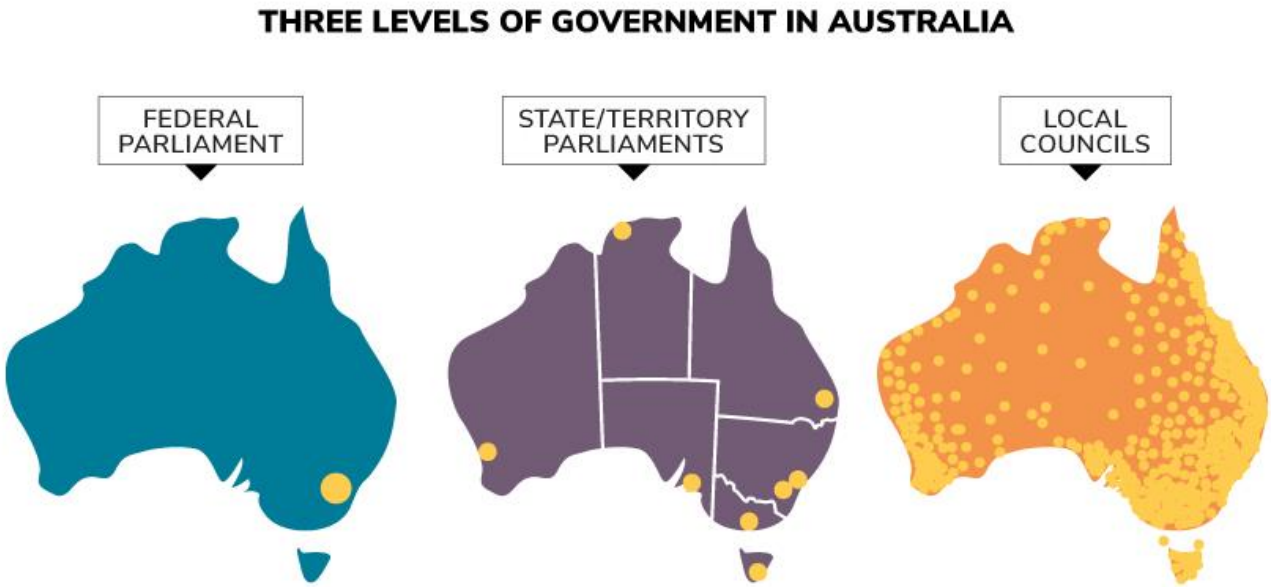
From:	thefiggs@bigpond.com
To:	Partridge, Tamatha
Subject:	HPE CM: RE: USB
Date:	Saturday, 7 November 2020 2:50:48 PM
Attachments:	Three levels of government & Coastal law.pdf

Could you please pass this onto the commissioners Sandra Hogue and John Ramsay, as a clarification to the two questions challenged by council and the commission on my statements as an example of where I based my arguments on.

Many thanks
Michael Figg

Three levels of government: governing Australia

In Australia the three levels of government work together to provide us with the services we need. This in-depth paper explores the roles and responsibilities of each level, how they raise money and how they work together. Case studies show how the powers of the Australian Parliament have expanded.



Three levels of government in Australia.

Parliamentary Education Office (peo.gov.au)

Australia has three levels of government that work together to provide us with the services we need.

The three levels are:

- federal Parliament—makes laws for the whole of Australia
- 6 state and 2 mainland territory parliaments—make laws for their state or territory
- over 500 local councils—make local laws (by-laws) for their region or district.

How the federal and state parliaments work together is sometimes referred to as the division of powers.

Each level of government has its own responsibilities, although in some cases these responsibilities are shared.

Australians aged 18 years and over vote to elect representatives to federal, state and territory parliaments, and local councils to make decisions on their behalf. This means Australians have someone to represent them at each level of government.

History

The establishment of the three levels of Australian government was an outcome of federation in 1901, when the 6 British colonies—New South Wales, Western Australia, Queensland, Victoria, South Australia and Tasmania—united to form the Commonwealth of Australia. Up until the 1850s each colony was run by a non-elected governor appointed by the British Parliament.

By 1860 all the colonies, apart from Western Australia, had been granted partial self-government by Britain. (Western Australia became self-governing in 1890). Each had its own written constitution, parliament and laws, although the British Parliament retained the power to make laws for the colonies and could over-rule laws passed by the colonial parliaments. By the end of the 19th century, many colonists felt a national government was needed to deal with issues such as defence, immigration and trade.

For federation to happen, it was necessary to find a way to unite the colonies as a nation with a central or national government, while allowing the colonial parliaments to maintain their authority. The Australian Constitution, which sets out the legal framework by which Australia is governed, resolved this issue by giving Australia a federal system of government. This means power is shared between the federal—Australian—government and state governments.

Under the Constitution the states kept their own parliaments and most of their existing powers but the federal Parliament was given responsibility for areas that affected the whole nation. State parliaments in turn gave local councils the task of looking after the particular needs of their local communities.

Making laws

Federal Parliament

Section 109 of the Constitution of Australia provides that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid

The Constitution established an Australian—federal—Parliament. The 227 members of the Australian Parliament—76 in the Senate and 151 in the House of Representatives—are responsible for making federal laws.

Sections 51 and 52 of the Constitution describe the law-making powers of the federal Parliament. Section 51 lists 39 areas over which the federal Parliament has legislative—law-making—power. These include:

- international and Australian trade and commerce
- defence
- postal and telecommunications services
- banking and insurance
- foreign policy
- citizenship
- taxation
- pensions
- census and statistics
- welfare payments
- currency
- Medicare
- national employment conditions
- marriage and divorce
- immigration

Under section 51 of the Constitution, state parliaments can refer matters to the federal Parliament. That is, they can ask the federal Parliament to make laws about an issue that is otherwise a state responsibility. Any federal law then made about the issue only applies in the state or states who referred the matter to federal Parliament or who decide to adopt the law.

Some of the powers listed in section 51 are exclusive powers of the federal Parliament; that is, only the federal Parliament can make laws in these areas. Some powers are shared with the state and territory parliaments. These powers are said to be concurrent. Exclusive powers of the federal Parliament are also included in sections 52, 86, 90, 114, 115 and 122.

Examples of exclusive and concurrent powers

EXCLUSIVE POWERS

of the federal Parliament

Section 51

- defence
- payments to Australians, including pensions and Medicare
- foreign policy
- national census
- currency
- lighthouses, lightships, beacons and bouys
- copyright
- citizenship

Section 52

- the national capital
- federal public service

Sections 86 and 90

- Collection of customs—taxes—on imported goods

Sections 114 and 115

- Defence and currency exclusive powers of the federal parliament

Section 122

- Federal Parliament can make laws for territories, including their representation to the federal Parliament

CONCURRENT POWERS

powers shared by the federal Parliament, and the state and territory parliaments

Education

- federal parliament – universities
- state and territory parliaments – schools and teachers, vocational education

Environment

- federal Parliament – responsible for obligations under international treaties (for example world heritage areas)
- state and territory parliaments – protection of the natural environment, approvals for new developments, waste disposal etc

Health

- federal Parliament – payments to doctors and for pharmaceuticals
- state and territory parliaments – hospitals

Marriage and divorce

- federal Parliament – decides who can get married
- state and territory parliaments – decides how marriages are registered

Overseas trade

- federal Parliament –ratifies—makes Australian law—international trade agreements for the whole of Australia
- state and territory parliaments – ratifies international trade agreements for that state or territory

Taxation

- federal Parliament – collects taxes on income and company profits
- state and territory parliaments – collects stamp duty, payroll tax and other smaller taxes

State and territory parliaments

Australia has 6 state parliaments. It also has 2 territory parliaments known as legislative assemblies. These parliaments are located in Australia's 8 capital cities.

Each state, apart from Queensland, has a parliament that consists of 2 houses. The Queensland Parliament has only 1 house—the Legislative Assembly—making it unicameral—single-house.

The Northern Territory and the Australian Capital Territory parliaments are also unicameral— both have one house called the Legislative Assembly. The Australian Capital Territory is unique in Australia because its parliament combines the responsibilities of both a local and state government.

Section 122 of the Constitution gives the federal Parliament the power to make laws for the territories. Until they were granted self-government, the Northern Territory and Australian Capital Territory were administered—managed—by the federal government. Federal Parliament gave the territories self-government by passing the *Northern Territory (Self-Government) Act 1978* and the *Australian Capital Territory (Self-Government) Act 1988*.

Other territories

There are 8 Australian territories in addition to the Australian Capital Territory (ACT) and Northern Territory (NT):

- Ashmore and Cartier Islands
- Australian Antarctic Territory
- Christmas Island
- Cocos (Keeling) Islands
- Coral Sea Islands
- Jervis Bay Territory
- Norfolk Island
- Territory of Heard Island and McDonald Islands.

These territories are governed according to Australian—federal—law and the laws of a state, the ACT or NT. Most have an appointed Administrator.

State and territory parliaments make laws that are enforced within their state or territory. By defining federal powers, the Australian Constitution reserved—left—most other law-making powers to the states. These are called residual powers. As a rule, if it is not listed in sections 51 and 52 of the Constitution, it is an area of state responsibility. State laws relate to matters that are primarily of state interest such as:

- schools
- hospitals
- roads and railways
- public transport
- utilities such as electricity and water supply
- mining
- agriculture
- forests
- community services
- consumer affairs
- police
- prisons
- ambulance services

Section 122 of the Constitution allows the Parliament to override a territory law at any time.

The federal Parliament has only used its power under section 122 a few times and only in cases where the territory law has created much debate or controversy within the Australian community.

Up until 2011 the self-government Acts covering the Northern Territory and the Australian Capital Territory gave federal ministers the right to veto or change territory laws without approval of federal Parliament. This veto power was used by Prime Minister John Howard in 2006 to disallow the Australian Capital Territory's civil union laws. Federal Parliament has now amended the self-government Acts so the federal Parliament must vote to veto a territory law.

Councils

There are over 500 local government bodies across Australia. They are often called councils, municipalities or shires. Local governments consist of 2 groups who serve the needs of local communities:

- elected members, who normally have 4-year terms
- staff who work for the council.

On average each council has 9 elected members who are usually called councillors or aldermen, while the chair or head of the council is usually called the mayor or president. These smaller legislative bodies make by-laws about local matters and provide services. For example, councils are responsible for:

- local roads, footpaths, cycle ways, street signage and lighting
- waste management, including rubbish collection and recycling
- parking
- recreational facilities such as parks, sports fields and swimming pools
- cultural facilities, including libraries, art galleries and museums
- services such as childcare and aged care
- sewerage
- town planning
- building approvals and inspections
- land and coast care programs
- pet control.

One of the main tasks of local government is to regulate—manage—services and activities. For example, councils are responsible for traffic lights, and dog and cat registration. These tasks would be difficult for a state government to manage because they are local issues.

Councils can deliver services adapted to the needs of the community they serve. For instance, the needs of residents in inner-city Brisbane might be different to those of people living in rural Queensland. By providing these services and facilities, councils make sure local communities work well from day-to-day.

From the 1840s colonial parliaments began to hand over responsibility for local issues to local councils. The first council was established in Adelaide in 1840, followed in 1842 by the City of Sydney and Town of Melbourne councils. From the 1850s onwards, the number of elected councils grew rapidly.

Today, local authorities include city councils in urban centres, and regional and shire councils in rural areas. On average each council looks after about 28 400 people. The largest council by population is Brisbane City Council which is responsible for a population of nearly 1.2 million. The Shire of East Pilbara in Western Australia is the largest local authority area.

Local councils are not mentioned in the Australian Constitution, although each state has a local government Act—law—that provides the rules for the creation and operation of councils.

While these Acts vary from state to state, in general they cover how councils are elected and their power to make and enforce local laws, known as by-laws. A by-law is a form of delegated legislation because the state government delegates—gives—to councils the authority to make laws on specific matters. As councils derive their powers from state parliaments, council by-laws may be overruled by state laws.

Because the federal Parliament and the state parliaments can make laws in the same areas, sometimes these laws conflict. Section 109 of the Constitution states that if the federal Parliament and a state parliament pass conflicting laws on the same subject, then the federal law overrides the state law or the part of the state law that is inconsistent with it.

Losing Land through sea level rise.

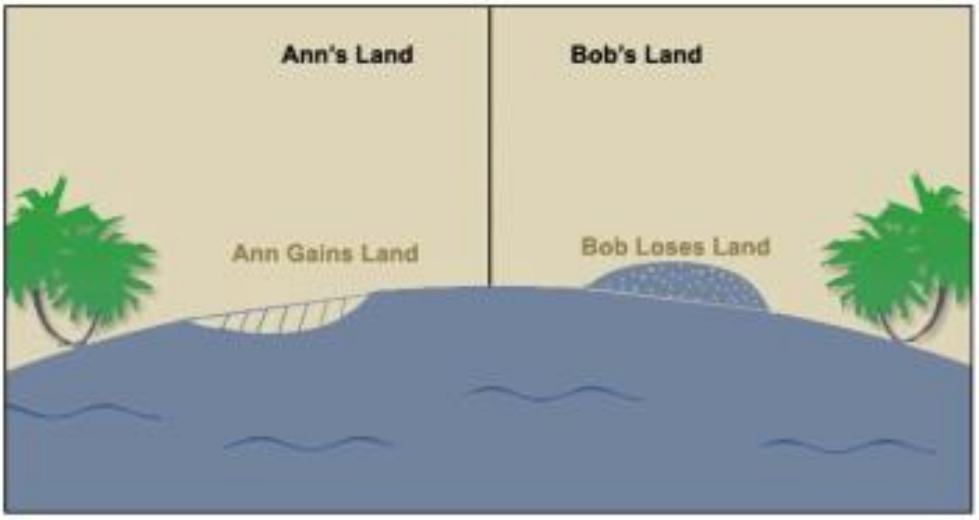
Erosion:

This is the gradual eating away of the soil by the currents or tides. *Black's Law Dictionary*. It is the owner's responsibility to improve and protect his shoreline from erosion. It many cases when this is not feasible, in time the entire parcel may be lost to erosion. The adjoining upland parcel then becomes riparian and acquires all the rights of the eroded parcel.

Submergence:

This is the disappearance of land under water and the formation of a more or less navigable body over it. Black's Law Dictionary A riparian owner may lose title to land that gradually becomes eroded or permanently inundated with water. If the change is sudden, however, the title will not change.

Naturally Occurring Accretion and Erosion



In this scenario, Ann and Bob are both riparian property owners along Alabama's coastal shore. Ann gains land as a result of naturally occurring accretion while Bob loses land because of naturally occurring erosion.

Who owns the newly gained and lost land?

UNSW
THE UNIVERSITY OF NEW SOUTH WALES

NCCARF
National
Climate Change Adaptation
Research Facility
Adaptation Research Network
SETTLEMENTS AND INFRASTRUCTURE

PRINCIPLES and PROBLEMS of SHORELINE LAW

by John Corkill, Southern Cross University

Nine Key Principles Underpinning Shoreline Law

As a result of my research I have summarised the fundamental concepts underpinning the doctrine of accretion by stating nine principles of shoreline law.

They are:

1. The legal boundary between tidal waters and adjacent land is the High-Water Mark (HWM).
2. Where land is bounded by water, the legal boundary of the land changes to reflect changes in the position of the waters' edge, but only if certain conditions are met;
3. To be recognised in law, changes in a water boundary must be 'gradual' and 'natural';
4. New land formed gradually by accretion belongs to the adjoining landowner;
5. The doctrine of accretion includes gradual changes brought about by erosion, and by the advance or retreat of waters (diluvion or dereliction).
6. Land below the high-water mark (<HWM) belongs to the Crown and is held in trust for public purposes
7. **Land 'lost' to the sea, below HWM, by gradual erosion or diluvion, ceases to be real property, and reverts to the Crown.**
8. Ambulatory boundaries supplant and rescind surveyed boundaries.
9. **No compensation is payable for either gradual loss or gain of land.**

THERE'S bad news for the owners of beachfront property with new research from Southern Cross university finding landowners in NSW have no basis in law to claim they still own land that is lost to rising seas.

A PhD candidate from the School of Law and Justice, John Corkhill OAM, recently published research in the Property Law Review titled 'Ambulatory boundaries in NSW: Real lines in the sand'. (See Vol 3 (2) December 2013, pp 67-84). The research focuses on the common law doctrine of accretion.

"The doctrine of accretion holds that, since the position of bounding water-lines may move over time, legal boundaries formed by water may also change over time, but only if two conditions are satisfied: the change must occur gradually, and as a result of natural processes.

"Australian case law has made it clear that where land is gradually eroded by the sea, or covered by rising seas, any part that comes to lie below the mean high-water mark ceases to be land that is 'real property'.

When that happens a boundary originally defined by survey ceases to exist, the property gains an ambulatory boundary, and the ownership of the lost land reverts to the Crown as the NSW Government.

Mr Corkill found that under the common law and current NSW statute law, when land is lost to the sea no compensation is payable to landowners.

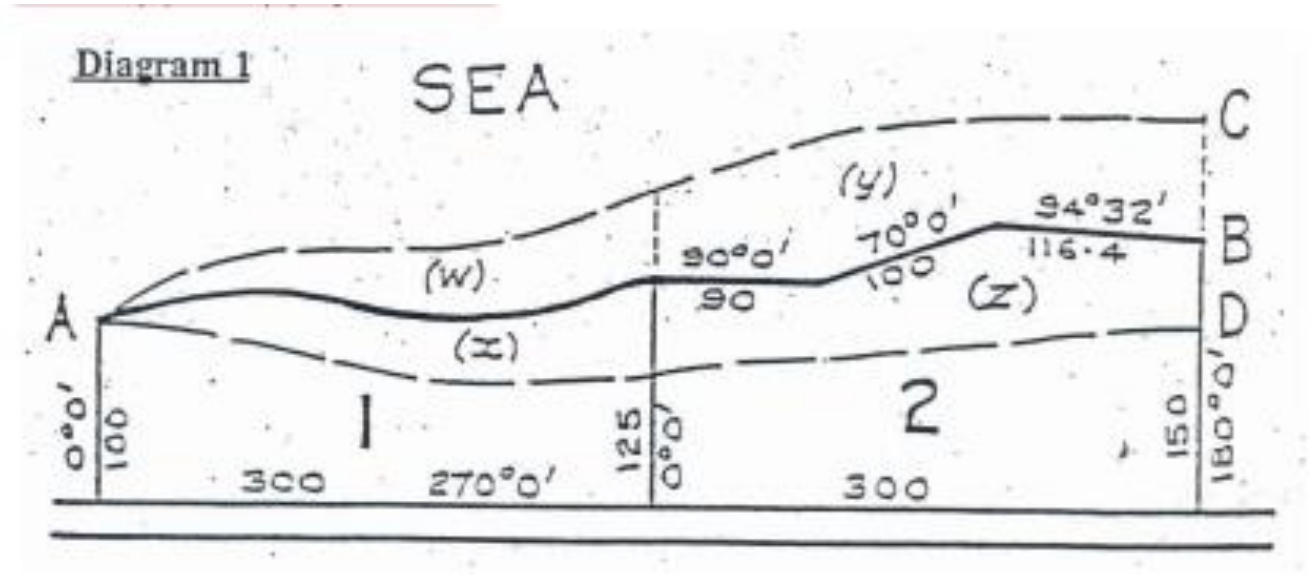
"Because the land is lost, not through a decision by Government, but because of the action of the sea, the land is not acquired under NSW legislation, but is 'silently transferred' under common law," he said.

"Further, because land that falls below the mean high-water mark ceases to be real property under the Act no 'property' is in fact acquired, with the result that there is no basis for a claim for compensation."

Mr Corkill further warns that the impacts of the doctrine of accretion are not limited to tidal waters.

"As seas rise, many land titles which become bound by the waters of the open coast, tidal rivers or tidal lakes will be so adversely affected that eventually they will be wholly lost to the sea."

This process can be explained by reference to Diagram 1. If it can be clearly established by reference to title that the boundary marked A-B is the common boundary between the sea and properties 1 and 2; the doctrine will apply. A slow and imperceptible movement of the sea boundary from A-B to A-C would result in the accretion of areas (w) and (y) to properties 1 and 2 respectively. A movement to A-D would result in the loss by properties 1 and 2 to the Crown of the areas shown (x) and (z) by diluvion.



Just as the doctrine applies. against the Crown (see paragraph 3.2), so the Crown could stand to gain in a case of diluvion. In theory, the Crown (probably through (CNR), could apply to have titles amended to show that former freehold had become Crown land.

References

This guideline is primarily based on recent advices from the

- Victorian Government Solicitor (VGS) and records from the former Department of Crown
- Lands and Survey. Some definitions are taken from "Jowitt's Dictionary of English Law, John Burke; Sweet and Maxwell, 2nd Edition 1977".

WHO OWNS THE BEACH?
Mike Stapleton

Land below MHWM

Titles to the beds of all tidal waters, unless specifically vested in another authority or the subject of a Crown Grant, are under common law deemed to be vested in the Crown. The Minister administering the Crown Lands Act 1989 (or his delegate) is responsible for the management of these lands and is the approval authority for Mean High Water Mark redetermination. (Hallman and NSW (Surveyor General's Directions))

Principle of Erosion and Accretion

The doctrine of accretion and erosion applies to boundaries of tidal lakes and both tidal and non-tidal streams and waterways where the change in the position of the bank of the waterway is natural, gradual and imperceptible. (NSW (Registrar-General's Directions Thus, if one's boundary is defined by the MHWM or reference thereto, it is subject to accretion and erosion. That is, except for the provisions of the Coastal Protection Act 1979 which prevents a claim based on accretion if:

- accretion is not likely to be indefinitely sustained by natural means
- Public access to a beach is restricted or denied

Conclusion

Ownership of the beach is clearly a complicated question, and I have only considered the New South Wales scenario. Due to the increased prevalence of global warming and impacts of sea-level rise, I agree with Corkill and others who, with respect to New South Wales, are suggesting that the Registrar-General and probably legislators need to provide updated guidelines and possibly legislation to improve clarity and understanding of the issue. The values of beach front properties are generally high and hence the loss of land can affect property owners significantly. Furthermore surveyors, who have a hands on, practical understanding of the locational and measurements aspects of boundaries need to be actively involved in such provision.

References:

- Australian Government (2014), The Beach, http://australia.gov.au/about-australia/australian-story/beach
- Clerke, Adam (2004), Determination of Mean High-Water Mark within New South Wales, University of Southern Queensland Faculty of Engineering and Surveying
- Corkill, John (2012), Principles and Problems of Shoreline Law, Australian Climate Change Adaptation Research Network for Settlements and Infrastructure (ACCARNSI)
- Hallmann, F.M. 2004, Legal Aspects of Boundary Surveying as apply in New South Wales. The Institution of Surveyors, Australia, NSW Division. Sydney
- New South Wales Land and Property Information Registrar General Directions, Accretion and Erosion, http://rgdirections.lpi.nsw.gov.au/deposited_plans/natural_boundaries/accretion_erosion
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- New South Wales (2012), Surveying and Spatial Information Regulation 2012, Sydney
- Strata Community Australia (2014), Coastal erosion: nature's way or a man-made problem?
- http://www.stratacommunity.org.au
- Thom, Bruce (2014), Who owns the beach when the sea is rising? http://theconversation.com/who-owns-the-beach-when-the-sea-is-rising-24767
- Whittal, Jennifer (2011), Integrated Coastal Management Act - Surveying Challenges in the South African Coastal Zone, University of Cape Town, Cape Town

Doctrine of accretion and diluvion Continued.

the change to the course of the river has taken place steadily over a period of time, and has been 'gradual and imperceptible', the doctrine of accretion and diluvion will apply.
This doctrine, described by Lord Wilberforce in *Southern Centre of Theosophy Inc v State of South Australia [1982] AC 706, 716*, provides that where a river boundary moves gradually, the boundary of a landowner's title will be deemed to move with the river, meaning that the extent of the landowner's title may increase or decrease, and that the ownership of it reverted, accordingly, to the Crown.

Courts held, further, that the reversion of ownership to the Crown ensued notwithstanding the provisions of the Real Property Act 1900 (NSW). The correctness of the law in that regard as stated by his Honour, is not challenged. (Ibid 287.)

These three Australian cases make it clear that where land is gradually eroded by the sea, or covered by rising sea levels, a 'right-line' boundary originally defined by survey does not survive and any part that comes to lie below MHWM ceases to be 'land' that is 'real property'. Further, they demonstrate that when the MHWM crosses a boundary originally defined by survey, that boundary ceases to exist and the property gains an ambulatory boundary.

1. Environment Protection Authority v Leaghur Holdings PL (1995) 87 LGERA 282.
2. Environment Protection Authority (EPA) v Saunders (1994) 6 BPR 13,655
3. Southern Centre of Theosophy Inc v State of South Australia [1982] AC 706 at 720"
4. Real Property Act 1900 (NSW).

NO COMPENSATION IS PAYABLE FOR LAND 'LOST' TO THE SEA

Because the issue of the payment of compensation for land lost to the sea was briefly considered by Thom in 2003, 2009, important issue requiring clarification, it is apposite to consider whether a basis exists for any claims for compensation.

The position under common law

The observation made by Hale in De Jure Maris when he discussed the precedent of the Abbot of Ramsey's case (c 1369) 43 E 3, R 13, gave one of the earliest indications that compensation was not payable for lost land. He said of that case: