



# Environmental Defenders Office

14 July 2023

Our Ref: RK:JB:S4512

Ian Taggart  
Public Officer  
Stockton Community Group Inc.

By email only: <stocktoncomgroup@gmail.com>

Dear Ian

## Stockton Beach – Public Trust Doctrine

1. We refer to your request for advice in relation to the above matter.

### A. Scope of Advice

2. You have requested our advice in relation to identifying who is responsible for the care, maintenance and repair of Stockton Beach, pursuant to statute and to the legal doctrine of public trust (also known as the doctrine of public rights, or the public trust doctrine (**PTD**)).
3. We understand that you intend to share this advice with the relevant government agencies.

### B. Summary of Advice

4. We provide a summary of our conclusions in relation to the above question below. These conclusions are based on the information you have provided to us, the relevant legislation, and other information we have considered, which is set out in Section C; and our reasoning in support of these conclusions set out in Section D. In summary, in our view:
  - a. The entities who primarily have statutory responsibility for Stockton Beach are City of Newcastle Council (**Council**) and the NSW Minister for the Environment/Minister for Climate Change. This is pursuant to the *Coastal Management Act 2016* (**the Coastal Management Act**) and the relevant coastal management program (**CMP**), being the Stockton Coastal Management Program 2020 (**Stockton CMP**).
  - b. However, responsibilities under the Coastal Management Act also extend to “any other public authority that exercises functions in connection with the coastal zone”.<sup>1</sup> The definition of “public authority” is very broad and, as such, there are many different authorities who will need to consider the Coastal Management Act when discharging their duties under other relevant legislation (discussed in Part C, below).

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<sup>1</sup> Coastal Management Act, s 11.

- c. There are also other entities who have some statutory responsibilities that may relate to Stockton Beach in certain circumstances. We have identified key pieces of relevant legislation that create *some* statutory responsibility but have focused our attention on the legislation primarily responsible for regulating activities on/around Stockton Beach.
- d. In our view, the wording of the Stockton CMP, read together with other relevant legislation, encapsulates the notion of public trusteeship and, as such Stockton Beach may be subject to such a trusteeship. In our view, a public authority who is required to take the Stockton CMP into account when discharging their duties must also have regard to the PTD, which is embodied in the provisions of the Stockton CMP and other relevant legislation.

## C. Background

### Stockton Beach

- 5. Stockton Beach is situated at the southern end of the Newcastle Bight, where there is a sweeping expanse of sand and sand dunes, and views stretching back to Port Stephens.<sup>2</sup>
- 6. You have provided us with a copy of the *Stockton Beach Erosion Review* dated 23 February 2020 (although we note that it is dated 23 February 2021 on the Stockton Community Group website), which was prepared for the Stockton Community Group by International Coastal Management (**Review**). The Review states that it is a “*critical assessment of the insights gathered from the conclusions made by ...previous studies.*” The Review states in the Executive Summary:<sup>3</sup>
  - a. Long-term coastal erosion and landward re-alignment of the shoreline has been occurring along Stockton Beach to at least about midway along Stockton Bight.
  - b. This erosion has been occurring from the upper beach face and out to the offshore seabed up to a water depth of 20m, resulting in the ongoing deepening of the offshore seabed profile.
  - c. This erosion is ultimately the result of a severe net deficit of sand supply to the Stockton Beach system (i.e., more sand is lost from the system than is being brought in to replenish it).
  - d. Each of the studies reviewed agree that the interruption of sand supply and resulting depletion of sand arriving at Stockton Beach is most significantly due to the changes to the harbour entrance and port.

### Statutory regulation of Stockton Beach

#### *The statutory framework*

- 7. Coastal areas in NSW are regulated by various statutes, delegated legislation and other extrinsic material. The following are relevant to Stockton Beach:

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<sup>2</sup> City of Newcastle, ‘Stockton Beach’, <https://www.visitnewcastle.com.au/see-do/things-to-do/stockton-beach#:~:text=Stockton%20Beach%20is%20situated%20at,ferry%20ride%20across%20the%20harbour.>

<sup>3</sup> International Coastal Management, ‘Stockton Beach Erosion Review’ (2020) prepared for Stockton Community Group (SCG) ii.

- a. the Coastal Management Act for all land in the “coastal zone”, which is defined by the *State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP)* (see below);
- b. the *Crown Land Management Act 2016 (Crown Land Management Act)* for all Crown Land, which encompasses a significant portion of the foreshore along Stockton Beach (specifically, lot 2 in DP 1249904 and lot 7300 in 1146198);<sup>4</sup>
- c. the *Newcastle Local Environmental Plan 2012 (Newcastle LEP)*<sup>5</sup> for all land at Stockton shown on this [map](#);<sup>6</sup>
- d. Chapter 2 of the Resilience and Hazards SEPP for all land defined by cl 2.4 and shown on this [map](#),<sup>7</sup> except for land identified by the *State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP)*;<sup>8</sup> and
- e. Chapter 5 of the Transport and Infrastructure SEPP for the port area identified by [this map](#).<sup>9</sup>

We note that other legislation can, in certain circumstances, be relevant to dealings with Stockton Beach (such as the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, and the *Local Government Act 1993*), but the primary statutory responsibilities for land at, or adjacent to, Stockton Beach will fall under the above instruments.

#### *The statutory responsibilities for the care, maintenance and repair of Stockton Beach*

8. Each of the abovementioned instruments contain statutory responsibilities that relate to the care, maintenance and repair of Stockton Beach. The relevant sections are reproduced, below:

#### A. Coastal Management Act 2016

9. The overarching objects of the Coastal Management Act “are to manage the coastal environment of New South Wales in a manner consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State”.<sup>10</sup> Ecologically Sustainable Development (**ESD**) is defined by reference to definition in the *Protection of the Environment Administration Act 1991* and includes the principle of intergenerational equity, which advocates that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations. Other particular objects of the Coastal Management Act that are of relevance include to “protect and enhance natural coastal processes and coastal

<sup>4</sup> Stockton CMP, <https://www.newcastle.nsw.gov.au/Newcastle/media/Documents/environment/Our%20Coastline%20-%20Documents/Stockton%20Erosion%20Response%20-%20Documents/Stockton/4219-Stockton-CMP-Appendix-August2020-spreads-FINAL.pdf>, p 51.

<sup>5</sup> We note that the provisions of the Newcastle LEP will also interact with the *Environmental Planning and Assessment Act 1979* and the *Local Government Act 1993*, both of which have relevant objects and guiding principles that shape how decision-makers discharge their duties.

<sup>6</sup> City of Newcastle, ‘Land Application Map’

[https://eplanningdlprod.blob.core.windows.net/pdfmaps/5900\\_COM\\_LAP\\_001\\_080\\_20140317.pdf](https://eplanningdlprod.blob.core.windows.net/pdfmaps/5900_COM_LAP_001_080_20140317.pdf)

<sup>7</sup> Head to this map viewer: <https://www.planningportal.nsw.gov.au/spatialviewer/#/find-a-property/poi> and apply the Coastal use Area (orange highlight) and Coastal Environment Area (blue highlight) filters, while the map is pointed at Stockton Beach. We note that the map tool is incomplete, though it appears that Stockton Beach is comprised of both coastal use areas and coastal environment areas.

<sup>8</sup> <https://www.planningportal.nsw.gov.au/spatialviewer/#/find-a-property/address>

<sup>9</sup> [https://eplanningdlprod.blob.core.windows.net/pdfmaps/SEPP\\_TIN\\_TPT\\_LAP\\_003\\_20220721.pdf](https://eplanningdlprod.blob.core.windows.net/pdfmaps/SEPP_TIN_TPT_LAP_003_20220721.pdf)

<sup>10</sup> Coastal Management Act, s 3.

environmental values including natural character, scenic value, biological diversity and ecosystem integrity and resilience”,<sup>11</sup> “support the social and cultural values of the coastal zone and maintain public access, amenity, use and safety”<sup>12</sup> and “facilitate ecologically sustainable development in the coastal zone and promote sustainable land use planning decision-making”.<sup>13</sup>

10. Part 3 of the Coastal Management Act establishes the process for the management of coastal issues through the use of CMPs. The purpose of a CMP is to “set the long-term strategy for the co-ordinated management of land within the coastal zone with a focus on achieving the objects of this Act”.<sup>14</sup> Part 3 applies to local councils with land within the coastal zone. As Stockton Beach falls within the coastal zone, the Council may prepare a CMP that relates to any or all of Stockton Beach. At the time of writing, Stockton Beach is subject to the [Stockton CMP](#).<sup>15</sup>
11. In addition to local councils, other entities are tasked with responsibilities under the Coastal Management Act, including the responsible Minister for the Coastal Management Act (the Minister for the Environment/Minister for Climate Change, who is currently Penny Sharpe). Further, “any other public authority that exercises functions in connection with the coastal zone” will need to have regard to the Stockton CMP.<sup>16</sup> We note that “public authority” is broadly defined to include a Minister, State owned corporation, electricity supply authority, Public Service agency, local council, any other public or local authority constituted by or under any Act, and any person or body prescribed by the Regulations.<sup>17</sup> In our view, any of the entities that have duties under the below mentioned legislation will fall within the definition of “public authority” under the Coastal Management Act.

#### B. Crown Land Management Act 2016

12. Part of the Stockton Beach area is comprised of Crown land.<sup>18</sup> As such, the Crown Land Management Act will apply. The objects of the Crown Land Management Act are to, inter alia, provide for the use and management of Crown land.<sup>19</sup>
13. Section 3.1 of the Crown Land Management Act provides that the person responsible for the care, control and management of particular dedicated or reserved Crown land is the Crown land manager/s for that land. For Crown land that is not dedicated or reserved, or for Crown land over which there are no Crown land managers, the Minister for Lands and Property is responsible.<sup>20</sup>

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<sup>11</sup> Coastal Management Act, s 3(a).

<sup>12</sup> Coastal Management Act, s 3(b).

<sup>13</sup> Coastal Management Act, s 3(e).

<sup>14</sup> Coastal Management Act, s 12.

<sup>15</sup> Stockton CMP,

<<https://www.newcastle.nsw.gov.au/Newcastle/media/Documents/environment/Our%20Coastline%20-%20Documents/Stockton%20Erosion%20Response%20-%20Documents/Stockton/4219-Stockton-CMP-Appendix-August2020-spreads-FINAL.pdf>>

<sup>16</sup> Coastal Management Act, ss 11(b), 22 and 23.

<sup>17</sup> Coastal Management Act, s 4(1) - Definitions.

<sup>18</sup> Stockton CMP, p 51.

<sup>19</sup> Crown Land Management Act, s 1.3.

<sup>20</sup> Crown Land Management Act, Responsible Minister; See also the Administrative Arrangements (Minns Ministry—Administration of Acts) Order 2023, which describes the responsibilities of the Attorney General and Minister for Sport under the Crown Land Management Act (which we note are not relevant to Stockton Beach).

### C. Newcastle Local Environmental Plan 2012

14. The aim of the Newcastle LEP is, inter alia, to conserve and manage the natural and built resources of the City of Newcastle for present and future generations, and to apply the principles of ESD in the City of Newcastle. Council carries many of the responsibilities under the Newcastle LEP.<sup>21</sup>
15. According to [Land Zoning Map – Sheet LZN 004J](#), and [Land Zoning Map – Sheet LZN 004I](#), most of the Stockton Beach foreshore is zoned “Unzoned land”. Clause 2.4 of the Newcastle LEP states that development may be carried out on unzoned land *only* with development consent. In deciding whether to grant development consent, Council must:
  - a. consider whether the development will impact on adjoining zoned land and, if so, consider the objectives for development in the zones of the adjoining land, and
  - b. be satisfied that the development is appropriate and is compatible with permissible land uses in any such adjoining land.

### D. State Environmental Planning Policy (Resilience and Hazards) 2021

16. The aim of Chapter 2 of the Resilience and Hazards SEPP is to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objects of the Coastal Management Act, including the management objectives for each coastal management area, by managing development in the coastal zone and protecting the environmental assets of the coast. Part 2.3 of the Resilience and Hazards SEPP regulates coastal protection works by a public authority, where public authority is given the same meaning as in the Coastal Management Act.
17. The Resilience and Hazards SEPP places development controls on land within the coastal zone. For example, it requires CMPs to be considered in the course of the development application process.

### E. State Environmental Planning Policy (Transport and Infrastructure) 2021

18. Although parts of the coast around the Port of Newcastle might ordinarily fall within the “coastal zone” for the purposes of the Coastal Management Act and Resilience and Hazards SEPP, Chapter 2 of the Resilience and Hazards SEPP does not apply to land within the Lease Area within the meaning of *State Environmental Planning Policy (Three Ports) 2013*.<sup>22</sup> We note also that the Stockton CMP explicitly does not apply to this area (see [map](#)). This means the Resilience and Hazards SEPP will not apply to the Lease Area identified by Chapter 5 of the Transport and Infrastructure SEPP (shown at this map: [Lease Area Map – Sheet LES 003 Port of Newcastle](#)). Instead, the Transport and Infrastructure SEPP regulates the area shaded in red in the Lease Area Map, even when that land would otherwise have fallen into the “coastal zone”.
19. The aims of Chapter 5 of the Transport and Infrastructure SEPP are to, among other things, to allow the efficient development, re-development and protection of land at the Port of Newcastle for port purposes.

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<sup>21</sup> Newcastle Local Environmental Plan 2012, cl 1.6.

<sup>22</sup> Resilience and Hazards SEPP, cl 2.5(2).

## The Public Trust Doctrine

20. We have considered whether, in addition to various statutory responsibilities, certain governmental entities may also have a common law responsibility of care pursuant to the PTD.

### *What is the Public Trust Doctrine?*

21. The PTD has its foundations in Roman Law, with the concept of *res communes* – things owned by no one and subject to use by all.<sup>23</sup> It is “based on the idea that certain common resources such as the air, waterways and forests were held in trust by the State for the benefit and use of the general public”.<sup>24</sup> The conception of the public trust is that these communal resources are held in trust<sup>25</sup> by the present generation for future generations. The PTD would operate to impose upon the trustee a duty to deal with these communal resources in a way that is in the interest of the general public, who are the beneficiaries of the trust. According to academic Joseph Sax, the idea of a public trusteeship rests on three related principles:

- a. First, that certain interests – like the air and the sea – have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership;
- b. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status; and
- c. Third, that it is a principal purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted public benefit.<sup>26</sup>

22. Joseph Sax also suggests that the trusteeship constrains the government in three ways:

- a. The property the subject of the trust must not only be used for a public purpose, but it must be held available for use by the general public;
- b. The trust property must not be sold; and
- c. The property must be maintained for particular types of uses, such as navigation, recreation or fishery.<sup>27</sup>

### *Development of the PTD*

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<sup>23</sup> Freedman, Bradley and Shirley, Emily, ‘England and the public trust doctrine’ (2014) *Journal of Planning and Environment Law* 839 at 840.

<sup>24</sup> Chief Judge Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific’ (2005) 9(2-3) *Asia Pacific Journal of Environmental Law* 109, 203.

<sup>25</sup> We note that the term “trust” may not necessarily refer to a “true trust” that can be enforceable by courts, but may refer to a trust in the broader sense of governmental obligation. See, for example, *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566.

<sup>26</sup> Joseph L Sax, *Defending the Environment: A Handbook for Citizen Action* (Vintage Books, 1971) 165.

<sup>27</sup> See *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99; and Joseph L Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ at 477.

23. The use of the PTD<sup>28</sup> in law originated in England to reflect a common law response to protect public rights to fish and navigate in the bed of tidal navigable rivers<sup>29</sup> and the sea.<sup>30</sup> The PTD made its way to the United States (**US**), where they adopted a broader iteration as a result of the notion that, after the American Revolution, the traditional privileges of the Crown vested in the people of the US. The US version of the PTD has extended to recreational uses such as bathing and swimming,<sup>31</sup> and appears to impose positive duties on the State as trustee (such as a duty to protect public trust uses whenever possible).<sup>32</sup>
24. Chief Judge Preston has more recently noted, extra-curially, that the PTD has been “liberated from its historical shackles so as to apply to other water resources (freshwater lakes and subterranean water sources), forests, parklands, fish and wildlife, and other important natural areas.”<sup>33</sup> These areas may also include some beaches.<sup>34</sup> However, it has not yet evolved into a widely accepted recognisably enforceable principle of law in Australia. Indeed, there has been commentary critical of the PTD’s potential to be enforced in Australia.<sup>35</sup>

### *The PTD in Australia*

25. Notwithstanding the above, the concept of the PTD is not new in the Australian context. Its earliest appearances can be traced back to a challenge to the sale of parts of a park in the 1870s,<sup>36</sup> and a dispute in the 1890s relating to a proposed coalmine in Sydney Harbour.<sup>37</sup> There have been several cases since the 1970s that have heard arguments relating to a duty to maintain public resources in a similar vein to the PTD (noting that the terminology varies from case to case). We summarise some salient points of a few of these cases, below:

- a. *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

In *Harper*, a commercial abalone fisherman challenged the validity of legislation requiring a fee for obtaining abalone licences, arguing that this was contrary to s 90 of the Constitution. The High Court found that a common law right exists of the public to fish in Tasmanian tidal waters. However, the Court also stated that the right to fish is a public and not a proprietary right, and hence is freely amenable to abrogation or regulation by a competent legislature.

Although the *Harper* judgment makes no reference to the PTD specifically, the two leading judgments have been described as using language similar to PTD cases in the US.<sup>38</sup> It is

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<sup>28</sup> We note that the PTD has had different names over time and in different jurisdictions. For simplicity, we refer to all iterations of the concept as the PTD.

<sup>29</sup> *Gann v Free Fishers of Whitstable* (1865) 11 HLC 192, 209 (Lord Westbury LC); 11 ER 1305, 1312.

<sup>30</sup> See *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153, 168–169.

<sup>31</sup> *Borough of Neptune City v Borough of Avon-by-the-Sea* 294 A 2d 47 (Supreme Court of New Jersey, 1972).

<sup>32</sup> *National Audubon Society v Superior Court* 33 Cal 3d 419, 446 (Supreme Court of California, 1983).

<sup>33</sup> Chief Judge Preston, ‘Protected Areas in the Courts: An Overview’ (IUCN World Parks Congress, Sydney, 13 November 2014) 29-35.

<sup>34</sup> See, for example, *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984) (a US case); and *State of Western Australia v Manado* [2020] HCA 9.

<sup>35</sup> See, for example, Paul Finn, ‘Public Trusts and Fiduciary Relations’ in Charles Sampford, Ken Coghill, and Tim Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate, 2011) 31.

<sup>36</sup> *Palmer v The Board of Land and Works* (1875) 1 VLR 80.

<sup>37</sup> See, Chief Judge Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific’ (2005) 9(2-3) *Asia Pacific Journal of Environmental Law* 109, 203; Tim Bonyhady, ‘A useable past: the public trust in Australia’ (1995) 12 *EPLJ* 329, 333-337; and *Re Sydney Harbour Collieries Co* (1895) 5 Land Appeal Court Reports 243.

<sup>38</sup> Gary Meyers, ‘Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act’ (1994) 11 *EPLJ* 289, 297.

arguable that the judgment in *Harper* points to the ability for legislation to limit public access rights in trust resources, but only when that legislation preserves (rather than destroys) that right of access.<sup>39</sup>

- b. *Woollahra Municipal Council v Minister for the Environment* (1991) 23 NSWLR 710.

*Woollahra* was concerned with the approval of the development of a private university in the South Head National Park in Sydney Harbour. Although this case did not specifically mention the PTD, the Court held that the Minister's consent was invalid because there were no provisions in the relevant statute that allowed private development in areas that were held for the benefit of the public.

- c. *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19

*Willoughby* concerned the decision of National Parks and Wildlife Service (**NPWS**) to lease parts of a State recreation reserve for private development. The Court held that the development was prohibited under the relevant planning instrument and was also in breach of the *National Parks and Wildlife Act 1974* (**NPWA**). Section 47B of the NPWA provided that the Minister could reserve land as a State recreation area "for the purpose of public recreation and enjoyment".

The Court accepted the Applicant's submissions that there was a public trust over national parks, and the Minister could not lawfully make an administrative decision to harm the land. The Court made specific reference to the statutory purposes for which national parks are reserved – that they "are held by the State in trust for the enjoyment and benefit of its citizens, including future generations".<sup>40</sup> Also, that the NPWS's public officers "have a duty to protect and preserve national parks ... to achieve the objects of the [NPWA]."<sup>41</sup>

- d. *Cameron v Eurobodalla Shire Council* (2006) 146 LGERA 349.

*Cameron* confirmed *Willoughby* as authority for the recognition by courts of the importance of public lands, as well as the controls on the care and management of public lands.

- e. *Packham v Minister for the Environment* (1993) 31 NSWLR 65.

*Packham* concerned the development of an accessway through a national park to private property. It was held that there was no power in the NPWA to enable the use of national park land for anything other than "public recreation and enjoyment". Although the PTD is not expressly mentioned in this case, the Court referred to a clear general principle established by the NPWA and case law, being that land used for public recreation and enjoyment must be open to the public generally, as of right. That is, that national parks must be available for public use, and their benefits should be retained for the public generally.

- f. *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99

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<sup>39</sup> Gary Meyers, 'Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act' (1994) 11 *EPLJ* 289, 297-298.

<sup>40</sup> *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19, 34.

<sup>41</sup> *Ibid.*



*Stannards* is arguably the strongest Australian treatment of the PTD over natural resources to date. It concerns a proposal to moor and make use of a floating dry dock at Berrys Bay, which is part of Sydney Harbour. The Land and Environment Court of NSW (**LEC**) refused consent based on the landscape character and visual impacts, which were unacceptable having regard to (now repealed) Chapter 10 of the *State Environmental Planning Policy (Biodiversity and Conservation) 2021 (BC SEPP)*, the *Sydney Harbour Foreshores and Waterways Development Control Plan 2005 (SDCP)*, and the concept of the public trust and the principle of intergenerational equity embedded in these statutory instruments.

Chief Judge Preston identified that Sydney Harbour is “part of the public trust” for reasons set out from [163] onward.<sup>42</sup> He noted that the PTD constrains the government in its dealings with and management of natural resources, and that one of these constraints is the ownership of the navigable waters of the harbour and of the lands underneath them are held in trust for the benefit of the whole people of the State. His Honour’s reasons rely heavily on the specific wording of the provisions of the BC SEPP and SDCP. He argues that the BC SEPP encapsulates the idea of public trusteeship of Sydney Harbour, and that to take these statutory provisions into account in determining the development application involves having regard to the idea of the public trust embodied in those provisions.

#### **D. Analysis**

##### Can the PTD be used to aid in the care, maintenance and repair of a natural asset in Australia?

26. The PTD has previously been described as “submerged” or “sleeping”<sup>43</sup> in the Australian context. However, more recent case law has left the door open for the further development of the PTD in the future,<sup>44</sup> albeit with little guidance about how the PTD might be couched - whether in common law, statute, equity or some variation or combination of these.
27. Based on contemporary case law and academic publications, the preferred approach in Australia appears to be (at least at this stage) that the public trust arises from, and is largely determined by, the objects and structure of the relevant statute. We are of this view because:
  - a. Academic Gary Meyers opined that leading Australian PTD case law<sup>45</sup> relied upon “statutory guidance to establish parameters of trust responsibilities, as opposed to the classic public trust doctrine, and its reliance on common law duties”,<sup>46</sup> and
  - b. Chief Judge Preston, in *Stannards*, held that the essence of the PTD could be found in specific relevant legislative provisions and, because of those specific legislative provisions, the PTD was a relevant consideration in determining whether a development application should be approved.

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<sup>42</sup> But see generally *Re Sydney Harbour Collieries Co* (1895) 5 Land Appeal Court Reports 243; and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190.

<sup>43</sup> Gary Meyers, ‘Divining common law standards for environmental protection: application of the public trust doctrine in the context of reforming NEPA and the Commonwealth Environmental Protection Act’ (1994) 11 EPLJ 289.

<sup>44</sup> See, for example, *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd and Minister for Planning* [2016] NSWLEC 6; and *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99.

<sup>45</sup> *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 788 LGRA 19; and *Kent v Johnson* (1973) 21 FLR 177.

<sup>46</sup> Gary Meyers, ‘Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act’ (1994) 11 EPLJ 289, 299.

28. This approach complicates the question about whether (and how) the PTD can be used to aid with the care, maintenance and repair of Stockton Beach. However, if it can be established that the relevant legislative framework encapsulates the idea of public trusteeship in a particular public asset, then the PTD may be a concept to which a relevant authority must have regard when discharging their statutory functions.
29. Whether or not Stockton Beach might enjoy such public trusteeship will therefore turn on the specific wording of the Coastal Management Act and other relevant legislation.

#### Does the PTD apply to Stockton Beach?

30. In our view, the provisions of the Stockton CMP and the Coastal Management Act (and related documents) recognises the concept of the public trust, and, as such, Stockton Beach is under some form of public trusteeship.
31. In *Stannards*, Preston CJ found language in the relevant SEPP and DCP “giving recognition to the concept of the public trust and the principle of intergenerational equity”.<sup>47</sup> Given the status of Sydney Harbour, the provisions of the SEPP clearly reflected an intention to showcase its importance. It is described as “an outstanding natural asset”, “a public asset of national and heritage significance”, “a public resource, owned by the public, to be protected for the public good”, and notes that “the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour and its foreshores” and “protection of the natural assets of Sydney Harbour has precedence over all other interests”.<sup>48</sup>

#### *The provisions of the Coastal Management Act and Stockton CMP are relevant to consider*

32. Unlike Sydney Harbour, there is no environmental planning instrument specific to Stockton Beach. However, there is case law that supports looking to the objects of legislation to better understand the duty owed by public authorities,<sup>49</sup> and this sentiment is echoed in s 22(1) of the Coastal Management Act, which states that a local council is to “have regard to the objects of” the Coastal Management Act in giving effect to a CMP. As noted above at [9] the overarching object of the Coastal Management Act is to “manage the coastal environment of New South Wales in a manner consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State.” In particular, “to protect and enhance natural coastal processes and coastal environmental values including natural character, scenic value, biological diversity and ecosystem integrity and resilience” and “to support the social and cultural values of the coastal zone and maintain public access, amenity, use and safety.”<sup>50</sup> As such, the objects of the Coastal Management Act and the provisions of that Act relating to CMPs are relevant to consider for the purpose of ascertaining whether the PTD applies to Stockton Beach.

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<sup>47</sup> *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99, 163.

<sup>48</sup> *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99, 166.

<sup>49</sup> See, for example, *Willoughby City Council v Minister Administering the National Parks and Wildlife Act (1992)* 78 LGERA 19, where Stein J held at 34 that, in the context of the NPWA, “it is clear from the legislation that national parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law to achieve the objects of the *National Parks and Wildlife Act*”.

<sup>50</sup> Coastal Management Act, s 3(a) and (b).

33. Further, on 17 February 2020, pursuant to s 13 of the Coastal Management Act, the Minister for Local Government,<sup>51</sup> in response to coastal erosion issues, directed that Council submit a draft CMP for Stockton Beach. The final CMP was signed on 5 August 2020 and published in the [NSW Government Gazette on 7 August 2020](#).<sup>52</sup> Stockton Beach is currently subject to the Stockton CMP.
34. Although the Stockton CMP is not an environmental planning instrument (like a SEPP), s 22 of the Coastal Management Act requires Councils to “**give effect** to its [CMP] and, in doing so, they are to have regard to the objects of [the Coastal Management Act]” [our emphasis]. Further, s 23 provides that other public authorities are to have regard to CMPs to the extent a CMP is relevant to the exercise of their functions. In this way, we consider the treatment of a CMP when a public authority exercises its functions under the Coastal Management Act to be similar to the treatment of a Development Control Plan (**DCP**) (noting that DCPs are not environmental planning instruments) when a public authority exercises its functions under the EP&A Act. That is, a CMP is something that must be considered in the exercise of performing certain statutory functions.<sup>53</sup> Chief Judge Preston in *Stannards* refers to the language of the Foreshores and Waterways Area DCP in the course of finding provisions giving legislative recognition to the concept of the PTD. As such, we consider the provisions of the Stockton CMP to be relevant for the same purpose.
35. It is also relevant to note that Preston CJ in *Stannards* found that the concept of the public trust is related to the ESD principle of intergenerational equity, citing WH Rodgers who described the public trust as “the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users”.<sup>54</sup> The purpose of the Stockton CMP is to achieve the objects of the Coastal Management Act,<sup>55</sup> which, among other things, includes managing the coastal environment in a manner consistent with intergenerational equity, and there are provisions throughout the Stockton CMP that recognise the need to afford intergenerational equity.<sup>56</sup>

*Does the language of the Stockton CMP encapsulate the idea of public trusteeship of Stockton Beach?*

36. In our view, the language of the Stockton CMP (and related documents) encapsulates the idea of public trusteeship of Stockton Beach. The language recognises the importance of Stockton

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<sup>51</sup> The Minister for Local Government was previously the Minister responsible for the Coastal Management Act (see <https://legislation.nsw.gov.au/view/html/compare/2019-05-01/2020-05-01/sl-2001-0338#sec-oc.17>), whereas the responsible Minister is now the Minister for the Environment (<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2023-0139#sch.1-sec-oc.7>) and the Minister for Climate Change (<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2023-0139#sch.1-sec-oc.5>).

<sup>52</sup> NSW Government, ‘Government Gazette’ 7 August 2020,

[https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette\\_2020\\_2020-171.pdf](https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2020_2020-171.pdf), p 3922.

<sup>53</sup> However, we note that s 29 provides that ss 22 and 23 do not render the exercise of a function invalid because it did not give effect to a CMP, was made without regard to the objects of the Coastal Management Act or was inconsistent with achieving the outcomes of a CMP. In our view, the operation of s 29 is unclear given the language of ss 22 and 23, which appear to be mandatory.

<sup>54</sup> *Stannards Marine Pty Ltd v North Sydney Council* [2022] NSWLEC 99, 187, Preston CJ citing WH Rodgers, ‘Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resource Law’ (1982) 10 *Ecology Law Quarterly* 205 at 239, 240 and Catherine Redgwell, ‘Principles and Emerging Norms in International Law: Intra- and Intergenerational Equity’ in CP Carlarne, KR Gray and R Tarasofsky (eds) *The Oxford Handbook on International Climate Change Law* (OUP, 2016) 185 at 191.

<sup>55</sup> Coastal Management Act, s 12.

<sup>56</sup> See, for example, the Foreword on page 7 of the Stockton CMP, which states that City of Newcastle Council are working “towards ensuring Stockton beach is enjoyed by the current community and future generations to come”.

Beach as a public asset and aims to protect it for future generations to use and enjoy. Specifically:

- a. Pursuant to s 14(1) of the Coastal Management Act, CMPs are to be prepared in accordance with the Coastal Management Manual.<sup>57</sup> Part A of the NSW Coastal Management Manual notes that the “NSW coast is one of [its] greatest assets”.<sup>58</sup> The manual “seeks to facilitate ecologically sustainable development (ESD) in the coastal zone” and considers the importance of “public access to the coastal zone along with the need for protecting and enhancing coastal environments”.<sup>59</sup>
  - b. The Stockton CMP adopts and aims to give effect to the objects of the Coastal Management Act.<sup>60</sup>
  - c. The Foreword of the Stockton CMP states that “Stockton beach is of intrinsic value to the Stockton and Newcastle community, and visitors. There is a strong desire to preserve and protect its natural environment and character.”<sup>61</sup>
  - d. The intent of the Stockton CMP is stated to be, among other things, “planning and delivering on the urgent protection of critical public assets” in Stockton.<sup>62</sup>
  - e. The Stockton CMP’s vision is that the “coastal environment is protected, enhanced and resilient while maintaining the recreational amenity and sense of identity the coast provides to the community”.<sup>63</sup>
  - f. Two of the stated purposes of the Stockton CMP are to outline proposed long-term actions to address beach access and recreational use of the coastal zone.<sup>64</sup>
  - g. The Stockton CMP outlines specific processes designed to “protect and preserve Stockton Beach”<sup>65</sup> and gives effect to the above by implementing, according to the [Council website](#),<sup>66</sup> various actions, plans and programs contemplated by Chapters 4 – 8.
37. It is arguable that there is language in the above that demonstrates a level of public trusteeship over Stockton Beach.

*Other provisions that encapsulate the idea of public trusteeship of Stockton Beach*

38. Under the Newcastle LEP, most of the foreshore is zoned UL – Unzoned land. Clause 2.4 of the Newcastle LEP states that unzoned land may only be developed with consent, and only after the consent authority:

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<sup>57</sup> See link to Part A and B, <https://www.environment.nsw.gov.au/topics/water/coasts/coastal-management/manual>.

<sup>58</sup> NSW Government, Our future on the coast – NSW Coastal Management Manual Part A: Introduction and mandatory requirements for a coastal management program, <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Water/Coasts/coastal-management-manual-part-a-170671.pdf>, p 3.

<sup>59</sup> Ibid, 15.

<sup>60</sup> Stockton CMP, p 17.

<sup>61</sup> Stockton CMP, p 7.

<sup>62</sup> Stockton CMP, p 8.

<sup>63</sup> Stockton CMP, p 13.

<sup>64</sup> Stockton CMP, p 25.

<sup>65</sup> Stockton CMP, p 9.

<sup>66</sup> City of Newcastle, Stockton Works Updates, <<https://newcastle.nsw.gov.au/living/environment/our-coastline/coastal-erosion-at-stockton/stockton-works-updates>>.

- a. Considers whether the development will impact on adjoining zoned land and, if so, consider the objectives for development in the zones of the adjoining land, and
  - b. Is satisfied that the development is appropriate and is compatible with permissible land uses in any such adjoining land.
39. Most of the land immediately adjacent to the unzoned land (that is, inland from the ocean) is zoned RE1 – Public Recreation. The objectives of zone RE1 are to:
- a. Enable land to be used for public open space or recreational purposes;
  - b. Provide a range of recreational settings and activities and compatible land uses; and
  - c. Protect and enhance the natural environment for recreational purposes.
40. We also note that part of the open coastline of Stockton Beach is Crown Reserve 79066, which was reserved for, among other things, the purpose of public recreation.<sup>67</sup>
41. In our view, Stockton Beach being primarily unzoned land that is adjacent to land zoned RE1 is a clear indication that the land is for the public purpose, is not going to be sold, and is being maintained for, among other things, recreational purposes. This is consistent with the governmental constraints identified by Joseph Sax (see paragraph [22], above).
42. We note that the Stockton CMP will not be relevant to the land identified by the Lease Area in the Resilience and Hazards SEPP. As such, the PTD is unlikely to be a relevant consideration for decision-making with respect to that land.
43. However, on balance, we consider it likely that the relevant provisions aim to protect and preserve Stockton Beach in a way that encapsulates the idea of public trusteeship.

## **E. Conclusion**

44. The PTD is not yet a widely recognisable and enforceable principle of law in Australia. It has been utilised most recently by Preston CJ in *Stannards* but given the novelty of the concept and the lack of relevant case law, it is not clear how the PTD might be properly employed in Australia.
45. Our view is that, currently, the PTD may be a concept to which public authorities ought to have regard when discharging their statutory duties, supposing the provisions in the relevant statutory framework encapsulate the idea of public trusteeship over the public asset to which they relate. We consider that the relevant statutory framework that applies to Stockton Beach contains language indicative of an intention to protect Stockton Beach in a manner consistent with the principles of the PTD.
46. In our view, the statutory framework for Stockton Beach supports the argument that the relevant public authorities must have regard to the notion of the PTD, which is embodied in the provisions of the Stockton CMP (and related legislation), in the course of exercising their statutory functions over land in/around Stockton Beach.

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<sup>67</sup> Stockton CMP, p 81.

47. For example, suppose the Crown land manager for Lot 2 in DP 1249904 wishes to exercise a function conferred on them under the Crown Land Management Act, and suppose this land falls within the coastal zone (which we think it does, based on the map at [7.d]). The Crown land manager must have regard to the CMP and the objects of the Coastal Management Act while exercising this function (s 23, Coastal Management Act). In our view, the Crown land manager must also have regard to the idea of the public trust embodied in the provisions of the Stockton CMP (and related legislation) when discharging their duty.
48. Further, section 18 of the Coastal Management Act provides that a CMP is to be reviewed at least once every 10 years, and the Stockton CMP is scheduled to be reviewed in 2025. We suggest it would be a worthwhile argument to make to Council that Stockton Beach is an asset that is part of the public trust, and that they ought to have regard to the PTD throughout the review process.

Please do not hesitate to contact us on (02) 9262 6989 to discuss this advice or any matters arising from this advice.

Yours sincerely

**Environmental Defenders Office**

A handwritten signature in black ink, appearing to read 'Jasper Brown', with a long horizontal flourish extending to the right.

Jasper Brown

**Solicitor**