Section 27, the enigma section of the 2016 Coastal Management Act

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Introduction

Section 27 (s27) of the 2016 Coastal Management Act, which deals with the granting of development consents, is proving to be the least understood provision within the Act. It isn't that the wording, as such, is misunderstood but rather the reasons, and opportunities behind, and provided by the Section. Some consent authorities see s27 as an impediment and a provision that makes the granting of consent to development applications for private coastal protection works all but impossible. Instead however s27, if correctly understood and utilised, provides a pathway for councils to both satisfy s773 of the local government Act and to minimise their exposure to common law cases for damages, while at the same time providing a mechanism to allow for consent to be granted. That is, if properly understood and used correctly, s27 is actually a "friend", not a "foe", for consent authorities.

Section 27 of the Coastal Management Act

In regard to the granting of development consent relating to coastal protection works s27 of the NSW Coastal Management Act states:

"(1) Development consent must not be granted under the Environmental Planning and Assessment Act 1979 to development for the purpose of coastal protection works, unless the consent authority is satisfied that:

(a) the works will not, over the life of the works:

- *unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland, or*
- *pose or be likely to pose a threat to public safety, and*

(b) satisfactory arrangements have been made (by conditions imposed on the consent) for the following for the life of the works:

- *the restoration of a beach, or land adjacent to the beach, if any increased erosion of the beach or adjacent land is caused by the presence of the works,*
- *the maintenance of the works.*

(2) The arrangements referred to in subsection (1) (b) are to secure adequate funding for the carrying out of any such restoration and maintenance, including by either or both of the following:

(a) by legally binding obligations (including by way of financial assurance or bond) of all or any of the following:

- *the owner or owners from time to time of the land protected by the works,*
- *if the coastal protection works are constructed by or on behalf of landowners or by landowners jointly with a council or public authority—the council or public authority,*

Note. Section 80A (6) of the Environmental Planning and Assessment Act 1979 provides that a development consent may be granted subject to a condition, or a consent authority may enter into an agreement with an applicant, that the applicant must provide security for the payment of the cost of making good any damage caused to any property of the consent authority as a consequence of the doing of anything to which the consent relates.

(b) by payment to the relevant council of an annual charge for coastal protection services (within the meaning of the Local Government Act 1993).

(3) The funding obligations referred to in subsection (2) (a) are to include the percentage share of the total funding of each landowner, council or public authority concerned."

It should be noted that, s27 of the 2016 NSW Coastal Management Act contains the same wording as s55M of the 1979 NSW Coastal Protection Act and is not therefore a "new" provision.

Section 27 (1) (a)

This section of the Act deals with safe beach and headland access for the general public. It refers not only to access to a beach from public parks and roads but also access along a beach. As a separate issue, poor access can also result in an inability to address the repairs required on private property resulting from an erosion event. For example, the 2016 June storm at Collaroy highlighted the need for good access along the beach, and building setback from seawalls, to enable access during and immediately after an erosion event in order to undertake remedial works (Gordon et al 2016).

There is already a high usage demands on beaches in developed areas and this is only likely to intensify with future increases in population. There is also the compounding issue of potentially reducing numbers of available beaches and/or the widths of usable beach as a result of ongoing coastal recession due to natural imbalances of a beach compartments sediment budget and/or future sea level rises and other climatic impact effects such as increased storminess.

Given these projected future strictures, while a consent authority may be reasonably satisfied that a proposed works will not limit current access or use of a beach or headland, and can be designed and constructed so it does not pose a threat to public safety, how can a consent authority reasonably take into account an uncertain future climate environment and population demand? Clearly the simple solution for a consent authority is to not grant approval for coastal protection works; a decision that may have a problematic political and legal outcome.

The other, and likely to be seen as more reasonable approach, is for the council(s) that manages the region in which the proposed works are located to have a certified Coastal Management Program (CMP) that is on a "whole of coastal compartment" basis, and includes actions to overcome the potential impacts of future uncertainties of coastal recession, erosion, population pressures and climate impacts such as a beach nourishment program. The key word being "program", not a current "plan" to undertake a specified project that may or may not be needed at some unidentifiable time in the

future. That is, a flexible and adaptive way forward that does commit the council to a concept for managing the future uncertainties, including potential funding mechanisms. The inclusion of works to protect private assets introduces the need to address an appropriate, and robust, funding mechanism to offset any access issues that the works may create in the future.

It should be noted that a "whole of coastal compartment" approach does allow for management programs that deal with individual coastal embayments, within an overall coastal compartment that may stretch for tens or hundreds of kilometers. But this is on the proviso that a sediment budget approach is adopted where sand transport into and out of the embayment is taken into account in terms of the sand movements within the overall coastal compartment in which the embayment is located.

Section 27 (1) (b)

On the NSW coast, although houses have been lost to coastal erosion since the 1920s, it was the damage resulting from cyclones and East Coast Lows (ECLs) of the late 1960s to early 1970s, and culminating in the major storm event cluster of 1974 (cyclones on the north coast and a series of ECLs on the rest of the coast), that provided the impetus for documenting such events (Foster et al, 1975) and focused attention and a new understanding on the threat of coastal erosion on private and public assets.

In 1978 an ECL erosion event on the NSW central coast resulted in further damage and led to a benchmark legal finding. One of the homeowners, at Wamberal, who lost their house during the event, took legal action against Gosford Council, and the owners of an adjacent property. The action against the neighbouring property owner was discontinued following a resolution between the parties however the action for damages in negligence against the council continued. The action against council was on the basis that Council had, initially in 1968, and later following the storms in 1974, approved a construction that included coastal protection works (extended after the 1974 storm), for a property to the immediate south of the subject house and that the works were responsible for causing the increased erosion to the north that resulted in the loss of the house. The case (14992 of 1979, Smart J) was drawn out over a number of years with considerable expert witness testimony until, in 1989, after a subsequent appeal (BC 8902422, Hope, Samuels and Clarke) that upheld the original findings, the case was finalised. This resulted in the establishment of a significant common law precedent.

This outcome can be summarised as a finding that the seawall protecting the southern property had interacted with the waves and resulted in additional erosion to the property to the north, and most probably caused the loss of the house. However, his Honour also concluded:

"In 1968 and 1974 no council exercising its powers would reasonably have appreciated the matters litigated, their complexity and difficulty. It would not have recognised the problems. No council acting reasonably in those years could have been expected to undertake an in depth investigation into and evaluation of these matters. If it had sought or undertaken any investigation or any advice in 1974, it could well have been told that the proposed seawall would not have any adverse erosive effect of significance on neighbouring properties because of its scale. That would not have been negligent advice."

After the storm events of 1974 a new awareness arose. In part this was promulgated to NSW Councils through the implementation of the State Government's Beach

Improvement Program. This program, introduced in 1975, but effectively commenced in 1976 was to assist councils to overcome the coastal erosion damage caused by the 1974 events. It also provided an avenue for the dissemination of information to councils and other relevant authorities regarding coastal processes and the threat of coastal erosion and recession. This new awareness led to the 1979 NSW Coastal Protection Act and the publishing of the Coastline Management Manual (NSW Government, 1990). The net result being that today it can reasonably be argued that it is well known that a seawall on an individual property or group of properties can adversely impact on adjacent properties and hence consent authorities have a duty of care to avoid harm by addressing this matter responsibly. Section 27 (1) (b) is intended to provide consent authorities with a structural basis for considering and demonstrating that the issue of adverse impacts of coastal protection works has been responsibly addressed.

Again, as with s27 (1) (a), a "coastal of coastal compartment" certified CMP provides the vehicle for being able to reasonably consider applications for the construction of coastal protection works. That is a "whole of coastal compartment" certified CMP should have identified where coastal works are/will be required and what remedial/offset measures, such as beach nourishment or setback of the protective works, and/or development, are required. It should logically include a continuous, integrated solution that recognises, and provides management options for the potential adverse impacts on adjacent properties, and hence avoids the possible legal consequences of a piecemeal, ad hoc, approach.

It is important to recognise that a robust solution is likely to be best achieved by a single design and construction authority undertaking all the work, on all affected properties as one complete project. Further, where coastal protection works have been identified in a certified CMP, a public authority can undertake them without the need for development consent. In addition, given that a number of private properties and public land may be involved, the logical authority to manage the overall management of the design and construction is the local council(s).

The actual work can be undertaken by contract or by the council. Alternatively a consortium of all the affected property owners could also achieve a satisfactory result for construction of works for the private properties, however they would be subjected to the DA process.

Regardless, the subsequent involvement of the local council or a State authority will most likely be required in order to implement any maintenance or remedial/offset works such as a beach nourishment program. It does need to be recognised that to achieve a robust outcome, a condition of consent must require agreement for each owner to be involved with all other affected property owners in owner consent/funding/implementing the initial construction of the works and a coastal services charge arrangement for on-going management through council (s496 B, LGA) that would be transferable to future owners through a legal instrument on title.

Section 27 (2) (a) and (b)

The key point of s27 (2) is that it deals with funding of "restoration or maintenance" not with the initial construction, nor does it address the desirability of an initial coordinated effort by all owners to achieve an integrated continuous solution. The term "restoration" highlights the fact that if a works adversely impacts on other properties, the owner of the "works" needs to make provisions for addressing any adverse impacts on others' properties. Unless the works have been undertaken as an integrated and continuous construction that satisfies a well-considered and certified CMP, s27 (2) (a) potentially

becomes an “open cheque book” in regard to unknown future damages caused by piecemeal coastal protection work, during some ill-defined and uncertain future storm(s). That is, consents issued to individual property owners potentially open up future legal “minefields” for both the owner of the protective work and for the consent authority.

Section 27 (2) introduces the concepts of legally binding obligations such as securities or bonds as a measure for managing restoration and maintenance issues. While these can be useful devices, if there is a reasonable basis for assessing potential damages, their use in situations where the future call on funding for maintenance or restoration works is unknown usually renders them impracticable. On the other hand bonds or other financial assurances can provide a meaningful condition of consent where the consent is for a protective works to be undertaken by private property owners. Such a condition allows for a bond, or other security to cover the costs of the works in case the proponent(s) defaults part way through construction and the local council, or other public authority, has to complete, or make safe, the work. In such circumstances the bond or other security can be tailored so that its value is progressively decreased once predetermined construction “milestones” have been reached.

In regard to s27 (2) (b), a coastal services charge arrangement can be a practical mechanism for the management of on-going maintenance of coastal protection works as it involves a publicly accountable authority being responsible to ensure the work is maintained in a fit for purpose condition; and being liable if it does not. The likely inspection and maintenance regime should be able to be reasonably established based on an understanding of the type of protective work involved. The situation is somewhat more complex if restoration is required from time to time due to ill-definable future damage as a result of uncertain future storms. The existing Guidelines (DECCW, 2010) for creation and operation of a coastal services charge were prepared before the current 2016 Coastal Management Act superseded the 1976 Coastal Protection Act, and hence may benefit from revision.

A practical management approach to the possible need for future restoration, and/or augmentation, could be based on a coastal services charge where the funds raised are restricted to actual costs of the specific purpose, are publically reported annually, held in a restricted reserve and can be varied as needs demand. It may be desirable that some actuarial modelling of potential future costs, based on a best estimate of storm events, and likely impacts, are also undertaken so that the affected property owners have a structured understanding of potential future charges.

However, if there is no certified CMP or coastal services charge arrangement for the area where the works are proposed, it may be difficult for a consent authority to satisfy s27 (2).

Section 27 (3)

This section is an expression of the “beneficiary is to pay” principle. While simple in concept it can prove challenging in reality especially if the protection work includes a beach nourishment program that has multiple classes of beneficiaries. This is a matter that needs to be addressed when preparing the CMP for the area, so that there is adequate opportunity for public and political debate before funding arrangements are finalised. There is no universal answer to the issue of who should pay for protective works, their impacts and remedial measures, so when preparing a CMP for a particular area this is a topic that requires a prudent allocation of time and effort.

Sand Nourishment

A sand nourishment program embedded in a certified CMP, is potentially the most practical and robust solution for managing the present/future beach access issues and the adverse impact concerns raised by s27. Sand nourishment of beaches is a long established methodology for replacing lost sand, widening beaches, and/or providing for future change that will deplete beach widths such as sea level rise and increased storminess. There are well-developed guidelines as to the choice of suitable material for use on a particular beach. It has been successfully used in many overseas countries and in NSW, Queensland and South Australia for over 50 years. Inclusion of a competent, feasible, and viable beach nourishment program in a certified coastal management program, can provide comfort that s27 has been addressed by a prudent consent authority wishing to approve coastal protection works. This is provided that the nourishment program has the necessary adaptability and is envisaged to have a similar life to that of the coastal protection works. A nourishment program alone can constitute the entirety of the coastal protection works however this is unusual, but not without precedent. Again it is noted that the word “program” implies a long-term commitment, as against a single one-off project, albeit the program may involve a series of distinct nourishment projects.

Sand for nourishing beaches can typically be obtained from onshore deposits, offshore seabed sources or dredging of estuary and harbour navigation channels. Given the demand for sand by the construction industry, in particular concrete aggregate, and the environmental constraints that apply to many onshore resources, there is limited opportunity to source the quantities of sand needed for future beach nourishment from onshore sources. While the dredging of estuaries and harbours for navigation purposes can yield some suitable sand, it is generally a limited and problematic source, particularly if the sand is contaminated with other material including silt. Hence, the ability to access suitable offshore sand resources is likely to be a significant factor to the success of a CMP that relies on an on-going sand nourishment program.

By the 1970s, because of the on-going depletion of readily available on-shore sources of sand in the Sydney region for construction purposes, a number of companies commenced offshore investigations into potential sand resources on the offshore Sydney shelf. These activities intensified during the 1980s and 1990s. At the same time NSW Public Works developed an interest in offshore sand that may be required for future beach nourishment and commenced an extensive program of offshore investigations (Gordon, 2009). However, during the late 1990s and 2000s significant public opposition developed towards the extraction of offshore sand for concrete aggregate purposes and this resulted in a State government decision to place what amounted to be a moratorium on offshore sand mining. Unfortunately, at the time there was no differentiation made between sand extracted for construction purposes and sand re-positioned within the coastal system, from offshore to onshore, for beach nourishment. Sand nourishment of the Queensland Gold Coast beaches, from offshore sources, has been practiced for the past 50 years and hence currently Queensland has in place the necessary regulatory regime to facilitate and manage this activity.

The Local Government Act

It is argued that effective consideration of s27 of the CMA can be greatly simplified if there is a certified, and adopted CMP for the area in question. Further, that the CMP is

based on “a whole of coastal compartment” management regime that details any works required and makes specific provisions to ensure integration of actions so that any potential adverse impacts are managed. However, in considering funding of coastal protection works, a CMP needs to recognise and address the three funding stages required for coastal protection works; the initial construction cost, the on-going inspection, maintenance and repair costs and the costs of any upgrade required due to changing circumstances such as increased sea levels and/or increases in storminess.

Section 495 (LGA) provides a mechanism for funding the initial construction of coastal protection works in the form of a Special Rate to be charged to benefiting properties. While this section could be used to address the initial cost of construction of coastal protection works, and possibly future upgrades, it requires an often onerous and problematic process through IPART and is not appropriate as a method for funding on-going maintenance, and arguably, future upgrades.

Special rates are best suited to specific projects that once completed can, if on going maintenance is required, be funded from normal rates. Given that coastal storms can occur at any time and cause major damage, the need for future maintenance and repair cannot reasonably be predicted. Neither can future nourishment offset requirements, which vary with weather conditions, be predicted. That is, a special rate option has limited practicality when applied to the realities of the on-going management of the uncertainties of the maintenance/repair demands of coastal protection works. Hence, in order to ensure the coastal protection work created through a special rate provision continues to be effective a second funding mechanism is required.

Section 496B (LGA) provides the required mechanism for the on-going funding of maintenance and repair through the leveeing of an annual charge, however it is limited to maintenance and repair and does not allow for the recovery of funds involved in the initial construction costs. Nor does it seem to envisage a funding requirement for future upgrades. This section of the LGA states that the proposed levying of an annual charge is to be applied to the parcels of land benefiting from the coastal protection works, however there could be arguments mounted that properties not currently under direct threat may also benefit from a coastal protection work. Guidance as to what are considered to be the benefiting properties therefore remains an “interesting” challenge.

Section 553B somewhat complicates 496B by differentiating between existing, and new works when providing councils with the authority to undertake the necessary actions to ensure all interdependent coastal protection works are managed in an integrated manner. Further s553B overlooks coastal protection works that were in the past constructed without the proper approval process, nor design and construction competence, and need to be upgraded to a standard where they can be considered fit for purpose to integrate with new works; a situation now potentially made more complex by a recent Land and Environment Court (LEC) decision which addressed the inappropriateness of regularising existing unlawful works (Sack et al, in press). In reporting the case the Chief Judge of the LEC, Preston CJ cited the principles expressed in Kouflidis that “*the unlawful user of the land should gain no advantage from having established an unlawful use*”.

Where past approvals apply to existing works, and depending on the contemporary competence of their design and construction, they may also require upgrade to integrate effectively with any new works however, given the original works are lawful the same complication does not arise.

So, although the provisions exist in the LGA for funding of construction, and separately maintenance and repair, of works it would probably be simpler if these issues were all contained in a single section of the LGA as a coastal management charge that

comprised three components: the initial actual construction costs; the required on-going actual costs generated by the need to maintaining an adequate “work” and/or repair any damage caused by the “work”; and the actual costs of any future upgrade that may be required as a result of changing circumstances.

It may appear simple to calculate the on-going component of the Charge by calculating the “best estimate” of likely future works/operations and then accumulating funds accordingly. However this presents two problems. The first is in regard to how reliable an estimate can be made of an uncertain future damage regime and the second is what to do with the accumulated funds while awaiting storm damage. Again this may seem simple however the time value of money means that funds collected today may prove insufficient if the damage takes place a long way into the future.

Currently the science is not sufficiently reliable to enable a robust calculation of damage probability. An alternative method could be to only collect funds to cover the actual on-going costs of routine maintenance, but then raise a loan in order to fund any necessary remedial actions should unexpected damage occur as a result of a major event. The Charge would need to have the flexibility that it could then be varied for future years to recover the full costs (including interest) of the loan(s).

It would be prudent to consider and detail all of these issues in the development of a CMP so that they can be fully considered, through the public exhibition process, by the State in certification of the Program and, by Council through its formal adoption process. By doing so not only is implementation facilitated but also consideration of s27 simplified in regard to future development applications.

Section 733 of the Local Government Act 1993 covers exemption from liability for flood liable land, land subject to risk of bush fire and land in the coastal zone. In regard to s27 of the CMA the most relevant parts of s733 of the LGA state that a council does not incur any liability in respect of any advice furnished in good faith by the council relating to the likelihood of any land in the coastal zone being affected by a coastline hazard or the nature or extent of any such hazard, or the preparation or making of an environmental planning instrument, including planning proposal for the proposed environmental planning instrument, or a development control plan, or the granting or refusal of consent to a development application, or the determination of an application for a complying development certificate, the preparation and adoption of a coastal management program, and the imposition of any condition in relation to an application, the carrying out of coastal management works, and anything done or omitted to be done regarding beach erosion or shoreline recession on Crown land or land owned or controlled by a council or a public authority, and the failure to undertake action to enforce the removal of illegal or unauthorised structures that results in erosion of a beach or land adjacent to a beach.

Importantly, although s733 may, at first reading, appear to provide exemption of liability for granting, or withholding consent, this exemption applies only if the council is considered to have “acted in good faith”.

It might be somewhat difficult to sustain an argument of having “acted in good faith” if there is a demonstrated failure to have competently addressed s27 of the CMA, particularly when s733 goes on to state, in part, a council is, unless the contrary is proved, taken to have acted in good faith if the advice was furnished, or the thing was done or omitted to be done, substantially in accordance with the principles and mandatory requirements set out in the current coastal management manual under the Coastal Management Act 2016 or in accordance with a direction under section 14 (2).

Summary

Clearly, when preparing a CMP, it would be prudent for a council to carefully consider s27 of the CMA in guiding their actions and considerations of the content of the CMP, from the very commencement of the process. This would enable the CMP to be structured accordingly so that the applicable consent authority can, if desirable, be in a position to grant consent to coastal protection works. That is, work backwards from the required result. If a CMP has not attended to the issues raised by s27 then it is likely that the consent authority will have little choice other than to frustrate any applicant, or expose the relevant public authority to future legal uncertainty. Similarly, in preparing a CMP it would be prudent to be cognizant of s733 of the LGA to ensure the "in good faith" provisions of s733 can be achieved and the exemption from liability is realized.

In regard to 27 (1) (a) as to whether a proposed protection works unreasonably, or will in the future unreasonably limit access to a beach or headland, can be considered in terms of access from a public road or reserve to a beach or headland and access along a beach. Where it is felt, or there is uncertainty as to whether a work may limit access, the relevant certified CMP should contain provision for future feasible and viable actions such as beach nourishment to ensure access along the beach can be maintained, and/or restored. Without a certified CMP that specifically addresses this issue, it may be difficult to satisfy s27 of the CMA when considering a development application. In the past there have been some attempts to satisfy this section, where the "beach" has been, or will be compromised by a coastal protection structure, by proposing an access way along the coast in the form of a continuous pathway integrated into the protective structure. However this approach has not been tested in court and would seem contrary to the intent of the Act.

Section 27 (1) (b) is the heart of the matter that needs addressing in a CMP. It is the section that provides the impetus and vehicle to forestall common law cases for damage and it provides the opportunity to address s733 of the LGA. However, In order to do so a CMP should be based on a "whole of coastal compartment philosophy" and an associated sediment budget approach, particularly when analysing individual embayments/beaches within the overall coastal compartment. That is, in order to achieve satisfactory resolution of the issue of managing any future adverse impacts on a beach or land adjacent to a beach that result from a coastal protection work, a CMP needs to identify any protection works that may be required, the likely impacts of those works and therefore any offsets, such as future beach nourishment programs that might be required. The preparation phase of a CMP provides the opportunity to canvas the need for a wholistic, integrated approach that is fully fundable. The CMP preparation can also be utilized to detail the likely conditions of consent that will be applied to private development applications in order to achieve a result that will satisfy the requirements of s27. Importantly however, where coastal protection works are included in a certified CMP, a public authority can undertake those works without the need for development consent; a good reason for councils to champion the desired outcome.

In regard to restoration and maintenance work as covered by s27 (2) (a), legally binding obligations, such as in the form of a bond, are useful devices if there is a reasonable basis for assessing potential future damages, however they tend to become impractical where the possible future requirements for restoration, and/or maintenance works are ill defined or unknown, as can be the case of coastal protection works in an environment that includes uncertainty in regard to the future climate and population pressures. Legally binding obligations, as a condition of consent, can however provide a useful mechanism where protective works are to be undertaken by private property owner(s), or by other authorities and the security covers the costs of

the works in case the proponent(s) defaults part way through construction and the local council, or other public authority, has to complete, or make safe, the work. Consent conditions can be tailored so that the quantum of the security progressively decreased once predetermined “milestones” have been reached. The percentage share issue in regard to legal obligations is covered in s27 (3).

In regard to s27 (2) (b) a coastal services charge arrangement is potentially the most practical mechanism for the management of on-going maintenance of coastal protection works to ensure they are maintained in a “fit for purpose” condition, and for any restoration work that may become necessary. Hence, it would be prudent to foreshadow the imposition of such a charge when preparing a CMP and ensuring it is adequately covered in the final, certified and adopted CMP.

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