

The background of the slide is a light gray gradient. It is decorated with numerous realistic water droplets of various sizes. Some droplets are at the top, some at the bottom, and some are clustered together. They have highlights and shadows, giving them a three-dimensional appearance.


LAW REFORM FOR ADAPTIVE COASTAL MANAGEMENT IN AUSTRALIA

THE PUBLIC TRUST DOCTRINE AND ROLLING EASEMENTS



THE “BLUF”

(Bottom Line, Up Front)

- Public trust doctrine unlikely to be widely adopted in Australia
 - BUT legislative reform should be clear about hierarchy of priorities for coastal management – where the trade-offs lie
 - Protection of public beach (& access) should be highest in most cases
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THE PUBLIC TRUST DOCTRINE

- **English Common Law**

- Title to natural resources (rivers, lakes, seashore and coastal waters) held by the Crown in trust, for benefit of the public.
- Public right to use and enjoy trust land

- **Reflected in US state laws or Constitutions, but not in Australia**

- US - Tidal wetlands, beaches, navigable waters and the underlying lands publicly owned - 'free from private interruption and encroachment'
 - Florida Constitution - public has a right to use navigable waters for navigation, commerce, fishing and bathing and other easements allowed by law, including the use of the foreshore, in the 'service of the people'
 - 2008 Florida Supreme Court rejected private landowner's objections to beach renourishment
 - 'State has a constitutional duty to protect Florida's beaches, part of which it holds in trust for public use'
- *Sax argued for wider use: 'diffuse public interests need protection against tightly organised groups with clear and immediate goals.'*
 - Hawaiian Constitution: *All public natural resources are held in trust by the state for the benefit of the people*

THE PUBLIC TRUST DOCTRINE

- Operates as **duty on government**
- State may convey private property rights to individual property owners, but not so as to interfere with public interests of navigation, fishing or riparian rights.
 - *Trustee may not use trust resources inconsistently with the public benefit*
 - *Trustee must ensure no significant reduction of public's rights to use and enjoyment*
 - *Trustee cannot alienate trust resources unless the public benefit arising from the alienation would compensate for loss of previous public uses.*
- What this means in practice, and what remedies are available if trustee fails to meet obligations - poorly defined

TEXAS OPEN BEACHES ACT 1959

- Incorporated into Texas Constitution 2009 - authority to regulate public rights and public welfare in the coast without effecting a compensable taking.
- Guarantees 'the free and unrestricted right of ingress and egress to and from the State-owned beaches'
 - Rolling easement over beach between LWM and vegetation line
 - if erosion or a storm wiped out the public beach behind them, homes could become state property. (General Land Office had taken 18 properties for such reasons, reimbursing owners \$50,000 each.)



Hurricane Rita 2005

Severance sued the state after it said her property was now in the public domain.



TEXAS OPEN BEACHES ACT AFTER “SEVERANCE”

- Preservation of public access to the shoreline does not entitle State officials to seize private property that suddenly moves onto public beaches because of the avulsive effect caused by erosion from hurricanes or storms
- erosion that suddenly changes the location of the dry beach does not move the established public easement from its original location.
- However, that public easement may “move according to gradual and imperceptible changes” that are part of a dynamic coast
- State continues to own the wet sand portion of the beach up to the MHWL, regardless of how the beach changes.



GLO Commissioner Patterson: “a “Californication of Texas beaches.”

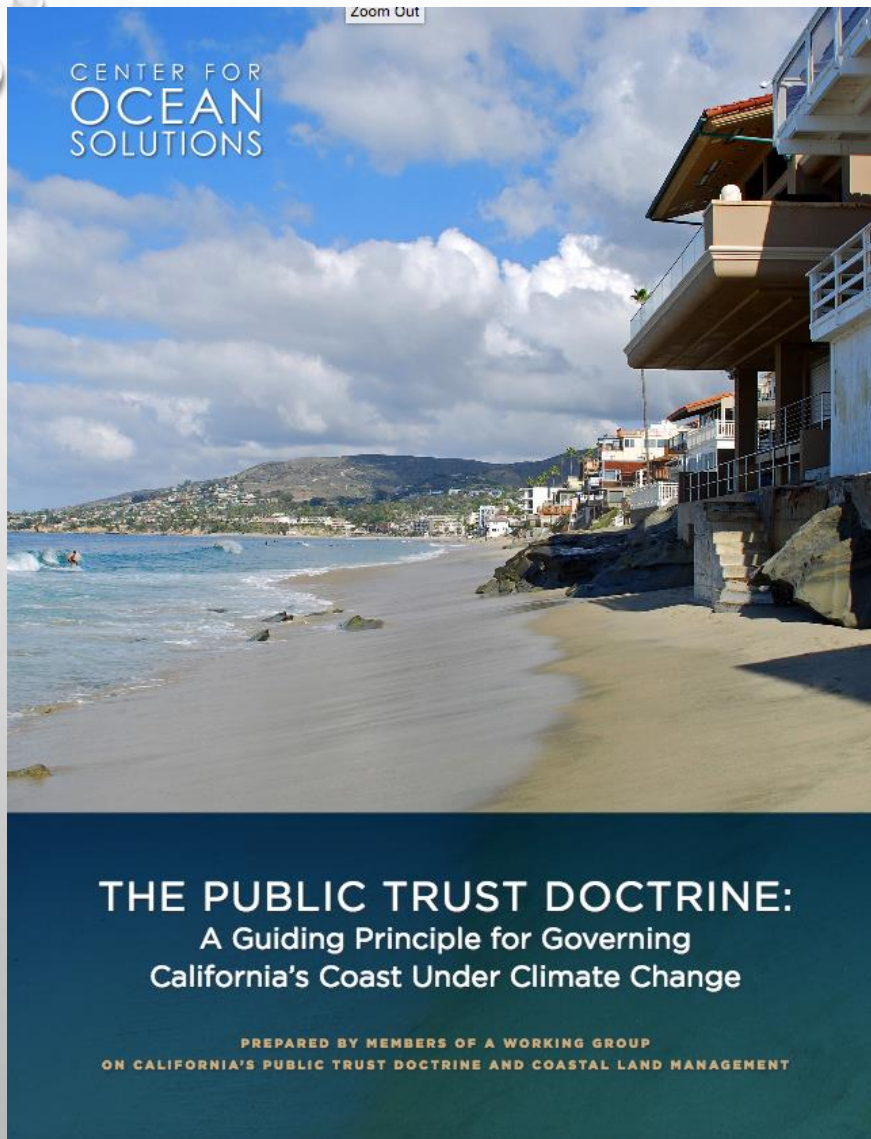
On march 30th, 2012 the Texas Supreme Court ... in the *Severance v. Patterson* case, gutted the Open Beaches Act and reversed 200 years of the Texas public's right to the beaches of the Lone Star State.

Meanwhile California real estate broker and, fittingly enough, divorce attorney Carol Severance and her Attorney J. David Breemer from the ultra conservative property rights non-profit Pacific Legal Foundation (PLF) sit in California touting themselves as "Property Rights Heroes" as Texas Coastal Communities and the Texas General Land Office (GLO) try to sift through the chaos and rubble they have left behind.

- cancelled \$40m sand nourishment

TEXAS OPEN BEACHES ACT AFTER “SEVERANCE”

- Very limited funding for clean up or erosion projects on private property without a rolling easement
- Amendment post-*Severance*
 - Vests more authority in Commissioner to determine the line of vegetation to protect the public beach.
 - “Whether or not the Commissioner chooses to exercise that authority to suspend or determine a new line of vegetation is entirely discretionary.”



The Californian Consensus Statement On the Public Trust Doctrine, Sea Level Rise, and Coastal Land Use in California (July 2017)

The Californian Consensus Statement On the Public Trust Doctrine, Sea Level Rise, and Coastal Land Use in California (July 2017)

- Decision-makers should interpret and implement legal obligations in light of PTD and resolve gaps or ambiguities **in favour of PT resources.**
- Regulations of property that are an exercise of PTD do not give rise to compensable takings
- PT lands conveyed to private interests remain subject to a public trust easement unless intention to abandon trust is clearly expressed or necessarily implied
- Decision makers cannot undertake or authorise uses of PT lands or uplands that impact or are inconsistent with PT needs

The Californian Consensus Statement On the Public Trust Doctrine, Sea Level Rise, and Coastal Land Use in California (July 2017)

- Must consider the immediate and foreseeable effect of actions and decisions on trust resources (SLR)
- Duty to protect is continuing – may condition approvals to require further evaluation, and in some cases revoke or amend previously granted rights
- Structures that come to be on public trust lands become subject to state lands commission – charge rent or require removal

THE CALIFORNIAN CONSENSUS STATEMENT (July 2017)

Measures include:

- Rolling land use restrictions
- New zoning to phase out development
- Encourage community-level adaptation planning
- setbacks, time restrictions, restrictions on future protective structures, payment of fees to mitigate effects on trust resources, or requirements for future removal if substantial impairment of public trust resources and uses arise
- Procedures for periodic review
- http://www.centerforoceansolutions.org/sites/default/files/publications/The%20Public%20Trust%20Doctrine_A%20Guiding%20Principle%20for%20Governing%20California_Report.pdf

PUBLIC TRUST IN AUSTRALIA

- Scholarly discussion
- Very little judicial acceptance
- Strong emphasis on property owner's rights
- Difficulties in locating MHWL with dynamic beach profile
- 'Some' reflection in recent legislative reforms

FORMS OF REFORM

- [Explicit statutory recognition of PTD]
- Clauses in planning, coastal and property law that **prioritise protection of beaches** as transient land
 - Over-arching obligation of administering agencies - act as trustee in protecting in perpetuity the beach for the public good.
 - changes to property law to clarify future uncertainty regarding land ownership and property boundaries as shorelines recede
 - Define erosion/inundation zones that extend into private land and make private use in such zones subservient to the need to protect the beach and beach access.
 - Provisions clarifying property owners have no right to protect property
- Adoption as part of the Common Law, through strategic litigation????

VICTORIAN COASTAL STRATEGY

- **As a general principle, use of the coast and the location of public and private assets should respect natural coastal processes.**
- **Crown does not have an obligation to reduce the impacts of coastal hazards, sea level rise and other natural processes on private land.**

VICTORIAN MARINE AND COASTAL ACT CONSULTATION

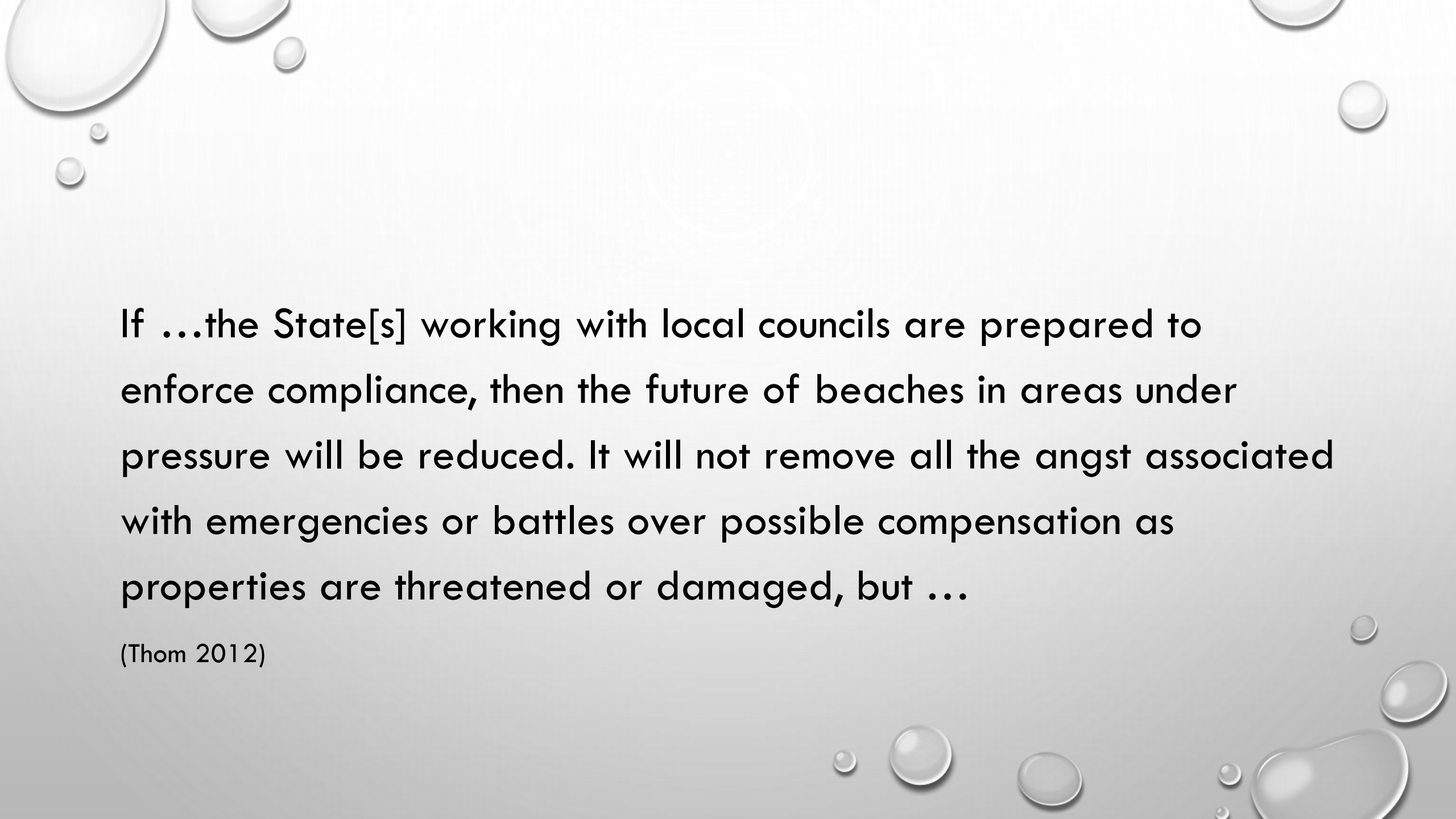
- A healthy coast and marine environment, appreciated by all, now and in the future
- To plan for, manage, maintain and improve Victorian marine and coastal ecosystems, waters, and lands by building ecosystem resilience to climate change impacts, avoiding detrimental incremental and/or cumulative ecosystem impacts and working with natural processes where practical.
- To reduce current and future risks from climate change by improving the resilience of coastal communities and assets and adapting to the impacts of increased hazards

VICTORIAN MARINE AND COASTAL ACT CONSULTATION

- Policy and guidance and implementing processes for adapting to climate change
 - should take a risk management approach (prioritises action based on risk) and be adaptive if circumstances, scientific knowledge or other information change.
- Benchmarks for planning

COASTAL MANAGEMENT ACT 2016 (NSW)

- The objects of this 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, and 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
 - **to support the social and cultural values of the [coastal zone](#) and maintain public access, amenity, use and safety,**
 - to recognise the [coastal zone](#) as a vital economic zone and to support sustainable coastal economies,
 - to facilitate [ecologically sustainable development](#) in the [coastal zone](#) and promote sustainable land use planning decision-making,
 - to mitigate current and future risks from [coastal hazards](#), taking into account the effects of climate change,
 - to recognise that the local and regional scale effects of coastal processes, and the inherently ambulatory and dynamic nature of the shoreline, may result in the loss of coastal land to the sea (including estuaries and other arms of the sea), and to manage coastal use and development accordingly,
 - to promote integrated and co-ordinated coastal planning, management and reporting,
 - to encourage and promote plans and strategies to improve the resilience of coastal assets to the impacts of an uncertain climate future including impacts of extreme storm events,
 - **to facilitate the identification of land in the [coastal zone](#) for acquisition by public or local authorities in order to promote the protection, enhancement, maintenance and restoration of the environment of the [coastal zone](#),**



If ...the State[s] working with local councils are prepared to enforce compliance, then the future of beaches in areas under pressure will be reduced. It will not remove all the angst associated with emergencies or battles over possible compensation as properties are threatened or damaged, but ...

(Thom 2012)