

Court orders on Byron Bay's coastal wars

by Dr Kevin Roche

Risk Frontiers have had an opinion piece published in *The Australian* this morning that looks at the recent conclusion of two Supreme Court cases concerning Byron Bay property owners after almost 10 years of court activity.

On the back of receiving this opinion piece, the newspaper used it as the basis for a broader front-page story.

<http://www.theaustralian.com.au/opinion/shifting-sands-for-councils-on-responsibility-for-past-projects/news-story/74910f502ed45a20de2eb5cc4ec307fd>

Shifting Sands for Councils

Two successful cases against Byron Shire puts onus on local authorities for past works.

Byron Bay, home to one of Australia's most iconic pieces of coastline, has long been the poster child for disputes in the coastal zone.

In recent times, the newly proposed NSW Coastal Management Bill and the recent east coast law that impacted Sydney's Northern Beaches has drawn much of the attention in the coastal space, but this might not be the case for much longer.

After almost 10 years of prolonged court activity, two Supreme Court litigation cases involving the Byron Shire Council were finally resolved by Court orders last week. Both of these cases relate to engineering works on the coast. Despite no admission of liability by Council, both involved substantial financial settlements to the plaintiffs and orders against Council in one of the cases.

The first case concerned a group of Belongil Beach property owners who were seeking compensation for financial loss in relation to the Council's historical works in front of the Jonson Street car park. They were awarded \$2,750,000 including costs.

The second case involved another group of Belongil Beach property owners who successfully claimed an undisclosed amount of compensation related to injunction orders that were won in the Land and Environment Court in February 2010 following the May 2009 storm event.



Landowner John Vaughan surveys the damage to his front lawn following the the May 2009 storm event.

According to Angus Jackson from International Coastal Management, the cause of all the problems in Byron dates back to 1964, when the structure was first built by the Council. In 1975 the initial structure was then added to with finger groynes, further trapping sand that benefited the main beach whilst starving Belongil Beach.

Jackson states “the artificial headland and groynes at Jonson Street that were constructed by the council were designed to not only protect the carpark but also to widen Main Beach on the updrift side. The groyne effect causing erosion along the beaches on the downdrift side (Belongil) has been well documented since at least the 1978 Public Works Department report.”

Larger beach widths provide natural protection from storm events. Evidence filed in the court indicated that the impact of the Jonson Street engineered structure was significant enough to cause the loss of more than 20-25m of beach width.

What makes these court orders so interesting and significant is that the statutory authority, in this case Byron Shire Council, did not receive legal impunity (exemption of liability) from its earlier actions from over 50 years ago. As Karen Coleman from King & Wood Mallesons, the lead solicitor on the Byron litigation cases since their inception stated

“The court case against the council was based on well-established legal authority in Australia that a Council has a duty to protect its residents from a danger it creates by prior use of its statutory powers, in this case the building of the wall to protect the town.”

As part of the resolution, the Court has ordered Byron Shire Council to allow property owners to retain any existing protective works adjacent to the Belongil properties in their current form or as repaired. The property owners will now be in a position to submit applications that would enable them to undertake lawful protective works at their own cost under current legislation.

The Byron Shire Council’s legal services coordinator, Ralph James was quick to point out that despite the significant changes to NSW State planning regulations within the Coastal Protection Act and State Environmental Planning Policy “the resolution agreement does not provide the property owners with greater or different protection than currently exists.”

While technically this might be correct the reality is far different. These court orders should now be recognised as a pre-existing legal duty that cannot be ignored by Council and should guide and inform all subsequent efforts to use their statutory powers, including the Draft Coastal Zone Management Plan for Byron Shire. These orders will effectively restrict the options that the Council has to exercise its statutory powers going forward.

On the one hand this has been a win for the property owners with their individual property rights being recognised by the Court in the orders it has made. The property owners had sued on the basis that the Council had a duty to protect the residents of Belongil Beach from the danger it had created. On the other hand though, it highlights the complex legal issues that surround the coast and our continued infatuation with it.

As Karen Coleman stated “this case concerned a legacy issue arising from the impact of the man-made structure protecting Byron’s township. The impacts of that structure, according to our evidence, threatened a natural dune along Belongil that is 6,000 years old and which also protects the wetlands behind it. These aspects have been ignored in many quarters.”

Last year the Land and Environment court declined to grant an interim injunction sought by a community action group because of the greater risk to the environment if the dune was allowed to fail.

At the coast we have a very complicated intersection of various aspects of the law, environmental policies and beliefs, social and recreational values and political will. We are not dealing with a pristine coastline – it’s been severely impacted by development over many generations. We need laws that are adaptable and flexible enough to deal with these legacy issues without lengthy court cases, as these problems will not go away. People will continue to migrate to the coast leading to increasingly large concentrations of population, property and infrastructure that may already be at risk to natural coastal processes and/or man-made impacts, as has been shown by recent events in NSW. This, in combination with potential climate change impacts, magnifies our vulnerability to changes in an inherently dynamic environment.