1752] Althaus et al, above n 163.
[1753] Cooper and McKenna, above n 123.
[1754] Ibid 296, discuss the history of the public policy on coastal management in England and Wales since the 19th century.
[1755] That decisions primarily used economic considerations. See Cooper and McKenna, above n 123, 304.

address when I assess the potential responses satisfaction of each criterion are stated.

I] ***Public interest justification*****.** This criterion focuses on the reasons given for the public policy. Typically, it involves a public statement by the responsible government minister, of the problem or issue of public concern that the new policy is intended to address. This statement usually refers to the public interest benefits which the policy aims to achieve and may acknowledge and explain any 'trade-off' involved, where a diminution in other public interests is necessary to achieve the intended 'greater good'. Further, the rationale for a new policy may be as part of a government response to events which were beyond government control. In any case it is the strength of the logic and the coherency of the justification for the new policy as in the public interest which is important. A rationale for a new policy framed with a claim it will achieve a remote or indirect public benefit, when the policy undermines other public interests or confers major private benefits, would be seen as an inadequate, implausible or misleading justification.

Explaining a public policy's benefits to the public interest is crucial because it provides the moral justification necessary to authorize spending of public funds and allocate agency staff. Further, the statement of outcomes the policy aims to achieve should be an essential element of the plan to implement the policy and inform the actions of the responsible agency's staff.

A response with a coherent public interest justification which explains the policy's origin, development and refinement, its alignment with best practice and expert opinion would rate highly against this criterion. A response which has a weak or implausible justification, or which is incompatible with the 'public interest' would rate poorly against this criterion. [1756]

That a coherent statement of its public interest justification is an essential part of a public policy is corroborated by its recognition as a central element in public administration in the literature,[1757] property law theory,[1758] case law[1759] and statutes[1760] considered above.

Focus questions for this criterion may include: What is the policy's public interest rationale?

[1756] Such policies would risk being seen as 'morally illegitimate and socially unwise'. See Freyfogle, 'On Private Property, above n 1607, 124; Freyfogle, 'Private Rights', above n 356, 277-8.
[1757] See Freyfogle, 'Eight', above n 202, 788; Althaus et al, above n 163, 62, 82-3.
[1758] Blackstone's *Commentaries*, above n 580, stresses the importance of the public purpose in overriding private property rights to acquire private land (see vol 2, 2-11).
[1759] For eg see *Falkner v Gisborne DC* [1995] in which the court found that the public interest purposes of the *Resource Management Act 1991* (NZ) were relevant considerations, which authorised the Council's decisions and justified overriding the landowners' claimed property right to defend against the sea. See also the importance of the public purpose of creating a new national park, underpinning the decision to terminate coal leases, in *Durham Holdings Pty Ltd v NSW* [2001] also discussed in Chapter III.
[1760] See the Objects of the *Coastal Management Act 2016* (NSW) and the need to state the relevant 'public purpose' under statutes to acquire private land and create easements discussed in Chapter IV.

How well has this been explained? Is it evidence-based? How will it achieve a 'greater good'?

II] *Timeliness*. This criterion relates to the perceived responsiveness of government to an identified public policy issue. It involves the early identification of emerging issues of public interest or concern, anticipating their possible social, economic and ecological implications, research into and development of a range of possible public policy responses to address and, if possible, ameliorate likely impacts, the selection the policy response deemed most appropriate, and its implementation, before, or as, the issue become acute, or a key deadline is reached.[1761]

Often timeliness is part of the crisis management of unforeseen issues by governments in which being seen to respond promptly to a public concern is the main goal. Regrettably, rapid reactions to unforeseen problems or acute episodes of wicked problems can produce decisions which, though timely, may be ineffective, harm other interests, or prove counterproductive.[1762]

Hence this criterion is not about minimizing the time required by government to make and implement a policy decision, so much as about taking the right amount of time to identify, develop, consult, refine, and plan for the implementation of new public policy, so that it is ready to address the perceived public concern, when assistance is needed, without undue delay.[1763] This criterion has implications for the public's perception of the competence of the relevant agency and minister. Hence, if issues of public concern are not recognised promptly, or policy responses are too slow being developed, adopted or implemented to be ready when needed, the lack of 'timeliness' may damage the government's electoral support.

Timeliness also has implications which extend beyond decision making to the implementation of public policy responses by government agencies through programs of action. Though the announcement of the policy may be timely, the real proof of the timeliness of policies, is the time required to deliver the policy on the ground. Often this implementation involves the allocation of committed funds, integration and co-ordination of actions by several state government agencies, in co-operation with local councils and other public authorities, non-government organisations, institutions, business entities, to achieve the desired policy goal.[1764]

Public policies would be seen as timely if they quickly identify issues of public interest concern,

[1761] The IPCC stresses the need for timely action by governments to reduce $C0_2$ emissions, to keep global warming below 1.5^0C by 2100, see IPCC, *Special Report on Oceans &the Cryosphere*, above n 45.
[1762] Althaus et al, above n 163, 54. See also Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Australian Government, 2007).
[1763] Althaus et al, above n 163, 159.
[1764] Ibid 125-141, 159-160.

have taken appropriate steps inside government to consult, develop, cost, refine, and adopt the policy and realistic plans have been prepared for its implementation.

A lack of timeliness would be evident in a slowness or refusal by government to recognise that a public concern requires a public policy response, an ignorance of or lack of planning to meet a looming deadline, poor or mal-alignment of agency roles, use of simplistic assumptions about what is needed, or unrealistic demands of timelines, which produce unanticipated delays in preparing, selecting, adopting and implementing the policy. Hence though the announcement may be 'timely', a rushed decision on an ill-considered policy, whose implementation then stalls because it has not been thought through or effectively organised, would not been seen as timely. A government policy response that recognizes an issue as a public policy concern only after escalating acute episodes, or growing social and political protests, would not be seen as timely. Even a well-developed, highly rational, scientifically credible policy response whose adoption or implementation was seen to be unduly delayed (for whatever reason) and came well after it was needed, would not be perceived as 'timely' and would rate poorly under this criterion.

The notion of public policy needing to be 'timely' if it is to be successful, is well recognised in the literature,[1765] in the cases[1766] considered, and in the statutes[1767] discussed in Chapter IV.

The focus questions for this criterion include: Is the response unduly delayed? Or rushed and ill considered? Has time for consultation and legislative authorization been factored in? Could poor process in developing, testing and modifying policy proposals cause problems or delays?

III] ***Cost-effectiveness*****.** This criterion relates to the ratio of public benefit, or positive effect on the common good, of a policy option, against its imposts on the public's interests and costs to the public purse.[1768] It is a private sector concept, focused on the effectiveness of spending, which now drives scrutiny of the funding, staffing and programs of many public authorities. It involves estimates of the likely value of foreseen future 'positives' and 'negatives', but as well as their quantum, the scope of factors considered can dramatically affect the outcome of the analysis. The tangible benefits from and direct costs of a policy option may be easy to identify and take into account, but claimed future benefits may be unrealized or overstated and time-frames and projections of future cost may prove to be drastic under-estimations. Intangible

[1765] See the view of Michael Keating, that policy advice should be 'timely, forward looking', cited in Althaus et al, above n 163, 64.
[1766] The need for timely action to implement a decision to build a bridge was argued, unsuccessfully, as a defence in *York Bros (Trading) v Commissioner of Main Roads* (1983) discussed in Chapter II.
[1767] See the need for timely action to prevent irreversible harm to the environment mandated by the precautionary principle, in s 6 (2)(a) *POEAA 1991* (NSW).
[1768] See Althaus et al, above n 163, 72-4.

benefits and especially intangible 'costs' may by noted, but not integrated into the value of public interests likely to be affected, or overlooked entirely, in a dry narrowly-focused economic analysis.
Cost-effectiveness can also vary over time, but it is often calculated using electoral cycles.

This criterion is not the same as 'cost', since it is a ratio of 'benefits' against 'costs'. Once-only low cost policies could rate highly for their cost-effectiveness if the benefits of the initial public spending are immediate and seen to be enduring.[1769] Higher cost policies could also achieve a high cost-effectiveness ratio over time if carefully planned, all relevant public benefits and potential costs were identified and credible estimates of their 'value' were considered, as long term public benefits were realised and foreseen costs were minimised or avoided. Higher cost policies would have a mid to low cost-effectiveness rating if the intended public benefits were narrowly focused, in fact minor, limited or temporary.

This concept reflects the moral obligation impliedly placed on governments by their taxpaying citizens, that public funds be efficiently spent to achieve public benefits. [1770] It recognises that there are many competing public interests seeking public funding, and that to make decisions to allocate scarce resources, as well as a coherent public interest rationale, decision makers in government need a method of comparing competing proposals for public funds expenditure. [1771]

The use of this concept as a criterion with which to assess the merits of potential responses by government is supported by references to it in the literature,[1772] case law[1773]and statutes.[1774]

Focus questions for this criterion would be: Do the public funds, and public officials' time to implement the response, represent value for public money? Do the public funds achieve socially useful outcomes? Are public funds locked in, or available for reallocation if needed?[1775]

IV] ***Minimal disruption*****.** This criterion focuses on the possible adverse impacts of introducing new public policy on existing policy by creating delays, new procedures, extra costs, greater limits or prohibitions on prior practice, but it would also include the impacts of confusion and

[1769] See Cooper and McKenna, above n 163, 304.
[1770] Cooper and McKenna, above n 123, 300, 304, discuss defensive structures' cost-effectiveness.
[1771] See Althaus et al, above n 163, 73. The IPCC's *AR5* compares the cost-effectiveness of options for climate change mitigation. See IPCC, *Climate Change 2014,* above n 1420, SPM 4.3, 27-28.
[1772] Althaus et al, above n 163, 37-42.
[1773] The 'cost-effectiveness' of the government's compensation arrangements under the authorising Act, for loss of access to coal leases, was discussed in *Durham Holdings Pty Ltd v New South Wales* (2001).
[1774] See the ESD principle of using economic instruments to achieve environmental protection, in s 6(2)(c) *POEAA 1991* (NSW) discussed above.
[1775] See Cooper and Mc Kenna, above n 123, 298, 302, 305.

uncertainty while the new policy is implemented.[1776] It includes the disruption of elements of law, procedures of public administration and the operation of related social and economic enterprises, including the expectations of stakeholders with social or economic interests.[1777] At another level it also relates to disruptive impacts on healthy, functioning ecosystems.[1778]

This criterion does not equate with minimalist change: in theory, even a major change in public policy is possible with minimal disruption,[1779] if it is well designed, well explained and plans are prepared to enable its proper implementation.[1780]

An important distinction is recognised however, between planned and unplanned disruptions. In a rational policy development process an early step would be identifying the elements of law, procedures, and operations potentially affected by the policy, adversely or beneficially, either intentionally or coincidentally, so that the policy can be developed to target intended effects and designed to avoid or minimise other possible coincidental disruptions.[1781] A government's capacity to minimize the new public policy's anticipated disruption ie the impacts of its intended changes, would be assisted by clearly stating the public goals it is pursuing, explaining its effects on prior policies, laws, procedures and operations, retraining agency staff, creating transition measures to allow time for adjustment; and setting a date for the policy to commence.

However, it is possible that unplanned disruption could also occur, especially if the process of policy development has been telescoped into a very short period or overlooked entirely. Where unforeseen applications of the policy become apparent, unintended consequences affect otherwise unaffected parties, new procedures prove complicated or costly, and create unanticipated delays and extra costs, the level of disruption would increase. If many unplanned disruptions arose from a new public policy, it could create confusion, heighten uncertainty, undermine business confidence, and erode public support for the government.

The adoption of 'minimise disruption' as a suitable criterion with which to assess the merits of public policy is corroborated by its recognition in the literature,[1782] case law,[1783] and statutes.[1784]

[1776] Cooper and McKenna, above n 123, 300 discussed the disruption of landowners' expectations of continued public funding of defensive structures.
[1777] It is due to the potential for disruption that many public policy changes proceed by small incremental steps. See Althaus et al, above n 163, 83.
[1778] See the duty to consider adverse impacts on the environment, including disruptions of ecosystems, under s 5.5 *EPAA 1979* (NSW).
[1779] For eg the introduction of decimal currency in 1966, recognition of Native Title in 1993.
[1780] An implementation plan should be developed with the policy. See Althaus et al, above n 163, 159.
[1781] Althaus et al, above n 163, 77.
[1782] Freyfogle, 'Owning the land', above n 310, 306 noted the need to minimize disruption when property laws change.

Relevant focus questions would be: How much disruption might adopting the policy response cause? Could unforeseen effects, outcomes or unproductive transitional costs be incurred? What would it take to change existing laws, regulations or other texts to reflect the 'new' policy?

V] ***Credibility*****.** This criterion refers to how the potential responses under review would be likely to be regarded by the public, the media, local councils, coastal land managers and experts in related fields.[1785] It relates to the intellectual substance of the public policy: the basis for it in the evidence of recent research, its integration of the latest information and analysis, alignment with best professional practice and consistency with expert opinion in the literature.[1786]

Beyond these assessments of scientific and technical credibility, this criterion also relates to the responses' consistency with existing social and cultural norms: public policy positions which are largely consistent with existing norms[1787] would be seen as credible, and vice versa.[1788] Further, 'credibility' has a prosaic use assessing the 'practical achievability' of potential responses. Though meritorious in theory, a public policy without funding and a plan for its practical implementation may not be seen as credible. Supported by a strategic plan that shows how the policy will be funded, can be feasibly introduced and implemented, monitored and if necessary adjusted, would maximize a response's credibility.[1789]

Corroboration of the significance of 'credibility' for successful public policy and its suitability as a criterion for assessing the merits of potential responses as successful public policy is provided by its recognition and use in the literature,[1790] and case law[1791] considered above.

[1783] The disruption of a shipbuilding business and the creation of a public nuisance to public navigation along a tidal river, caused by the policy of constructing bridges to replace ferry services, was the source of the legal action in *York Brothers v Commissioner of Main Roads* [1983] 1 NSWLR 391. See Chapter II. See also *Ralph Lauren PL v TCP NSW* [2018] NSW LEC 207 in which the court refused consent for a seawall because of its unreasonable limitation (ie disruption) on public access to and along the beach.

[1784] See the prohibition on unreasonable limiting (ie disruption) of public access to and along the foreshore under s 55M(10)(a) *CPA 1979* and s 27(1) *CMA 2016* discussed in Chapter IV.

[1785] As noted in Chapter I, affected stakeholders would include the beach-using non-residents, beachfront landowners, researchers and academics and proprietors of coast based businesses.

[1786] See the discussion of evidence based policy in Althaus et al, above n 163, 67-71.

[1787] These norms include the recognised elements of property theory, property law rules, common law decisions and the explicit provisions of current statutes, which were examined in Chapters II, III and IV.

[1788] In *Durham* (2001) [14], [57], the court evaluated the credibility of the claim that a common law right to compensation existed, and concluded that not one example had been cited to support the argument.

[1789] See the observation of Pressman and Wildavsky (1973) "there's no point in having good ideas if they cannot be carried out", quoted in Althaus et al, above n 163, 167.

[1790] Althaus et al, above n 163, 67-71. Cooper and McKenna, above n 123, 303 quote Novak's analysis of the credibility of UK landowners' calls for social justice in coastal management as 'ideological intimidation' at worst, and wishful thinking at best'.

[1791] In *Falkner v Gisborne DC* [1995], 632, the court assessed the credibility of landowners' claims of dominant property rights against the aims and provisions of the relevant legislation.

Focus questions for this criterion are: How would this response be received by stakeholders? Is it evidence-based reflecting the latest research? Does it accord with expert opinion? Would it foster or frustrate best practice in coastal management?

Thus far I have identified and described criteria and focus questions for assessing the merits of potential government responses in Chapter VII, as decisions about future coastal land use, and as public policy. However criteria are also required to ascertain which potential response is 'most likely' to be adopted by a future government, and supported by the legislature.

9. From greatest merit to 'most likely'

Criteria which enable an assessment of the 'most likely' response are necessary because the public policy process is political,[1792] and political factors would affect which response is adopted by Government, and the legislative support it attracts. However, unlike decision-making about land use, or the merits of public policy, writers of contemporary texts and discourse rarely suggest criteria for, or attempt to estimate, the likelihood of a public policy succeeding politically. Hence in this final section it is necessary to nominate relevant factors and frame appropriate criteria for making political assessments of the 'likeliness' of potential responses being adopted by a future government.

Though merits would be considered, three factors which frame most government decisions to adopt policy were identified. These are political calculations, by key government ministers, of:

i) its difficulty: in justifying it, enacting and implementing the necessary legislation;
ii) the overall cost of implementing the policy; and
iii) its kudos[1793] or electoral appeal: ie its potential political value to the Government.[1794]

It is highly likely that decisions of a future government on 'whose rights *should* prevail?' and hence which potential response to adopt, would use these same factors and calculations. Thus I adopt these factors as relevant criteria for estimating the responses' political likeliness. These criteria are explained next and are applied in Chapter VIII to identify the potential response 'most likely' to be adopted by a future government.

[1792] See Cooper and McKenna, above n 123, 303; Althaus et al, above n 163, 44-50, 209, 215.
[1793] Delbridge, et al (eds) above n 4, 984. 'kudos': n. glory, renown [Gk *kydos*].
[1794] Althaus et al, above n 163, 145, acknowledge the role that ministers' assessments of "political risks and benefits" play in decisions to adopt, or not adopt, policy options.

i) Difficulty. This criterion is concerned with how hard it would be to achieve the policy response and involves calculations of difficulty on several levels. It would employ estimations of the conceptual difficulty of articulating a coherent public interest rationale to justify the policy; and defend it against criticism; the complexity of the policy and the technical difficulty in drafting appropriate legislation to implement it; the ease or difficulty politically, in attracting crucial non-government support in the legislature and the procedural difficulties of enacting key parts of the policy; and an appraisal of the practical difficulties involved and the time likely to be needed to implement the policy.

Political calculations of difficulty would draw on the results of the merits assessments and integrate evaluations of potential responses against the criteria for ethical decision making, public interest rationale and minimal disruption.

ii) Overall cost: This criterion encompasses consideration of all the costs associated with a public policy proposal: for preparatory research, initial scoping and planning of the policy's development, internal and external stakeholder consultations, implementation costs including public information, communications, capital works, ongoing maintenance, or other recurrent costs such as agency staff.

Typically, political assessments using this criterion would draw on the information on costs and benefits assembled by the responsible agency developing the public policy, in association with Treasury, in order to assign a cost-effectiveness rating against the policy. However, in this assessment the total cost is the crucial factor, because of the intense competition between policy proposals for limited public funds. Lower cost policies would allow spending on other public interest priorities; higher cost policies would constrain the public funds available for other government initiatives. Thus, of two policy proposals with similar cost-effectiveness ratings, it is likely that the policy with a lower overall cost, would rate more highly under this criterion. Hence, scoring of responses against the criterion of 'overall cost' is inversely proportional.

iii) Kudos for government: This criterion relates to estimations of the positive value of the public policy to the government, the level and extent of the community goodwill it creates, the warmth of its reception by the media and stakeholders and how well the positive reaction to it translates into electoral support for the government at the next election.[1795]

Political calculations using this criterion would draw on the merits assessments using the criteria

[1795] See Althaus et al, above n 163, 72.

of timeliness, achievement of social goals, and credibility, but would also factor in calculations of political risk arising from assessments of responses' potential to minimize disruption.

The integration of considerations from the merits assessments into assessments of a response's likeliness to be adopted, using political criteria, is shown in Table 5 below.

Merits assessment criteria	**Political assessment criteria**
Ethical contexts Public interest rationale Minimal Disruption ⇨	Difficulty
Cost-effectiveness ⇨	Overall cost
Achieve social goals Timeliness Credibility ⇨	Kudos for government

Table 5 – Integration of merits assessments into political assessments

10. Conclusion

From the foregoing description of the adopted criteria and their correlation with property theory, property law rules, common law decisions and current statutes, it is clear that as existing continuing elements of law they are highly relevant to several criteria. Hence, estimates of potential responses' consistency with these underpinning elements of law inform my assessments of their satisfaction of the ethical criteria of physical characteristics, and contribution to social goals, and the public policy criteria of public interest rationale, minimal disruption and hence cost-effectiveness, and credibility. Further, because these merits assessments are drawn on the subsequent assessment these existing elements of property law inform, albeit indirectly, political assessments of responses' difficulty and likely kudos for government.

In this chapter I have pivoted from my analyses of competing rights under current law, to refocus forward. I have described the next stages of my analysis in ascertaining their likely future relationship, canvassed perspectives on coastal lands' management which could shape future government policy, and identified and justified criteria for use in the planned next steps.

In the next chapter I describe the responses to conflicting rights, potentially available to government. In later chapters the criteria above are used to evaluate these responses and identify which would be 'most likely' to be adopted by a future government, and supported by the legislature.

"I tell you naught for your comfort,
Yea, naught for your desire,
Save that the sky grows darker yet
And the sea rises higher."

GK Chesterton,
The Ballad of the White Horse (1911)

Chapter VI - Potential responses by a future State government.

Introduction to Chapter VI

This chapter continues the focus on the future and its core task is outlining possible courses of action available to a future State government, in responding to climate change impacts and conflicts between competing private and public rights to use coastal lands. To scope the range of options potentially available in the future I apply the IPCC's scenario setting approach,[1796] and identify a diverse suite of potential responses. The objectives and public policy actions that each response would involve, and their advantages and disadvantages, are then explored.

Defining a diverse suite of potential responses is a key, but only preliminary, step towards anticipating the public policy environment of the future. These responses are evaluated in the next chapter, and an estimate of the response 'most likely' to be adopted by a future government is made in the last chapter. With the results of this analysis I then answer my primary research question - Will private property rights 'trump' public rights and interests in coastal lands, under climate change conditions?

Before I begin my exposition of these responses several points about my approach ought to be made clear.

First, in the discussion which follows I deal with real property and rights within the social institution of law. An exploration of these matters within a wider domain, where property operates as a cultural ideal, subject to cultural myths,[1797] is beyond the scope of this thesis.

Second, as stated in Chapter I, rather than pursue an abstract theoretical enquiry, I ground my discussion of property and rights in 'place', in an actual functioning property regime – the State of New South Wales - where 'real property' and other elements of property theory are defined

[1796] See the explanation of the factors defining likely future scenarios for emissions reduction in IPCC *Special Report on Emissions Scenarios,* above n 176, 3 -5.
[1797]'Cultural myths' influencing ideas of 'property' in the US and other liberal societies are cited and debunked by Freyfogle in several articles. See Freyfogle, 'Context', above n 1621, 1555-6; Freyfogle, *On Private Property,* above n 1607, 61, 72.

and 'property rights' over land are affected by other elements of law, in practice. This is preferred to a placeless, 'in principle' approach, which seeks universally applicable answers.

Third, though there are inherent complexities involved, and many factors could influence future circumstances, I have concluded the most crucial factor which could change the status quo, would be the 'policy position' of a future State government. By 'policy position' I mean a future State government's attitude to, engagement with, decisions about and actions on the policy issues driven by anthropogenic global warming and climate change impacts, especially sea level rise and coastal hazards' impacts on both publicly- and privately-owned land.[1798] Regardless of their substantive content, all the public policy response options canvassed below would involve advocacy, enacting relevant legislation and regulations, allocating public funds, issuing public and stakeholder information and explanatory materials, and deploying staff resources.[1799] Hence the government's choice of public policy response to emerging conflicts between private property rights and public rights and interests in coastal land in New South Wales will be key.

Were a future government to decide 'private property rights' *should* be 'trumps', then legislation, not decree of policy, would be required to implement this policy, and an assessment of the implementation costs and an authorization to allocate public funds would be required. Conversely, if government policy were to enhance public rights and interests, legislation, funding, public explanation and information, and staff necessary to implement the policy would also need to be estimated and authorized, but their nature and scope would qualitatively differ. Logically if a 'do nothing' response was adopted there would be no need for legislation to authorize public funding for public policy action. However it is conceivable that a future government could adopt a policy position, prepare the necessary legislation but find it can 'do nothing' because it lacks the support of a majority of the legislature.[1800]

Thus as a starting point, I observe that a future government may adopt a policy which explicitly answers my research question, and implements it through legislation, allocation of public funds and government agency 'action', or it may not. The purpose of this chapter is to explore the public policy actions of a diverse range of potential policy responses by a future government.

[1798] See the discussion of policy issues in Althaus et al, above n 163, 43-56.
[1799] Ibid 86-95. The authors note '[n]o typology captures fully the complexity of policy instrument choice…' and describes five categories of 'policy instruments': advocacy, network, money, government action, and law, but notes a trend to outsourcing to the private sector as 'virtual government',
[1800] See discussion of this possibility in s 14 Chapter I, s 1 Chapter IV. This was the fate of the O'Farrell government's *Planning Reform* Bill rejected by the NSW Legislative Council in November 2013. See < https://www.smh.com.au/national/nsw/overhaul-of-nsw-planning-laws-shot-down-in-upper-house-20131127-2y96t.html >.

Fourth, each response canvassed below would incur a characteristic suite of costs to the public purse for the actions it entails. Ideally in a rational comprehensive approach to decision-making about policy responses,[1801] the economic costs of all the actions proposed by government in these responses would be estimated and considered in an economic study which compares the likely costs of the response options under consideration.[1802] However, preparing such a study, using credible estimates of the costs of the suite of future actions by government in each response, is beyond the scope of this thesis.[1803] Hence only broad indications of the scale of likely future costs are included in the discussion of responses' advantages and disadvantages.[1804] I adopt for these purposes five terms: 1) very low or no cost, 2) low cost, 3) moderate cost, 4) high cost and 5) very high cost and indicate whether the public funding required is 'once-only' or ongoing and whether it is likely to increase, plateau or decrease. These indications of the scale of costs are nonetheless useful for assessing the merits of each response and for comparing their likely cost of implementation, at a high level of generality, in later stages of analysis.

Last, as outlined in Chapter I, four pathways for a future State government's response to conflicts between competing rights to use coastal land were identified: i] do nothing, ii] privilege private property rights, iii] protect public rights, and iv] attempt to do both. However, to develop a more diverse suite of responses, two versions of three of these macro-policy options are considered. Consequently seven potential responses have been identified:

i) do nothing / status quo
ii) a weak approach to privileging private property rights
iii) a robust approach to privileging private property rights
iv) a strong approach to protecting public rights of access
v) a stronger approach protecting and enhancing public rights
vi) a balancing response, where criteria other than 'rights' are determinative
vii) accept public rights dominance and accommodate private interests where feasible.

These potential responses feature different policies on the core concerns, identified in Chapter I: a] the nature and location of the real property boundary, b] ownership of land below MHWM, c] the 'right to defend', d] the government 'duty to protect', e] any right to compensation, and f] level of public funding available.

[1801] Althaus et al, above n 163, 59-60.
[1802] Ibid 59-60. See the suite of analytic tools which might be employed in such an economic study, at 73.
[1803] The thesis is focused on addressing questions of law not economics. Credible estimates of likely future costs to implement these responses would require the detailed economic study flagged above.
[1804] Estimates of the likely costs to implement each potential response would be one of several key considerations for a State government when it adopts public policy on future use of coastal lands.

Hence in Part A, I explore a potential nil response by a State government which does nothing, leaving questions of 'whose rights *should* prevail?' to the courts to determine. In Part B I outline two potential responses where a future government adopts a 'weak' or a 'robust' policy of privileging 'private property rights' over public rights and interests in coastal land.

In Part C two potential responses where a future State government adopts a 'strong' policy of protecting public rights and interests or a 'stronger' policy of enhancing public rights to use coastal lands and waters are considered. In Part D, two different responses where a future State government attempts to 'do both' are outlined. In one response the State government would attempt to 'balance' private and public rights and interests, and in another, would protect public rights but accommodate private interests to some degree, where this was feasible.

In Section E, I collate these responses' policies on key issues in Table 3, make some preliminary observations on them and cue their evaluation in the next chapter.

Part A. If government does nothing to address conflicting 'rights'

I begin my discussion of potential responses to conflicts between private and public rights by a future NSW government by considering an exceptionable but possible situation in which the government does not take legislative action to determine which rights should prevail when they conflict. This situation could arise under a number of scenarios.

A future government may not accept that global climate change is real, adopt no policy and introduce no legislation to address conflicts between private and public rights or interests.[1805] Or it may arise in a political deadlock where a future government adopts a policy, but cannot implement it, due to the Legislative Council's rejection of enabling legislation.[1806] Under either of these scenarios, the status quo would be unaffected. Consequently it would likely that the resolution of conflicts between competing private and public rights to use coastal lands would be pursued in the State's courts.

[1805] This was the position of the Liberal National Party Coalition government in New South Wales, elected in March 2011, under Premier Barry O'Farrell.

[1806] The government of New South Wales has lacked a majority in the Legislative Council on several occasions (1976-77-78, 1988 and 1988-89) according to Barbara Page 'The Legislative Council of New South Wales: Past, Present and Future' (Parliament of New South Wales Briefing Paper 01/1990). Since 1991, no government has held a majority in the upper house. Consequently, many government Bills have failed due to opposition in the Legislative Council. See 'Party Composition of the Legislative Council since 1978' at < https://www.parliament.nsw.gov.au/lc/pages/statistics-of-the-legislative-council.aspx >

Philosophically this response would, by default, align with the 'modern' approach to the common law tradition.[1807] The court's decisions would likely be doctrinally conservative but the law would not be static.

1. A 'storm of litigation'? – leaving it to the courts

Framing a discussion of future possibilities under this potential nil-response by government is possible because current law on private and public rights would continue to apply, and its operation, and the outcomes of future proceedings can be relatively confidently anticipated. Under the principle of *stare decisis,* the court would be bound to apply earlier precedents where the facts of the matter corresponded well with precedent decisions.[1808] However, if the case warranted it, or the court wished to avoid unhelpful precedents, it could distinguish the case on its facts,[1809] then adapt and apply existing principles of law to the novel circumstances or conditions of the case.[1810] Thus the court's approach would be cautious. Incremental change to develop existing law would be possible, but the repudiation of earlier decisions and the reversal of longstanding rules of law would be unlikely.

No full assay of potential legal actions to protect access to and use of coastal land, is possible here due to limited space, but the following examples indicate diverse ways future conflicts between public rights and private property rights, or claims, might play out in the courts.

2. Private landowner initiated actions

Without intervention by the State government it would be likely that landowners would bring legal actions to protect their private land, asserting that their private property rights prevailed over public rights to use coastal lands, and seeking the courts concurrence with this view. Commencing proceedings would be procedurally simple for private landowners since their vested interests in their real property would qualify them for standing before the court. For example in bringing an action against a member of the public for trespass on coastal land, said to be privately owned.[1811] However, in such a case evidence of where the property boundary was actually located would be decisive.

[1807] See Davies, above n 593, 69-72. See also Cook et al, above n 18, 73-88.
[1808] See Cook, et al, above n 18, 74-76.
[1809] Ibid 150.
[1810] This was the approach adopted in *Southern Centre of Theosophy Inc v South Australia* [1978] 19 SASR 389, 394 (Walters J).
[1811] Repeated actions for trespass by the landowner McCarthy, were the cause of the government's intervention in *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, discussed in Chapter III.

Other landowner initiated proceedings in which a council or public authority would be the respondent, include an appeal of a decision to refuse their application to construct a seawall,[1812] to challenge an authority's decision to remove ineffective structures,[1813] or to discontinue nourishment of a beach. In such proceedings a plaintiff might seek compensation for lands lost to the sea, at full market value.[1814]

Proceedings with other respondents could challenge a Minister's decision to approve or certify a coastal zone management plan,[1815] or a coastal management program, that does not include the coastal defenses sought by the landowner.[1816] Alternatively, a landowner may bring a suit to contest a decision of the Registrar General of land titles on the location of a property boundary formed by water, or details recorded on a land title.[1817]

Landowners could also bring proceedings against a neighbor, the local council or a State government agency, alleging the works approved and built to reduce erosion on one allotment, has caused, or increased, coastal erosion of their private land.[1818]

Though a theory of dominant private property rights might be argued in a hearing, the court would likely place more weight on the specific facts of the conflict, and the nature of the land in dispute than theoretical arguments, and would determine the plaintiff's application on the basis of the evidence, the character and extent of any 'rights' in dispute, and then current applicable law. In doing so the court would necessarily focus on the allegations, specific declarations and orders sought as remedy by the plaintiff landowner, and the arguments of the parties' counsel, but it is highly likely the courts would consider and apply more elements of law than the plaintiff's claims of a private property right or a defendant's claim of a public right. This would include considering relevant provisions of current statute law, described above, applicable principles of property law[1819] , and common law.[1820] Thus the court would likely consider a

[1812] See for eg *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207.
[1813] As in the case *Falkner v Gisborne District Council* [1995] 3 NZLR 622 discussed in Chapter III
[1814] This claim would most likely fail. See the discussion of *Durham Holdings PL v NSW* (2001) discussed in s 10 Chapter III.
[1815] In *Boomerang & Blueys Residents Group Inc v NSW Minister for Environment, Heritage and Local government, and MidCoast Council No.2* [2019] NSWLEC 202 the residents' challenge to the Great Lakes CZMP failed because the decisions taken by the council to adopt the Plan and by the Minister to certify it were not discretionary but procedurally required.
[1816] The maintenance of a temporary seawall built by Council was the subject of proceedings in *Byron Shire Council v Vaughan, Vaughan v Byron Shire Council* [2009] NSW LEC 88.
[1817] See for eg *In Re White* (1927) 27 SR (NSW) 129.
[1818] See *Egger v Gosford Shire Council* (1989) 67 LGRA 304.
[1819] These principles would include the maxim of *caveat emptor*, the doctrine of accretion, doctrine of estates, principle of escheat, and the *numerus clausus* meta-principle, discussed above.
[1820] This was the approach of Bannon J in *EPA v Saunders* (1994) discussed in s 8 Chapter III.

landowner's legal action to protect a claimed private property right in the context of all relevant elements of law which apply to the land in dispute.

3. Public interest litigation

Public interest litigation to protect public rights of access and use of coastal land, or other public interests in them could be brought by a member of the public, a community group,[1821] non-government organisation (NGO), or conceivably by a local council or public authority, to halt unapproved works by a private landowner, to construct a seawall or other structure which impeded public access, created a risk to public safety, effected coastal processes or presented a danger to public navigation.[1822]

Members of the public, community groups and public interest NGOs could initiate proceedings under the open standing provisions, of the *EPAA 1979*,[1823] but may be asked to give undertakings for damages if the proceedings do not succeed. Proceedings could initially be of an interlocutory nature, requiring a halt to works or a stay of decision-making until completion of mandatory procedures, such as the public exhibition of relevant documents, or consideration of an environmental impact study (EIS).[1824] However, even where *prima facie* a serious case for trial has been accepted by the court, a public interest applicant may not obtain interlocutory relief due to uneven 'balance of convenience' considerations.[1825]

Another possible legal action could be an appeal by an objector who had cited loss of public access rights as a reason for their objection to a permanent seawall.[1826] Or a public interest plaintiff could allege 'harm to the environment' from the works, and seeks interlocutory relief until trial.[1827] In these cases it might be argued that the seawall would increase erosion,[1828]

[1821] See *Friends of King Edward Park Inc v Newcastle City Council* (No 2) [2015] NSWLEC 76.
[1822] In *EPA v Saunders* (1994) 6 BPR 13,655, the landowner was convicted of polluting tidal waters with motor vehicles tyres in an attempt to construct an ad hoc seawall.
[1823] Third party rights to civilly enforce the *EPAA 1979* are available under s 9.45 to 'any person'.
[1824] *Positive Change for Marine Life Inc v Byron Shire Council (No. 2)* [2015] NSWLEC 157, [82].
[1825] Ibid. The court agreed that the lack of an EIS was a serious issue for trial but declined to grant an injunction against the works because, in its consideration of the balance of convenience, it concluded that there was greater potential for environmental harm if the injunction was granted and a major storm occurs, than in allowing the works to proceed without an EIS.
[1826] Objectors to development proposals have an 'appeal right' under s 8.8 of the *EPAA 1979* (NSW).
[1827] Legal proceedings by a member of the public to halt unapproved works could be brought under s 9.45 of the *EPAA 1979* (NSW), or s 219 of the *Protection of the Environment Operations Act 1997* (NSW). See eg *Positive Change for Marine Life Inc v Byron Shire Council (No. 2)* [2015] NSWLEC 157.
[1828] This was a key issue in *Egger v Gosford Shire Council* (1989) 67 LGRA 304, 314-322 Hope JA), 328-9 (Clarke JA).

inevitably lead to the total loss of the beach,[1829] and public recreational opportunities, and impacts on the habitats of key species of economic significance in adjacent estuarine waters.[1830] In proceedings to prevent the destruction of beach habitats of species of ecological significance it could be alleged that the works were in breach of Commonwealth,[1831] or international law.[1832] Evidence of rapid sea level rise creating 'coastal squeeze'[1833] could be crucial in convincing the court that species of concern would be unable to relocate or adapt if a seawall is built, and would face increased risk to their long-term survival.

An action could also be brought by a member of the public, against the local council as approval authority, the private owner of a seawall, and or its maintenance contractor, alleging 'negligence' which has led to an injury to them, or their child, due to risks to public safety created by the structure, or its lack of maintenance. The plaintiff might assert that the council, owner and or contractor should have foreseen the hazard created by the seawall and effectively mitigated the risks to public safety. In such a case the extent of local councils' exemption from legal liability[1834] under the *Local Government Act 1993* (NSW),[1835] and the 'duty of care' owed to members of the public[1836] using coastal land or waters, may be highly pertinent.

4. Government initiated litigation

Under this 'do nothing' response a future State government Minister would be disinclined to commence legal proceedings to enforce State law to protect the public interest in coastal lands, or appeal an adverse lower court's decision, [1837] and state government agencies may be

[1829] See Pilkey and Young, above n 108, 165.
[1830] Many fish and crustaceans of commercial value spend the early part of their life in estuarine waters, where water is shallow, wave action lower and marine vegetation abundant. Where a seawall is constructed increased scour from erosion would likely lead to deeper nearshore waters, loss of seagrass beds, and reduced value of adjacent waters as fisheries habitat.
[1831] See the offences under s 17B RAMSAR sites; s 18A re threatened species and communities, s 20A re Migratory species, *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
[1832] Several species of migratory birds, such as the Sooty Oystercatcher *Haematopus fuliginosus*, are protected in Australia under international law: *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (adopted 2 February 1971, Ramsar, Iran) (entered into force 21 December 1975) (the *Ramsar Convention*). See also the Japan Australian Migratory Birds Agreement (JAMBA 1974) entered into force 30 April 1981; the China Australian Migratory Birds Agreement (CAMBA 1985) entered into force 1 September 1988, and Republic of Korea Australia Migratory Birds Agreement (ROKAMBA 2006) entered into force 13 July 2007.
[1833] The phenomenon of 'coastal squeeze' was discussed in Chapter I. But see Doody, above n 79.
[1834] See s 733 (3)(f), (f2), (f3) *LGA 1993* (NSW).
[1835] The test of 'in good faith' is stated in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) FCA 408, [27] – [34], (Gummow, Hill and Drummond JJ).
[1836] In *Simmons v Rockdale City Council* [2013] NSWSC 1431, (Hall J) the court cited the 'salient features' creating a 'duty of care', [398] and concluded that the council had such a duty [411].
[1837] They may be constrained by party policy, or require Cabinet approval which is refused. They may have their own agenda to pursue, be too busy, have insufficient competent staff, be unwilling to do the 'extra' work to obtain relevant evidence and build a credible case. Or to initiate proceedings may make him or her unpopular with a key section of their electorate, or party donors. Political pressure on other unrelated matters, personal circumstances eg ill-health may dictate that relevant action is not taken.

prevented from doing so due to lack of 'agency' will, limited resources or a failure to gain authorization from the executive government. More likely in this response the State government would seek to shift the onus onto the local council, or other public land manager, to intervene with legal action if a landowner attempts to build a seawall without approval. Avoiding commencing litigation may not be entirely possible however, given the State government is the 'owner' of land below MHWM, and its agencies' statutory roles.[1838] Consequently under this response a State government minister, agencies or public authorities would be more likely to become involved in legal action as a defendant / respondent, rather than as plaintiff.

Hence there are range of potential legal proceedings which could be brought by different plaintiffs, which, though seeking specific declarations and orders, would be essentially concerned with seeking the court's answer to the question, whose rights would prevail?

It is not proposed to further discuss here the likely decisions of future courts on these proceedings, since these matters were canvassed in Chapter III.

5. Advantages and disadvantages of this response

5.1 Advantages

This response would have an advantage of being consistent with existing elements of law[1839] and consequently would most likely create no disruption to existing operations of property law or level of commercial trade in real property. From a government perspective, this response has the advantage of incurring least public spending. However, it seems inevitable that local or State government bodies, as defendants in future legal proceedings brought by private landowners as plaintiffs, would incur costs defending the litigation. This 'do-nothing' response would also have the advantage of 'plausible deniability'. The government could 'blame' the courts for adverse impacts on landowners' expectations about their property rights and deny responsibility, particularly if government policy had been frustrated by the legislature.

5.2 Disadvantages

The disadvantages of this litigation led response are numerous. Due to the courts' process, decisions are always made looking backwards, at what has happened in specific circumstances, and the court would apply the law as it is, or was,[1840] not as it *should* be.

[1838] The Environment Protection Authority (EPA) and Roads and Maritime Services (RMS) are authorised to bring proceedings to enforce laws under their administration.
[1839] Specifically existing property laws rules and property theory discussed in Chapter II, rulings by the courts considered in Chapter III and the statutes examined in Chapter IV.
[1840] In the proceedings, *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207, [2], [43] – [47] (Preston CJ) the court applied the statute law and planning instruments current at the time of the seawall application's 'deemed' refusal.

Thus under this response the courts would be unlikely to prescribe the nature of future law, how it *should* operate, or how government should respond to future climate change impacts.[1841] Hence this response would more likely lead to a series of narrow, specific decisions rather than a strategic response to future scenarios. Together these rulings might later be interpreted as having wider application to all coastal land, but it is highly likely that the emergence of a wider view of the relevance of a suite of limited court rulings would be quite slow.

A further disadvantage of this response would be that landowners would have, and likely gain, greater advantage from using the courts to advance their private property interests due to their standing as owners, and balance of convenience considerations,[1842] than would individuals or groups acting to protect public rights, or the public interest.[1843]

Another disadvantage of the government taking no action, could be hidden costs and adverse results. Despite their formal exemption from liability,[1844] if local council decisions to act, or not act, were found to have lacked 'good faith', this exemption from liability may not apply[1845] and significant costs for damages, restoration works or compensation might be ordered by the court. A pre-occupation with litigation, or liability, may create problems for councils or state agencies. It may absorb crucial financial resources in legal fees, which would otherwise have been available to coastal management actions; could distract public authorities from developing appropriate responses to other public policy and legal issues triggered by rising sea-levels and receding shorelines, and hinder or prevent the implementation of wider more integrated (adaptation) responses which address other ecological, social and economic priorities.[1846]

Of course, these adverse consequences would be avoided if considered timely responses to the challenges posed by rising sea levels and receding shorelines were adopted and implemented by a future State government.

[1841] But see Barker J's suggestions in *Falkner v Gisborne DC* [1995] discussed in s 9 Chapter III.
[1842] See eg *Positive Change for Marine Life Inc v Byron Shire Council (No. 2)* [2015] NSWLEC 157.
[1843] Though the landowners commenced the proceedings over a 'deemed refusal' of their seawall, the court's refusal of consent achieved the result unable to be achieved by the public interest NGO plaintiff.
[1844] Under s 733 (2) (b) *Local Government Act 1993* (NSW), provided they act 'in good faith'.
[1845] In a key case on 'good faith' decision-making by local councils, *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) FCA 408, [27] – [34], (Gummow, Hill and Drummond JJ) the Court ruled that the term meant more than a state of mind or an absence of dishonesty and observed that acting in good faith 'may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence,' and concluded 'it would be wrong to assume' that the term operated to leave a council liable 'only in respect to dishonesty', and held that "good faith" calls for 'more than honest ineptitude', finding that to act 'in good faith' councils are obliged to make a 'real attempt' to access relevant information.
[1846] Private property claims 'can pervade, dissuade and undermine land use management policies' according to Tayanah O'Donnell, in "Coastal management and the socio-legal geographies of climate change adaptation in Australia', (2019) 175 *Ocean and Coastal Management* 127-135, 127, 132.

Part B. If government policy privileged private property rights

A second potential response of a future government to the challenges raised by global climate change could be to adopt a policy to privilege private property and private property rights in any conflict with public rights to use coastal land. This response would require extensive legislative program to put it into effect, because the existing legal framework for real property in this jurisdiction includes many elements of surviving common law, and statutory provisions which provide contrary indications.[1847] Only by comprehensive statutory changes could all these elements of property law be repealed,[1848] and new provisions be enacted, to privilege private property rights where they conflict with public rights.

I have framed two versions of privileging private property rights in 'weak' and 'robust' versions of this response. They differ slightly on four key issues of concern to private landowners: the location of their boundary as MHWM moves landward; the security of long-term ownership of the land title as sea levels rise; level of public funding for defensive structures; and payment of compensation. However, these are only two hypothetical responses in a theoretical range, not opposites, and not the only permutations of this approach which would be potentially available.

These responses reflect liberal philosophical values, where the rights of individuals, including their private property rights, have great moral weight. In the weak response these property rights would be recognised by a liberal democratic government, but not as immutable. In contrast the robust pro-private property rights response would reflect a libertarian perspective,[1849] wherein private property rights are regarded as dominant, 'absolute', and immutable.[1850]

6. A 'weak' version of protecting private property 'rights'

Under a 'weak' response a State government could recognise many claims to property 'rights', but would not allow landowners, or commit the State, to protect private property at any cost.

(a) Location of property boundaries, ownership of land below MHWM

In this 'weak' version, the State could recognise the current location of MHWM as the property

[1847] This was the conclusion I reached at the end of Chapter IV, having considered both surviving common law and current statute laws.
[1848] These are the property laws rules described in Chapter II, the court decisions rejecting a 'right to defend, and a 'right to compensation', on the nature and location of boundaries, and ownership of land <MHWM discussed in Chapter III, and the many statutory provisions recognising the dominance of public rights over private property rights described in Chapters II and IV.
[1849] 'Rights discourses' in the literature on property theory was discussed in s 3 Chapter II.
[1850] This was the position of landowners in New Zealand in *Falkner v Gisborne DC* [1995] discussed in s 9 Chapter III, and Coleman, above n 13, discussed in s 9 Chapter II.

boundary and legislate to fix it in that location permanently. The State could acknowledge prior private ownership of land now below MHWM and pay compensation at full market value for the land already lost to the sea.[1851] However, in this weak version the government would not allow lost land to be 'reclaimed', or the erection of seawalls along that historical boundary defined by first survey.

(b) A right to a defence against the sea, or a right to compensation?

The State could create a statutory 'right' to a defence against the sea, which entitled a land-owner to build a seawall, without consent on the MHWM boundary,[1852] with public funding contributed, if some public lands were also 'protected' by the structure. Where building a defensive structure was not feasible, the government could remedy landowners' foreseeable loss of land to the sea, by acquiring land title at full market value, when the owners chose to sell.[1853]

(c) A transferable development right

Further, in this weak version, a transferable development right (TDR) could be created which recognised the prior development consent for a dwelling or other structure as a valuable property, and could be severed from the land title, to allow relocation of the dwelling or structure within the allotment, or to another allotment owned by the same landowner.[1854]

7. A 'robust' version of privileging private property 'rights'

A 'robust' version of privileging private property rights could go much further.

(a) Abolishing ambulatory boundary of MHWM

In this potential response a future State government may accept landowners' claims to still own land now below MHWM. It could abolish the ambulatory boundary of MHWM by legislation and reinstate all boundaries as originally defined by survey, using GPS co-ordinates, even if below tidal waters.[1855] By so doing, the boundaries of the real property, and the continued private ownership of the land title, might be permanently secured, even as sea levels rise.

[1851] Legislation to this effect could enable the triggering of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), and the payment of compensation on 'just terms'.

[1852] Similar to, or more robust than, the broad authorisation of landowners to undertake 'emergency coastal protection works' without consent, created by the insertion of new sections 55O – 55V into the *Coastal Protection Act 1979* (NSW) in 2010.

[1853] If the *LA(JTC)A 1991* (NSW) was formally triggered by a public authority. See s 6 Chapter IV.

[1854] See John Sheehan, et al. "Coastal climate change and transferable development rights." (2018) 35 (1) *Environmental and Planning Law Journal,* 87, 96. The use of TDRs was also discussed in Freyfogle, 'Eight', above n 202, 795.

[1855] Special legislation would be needed since this would be contrary to existing law as declared by the courts in *EPA v Saunders* (1994) *EPA v Leaghur Pty Ltd* [1995] discussed in s 8 Chapter III.

(b) A statutory right to defend along original property boundaries

Under this robust response the State government could create a statutory property 'right' to protect against the sea[1856] and allow landowners to build permanent defensive structures along the original boundary and undertake reclamation works to reinstate the land above MHWM, without the need for environmental impact assessment or a development consent.[1857] Such works would likely create privately owned foreshores and exclude public access and use.[1858]

The State government could also agree to publicly fund the costs of maintaining and upgrading these structures to protect private property threatened by coastal hazards, in perpetuity.[1859] However in this robust version, government acquisition of privately-owned coastal land would be limited, since many landowners would rather defend their 'original' boundaries than sell. Hence government acquisition would only occur if land was voluntarily offered for sale, and the State paid 'full market value'.[1860] In such a buy-out, the government could acquire the land and allow the landowner to sell the TDR for their dwelling to a third party.

(c) Restricting public use rights

A 'robust' pro-private property approach might include legislation to amend existing statutes to extinguish public use rights, and increase penalties for trespass, and could seek to diminish public rights wherever feasible, by directing public authorities to revoke easements for public access across private land, and discontinue the requirement that public access to the foreshore be provided as a condition of consent for new developments of privately-owned coastal land.[1861] Such a 'robust' response might also revoke dedications of coastal lands for public use, end their reservation from sale, and sell publicly-owned coastal lands to the private sector. [1862]

8. Advantages and disadvantages of these responses

These potential responses, privileging private property rights, would have varying advantages and disadvantages for private landowners, members of the public, and a future government.

[1856] Legislation would be required because no right to defend has been recognised. See s4 & 5 Chapter III.
[1857] Though no 'right' to defend was created, exemption from the need to consider environmental impact and obtain development consent before constructing 'emergency' coastal protection works, were government policies reflected in amendments made to the *Coastal Protection Act 1979* (NSW) in 2012. See discussion of this in s 4 Chapter IV
[1858] Legislation would be needed to overturn rights of public access described in s 9 Ch II, s 4 Chapter IV.
[1859] This was the former approach employed in the UK which was subsequently discontinued. See the discussion of landowner's expectations by Cooper and McKenna in s 7 Chapter V.
[1860] This policy would require amendment to the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) since 'just terms' provisions apply to compulsory acquisitions.
[1861] See the *NSW Coastal Development Guidelines 2003*, discussed in s 5 Chapter IV.
[1862] See discussion of the Minister's powers under s *CLMA 2016* (NSW) in s 3 Chapter IV.

8.1 Advantages

Legislating for either 'weak' or 'robust' version of this response would have the advantage of clearly stating the priority of private property rights, which could guide expectations and decision-making to resolve future conflicts between competing rights. Though this might be a dubious advantage, under either version of this potential response, the relevant law of property would be simplified and limited to what the statutory provisions set out, and no more.

Private landowners would obtain several advantages. Under the 'weak' version their 'original' boundaries, would be recognised even if they could not be defended, via the payment of compensation for land already lost to the sea, and they would gain a 'right to protect' their property boundaries, fixed at the then current location, with defensive structures. Under the 'robust' version, landowners would be similarly advantaged by the recognition, re-instatement of their original private property boundaries, 'right to protect', and their believed immunity from the tidal boundary, as sea levels rise. The partial, or total, public funding to design, build, repair, maintain and potentially, upgrade of these structures, over the long term,[1863] and the guaranteed acquisition of the land by the State government, at full market value,[1864] as a last resort, would also constitute a very substantial advantages to landowners. Thus this response would secure the long-term private ownership of the land, and protect, or perhaps increase, the market value of the 'real property' despite the effects of rising sea levels.

Advantages for government of a 'robust' response which permitted the sale of valuable public lands, would be the savings in management costs and the generation of 'profits' for future use. It is possible that this response could have appeal to voters in key marginal seats and thus be of electoral advantage to the government. However the contrary is also possible.

No advantages to the public, or the 'public interest', are foreseen under these responses.

8.2 Disadvantages

A major disadvantage of both the weak and robust responses is that they would in effect, require the reversal of the priorities under the status quo, and as a result seriously disrupt public uses of coastal lands and waters, produce upheaval and create uncertainty in the State's property law.

Because these responses would be deliberately contrary to the existing elements of property law,[1865] a future government which adopted either of these responses would face a serious

[1863] Cooper and McKenna, above n 123, discussed the dangers of being 'locked' into building and maintaining coastal management works. See s 7 Chapter V.
[1864] If the *LA(JTC)A 1991* (NSW) were triggered by a public authority. See s 6 Chapter IV
[1865] The property law rules, common law decisions and relevant statutes described in Chapter I, III & IV.

challenge in framing a credible rationale and articulating the social utility of privileging private property rights over public rights and interests in coastal lands. The lack of a plausible justification which explained how this would benefit society, or contributed to a greater public good, would be a major disadvantage when seeking the support of the public or the legislature.

A serious disadvantage confronting a future government seeking to reverse the status quo, would be the need for an extensive legislative program to implement it. Special legislation with cognate amendments to existing statutes would be required to extinguish public rights in coastal lands, create new private property rights in a new statutory framework, and repeal all common law rules of property which would otherwise apply to the contrary. Until such legislation were enacted there would likely be a period of confusion, and common law rules and public rights would continue to conflict with private property rights.

One disadvantage to landowners of the weak response would be the loss of land below MHWM 'to the sea', although this loss would be mitigated by the payment of compensation. A further disadvantage could be the cost of contributing, perhaps compulsorily, to the costs of designing, constructing, maintaining and upgrading coastal defensive structures. Since their foundations would need to be located below low water mark, there would be practical difficulties building structures below the waterline, particularly in stormy conditions, creating disadvantages of uncertainty in time required and total costs. Further, there may be little or no co-ordination of design specifications, or inconsistent standards of construction between adjoining structures, which could have the disadvantage of potentially compromising the structures' likely effectiveness under severe or extreme storm conditions.[1866]

A serious danger created by building structures to 'protect' private land, would be the 'false sense of security' evoked in private landowners regarding the safety, and suitability for further development, of lands vulnerable to coastal hazards.[1867] Thus due to later development, were a seawall to fail in storm conditions which exceeded its design limits, there would likely be far greater damage and loss of private property due to inundation and wave attack, than there would have been, had no structure been built at all. The failure of such a protective structure would have catastrophic financial impacts, with public investment in building the structure effectively wasted, and unwise, avoidable private investment in the affected land, diminished or lost.

Another serious disadvantage to private landowners of these responses would be the lack of

[1866] This is the problem facing the current owners of coastal lands on the Queensland Gold Coast.
[1867] The 'false sense of security' seawalls create is recognised in the literature. See Cooper and McKenna, above n 123, 301; Australian Government, above n 44, 152; Pilkey and Young, above n 108, 166.

statutory exemption from legal liability.[1868] It is possible that, unless this private liability was also extinguished by the legislation which created a 'right to protect', litigation between landowners on the adverse impacts of works on nearby private lands would increase.[1869] Justifying landowners' exemption from legal actions brought by other landowners, while seeking to privilege private property rights would appear difficult, logically and ethically.

The disadvantages of these potential responses to members of the public and the public interest, would be substantial. By privileging private property rights, public rights to access and use the beach would be diminished, restricted to fewer locations or perhaps abolished altogether. If sea-walls were permitted along current or original property boundaries, further disadvantages would be the co-option of public land for private purposes, increased risks to safe public access to and along the foreshore, dangers to recreational use of coastal waters for wading, swimming, surfing or boating and the likely closure of the beach and the adjacent coastal waters to public use, for extended periods to permit construction and repeated episodes of maintenance.[1870]

As shown in Chapter I, seawalls would create conditions conducive to 'coastal squeeze' by reducing the area of beach available for public recreation,[1871] decreasing the area of intertidal habitats, generating adverse conditions for species dependent on these environments,[1872] and would inevitably destroy the beach.[1873] Changes in coastal processes due to seawall construction could create shocks in local ecosystems, such as rapid loss of salt marshes, seagrass beds, or mangroves, leading to the loss of vital fisheries habitats, with consequences for ecological and economic productivity.[1874] Major changes in the amenity, safety or appeal of visiting and recreating at certain beaches could produce economic shocks through adverse financial impacts on businesses and industries which rely on public access to the coast.

If government committed to publicly funding coastal structures to protect private property, major disadvantages would be the substantial public funds required for capital works, and 'locked-in' long-term public funding to repair, maintain and upgrade such structures.[1875] Similarly committing to pay for lands lost to the sea would have serious cost disadvantages to government, and the public purse, since compensation at full market value would not be cheap and would need to continue indefinitely.

[1868] Councils are exempt under s 733 *Local Government Act 1993* (NSW). See s 3 Chapter VI.
[1869] See *Egger v Gosford Shire Council* (1989) 67 LGRA 304.
[1870] These impacts on public access were recognised by the court in *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207.
[1871] Cooper and McKenna, above n 123, 301.
[1872] See Bird, above n 80, 80.
[1873] See Pilkey and Young, above n 108, 166-7.
[1874] See David Pollard, 'Estuaries are valuable contributors to fisheries production' (1981) 40 *Australian Fisheries* 7-9.
[1875] See the discussion of costs in Cooper and McKenna, above n 123, 300-302.

'Locked-in' commitments of billions of dollars,[1876] would reduce the public funds available for other public purposes and would likely have negative re-distributive effects, converting public funds expenditure into increased value of privately owned land for low or no public benefit.

Thus it is likely that the advantages of these 'weak' and 'robust' responses would favour private landowners overwhelmingly, while the public and government would suffer the disadvantages.

Part C. If government policy protects, enhances public rights

In this Part I explore a third potential option, where a future government adopted policy to protect public rights to use coastal lands and waters, in two versions: one 'strong' and another 'stronger' potential response. Under both these responses a future government's policy would be that public rights *should* prevail in future conflicts with landowners claimed private property 'rights' and legislation, funding and management action would protect public use rights, and public interests in coastal lands and resources.

Both responses address the issues previously traversed from a public rights point of view: the location and nature of property boundaries, security of long term land ownership, right to defend, compensation, quantum and value of public expenditure.

These potential responses would reflect the civil law philosophical perspective of the 'public trust' which recognizes the beach as 'public property',[1877] the validity of public ownership of resources and seeks to protect the public's use rights over coastal lands and waters.[1878]

9. A 'strong' approach to protecting public rights and interests

A strong pro-public rights response would favour public rights to access and use coastal lands and waters in any future conflicts with landowners claiming dominant private property rights. This strong response would resolve any uncertainty by affirming the dominance of public use rights[1879] and dispel any confusion over the location of natural boundaries formed by tidal waters, by explicitly confirming extant property rules[1880] through declaratory legislation.

[1876] The value of residences in NSW at risk of a 1.1 m sea level rise and 1:100 year storm tide were estimated in 2009 to be between $12.4 and $18.7 billion. See Australian Government, above n 44, 77.
[1877] See the discussion of surviving elements of the civil law in s 7 Chapter II.
[1878] This is the core of the 'public trust doctrine' in the US, described by Sax, above n 189, and Slade, above n 336, as discussed in s 5.1 Chapter V.
[1879] As shown in s 27 *CMA 2016* (NSW) discussed in s 4 Chapter IV.
[1880] That is the rules devised and employed by judges in their decisions, as collected and summarised in books of law such as *Halsbury's Laws of England* (1st edn, Butterworths, 1908). Common law rules relevant to this thesis were discussed in s 6.3 Chapter II and in ss 7 & 8 Chapter III.

(a) The nature and location of the boundary of MHWM

Under this response, the government would introduce legislation to restate the settled rules of the common law governing the ambulatory nature and location of the boundary between privately owned 'real property' and the foreshore: that the legal boundary is the MHWM, wherever it may be located from time to time.[1881] Statutory provisions could direct the Registrar-General to amend the folios of registered land titles[1882] where a property boundary first defined by a line of survey,[1883] is supplanted by the ambulatory boundary of MHWM.[1884]

(b) Ownership of land below MHWM

Similarly, such legislation could codify existing common law rules regarding the ownership of submerged lands below MHWM, by enacting provisions which declare that:

i) submerged lands below low water mark are owned by the State government;[1885]

ii) foreshore lands between MHWM and low water mark, are owned by the State government under surviving common law; [1886]

iii) ownership of part of a registered land title once above MHWM, which comes to lie below MHWM, due to gradual erosion or inundation, reverts to the State government;[1887] and

iv) compensation is not payable to coastal landowners for the loss of land to the sea.[1888]

Such declaratory provisions would make these common law rules visible in the legislation and provide certainty to parties and arbiters in resolving future conflicts between competing rights, remove any doubts about the ownership of the foreshore and the priority of public rights in future disputes.

This would allow local councils to proceed with coastal management planning without lingering uncertainty regarding these crucial elements of law. In theory such a 'strong' response would be uncontroversial since this new statute would not disrupt existing property law, but codify common law rules, preserving the status quo.

[1881] See *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J).
[1882] See s 12 (d) *Real Property Act 1900* (NSW).
[1883] *Attorney General (Ireland) v McCarthy* (1911) 2 IR 260, 298 (Gibson J).
[1884] *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,660 (Bannon J).
[1885] *Coastal Waters (State Title) Act 1980* (Cth); *Marine Estate Management Act 2014* (NSW).
[1886] *New South Wales v Commonwealth* (1975) 135 CLR 337, 407 [44], [45] (Gibbs J).
[1887] See *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287.
[1888] See *Durham Holdings PL v NSW* (2001) discussed in s 10 Chapter IV. It is argued that the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) is not triggered by action of the sea, only by a public authority, in Corkill, "Ambulatory, above n 63, 80-2.

(c) Response to climate change impacts

In its response to climate change impacts, specifically coastal erosion 'hot spots' and areas of shoreline recession, the differences between this and other responses would be apparent. A government policy to protect public rights and public interests would mean that where they conflict, private property rights would yield to public rights, public interests or public purposes. Due to their adverse impacts on public access and their risks to public safety, the building of more seawalls to 'defend' eroding land would be largely discontinued under this response.

To protect public rights to access and use the coast into the foreseeable future, under climate change conditions, beach and dune systems, nearshore seabed and their associated biota would be allowed to migrate – or naturally retreat - gradually landward, and the trend of shoreline recession would continue uninterrupted by defensive structures, indefinitely into the future.[1889] Hence under this response, the seawalls or other defensive structures would not be approved behind retreating beaches except in essential circumstances. To facilitate this migration a future government, in consultation with local councils, could adopt and implement the option of managed relocation, or 'retreat'[1890] for appropriate locations.

Under legal instruments made to implement this response,[1891] local councils would direct landowners to relocate residences or businesses which become at risk from coastal erosion or shoreline recession, within the lot, and if this is impossible, to remove the structures entirely.[1892] Further they would also direct landowners remove anything[1893] which could create threats to public uses, risks to public safety,[1894]or dangers to public or environmental health.[1895]

Prioritising public rights to use coastal lands, and creating room for beaches to retreat naturally, would also allow public recreational use[1896] and ecological functions to go on uninterrupted.[1897] The major challenge facing local councils managing public lands would then be to devise,

[1889] This option of permitting the shoreline to recede naturally was discussed in Cooper and McKenna, above n 123, 300. See also Figure 9.12 'avoiding the squeeze' in s 3 Chapter I.
[1890] See Australian Government, above n 44, 152.
[1891] Such as Byron Shire Council, *Development Control Plan Part J – Erosion-prone Lands* (adopted 2 August 2018).
[1892] Ibid sections J2.2 and J2.3.
[1893] Councils may issue a clean-up order to a landowner under s 91 *Protection of the Environment Operations Act 1997* (NSW). Such as wire fences, electrical wiring or plumbing fixtures.
[1894] Such as broken glass, steel structures, brickwork, masonry, cement steps and paths, footings.
[1895] Such as fibro cladding manufactured before 1984, likely to be asbestos bearing. Abrasion of copper pipe fittings or electrical cables could have serious impacts on the health of the marine environment.
[1896] The suite of public uses of the foreshore was described in s 5.1 Chapter V.
[1897] As is required by s 3 (a) *CMA 2016* (NSW) discussed in s 4 Chapter IV. See also the recognition of ecological benefits of no seawalls by Cooper and McKenna, above n 123, 301, discussed in s 6 Ch V.

through public consultation, effective ways to ensure public uses of coastal lands and waters were ecologically sustainable.[1898]

Under this response a future government could modify public rights, and in association with public land managers, to regulate public rights to use coastal lands and waters, where they concluded that unregulated uses were inconsistent with the principles of ESD, and the ecologically sustainable management of the coast. For example the timing and location of public access to the beach and public uses, such as off-leash dog exercise, could be limited on some beaches to protect the nesting areas of beach dependent migratory bird species protected under international agreements,[1899] in accord with the biodiversity conservation principle.[1900]

(d) Spending public money

A fourth area of difference would be the priorities for public expenditure, with public funding directed to projects with the greatest public benefits. Under this response government approval of public funding to build seawalls or other defensive structures, to protect private lands would be unlikely. Public funding for seawalls might be approved however to protect public assets, where this was justified by a careful assessment of impacts, risks, costs and benefits.[1901]

Under this response, other higher priorities for public spending to protect and enhance public use rights, and manage coastal lands sustainably, under climate change conditions, may include:

i) relocating public infrastructure on coastal lands susceptible to damage by coastal processes or coastal hazards, such as rail lines, roads, carparks, water supply, power, sewerage;
ii) removing hazards to navigation and public access from derelict seawalls;
iii) cleaning-up and decontaminating coastal residences surrendered or abandoned by their private owners, to identify and remove potential hazards to the land's future public use;
iv) preparing coastal lands surrendered to the government, for interim commercial uses, while these uses are still feasible;
v) educating the public about the hazards created by climate change, the impacts forecast to continue over centuries, and appropriate responses to these hazards and impacts; and
vi) purchasing key coastal properties offered for voluntary sale by owners.

[1898] To ensure coastal management is consistent with the principles of ESD, as required by s 3 *CMA 2016* (NSW) discussed in s 4 Chapter IV. See also s 5.2 Chapter V.
[1899] Such as *Japan Australia Migratory Birds Agreement* (JAMBA) entered into force 1981; and the *China Australia Migratory Birds Agreement* (CAMBA) entered into force 1988.
[1900] See s 6(2)(c) *POEAA 1991* (NSW) discussed in s 6.2 Chapter V.
[1901] This is the approach recommended in the National Committee on Coastal and Ocean Engineering, Institute of Engineers Australia, *Coastal Engineering Guidelines for working with the Australian coast in an ecologically sustainable way* (EA, 2012).

However this response could be ratcheted up into a 'stronger' response by government if prior assumptions about the rate of increase in sea level, the extent of climate impacts on coastal environments and the timing of their onset are shown to have been under-estimated.

10. A 'stronger' approach to protecting public rights and interests.

A stronger approach to protecting public rights could be adopted if an accelerating rate of sea-level rise and an increase in severe storms created an unexpected increase in shoreline recession, and a spike in conflicts between private landowners and the public for access to coastal lands, making a future government acutely aware of the need for a credible policy and effective action.

If a future government's policy were to adopt a stronger position, to enhance public rights and interests in coastal lands and strengthen them in any conflicts with private property rights, considerably more might be done with the support of the legislature, in three ways:

a) broadening the public uses recognised as public rights;
b) enlarging the footprint of public uses rights;
c) increasing the level of protection through policy.

These possibilities are explored in the following sections

(a) Broadening public uses recognised as 'public rights'

Broadening the public uses explicitly recognised by law as public rights could be achieved by legislation which formalizes common law public rights to fish and navigate on tidal waters,[1902] restates the right of pedestrian access to and along the foreshore,[1903] and creates new 'rights'. The new statute could restate the legislature's power to create and regulate statutory rights, add 'for recreation' as an approved purpose for public access to the foreshore and coastal waters,[1904] create statutory 'rights', such as a 'right to bathe or swim', a 'right to surf' or a 'right to dive' in coastal waters, and include as part of its objects a statement that future residents of New South Wales should continue to have these public rights.[1905] By legislating in this way, the government could create a free-for-all in public uses of coastal lands and waters. However, conflicts between competing public use 'rights' could be averted by precisely defining them, situating them in a formal hierarchy, and specifying where they would, or would not apply.[1906] Such 'rights' would be statutory rights, not common law public rights.

[1902] Specifically the *Fisheries Management Act 1994* (NSW) and the *Marine Safety Act 1998* (NSW)
[1903] As per the public right of pedestrian access to the coastal region under s 3(d) of the *Coastal Protection Act 1979* (NSW), inserted in 1998.
[1904] The public right of access to the foreshore was originally limited to fishing or navigation.
[1905] This would be consistent with the ESD principle of 'intergenerational equity' described in s 6(2)(b) *POEAA 1991* (NSW) discussed in s 5.2 Chapter V.
[1906] As does the statutory framework governing public navigation currently: see s 7 Chapter IV

If the policy were broadened to include protecting public 'interests', or 'the public interest', the enabling legislation could recognize the 'use rights' of others in the ecological community,[1907] whose long-term protection under climate change conditions, was in the public interest.[1908] Connected to existing legal principles,[1909] broader protection of 'public use', public purposes and public interests under this response could be framed as part of an endemic 'public use doctrine' which operates within the statutory framework,[1910] whose goal is to manage the State's coast to enable ecologically sustainably public use.

(b) Enlarging the footprint of public use rights

Two feasible options exist for enlarging the area where public rights could apply in the future: raising the high water mark, and creating easements to facilitate public access to the beach.

i] Raising the level of high water mark

Traditionally the boundary between private land and the foreshore has been the high-water mark,[1911] as defined in English common law.[1912] The State of New South Wales uses this common law definition and has codified it as mean high water mark, (MHWM).[1913] In contrast, Queensland has adopted a higher high-water mark as the seaward boundary of private land, being 'mean high water at spring tides' (MHWS).[1914] By adopting a new statutory definition of the boundary formed by tidal waters, at a higher level such as MHWS, or highest astronomical tide (HAT)[1915] the line of high-water would retains its character as an ambulatory boundary.[1916]

[1907] As advocated by Freyfogle, 'Owning', above n 310, 302-3, discussed in s 5.2 Chapter V.
[1908] For example migratory birds protected under international agreements.
[1909] That the foreshore is owned by the State and available for public use: see 5.1 Chapter V.
[1910] The existence of an endemic 'public use doctrine' in New South Wales was posited in s 6 Chapter V.
[1911] The boundary between land and water was first determined as high-water mark in *Vanhaesdanke's Case* 12 Car 1. (1636), as cited by Sir Matthew Hale in *De Jure Maris* (1667) Cap IV. IId. (I), in Stuart A Moore *A History of the Foreshore* (1888) at 378.
[1912] An ordinary high tide is… the line of the medium high tide between the springs & neaps, ascertained by taking the average of the medium tides during the year. *Tracey Elliot v Morley* (Earl of) (1907) 51 Sol Jo 625 (Joyce J), cited in *The English and Empire Digest* Repl Vol 47 Waters at [491].
[1913] In section 5 Definitions of the *Survey and Spatial Information Regulations 2017* (NSW) "mean high-water mark means the line of mean high tide between the ordinary high-water spring and ordinary high-water neap tides." Clause 51(a) and (b) of the *Regulation* stipulates that references to high-water mark and to tidal waters are to be taken to refer to "mean high-water mark", (MHWM).
[1914] See the *Land Act 1994* (Qld) Schedule 6 – Dictionary, at 407 Reprint No. 10G, as in force at 18 December 2009: '*high-water mark* means the ordinary high-water mark at spring tides'. For a short history of relevant legislation see *Svendsen v Queensland* (2002) 1 Qd R 216, 230 (Demack J). The spring tides are the highest of the monthly tides, occurring at new and full moon.
[1915] See Angus Gordon, 'Highwater Mark - The Boundary of Ignorance' (2001) (Paper presented at 11th NSW Coastal Conference, Newcastle, 13-16 November 2001), 5, where Gordon states "it is illogical to delimit a "land" boundary that is regularly over-washed by the sea", suggesting that the highest astronomical tide (HAT) [the highest high tide occurring naturally each year under non-storm conditions], be adopted as the boundary line between public and private land.
[1916] That the highwater mark is an ambulatory boundary was confirmed in *SCOTI v SA* [1982] and in *EPA v Saunders* (1994) discussed in ss 7 & 8 Chapter IIII.

Legislation could declare that existing real property boundaries would now be affected by the ambulatory boundary of the new high-water mark, wherever it is located from time to time.[1917]

The State government would nominate an agency as the relevant public authority and authorize the issuing of 'notices' to acquire the strip of land between the old high-water mark of MHWM and the new mark of MHWS, or HAT. This would trigger the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) and land would be acquired at then current market rate.[1918]

As an alternative, a statute could authorize a public authority to acquire the land at a rate set by the legislation: which could be one payment per each affected land title, or at a specified price per square metre of land title acquired.[1919] In either case, the enabling legislation would authorize the Registrar General to amend the description of boundaries of affected land titles to reflect it gaining an ambulatory boundary of high-water mark,[1920] as newly defined, and the State's acquisition of the land up to that boundary.

By adopting a new, higher definition of high-water mark, a future government could extend the foreshore's area landwards to include lands above MHWM regularly washed by spring tides and storm surges, and augment the area of coastal lands subject to public use 'rights'.[1921] Because both MHWS and HAT are more easily discernible in the coastal landscape than the mathematical mean of MHWM, such a change could reduce conflicts over a boundary's location and prevent the need for trespass actions over public use of privately-owned parts of the beach.[1922] Redefining the high-water mark would have no impact where adjacent land was publicly owned, but would move the boundary of privately-owned 'real property' landward to some extent, from millimetres to metres, depending on the land's topography and the foreshore's gradient. Even small changes could be seen by landowners as quite significant however, and an emphasis on the public benefits gained, and payment of compensation for the land acquired would likely be required to mitigate adverse reactions.

ii] Instituting a system of easements

The second means of increasing the area of land to which public use rights apply could be the creation of easements, over a small part of privately owned coastal land, to allow public use of

[1917] As per the common law rule stated in *Scratton v Brown (*1825) 4 B & C 485; 498-9 (Bayley J).
[1918] See the discussion of actions necessary to compulsorily acquire private land in s 6 Chapter IV.
[1919] The State legislature's power to assign a rate of compensation in legislation less than 'full market value' was affirmed in *Durham Holdings PL v NSW* (2001). See s 10 Chapter V.
[1920] See the court's direction to the Registrar General to amend land titles which had become erroneous, in *EPA v Saunders* (1994) discussed in s 8 Chapter III.
[1921] The foreshore's importance for rights of access and navigation was discussed in s 9.2 Chapter II.
[1922] Trespass over private land and uncertainty about the location of the property boundary were key issues in *AG (UK) v McCarthy* (1911) discussed in s 6 Chapter III.

the beach, where the beach above MHWM extends onto privately-owned land.[1923] Easements, as instruments of property law, have existed for many years in various guises, including easements for public access,[1924] and more recently to protect significant public interests in land.[1925]

A rolling easement is similarly imposed on a 'burdened' private land title for the public's benefit,[1926] but differs in an important respect. Its width, measured from HWM, is a defined constant, but the location of its landward boundary is not static. As sea levels rise and the shoreline recedes, the easement would maintain its specified width from the ambulatory boundary of HWM and move, or 'roll' with it. 'Rolling easements' are well-known in the United States of America[1927] but were seldom seen in New South Wales,[1928] until the Land and Environment Court created an ambulatory easement for public access, when granting a claim over vacant coastal Crown land at Red Rock in Coffs Harbour Shire.[1929] Evidence in that case showed that there was a large area of sandy beach above MHWM,[1930] which had been subject of ad hoc public use.[1931] The claimant land council recognised that public use of the beach was an essential public purpose, and conceded that the beach was not 'claimable Crown land'.[1932] However this public use did not extend to the whole of the land claimed, or prevent it from being granted. As a condition of the grant the court created an 'ambulatory easement'[1933] 30m wide, measured from MHWM,[1934] as the appropriate width to capture most of the beach,[1935] to permit its continued public use,[1936] as the shoreline recedes.[1937]

Use of 'rolling easements' could be a feature of a future policy to protect and enhance public rights, since they would ensure that public use rights survive likely climate change impacts.[1938]

[1923] See *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act* (2013) NSW LEC 216 discussed below: [hereafter *CH & D LALC v Minister* (2013)].
[1924] See s 88A *Conveyancing Act 1919* (NSW) discussed in s 6 Chapter IV.
[1925] Such as native vegetation of conservation significance. See s 88E *Conveyancing Act 1919* (NSW).
[1926] Young et al, above n 437, 144, [32217].
[1927] See Titus, 'Rising', above n 84, 1313; Titus, 'Rolling' above n 1558.
[1928] See also Environmental Defender's Office, 'Climate Change and Adaptation and Coastal Biodiversity: is a system of rolling easement is a legally feasible option for New South Wales?' (EDO NSW, 2010).
[1929] *CH & D LALC v Minister* (2013) [163], [167] (Craig J).
[1930] Professor Short provided evidence that beach width above MHWM varied between 20 and 50 metres, and averaged 40 metres: *CH & D LALC v Minister* (2013) [108]-[113].
[1931] Ibid [13], [145].
[1932] Ibid [161].
[1933] Ibid [163].
[1934] Ibid [167].
[1935] The average beach width was 40m, but it varied between 20m and 50m above MHWM. *CH & D LALC v Minister* (2013) [111].
[1936] In addition to a 30m wide rolling easement extending north south along the beach, in its Final Orders of 10 March 2014 in *CH & D LALC v Minister* (2013) the court created a second easement for public access to the beach from the west, five metres wide along the line of an existing track in use.
[1937] *CH & D LALC v Minister* (2013) [109]. Professor Short's evidence was that in the beach southern section of the land in question had retreated 'perhaps a few metres' since 1993.
[1938] An 'ambulatory' easement would migrate inland as sea level rises: see Corkill, 'Coffs', above n 1559.

(c) Increasing the level of protection through policy

To enhance the public use doctrine in New South Wales a future State government could adopt policies to increase levels of protection of public rights and public interests, such as:

i] ensuring that areas of publicly owned coastal land cannot be alienated;[1939] and acquiring through various means, additional areas of coastal land for public use,[1940] where appropriate;

ii] directing local councils to police the tidal boundary of public lands to ensure hazards to public use of the beach from adjacent private land, such as collapsed seawalls, or derelict structures, are swiftly identified, and removed by the owners;

iii] instructing public land managers to protect public uses from commercial encroachment; remove unnecessary constraints on public access and abolish fees for entry to public lands;[1941]

iv] requiring certain land-uses to undergo a higher standard of assessment; eg requiring activities which were permissible without consent, to obtain consent; and an environmental impact statement (EIS) to be prepared for certain activities;[1942]

v] using a higher threshold for approval; and refusal of consent[1943] instead of using conditions to mitigate threats to public uses or interests to make proposals compliant at the last minute.

11. Advantages and disadvantages of these responses

A range of advantages and disadvantages arise under these pro-public rights responses.

11.1 Advantages

Advantages of both these responses would be their strong foundation in existing law and local doctrine on public use of coastal lands developed over New South Wales' history,[1944] and their consistency with common law rules declared by the court.[1945] Another plus would be the clarity of the message conveyed by the government through the legislature to the community about whose rights would prevail in future conflicts. A major advantage would be that many people

[1939] Reserving coastal Crown lands from sale and dedicating them for public purposes were discussed in s 3 Chapter IV.
[1940] Under the *LA(JTC) 1991* (NSW) or under special legislation. See s 6 Chapter IV.
[1941] See the recent authorisation of managers to charge the public entry fees to Crown lands, under s 9.25(2)(f) *CLMA 2016* NSW) discussed in s 3 Chapter IV.
[1942] This was the approach used in protecting coastal wetlands and littoral rainforests in the New South Wales government's State Environmental Planning Policies (SEPPs 14 and 26). See s 5 Chapter IV.
[1943] Using powers under s 4.15 and 4.16 *EPAA 1979* (NSW) discussed in s 5 Chapter IV.
[1944] See discussion of this in s 3 Chapter IV, and s 5.1 Chapter V.
[1945] On the nature and location of real property boundary and ownership of lands < MHWM, in *EPA V Saunders* (1994), *v Leaghur Pty Ltd* [1995] discussed in s 8 Chapter III.

would see them as consistent with historical norms,[1946] creating no disruption to their lives, but ensuring that public rights to use coastal lands, are not lost in the future, due to actions aimed at addressing climate change impacts.

More fundamental advantages of these responses lie in the social and ecological uses of beaches which could continue if the construction of hard defensive structures were prohibited, and the shoreline allowed to recede naturally as sea levels rise.[1947] The suite of public uses of beach and dune systems, the diverse range of ecological functions of intertidal environments and their related social and economic activities would be able to continue uninterrupted, as the result.[1948]

Both these responses would also have the advantage of saving public expenditure on constructing, maintaining and upgrading seawalls, which a future government could then re-allocate to projects or actions by public land-managers that protect public rights to use coastal lands under the adverse conditions likely to be created by local climate change impacts.[1949] The 'strong' response would not incur major public expense since it would simply codify the status quo. The 'stronger' response would have the advantage of using a range of relatively low costs actions: broadening public rights, creating easements for public access, monitoring beaches for dangers to public use, and increasing the level of protection of public rights to use coastal land via the planning and development control systems. Raising the high-water mark would incur more public spending due to acquisition costs, but would have the advantages of increasing the area of beach available for public use, more clearly situating the tidal property boundary in the landscape, and reducing uncertainty about its location.

11.2 Disadvantages

From a public interest perspective there appear to be few disadvantages of these responses.

For private landowners however, there would appear to be immediate and longer-term disadvantages. Changes in a property boundary, and hence the area, of their privately owned 'real property' could occur without their consent or effective remedy.[1950] Hopes of constructing structures to 'defend' privately-owned land would be dashed, since their approval would be prohibited if the works would adversely affect public rights or interests in adjacent public lands,

[1946] That the foreshore is publicly owned and available for a range of public uses. See s 5.1 Chapter V.
[1947] See the discussion of 'coastal squeeze' and how to avoid it in s 3.3 Chapter I.
[1948] See Cooper and McKenna, above n 123, 301, discussed in s 6 Chapter V.
[1949] As did public authorities in the UK when deciding to discontinue the maintenance of seawalls along the coast of England and Wales. See Cooper and McKenna, above n 123 discussed in s 7 Chapter V.
[1950] Through the operation of the doctrine of accretion, discussed in s 5.3 Chapter II.

or create a nuisance on nearby private land.[1951] Current and future uses of private land may become restricted, or prohibited, as risks from coastal hazards increase.[1952] The value of the coastal 'real property' may plateau, decline or drop away. Over the longer term the land could be entirely inundated by tidal waters, and the land title lost, with no compensation payable.[1953]

Few disadvantages would accrue to government were this response endorsed by the legislature through relevant legislation. In both responses mounting a credible argument that the policy was in the public interest would be required, but not difficult. A 'strong' response would need only a modest legislative program but more ambitious legislation would be necessary however if a future government were to pursue the 'stronger' action of raising the high-water mark.

One disadvantage of raising of the high-water mark through statutory redefinition, would be its effect on many owners of coastal lands all at once, potentially causing an electoral backlash. This disadvantage could be ameliorated somewhat if the public benefit was clearly explained before the legislation was introduced and payment of compensation was specified in the Act.[1954] Acquiring the strip of land between old and new high-water marks via 'notices' under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) would have the disadvantage of likely incurring higher costs, due to high value of coastal land, but implementation could be staggered by the staged issue of 'notices' of intent to acquire, perhaps on a geographic basis.[1955] The disadvantages this would be it would continue over many years, perhaps decades, 'locking-in' long-term public expenditure and making estimation of the total cost impossible. Further, it is likely that the focus of local coastal management would not 'move on' but would return again and again to the questions of acquisition and valuation of small strips of coastal land.

Acquiring the strip of land between old and new high-water mark by special legislation could have lower costs if the rate of compensation payable was clearly designated in the legislation. One disadvantage of this legislative approach would be that all coastal landowners would be affected at once, potentially creating an administrative logjam in the issuing compensation payments and amendment of land titles. However this approach would have the advantages of allowing the total cost of the policy to be credibly estimated, and once completed, the focus of coastal management would be able to move on to other issues and actions.

[1951] See s 27 *Coastal Management Act 2016* (NSW) discussed in s 4 Chapter IV.
[1952] For lands identified as 'vulnerable' to coastal hazards under s 5 *CMA 2016* (NSW) see the development controls created under the *SEPP Coastal Management 2018*, discussed in s 5 Chapter IV.
[1953] This was the result for many lots in the sub-division considered in *EPA v Saunders* (1994) discussed in s 8 Chapter III.
[1954] As was the case in *Durham Holdings Pty Ltd v NSW* (2000) discussed in s 10 Chapter III.
[1955] The operation of the *LA(JTC)A 1991* (NSW) was considered in s 6 Chapter IV.

Hence there are a range of advantages and disadvantages which may arise from these responses, and estimating the public appeal of a 'stronger' public rights response would require a careful weighing of the potential costs likely to be involved and the public benefits likely to be gained.

Part D. If government policy attempts to do both

A fourth potential response, is conceivable. A future government may attempt to protect both private and public rights in coastal land, for a range of reasons.

Politically, it may be impossible to abandon coastal residents, or those in key electorates, to climate change impacts, without some form of government assistance. Further, the public and the government might foresee problems in consistency, compliance and equity in a scenario where private landowners bear the cost of hazard minimization to avoid legal liability for pollution of coastal waters.[1956] Therefore a legitimate role for government might be identified as planning and supervising the clean-up of coastal lands to prepare for anticipated climate change impacts, as part of managing the State's coastal resources.

Policy responses of a future government seeking to protect both private and public rights could have many diverse manifestations. I next consider two differently oriented potential responses. In the first, the government might seek to move away from historical notions of dominant rights and attempt to 'balance' competing private and public rights in any resolution of a conflict. In a second, a future government might accept public rights' dominance, historically and currently, but not want to ignore private landowners' interests altogether. Thus it could protect public rights, and seek to accommodate private interests in coastal lands, where this was feasible.

I explore these potential responses of 'balancing' and 'accept and accommodate' next.

12. 'Balancing' private and public rights

In theory a future government could enact legislation to extinguish common law rules on the movement of property boundaries,[1957] repeal provisions of existing statutes where public rights are dominant[1958] and declare private property rights and public rights to be 'equivalent'. In this new statutory framework, no rights would be 'trumps', and disputes would be heard and resolved by an arbitrating tribunal, not a court. An arbiter's task in solving disputes over conflicting uses of coastal land would be to 'balance' the competing private and public interests.

[1956] The pollution of tidal waters with tyres was the initial cause of action in *EPA v Saunders* (1994) discussed in s 8 Chapter III.
[1957] As described in s 5.3 Chapter II, and the case considered in s 8 Chapter III.
[1958] A suite of legislation where public rights are dominant were considered in ss 3 – 6 Chapter IV.

In this response it is likely that adjoining private landowners and members of the public would be parties, but local councils may also be involved due to their interests as land owner, or Crown land manager, or as an agency responsible for protecting an aspect of the public interest. Conceivably other parties to a dispute over conflicting private and public uses of an area of coastal land could include State agencies with a public interest role, such as fisheries or NPWS, and local businesses that depend on public access to the beach, and whose clientele value it.

Hence this 'balanced' response could more closely resemble mediation, rather than litigation, between multiple parties with diverse interests in using certain coastal lands, which would aim to recognize and include all relevant private and public interests in the balance. The results of the mediation, the 'balanced' outcome, could be formalized through a deed of agreement between the parties or the adoption of a plan of management for the lands as defined.

In this response the location of the boundary between private and public land could be disconnected from prior rules governing the movement of property boundaries and the mediation may involve parties 'agreeing' to a boundary location which is convenient, 'splits the difference' between competing proposals, or reinstating its location prior to the dispute. Hypothetically the parties could agree instead that the property boundary's location does not matter so much, and the public use area could be defined by a mapped easement[1959] which includes both public land and parts of privately owned land.

A 'balanced' response could seek to enshrine the co-existence of private and public use rights in an agreement and seek to integrate a diverse suite of land uses via an agreement, but such an agreement would need to address the potential for competing uses to conflict. One approach could be to 'divide' certain coastal lands and allocate part to public and part to private uses. A second approach could be to institute a 'time-sharing' arrangement in which public uses of the designated coastal lands would continue during agreed hours and days, and exclusive private uses would be permitted at other agreed times.[1960] To 'balance' the use of public easements over private land to allow public access to the beach, adjoining landowners could seek to extend their private uses onto public land. Using these 'balanced' approaches, a great deal of private use of publicly owned coastal lands would be possible. A further approach could seek to balance the diminution of private property rights created by easements for public access with a transfer of development rights to elsewhere on the land title.

[1959] If a public authority agreed to do so under the *Conveyancing Act 1919* (NSW). See s 6 Chapter IV.
[1960] Both these approaches were used by Council at the King Edward Park in Newcastle, but were found unlawful, in *FOKEPI v NCC* [2015]. They are however now lawful approaches under the *CLMA 2016* (NSW). See the discussion of this in s 3 Chapter IV.

In this 'balanced' response private and public interests would contribute equally to the costs of managing coastal lands and maintaining public access to the beach, and this principle would extend to landowners committing to pay half the costs to build and maintain any new seawall. Or, under this response it might be agreed that an approval could be granted to build a privately-owned seawall but a consent condition[1961] could require the beach to be 'nourished' repeatedly, at the wall owner's expense, to ensure a beach continues to exist and be available for public use. Striking a balance between private and public interests could see a State government compulsorily acquire privately-owned coastal lands for public purposes, but enact legislation authorizing payment of compensation at less than market value[1962] in recognition of the costs it would incur in demolishing structures and rehabilitating the site.

13. Accept and accommodate

A less disruptive response would be for a future government to adopt the strong approach to protecting public rights and a very weak approach to protecting private interests.

In this potential response government would accept public use rights in coastal lands as dominant,[1963] acknowledge private interests in coastal lands notwithstanding that they may not constitute 'rights' and accommodate them where this is possible, while protecting public rights. This 'accept and accommodate' approach would state a clear priority of rights and interests to be protected where possible and allow a future government to devise and implement measures to support affected private landowners without being obliged to 'compensate' them.[1964]

In this response the government would implement some or all the policies of the 'strong' and 'stronger' responses above, and take other actions not inconsistent with them, which recognise and accommodate private interests in coastal land by various means, such as by creating a 'transferable development right (TDR). In this way, though dominant, public rights and interests would not negate private interests.

Create a coastal land exchange scheme

One means of achieving both these goals could be the creation of a coastal lands exchange scheme. A future government could recognise shoreline recession as a natural process, which cannot be 'tamed' by engineering[1965] and, to assist residents affected by coastal hazards, begin a

[1961] Conditions may be imposed on development consent under s 4.17 *EPAA 1979*. See s 5 Chapter IV.
[1962] This was the approach employed by the NSW government, cited in *Durham* (2001). See s 10 Ch III.
[1963] Under the property law rules, court decisions and statues considered in Chapters II, III & IV.
[1964] By not formally triggering the *LA(JTC)A 1991* (NSW). See s 6 Chapter IV.
[1965] Or plausibly denied, or wished away as a temporary phenomenon, likely to be soon reversed. These were the responses of local MPs and ministers in the O'Farrell / Baird government 2011-2015.

program of relocating existing development at risk from coastal hazards.[1966] It could, following public consultations, introduce legislation to authorize the creation of a statutory scheme, to encourage the surrender of private land affected by coastal hazards to the State, in exchange for new land titles created by government.[1967]

Under such a scheme when land titles affected by coastal hazards were identified by local councils, currently or in the future, during the preparation of coastal management programs,[1968] the owners of affected land titles would qualify to enter the voluntary scheme.[1969] In exchange for the surrender of their hazard-affected land title, the State government would grant a new land title, to a new allotment, in new residential estate in an approved hazard free location. Public assistance to affected private landowners could be justified as an exchange 'in kind', ie a new allotment to compensate for land lost to the sea, in line with an old common law rule.[1970]

Identifying suitable areas for 'replacement' estates, to relocate the existing at-risk population, and cater for anticipated population growth,[1971] and as part of an overall government response to climate change impacts, would require careful consideration of appropriate locations, to avoid other hazards.[1972] Ideally, preferred locations would optimize existing and planned infrastructure, preserve agricultural land, prevent conflicts with adjoining land-uses and avoid adverse impacts on environmentally sensitive land, including threatened species' habitats.[1973]

If the number of new land titles needed[1974] could not be obtained from existing suitable Crown

[1966] Planned or managed retreat is one of three macro-options canvassed in Australian Government, above n 44, 152. Other adaptation options canvassed were 'protection' and 'accommodation'.

[1967] This idea was first publicly proposed in a discussion paper, John R Corkill, 'Getting real about shore-line recession: time to plan ahead and develop a scheme to relocate threatened coastal communities', (Paper presented at 22nd NSW Coastal Conference, Port Macquarie, 12-15 November 2013). See < http://www.coastalconference.com/2013/papers2013/John%20Corkill.pdf >

[1968] See the mandatory requirements to identify areas at risk when preparing a coastal management program in NSW Government *Coastal Management Manual, Part A,* over immediate, 20, 50 and 100 year planning horizons; s 6 ii 'determine and assess coastal risks, vulnerabilities and opportunities'; and s 8 iii 'identify the key coastal management issues affecting the areas to which the CMP is to apply and how these have been considered'.

[1969] In the recent case, *Boomerang & Bluey's Residents Group Inc v NSW Minister for Environment, Heritage and Local Government, and MidCoast Council No.2* [2019] NSWLEC 202, the residents objected to the identification of their land titles as at risk in the CZMP then in preparation.

[1970] The possible gain of land from the sea to compensate for loss of land to the sea was first discussed by Sir Matthew Hale in *De Jure Maris et Brachiorum Ejusdem* (c 1667), in Moore, above n 37, 396.

[1971] Department of Planning *Far North Coast Regional Strategy 2006-2031* (2006).

[1972] Such as contaminated lands, or from other hazards likely to be made worse by climate change conditions, such as riverine flooding, mass movement, or fire.

[1973] See Appendix 1 –Sustainability criteria in NSW Government, Department of Planning *Far North Coast Regional Strategy 2006-2031* (2006), 45-6.

[1974] Between 40,000 and 63,000 'replacement' allotments would be needed in NSW by 2100, if the assessment of properties at risk in NSW were relied upon. See Australian Government (2009) above n 3, 77-79. Plus an additional 110,000 new dwellings are required by 2031 to cater for anticipated population growth in the Mid North Coast and Far North Coast regions alone, = > 150,000 new lots.

land, and privately owned lands were better located, or had fewer constraints on their development, the government could purchase,[1975] sub-divide them and create new estates and land titles 'at cost', rather than leave this to private enterprise, who may not be committed to achieving wider economic, social or environmental outcomes. A major program of government-led residential development would provide opportunities to apply, as core principles, ecologically sustainable estate layout, water and energy efficient housing design,[1976] use of recycled or recovered building materials and environmentally responsible building practices.[1977] Though they are issues beyond the scope of this thesis, relocating at-risk dwellings and creating new housing estates could also improve the mix of housing types and apply current best practice in locating social and economic infrastructure, and designating adequate 'employment lands'.

Such a land exchange scheme would require overarching legislation to authorize it and initiate processes to identify suitable Crown lands, approve new sub-divisions or settlements, and ensure the development of necessary infrastructure,[1978] but could use existing statutory provisions which permit new land titles to be created,[1979] registered,[1980] surrendered,[1981] or exchanged.[1982]

Because joining the scheme would be voluntarily initiated by the landowner agreeing to exchange land titles under the authorizing legislation, the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) would not apply, and the State government would avoid the liability of the 'just terms' compensation at full market value.[1983] By surrendering their land title the private landowner's responsibility for demolishing structures and decontaminating the land would transfer to the State, as the new owner, and the strict liability for pollution of coastal waters from sources on their private land,[1984] would cease.

[1975] At full market value per *Land Acquisition (Just Terms Compensation) Act 1991* (NSW).
[1976] See the standards for water, energy and thermal comfort in new buildings in the Building Sustainability Index (BASIX) < https://www.planningportal.nsw.gov.au/basix/about-basix >
[1977] Micheal Mobbs, *Sustainable House – Living for our future* (Choice, 1998)
[1978] Under the *Environmental Planning and Assessment Act 1979* (NSW)
[1979] Land titles are generated by the 'creation of a folio' for that land under s 13D or s 17 *Real Property Act 1900* (NSW) New land titles are principally created through the approval of a plan of sub-division pursuant to s 195G *Conveyancing Act 1919* (NSW) for a land title already registered under the *Real Property Act 1900* (NSW) and Registrar-General's registration of the plan and the creation of new folios of the State's Land Titles Register under s 32(4) of the *Real Property Act 1900* (NSW).
[1980] Folios for new land titles are entered into the Register by the Registrar General under s 31B *Real Property Act 1900* (NSW).
[1981] See sections 134, 135 and 137 *CLMA 2016* (NSW).
[1982] See s 34 *CLMA 2016* (NSW).
[1983] This would be apt because no 'real property' would be acquired. See the discussion of this in John R Corkill 'Claimed property right does not hold water' (2013) 87 *Australian Law Journal* 49-58, 56-7.
[1984] Pollution of tidal waters with tyres, contrary to s 27A *Clean Waters Act 1970* (NSW) was the cause of action in *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,656. Pollution of waters, including tidal waters, is an offence under s 120 of the *Protection of the Environment Operations Act 1997* (NSW).

This would be desirable since the State government could oversee, or operate, timely, consistent and effective demolition and clean-up programs, to avoid a legacy of disastrous environmental health and public safety impacts from derelict buildings and abandoned infrastructure.

Critics might assert that no-one would swap a million-dollar coastal property for an allotment worth a fraction of that value. However, after a series of major storms the appeal of a land swap may increase. A more astute analysis may conclude that, even if true today,[1985] that assertion may not hold in the future. If the impacts of coastal hazards and the costs of maintenance increase, and insurance becomes prohibitively expensive or unattainable, and coastal land values fall, the utility or appeal of owning coastal land may diminish. Thus if defensive options were unavailable and land exchange was the only available option, its appeal may increase. The attractiveness of swapping an uninsurable, devalued hazard-prone site, with a weather-beaten, high-maintenance dwelling of compromised structural integrity, and a potentially substantial legal liability, for an allotment in a new, best-practice Crown sub-division, free of demolition and clean-up costs and legal liabilities, could become irresistible.

Entry into the scheme could be encouraged by offering landowners incentive payments to participate,[1986] not linked to market values.[1987] Capped incentive payments would allow Treasury to calculate the costs of the scheme, in contrast to an ongoing, unlimited liability for compensation at full market-value. Incentive payments could assist landowners to meet the costs of moving their residence, if feasible, or demolishing it and building a new better, more space- and energy-efficient dwelling on their new lot.

If incentives were offered at their highest levels for early entry into the scheme,[1988] when the land title was first identified by a local council in its coastal hazard study as likely to be affected by coastal hazards,[1989] the State government would gain substantial benefits. Through early surrender of land, government would obtain a larger area of shrinking land title, have greatest flexibility in permitting appropriate revenue-generating interim uses, such as short term rental, and longer lead time to assess, organise and conduct demolition and clean-up. When short term

[1985] Such a view is contestable, since there are many houses at risk which have been for sale for some time eg Wooli village. This may indicate that the owners cannot find a buyer at the price sought.
[1986] Incentive payments would accord with ESD principle (d) 'improved valuation, pricing and incentive mechanisms'. See s 6(2) *POEAA 1991* (NSW).
[1987] since they would not be 'compensation' as such.
[1988] Say, $100,000.
[1989] Consideration of coastal hazards impacts was required when preparing a coastal zone management plan. See s 55C *CPA 1979* (NSW). Impacts of coastal hazards must be considered and maps of affected areas are required when preparing a coastal management program. See s 15(3) *CMA 2016* (NSW). See also *Our Future on the coast… NSW Coastal Management Manual Part B* s 1.5, 7-9.

commercial uses become inappropriate, public benefits could be secured by dedicating the land for conservation and recreational uses, until it becomes unsafe for these uses to continue.[1990]

With lower incentive payments for late entry into the scheme,[1991] when the area of land surrendered would have been reduced due to tidal waters intrusion, and the State obtained no advantage from interim commercial uses, or flexibility in assessing and organising timely demolition and clean-up, landowners might be motivated to join the scheme sooner, rather than later. Landowners who chose not to participate would be free to do so but would receive no assistance, and eventually may have no land title to sell or exchange.[1992] They would bear the demolition and clean-up costs or face the strict legal liability for any pollution of tidal waters which came from their land while it was being lost to the sea.[1993]

Transferable development rights could provide flexibility

A further incentive to enter the scheme could be to use an idea from the weak private property response, and create a transferable development right (TDR) for approved structures, such as a dwelling, on land voluntarily surrendered to the State. Such a TDR would recognize the consent – which would continue to be valid - as 'property' and allow its severance from the site.[1994]

A TDR for a dwelling could be relocated on existing free-hold land, or linked to a new land title generated under the scheme. This would expedite any final approval process and allow lawful residential occupation to continue, albeit in a new location. Such a TDR could also be sold to another landowner, or acquired by a local council, or the State government.

14. Advantages and disadvantage of these responses

An entirely different suite of advantages and disadvantages flow from these potential responses of 'balancing' private and public rights, and 'accept and accommodate', where possible.

14.1 Advantages

The advantages of the 'balancing' response would be limited. One advantage would be its

[1990] A reduced 'incentive payment' of, say, $50,000 could be paid for a delayed entry into the scheme, where the Crown retains some flexibility on demolition and clean up, or if a substantial area of land is surrendered, enabling some revenue generating interim uses and/or dedication for public purposes.
[1991] Say, $10,000.
[1992] Lands below MHWM cease to be land for the purposes of the *Real Property Act 1900* (NSW) and title to that land reverts to the State government. See *Environment Protection Authority v Leaghur Holdings PL* [1995] 87 LGERA 282, 287 (Allen J).
[1993] See *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655, 13,661.
[1994] See the suggested use of TDRs in John Sheehan, et al, 'Coastal climate change and transferable development rights' (2018) 35 (1) *Environmental and Planning Law Journal,* 87, 96. See also Peter Williams, 'The Curious Case of Property Rights in the NSW Planning System and Its Reluctance to Adopt Transferable Development Rights' (2012) 17 *Environmental and Planning Law Journal* 61.

appearance of 'fairness', since neither set of 'rights' would dominate the other as trumps. Another advantage would be the avoidance of an adversarial approach to dispute resolution common in court proceedings and the absence of litigation costs. Under this response it is possible that the interests of a range of parties to the dispute could be considered and addressed in resolving the dispute. There would be few, if any, other advantages to this response.

A primary advantage of the 'accept and accommodate' response would be its consistency with the normative elements of property law in which public rights are dominant.[1995] Another major advantage would be its clear signal to the community: that public rights have precedence, but private interests would be recognised and accommodated where possible. Major advantages would be that public use and ecological functions of beaches and other intertidal habitats, and associated social and economic activity, would continue uninterrupted, while disruption of existing property law, would be minimal.

The 'accept and accommodate' response would reflect Freyfogle ethical approach since it would properly consider physical and temporal issues but would better address impacts across the whole social community by assisting adversely affected private landowners, where feasible.

This response would allow flexibility for government in its spending to achieve its policy goals. Long-term funding would not be 'locked in' to maintain and upgrade sea defences, or buy out landowners and public funds could be allocated to respond to changing circumstances.[1996]

A future government could gain support for this response from the diverse public who use the coast, and from beachside residents, and obtain an electoral advantage by being seen to champion public rights while also accommodating private interests, where possible. By avoiding the social division in coastal communities likely to arise if a future government only focused on protecting the private property of waterfront residents, with adverse impacts on a larger group of non-resident beach and coast users, the potential for electoral back-lash might be minimized. The proposed land exchange scheme would have the advantage of reducing political risks to the government, since landowners affected by coastal hazards would not be abandoned, and though they would not be paid for their land, they would be compensated 'in kind' and receive payments to assist their relocation. The advantages of this response for non-resident coast users would be retaining public access to the foreshore and ensuring coastal lands and waters are safe for public use, despite climate change impacts.

[1995] Under the property law rules, court decisions and statues considered in Chapters II, III & IV.
[1996] This would heed the warning against being locked into an ever increasingly expensive cycle of construction and defence, in Cooper and McKenna, above n 123, 304, discussed in s 6.2 Chapter V.

Further, concerns about public funds being diverted from essential programs or re-distributed into private hands for no public benefit, would also be minimized. Though the costs of publicly funding a land exchange scheme and rendering surrendered lands safe are not known, the scheme may have the advantage of costing less than acquiring land on 'just terms'.[1997] Hence a distinct advantage of this response would be that for limited public expenditure, long-term threats to public safety, public health and the health of coastal environments, from deteriorating derelict structures, would be avoided.

The advantages to private landowners under this response would be more modest than under a response which gave weak or robust protection to private property rights, but the level of public funding and other assistance available to landowners would likely be greater than that available under a strong or stronger pro-public rights response, or from litigation.

This response would also have an advantage of creating a range of social and economic benefits. Coastal tourism, recreational and commercial fishing industries would not be 'squeezed' and face decline and eventual collapse. New infrastructure would be built and existing residential infra-structure would be better utilized. Implementing the scheme would boost employment and economic growth in regional areas. Under this response it would also be possible for the energy efficiency and sustainability of the State's housing stock to be improved, the mix of housing types to be diversified, and house prices to be unaffected by scare supply and high demand.

14.2 Disadvantages

Consistent with their divergent objectives, there are major differences in the disadvantages likely to result from these potential responses.

The 'balancing' response has many disadvantages. A major weakness is its inconsistency with the normative elements of property law discussed above.[1998] Since it would change the status quo, the government's message of 'balance' may not be well understood, or accepted. Stating a credible rationale for revoking private and public 'rights' and explaining the new system's operation would be needed, but difficult, and may not be effective in mobilizing public support. A major disadvantage would be the difficulty in preparing and enacting the comprehensive legislation required, to repeal the status quo, create the tribunal and new statutory framework in which conflicting 'use rights' might be 'balanced', train arbiters on how to achieve this 'balance', and restore or modify it, if the prior 'balance' is upset. Another disadvantage would

[1997] A direct comparison of costs is not possible without a detailed economic study. However, the value of residential buildings in NSW potentially affected by a 1.1m sea level rise and a 1 in 100 year storm was assessed as between $12.4 billion and $18.7 billion. See Australian Government, above n 44, 77.
[1998] The property law rules, court decisions and statues considered in Chapters II, III & IV.

be that public rights would have less weight and private rights more than under current law. Other serious drawbacks would include the costs of creating a new system, and the confusion and serious disruption likely to occur until the enabling law had been enacted and implemented.

An obvious disadvantage of this response is that it would provide little or no guidance in resolving future disputes between conflicting private and public uses. Since every dispute would focus on the particular circumstances, not theory of dominant 'right', the 'balance' of interests achieved to resolve one dispute would not apply in resolving other disputes. Where the boundary was located, whether and where a seawall could be built, and which uses of coastal land would be permitted would be decided by an arbiter on the basis of facts and evidence of actual practice reported by the parties, not theoretical arguments. Resolving disputes by achieving a 'balance' of the parties' competing uses could be complicated by difficulties in assembling adequate evidence, inconclusive results, extensive delays and cost blow-outs. Due to coastal lands' dynamic nature and changing social and economic uses, it is likely a 'balance' could be upset, so additional disadvantages of this response would be the likelihood that many 'balances' would be needed over time, and earlier mediations would be of limited value.

A further disadvantage would be the likelihood that only recent and current uses of the land in dispute would be considered, not its use by future generations. Thus other disadvantages of this response would be its lack of long-term perspective, overstates benefits, underestimates impacts and undervalues costs into the future,[1999] in an attempt to 'balance' competing uses. Hence, the 'balancing' response appears to reflect the 'wrong' philosophical approach flagged by Freyfogle[2000] since the parties' uses would be considered, and the land's characteristics, its wider social community including future generations, and ecological community would not.

There appear to be a few disadvantages to the 'accept and accommodate' response. For land-owners affected by coastal hazards the main disadvantage would be that they would not get the response they wanted. As a result they could create an electoral backlash to disadvantage the government. However this disadvantage could be minimized and the reaction tempered if assistance was provided to affected landowners, with the support of non-resident beach users.

The costs of creating and operating a land exchange scheme would be a major disadvantage of the 'accept and accommodate' response but the public funds needed to implement such a scheme could create substantial public benefits that would be otherwise unachievable.

This concludes my exposition of responses. Next I summarise and begin to compare them.

[1999] The defects in estimating costs and benefits were recognised by Cooper and McKenna, above n 123, 302, discussed in s 6.2 Chapter V.
[2000] See Freyfogle, 'Ownership', above n 193, 1278-1283.

Part E. Discussion

In this Part I tabulate the responses' policies on key issues and make some preliminary observations on them, preparatory to my evaluation of their merits in the next chapter, VII.

15. Summary of potential responses policies

A summary of potential responses policies on key issues is shown in Table 6. below.

Response ISSUE	**1] do nothing**	**2] weak** pro-private	**3] robust** pro-private	**4] strong pro-public**	**5] stronger pro-public**	**6] balanced**	**7] accept + accommodate**
Location of boundary	Remains ambulatory boundary of MHWM	Frozen at current position by new statute no longer ambulatory	New statute revives original position, even where < MHWM or < LWM; declares not ambulatory.	Affirms ambulatory boundary of MHWM by new declaratory statute	Raises ambulatory boundary to MHWS or HAT by new statute	Remains ambulatory boundary of MHWM	Affirms or raises ambulatory HWM by new statute
Ownership of land which falls <MHWM	Reverts to the State as owner of foreshore under common law	Reverts to State, who admits gain of private land <MHWM: acquire + compensate	Remains privately owned / may be reclaimed as property right under new statute	Affirms reversion to the State via new declaratory statute	Affirms reversion to the State via new statute	Reverts to the State under common law unless changed by statute	Affirms reversion to the State via new statute
Right to defend? Build seawalls	No. Yes. Only with developme nt consent.	Yes. Yes. No developme nt consent required.	Yes. Yes. No developme nt consent required.	No. Not preferred. Only with development consent.	No. Not preferred. Only with development consent.	No. Possible. Only with developme nt consent.	No. Not preferred. Only with development consent.
Compensat ion payable	No. Not payable for lands lost to the sea, under common law	Yes, at 'market value' for lands lost to the sea via new statute	Not preferred but Yes at 'market value' per statute	No. New statute law confirms not payable for lands lost to the sea	Yes, 'market value, for ribbon of land when raising HWM, or less if special Act	No. Agreement balances uses, no change to ownership	No. 'In kind' assistance provided, to expedite relocation of at risk residents + residences
Public funding	Yes Court costs	Yes Co-fund seawalls Acquire land <MHWM	Yes Build upgrade seawalls for private land Acquire land title as last resort	Yes Provide public access Acquire land title if rec	Yes. Plan / prepare for climate impacts Improve public access Raise HWM, acquire land	Yes if in agreement 'balancing' uses; May need 'balancing' payment by landowners	Yes As 4], 5] + Land exchange scheme, i/c demolition, site clean up
Likely cost	low	high	very high	moderate	high	mod - high	very high
Other policies	nil	Reduce public rights Restrict area available	Repeal public rights Sell public land Revoke easements	Create TDRs	Enact new public rights; Require higher EIA standard; Widen veg sp protected; Create TDRs, 'rolling' easements	Multi-party managemen t agreement	Per 5] Stronger + Land exchange scheme Demolition and site clean-up of surrendered land

Table 6. – Summary of potential responses' policies on key issues

16. Preliminary observations on these potential responses

From the exposition above is apparent that a diverse suite of policy responses to future conflicts over coastal land use would be available to a future NSW government. The merits of these various potential responses are evaluated next in the chapter, using the criteria identified in the last chapter, as ethical decision-making about land use, and as successful public policy. However some preliminary observations might be made here on their similarities and differences.

Not all potential responses would be easy to justify using the rationale of a greater public good, as it is presently understood, in order to win public support and gain the legislature's approval. Nor would they all be equally easy to achieve through the passage of necessary legislation. Further, the disruption to existing property law they would generate would also differ greatly. Relatedly, the time required to implement each potential response would vary markedly. The passage of legislation to apply the strong pro-public response, might be achieved in a matter of months, but more complex, disruptive responses which seek to reverse the status quo, enacting and implementing relevant legislation may take some time, even years. A 'do nothing' response which leaves disputes to the courts, would likely see litigation continue for many years.

Major differences in social impact arise from these potential responses, on private land owners, on members of the public and on the government itself. Those responses privileging private property rights of beach residents, would benefit a comparatively small number of people, while disadvantaging a larger group of non-resident beach users. Responses which sought to protect or enhance public rights would reverse this ratio of benefits and disadvantages. The balancing, and the 'accept and accommodate' responses would also vary in their social impacts, and produce different distributions of benefits and costs entirely.

The ecological impacts and implications of these responses would likely be polarized. Potential responses which would privilege private property rights and permit seawalls to proliferate, would produce, through the resultant 'coastal squeeze', significant immediate, ongoing and long-term impacts on coastal environments.[2001] Other responses which would facilitate the natural retreat of the beach and shoreline, would minimize or prevent such adverse impacts. Responses which sought to enhance the public interests, more broadly defined, would most likely allow, or create, conditions conducive to biodiversity persistence in coastal environments, and effective ecosystem functioning, under climate change conditions.[2002]

[2001] Such as the sandy beach, mangroves, salt marshes and seagrasses. See the discussion of this in Chapter I.
[2002] This would align with the principles of ESD, and Objects of the *CMA 2016* (NSW) discussed in s Chapter IV.

These responses would have different economic impacts, affecting private property owners, members of the public, beach-based businesses, coastal industries, local councils and State government, in different ways, to different degrees. As noted above, an economic analysis of the costs and benefits of these responses would be desirable but is beyond the scope of this thesis. Nonetheless it can be observed that, since economic activity in coastal cities and towns relies on stability and predictability, responses which generate instability and disruption, or exhaust key natural resources, eg beaches, would be likely to create economic shocks, and adverse impacts on local, and State, economies.[2003] All these responses would require some public funding but, as a competent comparative economic analysis would show, each would involve different costs and varying totals of expenditure, from public funds, and from private landowners. As well as different total commitments of public funds, these responses would differ in the cost-effectiveness of the public spending, in preventing or resolving future conflicts, or preparing for climate impacts, and in their redistributive effects. They also differ in their effect on future government spending. Some would allow great flexibility, others would 'lock in' long-term funding to repair and maintain coastal defensive structures for decades. [2004]

Though characterized as a set of potential responses of government to climate impacts and conflicts between private and public rights, these hypothetical responses are only illustrative. A future government could combine elements of any response, in the public policy they adopt.

17. Conclusion

In this chapter I have provided an exposition of a diverse suite of potential responses by a future State government to conflicts between competing rights to use coastal lands, as a first step in anticipating the likely legal framework in which these conflicts will be decided in the future.

In the next chapter I evaluate the merits of these responses, to determine which has greatest merit in resolving future conflicts between competing rights over use of coastal lands, and in addressing the climate impacts which frame them.

[2003] This potential for 'knock-on effects' on economic activities was recognised by Cooper and McKenna, above n 123, 301, as discussed in s 6.2 Chapter V.
[2004] Despite the warning to avoid this, given by Cooper and McKenna, above n 123, 305.

**"Time is more complex near the sea
for in addition to the circling of the sun
and the turning of the seasons,
the waves beat out the passage of time
on the rocks and
the tides rise and fall as a great clepsydra."**

John Steinbeck *Tortilla Flat* (1935)

Chapter VII – Evaluating potential responses

Introduction to Chapter VII

In the last chapter I outlined a diverse suite of potential responses by a future government to disputes between competing private and public rights. In this penultimate chapter I assess the merits of these potential responses, as a key step in estimating the likely policy environment of the future. These assessments and this estimation will allow me to formulate, in the final chapter, an appropriate answer to my research question: 'Will private property rights 'trump' public rights in coastal lands, under climate change conditions?'

In Part A, I restate the two sets of criteria identified in Chapter V, and reiterate the method of assigning scores in my assessments of the suite of potential responses, against these criteria.

In Part B I draw on the property theory, common law responses, statutory responses considered in Chapters II, III and IV and my knowledge of and experience in political decision-making in New South Wales, to assess each potential government response's satisfaction of the criteria, and award it a score. A summary of results is shown in Table 7, s 10 of this chapter.

In Part C, I discuss the responses' satisfaction of the criteria adopted in Chapter V, summarise their performance, make observations on their merit and ranking, and draw key conclusions.

In the next and final chapter, VIII, using the results of this merits appraisal, I make political assessments of which response a future State government would be 'most likely' to adopt using three political criteria. With this estimate of a NSW Government's likely public policy position in the future, and insight into the feasibility of the theoretical option of reversing the status quo, I then state an answer my primary research question which makes sense in practice.

Part A - Recap on assessment criteria and scoring method

In this Part, I briefly restate the assessment criteria adopted and the method of assigning scores.

1. Re-statement of assessment criteria

Ten criteria in two sets were identified from the literature reviewed in Chapter V for use in assessing the merits of potential responses: criteria for ethical land management;[2005] and criteria for successful public policy.[2006]

Ethical land management

Five criteria for ethical land management were identified. They ask one focus question: how well would the likely impacts on the following matters be considered, under these responses?

i] the land's **physical characteristics**, features, limits, carrying capacity and location in the landscape;

ii] the **social community** of neighbours, adjacent, downhill, down-stream, or downwind, non-owner residents nearby, members of the public, and future generations;

iii] the **ecological community**, those diverse forms of non-human life inhabiting that area of land and adjoining environs, including native plants and animals, and introduced species ;

vi] a **temporal perspective**: any long term opportunities, threats, impacts or costs likely to be generated or accumulated over time, including over many generations;

v] the contribution towards **key social goals**: e.g. restoring land health, abating land ills.

Successful public policy

Five criteria were also identified from the property theory, case law, statutes and literature considered above for evaluating the merits of responses as successful public policy, and a suite of related focus questions were developed for each criterion.

I] **Public interest rationale**. How would this response be in the public interest? Will it solve a social problem, or contribute to the 'greater good'? What is its rationale? How easy is it to justify?

[2005] from Freyfogle, 'Ethics', above n 201, 631 – 661; Freyfogle, 'Owning', above n 310, 279-307.
[2006] drawn from Cooper and McKenna, above n 123, 294-306, Freyfogle, above n 201, and others eg Althaus et al, above n 162.

II] **Timeliness**. Is the response timely? Delayed, rushed or ill considered? Has time to consult been factored in? How long will it take to implement? Are there long term implications, costs?

III] **Cost-effectiveness.** Are the public funds, and public officials' time, spent implementing this response 'value for money'? How well do they achieve priority public goals?

IV] **Minimal Disruption.** Would the response minimize disruption? Or create unforeseen impacts or costs? What time and effort would be required to enact and implement the policy?

V] **Credibility**. Would the response be seen as credible by the public or other stakeholders in coastal management? Is it consistent with the latest scientific research and expert opinion? Would it foster or frustrate 'best practice' coastal management?

Next, in Part B, I assess the likely capacity of each potential response to satisfy these criteria. However it is appropriate to first describe my method of scoring responses against the criteria.

2. Method of assigning scores

As described in section 15.5 in Chapter I, I employ a blend of deductive and inductive reasoning to assess each response against each criterion. Reflecting on the advantages and disadvantages of the potential responses identified in Chapter VI, and using the criteria's designated focus questions and the four considerations described in section 15.4 in Chapter I:

i] whether it is foreseeably possible that the criterion could be satisfied;
ii] if so, in what ways, to what extent and how well;
iii] whether its satisfaction might be logically indicated, or contra-indicated, and
iv] whether there are foreseeable obstacles to satisfying the criterion under that response;

I assign a score for the response's satisfaction of each criterion.

A score of 1.0 is awarded for full satisfying a criterion and partial scores are assigned for lesser satisfaction, using the scale shown in Table 3 in Chapter I, section 15.5 above.

However these raw scores are adjusted by applying the weight assigned to each criteria. Due to their primary importance, scores against the criteria of 'physical characteristics' and 'public interest rationale' are weighted x 1.0, and scores against all other criteria are weighted x 0.8.

The raw scores, weighted scores against each criterion and final total scores of all responses are shown in Table 5. – Summary of results, in section 11 below, and are discussed in Part C.

Part B - Evaluation against derived criteria

In this Part I comment on how well each response would likely satisfy the two sets of criteria, refer to correlating elements of existing property theory and property law described above,[2007] and rate the level of satisfaction with an appropriate score. These raw scores are shown in the sub-heading for each criterion as *[score x / 1.0]*.

At the end of each response's evaluation its satisfaction of both sets of criteria is summarized. The responses' raw scores are then adjusted using the weight assigned to the criteria, to produce a weighted score. These ten weighted scores are then aggregated to generate a final total score. (See Table 7, in Section 10 of this Chapter)

3. No response by government

The first potential response I consider is:

1] a 'nil response' by government: no legislative action would be taken; the courts would arbitrate conflicts between private and public rights using current law and legal rules.

Initially I considered commenting on the courts' capacity to satisfy these criteria but decided that the likely decisions of the courts were not relevant to my focus on the merits of future Government's responses. Hence reviewed below is a Government's 'do nothing' response.

a] Ethical decision making about land

This response performed very poorly against these criteria.

i] Physical characteristics [0.0]

A nil response would not indicate that the physical characteristics or condition of land affected by coastal hazards had been properly considered by the Government, or by the Legislature.

ii] Social community [0.0]

A failure by government to respond to the potential for social conflict between competing private property rights and public rights to use coastal lands, brought on by rising sea levels, would not demonstrate a consideration of the present social community, or future generations.

[2007] Agreed elements of property theory regarding the origin, nature and extent of private property rights over land, and the existence of public property and public rights were discussed in Chapter II, the common law rules used by the courts regarding the nature and location of real property boundaries formed by tidal waters, the ownership of land below MHWM, the courts' rulings that there is no right to defend and no right to be paid compensation for loss of land to the sea, were discussed in Chapter III, and current statutory provisions which recognise the dominance of public rights and apply them coastal lands and waters were discussed in Chapter IV.

iii] Ecological community [0.3]

A nil response would not exhibit proper consideration of impacts on coastal ecological communities. Absent any new legislation, impacts on the ecological communities of coastal land,[2008] or the quality of tidal waters,[2009] would probably be no better considered in future decision making than currently.[2010]

iv] Temporal perspective [0.0]

A failure to respond to global climate change would not reflect an understanding by government of the effects of natural processes on coastal land, over geological time.[2011] Nor would it anticipate the likely future impacts of climate change on adversely affected coastal land.[2012]

v] Key social goals [0.0]

A nil response by government would not achieve the key social goals of ethical landownership nominated by Freyfogle: the restoration of land health and amelioration of 'land ills'.[2013] Hence this response would satisfy only one ethical land management criterion to a minor degree.

b] Successful 'public policy'

A 'nil response' would also score very poorly on successful public policy criteria.

I] Rationale [0.0]

By doing nothing, a rationale explaining its 'social utility' and contribution to 'the greater good' would not be required. However, the government would still need to justify this lack of action.

II] Timeliness [0.0]

The lack of any response by government would not be timely.

III] Cost-effectiveness [0.0]

The cost-effectiveness of this response would be moot, because it would not spend public funds: even to protect public rights and interests in coastal land, from climate change impacts. Where

[2008] Consideration of potential impacts of development on Threatened species is required under s 7.12 of the *Biodiversity Conservation Act 2016* (NSW) section 5.7 of the *Environmental Planning and Assessment Act 1979* (NSW), and s 221 of the *Fisheries Management Act 1994* (NSW).
[2009] See *Environment Protection Authority v Saunders* (1994) 6 BPR 13,655 discussed in Chapter III.
[2010] Though the impacts of development on the ecological community ought to be considered in a proposal's EIS, the ecological impacts of climate change may be under-estimated or poorly considered.
[2011] For example loss of land to sea is well known to coastal geographers: see Chapman et al, above n 96.
[2012] Increased coastal erosion and tidal inundation, leading to shoreline recession, according to Church, et al, above n 44, discussed in s 2.4 Chapter I.
[2013] See Freyfogle, 'Owning Nature', above n 1480, 158 – 177.

government legal expenses to defend actions brought by a non-government party, were publicly funded, this spending would be unlikely to represent good value for 'public money'.

IV] Minimal disruption [1.0]

A lack of response by government would mean minimal disruption and an absence of transition costs. This is the only criteria which this response would be likely to satisfy.

V] Credibility [0.0]

It is unlikely that this response would be seen as credible by the public, or other stakeholders. A 'do nothing' response would not be consistent with the latest research warning of serious impacts from climate change,[2014] or expert opinion on appropriate actions to address them.[2015] This response would not be seen as fostering best practice in coastal management.

Hence this response would probably satisfy only one criterion for successful public policy.[2016]

4. 'Weak' pro-private property rights response

In this section I consider

2] a 'weak' pro-private property response which would privilege private property rights as dominant, and compensate the private owners at full market value for coastal land lost to the sea.

a] Ethical land management

This response would perform poorly against the criteria for ethical land management.

i] Physical characteristics [0.2]

It is likely that a 'weak' pro-private property response by a future government would not consider the physical characteristics and condition of land in its decisions. The focus on protecting privately owned 'real property' and property 'rights' would be asserted at an abstract level, in which individual characteristics of land would be thought largely irrelevant.[2017] Building defensive structures such as seawalls, under this response, could however imply

[2014] The erosion and inundation of coastal lands, due to sea level rise and increased storminess, forecast by IPCC, above n 7, and Church, above n 44, discussed in Chapter I.
[2015] See the four broad approaches to rising sea levels and receding shorelines discussed in s 3 Chapter I.
[2016] It would not be appropriate to assess the possible satisfaction of these criteria by the courts, through the process of extensive litigation foreshadowed as part of this potential response. The decisions of the court do not fall within the definition of 'public policy'.
[2017] This would be consistent with the critique of property theory that in conceptualizing land as 'real property' to commodify it, land is stripped of its special values and 'dephysicalised.' See Freyfogle, 'Ethics', above n 201, 643-9, Graham, above n 235, 7, 182-4 discussed in s 3.2 Chapter II.

recognition of the features of the land, including the hazards affecting it, and its condition,[2018] but would not demonstrate an understanding of the long-term geomorphological processes underway,[2019] or the physical limits to land use they create.

This response would fail to recognize that lands increasingly affected by coastal hazards are unsuitable for long-term residential occupation, because sea levels are predicted to rise for centuries,[2020] with effects lasting for millennia.[2021] Recognising the physical characteristics and condition of land would be key to its market valuation, in any scheme to buy private land.[2022] However the only physical feature likely to be considered relevant for entry into the scheme, would be whether the land title has been identified by the local council as affected, or likely to be affected, by a coastal hazard.[2023]

ii] Social community [0.1]

In this 'weak' response the property rights of one part of the social community, the private beachfront landowners, would be paramount over the interests of nearby landowners, residents or members of the public.[2024] However, because this policy is contrary to existing elements of property theory and property law,[2025] and would seek to reverse the status quo, comprehensive legislation would be needed to implement it.[2026] Where consent authorities, or landowners build sea defences along MHWM, this would create 'coastal squeeze' for the social community, and as a result future generations of non-resident beach users would be denied access to the beach.[2027] Further this response would not help resolve conflicts between adjoining landowners over their individual property rights to protect and enjoy their private land.[2028]

iii] Ecological community [0.0]

Ecological impacts would be unlikely to be closely considered under this response. [2029] In this

[2018] As identified in a Coastal Zone Management Plan (CZMP) or Coastal Management Program (CMP) and shown in planning certificates for land titles, required by s 10.7 *EPAA 1979*, discussed in s 5 Ch IV.
[2019] Erosion and inundation of coastal lands due to sea level rise, was discussed in s 3 Chapter I.
[2020] IPCC, *AR5*, above n 7, 12.
[2021] Pittock above n 8, 125, discussed the potential for rapid melting and ice sheet disintegration and concluded that if the Greenland and West Antarctic ice sheets 'more or less completely melted' the world could experience 'sea level rise of up to 10 to 12 metres lasting for millennia'.
[2022] The 'beach-front' location would be a factor in assessing the full market value of compulsorily acquired private land, to award 'just terms' compensation under the *LA(JTC)A 1991*. See s 6 Ch IV.
[2023] In a CZMP, CMP or planning certificate issued under s 10.7 *EPAA 1979.* See s 5 Ch IV.
[2024] This was one matter considered in Cooper and McKenna, above n 123, discussed in Chapter V.
[2025] The property rules and common law decisions and statutory provisions which recognise the dominance of public rights, discussed in Chapters II, III and IV.
[2026] For eg to remove the current requirement under s 3 *CMA 2016* for coastal lands management to be consistent with the ESD principle of 'intergenerational equity', discussed in s 4 Ch IV, s 6 Ch V.
[2027] See explanation of this problem in s 3.3 Chapter I. See also Pilkey and Young, above n 108, 165-6.
[2028] See the outline of possible litigation between private landowners explored in s 2 Chapter VI.
[2029] The ecological impacts of coastal squeeze created by constructing permanent seawalls and the related impacts on public access to the foreshore and coastal waters were discussed in s 3 Chapter I.

anthropocentric analysis only humans would have 'value' and eco-centric ideas of 'rights' or interests of other species would likely be thought foreign, inferior and irrelevant. Thus the ecological impacts created by building seawalls on receding shorelines, on inter-tidal species and nearshore environments, even if recognised, would not be important considerations.

iv] temporal perspective [0.0]

Ignoring the historical effects of the geo-morphological processes at work would appear to underpin the 'weak' pro private property response, and it seems improbable that a realistic appraisal of coastal hazards' effects over time[2030] would be considered under this response. More likely points of temporal focus would be the present, particularly in defining property boundary location of MHWM, or restoring the boundary to its prior location in the recent past. Thus temporal considerations about future climate impacts and future public use would likely be ignored or deemed irrelevant.

v] key social goals [0.0]

This 'weak' response may appear aimed towards the goal of land health, where seawalls seek to cure the 'land ill' of coastal erosion. However it would be difficult to sustain this view after analysis of the literature on the adverse impacts of hard seawalls.[2031] This point will be further considered in my assessment of the 'stronger' pro-private property response below.

However, two points might be usefully made here. The first concerns the meaning of 'land ills'. Freyfogle characterized 'land ills' as those activities that were antipathetic to 'land health'. He included increased erosion and more flooding, among others, attributing cause and culpability for these 'ills', to poor land management by owners or managers.[2032] Shoreline recession is not however due to human mis-management of land, but natural processes that have been underway for millennia. Thus it would be inappropriate to characterize it, or coastal erosion, as 'land ills'.

The second is that for a sandy beach and dune system 'land health' means the continuation of complex, highly dynamic, functioning natural eco-systems. Allowed to retreat, beaches and dunes would likely survive sea level rise and increased storminess.[2033] Backed by 'permanent'

[2030] For example the effect of sea level rise on coastal land by the current planning horizon of 2100. See IPCC, above n 7, 12 discussed in s 3 Chapter I.
[2031] Impacts of seawalls on ocean beaches were discussed in Chapter I.
[2032] Freyfogle, 'Eight', above n 202, 791.
[2033] See Figure 10.12 in s3 Chapter I. This was the conclusion of Cooper and McKenna, above n 123, 301, discussed in s 7 Chapter V.

seawalls, it is certain that before long the beach will be permanently lost.[2034] Thus more seawalls, to defend property boundaries, would be inconsistent with the goal of land health.

Hence this response would only consider a sub-set of relevant facts about the physical characteristics of coastal lands and would be unlikely to satisfy other ethical land management criteria.

b] Successful 'public policy'

This potential response also faces serious challenges in satisfying the public policy criteria.

I] Rationale [0.1]

One major difficulty of the weak response would be articulating a convincing rationale, which explained why it was in the public interest. Justifying on a 'greater good' basis, the repeal of existing elements of property law[2035] to reduce public rights to use coastal lands and waters, where they conflicted with private property rights would be difficult, perhaps impossible. Though it is likely that a future government might claim that protecting private property would be in the public interest, the logic and credibility this claim would be questioned by the public and cross-bench legislators.

Two contexts where this rationale might be advanced can be imagined. In the first, the loss of public rights would be limited to specific areas, or circumstances, so that regulated public uses of coastal lands and waters would be permitted elsewhere, albeit in a relict form. A second context could be a 'trade-off', where loss of public rights to access the beach adjacent to private land, would be justified by a new initiative in a 'package' of great 'public interest', eg a new coastal national park, where public access to coastal lands and waters would still be available.

Though these contexts exist theoretically, whether this 'weak' pro-private response would satisfy the criterion of public interest 'rationale' would depend on the quality of the advocacy, the scope of the 'trade-offs', the plausibility of the Government's arguments to justify it.

II] Timeliness [0.1]

By allowing seawalls to be built without development consent,[2036] this response could be seen as making 'timely' preparations for the forecast impacts of coastal hazards, satisfying the 'timeliness' criterion. However by ignoring the extent of likely impacts on coastal lands from

[2034] Pilkey and Young, above n 108, 166.
[2035] For example by repealing s 27 *CMA 2016* to abolish the prohibition on development consent for seawalls if they unreasonably limit public access to and along the beach, or pose a risk to public safety.
[2036] As per amendments to the *CPA 1979*, made in 2010, 2012, now repealed, discussed in s 4 Chapter IV.

centuries of rising seas,[2037] and not relocating development away from lands affected by coastal hazards, while there is time to do in an orderly manner,[2038] this response would not be 'timely'. Since reversing the status quo would be required,[2039] hold-ups enacting the enabling legislation and long delays in its implementation are foreseeable, due to the need to create new procedures and retrain staff. These factors would all adversely affect the likely 'timeliness' of this response.

III] Cost-effectiveness [0.0]

Spending public funds to protect private land or to purchase private land affected by coastal hazards at full market value, might be difficult to justify as 'cost-effective' public expenditure, since it may provide little or no public benefit, and incur additional non-financial costs to the public and wider social community, through the loss of public access and use of the beach.[2040] Further, because it is contrary to existing elements of property theory and law,[2041] and would require the reversal of the status quo, this response would likely create unproductive costs transitioning to the new system of dominant private property rights. Moreover, though protecting private land might become a goal of 'public policy' under a future government, which theoretically 'legitimated' spending public funds in ways which limited or extinguished public rights, this would not be seen by the public to be 'good value for money'. Public funding of this kind would convert the value of public spending on defensive works into increased value of the 'protected' private land, and reduce the funds available to the government to pursue other 'public goals'. Hence the weak response would not satisfy this criterion.

IV] Minimal disruption [0.0]

To implement the weak response, and privilege private property rights, the status quo would need to be reversed,[2042] through enactment of comprehensive legislation which repealed existing property law rules, common law doctrine and provisions of legislation and declared new law consistent with its policies eg freezing the location of real property's seaward boundary. Announcing this policy of reversal would create major disruption to existing practices and expectations of property law, and until relevant legislation was enacted and became operational, confusion and uncertainty would be likely. However, if the government could not obtain a majority in the Legislature Council to enact enabling legislation, reversing the status quo would

[2037] The erosion and permanent inundation of coastal lands by tidal waters, as discussed in s 3 Chapter I.
[2038] In accordance with the retreat option, shown in Figure 6 in Chapter I.
[2039] Due the total inconsistency of this response with existing elements of property theory, property law rules and rulings, and statutes in which public rights are dominant, discussed in Chapters II, III and IV.
[2040] These were core concerns of the court in *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207.
[2041] The norms, rules, decisions and statutory provisions where public rights are recognised as dominant, and intended to continue to be dominant in the future, described in Chapters II, III and IV.
[2042] The status quo in current NSW law, where public rights to access and use the foreshore are dominant over private property rights, was described at the conclusion of Chapter IV.

not be possible and disruption would be sustained. If enacted, implementing this response would need to promulgate new rules, make new institutional arrangements and re-train government agency staff, remedy unintended effects, minimize hidden costs and overcome unforeseen delays. Thus this response would be very disruptive.

V] Credibility [0.1]

Since it abandons existing property theory and property law,[2043] ignores the IPCC's warnings on climate change impacts[2044] rejects expert opinion on how to address coastal hazards,[2045] and allowing ad hoc seawalls would be inconsistent with 'best practice' in coastal management,[2046] the public and other stakeholders would likely see this weak response as lacking credibility. Nonetheless adversely affected landowners may see it as credible and gain a 'false sense of security'.[2047] For these reasons the weak response would not satisfy the credibility criterion, and its overall satisfaction of the public policy criteria would be very low.

5. 'Robust' pro-private property rights response

The next potential response to be considered is

3] a 'robust' pro-private property response, which would entrench private property rights in practice, publicly-fund hard defensive structures, and reduce, or extinguish, public rights.

a] Ethical land management

Satisfaction of ethical criteria by this 'robust' pro-private property rights response would also be poor. Its impacts can be distinguished from the 'weak' response however, in several ways.

i] Physical characteristics [0.1]

In this 'robust' response there would be an emphasis on one of the physical particulars of land: the location of the original boundary, since it would be along this boundary – even if fully submerged - that landowners would be allowed to build permanent defensive structures, without development consent,[2048] to defend and reclaim their private property from the sea.[2049] It is unlikely that the land's susceptibility to coastal hazards would be taken into account by landowners, except perhaps in specifying design parameters for their proposed structure.

[2043] The property norms, rules, decisions and statutory provisions described in Chapters II, III and IV.
[2044] That sea level rise will continue for centuries. See IPCC, above n 7, 26 reported in s 2.4 Chapter I.
[2045] That retreat or relocation is the most feasible option. See the analysis in s 3.3 Chapter I.
[2046] Best practice in designing, planning and approving seawalls is stated in the *Coastal Management Manual – Part A & B*, proscribed under s 21 *CMA 2016*, discussed in s 4 Chapter IV.
[2047] See the explanation of the danger of creating a false sense of security in s 3.3 Chapter I.
[2048] Because this is contrary to existing law which requires consent, as described in Chapters III and IV, comprehensive legislation would be needed to reverse the status quo and make this policy lawful.
[2049] Such actions by the landowner were the cause of a criminal prosecution in *EPA (NSW) v Saunders* (1994) 6 BPR 13,655. See also Coleman, above n 13, 422.

Hence physical suitability of the land would not limit or guide the land-use pursued on the site.

ii] Social community [0.0]

The wider social community would be likely to receive no consideration under this 'robust' response since only beachfront landowners' interests would matter.[2050] Building seawalls along original property boundaries even if submerged, and the structures themselves, would however likely disrupt the social community of beach users. During construction, in adjacent areas, the beach would be closed to public use in the interests of public safety to allow the movement of materials, machines and equipment on site.[2051]

Once built, seawalls would alienate parts of the foreshore, prevent public use,[2052] reduce public safety,[2053] and lead to the beach's permanent loss.[2054] Damaged seawalls may also create hazards to navigation, surfing or swimming in adjacent waters. Significant sudden changes to the safety, amenity and appeal of a beach would disrupt its social community, but the 'knock-on effects' such as economic shocks to local businesses and coastal industries,[2055] would be overlooked.

iii] Ecological community [0.0]

In this anthropocentric response, likely adverse impacts of building seawalls on the ecological community would not be considered. If protecting coastal ecosystems, or ecologically or economically significant species hindered landowners defending their original property boundaries, under this response the government would likely 'suspend' or rescind the protection law.[2056]

iv] Temporal perspective [0.0]

This 'robust' pro-private property rights response would not consider present or future impacts or uses. It would focus on re-establishing and defending the original real property boundaries. In the future under this response, the boundaries of coastal land would return to their location in the past, and remain unchanged forever, despite rising seas and shoreline recession.[2057]

[2050] Since this is contrary to existing property law which recognise public rights, s 27 *CMA 2016*, and require consideration of future generations, s 6 (2)(b) *POEAA 1991*, repeal of these and other relevant statutory provisions through special legislation would be necessary to implement this response.
[2051] That is this would be required was noted by Preston CJ in *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207, [125].
[2052] *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207, [122]
[2053] *Ralph Lauren PL v NSW TCP* [2018] NSWLEC 207, [126].
[2054] Orrin H Pilkey and Rob Young, *The Rising Sea* (Island Press, 2009) 165.
[2055] These impacts were recognised by Cooper and McKenna, above n 123, 301. See s 6.2 Chapter V.
[2056] Special legislation would be needed to repeal current law requiring consideration and protection of Threatened species: eg s 3(a) *CMA 2016*, s 3.25 *EPAA 1979*, discussed in ss 4 & 5 Chapter IV, and the ESD principle of the conservation of biological diversity, s 6(2)(c) *POEAA 1991*, see s 5 Chapter V.
[2057] To achieve this reinstatement and permanent relocate real property boundaries would also require special legislation since this policy too is contrary to key elements of existing property law regarding the nature and location boundaries, ownership of land below MHWM, described in s 8 Chapter III.

v] Key social goals [0.0]

This response would also fail to achieve progress towards social goals, such as 'land health'. Building major coastal structures would not 'cure', but probably increase, erosion[2058] and, as sea levels rise, inevitably the natural sandy beaches would be wholly lost.[2059] Even artificially nourished beaches would have only a very limited 'life', before they too disappeared.[2060] Thus, this response would not satisfy any criteria for ethical land management.

b] Successful 'public policy'

This 'robust' response would also struggle to satisfy the criteria for successful public policy.

I] Rationale [0.1]

Because it is contrary to existing property law,[2061] a major difficulty of the robust response would be framing a plausible public interest rationale for privileging private property rights, which explained why this was necessary and how it would contribute to a greater public good. To achieve the goals of this response and enact the necessary enabling legislation to reverse the status quo, the government would need to prosecute the argument successfully and gain support of the public and the Legislature. However, this would not be easy since many people would object to weakening or repealing public rights to use coastal lands and waters. The illogic of arguing that a loss of public rights, and redistribution of public funds into private hands, was in the public interest, would be an inherent flaw in this response's capacity to satisfy this criterion.

II] Timeliness [0.1]

Allowing landowners to build new seawalls to protect against anticipated climate impacts of rising seas and receding shorelines without consent, could indicate timeliness in this response. However this response would focus on the past, not the future, and reclaiming land previously lost to the sea. The structures built to reclaim land below MHWM, or LWM, would need to be substantial to be effective in the short term, and in the medium term would require regular repair and maintenance. In the long term, to be effective 'timely' upgrades would likely be required to increase their crest height.[2062] Thus timeliness under this response would include a race against time to find the materials needed to augment defensive structures to stay ahead of rising seas,[2063]

[2058] See s 3.3 Chapter I.
[2059] Pilkey and Young, above n 108, 165.
[2060] Ibid 166. They posit that nourished beaches 'will typically disappear in less than five years'.
[2061] The property law rules, case law and statutory provisions examined in Chapters II, III & IV.
[2062] See discussion of the disadvantages of seawalls in s 3.3 Chapter I.
[2063] Increasing seawall crest height requires the foundation to be enlarged to support it. Thus materials and costs increase by the second power, ie squared. A doubling of height would need four times the volume of materials and hence costs. A trebling in height would require nine times the materials and funding.

and a parallel race to secure the funds for these upgrades. However it is likely that the costs of upgrades could escalate and become prohibitively expensive in the future.[2064]

Because this 'robust' pro private property rights response would reverse the status quo, extensive complex legislation would be necessary, which may face some serious delays, and its implementation would require a change-over phase. Public objections, community concerns, or legislative delays would also adversely affect its timeliness.

III] Cost-effectiveness [-0.1]

Under this 'robust' response public expenditure to build and maintain structures to protect private land, or buy private land at full market value,[2065] would be poor value for public money. Moreover, funds spent on seawalls would inevitably lead to the beach's loss, with adverse social and economic impacts.[2066] Thus the cost-effectiveness of its public funding could be negative.

IV] Minimal disruption [0.0]

Because it would need to reverse the status quo to implement it,[2067] this response would deliberately create major disruption to existing property law system and incur unproductive costs in changing to the 'new' system. Where landowners sought to build seawalls along their original property boundaries, below MHWM, or below LWM, the impacts of these works could cause severe, immediate and long lasting disruption if they divide the social community, destroy the ecological community, and generate shocks to coastal economies.[2068]

V] Credibility [0.1]

Due to its gross inconsistency with existing property theory and property law,[2069] reversal of the *status quo,* and the apparent failure to understand the extent of likely climate change impacts as foreshadowed by the IPCC[2070] and apply appropriate responses to increased coastal hazards, recommended by experts,[2071] it is likely that this response would only be seen as credible by adversely affected coastal landowners. It is unlikely to be seen as consistent with 'best practice'

[2064] This was the conclusion of the management authority for coastal lands in England and Wales cited by Cooper and McKenna, above n 123, 300-1, see s 6.2 Chapter V; and of the public authority in New Zealand, which led to the appeal *Falkner v Gisborne District Council* [1995], see s 9 Chapter III.
[2065] By triggering the *LA(JTC)A 1991* (NSW), see s 6 Chapter IV.
[2066] The impacts of seawalls on the beach and their social and economic 'knock-on effects' were acknowledged by Cooper and McKenna, above n 123, 300-1, discussed in s 6.2 Chapter V.
[2067] Because the status quo, recognises public rights as dominant, and continuing to be indefinitely, in applicable property law rules, court decisions and statutory provisions cited in Chapters II, III & IV.
[2068] See Cooper and McKenna, above n 123, 300-1, discussed s 6.2 Chapter V.
[2069] The property law rules, court decisions and statutory provisions cited in Chapters II, III & IV.
[2070] Eg that sea level rise will continue for centuries: IPCC, *AR5*, above n 7, 26, cited in s 2.4 Chapter I.
[2071] Including retreat, relocation or realignment of at risk development. See Figure 6 s 3.2 Chapter I.

in ecologically sustainable coastal management[2072] by beach-using non-resident members of the public, local council staff and other stakeholders.
Thus the 'robust' response would not satisfy the public policy criteria.

6. 'Strong' pro-public rights response

Next to be considered is
4] a 'strong' pro-public rights response, which would protect public rights, permit the beach to migrate landwards naturally and allow public uses and ecological functions to continue.

a] Ethical land management

A 'strong' pro-public rights response by government would largely satisfy these criteria.

i] Physical characteristics [0.8]

Under this response the land's physical characteristics, condition and natural limits would be closely considered, and local and State governments would recognize private lands subject to current, or future, coastal hazards, which pose risks to current or future residential use.[2073] Moreover, under this response it would be more likely that other relevant site specific information, including provision of safe access, would be considered by a public authority when determining whether the land was suitable for continued, or future, residential occupation. The particulars of individual allotments of coastal lands might thus become very important in guiding, limiting or excluding future land uses.[2074] Since this response would protect public rights to access and use of the beach,[2075] it would identify and remove any dangers to public safety or threats to environmental health generated from adjoining private land.[2076] Thus many specific attributes of private land may need to be carefully considered, under this response.

ii] Social community [0.7]

Due to its orientation to public rights, in this response impacts on beachfront landowners would probably receive little or no consideration. However, the public benefits for the social community would be large, and the community would extend to include local 'members of the

[2072] As required by s 3 *CMA 2016* (NSW) discussed in s 4 Chapter IV.
[2073] Lands at risk from coastal hazards would be identified by local councils through studies prepared for coastal management plans or programs under the *Coastal Management Act 2016* (NSW): see s 4 Ch IV.
[2074] The inundation of some lots and the location of the ambulatory MHWM were crucial physical facts in *EPA v Saunders* (1994), *EPA v Leaghur Pty Ltd* [1995]. See s 8 Chapter III.
[2075] See s 27 *CMA 2016*, in s 4 Chapter IV, and *Ralph Lauren PL v NSW TCP* [2018] discussed in Ch V.
[2076] The pollution of tidal waters with truck tyres was the charge sustained against the landowner in *EPA v Saunders* (1995) discussed in s 8 Chapter III.

public', domestic visitors, international tourists, and future generations of these users of the beach and coastal waters. Government policy discouraging new seawalls except where necessary, would reflect an awareness of their likely adverse impacts on other social community members of immediate neighbours, nearby landowners and future generations.[2077]

iii] Ecological community [0.5]

Though the focus would be on protecting public rights, this response would avoid the ecological impacts of coastal squeeze and would give the ecological community time and space to migrate landward with the beach system, as sea levels rise.[2078] It would not weaken environment laws protecting the ecological community and would protect public interests in coastal resources, where possible. This would include protecting native vegetation types of public interest value, maintaining high standards of coastal water quality, and safeguarding the health of seafood. By avoiding adverse environmental impacts it would minimize the risk of economic shocks to local business and coastal industries dependent on public uses of coastal lands and waters.

iv] Temporal perspective [0.8]

A strong pro public response would recognize the effects geomorphological processes have had on the State's coast over geological time, and see coastal erosion and shoreline recession in their appropriate context, as natural processes which have been underway for millennia.[2079] Further, a future government with a strong pro-public rights response would prepare to manage the State's coastal lands and resources, in a future of major climate change impacts.[2080] Were it competent, a future government would aim to ensure its policies were timely and implemented on schedule.

v] Key social goals [1.0]

This response would be appear to be consistent with the goal of land health. By banning seawalls behind sandy beaches in all but exceptional situations, beach and dune systems could survive, by migrating landwards as sea levels rise.[2081] Ensuring the future health of coastal lands and waters would however require attention to identifying and removing dangers to public safety or threats to environmental health which might be generated or uncovered by the shore-line's retreat.[2082] Overall, this response could satisfy all the criteria for ethical land management.

[2077] The social environmental and economic impacts of 'coastal squeeze' created by building seawalls behind sandy beaches, were discussed in s 3.3 Chapter I.
[2078] See Figure 10.12, s 3.3 Chapter I; Cooper and McKenna, above n 123, 300-1, discussed in s 6.2 Ch V.
[2079] See Chapman et al, above n 96.
[2080] This would be consistent with the ESD principle of 'intergenerational equity' defined by s 6(2)(b) *POEAA 1991*, cited in s 6.2 Chapter V, and as required by s 3 *CMA 2016*, discussed in s 4 Chapter IV.
[2081] See Figure 10.12, s 3.3 Chapter I.
[2082] Local councils are exempted from liability for failure to remove dangerous materials from a public beach under s 733(3) *Local Government Act 1993* (NSW), provided they act 'in good faith'.

b] Successful 'public policy'

This 'strong' public rights response could also satisfy the criteria for successful public policy.

I] Rationale [1.0]

Due to its consistency with existing property theory and property law,[2083] articulating a plausible rationale for this response would be simple, and likely to be persuasive. A credible justification for protecting public rights and overriding private property rights, for the greater good, though theoretically easier, would still be needed. The responsible Minister could argue that protecting public rights to use coastal lands, where they conflicted with private property 'rights', would be in the public interest, and explain how this response addresses emerging climate change impacts, and maintains continuity with existing legal principles.[2084] Social utility arguments could also be made, to show how it would be useful, and contribute to a greater public good.[2085] Thus this response would be likely to satisfy this criterion.

II] Timeliness [0.7]

It would also be likely to be timely since the government would quickly resolve disputes over conflicting rights to use coastal lands, by protecting public rights. This would provide a clear framework for resolving future disputes and clarifying expectations of future use. By accepting that global climate change would continue for centuries,[2086] anticipating long-term impacts, and preferring 'retreat' over 'defend' as a principal policy, this response would exhibit timeliness. Identifying other consistent policy actions, through future coastal management planning, and implementing them effectively, would be other vital indications of this response's timeliness. Because the legislation to implement this response would be limited to protecting existing public rights to use coastal lands and waters,[2087] and codifying existing common law rules,[2088] it would not be complex and may not be controversial, making its timely passage likely.

III] Cost-effectiveness [1.0]

The cost-effectiveness of public expenditure would likely be well considered under this response. Public funds would be directed by a future government to public authorities, such as local councils to maintain public rights to access coastal lands and waters in their coastal planning and management. Public funding would not be available for protecting private land

[2083] The property theory, rules, decisions and statutory provisions which recognise the dominance of public rights discussed in Chapters II, III and IV.
[2084] Eg the public right of access to and along the foreshore, and of public navigation discussed in Ch II the public trust doctrine considered in s 6.1 Chapter V.
[2085] For eg by securing the basis for local towns' beach-based economies and coastal industries.
[2086] See IPCC, *Climate Change 2103,* above n 6, 26.
[2087] By stating the ambit of these common law public rights, described in Chapter II, in the statute law.
[2088] recognizing public (Crown) ownership below MHWM. See *EPA v Leaghur PL* [1995] in s 8 Ch III.

vulnerable to coastal hazards,[2089] preventing a transfer of value from public to private interests. The absence of locked-in commitments to maintain and upgrade coastal defenses would allow public funds to be allocated to other actions, to protect public rights, provide safe public access, prevent or minimize harm to the public interests in the environment, or encourage existing development to 'retreat'.

IV] Minimal disruption [1.0]

Because it is consistent with existing elements of property law,[2090] not disruptive of existing practice and expectations, or incur transition costs, this response would satisfy this criterion. Relevant law would be clearly stated and more certain, so business would continue as usual.

V] Credibility [0.8]

Since it is consistent with existing property law, would protect public rights over coastal lands and waters, address climate change impacts highlighted by the IPCC and others,[2091] and discourage new seawalls to allow beach and dune systems to retreat landwards as sea levels rise, consistent with 'best practice' in coastal land's management,[2092] this response would be likely to be seen as highly credible by the public, and other stakeholders in coastal management.
Hence this response would have the potential to satisfy all five criteria for sound public policy.

7. 'Stronger' pro-public rights response

To be considered next is

5] a 'stronger' pro-public rights response, which would broaden the public uses recognised as rights, extend the area where they apply and increase the level of protection of public rights.

a] Ethical land management

This response would likely satisfy the criteria for ethical decision making to a large degree.

i] Physical characteristics [0.9]

The physical characteristics, condition and limits of land would probably receive close consideration under this 'stronger' pro public rights response. The susceptibility of land to coastal hazards would be recognised,[2093] and with other site specific considerations such as

[2089] Discontinued public funding of ineffective protection works along the coast of England and Wales, was considered by Cooper and McKenna, above n 123, and was the management option adopted by the local authority in New Zealand, challenged in *Falkner v Gisborne District Council* [1995] 3 NZLR 622.
[2090] Rules, decisions and statutes which recognise public rights as dominant, cited in Chapters II, III & IV.
[2091] See climate change impacts forecast in IPCC, *AR5*, above n 7, 26, cited in s 2.4 Chapter I.
[2092] See the requirement for retreat of buildings at risk of erosion in Byron Shire Council, *Development Control Plan – Part J Coastal Erosion Lands* – (adopted August 2018) cited in s 3.1 Chapter I.
[2093] As identified in a CZMP or CMP prepared under s 13 *CMA 2016*, as disclosed in a 'planning certificate' issued by a local council under s 10.7 *EPAA 1979*, discussed in ss 4 & 5 Chapter VI.

access, would determine the site's suitability for residential occupation. Further, the existence of a valid development consent for a physical structure could be recognised by creating a TDR.[2094] The gradient and other features of coastal lands, and possible impacts on them, would be relevant matters for a future government to consider when deciding to adopt a new HWM, and setting the compensation payable when it acquires the ribbon of land from landowners.[2095] Enlarging the foreshore by raising the HWM to mean high water at springs tides (MWHS) or to highest astronomical tide (HAT)[2096] would recognize that many sandy beaches on private land above MHWM are regularly re-shaped by tidal waters, and often inundated during storms.[2097]

ii] Social community [0.7]

The wider social community of current and future generations of non-resident beach-users is central to this 'stronger' response. Government would increase protection of public rights,[2098] and public interests in coastal lands, to sustain them indefinitely, despite climate impacts. But impacts on adversely affected landowners would be likely overlooked.

iii] Ecological community [0.7]

Impacts on the ecological community would be considered, as part of protecting wider public interests in decisions about the use and management of coastal lands under this response.[2099] Though this 'stronger' response would still be anthropocentric, ecological communities would probably survive because coastal squeeze impacts would be avoided, and beach-dependent species would be able to migrate with the beach as it recedes landwards.[2100] Further, under this stronger response a future government could extend formal protection over other coastal resources: the habitat of all coastal species of ecological or economic significance. [2101]

iv] Temporal perspective [0.8]

This response would involve better temporal considerations including: the effects of sea level rise and shoreline recession over geological time,[2102] the likely future impacts of coastal hazards

[2094] Transferable Development Right. Sheehan, above n 1854, 96; Freyfogle, 'Eight', above n 202, 795.
[2095] Either by enacting special legislation as in *Durham Holdings v NSW* (2001), discussed in s 10 Chapter III, or by triggering the *LA(JTC)A 1991*, as indicated in s 6 Chapter IV.
[2096] In Queensland high water mark is MHWS, and s 6(b) *Marine Estate Management Act 2014* (NSW) adopts 'highest astronomical tide' (HAT) as its landward boundary of tidal estuaries. See s 7 Ch IV.
[2097] For the dynamic nature of wave-dominated beaches, see Short and Woodroffe, above n 80,114-128.
[2098] such as allowing beaches to retreat by banning seawalls behind them, raising the level of HWM to extend the area of the foreshore, and applying rolling easements …
[2099] This would align with s 3(a) *CMA 2016* requiring coastal management to 'protect… , biological diversity and ecosystem integrity and resilience', and the ESD principle of biodiversity conservation per s 6(2)(c) *POEAA 1991*, discussed in s 6.2 Chapter V.
[2100] See Figure 10.12, and how to avoiding seawalls' ecological impacts in s 3.3 Chapter I.
[2101] Through instruments such as *CM SEPP* 2016, which prohibit clearing of coastal native vegetation without completion of an environmental impact statement.
[2102] See Chapman et al, above n 96.

on existing development,[2103] and the long-term effects of seawalls,[2104] which would constrain future land uses. Further, future costs of purchasing coastal lands or maintaining seawalls would be foreseen and avoided.[2105] Requiring the retreat of vulnerable development,[2106] and increasing the opportunities for public rights to survive, under climate change conditions, would indicate a realistic appraisal of future conditions.

v] Key social goals [1.0]

By protecting public rights, allowing the beach to retreat,[2107] and social, ecological and economic uses to continue, this response would advance key social goals, including land health.[2108] Hence all five criteria for ethical decision-making about land could be satisfied by this response.

b] Successful 'public policy'

This response also exhibits potential to satisfy the criteria for successful public policy.

I] Rationale [1.0]

Articulating a public interest rationale for this 'stronger' pro-public rights response in terms of its 'social utility' or benefits for a greater public good, would be straightforward but necessary. Protecting public rights to access and use coastal lands and waters, where they conflicted with private property rights, could easily be characterized as in the public interest.[2109] The additional measures proposed under this response, a higher HWM, and 'rolling easements', would also be in the public interest, but would require justification, and explanation of their future operation. Were these basic steps taken, the first public policy criterion would likely be satisfied.

II] Timeliness [0.6]

This 'stronger' response would be likely to demonstrate 'timeliness' in several ways. It would provide a basis for resolving current disputes over conflicting rights, and would likely prevent future disputes. It would provide timely input into coastal management programs,[2110] and inform approval authorities' consideration of development applications.[2111] Since this response would also prefer 'retreat' rather than 'defend', it would acknowledge the long-term coastal processes

[2103] Church et al, above n 44, 192; Australian Government, above n 44, 73-86 cited in s 3 Chapter I.
[2104] Eg Silvester, above n 81, 44 and Pilkey and Young, above n 108, 165 quoted in s 3.3 Chapter I.
[2105] As recommended by Cooper and McKenna, above n 123, 302, and reported in s 6.2 Chapter V.
[2106] Through planning instruments such as the Byron Shire Council, *DCP – Part J Coastal Erosion Lands* (2018) cited in s 3 Chapter I.
[2107] See Figure 10.12 in s 3.3 Chapter I. See also the doctrine of accretion discussed in s 5.3 Chapter II.
[2108] This was the conclusion of allowing the coast to 'fluctuate freely' adopted by Cooper and McKenna, above n 123, 301, reported in s 6.2 Chapter V.
[2109] This would accord with the court's ruling in *Ralph Lauren PL v NSW TCP* [2018]. See s 5.1 Ch V.
[2110] Prepared pursuant to ss 13 -16 *CMA 2016,* discussed in s 4 Chapter IV.
[2111] By local consent authorities under s 4.1 – 4.70 *EPAA 1979,* as discussed in s 5 Chapter IV.

at work, and recognise likely climate change impacts on the State's coast in the medium to long term.[2112] Raising the HWM and using easements would be timely measures which would anticipate and prepare for future conditions.

Enacting the legislation necessary to implement this response would be more complex than the 'strong' response above, but because its core elements align with existing property law,[2113] they may be seen as non-controversial by non-government legislators, and their passage not unduly delayed. However, raising the HWM could be contentious, since the State would compulsorily acquire ribbons of private land, but the idea would not be novel: legislation permitting this already exist.[2114] Nonetheless some delays in passing the enabling legislation and completing acquisitions would be possible, perhaps likely.

Creating 'rolling easements' to extend public use rights over small areas of private land would be easy to implement since public authorities are empowered to do so under existing law.[2115] Raising the HWM would not be a 'time sensitive' action, so public consultation and dialogue with legislators to avoid legislative delays would not be problematic. The 'timeliness' of these measures would be their anticipation of likely future climatic and geographic conditions of the State's coast, and their preparations to protect public rights to use coastal lands and waters under those future conditions.

III] Cost-effectiveness [0.7]

The expenditure of public funds would be limited under this 'stronger' response. No public funds would be allocated to protecting privately owned coastal land, though the commitment of funds for works to protect key public assets or infrastructure would likely be necessary. Public funds would be mainly directed towards relocating public infrastructure, preparing vulnerable areas of publicly owned coastal land for climate impacts, providing continued safe public access to the coast under these conditions, and encouraging existing development to retreat, not defend. Were these the primary expenditures, the cost-effectiveness of public funding under this response would be likely to be high.

Defining a new HWM to enlarge the foreshore and maximize the area available for public use, would incur greater public expenditure in several ways however, so assessing its cost-effectiveness would be more complex. Though a future government could re-define the HWM

[2112] See the impacts forecast in Church, et al, above n 44, cited in s 3 Chapter I.
[2113] Those property rules, decisions and statutes which recognise the dominance of public rights, described in Chapters II, III & IV.
[2114] Private land may be acquired by the State for public purposes, under relevant authorising legislation, and the provisions of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) then apply.
[2115] A public authority may create an easement under s 88A or s 88E *CA 1919* (NSW) see s 6 Chapter IV.

without notice by regulation,[2116] it is more likely it would give notice to coastal landowners under the *LA(JTC)A 1991* of its intention to acquire the ribbon of land between the old and new HWM boundary lines and agree to pay compensation for it.[2117]

Existing conventions, and current statute law, would require compensation to be paid 'on just terms' at full market value,[2118] though special legislation could stipulate a cap to payments.[2119]

Addition to these capital costs would be the costs of amending affected land titles to show the position of the new property boundary formed by the new HWM.[2120] Initially the State could underwrite the costs of updating land titles, but it would be likely that later costs of boundary survey and new plan lodgment would be paid by private landowners, as it is presently.

By adopting a new HWM however, certain other costs might be saved. With a more easily recognised boundary of MHWS, or HAT, rather than the mathematical mean of medium tides, real property boundaries would be more easily located in the coastal landscape, avoiding some disputes and reducing survey costs. In the short-term, the cost-effectiveness of this measure may be limited, but over a longer term, its benefits to future generations of beach users might substantially increase. Creating and registering new 'rolling' easements for public access over private land where required,[2121] would be low cost actions. The costs of survey and registration would be limited and incurred once, but each easement would have enduring effect[2122] and provide good value for the public interest and the modest public funding required.

At a higher level of public funding, a new higher high-water mark would transfer significant public funds into private hands,[2123] but the State would acquire strategic inter-tidal land, and extend protection of public rights to larger areas. Overall, public expenditures under this response could be moderately cost-effective.

[2116] An amendment to a key definition in the relevant regulation, *Surveying and Spatial Information Regulation 2017* (NSW) would not require prior legislative approval.
[2117] See s 6 Chapter IV. The ribbon of land acquired would be slightly broader if HAT were adopted as the boundary tide-line, and its width would vary due to its gradient. The area of low gradient land so acquired could be extensive. On high gradient land, or vertical walls, little or no area may be acquired.
[2118] See ss 10(1), 54, 56(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)
[2119] This was the approach of the NSW government in 1990 when cancelling coal leases to create new national parks. See the discussion of compensation payable under the enabling legislation, in *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399; 177 ALR 436.
[2120] See Regulation 48(6) *Surveying and Spatial Information Regulation 2017* (NSW) which requires a 'comprehensive report' to be prepared on surveys which recognize changes to real property boundaries formed by tidal waters. Other costs, such as fees for amending land titles, would also be incurred.
[2121] Under the *Conveyancing Act 1919*, discussed in s 6 Chapter IV.
[2122] For the creation of a rolling easement in *Coffs Harbour LALC V Minister* (2014) see s 5.1 Ch V.
[2123] By paying a level of compensation designated in special legislation, as in *Durham Holdings v NSW* (2001) as discussed in s 10 Chapter III, or by triggering the *LA(JTC)A 1991*, as described in s 6 Ch IV.

IV] Minimal disruption [0.8]

This response would be largely consistent with existing elements of property law[2124] and hence would not disrupt existing public rights to access and use coastal lands and waters.[2125] However, several policy actions of this response, such as creating new rights and setting higher standards of impact assessment,[2126] would likely create minimal disruption, and few if any additional public costs. However, adopting a new HWM would create substantial disruption, which would vary however, with some landowners extensively affected, while others were not.[2127]

Owners of land to be acquired by the State would be paid compensation[2128] however, which would probably ameliorate much of the disruption. The public would not be disrupted, other than through the expenditure of public funds. Creating 'rolling' easements across private land, where necessary to secure public access to and use of the foreshore, would disrupt affected landowners, but to a minor degree. Public use would be limited to small areas,[2129] and neither ownership nor existing uses on adjoining private land would be disrupted. Consequently, public use of coastal lands would be enhanced, not disrupted. Hence, this response would likely create some minimal disruption, but gain tangible benefits for public use rights.

V] Credibility [0.8]

Since it aligns with existing property law, its policy actions would address the climate impacts identified by the IPCC and others,[2130] and seeks to ensure the survival of public rights to access and use coastal lands under climate change conditions, it is highly likely that this 'stronger' response would be seen as credible by many members of the public and by other stakeholders.

Its implementation would be consistent with current 'best practice' in coastal management[2131] but may require the development of better practice in protecting public rights and application of more ecologically sustainable ways to manage coastal lands affected by coastal hazards.

Thus this response would substantially satisfy all five criteria for successful public policy.

[2124] The property rules, decisions and statutes recognising public rights cited in Chapters II, III & IV.
[2125] Under common law rights identified in Chapter II, or s 27 *CMA 2016*, discussed in s 4 Chapter IV.
[2126] Such as designating the need to prepare and consider an Environmental Impact Statement (EIS) in a planning instrument made under the *EPAA 19179*, such as *SEPP 14, or 26*, as discussed in s 5 Ch IV.
[2127] Landowners with existing high gradient land, or vertical walls, as boundaries would not be affected.
[2128] Either set by the special legislation, as in *Durham Holdings PL V NSW* (2001) discussed in s 10 Chapter II, or at full market rate per ss 10(1), 54, 56(2) *LA(JTC)A 1991*, discussed in s 6 Chapter IV.
[2129] For example an easement for public access created in the *CHLALC v Minister* (2013) which followed an existing track in use, was only 6 metres wide. A second easement created in that case for a 'rolling easement', measured 30 metres from the position of MHWM.
[2130] See IPCC, *AR5*, above n 7, 21; Church, et al, above n 44, 192 cited in s 3 Chapter I.
[2131] Ecological sustainable management, as described by s 3 *CMA 2016.* See s 4 Chapter IV.

8. 'Balancing' response

I next assess a future government option of seeking to protect both public and private interests in coastal land through:

6] a response where neither private or public rights would be dominant; and disputes would be resolved by 'balancing' competing private and public uses. government would enact legislation to make public and private property rights 'equivalent', so there were no 'trumps'.

a] Ethical land management

These criteria would likely be satisfied only to a very limited degree by this response.

i] Physical characteristics [0.1]

When resolving conflicts over use of coastal land by 'balancing' competing private and public uses under this response, the land's physical character, condition and natural limits may be overlooked, and its unsuitability for one use could be deemed irrelevant. Hence it is unlikely this response would satisfy this criterion.

ii] Social community [0.3]

Under this 'balancing' response the likely effects of land use decisions on the social community could be considered if conflicts over use of coastal lands were arbitrated rather than litigated. Initially there may be two parties to a dispute, but a wider consideration of social community impacts would lead to other parties being joined in what becomes a multi-faceted dispute. The process of 'balancing' uses, to resolve disputes would then require the co-operation and accommodation of many interested parties and stakeholders. The greater complexity of interests to be included, the more difficult would be the task of achieving a balance. Hence, effects on future generations would be unlikely to be considered.

iii] Ecological community [0.0]

Potential ecological impacts would probably not be considered in resolving future disputes under this response.[2132] Its focus on balancing private and public 'rights' would suggest that the non-human world inhabiting particular places would likely receive little or no consideration.

iv] Temporal perspective [0.0]

It seems unlikely that the effects of time would be closely considered under this response. In seeking to 'balance' private and public uses, an arbiter could consider the history of local land

[2132] This would require the repeal of provisions s 3 *CMA 2016,* s 3.25 *EPAA 1979,* and s 6(2) *POEAA 1991* requiring conservation of biodiversity, cited s 4 & 5 Chapter IV and s 5.2 Chapter V.

use, to be important. More likely the focus would be on the present and immediate future, and longer-term impacts and costs, which are difficult to forecast and quantify, would be unlikely to be considered.[2133] Any 'balance' would also be temporally limited. When external events, such as a severe storm, change of private land ownership or the death of one party, upset the balance a new dispute could arise, requiring resolution via a new 'balance' of then competing uses. Thus over time this response could require many iterations of 'balances' to resolve, temporarily, perennial disputes between competing private and public interests.

v] Key social goals [0.0]

This response's narrow anthropocentric focus is not directed towards the goal of land health, but the perpetuation of then current competing claims of priority in using coastal lands. Satisfaction of criteria for ethical land management under this response would be patchy at best.

b] Successful 'public policy'

This response also faces difficulties in satisfying the criteria for successful public policy.

I] Rationale [0.1]

One advantage of this response would be its simple rationale of 'balancing' competing private and public interests, which might be publicly justified as fair, since there would be no dominant 'right', and disputes would be resolved by a 'balanced' win-win outcome. However, it would be difficult to justify this response as in the public interest, or for the greater good, if it would provide less protection of public rights to use coastal lands and waters, than previously.[2134] Thus a future government could offer a superficially plausible rationale, but fail to justify this response by not explaining its social utility.

II] Timeliness [0.1]

Several obstacles appear to limit this response's capacity to satisfy the criterion of 'timeliness'. In order to implement it, a new statutory framework for 'balanced' dispute resolution would be required to overturn the dominance of public rights and create an 'equivalence' of 'rights'. Consequently, comprehensive legislation would be needed to repeal existing laws, state the new property 'rules' and procedures, and make transitional arrangements. Drafting the necessary Bills could be slow, and progress through the legislature may be opposed or delayed, frustrating 'timely' action. Timeliness could be further limited by the need to devise and institute new procedures and train arbiters of disputes how to 'balance' competing rights and interests.

[2133] A flaw of short-term analysis noted by Cooper and McKenna, above n 123, 298. See s 6.2 Ch V.
[2134] Ie under existing property rules, court decisions and statutory provisions cited in Chapters II, III & IV, which recognise the dominance of public rights, uses, interests and purposes over private land.

Assuming enabling legislation were enacted, resolving future disputes through a new, untried, unpredictable process, would be unlikely to be timely. Moreover, the life of a 'balance' between competing uses could be short, with many 'balances' required over decades. Thus this response would be unlikely to satisfy this criterion.

III] Cost-effectiveness [0.1]

Under this response public funds could be used to 'balance' private funds, to construct, maintain and upgrade coastal defensive structures, to protect private land, or to protect both private and public land. However, given seawalls' adverse impacts on social, ecological and economic uses of the beach,[2135] this spending would likely be counterproductive to protecting public rights to use coastal lands and waters. There would likely be additional public expense in instituting a new framework to resolve disputes between competing interests, with little public benefit, if the 'balances' achieved derogate from prior public rights to access and use coastal lands and waters. Hence this response would likely rate poorly on the cost-effectiveness of its public spending.

IV] Minimal disruption [0.0]

Since it is contrary to existing elements of property law[2136] and would need to overthrow the status quo to create a completely new system to 'balance' competing interests; cause uncertainty until the enactment of enabling legislation, and incur a range of unproductive transition costs, this response would deliberately create significant disruption for little or no new public benefit.

V] Credibility [0.1]

It seems unlikely that this response would be seen as credible by the public or other stake-holders, except perhaps by some private landowners. It would be inconsistent with existing property norms and property law,[2137] not based on robust evidence, and ignore expert opinion. It would not focus on, and would likely frustrate, rather than foster, best practice in the management of coastal lands.[2138]

Hence, the 'balancing' response would perform poorly against all public policy criteria.

[2135] See Figures 10.1 – 10.12 and the discussion seawall impacts in s 3 Chapter I.
[2136] The property law rules, court decisions and statutory provisions cited in Chapters II, III & IV in which public rights, uses, interests and purposes are dominant, and intended to remain so into the future.
[2137] cited in Chapters II, III & IV.
[2138] Currently defined as the ecological sustainable management of the coast, s 3 *CMA 2016,* in which the coast's social, economic and ecological functions are protected for future generations of beach users, as described in the *Coastal Management Manual Parts, A & B,* proscribed by s 21 *CMA 2016.*

9. 'Accept and accommodate' response

The last option to be considered is

7] an 'accept and accommodate' response, which protects public rights, and accommodates private interests, where this would be feasible, and consistent with the first objective.

Here the government would accept the current dominance of public rights[2139] and adopt the strong or stronger pro-public rights response and accommodate private interests to some degree.

a] Ethical land management

This response would satisfy ethical criteria in similar ways as the pro-public rights responses,[2140] but would differ in several ways, due to its use of TDRs and a land exchange scheme.

i] Physical characteristics [0.9]

The physical characteristics and condition of land would be closely considered in this response. Areas exposed to current or future impacts from coastal hazards would be recognised as unsuitable for continued use, or future development.[2141] In the land exchange scheme suggested, particulars of site would be considered in other ways: access to the land, its utility services infrastructure, suitability for short-term uses, and in identifying and removing dangers to public safety, or threats to environmental health from prior uses of surrendered lands.[2142]
Once any short-term uses were discontinued, the lands' condition would guide decisions on how to make it safe for future public uses, as a migrating beach.

ii] Social community [1.0]

Social community considerations would be likely be substantial under this response and similar to the pro-public rights responses above. Adverse impacts on beach users would be minimized and public rights to use beaches and tidal waters would be protected, extended or enhanced.[2143]
Under this response, management planning for coastal lands and waters would focus on ensuring that public use would continue to be available to future generations, despite the

[2139] That public rights are dominant over private property rights was one conclusion drawn in Chapter IV.
[2140] To avoid repetition here, see the discussion of this in the 'strong' and 'stronger' responses above.
[2141] Through a CZMP or CMP prepared under s 13 *CMA 2016*, and or shown on the 'coastal vulnerability area' map prepared under cl 6(3) *SEPP CM 2018*, see s 4 Ch IV. This would heed the warning of adopting a 'false sense of security' due to a seawall, discussed in s 3 Chapter I.
[2142] This would include building foundations, utility service pipes, underground wiring and fence lines, and hazardous materials such as copper fittings, and asbestos bearing fibro building products.
[2143] This would be consistent with the body of case law and statute law which constitute a local NSW 'public use doctrine', akin to the PTD in the US, discussed in s 5.1 Chapter V.

impacts of climate change.[2144] However, by creating TDRs or exchanging land, the interests of private landowners trapped on an eroding land title of falling value and soaring liabilities might be accommodated to some extent, and assisted to relocate to a location free from hazards. Hence, this response would recognize the widest social community.

iii] Ecological community [0.7]

This response would consider the ecological community of land, similarly to the pro-public right responses canvassed above. By minimizing use of seawalls and avoiding the impacts of coastal squeeze, beach and estuary species of ecological or economic significance could migrate landwards as the shoreline recedes.[2145] Dedicating parts of surrendered private lands[2146] for future ecological purposes, eg fisheries habitat, would be a major advantage of this response.

iv] Temporal perspective [0.8]

Like the pro-public rights responses, under this 'accept and accommodate' response the State government would be more likely to consider 'time' in their decision making. They would likely recognize the natural geomorphological processes at work in shoreline recession; note the conditions forecast to prevail under climate change conditions; and anticipate likely future impacts of coastal hazards on coastal settlements under these conditions.[2147] The government could direct local councils to plan and act to protect public rights and interests in coastal lands and waters for future generations;[2148] and implement state-wide programs to achieve these goals. Further, by creating an enduring land exchange scheme this response could assist landowners caught in an economic 'coastal squeeze' and protect public rights for decades or longer.[2149]

v] Key social goals [1.0]

Allowing sandy beach and dune systems to recede naturally, and hence survive, as seas rise, would avoid the impacts of seawalls and contribute to coastal land health. Further it would allow other beach-based social and economic activities to continue, thus contributing to a range of social goals. As part of the land exchange scheme proposed under this response, a high priority would be to identify and remove dangers to public safety, and threats to environmental health from adjoining private land, to restore surrendered lands to a safe, healthy condition suitable for future public use and public interest ecological purposes.
Thus this response has the potential to satisfy all the criteria for ethical land management.

[2144] In accordance with objects of coastal management in s 3 *CMA 2016* discussed in s 3 Ch IV; and the ESD principle of 'intergenerational equity' stated in s 6(2)(b) *POEAA 1991,* reported in s 5.2 Ch V.
[2145] See Figure 10.12 and discussion of avoidance of seawall impacts in s 3.3 Chapter I.
[2146] The dedication of lands above MHWM for public purposes were discussed in s 3 Chapter IV, and dedication of lands below MHWM for ecological protection were discussed in s 9.2 Chapter II.
[2147] The impacts of climate change on coastal settlements in NSW was outlined in s 3 Chapter I.
[2148] As per the ESD principle of 'intergenerational equity' in s 6(2)(b) *POEAA 1991.* See s 5.2 Ch V.
[2149] The *Real Property Act 1900* (NSW) is already over a century old, and pre-dates federation.

b] Successful 'public policy'

This 'accept and accommodate' response combines elements of the 'strong' public rights, and 'soft' private property responses. Consequently, its satisfaction of criteria for successful public policy reflects theirs in many ways. However, there would be significant differences, due to its use of TDRs and a land exchange scheme.

I] Rationale [1.0]

Due to its consonance with existing elements of property theory and property law which recognize the dominance of public rights and uses,[2150] articulating a plausible public interest rationale for this response would not be difficult. A future government could easily mount a persuasive argument that protecting public rights and accommodating private interests where this was feasible - and consistent with the primary objective - would be in the public interest and contribute to a greater public good. The responsible Minister could thus properly argue that this response would have greater social utility and achieve better outcomes than other responses.

However a more persuasive rationale might be to place it in a wider context, as part of a more comprehensive government policy position on the impacts of climate change.[2151] It could then be argued that this response was in the public interest and appropriate for future conditions. Further, its public interest rationale could be augmented by a statement of the ongoing role of the State government in coastal management, as the owner of public lands, trustee of public rights and interests, and as a key regulating authority, in partnership with local councils.[2152] By providing a coherent rationale for continued State government involvement, which justifies its policy actions, this response would be likely to satisfy the first criterion of sound public policy.

II] Timeliness [0.8]

The 'accept and accommodate' response would be timely because its priority of public rights would resolve disputes about competing rights and provide a basis for avoiding or resolving future disputes. With the macro-policy of retreat as a core element, it could demonstrate timeliness in several other ways.

Legislation which mandated the orderly relocation of existing development at risk from coastal hazards and prohibited new development in 'at risk' areas, would appear to be timely, since thousands of residences are likely to be adversely affected by these hazards.[2153] By adopting

[2150] The property theory, rules, court rulings and statutory provisions identified in Chapters II, III & IV.
[2151] As forecast by IPCC, above n 7, 26, reported in s 3 Chapter I.
[2152] Recent government policy has been to devolve responsibility for coastal management to local councils, and minimise the role played by the State government on behalf of the public interest.
[2153] Up to 62,400 residences in NSW. See Australian Government, above n 44,77, cited in s 3.1 Chapter I.

'retreat' as a preferred policy, a future government could demonstrate its understanding that coastal environments will undergo major rapid change in the future,[2154] and require coastal managers to adopt strategies to reflect that temporal reality.[2155] Moreover, by creating a land exchange scheme, the government would make a timely response to climate impacts on coastal land, while ensuring the necessary mechanisms of property law operate stably and equitably, without disruption, over decades or centuries.[2156]

Importantly, once adopted, this response could be speedily implemented. Certain elements, such as legislation which confirmed existing common law rules via statute law,[2157] might be dealt with by the Legislature routinely. Legislation for other elements of this response, such as creating TDRs, or a land exchange scheme, might take longer to prepare, attract closer scrutiny by the Legislature and proceed more slowly. Indeed, due to the longer lead time required to gain final approval for such a scheme, a timely response would develop an enabling bill and allow time for public consultation, and the bill to be fine-tuned to gain the legislature's approval.[2158] Once enacted, its implementation could then proceed without delay. There would, therefore, be a good basis for this response satisfying this criterion.

III] Cost-effectiveness [0.9]

Like other pro-public rights responses which recognize the dominance of public rights in the existing property theory, case law and statutes, this one would not incur unproductive costs creating and moving to a new system, or spend public funds for little or no public benefit. Hence, it would not commit public funds to coastal defensive works whose sole purpose was to protect private land but would fund works to provide public access or protect key public assets. This expenditure would be a cost-effective use of public funds because of the direct public benefits achieved. However, the cost-effectiveness of public funding could be increased if funds were authorized for defensive works to protect both public assets and private land, where this 'levered' a financial contribution from all benefitting landowners. The costs of creating a TDR for approved structures on land adversely affected by coastal hazards, would also be a cost-effective use of public funds, if relocating at risk development helped achieve the public goal of protecting public rights. Similarly, the minor costs of creating and registering static or 'rolling easements' across some private land to permit ongoing public access to the beach would be

[2154] As forecast by IPCC above n 7, 26, Church et al, above n 44, 191, cited in s 3 Chapter I.
[2155] Consistent with the 'precautionary principle' of ESD, per s 6(2)(a) *POEAA 1991.* See s 5.2 Ch V.
[2156] Since sea levels are forecast to continue to rise for centuries, more land titles will become inundated by tidal waters over many decades; hence any land exchange scheme will need to continue indefinitely.
[2157] These are the property law rules regarding the nature, movement and location of real property boundaries formed by tidal waters, and the State's ownership of land below MHWM described in s 6.3 Chapter II, recognised in *EPA v Sanders* (1995) as discussed in s 8 Chapter III.
[2158] As occurred with 1997 Bill to amend *CPA 1979,* and the 2015 Bill for the *CMA 2016.*

cost-effective, due to the enduring protection of public rights they would provide.[2159]

The overall cost of public spending necessary to plan and implement a land exchange scheme, is difficult to assess due to the many expenditures it would involve.[2160] Significant public funding would be required to design the scheme, draft its enabling bill, consult widely, prepare for and promote its implementation, employ and train staff to operate it for decades. Public funding would also be needed to identify suitable sites for new government land releases to replace surrendered land titles, prepare documentation of the sub-division, register new land titles, install infrastructure needed for fully-serviced sites, and facilitate exchange of land titles. 'Incentive payments' to encourage landowners to join the scheme early, while substantial public benefits from surrendered lands were still possible would also require public funding. However in the scheme proposed, these payments would be structured to ensure their cost-effectiveness.

On acquiring surrendered land titles the government would also acquire the legal liabilities attached to them,[2161] so public funds would be needed for remediation works to render sites safe, install facilities for public access, or to protect ecological functions of public benefit. Thus the public funding to fully implement such a scheme could be substantial.

It is not possible to closely assess of the cost-effectiveness of the land exchange scheme outlined, since its total cost is unknown at present, and would involve many variable factors, affecting the making of credible appraisals. Its overall cost-effectiveness would be best assessed over the long term, when the scheme was mature, and all relevant costs and benefits to the public, affected landowners and the public interest generally, could be ascertained and integrated into the evaluation.

However, despite the absence of high-confidence costings I conclude that public expenditure on a land exchange scheme could be of enduring benefit, since public rights to use coastal lands and waters would be protected over time, and private interests accommodated to some extent. In the long term, if well implemented, though more costly initially, this approach could be a more cost-effective use of public funds, better protect public rights and achieve wider public benefits than other responses. Hence this more ambitious response has significant potential to satisfy this criterion.

[2159] Easements are registered on a land title and continue to remain in place when ownership changes. Rolling easements are intended to 'roll' with the ambulatory MHWM in perpetuity.

[2160] Ideally a detailed comparative economic study would estimate each response's implementation costs. It seems likely that the costs of creating and operating a coastal land exchange scheme would be less than the costs of acquiring all private land adversely affected by coastal hazards, at full market value, estimated to be between $12 and $18 billion in 2009. See Australia Government, above n 44, 77.

[2161] Landowners are liable for pollution of waters which emanates from their real property, under s 120 of the *Protection of the Environment Operations Act 1997* (NSW).

IV] Minimal disruption [1.0]

The 'accept and accommodate' response would minimize disruption. Accepting the dominance of public rights to access the foreshore and coastal waters[2162] and codifying extant property rules regarding tidal boundaries and ownership of lands below MHWM in declaratory statutes,[2163] would not be disruptive since this would not change current property law. Extensive legislation and the re-education of government staff, practitioners and the public would not be required.

Even creating a land exchange scheme could minimise disruption, if handled well. Administrative procedures could ensure that, private landowners would be no worse off, through their early entry into the scheme, and probably in a 'better' position in the medium term than if no action had been taken. Though relocation would be disruptive in the short term, landowners would gain secure title to a new allotment of land, free from hazards and liabilities, be able to transfer approved uses to it via TDRs, assisted by publicly-funded incentive payments. Land titles would be surrendered and new land titles would be created, but there would be no change to existing property law or the system of land title registration. Disruption to landowners would be limited but ongoing as more land titles become affected by the landward movement of the MHWM.[2164] Retreating, rather than defending, would also least disturb existing social, ecological and economic uses of beaches and waters.[2165] Thus this response would largely minimize disruption.

V] Credibility [1.0]

Finally, it is highly likely that this response would be seen as credible by the public, local council staff and other stakeholders in coastal management, including most landowners affected by coastal hazards. It would align with existing property theory and law,[2166] be consistent with expert opinion on the nature and rate of climate change,[2167] and its actions would address the local impacts of rising seas and receding shorelines while protecting public rights to access and use coastal lands and waters, and hence likely promote best practice in coastal management. By implementing a coastal lands exchange scheme and adopting innovative actions from the 'strong' or 'stronger' responses it could develop better practice in managing coastal hazards impacts. Consequently, this response would satisfy all criteria for successful public policy.

This concludes my analysis of potential responses. I next report the results of these assessments.

[2162] As per the common law stated in *Blundell v Catterall* (1821), see s 3 Chapter III, and under current statute law per s 27 *CMA 2016,* discussed in s 4 Chapter IV.
[2163] See the common law rules used in *EPA v Saunders* (1994) *v Leaghur PL* [1995] in s 8 Chapter III.
[2164] Between 40,800 and 62,400 residential buildings in New South Wales would be at risk of a sea level rise of 1.1m and a 1:100 years storm tide. See Australian Government, above n 44, 77.
[2165] This was the conclusion reached by Cooper and McKenna, above n 123, 301, noted in s 6.2 Ch V.
[2166] The rules, decisions and statutes which recognise public rights, stated in Chapters II, III & IV.
[2167] See the doubling in the rate of sea level rise shown in the CSIRO graph cited as Figure 2, s 2.4 Ch I.

10. Summary of Results

The results of my assessments of these responses, above, are shown in Table 7 below. As described in s15.5 in Chapter I, raw scores assigned for their satisfaction of criterion are shown in *[brackets]*. They are adjusted by applying that criteria's designated weight, to produce a weighted score for each criterion. Due to their relative importance against other criteria, scores for 'physical characteristics' and 'public interest rationale' criteria are weighted x 1.0, and all other criteria are weighted x 0.8. These scores are aggregated to produce a final total 'weighted' score for each potential response.

CRITERIA	Physical characteristics	Social community	Ecological community	Temporal considerations	Contribute to key social goals	Public interest rationale	Timeliness	Cost-effectiveness	Minimal Disruption	Credibility	**TOTAL SCORE**
Weight value *[raw]*weighted score	1.0	0.8	0.8	0.8	0.8	1.0	0.8	0.8	0.8	0.8	
RESPONSE											
1] do nothing	*[0.0]*	*[0.0]*	*[0.3]* 0.24	*[0.0]*	*[0.0]*	*[0.0]*	*[0.0]*	*[0.0]*	*[1.0]* 0.8	*[0.0]*	**1.04**
2] weak pro-private	*[0.2]* 0.2	*[0.1]* 0.08	*[0.0]*	*[0.0]*	*[0.0]*	*[0.1]* 0.1	*[0.1]* 0.08	*[0.0]*	*[0.0]*	*[0.1]* 0.08	**0.54**
3] robust pro-private	*[0.1]* 0.1	*[0.0]*	*[0.3]*	*[0.0]*	*[0.0]*	*[0.1]* 0.1	*[0.1]* 0.08	*[-0.1]* -0.08	*[0.0]*	*[0.1]* 0.08	**0.24**
4] strong pro-public	*[0.8]* 0.8	*[0.7]* 0.56	*[0.5]* 0.4	*[0.8]* 0.64	*[1.0]* 0.8	*[1.0]* 1.0	*[0.7]* 0.56	*[1.0]* 0.8	*[1.0]* 0.8	*[0.8]* 0.64	**7.00**
5] stronger pro-public	*[0.9]* 0.9	*[0.7]* 0.56	*[0.5]* 0.4	*[0.8]* 0.64	*[1.0]* 0.8	*[1.0]* 1.0	*[0.6]* 0.48	*[0.7]* 0.56	*[0.8]* 0.64	*[0.8]* 0.64	**6.78**
6] balancing	*[0.1]* 0.1	*[0.3]* 0.24	*[0.0]*	*[0.0]*	*[0.0]*	*[0.1]* 0.1	*[0.1]* 0.08	*[0.1]* 0.08	*[0.0]*	*[0.1]* 0.08	**0.68**
7] accept / accommodate	*[0.9]* 0.9	*[1.0]* 0.8	*[0.7]* 0.56	*[0.8]* 0.64	*[1.0]* 0.8	*[1.0]* 1.0	*[0.8]* 0.64	*[0.9]* 0.72	*[1.0]* 0.8	*[1.0]* 0.8	**7.66**

Table 7. – Summary of results

Next, in Part C I comment on the responses' satisfaction of the criteria and overall performance, rank them against the criteria and form some initial conclusions on their merits.

Part C - Discussion of results

11. Satisfaction of the criteria for ethical decision-making about land

In this section I compare the responses' satisfaction of the criteria for ethical decision making.

i] **Physical characteristics**

Coastal lands' physical characteristics would not be considered at all under the 'do nothing' response, hence it did not record a score against this criterion. The physical condition of land could be considered under the 'balanced' response but would not be useful in 'balancing' competing uses. The 'weak' and 'robust' responses recorded low scores against this criterion because only a small sub-set of the physical characteristics of land and its condition would be recognised: primarily as a cause for the erection of seawalls, and the land's natural limits would not guide decisions about its future use. The 'strong', 'stronger' and 'accept and accommodate' responses scored more highly because they would better consider land's physical character and its likely future condition due to anticipated climate impacts, and would likely modify planned future uses to recognize the land's natural limits.[2168]

ii] **Social community**

Impacts of future land uses on the social community would be considered to varying degrees in all except the 'do nothing' response. The 'weak, 'robust' and 'balanced' responses scored poorly against this criterion because of the narrowness of the social community likely to be considered. The 'strong' and 'stronger' responses recorded higher scores because they would consider social impacts on all members of the public, and future generations.[2169] However, the 'accept and accommodate' response scored highest on this criterion because its consideration of social impacts would have the widest scope and consider adversely affected private landowners.

iii] **Ecological community**

The 'weak' and 'robust' responses recorded no score against this criterion because they would ignore the likely profound ecological impacts they would make on the ecological community. The 'balanced' response also did not record a score due to its focus on the parties to any dispute over conflicting uses, not ecological communities. The 'do nothing' response recorded a low score because, the government would ignore the forecast ecological impacts of climate change and the need to develop an appropriate public policy response, but would not change existing

[2168] By making and updating coastal management programs (CMPs) under s 13-16 *CMA 2016*, consistent with the *SEPP Coastal Management 2018*, discussed in s 4 & 5 Chapter IV.
[2169] In accordance with ESD principle of 'intergenerational equity' defined by s 6(2)(b) *POEAA 1991*.

statutory provisions which require impacts on ecological communities to be considered in decision-making about coastal land.[2170] The 'strong' response recorded a median score since it would avoid the ecological impacts of 'coastal squeeze' and secure positive outcomes for coastal ecological communities albeit co-incidentally, but would not extend the protection of public interest values in native vegetation on private land beyond its existing limited scope.[2171] The 'stronger' and 'accept and accommodate' responses would also avoid the ecological impacts of coastal squeeze but earned higher scores since they would use planning instruments to extend the protection of native vegetation and other public interest values on private lands.

vi] **Temporal perspective**

Results for this criterion were polarized. The four 'do nothing', 'weak', 'robust' and 'balanced' responses would ignore or discount the effects of time. Hence they did not score against this criterion. The 'strong', and 'stronger' responses would consider future generations and time to a degree, recording higher scores, but the 'accept and accommodate' response scored highest because it would also consider the effects of climate change impacts over time on private lands, particularly when assessing what assistance to landowners would be feasible.

v] **Contribution to key social goals**

Scores were also highly polarized for this criterion. Because of their very narrow focus the 'do nothing', 'weak', 'robust' and 'balanced' responses would not contribute to key social goals, such as restoring land health, and recorded no score. In contrast, the 'strong', 'stronger' and 'accept and accommodate' responses recorded higher scores because they would seek to achieve public good outcomes and contribute to wider social goals, including restoring land health.

This concludes my review of the responses' satisfaction of the ethical decision-making criteria.

12. Satisfaction of the criteria for successful public policy

I next I compare these responses' satisfaction of the criteria for successful public policy.

I] **Rationale**.

The 'do nothing', 'weak', 'robust', and 'balanced' responses scored poorly against this criterion because it would be difficult to articulate a credible public interest rationale for them. In contrast the 'strong' and 'stronger' responses scored well because a coherent public interest rationale to justify these responses could be confidently stated, drawing on well established precedents in

[2170] See s 3.25 *EPAA 1979,* and s 6(2)(c) *POEAA 1991,* discussed in s 5 Chapter IV and s 5.2 Chapter V.
[2171] Coastal wetlands and littoral rainforests formerly protected under *SEPPs 14 & 26.* See s 5 Chapter IV.

property norms, common law rules, court decisions and statutory provisions of existing property law,[2172] and persuasive explanations of why and how these responses had social utility could be easily given. Moreover such a rationale would provide an important justification for authorizing public funding. Because it would adopt either the 'strong' or 'stronger' responses, the 'accept and accommodate' response would also satisfy this criterion. However a rationale would also be required to explain and publicly justify its key element: protecting private property interests where feasible. A future NSW government could also justify limited public expenditure to assist adversely affected private landowners, as being in the public interest, where this created, or contributed to, public benefits such as continued public access to the beach, or avoided threats to public health, dangers to public safety and harm to the environment. Hence the responses' satisfaction of this criterion were also polarized.

II] **Timeliness**.

No response exhibited the level of urgency necessary to fully satisfy this criterion. The 'do nothing' response recorded no score, while the timeliness of the 'weak', 'robust' and 'balanced' responses rated poorly because the government would not make timely preparations for future circumstances. Further, because they would overthrow the status quo, the legislation necessary to implement these responses would likely take time to prepare, may encounter opposition to its passage in the Legislature and delays in its implementation. Due to the simplicity of the 'strong' response and uncontroversial nature of laws codifying existing common law rules and public rights, the passage of legislation for this response would be straight-forward and its implement-ation would be immediate. Thus it would be very likely to be 'timely'. However, the legislation required for the 'stronger' response would take longer to prepare due to its wider scope and diverse actions, and its passage could be delayed, making it less 'timely'. Its timeliness could be further reduced if its implementation depended on major changes to institutions within Government. Hence it recorded a more modest score. Though the complexity of the legislation required, potential legislative hold-ups and delays in implementation would also affect the timeliness of the 'accept and accommodate' response, its initiation of government policies and legislation, which anticipated and prepared for future climate impacts, protected public rights, and created enduring public benefits, warranted a higher score.

III] **Cost-effectiveness.**

The cost-effectiveness of the public spending involved distinguished these responses. At the low end, the legal costs incurred by the State as a respondent, due to its 'do nothing' response may,

[2172] recognising the dominance of public rights, uses, interests and purposes cited in Chapters II, III & IV.

or may not, be cost-effective use of public funds. Because publicly funding seawalls would likely create threats to public access and use rights, the cost-effectiveness the 'weak' response would likely be nil, but with its higher spending and greater impacts, the 'robust' response's cost-effectiveness could be negative. Similarly, the 'balancing' response's cost-effectiveness, with its many ill-defined ongoing public costs for uncertain public benefit may also be negative. The cost-effectiveness of all three pro-public rights responses would be underpinned by their consistency with existing property law,[2173] and hence would not incur unproductive costs in reversing the status quo to create a new system. By not incurring major public expenditure, the 'strong' pro-public rights response would be cost-effective because it would protect public rights and prepare for climate change impacts. At the higher end of the scale, the 'stronger' and 'accept and accommodate' responses could be more cost-effective use of public funds, but would require higher spending to obtain significant additional public benefits.

IV] **Minimal Disruption.**

Scores against this criterion varied. Two responses most closely aligned with existing property law, which preserved the status quo with little or no disruption, the 'do nothing' and 'strong' responses, rated highly. The 'stronger' and 'accept and accommodate' responses, which would be consistent with extant property theory and law but create some disruption, recorded moderate scores. In contrast the 'weak, 'robust' and 'balanced' responses, which would overthrow the status quo, and hence deliberately maximize disruption, recorded very low scores.

V] **Credibility**.

Several responses would not be likely to be seen as credible by the public or other stakeholders, since they would be inconsistent with long-standing elements of existing property theory and property law which recognize the dominance of public rights,[2174] not be based on robust evidence, published research or expert opinion, and would frustrate or subvert, rather than foster, best practice in coastal management. Hence 'do nothing', 'weak', 'robust' and 'balanced' responses recorded low scores. The 'strong' and 'stronger' responses scored well due their alignment with extant property law, and their focus on managing local climate change impacts. The 'accept and accommodate' response scored more highly because it would be likely to be seen as credible public policy by more people, including adversely affected private landowners, and would foster the development of best practice in managing coastal hazard impacts on privately-owned coastal lands. This concludes my review of criteria satisfaction.

[2173] In which public rights are dominant. See s 9 Chapter II, s 3 Chapter III and ss 3-7 Chapter IV.
[2174] The property theory, common law rules, decisions and statutes considered in Chapters II, III & IV.

13. Responses' performance against criteria

In this section I summarise each responses' performance.

a] 'Nil response' by Government: courts decide

This response scored poorly against all criteria for ethical land management, and against the criteria for successful public policy, with the exception of 'disruption', where the lack of government action would be unlikely to disrupt the status quo. It would not be seen as a credible response to climate change impacts by the public, or other stakeholders in coastal management.

b] 'Weak' pro private property rights response

Neither the criteria for ethical land management or successful public policy would be satisfied by this potential response. Claims it could satisfy the public interest rationale and timeliness criteria, would be contestable and may not withstand closer scrutiny. Since it would commit significant public funds to protect private land into the future indefinitely, it would have low cost-effectiveness of public expenditure for public benefit. Further by reversing the status quo, it would create uncertainty, incur unproductive transition costs and significantly disrupt current property law. It is likely that this response would be seen as lacking credibility by the public and other stakeholders in coastal management, due to its reversal of public rights dominance, lack of robust evidence, inconsistency with recent research findings on climate change impacts and incompatibility with 'best practice' in ecologically sustainably managing coastal lands.

c] 'Robust' pro-private property response

Due to its focus on narrow goals, this response rated poorly against both sets of criteria. Noteworthy were the difficulties this response faced: in framing a coherent public interest rationale, the very low value of its public funding for public benefit gained, and its likely immediate adverse impacts on existing social, ecological and economic uses of coastal lands. Major disruption to current property law to reverse the status quo, creation of ill-defined unproductive costs, potential for social division in coastal communities, and the redistributive effects of its spending would be likely under this response. For these reasons, its inconsistency with IPCC's findings on climate impacts, and due to the subversion of 'best practice' in coastal management which would be required to implement it, this response would not be seen as a credible public policy response by the public or other stakeholders.

d] 'Strong' pro-public rights response

This response largely satisfied ethical land management criteria. However, due to its focus on public rights, the social community considered would not include affected private landowners,

and consideration of impacts on the ecological community could be overlooked. Its contribution to 'land health', while potentially positive since it would avoid 'coastal squeeze' impacts, would be incidental. It also performed well on criteria for successful public policy. Notable were the logic of its rationale, cost-effectiveness of its modest public funding, and the minimal, if any, disruption likely to result from protecting existing public rights to access and use coastal land and codifying property rules. Because it would align with other elements of existing property theory and law, reflect the IPCC findings on climate change, address the likely local impacts and apply 'best practice' in coastal management, this response would be seen as credible by the public and other parties involved in coastal management.

e] 'Stronger' pro-public response to public use rights'

Most criteria for ethical land management were satisfied by this 'stronger' pro public rights response. The ecological community would likely be considered in protecting wider public interests in coastal lands and waters, and though future generations of beach users would be considered part of a wider social community, adversely affected private landowners would not. This response would satisfy the public interest criteria of rationale, and timeliness, and if handled well would likely sustain public support for the Government. It would produce varying results against cost-effectiveness and disruption criteria however, depending on the policy measures pursued. The use of easements, including rolling easements, to provide public access across private lands to use the beach, would only minimally disrupt private landowners, but would provide major public benefits of enduring value, for relatively low public expenditure.[2175] Enlarging the foreshore by raising the HWM and acquiring intertidal land would create minor disruption and incur greater public funding, but this could be justified by the greater public benefits that would be gained. Its credibility among the public and other coastal management stakeholders would be likely to be high, due to its consistency with existing elements of property law, acceptance of the need to manage the impacts of climate change on coastal environments, and the likelihood that it would apply best practice' and develop better practice in protecting public access to the beach and coastal waters, as shorelines recede.

f] 'Balancing' response,

Despite its apparently reasonable premise, the 'balancing' response performed poorly against almost all assessment criteria. It would struggle to frame a credible public interest rationale for change, and though it would consider the interests of the social community, it would likely adopt a narrow focus on the parties to the dispute, who may or may not represent public interests. Though it would be possible for the interests of future generations to be considered, it would be more likely that, to resolve the dispute, the interests of current parties to the dispute

[2175] As in the case *Coffs Harbour LALC v Minister* (2013) discussed in s 5.1 Chapter V.

would matter most. Since it would require tortured logic to frame a credible public interest rationale, lacks timeliness, would abandon longstanding elements of property theory and law to create a new 'no trumps' system and hence cause extensive disruption, uncertainty and unproductive costs, with low cost-effectiveness of public spending this response scored poorly against these criteria. In addition to these problems, this response would be seen as credible by only a very narrow section of the community. It would be likely to be rejected as lacking credibility due to focus only on 'balancing' interests, not future impacts, its lack of evidence as to its workability, and conflict with existing best practice in coastal management. Hence this response would be unlikely to satisfy any criteria for successful public policy.

g] 'Accept and accommodate'

Most criteria were well satisfied by this response, save consideration of the ecological community. By accommodating private landowners' interests where feasible, as well as future generations of the public, the widest scope of social community consideration would be possible. However, apart from avoiding coastal squeeze, its positive environmental outcomes would be incidental. The goal of 'land health', the survival of beach and dune systems into the future, would be possible, but not certain. One strength of this response would be its use of economic instruments to protect public rights, accommodate private interests to some extent, and improve environmental outcomes, as a result. Although its cost-effectiveness would depend on the methodology used to assess it, another strength is that its policy 'to accommodate private interests where feasible', would require government to make careful appraisals of the feasibility, including the cost-effectiveness, of committing additional public spending to accommodate and assist private interests in adversely affected coastal lands, when protecting public rights. The use of economic instruments, TDRs, and land title exchange would be feasible ways to implement this response. Further, this response would be likely be seen as credible by the public, other coastal management stakeholders and importantly, by adversely affected private land owners. It would protect public rights and would recognize and respond to forecast climate change impacts on public land and on privately-owned coastal lands, where this was feasible. It is likely that this response would apply best practice in coastal management, and develop better practice in managing coastal hazards' impacts on private land. Hence it would satisfy all the successful public policy criteria.

14. Ranking of responses by merit

Based on the summaries and scores shown in Table 5 above, the potential responses' satisfaction of the criteria rank from highest to lowest in the order shown in Table 8 below.

Score	Ranking	Potential response
7.66	1	Accept and accommodate
7.0	2	Stronger pro-public rights response
6.78	3	Strong pro-public rights response
1.04	4	Do Nothing
0.68	5	Balancing response
0.54	6	Weak privileging of private property rights
0.24	7	Robust privileging of private property rights

Table 8. - Ranking of potential responses by merit.

15. Conclusions

From these assessments I have formulated the following preliminary conclusions:

1. Results are strongly polarized: there are several very low- and several high-scoring responses.

2. The ‘weak’, ‘robust’ and ‘balanced’ responses would be difficult to justify and execute, would ignore social and ecological impacts, incur unjust public spending and lack credibility.

3. The ‘strong’ and ‘stronger’ responses closely align with existing elements of property theory and law and hence seem credible and would be easy to justify and implement. They would maximize public benefits for public spending but overlook affected private landowners.

4. Both the ‘stronger’ and ‘accept and accommodate’ responses could increase the protection of public access and use rights through legislation and additional public spending.

5. The ‘accept and accommodate’ response would also align with existing property theory and law and be seen as most credible. By incurring higher public spending to accommodate private interests where feasible, it could secure additional valuable and enduring public benefits.

This concludes my assessment of the merits of potential responses.

In this chapter I evaluated seven potential responses by a future State government to determine which would be most useful in resolving future conflicts between competing rights over use of coastal lands, and in addressing the climate impacts which frame them.

In the next, final chapter, I use the results of this evaluation to identify the response most likely to be adopted by a future government and state my answer to the primary research question.

"*What The Sea Wants, The Sea Will Have*"
[The album] steers its helm
through nautical themes and scenes, drawing
on our defencelessness in the face of nature
and our fragility under the weight of the sea.

Sarah Blasko (2006)[2176]

Chapter VIII – A practical answer to the Question

Introduction to the final Chapter

In the last two chapters I have explored what the policy environment created by a State government may be in the future by outlining a diverse suite of potential responses which might be adopted, assessing their merits against criteria for ethical decision-making and successful public policy, and identifying three high-scoring responses.

In this last, short chapter I move from a technical assessment of these responses' merits against multiple criteria, to make a final, essentially political assessment of which response would be most likely to be adopted by a future government. Using this forecast of the policy environment most likely in the future I then answer my primary research question: will private property rights 'trump' public rights and interests in coastal lands, under climate change conditions?

In Part A I recap the methodology for the final stage of analysis, which moves beyond the results of the merit assessment, to focus on which potential response would be most likely.

In Part B I assess the likeliness of potential responses, discuss relevant insights from these assessments and draw conclusions on the response most likely to be adopted by a future New South Wales government. With the benefit of these analyses I then forecast the policy environment likely to exist in the future, in which my primary research question is situated.

In Part C I move beyond the theoretical answer foreshadowed in Chapter IV to furnish a practical answer to the primary research question and state the reasons for my answer. I then outline the significance of my research and indicate where these answers might usefully apply. Finally I offer an alternative answer, from an eco-centric perspective.

[2176] From the liner notes of the album by Sarah Blasko, *'What the Sea Wants, the Sea Will Have'* (Dew Process Records 2006).

Part A – Moving from 'most merit' to 'most likely'

At the end of Chapter VII I identified the responses that best satisfied the criteria employed, and ranked them in order of their scores. In this Part I recap the results of this merits assessment, reiterate why a further assessment of responses' 'likeliness' is required and restate my methodology for identifying the response 'most likely to be adopted by a future NSW government.

1. Recap of results of merits assessment

The results of the merits assessment ranked the potential responses in this order:

1. Accept and accommodate
2. Stronger pro-public rights response
3. Stronger pro-public rights response
4. Do Nothing response
5. Balancing response
6. Weak pro-private property rights response
7. Robust pro-private property rights response.[2177]

However, the merits of these potential responses would not be the only matter considered by a future government when deciding which one to adopt to address conflicts between competing rights to use coastal lands, and the substance of public policy for managing coastal lands under climate change conditions. The first ranked 'accept and accommodate' response, though best theoretically and highest scoring in this assessment, may not be seen by decision-makers as the most desirable response to adopt for political reasons: enabling legislation would be complex, need time to develop, explain, enact and implement, incur higher public spending and involve political risks. Hence it is necessary to undertake a final assessment to identify which response would be 'most likely' to be adopted by a future State government.

2. A political assessment is also required

This final assessment of the responses' 'likeliness' is necessary because the public policy is political.[2178] Which response to adopt, the nature and content of enabling legislation, the allocation of public funds and estimations of likely public and legislative support would all be fundamentally political decisions by parliamentarians, involving political considerations.

[2177] See Table 7 in Chapter VII.
[2178] See Althaus et al, above n 163, 6.

Though analysis of merits would likely be considered in a future government's decision-making, it would not necessarily determine the response 'most likely' to be adopted. Hence this last assessment approximates this final stage of decision-making government.[2179]

In the next section, I restate the methodology for this assessment: applying insights from the merits assessment to identify the response 'most likely' to be adopted by a future government.

3. Methodology for identifying 'most likely' response

As explained in Chapter V, when determining the direction of future public policy on whose rights *should* prevail when they conflict, key political decision-makers in a future NSW government would consider the merits assessment of potential responses, but would likely focus on three core political factors: difficulty, overall cost and the kudos generated for government.

Considerations of potential responses using these factors would likely integrate the results of the merits review into political assessments using these political criteria. This integration would likely simplify the merits review results and synthesize from them political appraisals of the responses' difficulty, cost and their political value: in their appeal to the public, electoral impact in key areas and demographics, and their capacity to generate kudos for the government. Hence considerations under the five ethical criteria, the criteria of public interest rationale and minimal disruption would inform political assessments of difficulty. Nuanced assessments of cost-effectiveness would likely be relied on, but flattened, to inform political assessments of total cost, and more diverse assessments under criteria of achieve social goals, timeliness and credibility would be used as part of political assessments of potential kudos for government.[2180]

In the next sections this approach is applied to make political assessments of the potential responses, to identify which one would be 'most likely' to be adopted by a future government. These are important because by identifying the response most likely to be adopted by a future government, it becomes possible to foresee an appropriate context in which a credible answer can be stated about the likely relationship between competing private and public rights in the future, in New South Wales, in practice.

[2179] A political assessment is necessary because it provides scope for input from the decision maker, to be considered. "The decision maker almost always has information and insight not available to the analyst. Decision makers and political leaders are likely to be keen aware of the constraints that the context imposes, which must be taken into account in formulating policy. Such constraints are not always evident to the professional analyst." See Quade (1982) quoted in Althaus et al above n 163, 82.

[2180] See Table x – Integration of merits assessments into political assessments, in Chapter I sX Method.

Part B – Forecasting the future

In this Part I assess the likeliness of potential responses using these political criteria, form conclusions on which one would be 'most likely' to be adopted by a future government, and forecast the likely public policy environment of the future.

4. Estimates of the 'likeliness' of potential responses

Using estimations of the three core political considerations of difficulty, overall cost and kudos, I next explore which response would be 'most likely' to be adopted by a future government.

1] *A 'nil response'*

It would easy for a future government to decide to take no action, and hence not require legislation or public funding. The immediate direct costs to the public purse from this response would be low, but would likely include the government's legal costs as a party to legal proceedings.[2181] However, whether due to an inability to act or disinterest, a 'do nothing' response would probably be seen as lacking credibility by the public, or stakeholders in coastal management. It would be unlikely to have electoral appeal or win kudos for the government.

The likeliness of this response being adopted by a future government is rated 'low'

2] and 3] *'Soft' and 'robust' pro private property responses*

Both the pro-private property rights responses would face major difficulties in framing a credible public interest rationale, encounter major legislative and administrative obstacles in reversing the status quo via legislative 'reforms', and would incur unproductive transition costs. Further, their high levels of public funding to protect private land would have redistributive effects, contrary to the public interest.[2182] For these reasons and their inconsistency with expert scientific opinion[2183] and best practice in current coastal management,[2184] these responses would not be seen as credible by the public and other coastal management stakeholders. Under these responses, social and ecological impacts would not be apparent immediately. However once 'coastal squeeze' became obvious, as beaches narrowed,[2185] non-resident beach-using voters could voice concerns about the loss of the beach, undermining support for the government. It is likely that these responses would only have electoral appeal to landowners adversely affected by

[2181] The likelihood and nature of possible proceedings were discussed in Part A Chapter VI.
[2182] This was the case in the UK reported by Cooper and McKenna, above n 123, discussed in s 6 Ch V.
[2183] The expert opinion of the IPCC and climate change researchers on likely local impacts were discussed in s 2.4 Chapter I.
[2184] See discussion of s 3 Objects, and s 21 CMA 2016 proscribing the *Coastal Management Manual Part A* as the mandatory standard of best practice in coastal management, discussed in s 4 Chapter IV.
[2185] The 'coastal squeeze' created by building seawalls on beaches was discussed in s3.3 Chapter I.

coastal hazards and would be opposed by the greater number of non-resident beach-users, creating an electoral back-lash and a loss of kudos for the government.

Due to these serious limitations these responses are rated as unlikely to be adopted.
This conclusion has major implications for resolving the lingering uncertainty inherent in the theoretical answer to the primary research question foreshadowed at the end of Chapter IV.

4] *'Strong' pro-public rights response*

This response would face least difficulty in framing a credible public interest rationale, enacting relevant legislation and implementing government policy because protecting public rights and codifying common law rules[2186] would maintain the status quo. Improving public access and dedicating additional areas of coastal Crown land for public use, as national parks or recreation areas would have good public interest value for only limited public expenditure.[2187] This response, where the government recognised the likely local impacts of climate change[2188] and addressed conflicts over use of coastal land with strong protection of public rights, would be seen as credible and responsible by the public, coastal scientists, academics, local council staff and other stakeholders in coastal management. Even if this policy had not been publicized before the election, protecting public rights over coastal lands and waters would likely engender wide public support for the government, and would be unlikely to provoke a public backlash or undermine the government's electoral support. Adversely affected landowners may not support this policy, or the government, but the electoral significance of their dissatisfaction, would likely be minor compared to support among the wider beach-using members of the public. Hence it would likely appeal to many electors and would create support for the government.

With its low difficulty, comparatively low cost and potential to create kudos, the likeliness of this response being adopted by government is rated high.

5] *'Stronger' pro-public rights response*

Little difficulty would be likely encountered in articulating a public interest rationale for this response, and only moderate difficulty might be expected in legislating to implement it since statutory mechanisms to acquire land and create easements for public purposes already exist.[2189] Declaring new statutory rights, creating new public easements, requiring higher standards of

[2186] Relevant common law rules applicable in New South Wales regarding the ambulatory nature of the MHWM, the location of real property boundaries, the ownership of land which falls below MHWM were stated in my discussion of *EPA v Saunders* (1994) and *v Leaghur Pty Ltd* [1995] in s8 Chapter III
[2187] The cost-effectiveness of public spending, in achieving public benefits was a key issue flagged by Cooper and McKenna, above n 123, and by Althaus et al, above n x. See ss 6 & 8 Chapter V.
[2188] See the summary of likely local impacts of climate change in s 2.4 Chapter I.
[2189] Current NSW statutes governing land acquisition and easements were outlined in s 6 Chapter IV.

impact assessment and protecting more coastal native vegetation,[2190] would have high public interest value for low public expenditure.[2191] Land acquisition costs would vary from medium, if only a narrow ribbon of land was acquired, to very high if the government were to compulsorily acquire whole land titles to protect public access and use of the beach.[2192] Because it responds to faster than anticipated climate change impacts,[2193] seeks to ensure the survival of public rights, and would likely apply and develop best practice this response would likely be seen by the public, local council staff and other stakeholders in coastal management as highly credible.

This response's capacity to garner support for the government would depend on its level of public promotion before the election. A clear pre-election policy, plausible public interest rationale, adroit legislation, followed by a realistic implementation program, would likely evoke a positive electoral response from the public. Adopting this response mid-term without a formal mandate would be politically feasible, especially if climate change impacts become acute, but could diminish support for the government among adversely-affected, unassisted landowners. Handled well however, it would likely create kudos and electoral support for the government.

On this basis, the likelihood of this response being adopted is rated as moderate.

6] *'Balancing' response*

Major difficulties are foreseen in justifying, enacting and implementing this response. Since it would overthrow the status quo,[2194] invent an new untested framework for arbitrating disputes over competing uses, create significant disruption and uncertainty, and incur a suite of transition costs for doubtful public benefit, this response would appear have serious deficiencies.[2195] However a superficial rationale of 'fairness' may be plausible, making it seem politically attractive. The lack of a robust evidence base, inconsistency with scientific warnings on climate change impacts[2196] and incompatibility with current best practice in coastal management[2197] would mean this response would be seen as lacking credibility by many stakeholders. The weakening of public rights,[2198] potential for counter-productive public funding[2199] and need for repeated 'rebalancing' would make it unlikely that this response would obtain public support.

[2190] See the discussion of higher standards of impact assessment and measures to protect native vegetation in SEPPs made under the *EPAA 1979* in s 5 Chapter IV.
[2191] For discussion of the importance of the cost-effectiveness of public spending, see ss 6 & 8 Chapter V.
[2192] See discussion of land acquisition costs in s 6 Chapter IV, and s 11 Chapter VI.
[2193] The increasing rate of sea level rise was discussed in s 2.4 Chapter I.
[2194] The status quo in NSW, in which public rights are dominant was described in s 11 Chapter IV.
[2195] See conclusions on the 'balancing' response's performance against the criteria in s 14f] Chapter VII.
[2196] As discussed in s 2.4, s 6 Chapter I.
[2197] That is, not consistent with the principles of ESD under s 3 *CMA 2016* and or compliant with best practice set out in the *Manual* proscribed under s 21 *CMA 2016,* as discussed in s4 Chapter IV.
[2198] Existing public rights to use coastal lands and waters in NSW were described in s 9 Chapter II.
[2199] See the likelihood of creating unproductive transition costs in moving to an entirely new and untested system outlined in s 14 Chapter VI, s 14 Chapter VII.

The likelihood of delays and uncertainty in outcomes would be great, benefits to private landowners and the public would be minor, if any. Thus this responses would probably alienate many members of the public and weaken electoral support for the government.

Overall, its difficulty, unproductive costs and limited electoral appeal mean this response would be most unlikely to be adopted by a future government.

7] *'Accept and accommodate' response*

Drafting Bills to protect public rights and codify common law property rules would not be hard.[2200] However preparing legislation to create TDRs and a land exchange scheme would face some difficulties which could be reduced by using existing legal means to implement them.[2201] This response would likely attract no public opposition and gain wider legislative support because as well as protecting public rights it would assist adversely affected landowners. The costs of introducing TDRs or creating easements would be low, however the cost of creating and operating a land exchange scheme could be very high, but could be off-set by income from interim uses of surrendered lands, or sale of some lots in new Crown sub-divisions.[2202]

Nonetheless, the costs of this response would probably be less than the cost of acquiring all adversely land titles at market value.[2203]

This response would be seen as credible by the public and other coastal stakeholders due to its focus on protecting public rights while managing the local impacts of global climate change.[2204] Moreover this response would be seen as credible by landowners adversely affected by coastal hazards and would develop and apply best practice in managing these impacts, where this were feasible. It would be highly likely that this response would attract public support due to its appeal to members of the public, coastal management stakeholders and private landowners. Were the responsible government Minister to publicly justify this response, and advocate for its timely implementation as in the public interest,[2205] this response would likely create electoral and legislative support for the government. If a Crown land exchange scheme were part of the response adopted this would likely maximize the kudos created for government.

On the basis of this appraisal, despite its increased difficulty and greater overall cost, the likeliness of this response being adopted by a future government would be high because of its

[2200] Common law rules re the nature and location of boundaries, ownership of land below MHWM and loss of land to the sea, raised in *EPA v Saunders, v Leaghur Pty Ltd* were discussed in s 8 Chapter III.
[2201] Relevant existing provisions of the *CLMA 2016* were described in s 13 Chapter VI.
[2202] See the discussion of costs for such a scheme in s 13 Chapter VI
[2203] The value of the more than 62,000 residential buildings at risk in NSW, assessed as between $12.4 and $18.7 billion dollars by the Australian Government, above note x, 77, was discussed s 6 Chapter I.
[2204] As forecast by the IPCC and Australian climate impact researchers, cited in s 2 Chapter I.
[2205] The need for a public interest objective to be stated and timely were discussed in s 8 Chapter V.

wider public and private benefits and its very high potential to create kudos for the government..

The ratings of responses' 'likeliness' under these three criteria are shown in Table 9 below.

Criteria / *Potential responses*	i] rationale, legislative or implementation difficulty	ii] indicative overall cost to implement	iii] kudos, potential electoral appeal
'nil response' = courts	Nil *Status quo*	Nil / very low	Low
'weak' pro private property	high	High	Low / negative
'robust' pro-private property	Very high	Very High	Low / negative
'strong' pro-public	Low	Low-moderate	High
'stronger' pro-public	Moderate	Moderate to high	Moderate
'balancing, no trumps'	Very high	Very High	Low / negative
'accept and accommodate'	High	Very High	Very high

Table 9. – Ratings of 'most likely' response

5. Conclusions on 'most likely' response

Drawing on the foregoing considerations I have formed the following conclusions:

1/ The 'strong' pro-public rights response would be most likely to be adopted by a future government. It would be easy to justify and enact, low cost and low risk, and create kudos.

2/ The 'stronger' response would be the next 'most likely' policy to be adopted. It would be easy to justify, face only moderate difficulty in enactment and implementation and though it would cost more, could generate additional electoral support for the government.

3/ If the 'strong' or 'stronger' responses were implemented well in the short to medium term, and good governance or good politics required further government public policy intervention, adoption of the 'accept and accommodate' response may become 'more likely' in the long term.

4/ This order of likeliness is strongly justified because all three pro-public rights 'options – the 'strong', 'stronger' and 'accept and accommodate' responses accord with existing property law rules,[2206] common law decisions[2207] and current legislation.[2208] The 'strong' response would create no disruption to the status quo, only clearly state it. The stronger' response would build on this foundation in existing elements of law[2209] and seek to extend them where feasible, creating minor disruption only but for clear additional public benefits. Likewise, the 'accept and

[2206] Eg the doctrine of accretion which governs natural boundaries to real property, as discussed in s 5.3 Chapter II and the principle of 'escheat' under which land ownership reverts to the Crown when it falls below the Mean High Water Mark, discussed in s 6 Chapter II.
[2207] See the courts' rulings on the nature and location of boundaries, ownership of land below MHWM and loss of land to the sea, in *EPA v Saunders, v Leaghur Pty Ltd* were discussed in s 8 Chapter III.
[2208] The protection of the public right of access to and along the foreshore in the prior Act and the current legislation, in s 27 *CMA 2016* (NSW) were discussed in s of Chapter IV.
[2209] The property law rules, common law decisions and statutory provisions cited in Chapters II, II and IV.

accommodate' response would be entirely consistent with these existing elements of law and hence unlikely to be disruptive. However, because it would also assist private landowners where this was feasible, and could employ existing mechanisms, the 'accept and accommodate' option offers an opportunity to minimize likely disruption to private interests, albeit it at some considerable public cost, while potentially obtaining valuable and enduring public benefits.

5/ The three potential public policy options which would reverse the status quo, explored in Chapters VI and VII, - the weak, and the robust pro-private property rights responses and the 'balancing' response – would be most unlikely to be adopted by a future government. Because they would aim to change the status quo, none of these options would be consistent with the normative elements of property law discussed above.[2210] Hence for all three of these responses the government would face serious difficulty in in framing a credible rationale to show how diminishing public rights was in the public interest, in justifying public spending without public benefit, or to the detriment of the public interest,[2211] and thus in winning the support of cross-bench legislators to enact the legislation needed to give the policy effect. [2212]. Further, it is likely that a future government would foresee that reversing the status quo for these three options would likely create major disruption, incur unproductive transition costs and risk being seen as "morally illegitimate",[2213] undermining public support for the government.[2214]

This conclusion is crucial to answering the primary research question in a way that makes sense in practice. By exploring what it would take to adopt and implement a policy to reverse the status quo, it has been possible to conduct an analysis of its feasibility as public policy. That analysis has demonstrated that, despite its availability, <u>in theory</u>, as a future policy option, reversing the status quo would face major, apparently insuperable, barriers to its adoption as public policy, and its enactment, rendering its likeliness extremely remote, <u>in practice</u>.

For these reasons potential responses rank in likeliness as shown below (see Table 10).

Ranking	Potential Response
1. 'most likely'	*a 'strong' pro-public*
2. next 'most likely'	*a 'stronger' pro-public*
3. may be 'more likely' in the long term	*'accept and accommodate'*

Table 10. – Ranking of 'most likely' response

[2210] The rules of property law, court findings and relevant legislation cited in Chapters II, III and IV.
[2211] See discussion of their advantages and disadvantages in s 8 Chapter VI. See also these responses assessment against the criteria in sections 5 and 6 Chapter VII.
[2212] The importance of special legislation to reverse the status quo was discussed in ss 6 & 7 Chapter VI.
[2213] See Freyfogle, *On Private Property*, above n 1607, 124. Freyfogle's comments on the legitimacy of land use decisions were discussed in s 6 Chapter V.
[2214] These likely consequences of the pro-private rights responses were discussed in ss 7 & 8 Chapter VII.

6. Forecasting the policy environment of the future

These conclusions indicate that the public policy of a future NSW government would 'most likely' continue to protect or enhance public rights to access and use coastal lands and waters, not privilege private property rights. Public rights, and public interests would remain dominant over some private property rights where they conflicted, but not 'trump' others.

Further, they suggest that as climate change impacts intensify it is possible, perhaps likely, that a future government would strengthen its policy commitment to protecting public rights by adopting and implementing additional policy measures aimed at ensuring safe public access to the beach and public use of coastal lands and waters are able to continue into the future. Thus I forecast that in the future the public policy environment will continue to favour public rights.

Part C - Answering the primary research question

In this Part I move beyond the some-what inconclusive theoretical answer posited at the end of Chapter IV, to address the primary research question at the core of this thesis.

Based on my positivist review of property theory in Chapter II, common laws decision in Chapter IV and current applicable statutes, I concluded at the end of Chapter IV, that public rights, public interests and public purposes are dominant over private property rights at present, and that successive legislators have clearly intended that this dominance continue indefinitely into the future. However I observed there, an answer in the negative was a tentative theoretical answer, because in theory at least, a future government, with the co-operation of the legislature could enact legislation to reverse this dominance and privilege private property rights. Hence, as I observed, this theoretical answer left the question open.

With the benefit of the merit review, my conclusion about the likely future policy environment, and my conclusions on the major practical barriers to a future government adopting and implementing a public policy to reverse the status quo to privilege private property rights, I can rule out this theoretical option as unachievable in practice, and define with considerable certainty a plausible realistic context in which I can frame a coherent, practical answer.

7. A straightforward practical answer

Q: Will private property rights 'trump' public rights and interests in coastal land in New South Wales, under climate change conditions?

A: No, they will not. Private property rights will not 'trump' public rights and interests in coastal lands in New South Wales, under climate change conditions, for the following reasons.

8. Reasons for this answer

A principal reason for this answer is that public rights over coastal lands and waters have been dominant over private property rights under common law property rules for centuries.[2215] Further as shown in Chapters III and IV, public rights are dominant in New South Wales currently, as of 2020, under a mix of statutory provisions and surviving common law rules.[2216]

One such rule, that privately owned real property in New South Wales does not include lands below MHWM, unless this is explicitly stated on the Certificate of Title,[2217] operates currently and unless negated by statute would apply in the future. A further rule of current property law, by which ownership of private land 'reverts' to the State when it falls below MHWM, makes it clear that private property rights would not extend beyond the tidal boundary of MHWM.[2218] Thus mistaken assumptions about the dominance of private property rights, 'permanence' of real property and misunderstandings about the doctrine of accretion's effect on property boundaries under current property law have been addressed and comprehensively rebutted.[2219] These common law rules[2220] will continue to operate unless expressly repealed, and they readily apply to future changes in boundaries and ownership of coastal lands as shorelines recede, due to rising seas and global climate change.[2221]

Unmistakable evidence of the legislature's intention that public rights and interest be dominant over private property rights in land can be seen in statutes authorising NSW public authorities to compulsorily acquire privately-owned land or manage biosecurity hazards on private land.[2222]

Evidence that private property rights are not now, and in the future would not be, 'trumps' can also be found in current NSW statutes which permit public authorities to create easements over privately owned land titles, to allow right of public access to the beach, and facilitate public use of the beach above MHWM, indefinitely into the future.[2223] However, the easement area would be small and well-defined, and other private property rights, including ownership and ability to

[2215] The *jus publicum* as defined by Hale in *De Jure Maris* (c 1667) was discussed in s 3 Chapter III.
[2216] This was the conclusion reached in s 10 Chapter IV.
[2217] See the discussion of *EPA v Saunders* (1994) 6 BPR 13,655 in s 8 Chapter III.
[2218] The authoritative ruling of the NSW Court of Criminal Appeal in *EPA v Leaghur Holdings PL* [1995] 87 LGERA 282, was discussed in s 8 Chapter III.
[2219] See the discussion of these cases in s 8 Chapter III.
[2220] Including the doctrine of tenure and principle of escheat, discussed in s 3 Chapter II.
[2221] The doctrine of accretion's subtractive modes, erosion and diluvion, were discussed in s 8 Chapter II.
[2222] The compulsory acquisition of real property under the *Land Acquisition (Just Terms Compensation Act 1991* (NSW) was discussed in s 6 of Chapter IV. The impact of biosecurity legislation on landowners' common law property rights was discussed in the 'right to manage' in s 5 Chapter II.
[2223] The creation of easements over private land for various public purposes was discussed in s 6 Chapter IV. Use of a 'rolling easement' by the Land and Environment Court, in *Coffs Harbour and District Local Aboriginal Land Council v Minister administering the Crown Lands Act* [2013] NSW LEC 216 (Craig J) to guarantee public access to the beach, was discussed in s 10 Chapter VI.

lease, mortgage, sell or bequest of the land, would remain unaffected. On land not within the easement, private property rights would not be diminished at all. Thus current property law[2224] indicates that the legislature intended that within the easement - albeit on private land - public rights would be dominant over a landowner's private property right of exclusive possession, to the extent necessary for the public purpose, and continue to be dominant indefinitely.

Hence I conclude that private property rights would not trump public rights in the future, but the converse would not be the case either. Public rights would not trump all private property rights, but would be dominant in certain locations where they conflicted, through easements.[2225]

A further reason why private property rights would not be trumps in the future, is that some claimed rights do not exist in current NSW law[2226] and are highly unlikely to exist in the future.

Moreover, through my exploration of options to privilege private property rights it is apparent that despite its availability in theory, in practice, due to their serious intellectual challenges, procedural difficulties and electoral risks, there is little or no possibility of a future government in New South Wales adopting a public policy to reverse the status quo.[2227] Hence, I conclude that this theoretical possibility is not actually feasible in practice, and thus, there is no plausible future scenario in which public rights will not remain dominant in the future.

In summary my reasons for finding private property rights will not be trumps in the future are:

- They are not dominant over public rights to access and use coastal lands under current law.
- Public rights have been dominant in English common law since at least the 17th century.
- Many current NSW statutes contain provisions which ensure public rights are protected.
- Successive legislatures have enacted laws that intend that public rights, interests and purposes continue to be dominant into the future.
- Absent reversal of the status quo by legislation, public rights would remain dominant.
- It would be too difficult, disruptive, expensive and unpopular to reverse the status quo.
- Private ownership and property rights do not apply to land which falls below MHWM.
- Public rights are dominant elsewhere in current NSW property law eg easements.
- Some claimed private property rights do not exist now and probably will not in the future.

2224 Sections 88A and 88E *Conveyancing Act 1919* (NSW) were considered.
2225 This was the conclusion reached at the end of s 6 Chapter IV.
2226 Claimed private property rights to defend or be defended, against the sea, and to compensation for land lost to the sea were discussed in s 9 Chapter II. The finding of no common law right to compensation is based on *Durham Holdings PL v State of New South Wales* (2001) 205 CLR 399, discussed in s 10 Chapter III.
2227 These responses were assessed as unlikely to be adopted by government in s 4 of Chapter VIII.

9. Usefulness of this answer

My research for this thesis, and the conclusions presented above, have clarified how important elements of property law currently operate in New South Wales, and will operate in the future, to resolve the confusion and uncertainty which has persisted for some time. Further I have highlighted several existing means and outlined other innovative ways a future State government could protect or enhance public rights to access and use coastal lands and waters.

Providing clarity on the current law governing five key issues - the nature and location of real property boundaries, ownership of land below HWM, whether a 'right to defend' exists, and liability for compensation for lands lost to the sea - will assist local council staff in responding to landowners' claims of 'rights' when developing plans or programs of management for coastal lands under the *Coastal Management Act 2016* (NSW).

Further, it is hoped that these clarifications might usefully inform, and modify, private land-owners' expectations regarding their future use of their land, the nature and extent of their private property rights, and the current and future operation of property law in this State.

It remains to be seen if a future State government can, with local councils, develop timely plans and programs to protect public rights to use coastal lands and waters, and assist adversely affected private landowners to make an orderly 'planned retreat' away from coastal hazards.

10. A concluding eco-centric observation

Though this thesis is anthropocentrically focused, another answer might be offered from an eco-centric perspective. It is possible - due to rapid increases in sea levels, and increased storminess - that it will be climate change impacts which operate as 'trumps' in the future, with coastal erosion and accelerated shoreline recession adversely affecting both public rights to access and use publicly owned coastal lands, and coastal landowners' private property rights.

Without a willingness to understand the nature and scale of climate changes likely to affect coastal environments, climate change impacts will be likely to produce sudden and severe shocks for coastal residents. However, private property rights will not protect them or their land from the power of wind and waves under a storm tide, when it is highly likely that these physical forces will 'trump' unrealistic human expectations and limit coastal lands' future use.

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