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## Submission on Barriers to Effective Climate Change Adaptation

This submission is made on behalf of the Byron Preservation Association ("**BPA**").

Our firm has represented the members of the BPA for more than five years in relation to coastal issues and Byron Shire Council in New South Wales. During this period, we have also advised other coastal communities in relation to a variety of issues affecting other parts of the NSW coastline.

These submissions reflect our overall observations in relation to current coastal management and emergency management issues and our observations of the barriers or potential barriers to adaption to threats on the coastline.

### 1 Overview

- 1.1 Overall, the BPA supports the "real options approach" described on page 9 of the Overview in the Commission's Draft Report on Barriers to Effective Climate Change Adaptation ("**Draft Report**"). We agree that the science around climate change and sea level rise is too uncertain to provide a solid basis for action in relation to predicted situations as long away as 2100. We agree that a real options approach which focusses on addressing current concerns while retaining flexibility to take further action in the future is a sensible, commendable and practical way forward.
- 1.2 The work done by the Australian Government in the First Pass National Assessment illustrates the very large value of public property, private property and infrastructure situated on Australia's coastline.
- 1.3 It logically follows that in order to maintain Australia's economic wellbeing, a realistic approach to protecting those assets against current concerns while retaining flexibility to take further action is a necessary approach.
- 1.4 The problems that are currently being experienced by various communities along the New South Wales coastline reveal, however, that at local council level, there is:
  - (a) a neglect of taking steps to address current coastal protection issues by some Councils;
  - (b) a disproportionate amount of energy and resources devoted to predicting sea level rise in 2,100 in combination with other scenarios;
  - (c) the development of planning regimes and restrictions on property owners on the scientifically uncertain basis of predicted sea level rise;

- (d) the selection of inappropriate responses to predicted sea level rise;
- (e) attempts to impose unreasonable restrictions and burdens on individual property owners in relation to their current property rights;
- (f) a failure to provide adequate emergency or permanent coastal protection plans by some Councils.

We will expand on these points later in this submission.

- 1.5 At the State level, the current New South Wales legislative regime severely impedes the ability to address coastal management issues. The new Liberal/National Government elected in 2011 has promised to make reforms in this area.
- 1.6 We therefore submit that the Productivity Commission should address what can be done to ensure that the “real options approach” which it endorses is actually the approach which is deployed along the coastline of Australia.
- 1.7 At page 14 of the Draft Report, the Commission comments that:  
  
*“improvement of the management of emergencies in the current climate would enhance the management of future risk as the intensity, frequency, duration and location of extreme weather events change”.*
- 1.8 We agree with the Commission’s suggestion that the effectiveness of emergency management could be improved by better coordinating and clarifying the roles and responsibility of emergency service providers. In this respect, New South Wales is in a very dire position and we submit that the Productivity Commission should note the deficiencies in the emergency management regime of each State that need to be improved immediately to deal with known risks.
- 1.9 Later in this submission, we will outline those deficiencies in relation to New South Wales.
- 1.10 The Productivity Commission has noted the particular importance of addressing climate change risks for existing areas of human settlement and that that involves consideration of whether, how and when governments should protect cities or towns or relocate communities from high hazard risk areas. The Commission notes that there is no well-established public response to this issue and suggests that it may be necessary to develop a national approach or principles to support strategic management of existing settlements.
- 1.11 We endorse the concept that there should be a national approach or principles in relation to the management of existing settlements and submit that the Commission’s recommendations contemplating the possibility of a national approach should be strengthened.
- 1.12 The current structure in Australia allows these issues to fall to be developed by Local Councils. There are a number of deficiencies in leaving it with local councils.
- 1.13 Firstly, this results in a divergent approach up and down the coast as different Councils take different responses to these issues.
- 1.14 For example, during the coastal erosion risks resulting from the May 2009 storm which hit the northern NSW coastline, there were diametrically opposed responses from two neighbouring Councils, Ballina Shire Council and Byron Shire Council. Ballina Shire Council immediately

deployed earthmoving equipment on the beaches to replenish and nourish the beaches to provide protection on an emergency basis until the storm had passed. In sharp contrast, Byron Shire Council refused to do anything at all to save any property under threat, including State-owned land which was eroding out to sea and private property in imminent danger. The physical dangers were so acute that evacuation of residents by the Police for safety reasons was undertaken. Yet the Council did nothing and sought injunctions in court to stop any protection work being done by residents. The ultimate orders made by the court show that the position of the Council was not legally justified. The incident, however, is illustrative of the disadvantages of leaving this important issue of the management of coastal risks to be dealt with on a local council by council basis.

- 1.15 Secondly, the Council attitude may also be determined not by rational strategic or economic assessment in the national interest but by local political motivation or ideology.
- 1.16 This can be well illustrated in Byron where a Green council has pursued a policy of “planned retreat” it says since 1988. Underpinning that philosophy seems to be an ideological belief that “nature should be allowed to take its own course” and that no protection at all should be undertaken at certain targeted points of the coastline. Some crucial decisions of Byron Shire Council were passed on the casting vote of the Mayor alone. The protection of Australia’s built environment and of Australia’s economic prosperity and the value of its current built environment should not be left to be decided in such a manner up and down the coastline.
- 1.17 Local government is also in many instances the least well-placed for the role of assessing strategic management of national issues of this magnitude; many councils have a shortage of professional expertise and financial constraints on acquiring that expertise.
- 1.18 Councils are now apparently each spending scarce resources on the calculation of likely sea level rises as far away as 2100 and the impact in their particular area. This can be seen as a waste of both human resources and financial costs as each council grapples with information that is scientifically uncertain in any event. There are obvious efficiencies in taking these responsibilities away from each Local Council and focussing on a national response using the best information available at an Australian Government level.
- 1.19 We therefore submit that national approaches or principles should be developed to support strategic management of current coastal erosion risks for existing settlement and for climate change risks to the extent that these risks are sufficiently known.

## **2 Emergency management**

- 2.1 It is submitted that the section in the Draft Report on “Emergency Management” should also identify existing weaknesses in the current plans and laws which apply to emergency management.
- 2.2 For example, the regime which applies to emergency management in NSW is in urgent need of reform which the current NSW Government has promised to address. However, at the moment the current regime has resulted in a situation where there are no emergency plans in place for a number of parts of the NSW coastline. We think the Commission should note this situation as a real present risk. In light of the manifest defects in New South Wales, the Commission may also wish to consider its recommendation as to whether a legislative audit of all applicable legislation on a national basis is required.
- 2.3 By way of background to the New South Wales position, the outgoing Labor Government in New South Wales made an array of reforms from October 2009 to March 2011, amending or introducing more than 20 instruments, including legislation and regulation. These reforms have led to the

current position that many places in New South Wales no effective emergency management plans have been put in place and no effective emergency management is possible.

- 2.4 We set out below a short summary of the current emergency regime in New South Wales.
- 2.5 The State Disaster Plan authorises government agencies to carry out designated functions during a state of emergency. It is given legal effect by the *State Emergency and Rescue Management Act 1989* (NSW), and has effect during an emergency.
- 2.6 Under the State Disaster Plan, each form of emergency has a designated agency which is to be primarily responsible for controlling the response.
- 2.7 The State Storm Plan is a sub-plan forming part of the State Disaster Plan. The last version was approved in November 2009. Among other things, the Storm Plan should deal with arrangements relating to severe storm events which may cause coastal flooding and erosion resulting from large waves and storm surges.
- 2.8 The State Storm Plan designates the SES as the combat agency for dealing with storm damage control, including damage control for coastal erosion. However, the Plan expressly states that the SES has no responsibility for controlling or conducting any physical mitigation works to protect properties or structures at risk from coastal erosion, either during or outside the period of storm activity.<sup>1</sup> In particular, the Plan expressly says the SES is not responsible for:
  - (a) The placement of rocks or other materials on beaches or foreshore areas; and
  - (b) The construction of temporary walls made of sandbags, geotechnical tubes or other materials.

**No-one** is given responsibility of this type of work. No other State agency has responsibility under the NSW Storm Plan for carrying out emergency coastal protection works to protect properties.
- 2.9 Local Councils have the responsibility of carrying out protective works, but *only* if there is a Coastal Zone Management Plan in force and *only* if that Plan requires protective works to be carried out.<sup>2</sup> Where a Coastal Zone Management Plan is in force, but the plan does not contain provisions for placing emergency coastal protection works to protect property, the Council has no responsibility under the State Storm Plan to carry out such works.
- 2.10 The NSW Department of the Environment encouraged councils to take the view that the Coastal Zone Management Plan need not include any action for protection of the property. Councils are following this view if it suits them politically. An example is Byron Shire Council, which has included no emergency protection in its emergency plan even though the coastline at Byron Bay township and at other points in the Shire (Belongil, South Golden Beach New Brighton) are recognised as vulnerable to storm erosion which occurs from time to time.
- 2.11 Property owners are not generally allowed to do emergency works. The Minister's guidelines approved by Minister Sartor in the last days of the Labor Government, now titled the *Code of Practice under the Coastal Protection Act 1979* ("**the Code**"), sets out mandatory requirements for

<sup>1</sup> NSW State Storm Plan, cl 2.2.4 and 6.13.5.

<sup>2</sup> NSW State Storm Plan, cl 2.13.5(j). One defect in this coastal planning regime in NSW is that, although the legislation provides for coastal zone management plans, many Councils have not made such plans. Byron Shire Council, for example, has been preparing such a plan for 12 years.

the installation and removal of emergency coastal protection works. The Code was published in March 2011 and is given force by regulation 7 of the *Coastal Protection Regulation 2011* (NSW). A copy of the Code is **enclosed** for ease of reference.

- 2.12 However, the Code does not apply along the whole of the NSW coast, but only at certain nominated points.
- 2.13 In any event, all experts agree that the protection in the Code do not afford the required protection. The protection in the Code is limited to a height of 1.5m AHD which would be of no assistance in most severe storm events. In addition, there are numerous pre-conditions to their implementation which render the process so unworkable that in reality they could never be used.
- 2.14 The Minister for Police and Emergency Services has a broad residual power under s 36 of the *State Emergency and Rescue Management Act* to direct any government agency to do any act or function during a state of emergency. The Minister and Senior Police Officers also have the power, during a state of emergency, to direct or authorise emergency officers to take certain safety measures.
- 2.15 If a Council has no plans for emergency protection, the Minister with these residual powers will be the only government entity with the power to instigate the carrying out of full emergency coastal protection works but with **no plans** or **preparations** in place at all – either by the SES or local councils.

### 3 Permanent Coastal Protection

- 3.1 It is submitted that the Commission should note that State laws in relation to coastal protection may constitute a barrier to effective coastal protection and adaption to coastal threats.
- 3.2 New restrictions in relation to permanent coastal protection works were inserted into the *Coastal Protection Act 1979* (NSW) in 2010 in section 55M by the outgoing Labour Government. These amendments were labelled by the then opposition as the “Coastal Destruction Act”. This nomenclature emphasises that the statutory regime regulating protection works is a major influence on the ability of communities to adapt to coastal threats.
- 3.3 The new provisions provide that no consent can be granted for the purpose of coastal protection works unless the consent authority is satisfied that satisfactory arrangements have been made for the life of the works, for the restoration of the 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. This obligation extends to requiring property owners wishing to install protection works to maintain the beach level of 10 metres AHD under the sea and to post a bond to secure this obligation at the outset to cover the life of the Works.
- 3.4 It is submitted that this approach casts impossible burdens on the frontline of property owners. It again fails to recognise the need for a whole of community strategic approach to the issue of protection of coastal communities and strategic assets. A strategic approach would take into account the interests of the community as a whole, its property and infrastructure as well as the natural environment and beach amenity.
- 3.5 It is submitted that the cost and burden of such strategic protection cannot be imposed exclusively on the front line of property owners. It is unjust to seek to impose on those owners the cost of protecting entire communities. In many instances, property owners will not be able to do so and this could have adverse consequences for the whole community.

- 3.6 It is submitted that the current defects in the New South Wales legislation illustrate the need for a review of all State legislation to ensure that the legislative framework is in place to achieve the approach which the Commission envisages in its draft report of a coordinated, well managed and strategic approach to protecting the built communities, both in an emergency and generally.

#### 4 Retreat?

- 4.1 On page 164–166, the Commission set out some material in relation to “planned retreat” and has cited examples of “planned retreat” at Byron Bay and at Port Macquarie – Hastings.
- 4.2 It is our submission that both those examples illustrate the defect in the so-called policy of “planned retreat” as commonly understood and that the Productivity Commission should note the dangers and risks inherent in a “planned retreat”, particularly when applied to already existing communities.
- 4.3 By way of background, we refer the Commission to the New South Wales Coastline Management Manual of 1990 (**“the Manual”**). The Manual included a planned retreat element, not as a “protective measure” but as a tool in environmental planning.
- 4.4 Under the heading “Planned Retreat” in Section 5, the Manual indicates that vacant coastal land can be planned to permit development that has a limited life and this approach allows use and occupation of the coastal site until coastline hazards threaten or damage the property. The Manual notes that this permits “a flexible approach in the future” if hazards become more severe or in cases where there is moderate to high coastal recession.
- 4.5 It is clear from the reading of the Manual that “planned retreat” was proposed in this context as an environmental planning tool in relation to permitting the development of vacant land.
- 4.6 The purported deployment of this principle in areas which are already built and which do not consist of demountable houses is a dangerous, recent and unsustainable development.
- 4.7 Byron Shire Council has purported to attempt to impose “planned retreat” on the residents of one existing residential community known as Belongil Beach. It should be noted that this area is capable of effective protection at this time. Those properties presently protected by rock walls at this beach have suffered no damage in the severe storms which have occurred over recent years. Erosion has only occurred in areas for which the Council has responsibility and where there is ineffective protection. Council nevertheless in the name of “planned retreat” proposed to **remove** all existing protection thereby rendering the properties so affected as very vulnerable to storm erosion.
- 4.8 There are a number of issues with the manner in which Byron Shire Council has proceeded which we think are important for the Commission to consider as they raise issues of general application about “planned retreat”. These issues include:
- (a) selective imposition of “planned retreat” on part of the community;
  - (b) Byron Shire Council has a large number of reports spreading over decades informing it that the works which it constructed to protect the town of Byron Bay have caused the erosion which now threatens the Belongil Beach community in storm events;
  - (c) against that background, the Council has nevertheless sought to pursue a policy where that structure protecting the town is maintained or enhanced whilst the residents affected by the consequent erosion are deprived of protection and forced to “retreat”;

- (d) none of the houses on which the Council seeks to impose “planned retreat” have any ability to be relocated or removed.

4.9 There are obvious unjustifiable inequities in such an approach.

4.10 Furthermore and significantly, Council has not had any regard to the consequences for the wider Belongil and Byron Bay community if the dune at Belongil was allowed to fail and these houses were “removed” or more likely allowed to fall into the sea. Expert opinion is in agreement that allowing the removal of the existing protection afforded by the dune would create an environmental disaster at Belongil because of the natural wetlands behind the dune, and over time would create an erosion threat to the northern part of Byron Bay. This can be seen in some sense as an issue of intergenerational inequity, as a manageable protection scheme for Belongil Beach would escalate into a much larger problem of protecting the northern part of Byron from a newly formed hazard arising from the collapse of the frontal dune system.

4.11 The Council has never articulated any plan to deal with these issues beyond acknowledging that the economic costs of “planned retreat” are in excess of \$50 million and that a large amount of infrastructure would be lost and require replacement. This includes bridges and the railway. The Council has identified no source of funding for the replacement of this infrastructure.

4.12 The draft Coastal Zone Management Plan of Byron Shire Council approved in 2010 by the Council recorded the following in relation to the loss of public infrastructure:

**“4.3.5 Public infrastructure**

*Infrastructure located within the 20 m buffer will be removed.*

*Infrastructure and utility services to be retreated include, but are not limited to:*

- *trunk infrastructure (e.g. water, stormwater and sewerage mains; pump stations and shut off valves; gas pipe lines, power lines, telephone lines; underground communication cables)*
- *road infrastructure.*
- *bridges and the railway.*
- *public amenities (e.g. community buildings, toilet blocks)*
- *interim erosion protection works at beach access locations (for example as currently exist at Belongil Beach) subject to completion of Management Action 2.2.2).”*

(Byron Shire Council withdrew this Coastal Zone Management Plan when proceedings were brought against it by residents in the NSW Land and Environment Court challenging the plan’s validity. The Council currently has no Coastal Zone Management Plan.)

4.13 Any description of “planned retreat” at Belongil should record that the Council was, in its own documents, acknowledging that it was proposing the destruction of this long list of important infrastructure and utility services.

4.14 In summary, “planned retreat” is sought to be imposed on the Belongil Beach community by the Council in circumstances where:

- (a) the Council has created the erosion danger by its works elsewhere;
- (b) the Council is exacerbating the position by itself failing to protect key beach access points from the danger it has created;
- (c) the Council is further exacerbating the position by refusing to allow property owners any reasonable protection and seeking to remove existing protection;
- (d) the Council has acknowledged that its proposed “planned retreat” will result in the destruction of a large amount of public infrastructure.

- 4.15 Viewed in this way, the so-called “planned retreat” can be seen as a “plan” by Byron Shire Council to preside over the destruction of both State-owned and Council land, infrastructure and private property for no good reason. All the expert evidence available shows that this Community is easily able to be protected from known risks at the moment. The points of vulnerability are those where the Council has elected to maintain inadequate protection, contrary to expert advice given to it.
- 4.16 If the Commission proposes to write about “planned retreat” at Belongil, it is important that these factors summarised above be mentioned to provide an accurate summary of what is occurring at this location. In particular, a description of “planned retreat” at Belongil should, for accuracy’s sake, disclose that the Council was proposing the removal and destruction of a large amount of existing infrastructure, including roads, bridges and the railway as part of its program of “planned retreat”. It should also be noted that “planned retreat” was discriminatory in that it applied only to one part of the Byron Bay compartment, and that protection of the whole compartment is easily achievable.
- 4.17 It is also submitted that the Productivity Commission should identify a number of issues from what has happened in Byron which illustrates the potential dangers of concepts such as “planned retreat”.
- 4.18 The cost of “planned retreat” seems to be viewed by those who favour it as a cost only of the front owners without regard to the true cost to the community if the front line of protection is allowed to fail.
- 4.19 For example, Narrabeen Beach is often cited as a coastal erosion hotspot in New South Wales. Immediately behind the first line of properties is a 6-lane highway and sewerage infrastructure. If the front line of houses were allowed to fail, that 6-lane highway, a major arterial road to the northern beaches of New South Wales, would be under threat as well as the sewerage infrastructure.
- 4.20 It therefore can be seen that imposing “planned retreat” on the front row of properties would bring with it huge structural problems to the infrastructure of this highly developed community.
- 4.21 Likewise at Lake Cathie, which the Commission also cites at page 165 of its Draft Report, experts have assessed that the 17 properties proposed to be subjected to “Planned Retreat” are in fact protecting another 85 properties behind them. Again, no holistic assessment of the true cost of Planned Retreat seems to have been made here of the impacts and economic cost beyond the front line of properties.
- 4.22 It is submitted that these examples illustrate that the Commission should record some caveats in relation to “planned retreat” and that in particular:
- (a) these examples illustrate that in relation to both emergency management and coastal management, a whole of community approach is required;

- (b) it is a mistake to view coastal protection issues as an issue only of the front line of properties;
- (c) in assessing the economic cost of protection or not protection, it is necessary to assess the value to the whole community of the protection afforded by the existence and maintenance of the front line of properties and the consequences to that community if the front line of properties are allowed to fail;
- (d) “planned retreat” is in many cases not a solution but an abandonment of property with major economic and natural consequences.

4.23 This issue of equity is also relevant to any cost benefit analysis as to who should pay because in effect, the front line of protection may be protecting many properties and infrastructure beyond that front line of property. Such a concept has been well recognised in the law for many centuries – see Karen Coleman, ‘Coastal protection and climate change’ (2010) 84 *Australian Law Journal* 421 (copy **enclosed** for ease of reference). The cases there cited show that the common law judges of England for many centuries have recognised the interest of the wider community in coastal protection – not just the frontage properties and that fairness and necessity required that the costs should be borne by the whole of the community that benefitted.

4.24 We are happy to expand on any of the points in this submission or to supply the Commission with any source material relevant to the matters covered by this submission.

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