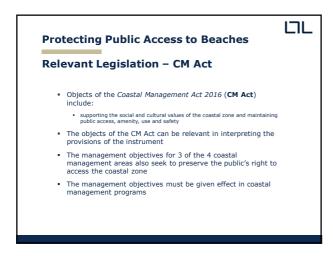


Protecting Public Access to Beaches Contents Legislation concerning Public Access to the Coastal Zone The Coast as Crown Land Native Title claims over the Coast





Protecting Public Access to Beaches

Relevant Legislation - CM SEPP

An aim of the State Environmental Planning Policy (Coastal Management) 2018 (CM SEPP) is to give effect to the management objectives for each coastal management area

- The CM SEPP requires consideration of CMPs in determining development applications for all development in the coastal zone, which would include provisions of the CMP required to protect public access
- The CM SEPP also contains preconditions to the grant of consent to development within some management areas relating to public access and additional matters for consideration in others

Protecting Public Access to Beaches

LIL

Relevant Legislation - CM SEPP

- In the Coastal Vulnerability area consent cannot be granted unless the consent authority is satisfied that the development
 - is not likely to reduce the public amenity, access to and use of any beach, foreshore, rock platform or headland adjacent to the proposed development,
- In the Coastal Environment area the consent authority must have considered whether the development is likely to cause an adverse impact on
 - existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability
- In the Coastal Use area the consent authority must have considered whether the proposed development is likely to have an adverse impact on
 - existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability

Protecting Public Access to Beaches



Relevant Legislation - CM Act

 Section 27 of the CM Act provides that development consent must not be granted to development for coastal protection works unless:

The consent authority is satisfied that over the life of the works, the works will not unreasonably limit or be likely to unreasonably limit public access to or the use of a beach or headland

 The predecessor to this section (s55M of the Coastal Protection Act 1979) was considered in the case of Ralph Lauren Pty Ltd v New South Wales Transitional Coastal Panel & Ors [2018] NSWLEC 207

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Relevant Legislation - CM Act

- Section 28 of the CM Act also removes the power of the Minister administering the Crown Land Management Act, the Registrar-General of LRS or a Court to make determinations and declarations concerning a water boundary that would increase the area of the landward property if as a consequence public access to a beach headland or waterway will be, or is likely to be restricted or denied
- A 'water boundary' is a boundary of a property defined or determined by reference to mean high water mark
- The section applies both in the coastal zone, and also in respect of land adjoining the tidal waters of Sydney Harbour or Botany Bay and their tributaries

Protecting Public Access to Beaches

The Coast & Crown Land

- Waters below mean high water mark are not privately owned
- Roads and Maritime Services owns Port Jackson, Botany Bay, Port Hunter and Port Kembla
- Generally beaches are Crown land and many local councils are appointed as Crown land managers for beaches within their local government area under the Crown Land Management Act 2016 (CLM Act)
- As Crown land managers, local councils have powers to manage beaches in accordance with plans of management under the Local Government Act 1993

Protecting Public Access to Beaches

LIL

Native Title

- Local councils have, since the coming into effect of the CLM Act, increased responsibilities in respect of native title on land they manage
- They must now appoint a native title manager and obtain the advice of that person before taking action such as granting leases and licences, or imposing covenants or restrictions on use of land, or approving plans of management to ensure compliance with the *Native Title Act 1993*
- Councils can now be liable for payment of compensation under the Native Title Act

Protecting Public Access to Beaches



Native Title

- Native title can be found to exist over Crown land
- Native title is defined in s223 of the Native Title Act 1993 as

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

 Native title rights and interests include hunting, gathering or fishing rights and interests

Protecting Public Access to Beaches



Native Title

- Section 212 of the Native Title Act provides:
 - A law of the Commonwealth, a State or Territory, may confirm any existing public access to and enjoyment of:

(a)waterways; or

(b)beds and banks or foreshores of waterways; or

(c)coastal waters; or (d)beaches..

- Native title rights and interests are taken not to extinguished
- This provision has been argued to mean that public access to beaches trumps native title

Protecting Public Access to Beaches

Native Title

- The Federal Court of Australia in Manado on behalf of the Bindunbur Native Title Claim Group v State of Western Australia [2018] FCAFC 238 (Manado) considered these provisions in a case involving a claim for native title over beaches in Western Australia
- WA had a provision in its State law seeking to confirm existing public access to beaches and waterways
- The Full Federal Court found there was no such right or privilege for the general public to access beaches which needed to be recognized in the native title determination

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Native Title

'To attribute an intention in s212 of the NT Act to permit 'the conversion of an ill-defined custom or convention reflecting an "aspect of Australian life" that members of the public may access and enjoy any unallocated Crown land because there is no law preventing them from doing so' into an interest in the NT Act, was a stretch of the language of the NT Act.

Protecting Public Access to Beaches



Native Title

- However, the Court did find that where, at the time s212 was enacted there existed as a matter of fact in a physical sense public access to and enjoyment of the relevant place, that could be confirmed by State legislation and constitute a right
- Also, in NSW beaches are often reserved for public recreation which does give members of the public arguably a right of access. There is doubt, however, as to whether that is sufficient for the Native Title Act and whether something over and above the ability general members of the public have is required.

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Native Title

- In the Manado case, the current effect of the decision is that the native title holders have exclusive possession of the areas in question which include a 40km strip of coast north on Broome
- The High Court of Australia has granted leave to appeal from the decision of the Full Federal Court
- There remains in our view scope to argue as the law currently stands that a public recreation reservation, and continuous public use based on that reservation, could ensure public access to a beach is recognized in native title determinations in NSW

