

Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties

A Report for the Australian Local Government Association

Final – 22 July 2011

DISCLAIMER

This report on Local Council Risk of Liability in the Face of Climate Change (the ***Report***) is a desktop report. Attached to the Report are Appendix 1: Table outlining variations in negligence laws between jurisdictions, Appendix 2: Table outline detail of potential claims against councils, Appendix 3: Table of legislative and policy frameworks and Appendix 4: Summary of cases (together, the ***Appendices***).

The Report and the Appendices have been commissioned by the Australian Local Government Association (***ALGA***) for the purpose of identifying: areas of potential risk and legal liability that State and Territory local government organizations face in relation to climate change, strategies to mitigate these risks, barriers to effective adaptation and providing an assessment of potential models or approaches to reduce or mitigate these risks. The views and opinions expressed in this publication are those of the authors and do not necessarily reflect those of ALGA.

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Executive Summary

The Australian Local Government Association (ALGA) has engaged Baker & McKenzie to prepare a report which will assist ALGA, in collaboration with State and Territory local government associations (LGAs) to:

- identify areas of potential legal risk and the liability of LGA associated with State and local government laws in relation to climate change – with a particular reference to coastal areas;
- identify legal or other strategies to mitigate these risks;
- identify where legislation or policy frameworks create barriers to effective adaptation or promotes maladaptation; and
- provide an assessment of potential models or national approaches to reduce or remove these risks to councils.

At the outset, it is important to note that ALGA has adopted a clear policy position in respect to climate change. In particular, ALGA acknowledges that:

- climate change is a shared responsibility;
- local government will need to prepare for climate change and, at the very least, will need to develop the capacity to protect its own assets and adapt to localised conditions; and
- local government has an important role in providing leadership and education to assist citizens and business to understand and accept their responsibilities to address climate change.

In the context of this report, we also note that ALGA supports the following statements / positions with respect to steps that need to be undertaken to ensure local government is well equipped to address the impacts of climate change:

- the need for the Australian Government and State / Territory governments to acknowledge that local governments have varying levels of capacity to address climate change and that, where appropriate, government resources, including funding, will be required to enhance the work of councils to implement effective measures to address climate change; and
- the need for the Australian Government and State / Territory governments to actively engage with local government to achieve policy alignment and coordinated action to address climate change at the local and regional level.

These and ALGA's wider policy positions have informed the preparation of this report.

Background

Local Councils are, in many instances, at the forefront in responding to the impacts of climate change. Impacts associated with increased temperatures, sea level rise, increased frequency and intensity of natural hazards and other severe weather events will all be experienced most acutely at the local level. Members of local communities will, therefore, increasingly look to their local Council to provide solutions to adapt to, manage, transfer or share the risks associated with

climate change impacts. Whilst this report primarily focuses on risks that arise in coastal areas, there are a number of climate change risks that will affect inland areas, including changes to the availability of water, increased risks of drought and bushfire risks.

Under State and Territory legislation, local governments are charged with a broad array of statutory and non-statutory responsibilities in relation to natural and man-made risks and hazards. There have recently been amendments to legislation in some states to address certain climate change risks. These powers provide Councils with a number of potential management levers for adapting to and addressing climate risk but equally creates many challenges, particularly in relation to legal liability.

There is also uncertainty about the extent of liability and responsibility of local governments to address climate change, which has been increased by a number of legal decisions where courts have required local governments to consider climate change impacts as part of the decision making process. Changing information about the nature and extent of climate change creates further uncertainty and the limited resources of councils is an added difficulty.

In this context, local governments are seeking to manage the burden and costs of responsibility and are seeking both guidance and coordination from federal and state governments to adopt a consistent approach to managing climate change risks.

This report identifies trends and inconsistencies between the jurisdictions in key legal risk areas; develops recommendations to reduce legal risks; and discusses options to limit or remove risks for councils through a national approach.

Recognising that there may be costs associated with increased litigation, the report also examines the issue of how Councils with limited resources can appropriately respond to climate change and legal proceedings resulting from climate change. It identifies different approaches taken in various jurisdictions and makes recommendations based on those approaches.

Legal Liability

There are well established bodies of law covering the liability of Councils in nuisance, negligence, administrative review and merits appeals. However, climate change liability is unique due to the nature of the loss and damage potentially suffered by property owners or other claimants, the range of potential claims across many areas of law, challenges with establishing causation and responsibility for impacts – particularly where claims relate to a failure to act or planning decisions that limit or refuse development, rather than the effect of positive actions, uncertainty regarding the likelihood of future impacts which affects long-term planning and the evolving body of scientific information which underpins decision making.

There are two important points with respect to the long-term liability of local governments. Firstly, in most jurisdictions, legislation prescribes that litigation must be commenced within six years of the cause of action accruing (the decision, action or inaction of the council which led to the damage). These time

limitations will be significantly less for decisions related to planning appeals. Further, any action is based on the knowledge of a reasonable person in the position of the council *at the time* any decision is made or action is taken. Thus, current scientific developments with respect to climate change which have occurred since the decision was made will not be taken into account. Local governments need to base their decisions on the best available scientific information at the time.

We have already seen actions brought against Councils and State governments with respect to decisions taken in light of potential climate change impacts, including:

- claims by private property owners challenging the refusal of development applications in the coastal zone on the basis of anticipated risks of flooding and erosion or that planned retreat strategies had not been fully considered;
- claims by third parties against decisions to approve development in circumstances where it was argued that climate change impacts on low-lying coastal land had not been considered;
- claims by third parties against decisions to approve development in circumstances where it was argued that submissions which raised concerns about climate change had not been adequately considered;
- challenges to the preparation and adoption of planning scheme amendments that sought to impose standards to guide development in the coastal zone;
- proceedings initiated by a Council seeking to prevent a private landowner constructing coastal protection works;
- proceedings initiated by a private landowner seeking to compel a Council to construct coastal protection works; or alternatively seeking a declaration or order that the landowner was entitled to do so, and claiming damages and other relief for nuisance and negligence.

These circumstances are elaborated upon in Part 2 of this report and the cases are summarised in Appendix 4.

In addition to these types of claims, it is possible that claims may also be brought in respect of:

- actions in negligence in respect of information provided by Councils or planning decisions they make;
- failure to disclose information it knows it has;
- actions in nuisance for interference with private property rights as a result of the construction of coastal protection or other works on public land;
- legal actions arising from a Council's decisions or failure to provide services or maintain infrastructure for climate change-related reasons;
- statutory compensation claims related to diminution of land values due to planning scheme amendments and rezoning;
- challenges to compulsory acquisition valuations; and

- claims challenging the reassessment of coastal boundaries and related claims related to diminution of land value as a result of coastal erosion and changes to property boundaries.

One of the key findings of the *2010 Report of the Coasts and Climate Change Council* (CCCC) was that it is unclear how different State systems can cope with the legal challenges that are starting to emerge to dispute planning decisions and which will increase in response to property loss from inundation or if property owners are unable to protect their property against erosion. The CCCC noted that local governments and property owners need issues of legal liability clarified.

Tables 1-3 set out the various types of claims that may be brought against Councils when exercising their powers or carrying out their functions and assesses the types of defences that are currently available, the risks of such claims materialising and strategies to manage that risk.

In each State and Territory (with the exception of the Northern Territory and South Australia, for which there is a general but weaker defence at common law) there is legislation which can limit the liability of Councils in civil litigation. The extent of these defences vary between States, for example, the Victorian *Wrongs Act 1958* (Vic) is more limited than others States. However, on this basis, a Council will not ordinarily be liable for any act or omission unless it can be shown that it was manifestly unreasonable. Councils may also be able to limit their exposure to liability with respect to the materialisation of an obvious risk or an inherent risk, provided sufficient information or warnings about the risk are provided.

In NSW, Councils are also able to raise a defence to claims in nuisance and negligence where acts or omissions that caused a person loss or damage were done honestly or in good faith in the performance of the Council's statutory functions. NSW Councils may also be exempted from liability arising from advice given, acts or omissions in relation to flooding and certain natural hazards in the coastal zone.

These types of defences are an important tool to manage the liability of Councils. However, as Appendices 1 and 2 to this report demonstrate, there is significant variation between the Australian States and Territories with respect to the availability of statutory protections. Appendix 3 further demonstrates the significant variation between the States and Territories with respect to adopting legislative guidance, policies and plans to respond to the impacts of climate change.

The CCCC, the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts (House of Representatives Committee) in its report *Managing our Coastal Zone in a Changing Climate*, and other commentators have suggested that litigation risk could be reduced if national standards, supported by consistent State and Territory legislation were applied, particularly in respect of planning standards and policies. We agree with this proposition, however, a critical challenge is determining the most appropriate forum to advance this proposal – see discussion under "nationally

consistent approaches" below. The Commonwealth has clear legislative powers to address mitigation (e.g. through the introduction of a national carbon price) but more limited powers to legislate for local and regional adaptation.

In our view, it is highly likely that, in the coming years, more litigation will be brought against or will otherwise involve Councils as a result of the decisions taken, policies and plans adopted and functions exercised by Councils. In many instances, particularly where actions involve merit reviews, Councils will be unable to recover the costs (both legal and administrative) associated with this litigation. This poses a significant financial and resource burden on Councils, which may not be capable of being insured against in all cases.

Table 1: Summary of specific tort-based climate change related actions

	Possible actions	Defences	Likelihood of an action being brought	Mitigation strategies
Claim for approving development when risk of harm is foreseeable	negligence	Legislative reforms provide that councils are not liable for decisions unless they are manifestly unreasonable Obvious risk In NSW, s 733(3) of the <i>Local Government Act 1993</i> (NSW) provides that councils are not liable for damage caused by flooding and natural hazards in the coastal zone as a result of the granting or refusal of a development application	HIGH - With new scientific developments, it is more likely that a decision will be manifestly unreasonable if it does not take climate change into account LOW - in NSW due to the statutory exemption	Councils should have regard to precautionary matters in decision making Other jurisdictions should enact a defence similar to the defence in s 733 of the <i>Local Government Act 1993</i> (NSW)
Claim for failure to include protective standards in planning schemes	negligence	As above	HIGH - in vulnerable areas, such as flood prone, coastal zone or at risk areas Will depend on the facts and circumstances of the case	As a minimum, Councils should minimise development in highly vulnerable areas An integrated planning system for the entire Australian coast is desirable

Claim for failure to build or maintain infrastructure or conduct coastal mitigation works	negligence	<p>In jurisdictions where there has been statutory reform the liability of councils is limited by availability of resources, and the broad range of council activities. General allocation of resources cannot be challenged</p> <p>See discussion of s 733(3) of the <i>Local Government Act 1993</i> (NSW) above</p>	<p>LOW – in jurisdictions where there has been statutory reform</p> <p>MED - in other jurisdictions</p>	The statutory limitations on the liability of councils should be enacted in all jurisdictions
	nuisance	Reasonableness may be a defence, however, there is some uncertainty regarding this	LOW - it may be difficult to establish whether the council had control of the land that caused the damage	The limitations on liability that apply to negligence should be extended to apply to nuisance
Claim for failing to provide information	negligence	<p>Inherent risk</p> <p>Failure to warn defence</p> <p>NSW – Councils are not liable for advice, acts or omissions (in good faith) relating to the provision of information with respect to climate change and sea level rise (<i>Local Government Act 1993</i> (NSW) s 733(3)(f5))</p>	MED - there are defences but they are only partial defences	Enact the NSW statutory defence of good faith in other jurisdictions
			LOW - in NSW due to the statutory defence	Actively provide access to up to date climate change information
Claim for providing incorrect information	negligence	NSW - Councils are not liable for advice, acts or omissions (in good faith) relating to the provision of information with respect to climate change and sea level rise	MED - if councils provide incorrect information and residents rely upon it, residents may bring an action	Councils should exercise reasonable care to ensure all facts are known and understood, relevant law is identified and advice is expressed in clear and accurate terms
			LOW - In NSW if councils act in good faith	

				Enact the NSW statutory defence of good faith in other jurisdictions
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Table 2: Summary of administrative law climate change related actions

	Possible actions	Defences	Likelihood of an action being brought	Mitigation strategies
Administrative review of planning permit decisions	Merits review or judicial review	Provided that the guidance materials relied upon and decision making is proportionate and reasonable, the decision is unlikely to be regarded as unlawful under judicial review	HIGH – by Landholders who may bring an application for merits review in the hope of obtaining a more favourable result	Councils should ensure that decisions are reasonable and appropriate decision making procedures are followed and relevant considerations taken into account
		In States such as New South Wales where there is policy embedded in legislation and a clear trigger, there is a reduced likelihood that such decisions will be held to be unlawful.	MED – by Community groups that may use merits or judicial review processes as a means to test policy and bring public awareness to climate change	Councils should ensure they have the best available evidence and the appropriate expertise to interpret policy and technical documents to remove any uncertainty in interpretation
Administrative review of planning scheme amendments	Merits review or judicial review	If the final decision to approve the amendment does not rest with Council, Council may not be making an administrative decision which is capable of review and may only be taking a "preliminary step"	LOW – claims will more likely be made at the State decision making level.	Councils should ensure that decisions are reasonable and appropriate procedures followed Councils should ensure they have the best available evidence and information
Administrative review of	Merits review or judicial	Council is exercising its legislative power	LOW - a decision to pass a by-law is	Councils should be aware of the

decisions to make by-laws	review		likely to be a decision of legislative character rather than administrative character and it may not be open to review.	extent of their legislative power
Administrative review of decisions regarding levies, special rates, fees or levies	Merits review or judicial review	The particular works provide a special benefit to the particular rate-holder levied or also subsidise the cost of associated services, facilities or activities to rateable land that is not the subject of the charge	MED – there has been significant case law on this topic, although not yet in relation to climate change.	<p>Councils should ensure that decisions are reasonable, that appropriate procedures followed and that they do not take irrelevant considerations into account when setting rates and fees</p> <p>Care should be taken in defining the scope of the works and the land-holders that will benefit from such works</p>

Table 3: Summary of statutory compensation and other climate change related actions

	Possible actions	Defences	Likelihood of an action being brought	Mitigation strategies
Failure to provide services	Claim for failure to provide coastal protection works	See above re negligence and nuisance defences	MED – examples already exist	Clear legislative frameworks to facilitate the carrying out of emergency protection works in a coordinated manner
Statutory compensation claims – planning permits	Failure to grant planning permits	Proper exercise of Councils functions – usually no cause of action beyond administrative review above	LOW – only likely to be available if land required for a public process	See comments on planning appeals above

Statutory compensation claims – planning schemes	Loss of value, development rights associated with planning scheme amendments	Queensland has certain exemptions from where compensation may be payable i.e. compliance with a standard scheme	LOW in most jurisdictions.	Queensland may wish to consider ensuring that any amendments are consistent with a standard planning scheme
			MED in Queensland	
Compulsory acquisition	Dispute over compensation amount for resumption of land for public purposes	Where compensation awarded on just terms	MED – valuation for compulsory acquisition is frequently litigated	Clarify that acquisition as part of climate change adaptation is a public purpose
Boundary adjustments	Claim for compensation for loss of land value due to boundary adjustments where low water mark moves due to erosion - may lead to a need for Council's to exercise compulsory acquisition claims	Common law doctrine regarding accretion only addresses gradual change – not provisions for sudden events. There is no equivalent for erosion	LOW – limited knowledge of legal boundaries of this area	Consider legislation reforms to clarify the circumstances in which erosion and accretion give rise to the ability of Councils to make declarations regarding water boundary

Mitigating risks associated with legal liability

In order to mitigate against the risk of litigation, this reports proposes:

- strategies that can be adopted by Councils themselves when exercising their powers and functions, in particular with respect to planning in coastal zones; and
- strategies that involve regulatory reform which can be adopted working in partnership with relevant State and Territory governments to ensure legislation that addresses the liability of Councils offers suitable protections and that legislation that confers powers and functions on Councils (e.g. local government, planning or coastal protection legislation) provides clear guidance as to how decisions are to be taken.

These Strategies are set out below.

Whilst we appreciate the need for national consistency, and the call for leadership from the Commonwealth Government, we note that the ability of the Commonwealth to provide legislative guidance to local and State and local governments in this area is limited and that the role of the Commonwealth will more directly manifest itself in respect of assisting with the provision of

information and financial resources and through progressing this issue through the Council of Australian Government (COAG). We address ways of working collaboratively with the Commonwealth Government below.

Decision Making Functions

In order to mitigate liability, Councils must ensure they keep up to date with general climate change science and information related to mitigation and adaptation strategies and also information particular to their specific local government area. This is because Courts will tend to take into account the latest science, for example from the CSIRO or reports by the Bureau of Meteorology. Councils will require localised information on impacts on which they can rely when making planning decisions and specialist advice on planning and engineering options for other aspects of adaptation.

Clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of the best available scientific evidence. This could involve an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks, including advice regarding the appropriateness of particular developments or conditions which could be included in development approvals.

As uncertainty regarding climate science and climate change impacts is resolved over time, policy or guidance material used by Councils should be adjusted to reflect current knowledge.

Ensuring public consultation procedures are appropriate in each instance may also limit actions seeking administrative review. Increasing public consultation may improve transparency around decision making processes and limit administrative review but this need should be weighed in each instance against the increased work associated with managing the consultation process.

An associated issue is that property owners in an area have timely and transparent access to information, such as the best available flood mapping and data regarding risks. Ensuring that potential risks are communicated will allow property owners to adjust their expectations of the types of development that may be permitted on their property and avoid challenges to planning decisions.

A fundamental means of avoiding liability for councils is to exercise reasonable care when making planning decisions. This involves taking care to ensure all relevant facts are known and understood, that relevant law is identified and understood, and that reasons for decisions are expressed in clear and accurate terms. Councils also need to adopt this strategy with respect to the development of planning schemes and, at the very least, councils need to minimise development in highly vulnerable areas. Council staff and elected representatives need to be educated about climate change impacts and the potential risks that local governments face, as well as trained in any strategy adopted, so it is applied uniformly.

Recommendations in relation to council decision making

Recommendations in relation to council decision making	
Recommendations in relation to tort claims	Councils need to adopt a <i>reasonable</i> strategy to considering climate change impacts when determining development applications in order to create a strong defence to civil liability. This will provide evidence that Councils are integrating climate change considerations into the exercise of their statutory duties
	Councils need to adopt a <i>reasonable</i> strategy with respect to the development of planning schemes. At the very least, councils need to minimise development in highly vulnerable areas
Recommendations for planning permit decisions	Clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of the best evidence
	Policy or guidance material should be adjusted in the light of new scientific and other climate change information
	Councils should ensure public consultation procedures are appropriate in each instance to improve transparency around a process and limit administrative review
	Councils should provide property owners in an area with timely and transparent access to information, e.g. best available flood mapping and data
	Councils may wish to lobby for an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks. It should be considered whether this centralised advisory body should be placed at the State or Federal level

Regulatory Reform

Regulatory reform, on a number of levels, will assist Councils in their decision making in relation to climate change activities and enhance their protection from liability.

Certain State / Territory regulatory regimes could benefit from replicating reforms currently present in other State / Territory regimes, in particular with respect to limitations on liability through civil liability and local government legislation and the adoption of specific regimes to manage climate change impacts in planning and coastal management legislation.

The following table provides a summary of recommendations in relation to regulatory reform, identifying deficiencies across and within particular state schemes.

Recommendations in relation to regulatory reform

Recommendations in relation to regulatory reform	
Lack of decision making power recommendations	In a number of States, there is no permit trigger requiring the assessment of all development in areas that are prone to climate change risks. Councils should ensure that these areas are identified and that legislation and policies that facilitate developments in those areas require some form of planning approval trigger
Recommendations in relation to tort claims	Defences similar to the defence under s 733 of the <i>Local Government Act 1993</i> (NSW) are an important protection for Councils. They allow for Councils to respond to the threat of climate change according to their capabilities without the fear of incurring liability in negligence or nuisance
	The Northern Territory and South Australia should implement statutory reform with respect to the civil liability of public authorities as the other jurisdictions have. This would create more certainty surrounding what Councils are liable for, as well as providing greater protection for Councils
	The Australian Capital Territory and the Northern Territory should adopt the statutory defences relating to obvious and inherent risks, to allow for greater protection, particularly if and when climate change risks come to be realised as obvious or inherent risks
	Statutory reforms with respect to civil liability (including limitation of liability of Councils and stronger defences) do not apply to the tort of nuisance. The tort of nuisance is very unsettled, and it is not even clear whether liability is strict or whether there are defences in certain cases. If the legislative reforms to defences were applied to nuisance, it would provide both clarity and protection to Councils
Recommendations for planning permit decisions	There is a need for an integrated approach to planning for the entire Australian coast. Further, each State needs to develop an integrated coastal planning system based on up-to-date information
	Ensuring public consultation procedures are appropriate in each instance may limit actions seeking administrative review
	There is a need for stronger laws and more clearly defined responsibilities with respect to the extent to which climate change impacts are to be considered in approving or declining development applications. Examples could include buffer zones in local planning policies and restrictive zoning

Recommendations in relation to regulatory reform	
	Limiting the statutory right to merits review may limit the complexity and number of applications that will be subject to review. A similar outcome may also be achieved by limiting the standing to sue provisions, ensuring that only those persons immediately and directly affected have standing to sue. Any procedure to limit merits review or standing must be weighed against the public interest in limiting protections afforded to those affected by government decision making
	Clear permit conditions and mechanisms such as the ability to place covenants on title or issue time-based or temporary permits should be developed
Recommendations regarding compensation for planning scheme amendments	In Queensland, Councils can avoid paying injurious affection compensation claims if they are making changes to comply with a "standard planning scheme provision". Where changes are necessary to deal with climate change risks, it would be beneficial if the State government first made such amendments to its standard planning scheme provisions
Recommendations regarding emergency protection works	The NSW and Queensland provisions clarifying when and how emergency works can be put in place can be seen as a positive move towards clarifying the position of landholders and Councils to undertake coastal protection works and control erosion. Councils in other jurisdictions may consider the use of similar provisions
	In Victoria the ability to take emergency works appears limited and consideration may be given to clarifying provisions under the <i>Coastal Management Act 1995</i> (Vic) and <i>Environment and Planning Act 1987</i> (Vic) to allow Councils or persons to undertake emergency works without obtaining Ministerial approval
	In Tasmania, similar to Victoria, consideration could be given to clarify the ability of Councils and persons to undertake emergency works and obtain retrospective approval if required
Recommendations in relation to accretion and erosion recommendations	Councils may wish to consider amending through legislation the common law doctrine such that erosion events caused by sudden storm surges result in the boundary of land moving and reverting to the Crown. Similarly, the doctrine of accretion can also be amended by Statute to ensure public access and ownership
Recommendations in relation to compulsory acquisition	The restriction on the re-sale of compulsorily acquired land in NSW may act as a deterrent in some situations to Councils compulsorily acquiring land. Policy consideration may be given to whether resale could be allowed in certain circumstances
	In SA there is a specific exemption stating that Ministerial

Recommendations in relation to regulatory reform	
	approval is not required to acquire land to prevent flooding. However, there is a question of construction as to whether inundation due to sea level rise will be considered flooding and gain the benefit of this exemption. This provision in the Regulations could be clarified to make it clear that this includes flooding or protection works due to increased sea-level rise or other climate change impacts such as storm surges
	In Western Australia Councils can take land by agreement or compulsorily, for public work. In WA it is not clear that all works to mitigate climate change impacts will clearly fall within the definition of “public work”. WA could clarify the situation by including a specific category of “public work” that relates to works to coastal protection works or works to mitigate climate change impacts in the <i>Public Works Act 1902</i> (WA)
Recommendations in relation to rate determinations and environmental levies	In NSW the express provision to make and levy annual charges for the provision of coastal protection services is a positive provision that other jurisdictions could consider duplicating. If Councils do consider inserting relevant provisions to levy fees, it may be cast even wider than the NSW provision which may not cover climate change works that do not have a “coastal” element

Promoting a nationally consistent approach to managing climate change impacts in the coastal zone

Significant work has been undertaken and coordinated by the Federal government, its research agencies and committees such as the CCCC in relation to adaptation to climate change and addressing impacts of climate change in the coastal zone. This work includes:

- developing public good information in relation to risks and likely impacts of climate change to Australia’s coastal assets;
- undertaking scientific research in order to gain more detailed information on the causes, nature and consequences of climate change;
- consulting with decision makers to prepare Australia for future climate challenges on the coast; and
- funding adaptation programs at a local government level.

This work, along with programmes and studies carried out by and on behalf of State and Territory governments provides an important base of information which can assist Councils in understanding risks and making appropriate decisions that enable adaptation (rather than maladaptation) to climate change impacts.

Despite the strong national, state and local interactions that drive policy and funding, current arrangements are often complex and networked, with the three levels of government, other public organisations and the private sector often having shared (and duplicated) responsibilities for policy formulation, decision-

making and management. This complexity is a barrier to sound adaptation planning.

As noted above, the Commonwealth has only a limited role in setting the legislative agenda for environmental management, planning and the delivery of local government services. The Commonwealth Constitution does not recognise local government as a branch of government and, as a result of which, the Commonwealth does not have inherent jurisdiction over Councils. This means that, in order to influence coastal zone management outcomes, the Commonwealth is primarily responsible for setting a high level national policy agenda and coordinating State and local government responses through funding and research.

This notwithstanding, there is significant scope to leverage the work being undertaken by the Commonwealth, in particular through COAG, the CCCC and other Commonwealth research bodies such as CSIRO. The information developed by and for the Commonwealth, along with the funding it provides to pursue adaptation and mitigation strategies throughout the community, will underpin policy choices made by State and local governments. COAG also plays a significant role in shaping the direction of policy and can be used to promote a nationally consistent approach to coastal adaptation. COAG could be used to coordinate a nationally integrated planning system for the entire Australian coastline which takes a consistent approach to climate change.

The establishment of a centralised advisory body or agency to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks could also be considered. Such a body should be streamlined or harmonised with any other agencies that have a role in regulating the coast such as flood plain managers, catchment management authorities, coastal management authorities.

This agency could be 'independent', in a similar way to the relevant environment protection authorities, or fall within a government department.

The following table provides a summary of recommendations in relation to promoting a nationally consistent approach to manage climate change impacts.

Table 6: Recommendations on nationally consistent approaches

Recommendations in relation to leveraging the three tier system	
General	There is a need for an integrated approach to planning for the entire Australian coast based on a set of overarching principles and key matters to be applied in all jurisdictions.
	Coordinated national leadership, with clear allocation of responsibilities, is needed to reduce uncertainty in responding to climate change risks and provide clear information, tools and consistent messages that facilitate the engagement and building of communities' capacity in coastal adaptation
	There should be an increasing move towards national

Recommendations in relation to leveraging the three tier system	
	consistency in applying sea level rise benchmarks. Where local variations exist, these should be included based on the best available evidence
Recommendations for planning permit decisions	A centralized advisory body could prepare and distribute generic and specific policy and guidance material across jurisdictions for councils in relation to planning permit decisions

1. Introduction

Global climate systems are changing faster than scientists previously anticipated resulting in increased climate variability and potential sea levels rises of a metre or more during this century.¹ With over fifty per cent of Australian addresses located within seven kilometres of the coastline, these changes will present significant challenges for Australia's coastal communities and environments.

Impacts due to climate change in Australia are unlikely to be uniform. Average surface temperatures will vary across the continent, with higher increases in the north and inland than on the coast.² The distribution and frequency of extreme weather events is also likely to change, generating increased hot spells and storm events. This will have profound effects on coastal land and assets.

Insurers, for example, estimated that the insurance losses from a Category 3 tropical cyclone crossing the south-east Queensland coast could be between \$10 and \$20 billion.³ In 2010, overall annual losses from natural catastrophes were the fifth highest since 1980.⁴ Australia and Oceania accounted for 20% of these losses, with three of the four most costly regional events arising from two hailstorms in Melbourne and Perth and floods in Queensland. The latter event, which continued into January 2011, resulted in overall losses of more than US\$2 billion⁵ and insured losses of more than US\$500 million.⁶

In most coastal communities, major climate change impacts will arise from increasing frequency of inundations during high tide and storm surge events due to relatively small increases in sea levels. Based on current modelling, in the near-term, only a few coastal communities will be directly threatened by vertical height sea level rises.

Challenges that will arise for Councils from climate change include:

- managing inundation of coastal infrastructure and settlements and inland flooding as a result of extreme weather events;
- managing the effects of flooding, drought and/or extreme weather events on services provided by Councils, e.g. the effects of drought on water supplies (this challenge is not confined to coastal Councils);
- managing and conserving Council assets and infrastructure where these are threatened by sea level rise, erosion or extreme weather events;

¹ New South Wales Government Draft Sea Level Rise Policy Statement (February 2009)

² Commonwealth Scientific and Industrial Organisation/Bureau of Meteorology, *Climate change in Australia: technical Report*, CSIRO, Canberra, 2007, ch 2

³ Munich Re, *Topics geo natural catastrophes 2006*, Munich Reinsurance Company, Germany 2007, available at <www.munichre.com/publications/302-05217_en.pdf>

⁴ Munich Re, *Topics geo natural catastrophes 2010*, Munich Reinsurance Company, Germany 2007, available at <www.munichre.com/publications/302-06735_en.pdf> at pg 44

⁵ Insurance Council of Australia Media Release – Revised Claims Figures – QLD and VIC February 11, 2011

<<http://www.insuranceCouncil.com.au/Portals/24/Media%20Centre/2011%20Media%20Releases/Insurance%20Council%20Media%20Release%20-%20QLD%20and%20VIC%20Revised%20Figures.pdf>>

⁶ Ibid, n 5 at pg 54

- managing changes in demography and patterns of economic activity, including for continued development;
- managing coastal hinterland and public resources (e.g. beaches and parks);
- raising awareness of the implications of climate change for property values and land use;
- zoning land appropriately to minimise the risk of loss of life and asset value; and
- responding to changes in Australian Government and relevant State / Territory policy frameworks and regulatory regimes, particularly in relation to climate change and planning.

Many of these risks were identified in the federal Parliament House Standing Committee on Climate Change, Water, Environment and the Arts inquiry into climate change and its environmental impacts on coastal communities.⁷ The Australian Government's response to this inquiry⁸ is indicative of the greater attention this issue is receiving.

The risks posed by climate change are different from other risks that Councils may face due to the issues that they present from both a practical and legal perspective.

From a practical perspective, the key issue is the level of uncertainty in climate change science. Impacts due to climate change in Australia are unlikely to be uniform. Average surface temperatures will vary across the continent, with higher increases in the north and inland than on the coast.⁹ The distribution and frequency of extreme weather events is also likely to change, generating increased hot spells and storm events.

This presents a major policy challenge: how to translate this growing awareness into action to adapt to climate change, including concrete policies and plans and more robust decision-making frameworks.

At the State / Territory level, some states have been proactive in developing legislative and policy approaches to climate change which seek in part to enable local Councils to better manage the risks. New South Wales and Tasmania (to some extent) are two such jurisdictions. Conversely, laws and policies in other jurisdictions, including Victoria, Western Australia and Queensland, are comparatively less well-developed. Understanding these variations is important to developing national 'best practices' for coastal Councils.

From a legal perspective, climate change legislation and policies do not directly place obligations on local governments. Rather, as is demonstrated by the Victorian *Climate Change Act 2010* (Vic), obligations are placed on the State

⁷ House Standing Committee on Climate Change, Water, Environment and the Arts, Inquiry into climate change and environmental impacts on coastal communities, 26 October 2009, <http://www.aph.gov.au/house/committee/ccwea/coastalzone/report.htm>; accessed 13 May 2011.

⁸ Australian Government response, House Standing Committee on Climate Change, Water, Environment and the Arts, Inquiry into climate change and environmental impacts on coastal communities, November 2010, <http://www.climatechange.gov.au/media/whats-new/house-of-reps-response.aspx>, accessed 13 May 2011.

⁹ Commonwealth Scientific and Industrial Organisation/Bureau of Meteorology, *Climate change in Australia: technical Report*, CSIRO, Canberra, 2007, ch 2

and its agencies when exercising their powers and functions. There have also been amendments to planning acts, and judicial interpretation of principles of ecologically sustainable development which guide the implementation of those acts, which identify and include climate change as a relevant consideration of decision making, however, this only affects councils indirectly. Thus, any response by councils to the risk of climate change must be based on these and other more general law obligations and there is uncertainty regarding how those laws could be applied. This has led to a grave concern amongst Councils as to what their liability may be when exercising their powers and functions in the face of potential climate change impacts.

The Australian Local Government Association (ALGA) has engaged Baker & McKenzie to prepare a report which will assist ALGA, in collaboration with State and Territory local government associations (LGAs) to:

- identify areas of potential legal risk and the liability of LGA associated with State and local government laws in relation to climate change – with a particular reference to coastal areas;
- identify legal or other strategies to mitigate these risks;
- identify where legislation or policy frameworks create barriers to effective adaptation or promotes maladaptation; and
- provide an assessment of potential models or national approaches to reduce or remove these risks to councils.

The report also examines the issue of how councils with limited resources can appropriately respond to climate change and legal proceedings resulting from climate change. It identifies variations between State laws and policies and different approaches taken to manage risk in various jurisdictions and makes recommendations based on those approaches.

1.1 Federal / State responsibility to respond to climate change

Australia's State and Federal Governments have varying responsibilities in respect of responding to the impacts of climate change. The Federal Government is a signatory to the *United Nations Framework Convention on Climate Change* (UNFCCC) and ratified the Kyoto Protocol in 2007. As a result of its commitments under these international agreements, including to limited Australia's greenhouse gas emissions to not more than 108% of 1990 levels between 2008-2012, the Federal Government has initiated a three pillar approach to respond to climate change. Those pillars are:

- *mitigation* - to reduce Australia's greenhouse gas emissions
- *adaptation* - to adapt to the climate change we cannot avoid
- *global solution* - to help shape a collective international response.

The Federal government has a clear mandate to legislate with respect to mitigation action, as seen through the development of the *National Greenhouse and Energy Reporting* (Cth) 2007, the *Carbon Credits (Carbon Farming Initiative) Bill 2011* (Cth), and the proposed carbon price mechanism. However,

it has shared responsibility with the States in respect of legislating for adaptation.

State governments have also taken steps to address climate change, in particular with respect to mitigation, for example, through legislating state-wide emission reductions targets, introducing measures to promote renewable energy and energy efficiency and to develop emissions trading schemes, such as the NSW Greenhouse Gas Abatement Scheme.

Pursuant to the Commonwealth Constitution, the State and Territory governments also have primary responsibility for the management of land, natural resources and environmental protection. This means that legislative change to implement adaptation strategies, including the introduction of planning approaches and development standards that respond to the potential impacts of climate change, will largely be driven by the States.

1.2 Council responsibilities

Councils are established by statute, usually by a State / Territory Local Government Act, with the objective of meeting the needs of the local and wider public, and managing the development of resources within the area, having regard to the principles of ecologically sustainable development.

A range of powers, functions and responsibilities are conferred on Councils by various statutes, primarily the State / Territory Local Government Acts and Environment and Planning Acts, which they must exercise with due care and skill. Key responsibilities relate to:

- *land-use planning and development*: this includes the development of zoning and planning instruments and the application and enforcement of those instruments. This may include through the approval or refusal of development applications or the issuance of orders;
- *land and infrastructure management*: Councils have responsibility for public spaces, including foreshores, beaches, drains, roads, footpaths, buildings and boating facilities;
- *public health*: in some States Councils are responsible for water and sewerage services;
- *community facilities*: these can include sporting facilities, libraries, community centres and support services;
- *emergency planning*: including in relation to bushfires, tree damage and flooding and storm damage; and
- *finance*: collecting rates and charges and applying them for public purposes.

An overview of the relevant statutory provisions with respect to Council functions in different jurisdictions is included at Appendix 5. It is important to note that councils vary widely in their size, population and resources. These factors affect their ability to actively pursue certain adaptation strategies and will influence the assessment of whether action (or inaction) to address climate change impacts is considered reasonable.

Councils may potentially be held liable in negligence or nuisance for decisions, acts and omissions that relate to the exercise of these powers and functions. Each of these powers and functions exist independently of climate change, however, climate change and its application across these areas is becoming increasingly more relevant. As previously discussed, climate change creates legal uncertainty, as there is no specific law which regulates it, and it is unclear where it fits into the current legal framework governing Councils.

1.3 Decision making by councils

In determining whether a Council is exercising its functions reasonably in the circumstances must be balanced against other legitimate functions of the Council. In all jurisdictions (with the exception of the Northern Territory and South Australia, for which there are similar but less developed principles at common law) the following limitations apply to the liability of Councils:

- financial and other resources available to the Council limit the functions required to be exercised by it;
- the general allocation of resources by the Council is not open to challenge;
- reference must be made to the broad range of the Council's activities in deciding the functions that it must exercise; and
- a Council may rely on evidence of its compliance with general procedures and relevant standards as evidence of the proper exercise of its functions.¹⁰

In the context of the scarce resources available to Councils and the competing demands for resources, Councils are reluctant to allocate considerable funds to address uncertain risks, where there are so many core services to be provided.

1.4 Climate change impacts for Councils

There have been a range of projections regarding sea-level rise for the rest of the century, from 0.19-0.59 metres (Inter-governmental Panel on Climate Change in 2007) to nearly two metres (VerMeer and Rahmstorf in 2009).¹¹ Current scientific evidence suggests that sea levels will rise between 0.5 to 1.0 metres in the period 2000 to 2100.¹² This will lead to 'high sea-level events' (a combination of sea-level rise, high tide and storm surge or excessive run-off, which triggers an inundation event). A 50 centimetre rise in sea level can multiply the frequency in occurrence of high sea-level events by over 100 times.¹³ For the next two decades an increase in temperature of 0.2°C per decade is predicted.¹⁴

Whilst there is uncertainty surrounding the timing and intensity of the impacts of climate change, the precautionary principle provides that where there is a risk

¹⁰ *Civil Law (Wrongs) Act 2002* (ACT), s 109; *Civil Liability Act 2002* (NSW), s 42; *Civil Liability Act 2003* (QLD), s 34(b); *Civil Liability Act 2002* (Tas), s 37; *Civil Liability Act 2002* (WA), s 5U; *Wrongs Act 1958* (Vic), s 79.

¹¹ Climate Commission, *The Critical Decade: Climate science, risks and responses*, May 2011, p 23.

¹² Climate Commission, *The Critical Decade: Climate science, risks and responses*, May 2011, p 23.

¹³ Climate Commission, *The Critical Decade: Climate science, risks and responses*, May 2011, p 23.

¹⁴ IPCC Fourth Assessment Report, Synthesis Report, 3.2.

of serious and irreversible damage, lack of full scientific knowledge shall not be used as a reason for postponing cost effective measures to minimise environmental degradation.¹⁵

The key areas of risk for Councils are:

- *flooding of coastal properties*: this may include damage to and loss of land and assets, changes to property boundaries and both short and long-term impacts;
- *storm water runoff and flooding*: similar risks to those mentioned above, however impacts are likely to be short term and episodic;
- *infrastructure instability*: this may include damage to buildings and infrastructure that is not built to withstand the impacts of increased flooding, winds and temperature;
- *structural damage to buildings* resulting from extreme weather events and falling trees;
- *demand for energy and water*: this is linked to the availability and quality of water;
- *fire risk and air quality*: this is linked to managing bushfire hazards; and
- *impacts on public open spaces*: including foreshores, beaches, drains, roads, footpaths, buildings and boating facilities.

These impacts will affect both public and private buildings and land. As a result of this, adaptation strategies and responses need to address both actions that can be undertaken by a Council itself, and the provision of information to the public to assist private property owners with their own adaptation and risk management.

Some climate change impacts are avoidable, however the costs of avoidance may determine whether steps are taken. Some impacts are unavoidable but may be adapted to and others are unavoidable and cannot be adapted to.

Where decisions regarding adaption are made it is important for them to be based on the best available scientific information and knowledge regarding adaptation responses. Adaptation to climate change is no easy matter and Council decisions may fail to meet their objectives, and they may even increase vulnerability or maladaptation.

The potential resource burden for Councils is significant and will need to be managed and planned for. Where impacts are unavoidable or are not avoided due to costs, insurance may or may not be available to transfer or share the risk.

1.5 ALGA

The Australian Local Government Association (ALGA) is a federation of state and territory local government associations. Its membership includes the Government of the Australian Capital Territory and the Local Government Associations of all of the Australian States.

¹⁵ Rio Declaration on Environment and Development, 1992, Principle 15.

ALGA represents local government on national bodies and ministerial councils, provides submissions to government and parliamentary inquiries, raises the profile and concerns of local government at the national level and provides forums for local government to guide the development of national local government policies.

ALGA has adopted a clear policy position in respect to climate change. In particular, ALGA acknowledges that:

- climate change is a shared responsibility;
- local government will need to prepare for climate change and, at the very least, will need to develop the capacity to protect its own assets and adapt to localised conditions; and
- local government has an important role in providing leadership and education to assist citizens and business to understand and accept their responsibilities to address climate change.

In the context of this report, we also note that ALGA supports the following statements / positions with respect to steps that need to be undertaken to ensure local government is well equipped to address the impacts of climate change:

- the need for the Australian Government and State / Territory governments to acknowledge that local governments have varying levels of capacity to address climate change and that, where appropriate, government resources, including funding, will be required to enhance the work of councils to implement effective measures to address climate change; and
- the need for the Australian Government and State / Territory governments to actively engage with local government to achieve policy alignment and coordinated action to address climate change at the local and regional level.

Importantly, ALGA's President is represented on the Council of Australian Governments (COAG) which provides an intergovernmental forum which initiates, develops and monitors the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments. A number of bodies have recommended that COAG be used as a forum to develop a nationally consistent approach to managing climate change impacts in coastal areas. ALGA's participation in the development of this policy will be critical.

1.6 Brief overview of what the report covers

In the context of the challenges that Councils face in responding to the threat of climate change, this report is set out as follows:

- **Part 1** – this introduction;
- **Part 2** - The key legal risks for coastal Councils: this provides an overview of the legal bases and possible defences to claims against Councils. In particular, the report examines the laws of negligence, nuisance, administrative review of planning decisions and merits review of planning decisions across all Australian jurisdictions.

- **Part 3** - Commonwealth and State action to address climate change impacts in coastal areas: this section looks at the existing steps being taken by federal and state governments.
- **Part 4** – Review of the barriers to risk mitigation and means of avoiding mal-adaptation by Councils.
- **Part 5** – Assessment of potential and existing legal strategies to minimise the risks of Councils and Recommendations. The particular focus in this section is on reducing barriers to risk mitigation and means of avoiding mal-adaptation by Councils, enhancing the ability of Councils to effectively manage climate change risks and an assessment of potential legal, economic and environments models or national policy or legal approaches to reducing the risks to Councils.

The Appendices provide further detail on the following:

- **Appendix 1** – Comparison of liability in nuisance and negligence between States;
- **Appendix 2** – Table of potential causes of action against councils;
- **Appendix 3** – Summary of laws, policies and plans related to local government functions and climate change and sea level rise;
- **Appendix 4** – Summary of cases related to the exercise of local government functions and climate change considerations; and
- **Appendix 5** – Summary of local government powers and functions.

2. Key legal risks for coastal councils

2.1 Possible claims against Councils

In each State and Territory (with the exception of the Northern Territory and South Australia, for which there is a general but weaker defence at common law) there is legislation which limits the liability of Councils.¹⁶ Generally, a Council will not be liable for any act or omission unless it can be shown that it was manifestly unreasonable.

Historically, cases have been brought against Councils for failing to carry out functions to standards expected of them. There are well established bodies of law covering the liability of Councils in nuisance, negligence, administrative and merits review.

However, climate change liability is unique due to the range of potential claims and impacts, as well as the level of uncertainty and the need to balance conflicting scientific information. The large number of claims against Councils extend to the following areas:

- appropriateness of development approvals in flood prone, coastal or at risk areas;
- adequacy of emergency procedures;
- responsibility for erosion and landslips;
- failure to undertake disease prevention programs;
- failure to preserve public spaces and natural assets;
- adequacy of building standards to withstand extreme weather events; and
- action and inaction regarding mitigation and adaptation measures.

There has already been litigation against and involving Councils and climate change impacts. This is an evolving area of law, and whilst it is currently very case specific, principles are already emerging and will continue to do so.

For Councils in coastal areas, the main areas of potential legal cost around climate change impacts are:

- (a) actions in negligence in respect of information provided (or not provided) by Councils, for example related to sea level rise or flood risk, or planning decisions they make;
- (b) planning and administrative law appeals against decisions by Councils, notably in relation to zoning and planning approvals; and
- (c) legal actions arising from Council failures to provide services or maintain infrastructure for climate change-related reasons.

¹⁶ *Civil Law (Wrongs) Act 2002* (ACT), s 110; *Civil Liability Act 2002* (NSW), s 41; *Civil Liability Act 2003* (QLD), s 35; *Civil Liability Act 2002* (Tas), s 38; *Civil Liability Act 2002* (WA), s 5W; *Wrongs Act 1958* (Vic), s 83. In Victoria, only factors 1, 2 and 4 apply.

Councils may also be faced with managing impacts of climate change that affects property they own or manage, which may in turn result in the need to seek insurance or compensation or otherwise mitigate risks.

Managing these risks involves developing an understanding of the legislative and policy framework within which these risks arise as well as the climate change-related case law which is evolving in all Australian jurisdictions.

2.2 Tort Based Claims – Nuisance and Negligence

If local governments unreasonably fail to take into account the likely effects of climate change, their actions or inactions may cause or contribute to harm against individuals, making them liable under a cause of action in negligence or nuisance.

We have divided the potential climate change related actions into five different types of claim:

- (a) claim for approving development when the risk of harm was foreseeable: this involves a consideration of the appropriateness of individual development approvals and whether they include conditions pertaining to factors such as sea level rise, flood, bushfire protection or erosion control;
- (b) claim for failure to include protective standards in planning schemes: examples include creating minimum standards regarding height above sea level for new development, and the requirement for buildings to be capable of withstanding extreme weather events;
- (c) claim for failure to maintain or build infrastructure or conduct coastal mitigation works: examples include a failure to upgrade drains, stormwater systems and roads, and to build mitigation works such as seawalls;
- (d) claim for compensation for failing to provide information: examples include failure to include information regarding flooding and coastal hazards in property information certificates; and
- (e) claim for compensation for providing incorrect information: examples include providing false or inaccurate information in property certificates and publicly disclosed information.

Below we set out the elements of nuisance and negligence and the common law and statutory defences that may be used by a Council to rebut a challenge. We then apply these elements to the potential claims set out above.

Negligence

Negligence is a failure to exercise care or skill. The elements of the tort of negligence are:

- (a) the defendant (in this case the Council) owed the plaintiff a duty of care;
- (b) the defendant breached that duty;

- (c) the plaintiff suffered loss or damage as a result of the breach; and
- (d) the loss or damage is not too remote.

An action will not succeed if the defendant can establish a defence.

Legislation has been enacted in all States and Territories which affects the common law doctrine in various ways.¹⁷ A comparative table in Appendix 1 details illustrates how negligence laws apply differently across the different jurisdictions.

Duty of care

At common law, a statutory authority (such as a council) that is under no statutory obligation does not generally owe a common law duty of care.¹⁸

In *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, the High Court held that a Council may be liable for failing to exercise a statutory function, where there is a 'general expectation' by the community that a power will be exercised. This became known as the doctrine of general reliance.

In *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 123 ALR 155 Brennan J held that regardless of whether a person is a public authority exercising a statutory power, if they do something which creates or increases a risk to another person, they are bound to do whatever is reasonable to prevent any injury unless statute precludes the duty to act.

The doctrine of general reliance was rejected by the High Court in *Pyrenees Shire Council v Day* (1998) 192 CLR 330, as a doctrine based on the general expectations of the community creates too much uncertainty. However, it was held that there could be circumstances where a Council would be liable for a failure to exercise a statutory function. For example, in *Ryan v Great Lakes Council* [1999] FCA 177 the State of New South Wales and the Great Lakes Shire Council were held liable in negligence for failing to prevent contamination of a lake, as the existence of pollution sources were known to the State and the Council and they had both failed to use their powers to prevent contamination. It was held that a 'pragmatic approach' to the proximity between the plaintiff and defendant must be taken in resolving whether a duty of care is owed.

In *Brodie v Singleton Shire Council* (2001) 206 CLR 512 the High Court held that in certain circumstances the powers vested by statute in a Council give it a special measure of control over the safety of citizens so as to impose on the Council a duty of care. Thus, the Council may be obliged to exercise its powers to avert a danger or to bring it to the knowledge of citizens.

¹⁷ *Civil Law (Wrongs) Act 2002* (ACT), Ch 4; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), *Personal Injuries (Liabilities and Damages) Act 2003* (NT); *Civil Liability Act 2002* (NSW), Pt 1A; *Civil Liability Act 2003* (QLD), Ch 2. *Civil Liability Act 1936* (SA), Pt 6; *Civil Liability Act 2002* (TAS), Pt 6; *Wrongs Act 1958* (VIC), Pt X; *Civil Liability Act 2002* (WA), Pt 1A.

¹⁸ *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424

Therefore, at common law, there are only limited circumstances in which a Council is liable for failure to exercise a statutory function.

Each State and Territory (with the exception of the Northern Territory and South Australia) has legislation further limiting the liability of statutory and public authorities. The definition of statutory or public authority includes Local Councils (see Appendix 1).¹⁹

Breach of duty

A plaintiff must show that a reasonable person in the defendant's position, would take certain reasonable precautions against a reasonably foreseeable risk of injury.²⁰ In determining this, a court will consider the following factors:

- (a) the likelihood of the risk occurring;
- (b) the magnitude of the risk and the seriousness of the potential harm;
- (c) the difficulty, expense and inconvenience of taking the precautions; and
- (d) the social utility of the defendant's conduct.²¹

Causation

The plaintiff must prove that the defendant's negligence caused or materially contributed to the injury or damage suffered by the plaintiff.²²

There are different tests for causation at common law and in statute. For a discussion of these tests, please see the comparative table at Appendix 1.

Remoteness of damage

The damage must be of a kind that a reasonable person (with the defendant's knowledge and experience) should have foreseen.²³

Nuisance

Nuisance is an interference with a public or private interest.²⁴ At common law, there are two torts of nuisance: public and private nuisance.

Private nuisance

Private nuisance is an interference with an individual's rights in relation to the use of the land.²⁵ Private nuisance may occur by material damage to land or

¹⁹ *Civil Law (Wrongs) Act 2002* (ACT), s 110; *Civil Liability Act 2002* (NSW), s 41; *Civil Liability Act 2003* (QLD), s 35; *Civil Liability Act 2002* (Tas), s 38; *Civil Liability Act 2002* (WA), s 5W; *Wrongs Act 1958* (Vic), s 83. In Victoria, only factors 1, 2 and 4 apply.

²⁰ *Swain v Waverly Municipal Council* (2005) 138 LGERA 50

²¹ *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 47-8; *Civil Law (Wrongs) Act 2002* (ACT), s 43(2); *Civil Liability Act 2002* (NSW), s 5B(2); *Civil Liability Act 2003* (QLD), s 9(2); *Civil Liability Act 1936* (SA), s 32(2); *Civil Liability Act 2002* (Tas), s 11(2); *Wrongs Act 1958* (Vic), s 48(2); *Civil Liability Act 2002* (WA), s 5B(2).

²² *Tubemakers of Australia Ltd v Fernandez* (1976) 10 ALR 303.

²³ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388

²⁴ *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145.

²⁵ *Hole v Chard Union* [1894] 1 Ch 293.

property upon which the interference occurred.²⁶ In some cases a person may be liable in private nuisance even if the damage results from natural causes, if the defendant knew of the cause but did nothing to prevent it.²⁷

The following elements must be proven:

- (a) the defendant is vested with management and control of the premises or asset;
- (b) as a result of an interference, material damage is caused to the property or the reasonable enjoyment of it;
- (c) the interference arose as a result of the defendant's actions or inactions; and
- (d) the defendant had knowledge of the risk of harm.²⁸

A claim may arise for nonfeasance (failure to prevent a nuisance) as well as misfeasance (actively creating a nuisance).²⁹ In certain cases (it is unsettled when), there is a defence that the defendant took reasonable precautions to avoid the damage.³⁰

Public nuisance

Public nuisance is an interference with rights of the public at large.³¹ The interference must be substantial and unreasonable. Civil proceedings for public nuisance may only be brought by the Attorney-General, or someone who suffers damage over and above that suffered by the general public.³² It is also a criminal offence in certain jurisdictions.³³

Activities that cause unreasonable interference to another person's land for which a local government may be liable include landslides, bushfires, flooding and coastal erosion. However, a local government will only be liable if it was 'in control' of the premises or resources from which the nuisance emanated (usually as landowner or principal manager).³⁴

Defences

There are numerous common law and statutory defences to an action in negligence. At common law, the defence of voluntary assumption of risk provides that there will be no liability if the defendant can establish that the plaintiff was fully aware of the risk, fully comprehended the risk and voluntarily accepted the whole risk.³⁵ This defence has been strengthened by statutory

²⁶ *Directors of St Helen's Smelting Co v Tipping* (1865) 11 HLC 642.

²⁷ *Leakey v National Trust* [1980] QB 485

²⁸ *Manson v Maffra Shire* (1881) 7 VLR (l) 364; *Harris v Carnegie's Pty Ltd* [1917] VLR 95; *Kraemers v Attorney-General (Tas)* [1966] Tas SR 113.

²⁹ *Goldman v Hargrave* [1966] 1 All ER 17.

³⁰ *Kraemers v Attorney-General (Tas)* [1966] Tas SR 113.

³¹ *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 at 190-1

³² *Benjamin v Storr* (1874) LR 9 CP 400

³³ *Kent v Johnson* (1973) 21 FLR 177; *Criminal Code (QLD)* s 230; *Criminal Code (Tas)* s 141.

³⁴ P. England, 'Climate Change: What Are Local Governments Liable for?', *Urban Research Program*, Issues Paper 6, March 2006, p 7.

³⁵ *Roggenkamp v Bennett* (1950) 80 CLR 292 at 300.

reform, which provides that a defendant is not liable for the materialisation of an obvious risk. An ‘obvious risk’ is a risk that, in the circumstances would have been obvious to a reasonable person in the plaintiffs position.³⁶ Other obvious risks include: risks that are patent or a matter of common knowledge,³⁷ a risk of something occurring even though the likelihood of it occurring is low,³⁸ and a risk, (or condition or circumstance that gives rise to the risk) that is not easily seen or noticed.³⁹

A further statutory defence is that a defendant’s liability for the materialisation of an inherent risk (one that cannot be avoided by the exercise of reasonable care and skill)⁴⁰ is limited to a failure to warn of the risk.⁴¹

There are also defences at common law and under statute for a failure to warn.

For a discussion of all of these defences and how they apply differently across the jurisdictions, please see the comparative table in Appendix 1.

A contract between the plaintiff and defendant may exempt the defendant from liability in negligence where there is a clear statement that liability for negligence is excluded.⁴² Where there is no contract, a notice or disclaimer may give the plaintiff sufficient knowledge of the risk to satisfy the defence of voluntary assumption of risk or to constitute reasonable warning.⁴³

In New South Wales, Councils may raise a defence to claims in both negligence and nuisance that acts or omissions that caused the plaintiff loss or damage were done honestly or in good faith in the performance of statutory functions.⁴⁴ This is a particularly important protection for Councils.⁴⁵

Section 733(1) of the *Local Government Act 1993* (NSW) exempts Councils from liability arising in respect of advice given, acts or omissions in relation to flooding, its nature and extent, provided that it was done in good faith. This

³⁶ *Civil Liability Act 2002* (NSW), s 5F(1); *Civil Liability Act 2003* (QLD), s 13(1); *Civil Liability Act 1936* (SA), s 36(1); *Civil Liability Act 2002* (Tas), s 15(1); *Wrongs Act 1958* (Vic), s 53(1); *Civil Liability Act 2002* (WA), s 5F(1).

³⁷ *Civil Liability Act 2002* (NSW), s 5F(2); *Civil Liability Act 2003* (QLD), s 13(2); *Civil Liability Act 1936* (SA), s 36(2); *Civil Liability Act 2002* (Tas), s 15(2); *Wrongs Act 1958* (Vic), s 53(2); *Civil Liability Act 2002* (WA), s 5F(2).

³⁸ *Civil Liability Act 2002* (NSW), s 5F(3); *Civil Liability Act 2003* (QLD), s 13(3); *Civil Liability Act 1936* (SA), s 36(3); *Civil Liability Act 2002* (Tas), s 15(3); *Wrongs Act 1958* (Vic), s 53(3); *Civil Liability Act 2002* (WA), s 5F(3).

³⁹ *Civil Liability Act 2002* (NSW), s 5F(4); *Civil Liability Act 2003* (QLD), s 13(4); *Civil Liability Act 2002* (Tas), s 15(4); *Wrongs Act 1958* (Vic), s 53(4); *Civil Liability Act 2002* (WA), s 5F(3). This does not apply in South Australia.

⁴⁰ *Civil Liability Act 2002* (NSW), s 5I(2); *Civil Liability Act 2003* (QLD), s 16(2); *Civil Liability Act 1936* (SA), s 39(2); *Wrongs Act 1958* (VIC) s 55(2); *Civil Liability Act 2002* (WA), s 5P(1).

⁴¹ *Civil Liability Act 2002* (NSW), ss 5, 5I(1), 5I(3); *Civil Liability Act 2003* (QLD), ss 16(1), 16(3), Sch 2; *Civil Liability Act 1936* (SA), ss 3, 39(1), 39(3); *Wrongs Act 1958* (VIC) ss 43, 55(1), 55(3); *Civil Liability Act 2002* (WA), ss 3, 5P(1), 5P(2).

⁴² *Davis v Pearce Parking Station Pty Ltd* (1954) 91 CLR 642.

⁴³ *Woods v Muti-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 483; *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661.

⁴⁴ *Local Government Act 1993* (NSW) ss 731, 733; *Environmental Planning and Assessment Act 1979* (NSW), s 149(6).

⁴⁵ Z. Lipman and R. Stokes, ‘That sinking feeling: A legal assessment of the coastal planning system in New South Wales’ (2011) 28 *Environmental and Planning Law Journal* 182 at 199.

means that if a local government acts with an honest intention and without deliberately misleading a resident, they will not be held liable.

Section 733(2) provides the same exemption in relation to natural hazards in the coastal zone. Section 733(3) extends the exemption to:

- the preparation or making of an environmental planning instrument or DCP;
- the granting or refusal of development consent;
- the determination of an application for a complying development certificate;
- the imposition of conditions;
- advice furnished in a s 149 certificate under the *Environmental Planning and Assessment Act 1979* (NSW);
- the carrying out of coastal management works; and
- any other thing done or omitted to be done in the exercise of a Council's functions.

These exemptions are extended by the *Coastal Protection and Other Legislation Amendment Act 2010* (NSW) to include:

- the preparation of a coastal zone management plan;
- acts or omissions regarding beach erosion or shoreline recession on Crown land or land owned and controlled by the Council;
- the failure to upgrade flood mitigation works or coastal management works in response to (project or actual) impacts of climate change; and
- the failure to remove or enforce the removal of illegal or unauthorised structures on Crown land or land controlled by the Council that results in beach erosion and the provision of information relating to climate change or sea level rise.

Unless the contrary is proved, a Council is taken to have acted in good faith if the advice was furnished or act or omission was substantially in accordance with the relevant manual published by the Minister for Planning.⁴⁶

This statutory exemption was considered by the High Court in *Bankstown City Council v Almodo Holdings Pty Ltd* (2005) 223 CLR 660. In this case, the Council was found liable in nuisance for the increased flooding of the respondent's land as a result of the construction and operation of a drainage system. The High Court held that the Council was indemnified under s 733(1) of the *Local Government Act 1993* (NSW). Conversely, in *Melaleuca Estate Pty Ltd v Port Stephens Council* (2006) 143 LGERA 319, the Council was found liable in nuisance for discharging water onto the applicant's land, and the New South Wales Court of Appeal rejected the Council's defence under s 733(1) of the *Local Government Act 1993* (NSW) as it had not shown good faith by rectifying the nuisance.

⁴⁶ *Local Government Act 1993* (NSW), s 733(4).

Remedies

In negligence actions, the usual remedy is compensatory damages. The purpose of compensatory damages is to put the plaintiff in the position that they would have been in had the tort not been committed.⁴⁷

The three remedies available for private and public nuisance are abatement, injunction and damages.

Abatement is available as an alternative to legal proceedings where a nuisance requires an immediate remedy.⁴⁸ If the abatement of a nuisance removes it, the plaintiff is only entitled to damages for loss suffered before the abatement.⁴⁹

Once a plaintiff has established a nuisance, the court may grant various injunctions restraining the nuisance, potential nuisance or continuing nuisance.⁵⁰

With respect to private nuisance, damages may be awarded in substitution for an injunction where there is little injury to the plaintiff's legal rights, the injury is capable of being calculated in monetary terms, the injury may be adequately compensated by a small monetary payment and it would be oppressive to the defendant to grant an injunction.⁵¹ With respect to public nuisance, damages are only available where the loss or damage was reasonably foreseeable.⁵² The court will not award damages in lieu of an injunction where a private individual sues in respect of a public nuisance.⁵³

In most jurisdictions, a claim must be brought within six years of the cause of action accruing, that is, the decision, action or inaction of the local government

⁴⁷ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, Lord Blackburn at 39, approved in *Registrar of Titles (WA) v Spencer* (1909) 9 CLR 641, Griffith CJ at 645; *Butler v Egg & Egg Pulp Marketing Board* (1966) 114 CLR 185, Taylor and Owen JJ at 191; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625.

⁴⁸ *Young v Wheeler* (1987) Aust Torts Reports ¶80-126 at 68,970 per Wood J.

⁴⁹ *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226 at 244 per Lord Atkinson; *Traian v Ware* [1957] VR 200 at 207 per Martin J; *City of Richmond v Scantelbury* (1988) 68 LGRA 49 per Kaye J.

⁵⁰ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 300; [1994] 1 All ER 53; [1994] 2 WLR 53 per Lord Goff; *Qantas Airways Ltd v Mascot Galvanising (Holdings) Pty Ltd* (unreported, SC(NSW), Windeyer J, No3610/96, 17 December 1998, BC9806749); *McCombe v Reid* [1955] 2 QB 429; *Young v Wheeler* (1987) Aust Torts Reports ¶80-126 at 68,972 per Wood J; *Don Brass Foundry Pty Ltd v Stead* (1948) 48 SR (NSW) 482 at 488-9 per Jordan CJ; *Adams v Taringa Shire Council* [1927] St R Qd 163 at 166 per Macnaughton J; *L'Estrange v Brisbane Gas Co* [1928] St R Qd 180 at 189 per Blair CJ; *Dajon Investments Pty Ltd v Talbot* [1969] VR 603; *Corvisy v Corvisy* [1982] 2 NSWLR 557 at 558 per McLelland J; *Raciti v Hughes* (1995) 7 BPR 14,837 at 14,838 per Young J, SC(NSW).

⁵¹ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322-3 per Stale J; *York Bros (Trading) Pty Ltd v Cmr of Main Roads* [1983] 1 NSWLR 391 at 399-400 per Powell J.

⁵² *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound (No 2))* [1967] 1 AC 617; (1966) 67 SR (NSW) 21; [1966] 2 All ER 709; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 301 per Lord Goff.

⁵³ *Neville Nitschke Caravans (Main North Road) Pty Ltd v McEntee* (1976) 15 SASR 330 at 344 per Jacobs J, at 351 per King J; *York Bros (Trading) Pty Ltd v Cmr of Main Roads* [1983] 1 NSWLR 391 at 400 per Powell J.

which is the subject of the claim.⁵⁴ In the Northern Territory, the claim must be brought within three years of the cause of action accruing.⁵⁵

Any action is based on the knowledge of a reasonable person in the position of the council at the time any decision is made or action is taken. Thus, a court will examine the scientific knowledge with respect to climate change impacts which was available to the local government at that point in time in assessing whether the decision or action was reasonable. Current scientific developments with respect to climate change which have occurred since the decision was made will not be taken into account.

Negligence and Nuisance compared

The tort of nuisance is distinct from the tort of negligence, although there is a close relationship between the two, and negligence may be the basis of liability in nuisance.⁵⁶

Actions in nuisance do not require proof of a breach of duty. The interference rather than the conduct itself must be shown to be substantial and unreasonable.

Summary - Key Questions

The relevant questions to ask in determining whether a Council is liable under an action in negligence are:

- (a) was a duty of care owed?
- (b) If so, what was the standard involved in the duty of care (common law and statutory standards for Councils depending on the jurisdiction)?
- (c) Did the harm or loss occur as a result of a failure to adopt the standard of care?

The relevant questions to ask in determining whether a Council may be liable under an action nuisance are:

- (a) Is the Council vested with the management and control of the premises or resource?
- (b) Did the interference result in material injury to property or reasonable enjoyment of it?
- (c) Did the interference arise as a result of the Council's actions or inactions?

⁵⁴ *Limitations Act 1985* (ACT), s 11; *Limitations Act 1969* (NSW), s 14(1); *Limitation of Actions Act 1974* (QLD), s 10(1); *Limitation of Actions Act 1936* (SA), s 35; *Limitations Act 1974* (TAS), s 4(1); *Limitation of Actions Act 1958* (Vic), s 5(1)(a); *Limitations Act 1935* (WA), s 13(1).

⁵⁵ *Limitation of Actions Act 1981* (NT), s 12(1).

⁵⁶ *Cunard v Antifyre Ltd* [1933] 1 KB 551 at 558; *Hargrave v Goldman* (1963) 110 CLR 40 at 61-2.

Specific climate change related actions - commentary

Actions in negligence and nuisance are both costly and time consuming for councils. If Councils are required to defend proceedings, this may last between six months and several years, and depending on the jurisdiction, court and cause of action. Whilst ordinarily costs follow the event in common law actions, it may still be difficult for Councils to recover 100% of their costs if they are successful. In addition, if a plaintiff is successful, the two potential compensatory damages and injunctions, may both be very costly for Councils, who already have limited resources. This section considers five potential actions in negligence and nuisance, the likelihood of a claim being brought and ways for councils to mitigate the risk of a claim being brought.

A summary of this section is contained in the following table.

Table 1: Summary of specific tort-based climate change related actions

	Possible actions	Defences	Likelihood of an action being brought	Mitigation strategies
Claim for approving development when risk of harm is foreseeable	negligence	<p>Legislative reforms provide that councils are not liable for decisions unless they are manifestly unreasonable</p> <p>Obvious risk</p> <p>In NSW, s 733(3) of the <i>Local Government Act 1993</i> (NSW) provides that councils are not liable for damage caused by flooding and natural hazards in the coastal zone as a result of the granting or refusal of a development application</p>	<p>HIGH - With new scientific developments, it is more likely that a decision will be manifestly unreasonable if it does not take climate change into account</p> <p>LOW - in NSW due to the statutory exemption</p>	<p>Councils should have regard to precautionary matters in decision making</p> <p>Other jurisdictions should enact a defence similar to the defence in s 733 of the <i>Local Government Act 1993</i> (NSW)</p>
Claim for failure to include protective standards in planning schemes	negligence	A above	<p>HIGH - in vulnerable areas, such as flood prone, coastal zone or at risk areas</p> <p>Will depend on the facts and circumstances of</p>	<p>As a minimum, Councils should minimise development in highly vulnerable areas</p> <p>An integrated planning system</p>

			the case	for the entire Australian coast is desirable
Claim for failure to build or maintain infrastructure or conduct coastal mitigation works	negligence	In jurisdictions where there has been statutory reform the liability of councils is limited by availability of resources, and the broad range of council activities. General allocation of resources cannot be challenged See discussion of s 733(3) of the <i>Local Government Act 1993</i> (NSW) above	LOW – in jurisdictions where there has been statutory reform MED - in other jurisdictions	The statutory limitations on the liability of councils should be enacted in all jurisdictions
	nuisance	Reasonableness may be a defence, however, there is some uncertainty regarding this	LOW - it would be difficult to establish whether the council has control of the resource that caused the damage	The limitations on liability that apply to negligence should be extended to apply to nuisance
Claim for failing to provide information	negligence	Inherent risk Failure to warn defence NSW – Councils are not liable for advice, acts or omissions (in good faith) relating to the provision of information with respect to climate change and sea level rise (<i>Local Government Act 1993</i> (NSW) s 733(3)(f5))	MED - there are defences but they are only partial defences	Enact the NSW statutory defence of good faith in other jurisdictions Actively provide access to up to date climate change information
			LOW - in NSW due to the statutory defence	
Claim for providing incorrect information	negligence	NSW - Councils are not liable for advice, acts or omissions (in good faith) relating to the provision of information with respect to climate	MED - if councils provide incorrect information and residents rely upon it, they are likely to bring an action	Councils should exercise reasonable care to ensure all facts are known and understood, relevant law is

		change and sea level rise		<p>identified and advice is expressed in clear and accurate terms</p> <p>Enact the NSW statutory defence of good faith in other jurisdictions</p>
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2.3 Claim for approving development when the risk of harm was foreseeable

Establishing and Defending a Claim

A resident could potentially sue a Council for negligently failing to consider factors such as sea level rise, flood, bushfire protection or erosion control when granting development consent. A successful claim may result in an award of compensatory damages.

In all jurisdictions other than the Northern Territory and South Australia, legislative reforms provide that the decisions of local governments are not considered to be negligent unless they are manifestly unreasonable. The common law provides a similar (but less strict) defence. What is manifestly unreasonable with respect to climate change is constantly changing as new scientific developments occur.⁵⁷ Commentary suggests that the following actions may be considered manifestly unreasonable:

- denial that climate change is occurring;
- ignoring evidence as and when it becomes widely available; and
- making decisions that increase vulnerability without regard to available precautionary methods.⁵⁸

In all jurisdictions other than the Australian Capital Territory and the Northern Territory, the defence of ‘obvious risk’ provides that the plaintiff is presumed to be aware of an obvious risk (a risk that, in the circumstances, would have been obvious to a reasonable person in the plaintiff’s position), and that a council is not liable for failure to warn the plaintiff of an obvious risk. In the Australian Capital Territory and the Northern Territory, the council must prove that the plaintiff knew of the risk in order to avoid liability.

Whether these defences would succeed depends on the facts and circumstances of each case. For example, the question of whether the erosion of a beachfront

⁵⁷ P. England, ‘Heating up: Climate change law and the evolving responsibilities of local government’ (2008) 13 *Local Government Law Journal* 209 at 218.

⁵⁸ P. England, ‘Heating up: Climate change law and the evolving responsibilities of local government’ (2008) 13 *Local Government Law Journal* 209 at 218.

property that already shows signs of storm wave impacts constitutes an obvious risk could depend on the extent of the erosion. Similarly, risks associated with development in flood prone areas will also depend upon expectations for different flood events e.g. the expected frequency of 1 in 100 year events. However, with the increasing awareness about climate change, in the future these types of matters could be considered an obvious risk.⁵⁹ Whether erosion control or flood mitigation requiring costly engineering works to minimise impact would constitute an inherent risk has not been tested.⁶⁰

In New South Wales, local governments can rely on the defence under s 733 of the *Local Government Act 1993* (NSW) (see previous section: Tort Based Claims: Negligence and Nuisance). This applies to flooding and natural hazards in coastal zones and covers the granting or refusal of development consent. There is a presumption that the Council has acted in good faith if they have acted substantially in accordance with the relevant manual published by the Minister for Planning.⁶¹ The Minister for Planning may create manuals relating to management of flood liable land, the coastline or land subject to the risk of bush fire.⁶²

In each jurisdiction, whether a duty of care is owed and has been breached is a question of reasonableness. In jurisdictions where there has been statutory reform, the question is whether it is wholly or manifestly unreasonable to fail to take climate change impacts into account in determining a development application.⁶³ This depends on the facts and circumstances of each case. For example, sea level rise, flooding and extreme weather events are likely to affect local governments most directly.⁶⁴ Thus, climate change impacts may be an important consideration in determining the appropriateness of development approvals in flood prone, coastal zone or at risk areas.⁶⁵ A failure to consider these impacts in these areas may be considered manifestly unreasonable.

As new scientific predictions of the impacts of climate change become available, councils will be more susceptible to this type of claim and the risk of residents succeeding against councils will increase. Councils in jurisdictions where there has been statutory reform limiting the liability of councils for negligence will be better placed to defend these claims, however, councils in New South Wales who can rely on the defence under s 733 of the *Local Government Act 1993* (NSW) are in the best position to do so.

⁵⁹ J. McDonald, 'A risky climate for decision-making: The liability of development authorities for climate change impacts' (2007) 24 *Environmental and Planning Law Journal* 405 at 414.

⁶⁰ J. McDonald, 'A risky climate for decision-making: The liability of development authorities for climate change impacts' (2007) 24 *Environmental and Planning Law Journal* 405 at 414.

⁶¹ *Local Government Act 1993* (NSW), s 733(4).

⁶² *Local Government Act 1993* (NSW), s 733(5).

⁶³ Z. Lipman & P. Stokes, 'Shifting sands – The implications of climate change and a changing coastline for private interests and public authorities in relation to waterfront land' (2003) 20 *Environmental and Planning Law Journal* 406 at 415.

⁶⁴ P. England, 'Climate Change: What Are Local Governments Liable for?', *Urban Research Program*, Issues Paper 6, March 2006, p 4.

⁶⁵ P. England, 'Climate Change: What Are Local Governments Liable for?', *Urban Research Program*, Issues Paper 6, March 2006, p 4.

Mitigating Risk of Claim

It is suggested that a Council should when considering a development application (or any other decision making):

- acknowledge that climate change is occurring;
- not ignore evidence as and when it becomes widely available; and
- not make decisions that increase vulnerability without regard to available precautionary methods.⁶⁶

As more regionally applicable authoritative predictions about climate change become available, it will be the task of Councils to keep up-to-date with the evolving standards and implement a reasonable response accordingly.⁶⁷

It is also recommended that other jurisdictions enact protections akin to s 733 of the *Local Government Act 1993* (NSW).

2.4 Claim for failure to include protective standards in planning schemes

Establishing and defending a claim

If a Council fails to include protective standards in planning schemes, and as a result of this omission a resident suffers loss or damage, the resident could potentially sue the Council for negligence.⁶⁸ A successful claim would result in an award for compensatory damages.

Examples of protective standards could include creating minimum standards above sea level for new development, and the requirement for buildings to be capable of withstanding extreme weather events.

The potential defences are the same defences as those discussed in the above section (Claim for approving development when risk of harm was foreseeable).

The likelihood of the success of a claim depends on the factors and circumstances of the case, however a council has a high risk of a claim being brought if they do not consider protective standards in flood prone, coastal zone and other at risk areas. Similarly, as more evidence relating to the impacts of climate change emerges, it will be more difficult for councils to defend these actions.

Whilst a resident could sue under private nuisance, it is unlikely that a claim would succeed, as a Council is only obliged to take reasonable steps to prevent a

⁶⁶ P. England, 'Heating up: Climate change law and the evolving responsibilities of local government' (2008) 13 *Local Government Law Journal* 209 at 218.

⁶⁷ P. England, 'Heating up: Climate change law and the evolving responsibilities of local government' (2008) 13 *Local Government Law Journal* 209 at 219.

⁶⁸ P. England, 'Climate Change: What Are Local Governments Liable for?', *Urban Research Program*, Issues Paper 6, March 2006, p 3.

natural phenomenon from affecting neighbourhood land unless the nuisance emanates from its land or land under its control.⁶⁹

This applies to risks such as the spread of bush fire from Council land. However, it is unlikely that climate change related ocean hazards or flooding would be so characterised.⁷⁰

Mitigating Risk of a Claim

Councils should consider climate change risks in the development of planning schemes.⁷¹ A number of commentators have also submitted that there is a need for an integrated approach to planning for the entire Australian coast.⁷² This system would be based on a set of overarching principles and key matters to be applied in all jurisdictions uniformly and would create certainty by outlining the responsibilities of the tiers of government. It would also provide governments with access to the most reliable and up-to-date information regarding climate change science, ensuring consistency (see discussion at 4.2).

In addition to national guidance, each State should also consider developing (if it has not already done so) an integrated coastal planning system based on up-to-date information.⁷³ In reconsidering the standards to include in planning schemes, at the very least, Councils need to minimise development in highly vulnerable areas where the risk of harm is foreseeable.⁷⁴ Claim for failure to maintain or build infrastructure or conduct coastal mitigation works

Establishing and defending a claim

If a Council fails to maintain or build infrastructure or conduct coastal mitigation works (including a failure to upgrade drains, stormwater systems and roads, and to build mitigation works such as seawalls and levees), and property damage occurs to a person or group of persons, it could be liable under negligence for failing to take reasonable care in exercising its functions (for compensatory damages).

⁶⁹ *Goldman v Hargrave* [1966] 1 All ER 645.

⁷⁰ J. McDonald, 'A risky climate for decision-making: The liability of development authorities for climate change impacts' (2007) 24 *Environmental and Planning Law Journal* 405 at 415.

⁷¹ P. England, 'Heating up: Climate change law and the evolving responsibilities of local government' (2008) 13 *Local Government Law Journal* 209 at 219-221.

⁷² L. Potts, 'Blueprint Planning for National Coastal Development' (2005) 125 *ECOS* 4; Z. Lipman and R. Stokes, 'That sinking feeling: A legal assessment of the coastal planning system in New South Wales' (2011) 28 *Environmental and Planning Law Journal* 182 at 196; B. Norman, 'Sustainable Coastal Planning for Urban Growth and Climate Change' (*New South Wales Coastal Conference*, Bateman's Bay, 10-12 November 2010), pp 5-6.

⁷³ Z. Lipman and R. Stokes, 'That sinking feeling: A legal assessment of the coastal planning system in New South Wales' (2011) 28 *Environmental and Planning Law Journal* 182 at 197.

⁷⁴ J. McDonald, 'A risky climate for decision-making: The liability of development authorities for climate change impacts' (2007) 24 *Environmental and Planning Law Journal* 405 at 415.

It may also be subject to claims in private or public nuisance for causing the unreasonable interference with a person's property or to the rights of the public at large (for an injunction or compensatory damages).⁷⁵

With respect to negligence, in all jurisdictions other than the Northern Territory and South Australia, the following principles limit the liability of Councils:

- availability of financial and other resources is to be taken into account,
- the general allocation of resources cannot be challenged,
- the broad range of a Council's activities is to be considered, and
- evidence of compliance with general procedures is to be taken into account.

Thus, in jurisdictions where there has been statutory reform, these limitations will be taken into account in deciding if a Council is liable in negligence for failing to build or maintain infrastructure or conduct coastal mitigation works. They provide a strong defence to these claims. Again, councils in New South Wales would have a stronger defence on the basis of s 733 of the *Local Government Act 1993* (NSW).

With respect to nuisance, whilst it is unclear whether a defence is available, it is unlikely that claims would be brought against councils given that councils are only obliged to take reasonable steps to prevent natural phenomena from affecting neighbouring lands if the nuisance actually emanates from its land or land under its control.⁷⁶ An example of where this may apply is where bushfire spreads to another property from council land. It is unlikely that a court would consider a council 'in control of' natural ocean hazards which are enhanced as a result of climate change.⁷⁷

The case of *Vaughan v Byron SC*, discussed at section 2.15, highlights the risk of such an action.

Mitigating Risk of a Claim

It is recommended that the statutory limitations on the liability of councils for negligence be enacted in all jurisdictions, as well as the defence contained in s 733 of the *Local Government Act 1993* (NSW).

The statutory limitations on the liability of councils with respect to negligence do not apply to nuisance, making it easier for a claimant to establish nuisance. The tort of nuisance is very unsettled, and it is not even clear whether liability is strict or whether there are defences in certain cases. If the legislative reforms to

⁷⁵ P. England, 'Climate Change: What Are Local Governments Liable for?', *Urban Research Program*, Issues Paper 6, March 2006, p 3.

⁷⁶ *Goldman v Hargrave* (1963) 110 CLR 40; *Leakey v National Trust* [1980] QB 485.

⁷⁷ J. McDonald, 'A risky climate for decision-making: The liability of development authorities for climate change impacts' (2007) 24 *Environmental and Planning Law Journal* 405 at 414.

defences were applied to nuisance, it would provide both clarity and protection to councils.⁷⁸

2.5 Claim for compensation for failing to provide information

Establishing and defending a claim

If a Council does not take steps to mitigate a potential risk, it may have a duty to inform its residents of the potential risk (for example, by giving property advice as to flooding and coastal hazards). If it fails to do so and a resident suffers damage, the Council could be liable in negligence.⁷⁹

Defences include inherent risk (in jurisdictions where there has been statutory reform) and the defence of failure to warn or inform.

An inherent risk is one that cannot be avoided even with the exercise of due care and skill. The liability of a council for the materialisation of an inherent risk is limited to the failure to inform the plaintiff of the risk.

In jurisdictions where there has been statutory reform, a council is not liable for failure to warn of a risk unless the plaintiff has enquired about the risk from the council or the council is required by law to warn the plaintiff of the risk.

For further information on how the laws apply differently in different jurisdictions, please see the comparative table in Appendix 1.

Given the protections surrounding councils, it would be difficult to establish that they are liable for failure to warn or inform of the risks of climate change.

However councils in New South Wales would be best placed to defend such a claim, given that in accordance with s 733(3)(f5) of the *Local Government Act 1993* (NSW), councils are not liable for any advice, acts or omissions given or done in good faith with respect to the provision of information relating to climate change and sea-level rise.⁸⁰ This defence effectively counteracts any claim for a failure to provide information.

If Councils have a duty to warn of a risk, whether the provision of information via the internet may be sufficient to discharge this duty, depends upon the exact standard of care. Greater or less precaution may be required depending on the degree of a particular risk - for instance, a risk that is extremely grave and imminent may require a higher standard of care than a general risk that is not of a serious nature and not imminent. The question of how far a person must go to direct information to a particular individual needs to be considered in this context, as the answer will differ depending on the nature of the risk and surrounding circumstances.

⁷⁸ P. England, 'Heating up: Climate change law and the evolving responsibilities of local government' (2008) 13 *Local Government Law Journal* 209 at 218.

⁷⁹ Z. Lipman and R. Stokes, 'That sinking feeling: A legal assessment of the coastal planning system in New South Wales' (2011) 28 *Environmental and Planning Law Journal* 193.

⁸⁰ *Local Government Act 1993* (NSW) s 733(3)(f5).

Mitigating Risk of a Claim

It is recommended that other jurisdictions enact exemption provisions similar to s 733 of the *Local Government Act 1993* (NSW).

2.6 Claim for compensation for providing incorrect information

Establishing and defending a claim

A Council may be liable for an action in negligence for providing incorrect information about climate change risks. If residents rely on this advice to their detriment, the Council could be required to pay compensatory damages.⁸¹

A claim for providing incorrect information is more likely to be brought than a claim for failure to provide information as it would be easier for a resident to prove that they had been misled, and there is a well-established body of case law with respect to the provision of incorrect information by Councils.⁸²

The most effective defence would be under s 733(3)(f5) of the *Local Government Act 1993* (NSW), that councils are not liable for any advice, acts or omissions given or done in good faith with respect to the provision of information relating to climate change and sea-level rise.⁸³ Thus, Councils in New South Wales would not be liable for incorrect advice given if it is given in good faith. It will be important for Councils to educate staff and elected officials with respect to the manner in which information is provided so as to avoid representations being made that may bind a Council at a later date.

With the increasing use of the internet, a large portion of information (including most forms) provided by Councils is done so through the internet. As a general principle, the majority of Australian laws dealing with problematic content and information apply equally to content published online as they do to content distributed offline. As a result, liability - including for negligence - can generally arise in the same way online as it can offline. However, the particular characteristics of the online environment can give rise to a number of specific issues and risks in practice, including as follows:

- Online publication of information via a public website can increase potential liability simply due to the fact that the information is quickly and easily made available to a global audience, rather than being specifically directed to a particular person or class of persons.⁸⁴
- Issues can also be heightened from a practical perspective due to the varying levels of online literacy within the Australian public. Where information is presented in a way that involves some level of technical

⁸¹ P. England, 'Climate Change: What Are Local Governments Liable for?', *Urban Research Program*, Issues Paper 6, March 2006, p 3.

⁸² *Shaddock v Parramatta City Council* (1981) 150 CLR 225; *Kyriacou v Kogarah Municipal Council* (1995) 88 LGERA 110.

⁸³ *Local Government Act 1993* (NSW) s 733(3)(f5).

⁸⁴ *Dow Jones v Gutnick* (2002) 210 CLR 575

literacy in order for a person to access it (for example, through the use of links between different pages) there is a heightened risk that some people (in particular the elderly) may misunderstand or misinterpret the information or fail to access some of the information, which can result in increased risks.

- If an online publisher seeks to rely on online disclaimers or terms and conditions to protect them from liability connected with online publication, issues can arise if those terms are not sufficiently brought to an end user's attention.

Mitigating Risk of a Claim

A fundamental means of avoiding liability for Councils is to exercise reasonable care. What is considered reasonable is that which would be fairly and properly required in the particular circumstances. In the case of Council decision making, reasonable care involves taking care to ensure all relevant facts are known and understood, that relevant law is identified and understood, and that any advice is expressed in clear and accurate terms.⁸⁵ Where material is published on a Council's website, care must be taken about the information published and it is important to ensure that appropriate disclaimers are brought to the attention of site users.

It is also recommended that other jurisdictions enact exemption provisions similar to s 733 of the *Local Government Act 1993* (NSW)

2.7 Administrative Law

General background

Administrative law seeks to provide safe-guards to people who are affected by government decisions, including decisions made by Councils, by allowing people who are adversely affected to challenge that decision.

Administrative in nature

For a decision to be challenged, the decision must be “administrative” in nature. Not all types of public decisions will be administrative in nature.

Examples of decisions that may not be open to challenge include those concerning broad public policy; or enacting an Act of Parliament.

Examples of decisions that are “administrative” and commonly open to challenge include decisions by Councils in relation to compulsorily acquiring land; imposing a condition on a licence; or granting or rejecting planning permits.

Right to review

A person's rights arise under both statute and common law and may allow:

⁸⁵ ‘Negligent Advice’, Australian Government Solicitor Legal Practice Briefing Number 6, 1 September 1993, available at <http://www.ag.gov.au/publications/agspubs/legalpubs/legalbriefings/br06.htm>, accessed 1 June 2011.

- merits review under the original empowering legislation;
- judicial review by a court under the relevant empowering legislation or administrative law legislation in that State; or
- review of the decision by a specialist court or the Supreme Court under the Court's inherent jurisdiction to review administrative decisions in that State.

Merits Review

Merits review involves reconsidering the original decision. In a merits review situation, the new decision-maker stands in the shoes of the original decision-maker and can affirm the existing decision, amend the decision or make an entirely different decision. Merits review is only available if it expressly granted in the legislation empowering the original decision.⁸⁶ In each State and Territory the vast majority of Council decisions will have statutory rights to merits review attached, either in the relevant planning or local government legislation.⁸⁷

A right to merits review can be excluded in legislation and such exclusions are most commonly found when the decision maker is the Minister – for example, when a planning scheme amendment is considered or where a development application is assessed by an independent panel (e.g. certain State significant development). Consideration of whether a right to review should be included in relation any new legislative provisions relating to climate change decisions should be considered on an individual basis.

Judicial review

Judicial review is a challenge to the lawfulness of a decision and is heard by a court. The court does not consider the *merits* of the case.

Judicial review cases are generally more complex than merits review cases. The majority of cases, where an alternative statutory right to merits review exists, will be litigated first on a merits review basis and then if the applicant remains unsatisfied and an administrative action is available, through judicial review. If a court accepts that the decision has been made unlawfully, the court will send the matter back to the original decision-maker to be lawfully remade.

Grounds of judicial review

The general grounds of judicial review include:

- *Relevant and irrelevant considerations*: A relevant consideration is one that must be taken into account. An irrelevant consideration is one which must not be taken into account. If the decision maker has failed to take into

⁸⁶ Examples of legislation governing the rights associated with merits review include the *Administrative Appeals Tribunal Act 1975* (Cth) for Commonwealth decisions; and the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) in Victoria.

⁸⁷ Applications for review of planning permit decisions are set out in sections 77-82 of *Planning and Environment Act 1987* (Vic)

Under Section 97 of the *Environmental Planning and Assessment Act 1979* (NSW) an applicant who is dissatisfied with a decision of a consent authority may to appeal to the Land and Environment Court NSW

account a relevant consideration or has taken into account considerations that are not relevant to the matter the matter may be subject to review on this ground.⁸⁸ The governing legislation will determine the scope of what is a relevant and irrelevant consideration.

- *No jurisdiction*: If a decision maker makes a decision that is outside the defined scope of its governing statute, the decision may be made without jurisdiction.
- *Error of law*: If a decision maker applies the wrong criteria or does not apply the correct procedure in the statute there may be an error of law.
- *Improper purpose*: A decision may be designed to achieve a purpose that is beyond the responsibilities of the government body.
- *Unreasonableness*: If a decision was so unreasonable that no reasonable body would have reached it can be the subject of review.⁸⁹ It must be shown that the decision was absurd or irrational. The particular evidence taken into account by the decision maker must be considered in each situation.
- *Bad faith*: To succeed on this ground it is necessary to show that there was a form of dishonesty, bribery or corruption impacting the decision.
- *Uncertainty*: Uncertainty is a ground that is used when a decision is too uncertain to be meaningful.
- *Improper delegation or divesting or dictation*: In improper delegation and divesting the decision maker has wrongly granted authority to another to make a decision. The opposite situation is dictation where the decision maker acts at the dictation of another without exercising their own discretion.
- *Inflexible policy*: A decision may be subject to challenge if a decision maker inflexibly applies guidelines or policy criteria without regard to the merits of the case.
- *Natural justice*: There are two arms to natural justice:
 - (a) the “fair hearing rule” – the right to be given a reasonable opportunity to be heard; and
 - (b) the “bias rule” - the right to have a decision maker who is free from actual or apprehended bias.

2.8 Administrative review of Council decisions

In Australia, the most common way that climate change issues have been litigated is through the administrative review of planning decisions. A number of cases have been based around flooding and sea level inundation risks. (see case law summary at Appendix 4)

⁸⁸ *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24

⁸⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

While planning decisions are always made about an uncertain future, the nature of the uncertainty associated with climate change impacts raises particular challenges. This is due to the short time frames in which potentially significant impacts will be felt, the lack of comprehensive risk assessments available, the technical nature of such risk assessments (leading to greater uncertainty as to how such assessments should be interpreted) and a residual level of climate change scepticism remaining in the general community. Combined, these factors present unique challenges to Councils making daily decisions about how to best to mitigate and adapt to such impacts.

The following table summarises the types of administrative review claims that may be brought in relation to council decisions.

Table 2: Summary of administrative law climate change related actions

	Possible actions	Defences	Likelihood of an action being brought	Mitigation strategies
Administrative review of planning permit decisions	Merits review or judicial review	Provided that the guidance materials relied upon and decision making is proportionate and reasonable, the decision is unlikely to be regarded as unlawful under judicial review	HIGH – by Landholders who may bring an application for merits review in the hope of obtaining a more favourable result	Councils should ensure that decisions are reasonable and appropriate decision making procedures are followed and relevant considerations taken into account
		In States such as New South Wales where there is policy embedded in legislation and a clear trigger, there is a reduced likelihood that such decisions will be held to be unlawful.	MED – by Community groups that may use merits or judicial review processes as a means to test policy and bring public awareness to climate change	Councils should ensure they have the best available evidence and the appropriate expertise to interpret policy and technical documents to remove any uncertainty in interpretation
Administrative review of planning scheme amendments	Merits review or judicial review	If the final decision to approve the amendment does not rest with Council, Council may not be making an administrative decision which is capable of review and may only	LOW – claims will more likely be made at the State decision making level.	Councils should ensure that decisions are reasonable and appropriate procedures followed Councils should

		be taking a "preliminary step"		ensure they have the best available evidence and information
Administrative review of decisions to make by-laws	Merits review or judicial review	Council is exercising its legislative power	LOW - a decision to pass a by-law is likely to be a decision of legislative character rather than administrative character and it may not be open to review.	Councils should be aware of the extent of their legislative power
Administrative review of decisions regarding levies, special rates, fees or levies	Merits review or judicial review	The particular works provide a special benefit to the particular rate-holder levied or also subsidise the cost of associated services, facilities or activities to rateable land that is not the subject of the charge	MED – there has been significant case law on this topic, although not yet in relation to climate change.	Councils should ensure that decisions are reasonable, that appropriate procedures followed and that they do not take irrelevant considerations into account when setting rates and fees Care should be taken in defining the scope of the works and the land-holders that will benefit from such works

2.9 Administrative review of planning permit decisions

The relevant State or Territory planning legislation in each jurisdiction establishes the framework for planning approval with the vast majority of planning decision making falling to local Councils (see legislation table at Appendix 3).

Establishing and defending a claim

Merits review

A right to merits review is generally available for all planning permit decisions made by Councils. A number of cases have been brought on this basis to date (see table at Appendix 4). What can be seen is that generally those deciding

merits review cases are taking a precautionary approach to considering climate change impacts.

Example - merits review decisions

Taip v East Gippsland SC [2010] VCAT 1222 (28 July 2010)

In November 2008, the East Gippsland Shire Council resolved to grant a permit for a residential development of eight dwellings in Lakes Entrance. Ms Taip made an application to the Tribunal to review that decision.

The substantive matter was about the risks posed by flooding of the site and its surrounds.

In this case Member Potts held that a cautious approach was considered to be warranted while planning frameworks and other responses are set in place to address and minimise these risks. It was concluded that the proposal for this more intensive development of Lakes Entrance was one that was pre-emptive to the development of appropriate strategies to address climate change risks. This led to the conclusion that to grant a permit failed to satisfy the purposes of planning in Victoria for intergenerational equity, sustainable, fair and socially responsible development and would not lead to an orderly planning outcome.

Judicial review

In relation to judicial review, successfully arguing a case is significantly more difficult. The need to bring such cases in the court system rather than through the various planning tribunals also acts as a disincentive. As a result, there have been fewer climate change cases brought on the basis of judicial review and it is envisaged that the ability of people to successfully make out a case for judicial review will decrease as climate change considerations become further embedded in legislation and the manner in which Councils interpret this information becomes more uniform.

From a legal perspective, the actions of courts in a variety of Australian jurisdictions have recognised that Councils have a positive duty to consider climate change impacts in making planning decisions. A failure to do so adequately may result in review of the decision.

Example Judicial review

Minister for Planning v Walker [2008] NSWCA 224

This case concerned a challenge to a proposed residential subdivision and retirement home at Sandon Point. It was argued that the Minister had failed to consider the principles of Ecologically Sustainable Development (ESD) and had failed to consider the 'public interest'. The NSW Court of Appeal rejected this argument and found that although it was mandatory to consider the 'public interest', it was not mandatory to consider the principles of ESD at the time that the original decision was made. The Court of Appeal noted, however, that what constituted the public interest may change

over time. The failure to consider climate change did not make the Minister's decision void.

Example compare with Walker

Aldous v Greater Taree City Council [2009] NSWLEC 17 (19 February 2009)

The Walker case can be compared to the case of *Aldous v Greater Taree City Council*. In this case the Greater Taree City Council granted consent to construct a dwelling on waterfront land. A neighbour, Mr Aldous challenged the decision.

In this case, Biscoe J found that this was a decision where consideration of the public interest required the consideration of ESD and climate change induced erosion. However his Honour found that there was sufficient documentary evidence that the Council did consider principles of ESD and the action was not successful.

A person might seek to bring an action in judicial review on one of the following grounds:

- **Relevant and irrelevant considerations:** This ground may be used by people seeking to attack a decision which either takes projections about climate change impacts into account (or fails to take such materials into account). As the science and policy around climate change is evolving it will be a question in each case whether the particular data or information used (or not used) is relevant to the decision maker's final outcome. Furthermore, as climate change impacts are a complex and evolving area, Councils may lack the financial resources or expertise to adequately identify and interpret the most up-to-date climate change materials.
- **Improper purpose:** This ground may be used if a Council makes a decision for a "hidden" purpose to address a climate change risk. For example if a Council declined a planning permit ostensibly due to amenity or traffic impacts but the real intention was to prevent development because of risks associated with sea-level rise, it may have made the decision for an improper purpose. It is usually difficult to prove that a decision-maker acted out of an improper purpose as evidence of the ulterior purpose needs to be made out.
- **Unreasonableness:** This ground may be open to people seeking to challenge a decision of a Council that either gave undue weight to certain climate-change related information or completely ignored some information. Usually, "unreasonableness" is coupled with other grounds which are more easily made out such as error of law or failure to take into account a relevant consideration. The risk of this ground being used increases if there are not clear permit triggers and the information a Council is required to rely upon is vague.
- At times conditions in planning permits that require the payment of levies or construction of "upgrading works" can be deemed to be unreasonable if they are disproportionate to the development in question or do not have a

sufficient nexus to the development in question.⁹⁰ In situations where Council is seeking to have climate-change mitigation works or fees included in a permit, it will need to show that such conditions are not unreasonable (and that they are not included for an improper or hidden purpose).⁹¹

- **Uncertainty:** This ground is often relevant to a particular condition placed on a permit or licence. Such conditions may arise in relation to climate change issues if decision makers place vague or uncertain conditions in permits, such as requiring temporary structures to be dismantled if (uncertain) events occur in the future.
- **Procedural fairness:** If a Council does not adequately consider climate change risks or material that is raised in submissions or does not follow appropriate procedures then there is a risk that its decision may be challenged on the grounds of procedural fairness.⁹²

Example - express relevant matters

It is now expressly set out legislation in a number of States that coastal climate change risks are relevant matters which must be taken into account.

NSW

- Section 79C of the *Environmental Planning and Assessment Act 1979* (NSW) requires in determining a development application, a consent authority is to take into consideration any coastal zone management plan
- Clause 228 of the *Environmental Planning and Assessment Regulation 2000* (NSW) includes as a factor to be taken into account any impact on coastal processes and coastal hazards, including those under projected climate change conditions

Victoria

The Victorian *Coastal Strategy 2008* is now embedded into the Victorian planning system across three sections of the Victorian Planning Provisions. Coastal references are embedded in the State Planning Policy Framework at:

- Clause 11.05 'Coastal Settlements'
- Clause 12.02 'Coastal'
- Clause 13.01 'Climate Change Impacts'

⁹⁰ See for example *Coulter v Glen Eira City Council* [2000] VCAT 2202 where VCAT struck out a condition that the applicant pay for the cost of a 3m wide laneway that was to provide part of the vehicle access to the site.

⁹¹ In *CJ Johnston & Assoc Pty Ltd v Shire of Upper Murray* (1987) 31 APA 5, the requirement of the payment of a financial contribution for fire protection works was held to be valid.

⁹² *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100

Implied relevant matters

In other States although climate change impacts are not embedded in legislation, they may still be regarded as implied relevant matters which must be taken into account.

In summary, in situations where the statutory obligations placed on Councils to consider climate change are vague or not clearly articulated, or the material that Councils are required to consider is not clearly specified, there is increased potential for merits or judicial review. At present, many climate change risks are enunciated in policies and strategies which are not legally binding documents. Councils are increasingly taking this information into account to avoid negligence claims associated with climate change risks. However, the counter issue is that taking such materials into account may increase the risk of administrative review.

Standing

To bring a case in administrative law a person or group requires standing to sue. To have standing the person or group must be affected by the decision. The person with standing is generally the *person* aggrieved but under certain legislation standing can extend to *any person*.⁹³

Where standing cannot be established a person or group can request the Attorney-General to initiate proceedings on their behalf as a fiat. This is most commonly used by community groups or groups with a general interest in a decision, such as an environmental group who wish to bring public interest litigation to test a particular policy or raise awareness of an issue. Such public interest litigation may increasingly become an issue for Councils if generalist environmental (or pro-development) groups seek to challenge decisions made by Councils in relation to developments that are subject to climate change risks. Limiting standing to a narrow group of persons who are directly affected by a decision can limit the number and scope of legal challenges but must be weighed against the public interest.

The time for appealing decisions, either by way of merits or judicial review, is usually limited by the planning legislation. For example, s 97 of the *Environmental Planning and Assessment Act 1979* (NSW) provides that the determination of a development application by a consent authority may only be appealed against within six months of the application being determined.

Decision making process

Councils retain significant discretion as long as the correct processes are followed. The extent of the duty imposed on any decision maker to take into account climate change impacts will almost always be a question on the facts of the case. Provided that the guidance materials relied upon and decision making is proportionate and reasonable, the decision is unlikely to be regarded as

⁹³ See for example, s.124 Environmental Planning and Assessment Act 1979 (NSW)

unlawful under judicial review (this may not stop persons bring merits review cases, as is always the case with any planning decision). In States such as New South Wales where there is policy embedded in legislation and a clear trigger, there is a reduced likelihood that such decisions will be held to be unlawful.

Mitigating Risk of a Claim

Councils will be able to mitigate the risk of judicial review through balanced, considered clear decision making on the best available evidence. Although this is relatively straight-forward to say, the issue becomes that the status of policy and technical documents may be unclear and without the expertise to interpret these (often highly technical materials) a level of uncertainty remains, leaving decisions open to challenge.

The ability to mitigate the risk of merits review related to climate change considerations in the short term may be difficult. This is largely because of the novel nature of the matters under consideration and the vested interests that landholders have in developing coastal sites. We would expect that many landholders would bring an application for merits review if their application was rejected or conditions related to temporary use and planned retreat imposed in the hope of obtaining a more favourable result. Conversely, community groups may use merits review processes as a means to test policy and bring public awareness to climate change. This issue may dissipate over time as the case law and policy develops in the area. (There is of course always the risk that the new decision will be less favourable.)

Another option for local governments to mitigate risk is by the use of Ministerial 'call in' powers, by which the Minister decides the merits of a development application directly, instead of the council.

Example – SEPP 71

In New South Wales, Ministerial call in powers are exercised under the State Environmental Planning Policy 71 – Coastal Protection (*SEPP 71*), which applies to developments which are located (in whole or in part) within a coastal zone. Certain developments are designated as significant, and the relevant council must refer the application to the Director-General of the Department of Planning. The Planning Minister may then decide to call in the development or may refer it back to the council, specifying additional matters that must be taken into account in determining the application. Significant developments include:

- buildings greater than 13 metres in height;
- large tourist and recreational facilities for more than 100 people;
- industries including extractive industries, landfill, mining and marinas; and
- certain residential subdivisions.

The advantages of such a policy are that they remove liability from councils in coastal areas and provide a uniform approach to coastal development in New South Wales

Recommendations for planning permit decisions

- Clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of the best evidence. This may involve an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks, including advice regarding the appropriateness of a particular development or conditions which should be included in a development approval (similar to the Environmental Protection Authority (*EPA*) in relation to contaminated sites). It should be considered whether this centralised advisory body should be placed at the State or Federal level.
- Updated materials: As uncertainty is resolved over time, any policy or guidance material should be adjusted in the light of new information. This material may be updated by the same centralised advisory body noted above.
- An associated issue is that property owners in an area have timely and transparent access to information, such as best available flood mapping and data. Ensuring that risks are communicated will allow property owners to adjust their expectations of the types of development permitted on their property and avoid challenges to shock planning decisions.
- Ensuring public consultation procedures are appropriate in each instance may limit actions seeking administrative review. Increased public consultation may improve transparency but this need must be weighed in each instance against the increased work associated with reviewing large numbers of submissions.
- Limiting the statutory right to merits review may limit the complexity and number of applications that will be subject to review. A similar outcome may also be achieved by limiting the standing to sue provisions, ensuring that only those persons immediately and directly affected have standing to sue. Any procedure to limit merits review or standing must be weighed against the public interest in limiting protections afforded to those affected by government decision making.

Time-based consents

A further option that may be considered is the recommendation that clear permit conditions and mechanisms such as the ability to place covenants on title or issue temporary permits are developed. This will ensure that planning schemes and other legislation makes clear when covenants or other notices may be attached to titles to deal with climate change risks. This may also involve educating Councils on how to draft such conditions and when they are appropriate, to avoid such conditions being struck down for uncertainty.

It is possible for Councils in most States to issue temporary or conditional planning permits that require a use to cease at a particular time.

In Victoria a permit can include a condition that the use must cease and that the development be removed at a particular time if for example, Council intends that:

- a proposal should be permitted only until a specific event occurs (for example until certain erosion events occur); or
- a proposal may be permitted for a specified period either because it is only intended to operate for this period, or because the responsible authority wishes to review the operation of the proposal after a fixed period of time.

In NSW the *Coastal Planning Guideline: Adapting to Sea Level Rise* (August 2010) also refers to temporary conditions and states rather than prohibiting infill or redevelopment in existing areas, Councils could consider measures that would allow ongoing sustainable occupation of coastal areas, until such times as coastal risks threaten life and property. This may include the use of time and/or trigger limited development consent conditions.

In Western Australia, Planning Policy No. 2.6 notes that the coastal processes setbacks shall be applied to all coastal development with the exception of the following:

- Development with an expected useful lifespan of less than 30 years undertaken by a public utility or government agency for a public purpose, on the proviso that the development is to be removed or modified should it be threatened by erosion or create an erosion threat to other land.
- Temporary, easily relocatable structures that are demonstrably coastally dependent e.g. Surf Life Saver lookouts.

Such conditions need to be drafted carefully to ensure that they are not struck down for vagueness or uncertainty. An interrelated issue is that future owners of the land may not be aware of the temporary condition. Such an issue may be overcome by the placement of a covenant or agreement on title.

In Victoria the *Environment and Planning Act 1987* (Vic) creates the ability for Councils to enter into 'Section 173 Agreements', which can be registered on title.

2.10 Administrative review of planning scheme amendments

Establishing and defending a claim

Generally planning scheme amendments are made at the State / Ministerial level; however, Councils often play a role in developing the subject matter of schemes that apply to their locality and also in facilitating public consultation regarding the planning schemes.

Therefore, Councils may find themselves subject to review for their role in earlier stages of the proceeding – for example, their role in reviewing

submissions or passing a resolution regarding an amendment. This will turn on the nature of the function performed by the Council under the relevant legislation.

Procedural fairness

If a planning scheme amendment process does not take into account climate change considerations (if such submissions are raised) this may be regarded as a failure to apply procedural fairness and may invalidate that section of the processes.

Example: Failure to take submission regarding climate change into account

Australian Conservation Foundation v Latrobe City Council (2004) 140 LGERA 100

On 29 October 2004, the Victorian Civil and Administrative Tribunal (VCAT) upheld an appeal in relation to a planning scheme amendment that would facilitate the continued operation of the Hazelwood Power Plant. The case concerned whether a planning panel, considering amendment to a planning scheme under the *Planning and Environment Act 1987* (Vic) was required to take into account submissions concerning the environmental effects of greenhouse gas emissions from that power plant. It was found that the panel was required to consider relevant submissions and that a submission will be ‘about an amendment’...*even if it relates to an indirect effect of the amendment, if there is a sufficient nexus between the amendment and the effect. One way of assessing whether the nexus is sufficient will be to ask whether the effect may flow from the approval of the amendment; and, if so, whether, having regard to the probability of the effect and the consequences of the effect (if it occurs), the effect is significant in the context of the amendment.*

This indicates that applicants for a planning scheme amendments (at least in Victoria) must consider all relevant environmental impacts (at a minimum where these are raised in submissions) when preparation planning scheme amendments and a failure to do so may result in administrative review of that decision.

Unreasonableness and failure to consider relevant considerations

A failure to consider climate change issues in general may result in the decision being subject to review on the grounds that it failed to take into consideration a relevant consideration or is unreasonable.

Not an administrative decision

In seeking review of interim steps in a proceeding there may be a question of whether the particular resolution, function or action undertaken by the Council is a “decision of an administrative character” or merely a “preliminary step”. If an action is merely a preliminary step it may not be subject to review. This will turn on the particular legislation and step in the process.

Example: Not an administrative decision?

Noosa Shire Council v Resort Management Services Ltd (1993) 81 LGERA 295

The question in this case was whether a resolution passed by the Noosa Council about development on was a reviewable decision. The legislation required the Council to go through five steps:

1. Propose amendment to planning scheme
2. Public notice
3. Consider submissions
4. Decide whether to approve the plan
5. Decision made by the governor

The question was whether that decision under point (5) was a “decision.” The Court of Appeal applied the High Court decision of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and held that this was an interim step specifically required to be made by the relevant *Local Government Planning And Environment Act 1990* (Qld). It expressly provided for the making of that interim decision through a process of steps leading up to the final decision for the governor. Hence this interim decision was reviewable. This case is to be compared to Redland Shire Council discussed below.

Compare with above case

Redland Shire Council v Bushcliff Pty Ltd [1997] 2 Qd R 97

In this case the Council was applying the same process as above. The applicant sought a statutory order of review regarding the first step (the Council proposing an amendment to the planning scheme). In this decision it was held that the particular step was not a decision that was reviewable as it was merely a “preliminary step”.

Mitigating risk of a claim

Please see the discussion above under administrative review of planning permit decisions, which also largely apply to planning scheme amendments. In addition to the points noted above, as with all planning scheme amendments, Councils should ensure that decisions are reasonable and appropriate procedures followed.

2.11 Administrative review of decisions to make by-laws**Establishing and defending a claim**

If Councils make by-laws to control access or require licences or fees to be paid to manage climate change risks, persons may seek to review such decisions.

Legislative rather than administrative decision

A decision to pass a by-law may not be a decision of an administrative character but rather of a legislative character and it may not be open to review.

Example: Legislative rather than administrative decision

Paradise Projects Pty Ltd v Council of the City of the Gold Coast [1994] 1 Qd R 314

The relevant Local Government Act empowered Councils to make by-laws regarding commercial activities on a road. The Gold Coast City Council passed a by-law requiring the selling of food stuffs from vehicles was prohibited without a license. Paradise Projects sought judicial review. Held: When a local authority exercises a statutory authority to make by-laws it is generally making a decision of a legislative character, and not a decision of an administrative character.

2.12 Administrative review of decisions regarding levies, special rates, fees or levies

Establishing and defending a claim

In most jurisdictions Councils will have some power to levy particular rates on the owners of land benefited by works carried out by Councils to pay for the special benefit to the land - for example, the construction of a sea-wall.

No special benefit

Councils may find a number of their decisions subject to review, in particular where applicants submit that they do not receive any “special benefit” from such works. It will be a question in each case as to the wording of the particular enactment and whether the particular works provide a special benefit to the particular rate-holder levied or also subsidise the cost of associated services, facilities or activities to rateable land that is not the subject of the charge. There has been significant case law on this topic.⁹⁴

Relevant considerations

Councils will also need to ensure that they do not take irrelevant considerations into account when setting rates and fees. For example, in *Xstrata Coal Qld P/L*

⁹⁴ Leading case law on the imposition of special rates and charges includes: *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385; *Parramatta City Council v Pestell* (1972) 128 CLR 305; *Western Stores Ltd v Orange City Council* (1973) 47 ALJR 118 (Privy Council); *Severn Shire Council v North West County District Council* (1974) 1 NSWLR 190; *Shanvale Pty Ltd v Livingstone Shire Council* (1999) 105 LGERA 380; *Australand Land and Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2006] QSC 332 which was upheld on appeal in *Australand Land and Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2007] QCA 189; [2008] 1 Qd R; *Leagrove Pty Ltd and Ors v Gold Coast City Council* [2010] QSC 370: In it was said in this case that it follows from the authorities referred to above, applied to the terms of the statute, that in addition to the four matters identified by Chesterman J in *Australand Land and Housing No 5 (Hope Island) Pty Ltd*, the following principles of law guide decision making pursuant to s 971 of the Local Government Act in this case: (a) The relevant opinion as to whether or not a service, facility or activity specially benefits the land or the occupier of the land, the subject of the special rate, is the opinion of Council; (b) The opinion must in fact be held; (c) The opinion need not be sound but must be reasonably open; (d) To be reasonably open, the opinion must be reasonably formed; (e) The opinion cannot be reasonably formed if some land is included where the land or its occupier does not specially benefit; (f) The opinion cannot be reasonably formed if some land is excluded where the land, or its occupier, specially benefits to a similar extent as included land: the Council cannot pick and choose among lands that would be specially benefited; (g) The opinion cannot be reasonably formed if the Council has taken into account irrelevant considerations or failed to take into account relevant considerations; The opinion cannot be reasonably formed if it is so unreasonable no reasonable Council could have formed that opinion.

and Ors v Council of the Shire of Bowen [2010] QCA 170 the appellants commenced proceedings for judicial review of the Council's resolutions claiming that in fixing the categories of coal mining land, and more particularly in fixing the differential rates with respect to each category, the Council took irrelevant considerations into account. Namely, the Council took into account the capacity of the appellants, who owned the land to pay the increased rate of burden. In this case, it was held that the legislation did not contemplate that wealth, or capacity to pay rates, should be a factor relevant to the rates fixed by a local government in its budget.

Mitigating the risk of a claim

Please see the discussion above under administrative review of planning permit decisions. In addition to the points noted above, if Councils decide to levy variable or differential rates to fund climate change works care should be taken in defining the scope of the works and the land-holders that will benefit from such works. As with all rating decisions, Councils should ensure that decisions are reasonable and appropriate procedures followed.

2.13 Other Claims

Claims, other than tort-related or administrative review claims, that may be brought in relation to council decisions. These may include:

- claims related to failure to provide services;
- statutory compensation claims;
- compulsory acquisition claims; and
- claims regarding title boundaries: erosion and accretion.

The following table summarises the types of other claims that may be brought in relation to council decisions.

Table 2: Summary of other climate change related actions

	Possible actions	Defences	Likelihood of an action being brought	Mitigation strategies
Failure to provide services	Claim for failure to provide coastal protection works	See above re negligence and nuisance defences	MED – examples already	Clear legislative frameworks to facilitate the carrying out of emergency protection works in a coordinated manner
Statutory compensation claims – planning permits	Failure to grant planning permits	Proper exercise of Councils functions – usually no cause of action beyond administrative review	LOW – only likely to be available if land required for a public process	See comments on planning appeals above

		above		
Statutory compensation claims – planning schemes	Loss of value, development rights associated with planning scheme amendments	Queensland has certain exemptions from where compensation may be payable i.e. compliance with a standard scheme	LOW in most jurisdictions.	Queensland may wish to consider ensuring that any amendments are consistent with a standard planning scheme
			MED in Queensland	
Compulsory acquisition	Dispute over compensation amount for resumption of land for public purposes	Where compensation awarded on just terms	MED – valuation for compulsory acquisition is frequently litigated	Clarify that acquisition as part of climate change adaptation is a public purpose
Boundary adjustments	Claim for compensation for loss of land value due to boundary adjustments where low water mark moves due to erosion - may lead to a need for Council's to exercise compulsory acquisition claims	Common law doctrine regarding accretion only addresses gradual change – not provisions for sudden events. There is no equivalent for erosion	LOW – limited knowledge of legal boundaries of this area	Consider legislation reforms to clarify the circumstances in which erosion and accretion give rise to the ability of Councils to make declarations regarding water boundary

2.14 Claims related to failure to provide services

Establishing and defending a claim

Claims for mandamus may arise as a way of compelling Councils to fulfil their statutory duties. Mandamus is an order of the court which compels a public official to perform a public duty or exercise a statutory power.⁹⁵ Mandamus is of limited use in environmental law because there is a large measure of discretion involved in many environmental management and protection functions.⁹⁶

⁹⁵ *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473.

⁹⁶ Butterworths Encyclopaedic Australian Legal Dictionary, LexisNexis.

The longstanding dispute between Vaughan and Byron Shire Council provides an example of a claim to establish or maintain essential infrastructure and services.

Example: Claims related to failure to provide services

Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2) [2009] NSWLEC 110

The case concerned the provision of coastal protection works in Byron Shire. The Council had granted itself consent for the construction of geobag erosion control wall on the coastline of private beachfront property. The private owners brought an action alleging breach of the development consent following severe storm that caused severe erosion of the beach including about 10m of the private property. Held: The terms of the consent obliged the council to monitor, and maintain and repair the beach stabilisation works they had erected. The council was ordered to restore the interim protection wall to its height and shape before the storm. In addition, the Court found that the private owners had the option of bringing an action in negligence or nuisance in the Supreme Court seeking damages for the loss of their property.

Coastal emergency works

There is considerable infrastructure and private property in erosion prone areas that is particularly vulnerable to severe short-term erosion events associated with storm surges, cyclones and high tides. In certain situations Councils and landholders may be minded to conduct emergency protection works such as sandbagging and the placement of rock, gravel or rubble walls. The ability to conduct such emergency works varies between States and the present lack of clarity in some States may lead to disputes.

Under recent amendments to the *Coastal Protection Act 1979* (NSW) emergency coastal protection works can be carried out to protect buildings that are lawfully used for a residential, commercial or community purpose. Emergency coastal protection works include the placement of sandbags (other than sand taken from a beach or a sand dune adjacent to a beach). Similar provisions apply in Queensland under the *Sustainable Development Act 2009* (Qld). However, the situation is less clear in other States.

For more detail please see the Legislation Summary Table at Appendix 3.

Emergency protection works recommendations

- The NSW and Queensland provisions can be seen as a positive move towards clarifying the position of landholders and Councils to undertake and control such coastal protection works. Councils in other jurisdictions may consider the duplication of such provisions.
- In Victoria the ability to take emergency works appears limited and consideration may be given to clarifying provisions under the *Coastal Management Act 1995* (Vic) and *Environment and Planning Act 1987* (Vic) to allow Councils or persons to undertake emergency works without obtaining Ministerial approval.

- In Tasmania, similar to Victoria, consideration could be given to clarify the ability of Councils and persons to undertake emergency works and obtain retrospective approval if required.
- In South Australia the Coast Protection Board has an advisory role is authorised to execute any works that are in the opinion of the Board necessary or expedient for the purpose of repairing or restoring any damage to any portion of the coast resulting from a storm. However, under the Policy on Coast Protection and New Coastal Development (1991) the Board will not protect private property nor provide funding unless:
 - there is an associated public benefit;
 - there is simultaneous protection of public property;
 - a large number of separately owned properties are at risk; and
 - the erosion or flooding problem has been caused or aggravated by Government coastal works.

These provisions may prevent Councils from undertaking works which specifically protect private property interests.

Although, there is a provision in the *Development Act 1993* (SA) that states where building work must be performed as a matter of urgency to protect any person or building, a person may perform the building work, and retrospective development approval must be sought. This provision may empower landholders to undertake works in an emergency situation without approval. The provisions under the Act and the Coastal Policy may need to be reconciled at times.

2.15 Statutory Compensation Claims

Planning almost always involves some form of interference with a landowner's property rights. If certain land uses are prohibited or development restricted, a diminution in the land value may result, particularly if the use of the land is effectively sterilised. However, planning decisions only attract compensation in a limited set of circumstances due to existing use rights.

An existing use is a use that was lawfully commenced and subsequently prohibited by a planning instrument. Despite the fact that the use is prohibited, the land may be continued to be used for the prohibited purpose so as to prevent any hardship to the owner of the land.⁹⁷ In certain circumstances, a non-conforming use may be converted to another non-conforming use, which may be very beneficial for developers.⁹⁸ Therefore, there is generally no compensation payable to affected landholders unless the prohibition:

- can be characterised as one or more types of action recognised under the relevant planning legislation or local government legislation.
- results in affected land being reserved for public purposes; or

⁹⁷ *Royal Agricultural Society of NSW v Sydney City Council* (1987) 61 LGERA 305.

⁹⁸ *Ashfield Municipal Council v Armstrong* (2003) NSWCA 355.

- involves some part of that land being compulsorily acquired.

Compensation for a failure to grant a planning permit

It is generally accepted that there is no compensation payable if a planning authority does not grant development approval or a planning permit. In situations such as the *Gippsland Case*,⁹⁹ where landholders have permits rejected, no compensation will flow for a failure to grant a planning permit. There are exceptions to this rule in most States if the permit is refused to be granted on the basis that the land is or will be needed for a public purpose.¹⁰⁰

Compensation for a planning scheme amendment

If the planning scheme is amended and restrictions are placed on coastal land, certain landholders may argue that they are entitled to compensation because their property rights have been “taken away”. In most States such arguments are unlikely to succeed unless land has been reserved for a public purpose or compulsorily acquired. This is to be compared to the situation in Queensland, which is the only State with a wide ranging injurious affection provision for general planning scheme amendments.

Restrictions placed on land through the re-zoning of land will not generally be regarded as tantamount to the compulsory acquisition of a property right.¹⁰¹ Therefore, compensation does not generally flow for any decrease in value to an owner’s land which may result from the imposition of land use regulations pursuant to legitimate and valid planning purposes, such as a rezoning (see discussion of existing use rights above).¹⁰²

Landholders may seek to argue that re-zoning land in a manner that severely restricts the development and use of that land is a de-facto reservation for public purposes. However, this argument has been rejected.¹⁰³ It is unlikely that a landowner would be successful in arguing that the zoning of coastal land in a “conservation” type zone under to take into account climate change impacts, was tantamount to reserving it for public purposes, even if that re-zoning significantly restricted the landholder’s rights of use.

In States such as Victoria, Tasmania and Western Australia, the relevant planning legislation sets out a limited number of specific situations where compensation will be paid, including when land is reserved for public purposes (or a road in the case of Tasmania).

In Queensland compensation is also available when the value of an owner’s property has been injuriously affected by a change to a planning scheme or to a planning scheme policy affecting the value of the land.¹⁰⁴ In Queensland the

⁹⁹ *Gippsland Coastal Board v South Gippsland SC and Ors (No 2)* [2008] VCAT 1545 (Gippsland Case)

¹⁰⁰ See for example section 98(2), *Victorian Planning and Environment Act 1987* (Vic)

¹⁰¹ *Belfast Corporation v OD Cars Ltd* [1960] AC 490

¹⁰² *Salvation Army, Canada East v. Ontario (Minister of Government Services)* (1986), 34 L.C.R. 93 (Ont. C.A.)

¹⁰³ *Meyden v MMBW* [1980] VR 255, *Equity Trustees Executors and Agency Co Ltd v MMBW* [1994] 1 VR 534

¹⁰⁴ Sections 703 to 713, *Sustainable Planning Act 2009* (Qld)

potential for significant compensation claims may be a barrier to Councils amending planning schemes to take into account climate change risks.

However, there are a number of exceptions which may limit the number of claims in Queensland, including:

- that compensation is not payable if the change is made to comply with a standard planning scheme provision;¹⁰⁵
- compensation is not payable if it affects development that, had it happened under the superseded planning scheme—would have led to significant risk to persons or property from natural processes (including flooding, land slippage or erosion) and the risk could not have been significantly reduced by conditions attached to a development approval; or would have caused serious environmental harm and the harm could not have been significantly reduced by conditions attached to a development approval.¹⁰⁶

Many climate change impacts can be regarded as natural processes (such as flooding, land slippage or erosion). Councils may be able to use this second exemption to make planning scheme amendments for climate change impacts without incurring compensation.

The differences between legislation in each jurisdiction are discussed in more detail in the Summary Legislation Table at Appendix 3.

Compensation: recommendations

- In Queensland, Councils can avoid paying injurious affection compensation claims if they are making changes to comply with a “standard planning scheme provision”. Where changes are necessary to deal with climate change risks, where possible, it would be beneficial if the State government first made amendments to its standard planning scheme provisions.
- Alternatively, Councils should consider whether the change to the planning scheme could obtain the benefit of the exception, that there was a significant risk due to natural processes flooding or erosion that were not capable of being reduced by conditions on a development approval. This will be a question of fact and degree in each case.

2.16 Compulsory acquisition claims

As the population continues to grow and climate change impacts become apparent there may also be the need to acquire land for public purposes to meet community expectations. In particular as boundaries move with sea level rise, Councils may be required to bring land adjacent to the coast into public ownership to ensure that there is public access to the coast, to conduct coastal protection works or to ensure that significant coastal landscapes are conserved. An extreme example is that it might be necessary for local governments to compulsorily acquire large amounts of land to relocate entire communities further inland as a result of sea-level rise. Such adaptation strategies could be

¹⁰⁵ Section 706(1)(a)(b), *Sustainable Planning Act 2009* (Qld)

¹⁰⁶ Section 706(1)(i), *Sustainable Planning Act 2009* (Qld)

necessary for the Lakes Entrance in Victoria or for several of the Torres Strait Islands. If this ever occurred, it would probably require a broader state-based strategy rather than being a local government initiative.

In Australia compulsory acquisition legislating is found at the local, State and Federal level, with each jurisdiction having its own legislation. The common thread in all legislation is the intention that compensation will be granted on just terms.

Although this principle speaks of a willing seller, the reality that confronts Councils seeking to acquire land is the reality that many landholders are not willing to sell for a reasonable price or any price at all. Compulsory acquisition legislation generally provides that an attempt must first be made to acquire property by agreement and only once this process is exhausted can compulsory acquisition under the legislation commence. It is not uncommon for court proceedings to be commenced when disputes become intractable. The engagement of valuers and lawyers to resolve a dispute regarding what is a sufficient quantum of compensation can place a financial and resourcing strain on a Council.

In addition there is the question of whether the area of land taken can legitimately be said to be for a public purpose. There is a body of case law which may disallow Councils taking more land than is required for the public purpose: *Minister for Public Works (NSW) v Duggan* (1951) 83 CLR 824 and *Thompson v Randwick Corporation* (1950) 81 CLR 87. As there is present uncertainty about the extent of sea level rise and other climate change impacts, there may be arguments about whether or not the particular area acquired is for a public purpose.

State variations

The ability of Councils to acquire and sell land is usually granted under the relevant local government legislation. In some States Councils can acquire land but often have the intention of passing this land on to some other organisation for its ongoing maintenance or upkeep. In a number of States there are limitations on re-selling such land, which may prevent Councils undertaking such compulsory acquisition in the first place. In other States, compulsory acquisition may not be straight forward as the power to compulsorily acquire land for such purposes is not always clear. Variations between States are discussed in more detail below and in the Summary Table at Appendix 5.

Compulsory acquisition recommendations

- In NSW powers of compulsory acquisitions are given to Council to “acquire land ... for the purpose of exercising any of its functions”. In the case of a compulsory acquisition, the power of resale is constrained by s188(1) of the *Local Government Act 1993* (NSW). The restriction on the re-sale of compulsorily acquired land may act as a deterrent in some situations to Councils compulsorily acquiring land and policy consideration may be given to whether it could be limited in certain circumstances.

- In SA there is a specific exemption stating that Ministerial approval is not required to acquire land to prevent flooding.¹⁰⁷ However, there is a question of construction as to whether inundation due to sea level rise will be considered flooding and gain the benefit of this exemption. This provision in the Regulations could be clarified to make it clear that this includes flooding or protection works due to increased sea-level rise or other climate change impacts such as storm surges.
- In Western Australia under section 161 of the *Land Administration Act 1997* (WA) Councils can take land by agreement or compulsorily, for public work. Public work is defined in an exhaustive list in the *Public Works Act 1902* (WA). In Western Australia it is not clear that all works to mitigate climate change impacts will fall within the definition of “public work”. This could be clarified by including a specific category of “public work” that relates to works to coastal protection works or works to mitigate climate change impacts in the *Public Works Act 1902* (WA).
- In the NT Section 178 of the *Local Government Act* (NT): a Council may acquire real or personal property (including intellectual property) by agreement. The Council must reimburse the relevant Minister for compensation and other costs associated with the acquisition. The requirement for Ministerial arrangement may at times provide an additional hurdle to Councils acquiring land.

2.17 Claims regarding title boundaries: erosion and accretion

The common law doctrine of accretion and erosion applies such that when a boundary between land and water alters gradually and imperceptibly. In the absence of evidence to the contrary on title (for example, the doctrine may not apply to boundaries on titles that are defined by meters and bounds or which are marked on the title as a straight-line “straight line boundary”), if freehold land has as a boundary the coast or to a river:

- accretion into the water extends the boundary of the freehold land; and
- diluvion or erosion of the freehold land by the water diminishes the boundary of that land and extends the area of the body of water (which is Crown land).¹⁰⁸

If erosion occurs due to sea level change in a gradual manner, property boundaries may shift, extending land in Crown ownership and decreasing the size of the private property. This has major implications for property owners whose land abuts the coast line. Conversely, if a “straight-line” boundary can be proven, Councils may lose access to coastal land. However, it is important to note that there is no statutory right for compensation for loss of land through natural process.

¹⁰⁷ *Local Government (General) Regulations 1999* (SA), s 15.

¹⁰⁸ The Doctrine of Accretion, NPPL Public Land Policy Section.

One of the requirements is that the change is gradual. Arguably the doctrine does not apply if the change occurs due to a sudden event such as a storm. In these situations the parcel of freehold may include part of the waterway. In the case of sudden erosion events which are accelerated by climate change, Councils may face an increasing loss of land and public access to land and may need to use powers of compulsory acquisition to retain access to the coast.

In situations where Councils lose access to coastal land, compulsory acquisition may be required, which is costly and may take time, due to disputes regarding valuation.

In some States such as NSW the common law doctrine has been altered by legislation. For example, section 55N of the *Coastal Protection Act 1979* (NSW) provides that there is no power to make a declaration concerning a water boundary that would increase the area of land to the landward side of the water boundary if:

- a perceived trend by way of accretion is not likely to be indefinitely sustained by natural means, or
- as a consequence of making such a declaration, public access to a beach, headland or waterway will, or is likely to be, restricted or denied.

However, this statutory provision in NSW only applies to accretion and does not apply to erosion situations, so its relevance to rising sea level may be limited.

Accretion and erosion recommendations

Councils may wish to consider advocating that States amend, through legislation, the common law doctrine such that erosion events caused by *sudden* events (such as large storm surges) result in the boundary of land moving and reverting to the Crown. Similarly, the doctrine of accretion can also be amended by Statute. Such amendments will ensure public access and ownership and may prevent large compulsory acquisition claims.

3. Federal and State Initiatives

Australia's State and Federal Government have varying responsibilities in respect of adapting to the impacts of climate change and will perform different roles in helping Australia achieve its adaptation objectives.

Policies and programs addressing climate change risk analysis, adaptation strategies and practices to promote resilience in coastal communities are gradually being developed and implemented across all government levels. These policies and programs have created both incentives and barriers to local government authorities in responding to climate change.

3.1 Federal

The Federal Government has undertaken a number of actions in relation to responding climate change impacts including:

- developing public good information in relation to risks and likely impacts of climate change to Australia's coastal assets;
- undertaking scientific research in order to gain more detailed information on the causes, nature and consequences of climate change;
- consulting with decision makers to prepare Australia for future climate challenges on the coast; and
- funding adaptation programs at a local government level.

These actions are summarised below. Importantly, the Federal Government is leading Australia's mitigation response through the introduction of legislation for:

- greenhouse and energy reporting through the *National Greenhouse and Energy Reporting Act 2007* (Cth);
- a national framework to create carbon credits from abatement/sequestration in the landscape (The Carbon Farming Initiative); and
- a carbon price mechanism designed as an emissions trading scheme with an initial fixed price period.

Public Good Information

The Federal Government has undertaken a number of assessments of climate change impacts to inform the public and relevant decision makers of possible adaptive responses.

Following the current Labour government's *Caring for our Coasts* policy election statement in 2007, the *National Coast Risk Assessment* was funded in order to provide a preliminary analysis of the extent and magnitude of risk to Australia's coastline, coastal biodiversity, cities and towns, and infrastructure. The summary report *Climate Change Risks to Australia's Coastline*, released in 2009, presented the findings of the assessment concluding that in relation to governance, states, territories, local government, industry and communities would have a primary role in on-ground coastal adaptation action. This report

was supplemented in 2011 by a further report identifying the exposure of coastal infrastructure to inundation.

Four major national inquiries concerning the coastal zone conducted over the last 30 years complement this research, including:

- *Management of the Australian Coastal Zone*, House of Representatives Standing Committee on Environment and Conservation, 1980;
- *The Injured Coastline: Protection of the Coastal Environment*, House of Representatives Standing Committee on Environment, Recreation and Arts, 1991;
- *Coastal Zone Inquiry: Final Report*, Resource Assessment Commission, 1993; and
- *Managing our coastal zone in a changing climate: the time to act is now* House of Representatives Committee on Climate Change, Environment and Water, 2009 (*House of Representatives Inquiry*).

Notably, the House of Representatives Inquiry found that national co-ordination was needed and recommended that the Australian Government, in cooperation with state, territory and local governments, and in consultation with coastal stakeholders, develop an Intergovernmental Agreement on the Coastal Zone to be endorsed by COAG. The agreement would define the roles and responsibilities of the three tiers of government involved in coastal zone management.

Other assessments which the Federal Government has undertaken include:

- *Biodiversity Vulnerability Assessment* - an assessment of the vulnerability of Australia's biodiversity to climate change;
- *Implications of climate change for Australia's World Heritage properties* – an assessment of the exposure, potential impacts and adaptive capacity of Australia's World Heritage properties to climate change and to identification of major knowledge gaps;
- *Implications of Climate Change for Australia's National Reserve System*;
- *Interactions between Climate Change, Fire Regimes and Biodiversity in Australia: A Preliminary Assessment* – an assessment of the possible future impacts of climate change on the frequency and intensity of fire in Australia and the consequences of such change for Australia's biodiversity; and
- *Climate Change Adaptation Actions for Local Government* (2nd edition, 2010).

Climate Change Research Facilities

The Federal Government has funded various research facilities to undertake research in relation to the impacts of climate change.

In 2009, in response to the House of Representatives Inquiry which recommended that the Australian Government establish a coastal zone research network, the government agreed to fund the development of coastal zone research plans under the National Climate Change Adaptation Research

Facility. These plans are intended to identify critical gaps in the information needed by decision makers, set research priorities based on these gaps, and identify the science capacity that could be harnessed to conduct this priority research.

The Australian Government has also developed maps of low-lying areas that are more vulnerable to sea level rise for a number of regions. The regions covered include the major population areas including Sydney, Melbourne, South East Queensland and Perth.

Other critical tools developed by the Federal Government include a national Digital Elevation Model (**DEM**) which identifies areas at risk nationally around the coastline. DEMs provide a three dimensional model of the ground surface topography and are used to assess impacts of inundation in low-lying areas. Other funded data collection includes a coastal landform dataset to map the spatial extent of landform types and the increasing coastal erosion due to rising sea levels. These are known as national geomorphology and polygonal coastal landform maps.

Significantly, the Federal Government also funds extensive research into climate change science under the CSIRO Climate Adaptation Flagship program. This program conducts research according to four major research themes; positioning Australia to deal effectively with climate change; sustainable cities and coasts; managing species and natural ecosystems; and primary industries, enterprises and communities in adaptation to climate change.

Consulting with decision makers

The Federal Government has undertaken to consult with state and local governments and coastal stakeholders. In 2009, the Coasts and Climate Change Council (**CCCC**) was established to engage with communities and advise the Government on key issues affecting these constituents. In early 2010, the Federal Government organised, with the assistance of the CCCC, the National Climate Change Forum to bring together 200 key decision makers to discuss the latest science on climate risks for coastal communities and to inform development of a national strategy to prepare for these risks.

A summary report, *Developing a national coastal adaptation agenda* (2010), presented the findings of the forum. Critically, it noted the broad agreement among Forum participants that a coordinated national approach, with clear allocation of responsibilities, be established in order to reduce uncertainty in responding to climate change risks.

The CCCC provided a report to the Minister in December 2010 and recommended the Australian Government improve collaboration and delivery of outcomes across a range of federal, state and local government agencies.

The CCCC recommended that the Australian Government define and progress a 10 year national agenda to address the significant near, medium and long term risks facing coastal regions from the impacts of climate change and that leadership for driving the science and information base for decision-support tools should be the responsibility of the Federal Government, along with

developing national standards for risk assessment; tackling legal reform to enhance national consistency and to reduce liability risks and the provision of technical support for local governments.

Funding of Adaptation Programs

The Federal Government funds adaptation programs that may be accessed by local government authorities and professionals. Programs include:

- Local Adaptation Pathways Program – this program provides around \$2 million in funding to local governments to help build their capacity to respond to the likely impacts of climate change;
- Integrated Assessment of Human Settlements sub-program – this program provides funding for five projects to help build the capacity of local governments to identify climate change challenges and develop responses; and
- Climate Change Adaptation Skills for Professionals Program – this program provides \$2 million to fund tertiary education, training institutions and professional associations in order to develop professional development and accreditation programs for architects, planners, engineers and natural resource managers.

3.2 State / Territory Initiatives

Significant work has been completed over the last three years to improve the policy and regulatory framework around climate change risks in a number of State jurisdictions.

Regulatory and policy developments

In **New South Wales**, the *Sea Level Rise Policy Statement 2009* specifies sea level planning benchmarks for the NSW coastline. These benchmarks are an increase above 1990 mean sea levels of 40 centimetres by 2050 and 90 centimetres by 2100.

The Department of Planning and Infrastructure also released the *NSW Coastal Planning Guideline: Adapting to Sea Level Rise* incorporating Coastal Regional Strategies which include strategic plans at a regional scale that:

- seek to ensure future urban development is not located in areas of high risk from natural hazards including sea level rise, coastal recession, rising water tables and flooding;
- state that in order to manage the risks associated with climate change, councils will undertake investigations of lands with the potential to be affected by sea level rise and inundation to ensure that risks to public and private assets are minimised; and
- specify that local environmental plans (LEP) will make provision for adequate setbacks in areas at risk from coastal erosion and/or ocean-based inundation in accordance with coastal management plans.

Other significant changes include amendments to the *Coastal Protection Act 1979* (NSW) to clarify the rights and responsibilities of landholders and Councils in relation to emergency coastal works.

Planning and development within the NSW Coastal Zone (as declared under the *Coastal Protection Act 1979* (NSW)) is further subject to the State Environmental Planning Policy (Major Development) 2005, which identifies coastal development that will need the approval of the Minister for Planning. These provisions are supported by clause 129 of the *State Environmental Planning Policy (Infrastructure) 2007* which relates to waterway or foreshore management activities and includes provisions regarding:

- consideration of relevant coastal zone management plans;
- allowing coastal protection works by private landowners with consent; and
- identifying the NSW Coastal Panel as the consent authority where no coastal zone management plan applies to the land; and
- specifying matters for consideration by the consent authority when assessing coastal protection works.

In **Victoria**, the *Victorian Coastal Strategy 2008* (VCS 2008) sets the overall strategic direction for planning and management of the coast in Victoria. It plans for sea level rise of not less than 0.8 metres by 2100, and allows for the combined effects of tides, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change. The VCS 2008 is now embedded into the Victorian Planning System across three sections of the Victorian Planning Provisions. This means that the VCS 2008 must be considered by planning decision makers in coastal areas where a permit is required. Coastal references are embedded in the State Planning Policy Framework at:

- Clause 11.05 ‘Coastal Settlements’;
- Clause 12.02 ‘Coastal’; and
- Clause 13.01 ‘Climate Change Impacts’.

For example, Clause 13.01-1: Coastal inundation and erosion states that decision making by planning authorities and responsible authorities should:

- plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change;
- apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change;
- ensure that new development is located and designed to take account of the impacts of climate change on coastal hazards such as the combined effects of storm tides, river flooding, coastal erosion and sand drift;
- ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk; and

- avoid development in identified coastal hazard areas susceptible to inundation (both river and coastal), erosion, landslip/landslide, acid sulfate soils, wildfire and geotechnical risk.

Planning decision makers must consider, as relevant,:

- the Victorian Coastal Strategy (Victorian Coastal Council, 2008);
- any relevant coastal action plan or management plan approved under the *Coastal Management Act 1995* (Vic) or *National Parks Act 1975* (Vic);
- any relevant Land Conservation Council recommendations; and
- future Coasts: Coastal climate change vulnerability mapping (DSE).

However, in Victoria a key deficiency is that there is no universal permit trigger for all developments near the coast. If a development or use is permitted "as of right" no permit is required and in such situations Councils have no control over the development even if climate change impacts are foreseeable. The development of a "climate change risk overlay" may be considered by Councils as one means of overcoming this issue.

In **Queensland**, the *Queensland Coastal Plan* is intended to commence in August 2011 together with amendments to the *Coastal Protection and Management Act 1995* (Qld) and associated regulations. The Queensland Coastal Plan has two parts:

- the *State Policy for Coastal Management*, which contains policies and guidance for coastal land managers; and
- the *State Planning Policy for Coastal Protection*, which applies to planning decisions under the *Sustainable Planning Act 2009* (Qld). This State Planning Policy is a statutory instrument under the *Sustainable Planning Act 2009* (Qld) and must be considered when a local planning instrument is made or amended, when development applications are assessed and when land is designated for community infrastructure.

In **Western Australia**, the *State Planning Policy 2.6 – State Coastal Planning Policy* has been updated through the release of a *Position Paper*, bringing WA into line with the policy positions of other States. This has resulted in a revision of the expected sea level rise projections from 0.38m to 0.9m by 2110. This policy must be taken into account by decision makers in coastal planning.

In January 2010, the Coastal Planning Program released a report entitled *Status of Coastal Planning in Western Australia*. This report includes over 70 outstanding planning tasks, highlighting the large number of local and regional planning instruments that have been developed to manage the coast in Western Australia. It is noted in this report that "on a state basis the key planning gaps are the development of a State Coastal Strategy and a State Marine Planning Strategy".¹⁰⁹

In **Tasmania**, there have been a number of guidelines, mapping exercises and vulnerability assessments which provide background reference documents on

¹⁰⁹ (Coastal Planning and Coordination Council, and the Western Australian Department of Planning, "Status of Coastal Planning in Western Australia", January 2010, p 8)

sea level rise risks, for example the paper *Coastal Hazards in Tasmania General Information Paper 2008* prepared by the Department of Primary Industries and Water. (Other papers are noted below under the heading "barriers to action".) There was also a considerable amount of work done in to understand climate change impacts on Tasmania's coast in the preparation of *Draft State Coastal Policy 2008*. However, recently a decision was made to not adopt *Draft State Coastal Policy 2008*. (All new planning schemes must be consistent with State Policies.) Therefore, although there has been considerable work done in Tasmania, the current planning legal framework is still found in the *State Coastal Policy 1996*, which leaves Councils with a level of uncertainty surrounding the future direction of coastal policy in Tasmania.¹¹⁰

Coastal Mapping and Impact Assessment

There are also large number of State and Territory initiatives currently underway to assess and understand the risks associated with climate change impacts. Further, significant mapping and assessment exercises have been produced to underpin many of the legislative changes and policies in each state and at the federal level.

The National Climate Change Adaptation Framework has established a number of Australian Government initiatives. This federal initiative sits along-side a number of State initiatives.

In Victoria, the Future Coasts Program is undertaking a state-wide assessment of the physical impacts of sea level rise and storms on Victoria's coast, with a focus on the areas with the greatest potential for erosion and flooding.¹¹¹

In NSW, the Comprehensive Coastal Assessment is an element of the NSW Government's Coastal Protection Package and includes a Comprehensive Coastal Assessment toolkit to help local councils, government agencies and others undertake important strategic land use planning.¹¹² The government has also undertaken a climate change mapping project, which identifies low-lying areas on the Central and Hunter coasts at risk of sea level rise resulting from climate change.¹¹³

In Tasmania, there has been a number of mapping and vulnerability assessments for the coast, coastal ecosystems and coastal infrastructure.¹¹⁴ In Western Australia, the government has adopted a Position Statement for the sea level rise policy requirement under Schedule One of State Planning Policy 2.6. Associated with the Position Statement is a technical report "Sea Level Change

¹¹⁰ The Tasmanian Planning Commission website notes that on 24 April 2010, the Commission publicly exhibited the Draft Policy and invited written representations. However the Commission found that the deficiencies in the Draft Policy were such that it would not be able to be satisfactorily altered without major modification. On that basis, a hearing was considered unnecessary and the Commission recommended that the Draft Policy not be made a Tasmanian Sustainable Development Policy.

¹¹¹ <http://www.climatechange.vic.gov.au/adapting-to-climate-change/future-coasts/what-is-being-done>

¹¹² http://www.planning.nsw.gov.au/plansforaction/pdf/cca_toolkit_brochure.pdf

¹¹³ <http://www.planning.nsw.gov.au/PlansforAction/Coastalprotection/ClimateChangeMappingProject/tabid/176/language/en-AU/Default.aspx>

¹¹⁴ <http://www.environment.tas.gov.au/index.aspx?base=8389>

in Western Australia: application to coastal planning".¹¹⁵ In Queensland, the government has prepared coastal hazard area maps showing areas projected to be at risk up to the year 2100.¹¹⁶

¹¹⁵ <http://www.planning.wa.gov.au/Publications/139.aspx>

¹¹⁶ http://www.derm.qld.gov.au/environmental_management/coast_and_oceans/coastal_management/faq-hazard-maps.html

4. Barriers to effective adaptation

This section reviews the legislation or policy frameworks that create barriers to risk mitigation and means of avoiding mal-adaptation by Councils. The main barriers arise from: lack of decision making power, lack of consistency, lack of clear guidance, materials and expertise and lack of funding.

4.1 Lack of decision making power

Planning is primarily a state-based responsibility. As a result of this, Councils must act within the legislative frameworks developed by State or Territory government agencies (to the extent they have in fact developed those frameworks).

There is contention regarding what degree of guidance should be provided to Councils by State / Territory or Federal governments to ensure consistency in adaptation strategies and to what extent local circumstances should determine the approach adopted.

As noted previously, when managing climate change risks one issue Councils face is that there is currently no power for a Council to make a “decision”. In many states, such as Victoria, there is no mandatory trigger for changes to use or new development near the coast. Without a permit trigger allowing a Council to make a decision, property owners can intensify the use of their land and Councils are powerless to prevent such developments. Councils should ensure that all developments on the coast require some form of planning approval trigger.

4.2 Lack of consistency

Over the last three years there has been substantial development in the updating of state and local planning schemes to include specific provisions for climate change impacts and adaptation strategies. However, there has been little consistency in the way this has been carried out and the resulting provisions vary between the approaches adopted by State and Local government within the same jurisdiction and at both levels of government across jurisdictions.

Variations between state and territory jurisdictions in the guidelines provided to Councils, for example in relation to coastal vulnerability, are a source of frustration. With some exceptions, state government policies do not provide clear and consistent guidance and the information available to inform Council decisions varies from jurisdiction to jurisdiction. Catchments that are shared between Councils and in areas that are located on State borders face particular challenges from a lack of co-ordination with other Councils and differences at the State level.

Example: Gold Coast city and Tweed Shire

An example is Gold Coast City and Tweed Shire (extending down to Byron Shire), where stark contrasts can be found at both the local and State level.

One could expect the climate change impacts between these areas to be broadly similar. However, there are a number of differences from a planning perspective:

- Compensation claims re planning scheme amendments: If Gold Coast City Council sought to make a decision to amend a planning scheme and prevent development in an area subject to sea level rise, it could be subject to claims for compensation under the *Sustainable Planning Act 2009* (Qld), while such a decision would not be subject to such compensation claims in Tweed Shire or Byron Shire.
- Benchmarks: In deciding if a development was appropriate, the Gold Coast City Council would be taking into account a .08 m sea level benchmark while in Tweed Shire it would be taking into account a .09 m benchmark.¹¹⁷
- Policies: The comparisons become more stark when one considers the differences between the policies in the Gold Coast and nearby Byron Shire, which has a policy of planned retreat. Byron Shire Council will consider a planning permit in light of this policy which allows the natural process of erosion to continue without counteracting engineering structures, the Gold Coast is not obliged to take these matters into account. (Byron Shire Council is currently in the process of preparing a new Coastal Zone Management Plan which is likely to broadly continue this policy).
- Extent of protection: faced with legal action for decisions made in the exercise of its statutory functions, Tweed or Byron Shire Council will have the benefit of s.733 of the *Local Government Act 1993*, Gold Coast Council will not.

The table below illustrates the different sea level rise benchmarks that are applicable in each state and Territory under the relevant planning regimes. It highlights that although there has been updates to a number of policies and plans within the last three years, a degree of inconsistency remains with the figures applied. It is acknowledged that it may be decided that differences are appropriate to take into account local variation; however, it is not necessarily apparent that the current inconsistencies are based on such evidence.

At present, all states and coastal territories aside from the Northern Territory and Tasmania have either mandatory or general guidance on a sea level rise benchmark.

¹¹⁷ *Queensland State Coastal Management Plan (2009)* compare with *NSW Sea Level Rise Policy Statement (2009)*, and the *NSW Coastal Planning Guideline: Adapting to SLR (2010)*

Table 3: State sea level rise benchmarks

	2050 (on 1990 levels)	2100 (on 1990 levels)	Reference
QLD	0.3m	0.8m	State Coastal Management Plan (2009)
NSW	0.4*	0.9*	NSW Sea Level Rise Policy Statement (2009), and the NSW Coastal Planning Guideline: Adapting to SLR (2010)
VIC	-	0.8	Victorian Coastal Strategy (2008)
TAS	Nil	Nil	State Coast Policy 1996
SA	0.3m	1m	Coast Protection Board Policy Document (2002)
WA	-	0.9m (by 2110)	State Coastal Planning Policy 2003 and sea level rise position statement
NT	Nil	Nil	NT Climate Change Policy 2009

*CSIRO has modeled sea level rise variation around Australia, and sea levels along the NSW coastline are projected to experience a regional rise of approximately 10cm, in addition to the global sea level rise projections¹¹⁸

As noted previously, many of the defences to liability claims involve an assessment as to whether a decision was reasonable and whether it was foreseeable. Central to these questions is what information was before the decision maker in assessing the risks. Where there is inconsistency in the information available to Council, such as in relation to sea level rise benchmarks, a Council must choose a source of information on which to base its decision. This could result in litigation where the information used contributes to loss.

The House Standing Committee on Climate Change, Water, Environment and the Arts has called for the federal government to develop an Intergovernmental Agreement on the Coastal Zone in cooperation with State, Territory and local governments.¹¹⁹

An integrated planning system would involve a national sustainable coastal planning framework which could incorporate a strategy for mitigating greenhouse gas emissions and adapting to climate change impacts. As it may not be practical for the Federal Government to have full responsibility for

¹¹⁸ Amended and updated extract from the GeoScience Australia OzCoasts website, <http://www.ozcoasts.org.au/climate/supporting.jsp>

¹¹⁹ Australian Government, *Managing our Coastal Zone in a Changing Climate: The Time to Act is Now* (House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, October 2009), Recommendation 44.

planning for coastal management, it could outline the responsibilities of the different levels of government and create a consistent standard approach to adaptation strategies which still allowed for flexibility for regional differences.¹²⁰ This system would be based on a set of overarching principles and key matters to be applied in all jurisdictions uniformly. It would also create a nationally consistent approach to climate change, based on the most reliable and up-to-date information. This would give local governments a source of information on which to base their decisions and thus provide certainty to this uncertain area.

In summary, an increasing move towards national consistency in applying sea level rise benchmarks should be promoted. Where local variations exist, these variations should be included in relevant benchmarks based on the best available evidence.

Variations between states are discussed in Part 3 and in the Summary Legislation Table at Appendix 3.

Councils also need support in prioritising actions and expenditure in response to risk factors in the context of limited revenues and many unknowns in terms of specific impacts in order to ensure their decisions are informed and mitigate against liability. The development of a national framework for climate change mitigation and adaptation would go a considerable way towards addressing these needs, and that a clear timeframe for completion of this framework will be established.

4.3 Lack of clear guidance, materials and expertise

An associated issue is the information, materials and expertise available to Councils to assess the appropriateness of developments. Climate change risk information is constantly changing and is often highly technical.

In order to mitigate liability, Councils must ensure they keep up to date with general climate change science and information related to mitigation and adaptation strategies and also information particular to their specific local government area. Councils will require localised information on impacts on which they can rely when making planning decisions and specialist advice on planning and engineering options for other aspects of adaptation.

As noted above, there are a large number of initiatives currently underway to assess and understand the risks associated with climate change impacts. Significant mapping and assessment exercises have been produced to underpin many of the legislative changes and policies in each state and at the federal level.

Such localised state based assessments are valuable. However, in the Report by the House of Representatives Standing Committee on Climate Change, it was noted that the Committee believes that more detailed, localised assessments of

¹²⁰ Lipman and R. Stokes, 'That sinking feeling: A legal assessment of the coastal planning system in New South Wales' (2011) 28 *Environmental and Planning Law Journal* 182 at 197.

the coastal zone will be of greatest value into the future.¹²¹ The House of Representatives Standing Committee Report also noted the concerns of the Western Australian government that there is no centralized repository of the various coastal assessments and hence limited comparative analysis to date. This has the potential to produce duplication and increase costs.

The status of some documents may also be unclear. As noted previously, in Tasmania although there have been a large number of assessments produced, the *State Coastal Policy 2008* was recently rejected, leaving a level of policy uncertainty given that *State Coastal Policy 1996* contains broad statements which can be regarded as lacking the specificity to allow enforcement.

In light of the large amount of information and technical nature of such information, Councils may wish to consider whether there is a role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks, including advice regarding the appropriateness of a particular development or conditions which should be included in a planning permit. Advice from this advisory body could be incorporated in the Council's final decision. It will be for the particular statute or policy adopted to determine how the advisory body's recommendations are to be taken into consideration.

Such an body would need to be streamlined or harmonised with any other agencies that have a role in regulating the coast such as flood plain managers, catchment management authorities, coastal management authorities.

Any new body should build and expand on government mapping initiatives such as *Future Coasts* in Victoria.

The new body could also be given other functions such as:

- acting as a centralised repository of mapping and impact assessments;
- commissioning mapping and impact assessments on behalf of Councils and government departments;
- developing coastal hazard management plans;
- developing guidelines and policies;
- co-coordinating temporary protection works and relief with emergency services;
- accrediting independent experts in climate change mapping and impact assessment;
- training Council staff and elected representatives; and
- educating and advising business and the community about climate change impacts.

It will need to be determined whether this body should be 'independent', in a similar way to the relevant environment protection authorities, or fall within a government department.

¹²¹ Report by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Managing our coastal zone in a changing climate, The time to act is now*, October 2009, p 74-76

There should also be ongoing programmes run at a state or national level, as well as locally within the individual Councils to educate and train staff and Councilors about the nature, impact and risks of climate change, the potential liability of councils and the most up-to-date information. This will ensure that Councils are best able to deal with the issue of climate change in their decision-making and day-to-day functions. An example of where such an initiative is already in practice is the Local Government and Shire Associations of New South Wales, which runs events, courses and conferences throughout the year for shires and local governments.

4.4 Lack of funding

A large barrier which faces Councils with the development and implementation of climate change initiatives is the ability to obtain financial resources and skills within the organisation. Councils, particularly smaller councils, struggle to obtain resources due to budgetary constraints, and have difficulty processing the lag time between seeing the direct benefits or outcomes of climate change initiatives and their implementation. A lack of immediacy is created with climate change which can impact on the support for initiatives both internally and externally leading to affects on resource allocation.

The two primary sources of funding for Councils are support from federal or state/territory governments or the charging of rates or levies to specifically fund initiatives to deal with climate change impacts. In particular, Councils may levy different rates on properties that obtain direct benefits from sea walls and other mitigation works. The ability of Councils to levy such rates varies between states.

In states such as Western Australia and South Australia there are relatively broad powers to levy differential rates. For example, in Western Australia differential rates can be levied, including for public works, depending on the zoning or the use of the land under section 6.33 of the *Local Government Act 1995* (WA).

In NSW a Council may impose variable rate levies by determining a sub-category or sub-categories for one or more categories of rateable land in its area based on a number of land use categories.¹²² However, as properties that are subject to climate change impacts are likely to contain a mixture of land use types, Councils are unlikely to be able to use this particular rate variation provision in every instance.

Beneficially, in NSW there is a specific provision under section 496B of the *Local Government Act 1993* (NSW), allowing a Council to make and levy an annual charge for the provision by the Council of coastal protection services for

¹²² Section 529, *Local Government Act 1993* (NSW) (2) A sub-category may be determined: (a) for the category "farmland"-according to the intensity of land use, the irrigability of the land or economic factors affecting the land, or (b) for the category "residential"-according to whether the land is rural residential land or is within a centre of population, or (c) for the category "mining"-according to the kind of mining involved, or (d) for the category "business"-according to a centre of activity.

a parcel of rateable land that benefits from the services, being services that relate to coastal protection works constructed.

Therefore, although Councils may not be able to levy variable rates in NSW, they are able to make levies or annual charges for coastal protection under section 496B of the *Local Government Act 1993* (NSW). However, this specific provision may not extend to all types of climate change mitigation works, particularly if such works do not have a direct nexus with “coastal protection” (such as inland drainage works to deal with increased storm surge activity). Nevertheless, this can be seen as a positive move towards addressing some of the issues Councils face in funding climate change works.

A broad power is also found in section 111 of the *Local Government Act 1989* (Vic) where Council has the power to make local laws ‘for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act’. In section 113 it is stated that a local law may provide that a Council may by resolution determine a fee, charge, fare or rent in relation to any property, undertaking, goods, service or other act, matter or thing. This power may allow Councils to levy funds to manage climate change impacts.

In NSW, the express provision to make and levy annual charges for the provision of coastal protection services is a positive provision that other jurisdictions could consider duplicating. If Councils do consider inserting relevant provisions to levy fees, it may be cast even wider than the NSW provision which may not cover climate change works that do not have a “coastal” element.

Council capacity and capability is clearly a significant factor in achieving an effective national response to climate change, and federal and state governments need to carefully examine how to further assist those councils that have very limited resources – many located in some of the areas most vulnerable to climate change impacts. In addition to the recommendations outlined above, consideration will almost certainly need to be given to adjustments to federal financial assistance grant allocations or other funding measures to help councils meet the long term challenges of climate change mitigation and, especially, adaptation measures.

5. Strategies and Recommendations

This Section revisits the risks faced by councils in relation to their responsibilities regarding climate change risks and identifies strategies to improve local government responses and mitigate against the risk of litigation through recommendations in three key areas:

- (a) council decision making;
- (b) regulatory reform; and
- (c) promotion of a nationally consistent approach.

Many of the council decision making recommendations can be adopted by Councils themselves when exercising their powers and functions, in particular with respect to planning in coastal zones.

The recommendations in relation to regulatory reform can be adopted by working in partnership with relevant State and Territory governments to ensure legislation that addresses the liability of Councils offers suitable protections and that legislation that confers powers and functions on Councils (e.g. local government, planning or coastal protection legislation) provides clear guidance as to how decisions are to be taken.

Whilst we appreciate the need for national consistency, and the call for leadership from the Commonwealth Government, we note that the ability of the Commonwealth to provide legislative guidance to local and State governments in this area is limited and that the role of the Commonwealth will more directly manifest itself in respect of assisting with the provision of information and financial resources and through progressing this issue through the Council of Australian Government (COAG). Our recommendations in relation to the promotion of a nationally consistent approach provide ways of working collaboratively with the Commonwealth Government in this regard.

5.1 Council decision making

In order to mitigate liability, Councils must ensure they keep up to date with general climate change science and information related to mitigation and adaptation strategies and also information particular to their specific local government area. Councils will require localised information on impacts on which they can rely when making planning decisions and specialist advice on planning and engineering options for other aspects of adaptation.

Clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of the best available scientific evidence. This could involve an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks, including advice regarding the appropriateness of a particular development or conditions which should be included in a development approval.

As uncertainty regarding climate science and climate change impacts is resolved over time, policy or guidance material used by Councils should be adjusted to reflect current knowledge.

Ensuring public consultation procedures are appropriate in each instance may also limit actions seeking administrative review. Increasing public consultation may improve transparency around decision making processes and limit administrative review but this need should be weighed in each instance against the increased work associated with managing the consultation process.

An associated issue is that property owners in an area have timely and transparent access to information, such as best available flood mapping and data. Ensuring that potential risks are communicated will allow property owners to adjust their expectations of the types of development that may be permitted on their property and avoid challenges to planning decisions.

A fundamental means of avoiding liability for councils is to exercise reasonable care when making planning decisions, which involves taking care to ensure all relevant facts are known and understood, that relevant law is identified and understood, and that reasons for decisions are expressed in clear and accurate terms. Councils also need to adopt this strategy with respect to the development of planning schemes and, at the very least, Councils need to minimise development in highly vulnerable areas.

The following table provides a summary of recommendations in relation to council decision making.

Table 4: Recommendations in relation to council decision making

Recommendations in relation to council decision making	
Recommendations in relation to tort claims	Councils need to adopt a <i>reasonable</i> strategy to considering climate change impacts when determining development applications in order to create a strong defence to civil liability. This will provide evidence that Councils are integrating climate change considerations into the exercise of their statutory duties
	Councils need to adopt a reasonable strategy with respect to the development of planning schemes. At the very least, councils need to minimise development in highly vulnerable areas
Recommendations for planning permit decisions	Clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of the best evidence
	Policy or guidance material should be adjusted in the light of new scientific and other climate change information
	Councils should ensure public consultation procedures are appropriate in each instance to improve transparency around a process and limit administrative review

Recommendations in relation to council decision making	
	Councils should provide property owners in an area with timely and transparent access to information, e.g. best available flood mapping and data
	Councils may wish to lobby for an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks, including advice regarding the appropriateness of a particular development or conditions which should be included in a development approval. It should be considered whether this centralised advisory body should be placed at the State or Federal level

5.2 Regulatory reform

Regulatory reform, on a number of levels, will assist Councils in their decision making in relation to climate change activities and enhance their protection from liability.

As noted above, there is a need for an integrated approach to planning for the entire Australian coast.¹²³ This will promote uniform decision making across jurisdictions and enable the sharing of resources and learning across jurisdictions and reduce the frustration of landowners and developers exhibited towards Councils who are bound by differing planning regimes in each state.

Certain state/territory regulatory regimes could benefit from replicating reforms currently present in other state/territory regimes, in particular with respect to limitations on liability through civil liability and local government legislation and the adoption of specific regimes to manage climate change impacts in planning and coastal management legislation.

The following table provides a summary of recommendations in relation to regulatory reform, identifying deficiencies across and within particular state schemes.

Table 5: Recommendations in relation to regulatory reform

Recommendations in relation to regulatory reform	
Lack of decision making power recommendations	In States such as Victoria, there is no permit trigger requiring the assessment of all development in areas that are prone to climate change risks. Councils should ensure that all developments on the coast require some form of planning

¹²³ L. Potts, 'Blueprint Planning for National Coastal Development' (2005) 125 ECOS 4; Z. Lipman and R. Stokes, 'That sinking feeling: A legal assessment of the coastal planning system in New South Wales' (2011) 28 *Environmental and Planning Law Journal* 182 at 196; B. Norman, 'Sustainable Coastal Planning for Urban Growth and Climate Change' (*New South Wales Coastal Conference*, Bateman's Bay, 10-12 November 2010), pp 5-6.

Recommendations in relation to regulatory reform	
	approval trigger
Recommendations in relation to tort claims	Defences similar to the defence under s 733 of the <i>Local Government Act 1993</i> (NSW) are an important protection for Councils. They allow for Councils to respond to the threat of climate change according to their capabilities without the fear of incurring liability in negligence or nuisance
	The Northern Territory and South Australia should implement statutory reform with respect to the civil liability of public authorities as the other jurisdictions have. This would create more certainty surrounding what Councils are liable for, as well as providing greater protection for Councils
	The Australian Capital Territory and the Northern Territory should adopt the statutory defences relating to obvious and inherent risks, to allow for greater protection, particularly if and when climate change risks come to be realised as obvious or inherent risks
	Statutory reforms with respect to civil liability (including limitation of liability of Councils and stronger defences) do not apply to the tort of nuisance. The tort of nuisance is very unsettled, and it is not even clear whether liability is strict or whether there are defences in certain cases. If the legislative reforms to defences were applied to nuisance, it would provide both clarity and protection to Councils
Recommendations for planning permit decisions	There is a need for an integrated approach to planning for the entire Australian coast. Further, each State needs to develop an integrated coastal planning system based on up-to-date information
	Ensuring public consultation procedures are appropriate in each instance may limit actions seeking administrative review
	There is a need for stronger laws and more clearly defined responsibilities with respect to the extent to which climate change impacts are to be considered in approving or declining development applications. Examples could include buffer zones in local planning policies and restrictive zoning
	Limiting the statutory right to merits review may limit the complexity and number of applications that will be subject to review. A similar outcome may also be achieved by limiting the standing to sue provisions, ensuring that only those persons immediately and directly affected have standing to sue. Any procedure to limit merits review or standing must be weighed against the public interest in limiting protections afforded to those affected by government decision making
	Clear permit conditions and mechanisms such as the ability to

Recommendations in relation to regulatory reform	
	place covenants on title or issue temporary permits should be developed
Recommendations regarding compensation for planning scheme amendments	In Queensland, Councils can avoid paying injurious affection compensation claims if they are making changes to comply with a "standard planning scheme provision". Where changes are necessary to deal with climate change risks, it would be beneficial if the State government first made such amendments to its standard planning scheme provisions
Recommendations regarding emergency protection works	The NSW and Queensland provisions clarifying when and how emergency works can be put in place can be seen as a positive move towards clarifying the position of landholders and Councils to undertake coastal protection works and control erosion. Councils in other jurisdictions may consider the use of similar provisions
	In Victoria the ability to take emergency works appears limited and consideration may be given to clarifying provisions under the <i>Coastal Management Act 1995</i> (Vic) and <i>Environment and Planning Act 1987</i> (Vic) to allow Councils or persons to undertake emergency works without obtaining Ministerial approval
	In Tasmania, similar to Victoria, consideration could be given to clarify the ability of Councils and persons to undertake emergency works and obtain retrospective approval if required
Recommendations in relation to accretion and erosion recommendations	Councils may wish to consider amending through legislation the common law doctrine of accretion and erosion such that erosion events caused by sudden storm surges result in the boundary of land moving and reverting to the Crown. Similarly, the doctrine of accretion can also be amended by Statute to ensure public access and ownership
Recommendations in relation to compulsory acquisition¹²⁴	The restriction on the re-sale of compulsorily acquired land in NSW may act as a deterrent in some situations to Councils compulsorily acquiring land. Policy consideration may be given to whether resale could be allowed in certain circumstances
	In SA there is a specific exemption stating that Ministerial approval is not required to acquire land to prevent flooding. However, there is a question of construction as to whether inundation due to sea level rise will be considered flooding and gain the benefit of this exemption. As such this provision in the Regulations could be clarified to make it clear that this includes

¹²⁴ In Victoria, as Councils are granted a broad power to purchase or compulsorily acquire any land which may be required in connection with (or even as incidental to) the exercise of their powers, we do not consider reform necessary in this area.

Recommendations in relation to regulatory reform	
	flooding or protection works due to increased sea-level rise or other climate change impacts such as storm surges
	In Western Australia Councils can take land by agreement or compulsorily, for public work. In WA it is not clear that all works to mitigate climate change impacts will clearly fall within the definition of “public work”. WA could clarify the situation by including a specific category of “public work” that relates to works to coastal protection works or works to mitigate climate change impacts in the <i>Public Works Act 1902</i> (WA)
Recommendations in relation to rate determinations and environmental levies	<p>In NSW the express provision to make and levy annual charges for the provision of coastal protection services is a positive provision that other jurisdictions could consider duplicating</p> <p>If Councils do consider inserting relevant provisions to levy fees, it may be cast even wider than the NSW provision which may not cover climate change works that do not have a “coastal” element</p>

5.3 Promoting a nationally consistent approach

Significant work has been undertaken and coordinated by the Federal government, its research agencies and committees such as the CCCC in relation to adaptation to climate change and addressing impacts of climate change in the coastal zone. This work includes:

- developing public good information in relation to risks and likely impacts of climate change to Australia’s coastal assets;
- undertaking scientific research in order to gain more detailed information on the causes, nature and consequences of climate change;
- consulting with decision makers to prepare Australia for future climate challenges on the coast; and
- funding adaptation programs at a local government level.

This work, along with programmes and studies carried out by and on behalf of State and Territory governments provides an important base of information which can assist Councils in understanding risks and making appropriate decisions that enable adaptation (rather than maladaptation) to climate change impacts.

Despite the strong national, state and local interactions that drive policy and funding, current arrangements are often complex and networked, with the three levels of government, other public organisations and the private sector often having shared (and duplicated) responsibilities for policy formulation, decision-making and management. This complexity is a barrier to sound adaptation planning.

There are not only variations in the level of sophistication of the approaches adopted by Australian jurisdictions in the laws and policies that have implications for the ability of Councils to manage the risks of climate change. Those governments which have developed laws and policies in similar areas have adopted a diversity of approaches.

Coordinated national leadership, with clear allocation of responsibilities, is needed to reduce uncertainty in responding to climate change risks and provide clear information, tools and consistent messages that facilitate the engagement and building of communities' capacity in coastal adaptation.

As noted above, the Commonwealth has only a limited role in setting the legislative agenda for environmental management, planning and the delivery of local government services. The Commonwealth Constitution does not recognise local government as a branch of government and, as a result of which, the Commonwealth does not have inherent jurisdiction over Councils. This means that, in order to influence coastal zone management outcomes, the Commonwealth is primarily responsible for setting a high level national policy agenda and coordinating State and local government responses through funding and research.

This notwithstanding, there is significant scope to leverage the work being undertaken by the Commonwealth, in particular through COAG, the CCCC and other Commonwealth research bodies such as CSIRO. The information developed by and for the Commonwealth, along with the funding it provides to pursue adaptation and mitigation strategies throughout the community, will underpin policy choices made by State and local governments. COAG also plays a significant role in shaping the direction of policy and can be used to promote a nationally consistent approach to coastal adaptation.

The following table provides a summary of recommendations in relation to promoting a nationally consistent approach to manage climate change impacts.

Table 6: Recommendations in relation to promoting a nationally consistent approach

Recommendations in relation to promoting a nationally consistent approach	
General	There is a need for an integrated approach to planning for the entire Australian coast. In particular, each State needs to develop an integrated coastal planning system based on up-to-date information.
	Coordinated national leadership, with clear allocation of responsibilities, is needed to reduce uncertainty in responding to climate change risks and provide clear information, tools and consistent messages that facilitate the engagement and building of communities' capacity in coastal adaptation.
	There should be an increasing move towards national

Recommendations in relation to promoting a nationally consistent approach	
	consistency in applying sea level rise benchmarks. Where local variations exist, these should be included based on the best available evidence.
Recommendations for planning permit decisions	Councils should lobby for an expanded role for a centralised advisory body to collect and disseminate information and provide assistance and input, where appropriate, to aid Councils in assessing impacts and risks in the course of their decision making, including advice regarding the appropriateness of a particular development or conditions which should be included in a development approval. It should be considered whether this centralised advisory body should be placed at the State or Federal level.
	A centralized advisory body should prepare and distribute generic and specific policy and guidance material across jurisdictions for councils in relation to planning permit decisions.

Appendix 1 – Table outlining variations in negligence laws between jurisdictions

	ACT	NT	NSW	QLD	SA	TAS	VIC	WA
Duty of care	<p>Act/omission must be manifestly unreasonable: <i>Civil Law (Wrongs) Act 2002</i>, s 111</p> <p>Further limitations/considerations: financial and other resources available, allocation of resources cannot be challenged, range of Council's activities, evidence of compliance with general procedures and relevant standards: <i>Civil Law (Wrongs) Act 2002</i>, s 109</p>	<p>Council is only liable under limited circumstances if they have a special measure of control over safety of citizens: <i>Brodie v Singleton Shire Council</i> (2001) 206 CLR 512</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 42, s 43</p>	<p>See ACT: <i>Civil Liability Act 2003</i>, s 3(b), s 36</p>	<p>See NT</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 37, s 40</p>	<p>See ACT: <i>Wrongs Act 1958</i>, s 79, s 84(2)</p>	<p>A policy decision cannot be used to support a finding that the council was at fault unless it was manifestly unreasonable: <i>Civil Liability Act 2002</i>, s 5X</p> <p>For further limitations, see ACT: <i>Civil Liability Act 2002</i>, s 5U</p>
Reasonable Foreseeability	<p>A person is not negligent for failing to take precautions unless: the risk was foreseeable, not insignificant and a reasonable person would have taken precautions in those circumstances: <i>Civil Law (Wrongs) Act 2002</i>, s 43(1)</p>	<p>The risk must not be far-fetched or fanciful: <i>Council of Wyong Shire v Shirt</i> (1980) 146 CLR 40 at 47-8</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 5B(1)</p>	<p>See ACT: <i>Civil Liability Act 2003</i>, s 9(1)</p>	<p>See ACT: <i>Civil Liability Act 1936</i>, s 32(1)</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 11(1)</p>	<p>See ACT: <i>Wrongs Act 1958</i>, s 48(1)</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 5B(1)</p>
Causation	<p>Two-fold test: the negligence was a necessary condition of the harm; and it is appropriate for the liability to</p>	<p>Test: if the plaintiff would not have sustained his or her injuries were it not</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 5D(1)</p>	<p>See ACT: <i>Civil Liability Act 2003</i>, s</p>	<p>See ACT: <i>Civil Liability Act 1936</i>,</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s</p>	<p>See ACT: <i>Wrongs Act 1958</i>, s 51(1);</p>	<p>See ACT: <i>Civil Liability Act 2002</i>, s 5C(1)</p>

	ACT	NT	NSW	QLD	SA	TAS	VIC	WA
	extend to the harm caused: <i>Civil Law (Wrongs) Act 2002</i> , s 45(1)	for the negligence of the defendant		11(1)	s 34(1)	13(1);		
Defence – obvious risks	Voluntary assumption of risk: there will be no liability if the council can establish that the plaintiff was aware of the risk, comprehended the risk and accepted the risk: <i>Roggenkamp v Bennett</i> (1950) 80 CLR 292 at 300.	See ACT	The plaintiff is presumed to be aware of an 'obvious risk' (a risk that would have been obvious to a reasonable person in the plaintiff's position): <i>Civil Liability Act 2002</i> , s 5F(1)	See NSW: <i>Civil Liability Act 2003</i> , s 13(1)	See NSW: <i>Civil Liability Act 1936</i> , s 36(1)	See NSW: <i>Civil Liability Act 2002</i> , s 15(1)	See NSW: <i>Wrongs Act 1958</i> , s 53(1)	See NSW: <i>Civil Liability Act 2002</i> , s 5F(1).
Defence – inherent risk	No defence	No defence	The defendant is liable only for a failure to warn of an inherent risk (one that cannot be avoided by the exercise of reasonable care and skill): <i>Civil Liability Act 2002</i> (NSW), s 5I	See NSW: <i>Civil Liability Act 2003</i> , s 16	See NSW: <i>Civil Liability Act 1936</i> , s 39	No defence	See NSW: <i>Wrongs Act 1958</i> , s 55	See NSW: <i>Civil Liability Act 2002</i> , s 5P
Defence – failure to warn or inform	General reversal of the onus of proof	See ACT	This is not a breach of duty unless the plaintiff has inquired about the risk from the defendant or the defendant is required by law to warn the plaintiff of the risk: <i>Civil Liability Act 2002</i> (NSW), s 5H	See NSW: <i>Civil Liability Act 2003</i> , s 15	See NSW: <i>Civil Liability Act 1936</i> , s 38	See NSW: <i>Civil Liability Act 2002</i> , s 17	See ACT	See NSW: <i>Civil Liability Act 2002</i> , s 50

Appendix 2 – Table outlining detail of potential claims against council

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
Tort based claims					
1. Claim in negligence for approving development	Council negligently fails to consider climate change risks when granting development consent and harm is suffered.	<p>In all jurisdictions other than the NT and SA due to statutory reform, decisions of local governments are not considered to be negligent unless they are manifestly unreasonable. The common law provides a similar (but less strict) defence in the NT and SA.</p> <p>In NSW there is a defence under s 733 of the <i>Local Government Act 1993</i> (NSW).</p> <p>In all jurisdictions other than the ACT and the NT, the defence of 'obvious risk' provides that the plaintiff is presumed to be aware of an obvious risk. In the ACT and the NT, there is a general reversal of the onus of proof in failure to warn or inform</p>	<p><i>Alec Finlayson Pty Ltd v Armidale City Council</i> (1994) 84 LGERA 225.</p> <p>Several cases have held that climate change is a relevant factor to take into account when determining a development application including:</p> <p><i>Hain v Glen Eira</i> [2006] VCAT 2493</p> <p><i>Taralga Landscape Guardians Inc v Minister for Planning</i> [2007] NSWLEC 59</p> <p><i>Jackson Teece v Waverly Council</i> [2007] NSWLEC 69</p> <p><i>Walker v Minister for Planning</i> [2007] NSWLEC</p>	<p>For the relevant common law and statutory provisions, please see section 2.2 (Negligence – Limitation on the duties of councils)</p> <p>NT and SA, the common law will apply.</p> <p>In the ACT, Qld. Tas, WA and Vic, an act or omission is not a breach of statutory duty unless it is so unreasonable that no authority with the same functions in the circumstances could properly consider the act or omission to be a reasonable exercise of its functions.</p> <p>In Western Australia, a policy decision cannot support a finding that a local council was at fault unless it was so</p>	<p>Councils should consider climate change impacts and act reasonably in approving development applications.</p> <p>In NSW, councils may raise a defence under section 733 of the <i>Local Government Act 1993</i> (NSW).¹²⁵ The enactment of similar provisions may be considered in other jurisdictions.</p> <p>NT and SA may consider statutory reform so that decisions are not negligent unless they are manifestly unreasonable</p> <p>The ACT and the NT may consider adopting the statutory defences relating to obvious and inherent</p>

¹²⁵ *Local Government Act 1993* (NSW) ss 731, 733; *Environmental Planning and Assessment Act 1979* (NSW), s 149(6).

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
		cases.	741 <i>14 Regent Street Pty Ltd v Hobart City Council</i> [2005] TASRMPAT 26	unreasonable that no reasonable local council in the position of the defendant could have made it.	risks.
2. Claim in negligence for failure to include protective standards in planning schemes	Council fails to include protective standards in planning schemes, and as a result of this omission a resident suffers loss or damage.	See discussion in [1] above.	<i>Ryan v Great Lakes Council</i> [1999] FCA 177	See discussion in [1] above.	See discussion in [1] above. Councils need to minimise development in highly vulnerable areas. Whether councils should take proactive steps to protect private property will depend on the wealth and resources of individual councils. Councils need to consider climate change in the development of planning schemes and set stringent conditions to respond to climate change.
3. Claim in nuisance for failure to include protective standards in planning schemes	Council fails to include protective standards in planning schemes, and as a result of this omission a resident suffers nuisance.	The statutory reforms with respect to civil liability (including limitation of liability of councils and stronger defences) do not apply to the tort of nuisance. A council is only obliged to			A council should take reasonable steps to prevent a natural phenomenon from affecting neighbourhood land. The statutory reforms with respect to civil liability

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
		take reasonable steps to prevent a natural phenomenon from affecting neighbourhood land if it can be said that the nuisance emanates from its land or land under its control. ¹²⁶ This applies to risks such as the spread of bush fire from council land. However, it is unlikely that climate change related ocean hazards would be so characterised.			(including limitation of liability of councils and stronger defences) do not apply to the tort of nuisance. The tort of nuisance is very unsettled, and it is not even clear whether liability is strict or whether there are defences in certain cases. If the legislative reforms to defences were applied to nuisance, it would provide both clarity and protection to councils.
4. Claim in negligence for failing to maintain or build infrastructure, conduct coastal mitigation	If a council fails to maintain or build infrastructure of conduct coastal mitigation works (including a failure to upgrade drains, stormwater systems and roads, and to build mitigation works such as seawalls and levees), it could be liable under negligence (for compensatory damages) or private or public nuisance (for an injunction or compensatory damages).	See discussion in [1] above.	<i>Brodie v Singleton Shire Council</i> (2001) 206 CLR 512 <i>Aiken v Kingborough Corporation</i> (1939) 62 CLR 179	See discussion in [1] above.	See discussion in [1] above.

¹²⁶ *Goldman v Hargrave* [1966] 1 All ER 645.

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
5. Claim in nuisance for failure to conduct coastal mitigation works	However, if a council had knowledge that climate change related hazards would cause damage to private property unless infrastructure was maintained or built, or coastal mitigation works were conducted, it could be held to be liable for a failure to restrain the nuisance, depending on the difficulty and expense (and thus, reasonableness) in doing so.	See discussion in [3] above.	Nuisance cases dealing with the failure to remedy a situation which has arisen through an act of nature include <i>Goldman v Hargrave</i> [1966] 1 AC 645, <i>Leakey v National Trust</i> [1980] 1 All ER 17, <i>Stockwell v State of Victoria</i> [2000] VSC 497, <i>Bankstown City Council v Almodo Holdings Pty Ltd</i> (2005) 223 CLR 660 and <i>Marcic v Thames Water Utilities Ltd</i> [2004] 2 AC 42	See discussion in [3] above.	See discussion in [3] above.
6. Claim for compensation for failure to provide information	A council may be liable for an action in negligence for failure to provide information about climate change risks and could be required to pay compensatory damages.	See discussion in [1] above It may be difficult for a plaintiff to succeed in such a cause of action for two reasons. Firstly, it would be difficult to establish that a council owed a duty to warn of such risks. Secondly, the plaintiff must prove that his or her loss flowed from the omission. It would be difficult to establish that a council had control when damage is caused by sea level rise or storm surges.	The line of 'failure to warn' cases is primarily concerned with medical cases, for example, failure to warn of the risk of developing HIV/AIDS.	See discussion in [1] above.	See discussion in [1] above.

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
		In the ACT and NT, a defendant is not liable for failure to warn if it can establish that the plaintiff was aware of, comprehended and accepted the risk. The question of whether the erosion of a beachfront property that already shows signs of storm wave impacts constitutes an obvious risk could depend on the extent of the erosion. However, with the increasing media coverage of climate change, in the future a presumption may arise about the vulnerability of coastal property. ¹²⁷ Whether erosion control or flood mitigation requiring costly engineering works to minimise impact would constitute an inherent risk is unclear and requires judicial clarification.			
7. Claim for compensation for providing	A council may be liable for an action in negligence for providing incorrect information	See discussion in [1] above	In <i>Shaddock v Parramatta City Council</i> (1981) 150 CLR 225	See discussion in [1] above.	See discussion in [1] above. Councils need to adopt a

¹²⁷ J. McDonald, 'A risky climate for decision-making: The liability of development authorities for climate change impacts' (2007) 24 *Environmental and Planning Law Journal* 405 at 414.

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
incorrect information	about climate change risks and could be required to pay compensatory damages If a council gives incorrect advice to residents and they rely on this advice to their detriment, they could be liable for making a negligent misstatement.		<i>In Kyriacou v Kogarah Municipal Council</i> (1995) 88 LGERA 110		strategy to respond to climate change impacts. ¹²⁸ Because of the uncertainty and scepticism that surrounds climate change, councils are concerned about giving advice which could make them liable.
Administrative review					
8. Administrative review of a planning decision	A right to merits review is generally available for all planning decisions made by Councils Judicial review may also be available under either: the relevant Supreme Court's inherent jurisdiction; or the relevant administrative law legislation	Administrative decision: an essential pre-cursor to bringing an action for administrative review is that a "decision" has been made. Generally, preliminary steps are not reviewable. Standing: Generally to have standing the person or group must be affected by the decision. Decision making process: Councils retain significant discretion and as long as the	<i>Walker v Minister for Planning</i> [2007] NSWLEC 741 <i>Charles & Howard Pty Ltd v Redland Shire Council</i> [2007] QCA 200 <i>Northcape Properties v District Council of Yorke Peninsula</i> [2008] SASC 57 <i>Gippsland Coastal Board v South Gippsland SC and Ors (No 2)</i> [2008] VCAT 1545	Please see table at Appendix 3	Clearer and certain criteria for decision making. Consider a centralised expert advisory body. Timely and transparent access to information, such as best available flood mapping and data. Communicating risks to landholders to manage expectations. Consider if rights to merits

¹²⁸ P. England, 'Heating up: Climate change law and the evolving responsibilities of local government' (2008) 13 *Local Government Law Journal* 209 at 219.

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
		correct processes are followed.			review and standing provisions are appropriate.
9. Administrative review of planning scheme amendments	<p>Regularly in planning scheme amendments the final decision is the Ministers however, there is a staged public consultation and assessment process in which the Council is involved. If the relevant process is not followed or irrelevant considerations are taken into account that may invalidate that section of the processes.</p> <p>A (limited) right to merits review is generally available for all planning decisions made by Councils.</p> <p>Judicial review may also be available under either:</p> <p>the relevant Supreme Court's inherent jurisdiction; or the relevant administrative law legislation</p>	<p>In seeking review of interim steps in a proceeding there may be a question of whether the particular resolution, function or action undertaken by the Council is a "decision of an administrative character" or merely a "preliminary step". If an action is merely a preliminary step it may not be subject to review. This will turn on the particular legislation and step in the process.</p> <p>Decision making process: Councils retain significant discretion and as long as the correct processes are followed.</p>	<p><i>Australian Conservation Foundation v Latrobe City Council</i> (2004) 140 LGERA 100</p> <p><i>Redland Shire Council v Bushcliff Pty Ltd</i> [1997] 2 Qd R 97</p> <p><i>Noosa Shire Council v Resort Management Services Ltd</i> (1993) 81 LGERA 295</p>	Please see table at Appendix 3	See discussion in [8] above
10. Administrative review: decisions to make by-laws	If Councils make by-laws to control access or require licences or fees to be paid to manage climate change risks,	A decision to pass a by-law may not be a decision of an administrative character but rather of a legislative	<i>R. v. Toohey ex parte Northern Land Council</i> (1980-1981) 151 C.L.R. 170		See discussion in [8] above

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
	persons may seek to review such decisions.	character and it may not be open to review.	<i>Paradise Projects Pty Ltd v Council of the City of the Gold Coast</i> [1994] 1 Qd R 314		
11. Administrative review: decisions regarding levies, special rates, fees or levies	<p>Most jurisdictions Councils will have some power to levy particular rates on the owners of land benefited by works carried out by Councils to pay for the special benefit to the land. Councils may find themselves subject to review where applicants submit that they do not receive any "special benefit" from such works.</p> <p>Similarly, Councils may find other rate determinations or decisions to levy particular fees subject to review.</p>	<p>In relation to rate variations or rates that benefit certain lands it will be a question in each case as to the wording of the particular enactment and whether the particular works as well as providing a benefit to the particular rate-holder levied, also subsidise the cost of providing another or other associated services, facilities or activities to rateable land that is not the subject of the charge</p> <p><i>Relevant considerations</i></p> <p>Councils will also need to ensure that they do not take irrelevant considerations into account.</p>	<p><i>Bankstown Municipal Council v Fripp</i> (1919) 26 CLR 385;</p> <p><i>Parramatta City Council v Pestell</i> (1972) 128 CLR 305;</p> <p><i>Western Stores Ltd v Orange City Council</i> (1973) 47 ALJR 118 (Privy Council);</p> <p><i>Severn Shire Council v North West County District Council</i> (1974) 1 NSWLR 190;</p> <p><i>Shanvale Pty Ltd v Livingstone Shire Council</i> (1999) 105 LGERA 380;</p> <p><i>Australand Land and Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council</i> [2006] QSC 332 which was upheld on appeal in <i>Australand Land and</i></p>	Please see table at Appendix 3.	

Claim	Particulars of the claim - cause of action - how council's liability may arise	Defences	Comparable cases	Jurisdictional variation	Risk mitigation
			<p><i>Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council</i> [2007] QCA 189 ; [2008] 1 Qd R</p> <p><i>Leagrove Pty Ltd and Ors v Gold Coast City Council</i> [2010] QSC 370</p> <p>Irrelevant considerations</p> <p><i>Xstrata Coal Qld P/L and Ors v Council of the Shire of Bowen</i> [2010] QCA 170</p>		

Appendix 3 – Table of legislative and policy frameworks

Legislation	Policy/Strategies/Plan
VICTORIA	
<p>Coastal Management Act 1995 (Vic)</p> <ul style="list-style-type: none"> section 37, consent is required to use or develop Crown land section 14, it is a requirement that the Council prepare the Victorian Coastal Strategy <p>Emergency works</p> <p>In Victoria we are not aware of a specific policy for emergency coastal protection works. Under the Coastal Management Act 1995 (Vic) a person must not use or develop coastal Crown land unless the written consent of the Minister has first been obtained (Section 37, Coastal Management Act 1995 (Vic))</p> <p>The definition of development includes works, which is in turn broadly defined to include any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil. This Victorian provision may prevent landholders or Councils undertaking emergency works</p>	<p>The Victorian Coastal Strategy 2008 (VCS 2008) sets the overall strategic direction for planning and management of the coast in Victoria. It plans for sea level rise of not less than 0.8 metres by 2100, and allows for the combined effects of tides, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change. As scientific data becomes available the policy of planning for sea level rise of not less than 0.8 metres by 2100 will be reviewed. http://www.vcc.vic.gov.au/2008vcs/part2.1climatechange.htm</p> <p>Future Coasts Coastal climate change vulnerability mapping includes:</p> <ul style="list-style-type: none"> http://www.climatechange.vic.gov.au/_data/assets/pdf_file/0007/77947/Planningforcoastalclimatechange1.pdf <p>Victorian Coastal Climate Change Hazard Guidelines Project Summary Document 2010</p> <ul style="list-style-type: none"> CSIRO Technical Reports: The Effects of Climate Change on Extreme Sea Levels in Port Phillip Bay and the Victorian Coast <p>Future Coasts proposed work program</p> <ul style="list-style-type: none"> Local Coastal Climate Change Assessments The land and sea DEM will be integrated with the modelling work to provide climate change assessments of the coastline. These assessments will be accessible to agencies and land managers to undertake further analysis of the impacts climate change 2011- 2012. The Future Paper is currently undergoing development as part of an internal review process and has previously been titled the Impacts and Responses paper. Stakeholder contributions were obtained via a series of practitioner workshops, which focused on the impacts and responses to climate change on Victoria's coast. 2011 The Future Coasts Program report is providing a basis for government's response to managing

Legislation	Policy/Strategies/Plan
<p>Planning and Environment Act 1987 (Vic)</p> <ul style="list-style-type: none"> Section 14, the duties of a responsible authority include administering, enforcing, implementing the planning scheme Part 3 of the P&E Act (Vic) deals with amendments to planning schemes Section 13 sets out that the person who is the responsible authority for the administration or enforcement of a planning scheme is the municipal council if the planning scheme applies to land which is wholly or partly in its municipal district unless the planning scheme specifies any other person as the responsible authority <p>Compensation</p> <ul style="list-style-type: none"> In Victoria the following sections enable a claim for compensation: sections 62, 98, 172 or 200, <i>Planning and Environment Act 1987</i> (Vic) Section 98 of the P&E Act (Vic) grants a right to compensation where land is required for a public purpose. An owner may claim compensation from a council for 'financial loss suffered as the natural, direct and reasonable consequence of a refusal by the responsible authority to grant a permit to use or develop the land on the ground that the land is or will be needed for a public purpose' Section 171-173 of the P&E Act (Vic) grants Councils the power to enter into agreements with landholders. Once registered agreements run with the land <p>Right to review of planning decisions</p> <p>Planning scheme amendments</p>	<p>the impacts of climate change on the coast. The format for this response and package of information is currently being developed. Mid 2011</p> <ul style="list-style-type: none"> Planning schemes are the central method for land use planning in Victoria. The Victorian Planning Provisions are a State wide standard reference document used to construct planning schemes. The VCS 2008 is embedded into the Victorian Planning System across three sections of the Victorian Planning Provisions. Coastal references are embedded in the State Planning Policy Framework at: <ul style="list-style-type: none"> Clause 11.05 'Coastal Settlements' Clause 12.02 'Coastal' Clause 13.01 'Climate Change Impacts': For example, clause 13.01 states: Plan for sea level rise of not less than 0.8 metres by 2100 and must consider as relevant: <ul style="list-style-type: none"> The Victorian Coastal Strategy (Victorian Coastal Council, 2008). Any relevant coastal action plan or management plan approved under the Coastal Management Act 1995 or National Parks Act 1975. Any relevant Land Conservation Council recommendations. Future Coasts: Coastal climate change vulnerability mapping (DSE). <p>Other policies</p> <ul style="list-style-type: none"> General Practice Note – managing coastal hazards and the coastal impacts of climate change, December 2008 Coastal Planning Fact Sheet – Managing Coastal Hazards and Coastal Impacts of Climate Change, 2008

Legislation	Policy/Strategies/Plan
<ul style="list-style-type: none"> Section 39 the P&E Act (Vic) provides a limited right of review for a failure to comply with procedure for making a planning scheme or amendment to a planning scheme. <p>Planning permits</p> <ul style="list-style-type: none"> Applications for review of planning permit decisions are set out in sections 77-82 of the P&E Act (Vic) Section 149 and 149A of the P&E Act (Vic) deal with referral of disputes and declarations at VCAT 	
NEW SOUTH WALES	
<p><i>Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)</i></p> <p>Land use in New South Wales principally governed by the EP&A Act.</p> <ul style="list-style-type: none"> Section 79C of the EP&A Act requires in determining a development application, a consent authority is to take into consideration any coastal zone management plan Clause 228 of the EP&A Regulation includes as a factor to be taken into account any impact on coastal processes and coastal hazards, including those under projected climate change conditions. <p>Division 5 provides for 'Review and Amendment of Environmental Planning Instruments', with regards to those instruments in s33A/s33B</p> <p>Right to review of planning decisions</p> <p>Permits</p> <p>Section 97 of the EP&A Act an applicant who is dissatisfied with a decision of a consent authority may to appeal to the Land and Environment Court</p>	<p>The NSW Sea Level Rise Policy Statement 2009 specifies sea level planning benchmarks for the NSW coastline. These benchmarks are an increase above 1990 mean sea levels of 40 centimetres by 2050 and 90 centimetres by 2100</p> <p>http://www.planning.nsw.gov.au/plansforaction/coastalprotection.asp</p> <p>The Office of Environment and Heritage has released guidelines on:</p> <ul style="list-style-type: none"> incorporating sea level rise into flood risk; and coastal hazard assessment <p>The Department of Planning and Infrastructure has also released its <i>NSW Coastal Planning Guideline: Adapting to Sea Level Rise</i>. In this document the following policies and plans are noted</p> <ul style="list-style-type: none"> The NSW Sea Level Rise Policy Statement (2009) NSW Coastal Policy (1997) – requires that climate change be considered in planning and development assessment matters. Coastal Regional Strategies – strategic plans at a regional scale that: seek to ensure future urban

Legislation	Policy/Strategies/Plan
<p>Amendments to Planning Schemes</p> <p>Part 3 Division Four of the Act concerns the creation of Local Environmental Plans, with Division 5 governing Review and Amendments of such instruments. While s73 requires councils to keep their LEPs under 'regular and periodic review' to ensure accordance with the Act's objectives, s35 allows the validity of the LEP to be questioned in legal proceedings within 3 months of the date of its publication on the NSW legislation website. s123 of the Act enables any person to bring proceedings in the Land and Environment court 'for an order to remedy or restrain a breach of this act, whether or not any right of that person' was infringed as a result of that breach.</p> <p>Right to Compensation:</p> <p>A right to compensation is afforded under s9(1) of the Act – it specifies that land must be compulsorily acquired in accordance with the <i>Land Acquisition (Just Terms Compensation) Act 1991</i> (NSW).</p> <p>Part 3 of that Act allows for Compensation for Acquisition of Land, with Division One creating Entitlement to Compensation if land is compulsorily acquired (s37) or if land (not available for public sale) is acquired by agreement (s38)</p>	<p>development is not located in areas of high risk from natural hazards including sea level rise, coastal recession, rising water tables and flooding; — state that in order to manage the risks associated with climate change, councils will undertake investigations of lands with the potential to be affected by sea level rise and inundation to ensure that risks to public and private assets are minimised; and — specify that local environmental plans (LEP) will make provision for adequate setbacks in areas at risk from coastal erosion and/or ocean-based inundation in accordance with coastal management plans.</p> <ul style="list-style-type: none"> • Sydney Metropolitan Strategy (2005) and draft Sub-Regional Strategies – contain a variety of actions factoring climate change into metropolitan planning frameworks. • Coastline Management Manual (1990) and Floodplain Development Manual (2005) – require consideration of climate change in the preparation of coastal hazard and flood studies and management plans. • State Environmental Planning Policy 71: Coastal Protection – requires that councils consider the impact of coastal processes and coastal hazards when preparing LEPs and assessing development in the NSW Coastal Zone. • Section 117 Direction 2.2 – Coastal Protection – directs that a draft LEP shall include provisions that give effect to and are consistent with the NSW Coastal Policy, the Coastal Design Guidelines for NSW and the Coastline Management Manual. • Section 117 Direction 4.3 – Flood Prone Land – requires that a draft LEP shall include provisions that give effect to and are consistent with the Floodplain Development Manual and the NSW Flood Prone Land Policy. • Standard Instrument: Principal Local Environmental Plan – contains clause 5.5: development within the coastal zone which requires that all development consent authorities within the NSW Coastal Zone consider the effect of coastal processes and coastal hazards and potential impacts, including sea level rise on the proposed development, and arising from the proposed development. <p>Planning and development within the NSW Coastal Zone (as declared under the <i>Coastal Protection Act 1979</i>) is further subject to:</p>

Legislation	Policy/Strategies/Plan
	<ul style="list-style-type: none"> State Environmental Planning Policy (Major Development) 2005, which identifies coastal development that will need the approval of the Minister for Planning. These provisions are supported by clause 129 of the State Environmental Planning Policy (Infrastructure) 2007 which relates to waterway or foreshore management activities and includes: <ul style="list-style-type: none"> consideration of relevant coastal zone management plans allows coastal protection works by private landowners with consent identifies the NSW Coastal Panel as the consent authority where no coastal zone management plan applies to the land; and specifies matters for consideration by the consent authority when assessing coastal protection works. <p>Other documents for consideration include:</p> <ul style="list-style-type: none"> Protecting our coast: the comprehensive coastal assessment toolkit Derivation of the NSW Government's sea level rise planning benchmarks: Technical Note
<p><i>Coastal Protection Act 1979 (NSW)</i></p> <p>Section 38: A Council is prohibited from granting development consent within the coastal zone without the concurrence of the Minister</p> <p>Under section 37B, the concurrence of the Minister is not required in a number of circumstances, including where the development:</p> <ul style="list-style-type: none"> requires development consent under the Environmental Planning and Assessment Act 1979; is exempt development under the Environmental Planning and Assessment Act 1979; or 	<ul style="list-style-type: none"> Sea Level Rise Policy Statement NSW Coastal Planning Guideline: Adapting to Sea Level Rise Guidelines on incorporating sea level rise benchmarks into flood risk assessment Guidelines on incorporating sea level rise benchmarks into coastal hazard assessment Derivation of the NSW Government's sea level rise planning benchmarks: Technical Note Policies of individual councils such as the Schedule of Activities Leading to Preparedness for Sea Level Rise adopted by Lake Macquarie City Council and Byron Shire Council Climate Change Policy

Legislation	Policy/Strategies/Plan
<ul style="list-style-type: none"> is carried out in accordance with a coastal zone management plan. <p>A decision on concurrence must be made within 21 days.</p> <p>Emergency works</p> <ul style="list-style-type: none"> Section 55P(2), <i>Coastal Protection Act 1979</i> : Under the Act emergency coastal protection works can be carried out to protect buildings that are lawfully used for a residential, commercial or community purpose, Emergency coastal protection works include the placement of sandbags (other than sand taken from a beach or a sand dune adjacent to a beach). Section 55Q, <i>Coastal Protection Act 1979</i> : These works must be removed within 12 months unless development consent is obtained or an application is pending. Section 55T, <i>Coastal Protection Act 1979</i> : Development consent is not required; however, the works will still require a certificate from the Council or Director-General. After placement of emergency coastal protection works Coastal Authorities may exercise powers under Part 4D of the <i>Coastal Protection Act 1979</i> to make orders relating to such works. Those orders include, where justified, orders to remove, alter or repair the works concerned. <p>These provisions enable landholders and Councils to undertake temporary emergency works without the need to obtain formal planning approval. However, Councils still have power to control such works via the issue of certificates and order the removal of such works.</p> <p>Accretion and erosion</p> <p>Section 55N of the <i>Coastal Protection Act 1979</i> provides that there is no power to make a declaration concerning a water boundary that would increase the area of land to the landward side of the water boundary if:</p>	

Legislation	Policy/Strategies/Plan
<p>(a) perceived trend by way of accretion is not likely to be indefinitely sustained by natural means, or</p> <p>(b) as a consequence of making such a declaration, public access to a beach, headland or waterway will, or is likely to be, restricted or denied</p>	
TASMANIA	
<p><i>Land Use Planning and Approvals Act 1993 (Tas)</i></p> <p>Right to review planning decisions</p> <p><i>Permits</i></p> <p>S61 of the Act confers power to appeal to the Appeal Tribunal for a rejection (ss4)/amendment (3A) of the permit within 14 days. If a planning authority has amended it</p> <p><i>Planning Scheme Amendments</i></p> <p>Amendments to planning schemes may be made under s34 of the Act, after there is a request under s33. Review of Planning Schemes is undertaken under s44, whereby the Commission directs the planning authority to undertake a review every five years with a notice under ss(2). Following this report, if the Commission believes it requires replacement or amendment, the Commission may direct the planning authority to prepare a draft planning scheme or amendment subject to 44(4). If the planning authority fails to comply with 44(1), the Commission may assume the responsibilities s44(7)(a).</p> <p>Emergency works</p> <p>There does not appear to be any power under the <i>Land Use Planning & Approvals Act</i> to obtain retrospective approval for emergency works to protect property subject to climate change impacts.</p>	<p>State Coastal Policy 2008 (not adopted): The Tasmanian Planning Commission website notes that on 24 April 2010, the Commission publicly exhibited the Draft Policy and invited written representations. Subsequently, the Commission assessed and reported to the Premier on the Draft State Coastal Policy 2008. The Commission considered the representations, which revealed that there is widespread in principle support for a state coastal policy. However the Commission found that the deficiencies in the Draft Policy were such that it would not be able to be satisfactorily altered without major modification. On that basis, a hearing was considered unnecessary and the Commission recommended that the Draft Policy not be made a Tasmanian Sustainable Development Policy</p> <p>http://www.planning.tas.gov.au/assessments_and_reviews/draft_state_policies/current_assessments/draft_state_coastal_policy_2008</p> <p>Existing</p> <p><i>State Coastal Policy 1996 – Outcome 1.4.3</i> is a driver for current policy and program responses to the potential effects of climate change (including sea level rise) on use and development in the coastal zone.</p> <p>No state-wide approach to sea level rise at this stage – individual planning schemes vary, but a number use 3 m AHD inserted in the late 1980s. Tasmania may not adopt a uniform SLR value at this stage, but is adopting a risk based approach taking location and planned life of development into account.</p> <p>DPIW manage the Coastal Risk Assessment project The Project is developing tools and resources to assist with risk-based management and planning for various assets and values in the coastal zone.</p>

Legislation	Policy/Strategies/Plan
<p>Decision makers may consider clarifying the ability of Councils and persons in Tasmania to undertake emergency works and obtain retrospective approval if required.</p> <p>Compensation for planning scheme amendments</p> <ul style="list-style-type: none"> Section 66, <i>Land Use Planning and Approvals Act 1993</i>: compensation is restricted to for financial loss suffered as the natural, direct and reasonable consequence of land being set aside for a public purpose under a planning scheme, if access to land is restricted by a road closure under a planning scheme or a permit is not granted due to land being set aside for public use. 	<p>A Template Coastal Risk Management Plan, with supporting Guidelines, has been produced for use by local planners and managers to assist in managing risks to assets in the coastal zone vulnerable to sea-level rise. In addition a Case Study has been developed to provide a working example of how to use the Template. Technical documents include:</p> <ul style="list-style-type: none"> Template Coastal Risk Management Plan General Information Paper on Coastal Hazards on Tasmania Climate Change and Coastal Asset Vulnerability: An audit of Tasmania's coastal assets potentially vulnerable to flooding and sea-level rise Sea-Level Extremes in Tasmania: Summary and Practical Guide for Planners and Managers Reference Manual: Historical and Projected Sea-Level Extremes for Hobart and Burnie, Tasmania <p>Background Report Coastal flooding: Review of the use of Exceedence Statistics in Tasmania</p> <p>Clarence City Council 'CC Impacts on Clarence Coastal Areas' project is a detailed integrated assessment of climate change risks</p> <p>http://www.dpiw.tas.gov.au/inter,nsf/WebPages/HBAW-7HNV LZ?open</p>
South Australia	
<p>Development Act 1993 (SA)</p> <p>The <i>Development Act 1993</i> governs land use and planning in South Australia.</p> <p>S32 requires 'development approval' to be granted prior to development, with s33 providing the considerations against which such approvals must be assessed. 'Development' is defined in Schedule 2 of the <i>Development Regulations 2008</i>. Part 4 of the <i>Regulations</i> also govern the application process, requiring it to be lodged with the local council. If the development is one within the ambit of Schedule 10 of the <i>Regulations</i>, s38 of the <i>Regulations</i> gives the Development</p>	<p>Policy</p> <p>Coast Protection Board Policy Document, endorsed 30 August 2002.</p> <p>Coast Protection Board Policy translated into coastal Development Plans (the statutory development control documents – one Development Plan for each area) by way of a Ministerial amendment in 1994.</p> <p>The Board recommends sea level rise of 0.3m by 2050 to be adopted for most coastal development (provided that development can be practicably protected against the further rise of 0.7 m to 2100).</p>

Legislation	Policy/Strategies/Plan
<p>Assessment Commission power to determine applications. <i>Part 8</i> of the <i>Regulations</i> determines relevant factors to do with 'Determination of an Application'.</p> <p>Environmental Considerations: s33(1)(c)(iii) requires, regarding assessment of a development, that 'adequate provision' is made for purposes of drainage...water supply and (iv) the requirements of the South Australian Water Corporation, relating to the provision of water supply and sewerage services, are satisfied</p> <p>If approved, it will be manifested in the granting of one of six consents, although conditions may be attached to such approval under s42.</p> <p>Under section 54 of the <i>Development Act 1993</i>, where building work must be performed as a matter of urgency to protect any person or building, a person may perform the building work, and retrospective development approval must be sought.</p> <p>Right to Review Planning Decisions</p> <p>Permits:</p> <p>S86 of the Act confers a general right of Appeal within the Environment, Resources and Development Court for a person who has applied for development authorisation regarding 'any assessment, request, decision, direction or act of a relevant authority...relevant to any aspect of determination under the application.' ((a)(ai)).</p> <p><u>Planning Scheme Amendments:</u></p> <p>S24 enables a Council or Minister to amend a Development Plan, subject to the respective conditions in ss25-26 respectively. s27 requires the Minister to seek parliamentary scrutiny within 28 days. While s85 confers a general right of Appeal to the Environment, Resources and Development Court for any breach of the Act - if they are a person who has a 'proper interest in the subject matter - , they must also satisfy the standing criteria in s86(1)(a)-(f).</p>	<p>In regards to coastal erosion, development setbacks should generally take into account 100 years of erosion at a site (taking into account local coastal processes and assuming a sea level rise of 0.3m by the year 2050). For major developments, especially those establishing entire new communities, 200 years of recession should be considered, and also the effect of sea level rise on this over the longer period.</p> <p>Coast Protection Board Policy Document, endorsed 30 August 2002 – includes:</p> <p>Appendix 1- <i>Standards applying to new development with regard to coastal flooding and erosion and associated protection works</i>, includes 11 Standards including the following:</p> <p>S1 – Site and Building Levels</p> <p>S2 – Flood Protected site and building levels</p> <p>S3 – Sea Level Rise for Major Developments</p> <p>S4 – Setback for Erosion</p> <p>S5 – Impact of Protection Works</p> <p>Appendix 2 - <i>Draft Development Guidelines and Risk Assessment Criteria for Coastal Acid Sulfate Soils in South Australia</i></p> <p>The 1994 Ministerial amendment to Development Plans provided a set of regional and council-wide objectives and principles. The provisions included matters of environment protection, the preservation of scenic, heritage and other values, maintenance of public access and hazard risk minimisation (coastal flooding and erosion):</p> <p>Those provisions included the following Principles:</p> <p><i>Maintenance of Public access</i></p> <p>15 <i>Development adjacent to the coast should not be undertaken unless it has or incorporates the provision of a public reserve, not including a road or erosion buffer provided in accordance with</i></p>

Legislation	Policy/Strategies/Plan
<p>Subdivision 2 of the Act enables the council (s25) or Minister (s26) to amend a Development Plan.</p> <p>Right to Compensation:</p> <p>S81(b) of the Act allows for the Minister to use money from the Planning and Development Fund for the purposes of 'payment of money (by way of compensation or in other ways) which the Minister is liable to pay under this Act'</p> <p>S85(6)(f) allows for an application to be made to the Environment, Resources and Development Court to be made, to require the 'respondent to pay to any person who has suffered loss or damage' resulting from any breach compensation for the loss or damage or 'an amount for or towards those costs or expenses'</p> <p>Emergency works</p> <p>There is provision under the Development Act 1993 providing that where building work must be performed as a matter of urgency to protect any person or building, a person may perform the building work, and retrospective development approval must be sought.¹²⁹ This provision may empower landholders to undertake works in an emergency situation without approval.</p>	<p><i>Principle 26, of at least 50 m width between such development and the toe of the primary dune or the top edge of the escarpment, unless the development relates to small scale infill development in a predominantly urban zone.</i></p> <p>21 <i>For the purposes of assessing coastal developments the standard sea-flood risk level for a development site is defined as the 100 year average return interval extreme sea level (tide, stormwater and associated wave effects combined), plus an allowance for land subsidence for 50 years at that site.</i></p> <p>22 <i>Land should not be divided for commercial, industrial or residential purposes unless a layout can be achieved whereby roads, parking areas and adequate development sites on each allotment are at least 0.3 m above the standard sea-flood risk level, unless the land is or can be protected in accordance with Principle 25.</i></p> <p>23 <i>Commercial, industrial or residential development should only be undertaken where:</i></p> <p>(a) <i>building floor-levels are at least 0.25m above the minimum site level of Principle-21 (i.e. 0.55m above the standard sea-flood risk level), unless the development is or can be protected in accordance with Principle 25; and</i></p> <p>(b) <i>there are practical measures in accordance with Principle 25 available to the developer. Or subsequent owners, to protect the development against a further sea-level rise of 0.7m above the minimum site level determined by Principle 22.</i></p> <p>24 <i>Buildings to be located over tidal water or which are not capable of being raised or protected by flood protection measures in future, should have a floor level of at least 1.25m above the standard sea-flood risk level.</i></p> <p>25 <i>Development which requires protection measures against coastal erosion, sea or stormwater flooding, sand drift or the management of other coastal processes at the time of development, or which may require protection or management measures in the future, should only be undertaken if:</i></p>

Legislation	Policy/Strategies/Plan
	<ul style="list-style-type: none"> (a) <i>the measures themselves will not have an adverse effect on coastal ecology, processes, conservation, public access and amenity;</i> (b) <i>the measures do not now, or in the future require community resources, including land,</i> (c) <i>the risk of failure of measures such as sand management, levee banks, flood gates, valves or stormwater pumping, is appropriate to the degree of the potential impact of a failure; and</i> (d) <i>adequate financial guarantees are in place to cover future construction, operation, maintenance and management of the protection measures.</i> <p>26 <i>Development should be set-back a sufficient distance from the coast to provide an erosion buffer which will allow for at least 100 years of coastal retreat for single buildings or small scale developments. or 200 years of retreat for large scale developments such as new towns, unless:</i></p> <ul style="list-style-type: none"> (a) <i>the development incorporates private coastal works to protect the development and public reserve from the anticipated erosion, and the private coastal works comply with Principle 25; or</i> (b) <i>(the council is committed to protecting the public reserve and development from the anticipated coastal erosion.</i> <p>27 <i>Where a coastal reserve exists, or is to be provided in accordance with Principle 15, it should be increased in width by the amount of buffer required.</i></p>
<p><i>Coast Protection Act 1972.</i></p> <p>In South Australia the Coast Protection Board has an advisory and referral role under the Coast Protection Act 1972. Under Section 21(2): the Coast Protection Board is authorised to execute any works that are in the opinion of the Board necessary or expedient for the purpose of repairing or restoring any damage to any portion of the coast resulting from a storm</p> <p>However, under the <i>Policy on Coast Protection and New Coastal Development</i> (1991) the Board will not protect private property nor provide funding unless</p>	

Legislation	Policy/Strategies/Plan
<ul style="list-style-type: none"> there is an associated public benefit there is simultaneous protection of public property a large number of separately owned properties are at risk the erosion or flooding problem has been caused or aggravated by Government coastal works. <p>These provisions may prevent Councils from undertaking works which specifically protect private property interests and should be reconciled with the ability under the Development Act to gain retrospective approval.</p>	
Queensland	
<p><i>Sustainable Planning Act 2009 (Qld)</i></p> <p>The <i>Sustainable Planning Act 2009</i> regulates the development of planning schemes</p> <p>S260--265 of the Act regulates application for development approval. <i>Part 5</i> regulates the 'Decision Stage' in determining applications</p> <p>Environmental Factors: s89(2)(e)(a) specifies that 'valuable factors' which form part of 'core matters for planning schemes' include resources or areas that are of ecological significance, including, for example, habitats, wildlife corridors, buffer zones, places supporting biological diversity or resilience, and features contributing to the quality of air, water (including catchments or recharge areas) and soil</p> <p>Right to Review Planning Decisions</p> <p><i>Permits</i></p>	

Legislation	Policy/Strategies/Plan
<p>s527 of the Act entitles an applicant to appeal to a building and development committee against the refusal of such an application, with the Appeal Process detailed under Division 8 of the Act.</p> <p>Amendments to Planning Schemes</p> <p>Chapter 3 Part 2 of the Act regulates amendments to Planning Schemes as Local Planning Instruments. s91 requires local governments to conduct a review every 10 years to ensure accordance with strategic outcomes. This review enables a local government to amend the Planning Scheme under s92(b). Part 6 of the Act enables the Minister to take action regarding a local government instrument, if satisfied 'urgent action is necessary to protect or give effect to a State interest' – s129(1). Step 7 of the <i>Statutory Guideline 02/09</i> makes it compulsory for local governments to notify the public and allow for submissions on such amendments, which are then provided in a report for the Minister.</p> <p>Right to Compensation:</p> <p>Part 3 under the Act provides for Compensation. s704 allows for 'reasonable compensation' for 'reduced value in the interest of land'. However, its operation is confined by provisions within s706, including:</p> <ul style="list-style-type: none"> • That compensation is not payable if the change is made to comply with a standard planning scheme provision; • Compensation is not payable if it affects development that, had it happened under the superseded planning scheme—would have led to significant risk to persons or property from natural processes (including flooding, land slippage or erosion) and the risk could not have been significantly reduced by conditions attached to a development approval; or would have caused serious environmental harm and the harm could not have been significantly reduced by conditions attached to a development approval. <p>Emergency works</p> <ul style="list-style-type: none"> • Section 585 of the Sustainable Development Act 2009 (Qld) there is an 	

Legislation	Policy/Strategies/Plan
<p>emergency exemption for operational work that is “tidal works” if all of the circumstances set out in the section apply</p> <ul style="list-style-type: none"> • This includes a requirement to as soon as reasonably practicable after starting the emergency work, the person— <ul style="list-style-type: none"> – (i) makes a development application for any development permit, or a request for compliance assessment for any compliance permit, that would otherwise be required for the work; and – (ii) gives the assessment manager for the application, or the compliance assessor for the request, written notice of the work and a copy of the safety management plan. • A person can be required by an enforcement notice or order to stop carrying out the emergency work. 	
<p><u>Coastal Protection and Management Act 1995</u></p> <p>Part 3A sets out the provisions in relation to the coastal zone map</p> <p>Section 20, The Minister must prepare a coastal plan for the coastal zone</p>	<p>The State Policy for Coastal Management (management policy) is prepared under the <i>Coastal Protection and Management Act 1995</i> .</p> <p>The Queensland Coastal Plan (coastal plan) is intended to commence in mid-2011 together with amendments to the <i>Coastal Protection and Management Act 1995</i>, and associated regulations</p> <p>The Queensland Coastal Plan has two parts:</p> <ul style="list-style-type: none"> • the State Policy for Coastal Management, which contains policies and guidance for coastal land managers (management policy); and • the State Planning Policy for Coastal Protection, for planning decisions under the Sustainable Planning Act 2009 (SPP) <p>Application: The management policy applies to management planning, activities, decisions and works that are not assessable development under the Sustainable Planning Act 2009 and therefore not subject to the State Planning Policy for Coastal Protection (SPP) (p3 State Coastal Plan). Authorities responsible for making statutory decisions about coastal land, and infrastructure organisations are to have regard to management policies in their decision-making processes. Management policies</p>

Legislation	Policy/Strategies/Plan
	<p>include (amongst others)</p> <p>1. Protecting coastal processes in erosion prone areas - principle: natural coastal processes including erosion and accretion are able to occur without interruption.</p> <p>2. Buildings and structures in erosion prone areas – principle: structures (including all infrastructure) in erosion prone areas are designed, located and managed to ensure that impacts on coastal processes are avoided or minimized</p> <p>6. Public access and use of the coast- principle: public access and use of the coast is maintained and enhanced for current and future generations.</p> <p>State planning policy and State planning policy guidelines:</p> <p>B.1 The State Planning Policy for Coastal Protection is a statutory instrument under the Sustainable Planning Act 2009 (Qld).</p> <p>B.2 The SPP has effect when a local planning instrument is made or amended, when development applications are assessed and when land is designated for community infrastructure.</p> <p>The policy would also be used to influence State planning instruments.</p> <p>State planning policy and State planning policy guidelines</p> <p>B.1 The State Planning Policy for Coastal Protection is a statutory instrument under the Sustainable Planning Act 2009 (Qld).</p> <p>B.2 The SPP has effect when a local planning instrument is made or amended, when development applications are assessed and when land is designated for community infrastructure.</p> <p>The policy would also be used to influence State planning instruments.</p> <p>The Policy notes in relation to Land-use planning the following principle – principle: Allocating areas for urban development avoids or minimises the exposure of communities to the risk of adverse coastal hazard impacts, maximises the conservation of coastal resources and preferentially allocates land on the coast for coastal-dependent development.</p>

Legislation	Policy/Strategies/Plan
	<p>Development outside the scope of the policy for development assessment</p> <p>The policy will not apply to:</p> <p>a) building work that is assessable only against the <i>Building Act 1975</i> (Qld)</p> <p>b) carrying out operational work that is clearing an area of high ecological significance to the extent necessary for a domestic activity.</p>
WESTERN AUSTRALIA	
<p><i>Planning and Development Act 2005 (WA)</i></p> <p>Planning is regulated by the <i>Planning and Development Act 2005</i></p> <p>S115 deals with applications for development in 'planning control areas'; s163 for application regarding development of 'heritage places';</p> <p>Environmental Considerations: In s69 of Part 5 (dealing with local planning schemes), requires the objectives within Schedule 7 of the Act to be considered, including the conservation of water (3) and the 'conservation of the natural environment of the scheme area including the protection of natural resources, the preservation of trees, vegetation and other flora and fauna, and the maintenance of ecological processes and genetic diversity</p> <p>Right to Review Planning Decisions</p> <p><i>Permits</i></p> <p><u>Part 14 of the Act</u> pertains to 'Applications for Review'</p> <p>Power to seek review of a decision in the State Administrative Tribunal is conferred by s244 of the Act for decisions relating to development under an 'interim development order' (s249), in a 'planning control area' (s250) or in</p>	<p>State Planning Policy 2.6 – State Coastal Planning Policy. This must be taken into account by decision makers in coastal planning.</p> <p>In a media release dated 16 September 2010 it is stated that the Western Australian Planning Commission (WAPC) has updated the sea level rise value for use in coastal planning, bringing WA into line with the policy positions of other States. This has resulted in a revision from 0.38m to 0.9m by 2110.</p> <p>This Position Statement notes that Schedule One of SPP2.6 sets out guidance on how to calculate a physical processes setback comprising 4 elements:</p> <p>Determining the baseline - horizontal setback datum (HSD) - 4 coastal types are identified - sandy, rocky, mangrove, cyclonic</p> <p>S1 - allowance for the impact of severe storms</p> <p>S2 - allowance for the historic trend - erosion or accretion</p> <p>S3 - sea level rise (0.38 based upon IPPC AR3 scenario A1B).</p> <p>The following changes to the methodology set out in Schedule One are recommended:</p> <p>SLR increase to 0.9m to 2110, based upon IPCC AR4 (scenario A1FI) and CSIRO 2008.</p>

Legislation	Policy/Strategies/Plan
<p>'exercise of a discretionary power under a planning scheme' (s251)</p> <p>Amendments</p> <p>Part 5 of the Act governs Local Planning Schemes. with s75 allowing Local Governments to amend schemes, either with an amendment approved by the Minister for a proposal approved by land owners in the scheme area, approved by the Minister. Notice of amendment must be forwarded to the Environmental Protection Agency (s81), which then must conduct an Environmental Review (s82). The Local Government, after having prepared a consolidation, must seek public submissions on the amendment (s89) before delivering a report on its operation (s90)</p> <ul style="list-style-type: none"> • S211 confers standing on a person aggrieved by 'the failure of a local government to enforce or implement effectively the observance of a local planning scheme' to make representations to the Minister. The Minister may subsequently choose to refer representations to the State Administrative Tribunal for its report and recommendations. s252 also allows decisions made in exercise of discretionary power under a Planning Scheme to be reviewed. <p>Right to compensation for planning scheme amendments:</p> <p>Part 11 of the Act provides for Compensation. Division 2 provides for compensation where land is injuriously affected by 'the making or amendment of a planning scheme' (s173). S174 prescribes specifically the specific scenarios in which this can occur, however compensation will be precluded if the 'scheme's provisions are, or could have been, in certain other laws' (s175).</p> <p>It will generally only be if a planning scheme prohibited all private use of zoned land or prohibits the continuance of non-conforming uses, or reserves land, that compensation will be payable.¹³⁰</p>	<p>Cyclone impacts are to be treated as severe storm events, under S1, rather than a coastal type as depicted in C.4 and F.4.</p> <p>Specific methodology will be provided in the full package of draft amendments.</p> <p>The impact of cyclonic events are to be used for calculations of S1 - storm event erosion, not as a line of maximum potential storm surge inundation.</p> <p>Other</p> <p>In January 2010 the Coastal Planning Program released a report entitled "Status of Coastal Planning in Western Australia". This report includes over 70 outstanding planning tasks, highlighting the large number of local and regional planning instruments that have been developed to manage the coast in Western Australia. It is noted in this report that "on a state basis the key planning gaps are the development of a State Coastal Strategy and a State Marine Planning Strategy" (Coastal Planning and Coordination Council, and the Western Australian Department of Planning, "Status of Coastal Planning in Western Australia", January 2010, p 8)</p>

¹³⁰ Section 174(1) *Planning and Development Act 2005* (WA)

Legislation	Policy/Strategies/Plan
Further, the reservation of privately owned land does not itself give rise to any right to compensation until certain specified events occur. This is to avoid a significant compensation liability accruing at the date a region planning scheme is implemented and to avoid unnecessary payouts if the planning scheme is later amended.	

Table expanded and updated extract from the Report by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, Managing our coastal zone in a changing climate, The time to act is now, October 2009, Appendix F. (Appendix F includes a citation to, Barbara Norman, Planning for Coastal Climate Change: an Insight into International and National Approaches, Victorian Department of Sustainability and Environment and Department of Planning and Community Development, 2009—Exhibit 176)

Appendix 4 – Summary of cases

1. Tort Based Claims – Nuisance and Negligence

1.1 Duty of care

Sutherland Shire Council v Heyman (1985) 157 CLR 424

The High Court held that a Council may be liable for failing to exercise a statutory function, where there is a ‘general expectation’ by the community that a power will be exercised. This became known as the doctrine of general reliance.

Alec Finlayson Pty Ltd v Armidale City Council (1994) 123 ALR 155

Brennan J held that regardless of whether a person is a public authority exercising a statutory power, if they do something which creates or increases a risk to another person, they are bound to do whatever is reasonable to prevent any injury unless statute precludes the duty to act.

Pyrenees Shire Council v Day (1998) 192 CLR 330

The High Court rejected the doctrine of general reliance on the grounds that a doctrine based on the general expectations of the community creates too much uncertainty. However, it was held that there could be circumstances where a Council would be liable for a failure to exercise a statutory function. For example, in *Ryan v Great Lakes Council* [1999] FCA 177 the State of New South Wales and the Great Lakes Shire Council were held liable in negligence for failing to prevent contamination of a lake, as the existence of pollution sources were known to the State and the Council and they had both failed to use their powers to prevent contamination. It was held that a ‘pragmatic approach’ to the proximity between the plaintiff and defendant must be taken in resolving whether a duty of care is owed.

Brodie v Singleton Shire Council (2001) 206 CLR 512

The High Court held that in certain circumstances the powers vested by statute in a council give it a special measure of control over the safety of citizens so as to impose on the council a duty of care. Thus, the council may be obliged to exercise its powers to avert a danger or to bring it to the knowledge of citizens.

Defences

Bankstown City Council v Almado Holdings Pty Ltd (2005) 223 CLR 660

The High Court considered the statutory exemption outlined under section 733(1) of the *Local Government Act 1993* (NSW). The council was found liable in nuisance for the increased flooding of the respondent’s land as a result of the construction and operation of a drainage system. However, the High Court held that the council was indemnified under the exemption.

Melaleuca Estate Pty Ltd v Port Stephens Council (2006) 143 LGERA 319

The council was found liable in nuisance for discharging water onto the applicant’s land. The New South Wales Court of Appeal rejected the council’s defence under s 733(1) of the *Local Government Act 1993* (NSW) as it had not shown good faith by rectifying the nuisance.

2. Administrative Review

2.1 Principles of ESD

Taip v East Gippsland SC [2010] VCAT 1222 (28 July 2010)

This case concerned a decision by the East Gippsland Shire Council to grant a permit for a residential development of eight dwellings at Lakes Entrance. Member Potts held that a cautious approach was considered to be warranted while planning frameworks and other responses are set in place to address and minimise these risks. It was concluded that the proposal for this more intensive development of Lakes Entrance was one that was pre-emptive to the development of appropriate strategies to address climate change risks. This led to the conclusion that to grant a

permit failed to satisfy the purposes of planning in Victoria for intergenerational equity, sustainable, fair and socially responsible development and would not lead to an orderly planning outcome.

2.2 Victorian tribunal rejects development based on precautionary principle

Gippsland Coastal Board v South Gippsland SC and Ors (No 2) [2008] VCAT 1545

This case involved six applications for planning permits under the Local Planning Scheme for the construction of sea side apartments on land within a Farming Zone near the township of Toora, Victoria. The Victorian Civil and Administrative Tribunal (VCAT) determined that, although not part of the Victorian Planning Provisions (“VPPs”) made under Part 1A of the *Planning and Environment Act 1987* (Vic) sea level rise and coastal inundation caused by climate change were relevant matters to be taken into account in assessing the suitability of this land for development. The VCAT set aside the decision of the Council to permit the dwellings on low lying flood affected farm land. Subject to subsequent judicial consideration of the matter, the immediate, relevant effect of this decision is to put all responsible authorities in Victoria on notice that a failure to adequately consider climate change impacts in applications for the development of low lying coastal land may render such decisions susceptible to challenge, appeal and possible invalidity.

2.3 Administrative review of a planning scheme amendment

Myers v South Gippsland SC (No 2) [2009] VCAT 2414 (19 November 2009)

This case involved an application to subdivide an existing lot into two lots. The Tribunal issued an interim decision requiring that a coastal hazard vulnerability assessment be undertaken prior to a decision being made. This decision follows from the submission of that assessment. The decision deals with balancing the vulnerability of the land to sea level rise with expectations about an individual development that would otherwise be consistent with the applicable zoning and other planning controls.

The Tribunal stated:

While we recognise the policy drivers are for action now rather than later, we also recognise, as was stated in the interim reasons, that to address the issue of coastal vulnerability on a lot by lot or development by development basis is a heavy burden for applicants to bear. From the nature of the issues raised in Dr Reidel’s assessment and the forms of action that might be undertaken to address coastal hazards, at the very minimum a regional, if not State wide approach is to be preferred. Such an approach should assess issues and potential remedial actions, be they engineering or planning based, and seek to produce a coordinated response. We see value in such an approach providing more certainty to all sectors of the community, be they responsible authorities and other decision makers, referral agencies, developers, land owners or other affected members of the community.

We also recognise that such an approach will not be without its difficulties and undoubtedly take time to prepare. It is apparent to us however, that while there is an increasing awareness of the broader issue of coastal vulnerability in the community, there appears within some sectors to be an inertia against addressing some of these harder issues [at para 10-11].

The Tribunal found that the current policy platform requires a precautionary approach when considering the impact of climate change and had regard to expert evidence which indicates that by 2100 without mitigation measures, there would be no dune, no foreshore access, no road and the subject site would be inundated by sea water and otherwise lost to use for the purpose of a residential lot.

The Tribunal also accepted evidence that as climate change is a gradual process, one cannot go and build a new road tomorrow at a higher level or new dune now as it simply would not work. The Tribunal found there was an absence of any strategy or work being undertaken in the Waratah Bay area on how the issue of climate change, rising sea level and increase in storm

surges was to be addressed including what mitigation works may be necessary and undertaken. The Tribunal adopted the precautionary approach of the General Practice Note (December 2008) and did not support a subdivision in the knowledge that without mitigation works, there would be no dune, no road, no access to the site and the site would likely be inundated with sea water.

2.4 Victorian Tribunal approves developments

Santos v East Gippsland SC [2008] VCAT 1658 (14 August 2008)

This case concerned modifications to the existing Patricia-Baleen gas plant, located near the coast in East Gippsland. This case concerned an approval under the *Environment Protection Act 1970* (Vic) and a planning permit under the *Environment and Planning Act 1987* (Vic).

In this case it was noted that there would be minimal noticeable change to the site and its operation if the proposed new buildings and works were to be installed and used. The existing works occupy a “footprint” area, within an enclosed compound. The new works would be accommodated within the footprint and compound. There would simply be closer development within the existing developed area.

It was also noted that the grounds open to a third party applicant for review in this case were confined by subsection (2) of section 33B Environment Protection Act.

The Tribunal found that it is normal in relation to the consideration of flooding under planning assessments to be guided by the extent of Land Subject to Inundation Overlays.

The Tribunal went on to say that, it is all very well to speculate about floods exceeding that level, but it becomes impractical to attempt to plan on the basis of 1:500 years or 1:1000 years. Further, similar considerations of useful life expectancy in the operation of the plant apply to arguments that were raised about the possible effect of future global warming and sea level change.

Although those possibilities are a serious long term considerations in the minds of many, their onset is, in our opinion, sufficiently delayed to not be relevant to our consideration of this case in relation to this gas treatment plant.

Seifert v Coloc-Otway SC [2009] VCAT 1453 (27 July 2009)

This case concerned an application for a two lot subdivision at a property in Apollo Bay which was situated on the other side of the Great Ocean Road from the foreshore. In this case the decision of the council was set aside and a permit was granted, allowing a two lot subdivision, subject to conditions.

The Tribunal had before it the benefit of two expert witnesses. It was found that the higher Lot 1, would be elevated high enough so as to not be affected by any flooding and/or coastal engineering problems. In relation to how these issues affected the lower Lot 2 the Tribunal found that the current projections regarding climate change/rising sea levels were not fatal, although, the Tribunal did state that obviously what is acceptable may well change over time, as fresh scientific information and analysis of that information comes to hand. By contrast, the Tribunal had some unresolved major concerns regarding the potential for flooding/ponding at the front section of the lot. To address this, the Tribunal amended the permit conditions to make several modifications to the plan of subdivision,

2.5 Victorian Tribunal recognises gaps in planning scheme

Ronchi & Anor v Wellington SC [2009] VCAT 1206 (16 July 2009)

This case concerned a proposal for two dwellings in Seaspray. The decision notes the need for any future permit application to be informed by an assessment of the site’s vulnerability to the impacts of river and coastal hazards. It also notes a gap in the planning scheme with respect to single dwellings that do not require a planning permit, and may therefore avoid a vulnerability assessment, considering that this may be addressed through a planning scheme amendment.

Tauschke v East Gippsland SC [2009] VCAT 2231 (26 October 2009)

In this case John Tauschke sought review of a condition relating to a permit for subdivision of land at 36 Metung Road in Metung. The East Gippsland Catchment Management Authority (EGCMA) acting in its role as a referral authority directed the placement of the condition, as part of the land was contained within a Land Subject to Inundation Overlay. In this case the Tribunal preferred the evidence brought by the Applicant and noted the following in relation to the advice of the EGCMA.

If the EGCMA seeks a broad prohibition of residential development and subdivision in a Residential 1 Zone in its catchments it should consider using a more appropriate mechanism to restrict development. One approach may be to seek an Urban Floodway Zone in a planning scheme amendment process, where all affected parties can have an opportunity to fully debate the implications of this approach in an open and transparent forum before an independent body. To apply a de-facto prohibition on development in a planning permit condition on an ad hoc basis may lead to uncertainty in the application of planning provisions as they currently exist in the East Gippsland Planning Scheme [at paras 41-42].

2.6 Importance of renewable energy policy in Victoria

Perry v Hepburn SC [2007] VCAT 1309 (27 July 2007)

This case concerned a proposal by the Hepburn Renewable Energy Association to develop Australia's first community owned wind farm at Leonards Hill. The proposal was supported by the Hepburn Shire Council which had determined to grant a permit for the facility. Parts of the community also supported the Association's proposal. However, residents and property owners around Leonards Hill, where the wind farm comprising two turbines would be erected, strongly opposed the development.

The Tribunal found that clause 52.32 of the planning scheme had as its purpose to facilitate the establishment and expansion of wind energy facilities, in appropriate locations, with minimal impact on the amenity of the area. It was stated that the concept of minimal impact must be considered in the context of the scale of a particular proposal, the physical setting within which turbines are proposed, and the directions of the scheme that decisions about impact must be weighted having regard to policy in support of renewable energy development. The Tribunal was satisfied that the proposal represented an acceptable outcome in terms of the policies and decision guidelines of the Hepburn Planning Scheme. It was acknowledged that the proposal would bring change to Leonards Hill but the extent to which the proposed turbines would be noisy or visually intrusive it satisfied the tests and objectives specified in the Hepburn Planning Scheme. Other objections brought by the Applicant did not warrant rejection of the permit application.

Taralga Landscape Guardians Inc v Minister for Planning (2007) 161 LGERA 1

This case concerned an appeal against grant of development consent for a wind-farm. In this case the appeal was allowed in part. The NSW Land and Environment Court found that the adverse visual impacts on surrounding properties did not warrant refusal because of the broader public interest in renewable energy outweighed the visual impact. The principle of intergenerational equity formed part of the reasoning and it was noted that renewable energy sources are an important method of reducing greenhouse gas emissions and preserving traditional energy resources for future generations.

2.7 Judicial Review

Walker v Minister for Planning [2007] NSWLEC 741

This decision of the NSW Land and Environment Court concerned a decision by the Minister to approve a concept plan in for a subdivision and retirement development at Sandon Point. The site was located in area comprising 53ha of mostly cleared coastal plain 14km north of Wollongong City. The court considered whether the respondent was obliged and failed to consider the ecological sustainable development (ESD) principles.

Minister for Planning v Walker [2008] NSWCA 224

This case involved the appeal by the Minister against the decision of Biscoe J in the Land and Environment Court. As noted above, it was argued that the Minister had failed to consider the principles of Ecologically Sustainable Development (ESD) and had failed to consider the 'public interest'. The NSW Court of Appeal rejected this argument and found that although it was mandatory to consider the 'public interest', it was not mandatory to consider the principles of ESD. The failure to consider climate change did not make the Minister's decision void.

Biscoe J held that the decision by the Minister was void and of no effect as the Minister had failed to consider relevant flood risks associated with climate change. The Minister was obliged to consider ESD principles in relation to climate change flood risk because of the gravity of potential consequences.

Gray v Minister for Planning [2006] NSWLEC 720

This case concerned the environmental assessment of a coal mine which was expected to produce 10.5 million tonnes of coal per annum by open cut mining. In this case Gray argued that the environmental assessment for the project did not meet the "environmental assessment requirements" (EARs) issued by the Director-General. It was argued that the environmental assessment failed to adequately take into account "indirect emissions" from the coal mine. Gray sought that the Director-General's decision to place the environmental assessment on public exhibition be set aside. The court agreed and held that the decision was invalid because it failed to take into account ecologically sustainable development principles. This included the following comments by Pain J:

Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient. The "not likely to occur" test is clearly met as is the proximate test for the reasons already stated [at para 98].

Aldous v Greater Taree City Council [2009] NSWLEC 17 (19 February 2009)

In this case the Greater Taree City Council granted consent to construct a dwelling on waterfront land. A neighbour, Mr Aldous challenged the decision in the NSW Land and Environment Court. Biscoe J found that this was a decision where consideration of the public interest required the consideration of ESD and climate change induced erosion. However his Honour found that there was sufficient documentary evidence that the Council did consider the issue and the action was not successful.

Charles & Howard Pty Ltd v Redland Shire Council [2007] QCA 200

The Queensland Court of Appeal upheld a challenge by the Appellants to a condition of development consent which required the Appellants to move a house site on coastal land, in order to avoid a requirement for excessive fill to be used to mitigate flood risk. The Court of Appeal considered the impacts of climate change and found that it was appropriate for the Council to impose conditions which addressed flood risk.

Northcape Properties v District Council of Yorke Peninsula [2008] SASC 57

The SA Court upheld the Council's decision to refuse a development application for subdivision on the grounds that coastal retreat due to climate change had not been adequately addressed. The relevant local development plan included strong coastal and hazard protection requirements, in particular, requiring an assessment of sea level rise predictions and impacts over the next 100 years. Expert evidence led in the case indicated that the coast would move between 35-40m

inland over this time. Unlike NSW or Victoria at the time of the decision the impact of climate change was an explicit statutory matter for consideration in SA. Therefore the case turned on factual issues regarding the application and the risk of coastal erosion rather than any point of law.

Noosa Shire Council v Resort Management Services Ltd (1993) 81 LGERA 295

The question in this case was whether a resolution passed by the Noosa Council to proceed with decision to amend a town plan was a reviewable decision. The Court of Appeal applied the High Court decision of *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 and held that this was an interim step specifically required to be made by the relevant *Local Government Planning And Environment Act 1990* (Qld). It expressly provided for the making of that interim decision through a process of steps leading up to the final decision for the governor. Hence this interim decision was reviewable.

Redland Shire Council v Bushcliff Pty Ltd [1997] 2 Qd R 97;

In this case the Council was applying the same process outlined in *Noosa Shire Council v Resort Management Services Ltd* (1993) 81 LGERA 295. The applicant sought a statutory order of review regarding the first step (the Council proposing an amendment to the planning scheme). In this decision it was held that the particular step was not a decision that was reviewable as it was merely a “preliminary step”.

2.8 Failure to take submission regarding climate change into account

Australian Conservation Foundation v Latrobe City Council (2004) 140 LGERA 100

In this case the VCAT upheld an appeal in relation to a planning scheme amendment that would facilitate the continued operation of the Hazelwood Power Plant. The case concerned whether a planning panel, considering amendment to a planning scheme under the *Planning and Environment Act 1987* (Vic) was required to take into account submissions concerning the environmental effects of greenhouse gas emissions from that power plant. The VCAT found that the panel was required to consider relevant submissions and that a submission will be ‘about an amendment’ ...even if it relates to an indirect effect of the amendment, if there is a sufficient nexus between the amendment and the effect. One way of assessing whether the nexus is sufficient will be to ask whether the effect may flow from the approval of the amendment; and, if so, whether, having regard to the probability of the effect and the consequences of the effect (if it occurs), the effect is significant in the context of the amendment.

2.9 Administrative review: decisions to make by-laws

Paradise Projects Pty Ltd v Council of the City of the Gold Coast [1994] 1 Qd R 314

This case concerned the relevant Local Government Act which empowered Councils to make by-laws regarding commercial activities on a road. The Gold Coast City Council passed a by-law that required a license for the selling of food stuffs from vehicles. Paradise Projects sought judicial review. The Court held that when a local authority exercises a statutory authority to make by-laws it is generally making a decision of a legislative character, and not a decision of an administrative character.

2.10 Administrative review: decisions regarding levies, special rates, fees or levies – Special Considerations

Xstrata Coal Qld P/L and Ors v Council of the Shire of Bowen [2010] QCA 170

The appellants commenced proceedings for judicial review of the Council’s resolutions claiming that in fixing the categories of coal mining land, and more particularly in fixing the differential rates with respect to each category, the Council took irrelevant considerations into account. Namely, that the Council took into account the capacity of the appellants, who owned the land in the four categories, to pay the increased rate of burden. In this case, it was held that the legislation did not contemplate that wealth, or capacity to pay rates, should be a factor relevant to the rates fixed by a local government in its budget.

2.11 Queensland court approves developments despite cyclone risk

Mackay Conservation Group Inc v Mackay City Council & Anor (2005) QPEC

This case was an appeal against the decision of the respondent council, which had granted a preliminary approval to develop a residential and tourism complex.

In this case the Court rejected an appeal by an objector arguing that the location was inappropriate as cyclonic events posed a risk to life and property. The court rejected this argument and said that that this level of caution was not required. There was no risk to the environment because sizable buffers were proposed for creek and beach and conservation purposes. The Court also made the comment that, it is reasonable to trust to the good sense of people in respect of their self-preservation; they would not need much experience of Mackay to know that in East Point/Slade Point and other areas their evacuation routes are inundated early. I am confident that in Australia there would be no replication of the abandonment of those unable to evacuate themselves, which happened in New Orleans [at para 69].

Daikyo (North Queensland Pty Ltd) v Cairns City Council and Anor [2003] QPEC 022

This case was an appeal against the conditions of preliminary approval of change of use and development permit concerning the height of ground floor above sea level. It was argued that the height of the ground floor provided insufficient protection against marine flood in the event of a tropical cyclone. The council had approved the development without adopting precautions recommended by the Queensland Department of Natural Resources and Mines.

In this case the Court dismissed the appeal and found that the height of the ground floor above sea level was sufficient protection against marine inundation and that the respondent had failed to demonstrate sufficient reason for increasing standard height above sea level. It said it was not reasonable to expect development to be immune from cyclonic wave effects that were more onerous than the standard set out in the planning instruments.

2.12 Emergency works

Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2) [2009] NSWLEC 110

This case concerned the provision of coastal protection works in Byron Shire. In late May 2009 the Byron Bay coastline was subject to severe storms. There was substantial erosion of Belongil Beach including about 10 metres of beachfront property owned by John and Anne Vaughan. The erosion appeared to have been caused by waves overlapping a geobag erosion control wall along Belongil Beach constructed by Byron Shire Council in or about 2002.

On 27 May 2009 the council commenced an action against the Vaughans to injunct them from carrying out threatened remedial erosion protection work involving the placement of rock without development consent. The Vaughans responded, bringing an action against the council, alleging breach by the council of conditions of a 2001 development consent granted by the council to itself for the construction of the wall; seeking to enforce the development consent by mandatory injunctions that the council construct the wall in accordance with the consent, or alternatively seeking a declaration or order that the applicants are entitled to do so, and claiming damages and other relief for nuisance and negligence.

On the evening of Friday 29 May 2009, after an urgent hearing, Pain J granted the council, on its undertaking as to damages, an interlocutory injunction against the Vaughans restraining them from carrying out any erosion protection work on and adjacent to their property involving the placement of rock or other material: *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council* [2009] NSWLEC 88.

Subsequently an interlocutory settlement eventuated and was reflected in consent of orders dated 17 June 2009 in the council action only, which in effect varied the interlocutory injunction in those proceedings by excluding certain remedial works from its ambit.

In *Byron Shire Council v Vaughan; Vaughan v Byron Shire Council (No 2)* [2009] NSWLEC 110 it was found that having regard to the consent variation of the injunction in the council action

only, the inconsistent injunction in the Vaughan action could not be allowed to continue and that injunction was also discharged.

A subsequent journal article provides further commentary on this case and states:

In February 2010, the Land and Environment Court approved consent orders, effectively discharging the injunction. The court declared that the 2001 consent that council had granted to itself was still valid and applied to the Vaughans' land and adjoining land. Further, the terms of the 2001 consent obliged the council to monitor, and maintain and repair the beach stabilisation works they had erected. The council was ordered to restore the interim protection wall to its height and shape before the May 2009 storm. The court also declared that the Vaughans were entitled to maintain, repair and restore the wall, although they were not obliged to do so. In addition, the Vaughans had the option of bringing an action in negligence or nuisance in the Supreme Court seeking damages for the loss of their property.¹³¹

2.13 South Australian court recognises ESD

Thornton v Adelaide Hills Council [2006] SAERDC 41

This case concerned a coal fired power plant in South Australia. The Environment Resources and Development Court in South Australia considered principles of ecologically sustainable development. It was noted that increasing the emission of greenhouse gases is not consistent with the principles of ecological sustainable development, including as it does, the principle of intergenerational equity and the precautionary principle: see *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 146 LGERA 10. However, the court noted that no real attempt had been made by the appellants to provide the likely increase in greenhouse gas emissions overall by the proposed development, compared with the existing operation. There was no evidence put to the court to show that there would most likely be an increase overall in the emission of greenhouse gases by the proposed development. Thus, the proposed development was not be rejected on that ground.

¹³¹ *That sinking feeling: A legal assessment of the coastal planning system in New South Wales*, Zada Lipman and Robert Stokes (2011) 28 EPLJ 182

Appendix 5 – Summary of local government powers

The table below sets out the key powers of local government (each of which has some impact on the ability to encourage Community Abatement). It also highlights the relevant legislative provision in each State and Territory which grants local government those powers.

Planning and Development								
Local Government Power	Legislation	Relevant legislative provision						
		NT	NSW	QLD	SA	TAS	VIC	WA
Develop local planning instruments	Planning Acts	N/A – Minister responsible	Pt 3 Div 4	Ch 3	s 24, 25	s22	s8(3) Pt 3	Pt 4 and Pt 5
Approve development applications	Planning Acts		Pt 4 Div 2	Ch 6	s34, 40	s51	Pt 4 Div 1	Pt 10
Compensation for planning	Planning Acts			s 703-713		s 66	Pt 5	s 171-183
Funding and Finance								
Local Government Power	Legislation	Relevant legislative provision						
		NT	NSW	QLD	SA	TAS	VIC	WA
Levy rates	Local Government Acts	Ch 11 S 140-173	Ch 15	Ch 4	Ch 10	Pt 9	Pt 8	Pt 6 Div 6
Levy charges	Local Government Acts	s 157	s 501, 503, 608(1)	Ch 4	s 155, 188(1)	s 93(1), 94(1), 97(1), 205	s 162-163, 221, 113	s 6.16(1)
Expenditure	Local Government Acts	s 119 - 139	Ch 13	Ch 4	s137	Pt 8 - s 74	Pt 7	Pt 6
Services								
Local Government Power	Legislation	Relevant legislative provision						
		NT	NSW	QLD	SA	TAS	VIC	WA
Provide services	Local Government Acts	s 11, 12	s 24	s 4	s 7	s 20	s 3E	s 3.1
Other								
Compulsory acquisition	Local Government Acts	s 178	Ch 8 Pt 1	Ch 9 Pt 4 SPA: Ch 3 LGA: Acquisition of Land Act 1967	Part 9 Development Act	s 176	s 187	s 3.55

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