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## Protecting Public Access to Beaches


28<sup>th</sup> Annual NSW Coastal Conference




## Protecting Public Access to Beaches

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- The Coast as Crown Land
- Native Title claims over the Coast



## Protecting Public Access to Beaches

### Relevant Legislation – CM Act

- Objects of the *Coastal Management Act 2016 (CM Act)* include:
  - supporting the social and cultural values of the coastal zone and maintaining public access, amenity, use and safety
- The objects of the CM Act can be relevant in interpreting the provisions of the instrument
- The management objectives for 3 of the 4 coastal management areas also seek to preserve the public's right to access the coastal zone
- The management objectives must be given effect in coastal management programs



## Protecting Public Access to Beaches

### Relevant Legislation – CM Act

Coastal vulnerability area	To maintain public access, amenity and use of beaches and foreshores
Coastal environment area	To maintain and, where practicable, improve public access, amenity and use of beaches and foreshores, headlands and rock platforms
Coastal use area	To protect and enhance the scenic, social and cultural values of the coast by ensuring that ... adequate public open space is provided, including for recreational activities and associated infrastructure ...

## 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



### 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

## Protecting Public Access to Beaches



### 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



### 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 be extinguished by such a law
- 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

## Protecting Public Access to Beaches



### 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

## Protecting Public Access to Beaches




### 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

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October 01, 2019 <b>Subsiding a land ceiling in categorisation - Does itchy habitat?</b>	October 17, 2019 <b>EEI not required for appeal to grant VTR Roads Act consent without EIRs concurrence</b>	October 17, 2019 <b>MSB1 - 6 month participatory plans due by 1 December 2019</b>
The Land and Environment Court (LEC) has recently released its decision in a recent decision in a case involving the categorisation of a site as a Category 1 site. The decision is significant as it clarifies the scope of the LEC's jurisdiction in relation to the categorisation of sites.	A Commissioner of the Land and Environment Court has confirmed that a Road District is not subject to the Roads Act 1988 (NSW) because it is not a 'road' for the purposes of the Act.	The deadline for the preparation of community participation plans (CPPs) for the upcoming 2019-2020 financial year is now approaching. The plans are required to be prepared by the end of the financial year (31 October 2019).
October 3, 2019 <b>NSL Tribunal: Local EIRs (Part 4) Review under the Model Code of Conduct Provisions</b>	October 3, 2019 <b>Consent to Building and Subdivision Certificate Provisions of the Environmental Planning and Assessment Regulation 2000</b>	October 02, 2019 <b>Attainable Housing Can create 80,000 jobs</b>
The NSW Land and Environment Tribunal (NSL) has recently released its decision in a case involving the review of a local environmental instrument (LEI) under the Model Code of Conduct provisions of the Environmental Planning and Assessment Regulation 2000.	The NSW Land and Environment Tribunal (NSL) has recently released its decision in a case involving the review of a local environmental instrument (LEI) under the Model Code of Conduct provisions of the Environmental Planning and Assessment Regulation 2000.	The NSW Land and Environment Tribunal (NSL) has recently released its decision in a case involving the review of a local environmental instrument (LEI) under the Model Code of Conduct provisions of the Environmental Planning and Assessment Regulation 2000.

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