



Local Government and Coastal Land Use Planning **Discussion Paper**

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1. Purpose

The purpose of the Local Government and Coastal Land Use Planning Discussion Paper (the discussion paper) is to:

- Collate existing legal advice and associated research on coastal climate change impacts and Local Government's land use planning decisions;
- Identify any existing information gaps with regards to coastal land use planning and decision making;
- Generate discussion and feedback from the Local Government sector in terms of the Association's next steps, and Local Government information needs; and
- Recommend next steps for the Association.

2. Scope

The impact of climate change will differ across Western Australia's regions and will impact Local Government land use planning decisions in a range of ways. This discussion paper focuses specifically on coastal climate change impacts that relate to coastal land use planning decisions by Local Government.

This paper will focus only on coastal impacts, to ensure a comprehensive analysis can be undertaken on this specific issue. Further discussion papers relating to other climate change impacts may be developed in the future.

This paper will not seek to provide legal advice but it will examine the current level of uncertainty in the sector regarding this issue, and will investigate whether a liability shield planning instrument would provide greater certainty for decision making to the sector.

3. Next Steps

After the release of this discussion paper, these are the proposed next steps and the expected completion dates.

Actions	Expected completion date
Release the Discussion Paper to the Local Government sector.	Friday, 28 November 2014
Submissions due back from the Local Government sector to the Association.	Monday 12 January 2015
Collate responses and feedback from the sector.	Friday 13 February 2015
Develop an action plan, including investigating the possibility of seeking endorsement for the Association policy position.	March 2015
Seek endorsement for action plan.	March 2015
Implement approved action plan and items.	Ongoing 2015

4. Have your say

To assist the Association's research on the topic of legal liability and coastal land use planning, the following discussion paper has been released for sector consultation. The feedback received will be used to develop next steps for the Association to support and advise the sector regarding legal liability.

Please use the detached template provided on [WALGA's Climate Change Management Toolkit](#) to submit your comments to the Association. Editable electronic submissions are preferred (i.e. MS Word and not PDF), where possible.

Options to submit your feedback are:

- Email: cperks@walga.asn.au.
- Post: Attention Climate Change Coordinator, Western Australian Local Government Association, Level 1, 170 Railway Parade, West Leederville WA 6007
- Fax: (08) 9213 2077

5. Introduction

The recent Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Synthesis Report stated that "warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased."¹

In specific reference to sea level rise, the IPCC Synthesis Report states that "over the period 1901 to 2010, global mean sea level rose by 0.19 [0.17 to 0.21] m. The rate of sea-level rise since the mid-19th century has been larger than the mean rate during the previous two millennia (high confidence)."²

Additionally in September 2014, the Climate Council, an independent, non-profit organisation, released a report called "Counting the Costs: Climate Change and Coastal Flooding."³ Key points outlined within this report are relevant to the current decision-making environment for coastal Local Governments. Some of the key points of the paper highlight that;

- Sea level has already risen and continues to rise due to climate change. Climate change exacerbates coastal flooding from a storm surge as the storm rides on higher sea levels.
- Australia is highly vulnerable to increasing coastal flooding because our cities, towns and critical infrastructure are mainly located on the coast. Australia's infrastructure has been built previously for a stable climate with known ranges of variability and is unprepared for the unstable climate system and the rising sea level.
- Damage caused by increased coastal inundation and recession poses a large financial burden due to damage and destruction of infrastructure, coastal ecosystems and community areas.

The vulnerability of land use and development within the Western Australian coastal zone is expected to increase in the future⁴. With the Local Government's planning and investment decisions typically

¹ IPCC. 2013. *Climate Change 2013 – The Physical Science Basis*. Last Accessed on 14 November 2014 from http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5_SPM_brochure_en.pdf

² IPCC. 2014. *Climate Change 2014 Synthesis Report – Approved Summary for Policymakers*. Last Accessed on 6 November 2014 from http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_SPM.pdf

³ Climate Council. 2013. *Counting the Costs: Climate Change and Coastal Flooding*. Last Accessed on 19 September 2014 from <http://www.climatecouncil.org.au/uploads/56812f1261b168e02032126342619dad.pdf>

⁴ Department of Planning. 2014. *Coastal Hazard Risk Management and Adaptation Planning Guidelines*. Last Accessed 14 November 2014 from http://www.planning.wa.gov.au/dop_pub_pdf/CHRMAP_Guidelines.pdf

being long term, they are likely to be affected by the impacts of climate change, such as sea level rise, increased incidence of extreme weather, storm surge or reduced rainfall.

The Western Australian Local Government sector is concerned about the legal implications of including climate change considerations in their current decisions. The sector requested the Western Australian Local Government Association (the Association) draft a “*position paper to support the lobbying of the Minister of Local Government to amend the Local Government Act (1995) to allow Local Governments an exemption from liability on flood liable lands, land subjects to bushfire and land in coastal zones where that Council has acted in good faith in relation to its decision on the land in question*”⁵.

The Association has drafted the following discussion paper to initially address the coastal impacts for climate change and the viability of implementing a liability shield planning instrument.

6. Background

On the 25th February 2011, the State Government of New South Wales amended section 733 of their *Local Government Act 1993 (NSW)*. This amendment provided New South Wales Local Governments with a conditional exemption from liability for “*flood liable land and land in the coastal zone*”. The amendment also exempted NSW Local Government from liability for “*any advice furnished, or anything done or omitted to be done, in good faith, in respect of bush fire prone land*”⁶.

As mentioned, the amendment to section 733 was not a blanket exemption but a conditional one, based on Local Government’s complying with and implementing policies outlined within the relevant guideline developed by the State Government. This guideline is called the “Guidelines for preparing Coastal Zone Management Plans” and it is understood that a Local Government is assumed to have acted in good faith if they have complied with this gazetted guideline.

The amendment to New South Wales’ Local Government Act can be referred to as a liability shield planning instrument⁷. Liability shields can be used to reduce the tendency for the fear of legal liability to lead to unwanted outcomes. These types of instruments can provide a partial or full exemption from legal liability to specified entities if a particular action is taken or fail to act in a particular way, in relation to climate hazards. Typically, the intent in deploying these instruments is to stop people from unjustly pursuing governments or other third parties for legal compensation when hazard risks materialise⁸.

On learning about this amendment in New South Wales, Western Australia Local Governments concerned about the legal liabilities relating to planning decisions, submitted a motion to the 2013 Local Government AGM. This motion requested that the Association researched and considered advocating for a similar liability shield in the Western Australian *Local Government Act 1995*.

6.1 Injurious Affection

A key consideration is the injurious affection clause which is unique to Western Australia. Under section 173 of the *Planning and Development Act 2005 (WA)*, any person whose land is injuriously affected by

⁵ WALGA. 2013. *WALGA AGM Minutes*. Last Accessed 21 February 2014 from <http://walga.asn.au/MemberResources/StateCouncilDocuments/AnnualGeneralMeeting/AGM2013.aspx>.

⁶ Department of Planning. NSW. 2010. *Environmental Planning & Assessment Amendment Act 2008 – Commencement Proclamation – bush fire prone land*. Last Accessed 27 August 2014 from http://www.planning.nsw.gov.au/Portals/0/planningsystem/pdf/circulars/ps_10_028_Codes%20SEPP%20Proclamation.pdf

⁷ NCCARF. 2013. *Limp, leap or learn?* Last Accessed 4 November 2014 from http://www.nccarf.edu.au/sites/default/files/attached_files_publications/Macintosh_2013_Spatial_planning_instruments_adaptati_on_Final.pdf

⁸ NCCARF. 2013. *Limp, leap or learn?* Last Accessed 4 November 2014 from http://www.nccarf.edu.au/sites/default/files/attached_files_publications/Macintosh_2013_Spatial_planning_instruments_adaptati_on_Final.pdf

the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority.

Therefore, while an amendment similar to section 733 of the *Local Government Act 1993* (NSW) could give Local Governments additional confidence when making decisions in relation to climate change; the Association is unsure whether it will negate Local Government's possible liability and therefore avoid the requirement to pay compensation to a landowner for injurious affection.

The AGM motion, and subsequent discussion it generated, has highlighted the ongoing uncertainty within the Western Australian Local Government sector regarding the legal liabilities for planning decisions made in response to climate change.

This discussion paper has been drafted to ascertain where Local Government's key concerns lie, to facilitate a shared understanding of the topic of legal liability, and to identify possible future actions that will address information gaps or missing tools and services required by Local Government sector.

7. Advocacy – The Association's Role

As an industry association, advocacy is a key part of the relationship that the Association has with its membership, the Local Government sector. As outlined in the Association's strategic plan, the Association exists to provide representation and services that deliver value to member Local Governments.

The Association will deliver these benefits by:

- Providing strong representation for Local Government;
- Providing effective leadership for Local Government;
- Building a positive profile for Local Government; and
- Enhancing the capacity of Local Government to deliver services.⁹

Legal liability, as it relates to coastal land use planning decision making, is a key concern for the Local Government sector. This discussion paper aims to identify gaps in knowledge and certainty, and proposes some specific action for the Association and the sector to undertake, to advocate and support Local Governments concern regarding land use planning and decision making.

⁹ WALGA. 2009. *Association's Strategic Plan 2010 – 2015*. Last Accessed 20 November 2014 from <http://www.walga.asn.au/AboutWALGA/WALGADetails/Contacts/StrategicPlan20101015.aspx>

8. Legal Advice

The Association has previously sought legal advice on Local Government's legal liability as it relates to planning decision and the impacts of climate change. The following section seeks to summarise this legal advice. This section aims to identify any information gaps with the legal advice currently obtained. Please note a number of a high level of direct quotes have been included in an attempt to accurately present the advice without additional interpretation.

Each piece of legal advice outlined below is available on WALGA's Climate Change Toolkit [website](#).

8.1 Freehills – Climate Change litigation to flood planning and development in coastal areas

In 2010, the Association initially sought advice from Freehills on;

- Recent cases, increasing trend by courts and planning tribunals towards the recognition of climate change impacts on and arising from proposed developments in coastal areas, and
- Recent national policy developments.

One of the key points of this advice outlined that "Local councils are likely to adopt a more conservative approach in approving developments as they consider the risks of future negligence claims if landowners suffer loss or property damage."¹⁰

The advice went on to examine recent developments in case law and policy in response to climate change and potential sea level rise, and discusses the implications for developers, owners and local councils in coastal areas.

8.2 Freehills – Climate Change Policy and Legal Risks

Also in 2010, the Association sought additional advice from Freehills. Within this advice they outlined the potential legal actions against Local Government to be:

- 1) "SAT appeals against Local Government planning approval decisions – which will always be available and cannot be entirely prevented; and
- 2) Injurious affection claims – which will be available if the land is injuriously affected by local planning schemes."¹¹

A relevant element of the WA planning regime is the ability to claim compensation if land is 'injuriously affected' by a planning scheme. The legal advice outlined that injurious affection claims will not be prevented by a 'proper' consideration of climate change risks. "However, a proper consideration of climate change risks may help minimise SAT appeals and any residual legal risks. Therefore, it does remain appropriate to consider the current climate change science/policy."¹² This is an important consideration for Local Governments.

Freehills advice concluded that "the scope for Local Government to suffer legal ramification is limited. This is primarily because of the generally limited ability to pursue legal actions against Local Governments."

¹⁰ Freehills. 2010. *WALGA Advice – Climate Change Litigation to Flood Planning and Development in Coastal Areas*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹¹ Freehills. 2010. *WALGA Advice – Climate Change Legal Liability*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹² Freehills. 2010. *WALGA Advice – Climate Change Legal Liability*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

The legal advice went on to state, “in particular it is highly unlikely that a Local Government could be successfully sued for damages regarding the bona fide preparation of a local planning scheme or a planning approval decision. There are practical limitations on the likelihood and effectiveness of judicial review challenges to Local Government decisions.”¹³

8.2.1 Freehills Recommendations

Within this advice from Freehills they outline that “land use planning is the appropriate way to prepare for long term climate change adaptation,” but they go on to warn that taking the necessary planning steps may require some restrictions on existing property rights which could require compensation.

Within this advice, Freehills also recommended the development of a sector-wide policy with a range of specific elements.

Freehills recommended that the Association develop a policy in consultation at minimum with the WAPC and State Government, if a co-ordinated national or State approach was not available. This policy would require climate change risks to be considered to a specified standard whenever a new local planning scheme is prepared. In response to this advice, the Association developed ‘Guidelines for Incorporating Climate Change impacts into the Local Government Planning Framework,’ which is outlined in section 10.2 of this discussion paper.

8.3 Baker & McKenzie – Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties¹⁴

In 2011, the Australian Local Government Association (ALGA) engaged Baker & McKenzie to prepare a report to assist ALGA, in collaboration with State and Territory Local Government Associations on a range of areas.

The report commissioned by ALGA was specifically for the “purpose of identifying areas of potential risk and legal liability that State and Territory Local Government organisations 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.”¹⁵

Similarly to the previous Freehills advice, the Baker & McKenzie report stated that in order to mitigate liability, Local Government must ensure that they keep up to date with general climate change science and information relating to mitigation and adaptation strategies.

The report continued that this is important as Courts will take the latest science into account, for example from the IPCC, CSIRO or the Bureau of Meteorology. Additionally, “clear and certain criteria for decision-making should be developed to increase public confidence that decisions are made on the basis of best available scientific evidence.”¹⁶

The report includes a summary table outlining specific tort-base, administrative law and statutory compensation climate change related actions. This table outlines possible actions and the possible defences and mitigation strategies. This report was collated in 2010; therefore it could be valuable to commission an updated table of actions.

¹³ Freehills. 2010. *WALGA Advice – Climate Change Litigation to Flood Planning and Development in Coastal Areas*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹⁴ Freehills. 2010. *WALGA Advice – Climate Change Legal Liability*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹⁵ Baker & McKenzie. 2011. *Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹⁶ Baker & McKenzie. 2011. *Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

This report outlined a number of recommendations however, as it was for a national perspective. Some intricacies regarding Western Australian legislation and planning policies may not be accurately represented within the listed recommendations.

8.4 Beatty Legal - Sea Change Taskforce Coastal Councils Climate Change Legal Risks Report, Part A

The purpose of this legal advice, sought in 2013, was to “identify legal risks for coastal Councils in New South Wales, Victoria and Western Australia created by the actual or projected impacts of climate change and to suggest how coastal Councils might:

- Minimise their legal risks associated with decision making in six key areas;
- Use various regulatory/policy tools to respond to these risks; and
- Demonstrate to Court (and, where possible for their own assets, their insurers) that they have acted reasonably and in a legally defensible manner.¹⁷”

A number of additional considerations were raised by Cockburn Sound Alliance after the release of Beatty Legal’s advice. Consideration arising from this advice relates to matters of negligence and nuisance and whether State or Local Government has a statutory obligation to protect private lands.

The Cockburn Sound Alliance is currently seeking clarification from the Department of Planning, and the Association also suggests seeking additional external legal advice to provide certainty to the Local Government sector.

8.4.1 Key Considerations – Negligence

According to the Beatty Legal advice “a Council could be the subject of an action in negligence if it:

- Grants approval to a development, which is subsequently rendered uninhabitable due to climate change related issues, or which causes consequential damage to other structures, in circumstances where the risk of harm is foreseeable; or
- Fails to build or maintain infrastructure (for example, storm water systems, roads, seawalls/levees) and property damage occurs in circumstances where it has failed to take reasonable care.¹⁸”

The Beatty Legal advice also indicates that a Local Government would only be liable for a Civil Tort claim, if its decision to grant the approval or to fail to conduct works or maintain works was “*manifestly unreasonable*”.

Beatty Legal’s advice continues “however, as scientific evidence mounts and case law evolves, it is more likely that a decision may be held to be manifestly unreasonable if:

- The decision maker’s decision was based on a denial that climate change was occurring;
- It ignored evidence as it became available; and/or
- The decision increased vulnerability without regard to available protective/preventative measures.¹⁹”

¹⁷ Beatty Legal. 2013. *Sea Change Taskforce Coastal Councils Climate Change Legal Risk Report Part A*. Last Accessed 18 August 2014 <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹⁸ Beatty Legal. 2013. Pp. 12. *Sea Change Taskforce Coastal Councils Climate Change Legal Risk Report Part A*. Last Accessed 18 August 2014 <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

¹⁹ Beatty Legal. 2013. Pp. 14. *Sea Change Taskforce Coastal Councils Climate Change Legal Risk Report Part A (pg. 14)*. Last Accessed 18 August 2014 <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

8.4.2 Key Considerations – Nuisance

According to the Beatty Legal advice, “a cause of action in (private) nuisance may arise if a Council substantially and unreasonably interferes with a plaintiff’s ordinary and reasonable use of land they own or occupy. It may be established if:

- Council owned or controlled the asset from which the nuisance emanated;
- The nuisance caused material damage to the land owned or occupied by the plaintiff (his or her reasonable enjoyment of that land);
- The nuisance was due to Council’s actions or inaction;
- Councils knew or ought to have known of the nuisance;
- The risk of harm was foreseeable; and/or
- Council did not take reasonable action to end the nuisance.²⁰”

Depending on the feedback received on this discussion paper, the Association aims to collect additional legal advice to clarify the implications as outlined by the Beatty Legal advice. This recommendation is outlined within the Association’s action plan.

Discussion Questions

1. Has the Local Government sector considered/utilised any of the listed legal advice?
2. Are there any information gaps with this advice? If so, what other information does Local Government require?
3. Can Local Governments suggest any actions to ensure this legal advice is readily available and easy to use, additional to having the legal advice available on the Association’s Climate Change Management Toolkit?

²⁰ Beatty Legal. 2013. Pp.16. *Sea Change Taskforce Coastal Councils Climate Change Legal Risk Report Part A (pg. 14)*. Last Accessed on 18 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

9. Relevant Cases

It is important to consider recent cases that consider decisions regarding liability and compensation. A breakdown and summary of some relevant cases has been included in Appendix 2.

Please note that this isn't an exhaustive list and only a basic summary for each case is provided. For additional information, please follow the links provided below.

Discussion Questions

4. Would your Local Government like additional information on relevant cases?
5. Do you know of any additional examples of national or Western Australian Local Government cases that may be relevant to share?

10. Tools and Services

10.1 IPCC Fifth Assessment Report

The IPCC is the leading international body for assessing the impact of climate change. It was established by the United Nation's Environmental Programme (UNEP) and the World Meteorological Organisation (WMO) in 1988 to provide the world with a clear scientific view on the current state of knowledge in climate change and its potential environmental and socio-economic impacts²¹. The recently released IPCC Fifth Assessment Report consists of three Working Group reports and a Synthesis Report.

10.1.1 Working Group II - Climate Change Impacts, Adaptation, Vulnerability

The Working Group II report contributes an assessment of impacts, adaptation, and vulnerability in the IPCC's Fifth Assessment Report (WGII AR5) and evaluates how patterns of risks and potential benefits are shifting due to climate change.

One of the key risks identified within the report that specifically relates to Australia, outlines that there are "increasing risks to coastal infrastructure and low-lying ecosystems in Australia and New Zealand, with widespread damage towards the upper end of projects sea-level-rise ranges (high confidence)."²²

10.1.2 Fifth Assessment Synthesis Report

This Synthesis Report provides a summary, distils and integrates the findings of the three working group contributions to the IPCC Fifth Assessment Report.

The Synthesis Report outlines that "national governments can coordinate adaptation efforts of local and subnational governments, for example by protecting vulnerable groups, by supporting economic diversification, and by providing information, policy and legal frameworks, and financial support."

The report continues, "Local Government and the private sector are increasingly recognised as critical to progress in adaptation, given their roles in scaling up adaptation of communities, households, and civil society and in managing risk information and financing."²³

Discussion Questions

6. How could the findings of the IPCC Fifth Assessment be made relevant to your local decision making?
7. Would your Local Government like some additional information on the findings within the IPCC Fifth Assessment?

10.2 The Association's Guidelines for Incorporating Climate Change Impacts into the Local Government Planning Framework

The Guidelines for Incorporating Climate Change Impacts into the Local Government Planning Framework (the Guidelines) were released to the Western Australian Local Government sector in early 2013. The Guidelines were developed to help Local Government planners incorporate climate change into their planning decisions. This is important to ensure that decisions made now do not have

²¹ IPCC. 2014. *Organisation*. Last Accessed 12 November 2014 from <http://www.ipcc.ch/organization/organization.shtml>

²² IPCC. 2014. *Climate Change 2014 – Impacts, Adaptation, Vulnerability*. Last Accessed 12 November 2014 from http://ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf

²³ IPCC. 2014. *Climate Change 2014 – Synthesis Report*. Last Accessed on 14 November 2014 from http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_SPM.pdf

adverse impacts on future generations, or create costly liability or compensation issues for future councils.

As stated within the Guideline, “this Guideline has been prepared as a specific tool which outlines a variety of options that could be applied for inclusion of climate change issues into the planning process to address potential coastal impacts, natural hazards and disasters which may result from climate change.”²⁴

Given the legal advice discussed in section 8 above, if a Local Government incorporates climate change projections into their planning decisions, as per the Guidelines, it may help minimise SAT appeals and any residual legal risks.

Discussion Questions

8. Does your Local Governments currently refer to the Guidelines?
9. Are there any barriers to using the Guidelines, and if so, what are they?
10. Can you identify any opportunities to improve the Guidelines?

10.3 State Planning Policy 2.6 – State Coastal Planning Policy

State Planning Policies are particularly important for the Local Government sector. Local Governments are expected to have due regard for State Planning Policies, as stated in section 77 of the *Planning and Development Act 2005*, “when preparing or amending a local planning scheme, to have due regard to this State Coastal Planning Policy where it affects it districts.”²⁵

In 2013, the Department of Planning released the updated State Planning Policy (SPP) 2.6 – State Coastal Planning Policy, which is the highest level of statutory guidance for coastal planning within WA. This policy states that the allowance for sea level rise should be based on a vertical sea level rise of 0.9 metres over a 100-year planning timeframe to 2110.²⁶

The SPP2.6 supports a risk management approach and provides the framework for undertaking risk management and adaptation planning for coastal hazards in Western Australia. It also provides a number of policy measures targeted at coastal hazard risk management and adaptation planning including the establishment of the following process: context vulnerability assessment; risk identification; analysis; evaluation; adaptation; funding arrangement; maintenance; monitoring and review.

Previously in 2012, the Association developed a policy position that agreed in principle to the SPP 2.6, but called for greater guidance about roles and responsibilities of both the State and Local Government. Through this process, the Association identified that Local Government are willing to write and implement adaptation plans, but requests that the State Government provides the resources and tools to develop these plans. This policy position was endorsed by State Council in 2012.

²⁴ WALGA. 2013. *Climate Change and Planning Policy Guideline*. Last Accessed 18 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

²⁵ Department of Planning. 2013. *State Coastal Planning Policy No. 2.6*. Last Accessed 21 February 2014 from http://www.planning.wa.gov.au/dop_pub_pdf/SPP2.6_Policy.pdf

²⁶ Department of Planning. 2013. *State Coastal Planning Policy No. 2.6*. Last Accessed 1 May 2014 from http://www.planning.wa.gov.au/dop_pub_pdf/SPP2.6_Policy.pdf

Discussion Questions

11. Does your Local Government currently give due regard to State Planning Policy 2.6?
12. Does your Local Government feel confident that taking action to have due regard to this policy, won't result in potential legal action?
13. What are the other potential barriers for giving due regard to the State Planning Policy 2.6?
14. Can you identify any opportunities to remove these barriers?
15. Can you identify any improvements to the State Planning Policy 2.6 that would assist Local Government planning decisions?

10.4 Coastal Hazard Risk Management and Adaptation Planning Guidelines

In September 2014, the Department of Planning released the Coastal Hazard Risk Management and Adaptation Planning (CHRMAP) Guidelines (CHRMAP Guidelines). The CHRMAP Guidelines support the SPP2.6 and the Department highlights that they should be read in conjunction with each other.

The CHRMAP Guidelines have been produced to support the implementation of SPP2.6 by assisting decision-makers (Local Governments, State Governments agencies, the Western Australian Planning Commission and the State Administration Tribunal) in developing and implementing effective CHRMAP. They provide an overview and explanation of:

- The process for undertaking CHRMAP;
- Determining appropriate content for CHRMAP; and
- Assessment options for appropriate management and adaptation to risk²⁷.

These Guidelines are now available for Local Governments to utilise at the Department of Planning's [website](#).

Discussion Questions

16. Was your Local Government aware of the CHRMAP Guidelines?
17. Would your Local Government like additional information on the CHRMAP Guidelines?

10.5 Emergency Management Act 2005 (WA)

Identification of coastal hazards and potential risks can be undertaken through a Local Government's Emergency Risk planning. Emergency Management in Western Australia is structured around the *Emergency Management Act 2005*. Amongst other elements, the Act requires that Local Governments maintain effective Local Emergency Management Arrangements for its district including a Local Recovery Plan, to manage recovery following an emergency.

10.5.1 Emergency Risk Assessment Database (ERAD)

Utilising the ERAD, Local Governments can identify hazards that present a high risk to their community and programs that will assist in protecting the community. Hazards that coastal or

²⁷ Department of Planning. 2014. *Coastal Hazard Risk Management and Adaptation Planning Guidelines*. Last Accessed 14 November 2014 from http://www.planning.wa.gov.au/dop_pub_pdf/CHRMAP_Guidelines.pdf

estuarine Local Governments can choose to plan for include flooding, coastal erosion, storm and tsunami events.

Discussion Questions

18. Does your Local Government use the ERAD?
19. Are there any barriers to using the ERAD, and if so, what are they?
20. Can you identify any opportunities to remove these barriers?
21. Can you identify any improvements to the ERAD that would assist Local Government planning decisions?

10.6 LGIS Relevant Services

LGIS understands that the risk to the environment is never constant and they have a dedicated team committed to working together with members to ensure the best possible customised insurance and risk management solutions are realised for all Western Australian Local Governments. LGIS offer a self-insurance scheme, risk management and specialised insurance broking facility and are strongly supported by Local Governments throughout WA.

LGIS provides a bespoke professional risk service that, among other things, is aimed at assisting Local Governments to identify and manage those professional liability risks most susceptible to the consequences and effects of climate change; particularly in relation to land use, building planning and development approvals, professional negligence, and duty of care obligations.

LGIS Liability provides Public Liability and Professional Negligence insurance for claims against Local Governments who are deemed negligent in the act. LGIS Liability has the experience and legal capacity in Public Liability and Professional Negligence claims management to enable all claims notified to the Local Government to be professionally defended.

Discussion Questions

22. Would Local Government like additional information on LGIS's service regarding Climate Change Adaptation Planning?
23. Are there any additional services that the sector would like to see developed by LGIS, and if so, what are they?

10.7 National Partnership Agreement on Natural Disaster Resilience

The Federal Government's National Partnership Agreement (NPA) on Natural Disaster Resilience contributes approximately \$27 million per year to states and territories. This agreement was established in 2009 and aims to enhance the resilience of communities against the impact of natural disasters.

“A key aim of the NPA is to enhance Australia’s resilience to natural disasters through mitigation works, measures and related activities that contribute to safer, sustainable communities better able to withstand the effects of disasters, particularly those arising from the impact of climate change²⁸.”

Funding for projects is prioritised by state and territories in the context of their natural disaster risk priorities. Western Australia’s funding is being managed by the State Emergency Management Committee (SEMC). The most recent application round was open on Friday 1 August 2014 and closed on Tuesday 30 September 2014²⁹.

For more information on the National Disaster Resilience Program, please visit

<https://www.semc.wa.gov.au/riskmanagement/NaturalDisasterResilienceProgram/Pages/default.aspx>

Discussion Questions

24. What kinds of projects could the National Disaster Resilience Program fund that could assist with managing legal liability issues relating to climate change?
25. Has your Local Government applied for funding under the National Disaster Resilience Program?
26. Are there any barriers to applying for this funding, and if so, what are they?
27. Can you identify any opportunities to remove these barriers?

10.8 UNISDR Disaster Resilience Scorecard

The United Nation’s Office for Disaster Risk Reduction (DNISDR) alongside IBM and AECOM has developed the Disaster Resilience Scorecard (the Scorecard). This Scorecard is intended to provide a single integrated perspective on a city’s total disaster resilience position, and the connections between the many different aspects of disaster resilience, while also identifying gaps in plans and provisions³⁰.

This Scorecard is available free to any city, to enable assessment of the city’s resilience to natural hazards. It provides a mechanism to measure a city’s progress and allows the city to establish a baseline and develop a prioritized list of actions to be taken to improve resilience.

Discussion Questions

28. Would a tool similar to this Scorecard be useful for Local Governments to reduce their legal liability of coastal climate change impacts?
29. Does your Local Government use this Scorecard?
30. Are there any barriers to using this Scorecard, and if so, what are they?
31. Can you identify any opportunities to remove these barriers?

²⁸ Attorney-General’s Department. N.d. *National Partnership Agreement on Natural Disaster Resilience*. Last Accessed 18 August 2014 from <http://www.em.gov.au/npa>

²⁹ State Emergency Management Committee. 2014. *Natural Disaster Resilience Program*. Last Accessed 18 August 2014 from <https://www.semc.wa.gov.au/riskmanagement/NaturalDisasterResilienceProgram/Pages/default.aspx>

³⁰ UNISDR. 2014. *Disaster Resilience Scorecard for Cities*. Last Accessed on 6 November 2014 from <http://www.unisdr.org/2014/campaign-cities/Scorecard%20FAQs%20March%2010th%202014.pdf>

10.9 Limp, Leap or Learn? Developing legal frameworks for climate change adaptation planning in Australia – NCCARF Final Report

The *Limp, Leap or Learn* report was published by National Climate Change Adaptation Research Facility (NCCARF) in 2013. This report presents the findings of research into the tools, instruments, and implementation features of legal frameworks for climate change adaptation planning in relation to coastal climate change and bushfire hazard across Australia³¹.

This report outlines seven categories of instruments which are identified according to their spatial planning function:

- Framing instruments;
- Information instruments;
- Regulatory instruments;
- Compulsory acquisition instruments;
- Voluntary instruments;
- Taxes and charges; and
- Liability shield instruments.

The choice and implementation of spatial planning instruments will depend on a range of legal, social, economic, political and institutional factors. This report explores the advantages and disadvantages of employing particular instruments in particular ways to achieve climate change adaptation.

For more information on this specific instruments, or to access the report please visit NCCARF's [website](#).

Discussion Question

32. Was your Local Government aware of this research?
33. Would you like WALGA to provide promotion and additional information on relevant NCCARF research?

Discussion Questions

34. Are there any gaps in the tools and services available to Local Government – i.e. are there any tools or services additional to those described above that would assist Local Government?
35. Are the tools and services described in section 10 adequate, but access/awareness of these tools insufficient? If so, can you identify opportunities to ameliorate this?
36. Do you use any other tools and services additional to those described in section 10 that can be shared with other Local Governments?

³¹ NCCARF. 2013. *Limp, leap or learn?* Last Accessed 4 November 2014 from http://www.nccarf.edu.au/sites/default/files/attached_files_publications/Macintosh_2013_Spatial_planning_instruments_adaptati_on_Final.pdf

11. Opportunities

11.1 Adapting to our Changing Climate

In 2012, the State Government released the WA Climate Change Strategy entitled *Adapting to our changing climate* (the Strategy). Within this document the Department of Environment Regulation outlines likely impacts of climate change for Western Australia.

This Strategy states that “ the bulk of the mitigation policy will occur at the national level,³²” clearly outlining that the strategy would have greater focus on adaptation. The Strategy also outlines priority areas for adaptation including; water supplies, agricultural sector, critical infrastructure, health and emergency management service systems, industries, communities and management of our natural environment.

11.1.1 Climate Change Science

The Strategy outlines a range of impacts of climate change, due to the enhanced greenhouse effect. It also recognises that the changes in the intensity and frequency of severe weather events have been observed throughout the world and that global climate change is impacting Australia.

Some of the likely impacts of climate change outlined within the strategy included an “increased risks to coastal settlements of coastal erosion, saltwater inundation and storm surge flooding.”³³

11.1.2 Risk to Infrastructure

The most relevant section of the Strategy relating to legal liability and land use planning is in the resilient infrastructure section.

This section states, “A changing climate will mean increased risks to major infrastructure due to events such as floods, storms, heatwaves and bushfires. These impacts may interrupt rail, road and port operations, water and energy supplies, resources industries, and cause damage to private and public assets. Planning and infrastructure provisions can also have a significant impact on the opportunities to reduce greenhouse gas emissions.”³⁴

The Strategy goes on to outline approaches to address these issues, relevant approaches include:

- supporting infrastructure risk assessment and adaptation planning; and
- integrated climate change considerations into development assessment, land-use and infrastructure planning, infrastructure procurement, management and maintenance programs.

Since the release of the Strategy, the Association has received an update from the Department of Environment Regulation, stating that it is the Department’s intention to review the implementation of action by state agencies in line with the strategy at the end of 2015. The Association will continue to monitor the progress of the State’s Climate Change Strategy.

Discussion Questions

37. Can you identify possible opportunities for the Association and Local Governments within the Department’s review of the State Climate Change Strategy?

³² Department of Environment Regulation. 2012. *Adapting to our Changing Climate*. Last Accessed 14 August 2014 from <http://www.dec.wa.gov.au/news/7136-adapting-to-our-changing-climate.html>

³³ Department of Environment Regulation. 2012. *Adapting to our Changing Climate*. Last Accessed 14 August 2014 from <http://www.dec.wa.gov.au/news/7136-adapting-to-our-changing-climate.html>

³⁴ Department of Environment Regulation. 2012. *Adapting to our Changing Climate*. Last Accessed 14 August 2014 from <http://www.dec.wa.gov.au/news/7136-adapting-to-our-changing-climate.html>

11.2 Proposed - Climate Change Readiness (Coastal Planning and Protection) Bill 2013

On 20 June 2013, Lynn MacLaren MLC tabled a private member's bill, *Climate Change Readiness (Coastal Planning and Protection) Bill 2013*. The Bill, originally introduced in 2012, has been updated to reflect the latest practices of coastal planners and in response to additional feedback from the Association. This legislation aims to address this critical issue, how to prepare our coastal cities and undeveloped environments for storm surges, flooding and sea level rise.

The formal synopsis of this Bill is "to provide for the regulation of planning, development and management in the coastal zone in readiness for the impacts of climate change."³⁵

Under this Bill, each Local Government (or other controlling body) of land in the coastal zone must prepare an adaptation plan and a management plan (each a 'local coastal plan') to ensure integrated management for the protection of the environmental, social, cultural and economic values of the coast. This Bill would regulate development within the transition zones. These zones are the area of the coastal zone most vulnerable to adverse impacts of coastal hazards and subject to specific development controls. These zones are identified through a state wide coastal plan and vulnerability assessment.

The Bill would allow only short term development to be permitted within transition zones, subject to conditions. Additionally, there would no compensation for injurious affection caused by the making of the WA coastal plan or a local coastal plan.

It is still uncertain whether this Bill will be passed and the timeline for decision making is also unknown. However, it is an important recognition of the issues regarding roles and responsibilities of State and Local Government's planning implications relating to the coastal areas.

Discussion Question

38. Would Local Governments like additional information on Lynn MacLaren's private members bill and the timeframe for decision making?
39. Can you identify possible opportunities for the Association and Local Governments through the proposed *Climate Change Readiness (Coastal Planning and Protection) Bill 2013*?

11.3 Federal Government Relevant Policies and Legislation

11.3.1 National Strategy - Enhancing Disaster Resilience in the Built Environment

It is important for Local Government to have an understanding of what is occurring at a national level. In 2011, the Council of Australian Governments (COAG) adopted a new National Strategy for Disaster Resilience (NSDR) which in turn led to the Enhancing Disaster Resilience in the Built Environment project. There are four key phases within this project.

Vision Statement - future state of disaster resilience in the built environment;

State Review - legislative stocktake of each jurisdiction for improvement, the Association represented the Local Government sector within this review;

³⁵ Parliament of Western Australia. 2014. *Climate Change Readiness (Coastal Planning and Protection) Bill 2013*. Last Accessed 27 August 2014 from <http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=0389E89F21EAF66248257B8F003E59C2>

Gap Analysis - analysis of current state and vision to identify areas for improvement; and

Roadmap - implementation activities to achieve the future state of disaster resilience.³⁶

The final phase of this project is the development of the Enhancing Disaster Resilience in the Built Environment Roadmap. The final version of this Roadmap was released in June 2012. The Roadmap identified seven priority areas for improvement, each with recommended implementation activities.

This Roadmap document has been developed to outline the vision and blueprint for improving disaster resilience in Australia through land use planning and building codes.³⁷ Importantly, this Roadmap includes a key issues section that identifies the findings, responsibilities, cost implications and legal and liability issues. The legal and liability issues will be relevant information for the Local Government sector.

The Association's Policy Manager of Planning and Improvement is on the State Working Group which informs the National Committee of the Roadmap's application in WA. The Association will provide updates to the sector as they arise.

Discussion Questions

40. Can you identify possible opportunities for the Association and Local Governments with the Roadmap's application in WA?
41. Are there any particular key issues that the sector would like the Association to raise through the State Working Group?

³⁶ Planning Institute Australia. 2013. *Enhancing Disaster Resilience in the Built Environment*. Last Accessed 29 August 2014 from <http://www.planning.org.au/news/resilient-communities>

³⁷ National Emergency Management Committee. 2012. *Enhancing Disaster Resilience in the Built Environment – Roadmap*. Last Accessed 29 August 2014 from <http://www.plandevbs.com.au/wp-content/uploads/2012/11/Roadmap-LUPBCT-Disaster-Resilience-FINAL.pdf>

12. Action Plan

Based the information collected through this discussion paper, these potential next steps have been identified by the Association.

Action Plan	
1.	<p>The Association to seek additional legal advice including:</p> <ul style="list-style-type: none"> - any liability implications for Local Government amending planning schemes to align with SPP2.6; - confirmation of Local Government's obligation or otherwise to undertake works to protect private property (as per Beatty Legal); and - updated list of case law examples from across Australia.
2.	<p>The Association to organise and facilitate the development of a Policy Forum on coastal planning and adaptation.</p> <p>A policy forum would allow the Association and coastal Local Governments to identify, consider and respond to commonly shared issues relating to coastal planning, coastal adaptation, decision making and legal implications.</p>
3.	<p>The Association to develop and submit for State Council endorsement a policy position relating to climate change, land use planning and legal liability.</p>
4.	<p>The Association to liaise with research agencies such as Western Australia Marine Science Institute (WAMSI) to distribute research findings that relate to local decision-making and legal liability to the Local Government sector.</p>
4.	<p>The Association to update and promote legal liability information on the Climate Change Management Toolkit, including a frequently asked question document and a table summarising all potential legal issues and corresponding legal advice.</p>
5.	<p>The Association to update its Guidelines for Incorporating Climate Change into Local Government Planning Framework with additional information on planning instruments and promote its location on the Climate Change Management Toolkit.</p>
6.	<p>The Association to work with the State Government specifically:</p> <ol style="list-style-type: none"> 1) Organise a workshop with the Department of Planning to promote guidelines and detail next steps for Local Governments aligning with the State Planning Policy 2.6; and 2) To develop a coordinated approach to land use planning. This would be appropriate given the potential exposure of the WAPC in respect of injurious affection claims and that where region planning schemes operate they must guide local planning schemes.
7.	<p>The Association continue to investigate the plausibility of rewording the <i>Planning and Development Act 2005</i> and if there is a significant case to do so.</p> <p>If significant cause is found, the Association will lobby the Minister for Planning, John Day, to include section 74 (protection from liability) from the private members Bill <i>Climate Change (Coastal Planning and Protection) Readiness Bill 2012</i> into the <i>Planning and Development Act 2005</i>.</p>

Discussion Questions

42. Does your Local Government support the possible action items suggested above?
43. If asked to rate, what would be your preferred five actions?
44. What additional action items would you suggest that the Association undertake to support the main aims of this discussion paper? Please provide details.
45. Can you identify any potential issues with the proposed above actions?
46. Would your Local Government support relevant advocacy actions, if they required specific Local Government support?

13. Conclusion

Local Government's uncertainty regarding legal liabilities of climate change have arisen due to the relatively uncoordinated approach between Federal, State and Local Government, and the fact that the issue is largely untested within Australia's judicial system. This discussion paper was written to assist in identifying a way forward that will mitigate Local Government's uncertainty and improve coordination across all levels of Government.

The Association welcomes Local Government's feedback on all the issues discussed throughout this paper. Any feedback provided will be used to develop additional recommendations for the Association's next steps and advocacy strategy.

Discussion Questions

47. What are your specific Local Government's key concerns in relation to legal implications, land use planning and the coastal impacts of climate change?
48. Are there any areas of concern that have not been outlined within this paper? Please include any details?

Appendix 1 – Glossary

The definitions included in the below table are indicative only. For additional clarification, please refer to the specific legislation or legal advice where the terms are mentioned.

Good faith	This can mean legally binding due diligence around the effort made, information given, or transaction done, honestly, objectively, with no deliberate intent to defraud the other party ³⁸ .
Due regard	This means to give a fair consideration to and give sufficient attention to all of the facts ³⁹ .
Injurious Affection	Under current legislation in Western Australia, the expression 'injurious affection' is not capable of a single universal definition. The meaning of the expression 'injurious affection' as it affects a land owner must be carefully determined from the provisions of the relevant legislation ⁴⁰ .
Negligence	The omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. It can also mean doing something which a prudent and reasonable person would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances ⁴¹ .
Nuisance	The two types of nuisance are private nuisance and public nuisance. A private nuisance is a civil wrong; it is the unreasonable, unwarranted, or unlawful use of one's property in a manner that substantially interferes with the enjoyment or use of another individual's property, without an actual trespass or physical invasion to the land. A public nuisance is a criminal wrong; it is an act or omission that obstructs, damages, or inconveniences the rights of the community ⁴² .
Compensation	An act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss of injury to another, in order that thereby the person damnified may receive equal value for his loss, or be made whole in respect of his injury ⁴³ .

³⁸ The Law Dictionary. 2014. *What is Good Faith?* Last Accessed 4 November 2014 from <http://thelawdictionary.org/good-faith/>

³⁹ The Law Dictionary. 2014. *What is Due Regard?* Last Accessed 4 November 2014 from <http://thelawdictionary.org/due-regard/>

⁴⁰ Law Reform Commission of Western Australia. 2014. *Project 98 – Compensation for injurious affection*. Last Accessed 4 November 2014 from http://www.lrc.justice.wa.gov.au/P/project_98.aspx

⁴¹ The Law Dictionary. 2014. *What is Negligence?* Last Accessed 4 November 2014 from <http://thelawdictionary.org/negligence/>

⁴² The Free Dictionary. 2014. *Nuisance*. Last Accessed 4 November 2014 from <http://legal-dictionary.thefreedictionary.com/nuisance>

⁴³ The Law Dictionary. 2014. *What is compensation?* Last Accessed 4 November 2014 from <http://thelawdictionary.org/compensation/>

Appendix 2 - Recent Cases

Recent examples of case law are important to evaluate the implications of decisions making. There are a number of states and national cases included below, however please note that this list is not exhaustive and only provides a basic summary of the specific cases.

Western Australia

The case of *Town of East Fremantle v Denis James Cornell [2005]* is particularly relevant for injurious affection considerations. The East Fremantle Town Planning Scheme designated places of heritage value and required them to be retained in their present state.

Towards the end of 1993, the owners of the property applied for development approval for a two-storey residence. The application was refused on the grounds of heritage considerations, as the proposed development encroached into the heritage value area and was deemed to have an unacceptable impact on the adjacent river landscape.

The owners of the land proceeded to make a claim for compensation for injurious affection. The case discusses the grounds for injurious affection and whether the Town Planning Scheme permitted development for any purpose other than a public purpose within this heritage value area. For more information on this case, please visit this [website](#).

The Department of Planning outlined the *Western Australian Planning Commission v Temwood Holdings Pty Ltd [2004]* case to the Association, stating its importance with regard to possible future judicial rulings. Within this case, the High Court held that a developer had no right to compensation for the Crown taking over ownership of a foreshore reserve⁴⁴. This decision by the High Court has therefore overturned a decision by “Western Australia’s Full Supreme Court in relation to statutory compensation for property affected by planning schemes.”⁴⁵

The key facts of the case include;

- That “only the person who owned the land when the reservation was made could obtain compensation,” and
- That the condition imposed (the taking of the land) was “imposed for a legitimate planning purpose, and was reasonably related to the proposed development.”

The Association notes that the *Planning and Development Act 2005 (WA)* was enacted after this case, so only the principles of the court decisions would apply. Therefore under the current Act, the purpose for acquiring land is clearly set out in Part 11 – *Compensation and acquisition*. For more information on this case, please visit this [website](#).

National Cases⁴⁶

Victoria

In *Myers v South Gippsland Shire Council [2008]* VCAT 2414, the Victorian Civil Administrative Tribunal (**VCAT**) refused, on climate change-related grounds, to approve a development proposal to

⁴⁴ High Court of Australia. 2004. *Western Australian Planning Commission v Temwood Holdings Pty Ltd*. Last Accessed 24 August 2014 from <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2004/hca63-2004-12-9.pdf>.

⁴⁵ Business News. 2004. *High Court decision favours WAPC*. Last Accessed 24 February 2014 from <http://www.businessnews.com.au/article/High-Court-decision-favours-WAPC>.

⁴⁶ Freehills. 2010. *WALGA Advice – Climate Change Litigation to Flood Planning and Development in Coastal Areas*. Last Accessed 15 August 2014 from <http://www.walgaclimatechange.com.au/announcements/climate-change-and-planning-policy-guideline>

subdivide an area of coastal land. A coastal hazard vulnerability assessment was required by the Tribunal which considered issues including sea level rise, storm tide and surges, coastal processes and local topography and geology. The Tribunal held the key issue in assessing the appropriateness of the subdivision was to balance the finding of the coastal vulnerability assessment with the expectation of township zoning development. Adopting a precautionary approach, the Tribunal held that granting a development approval in the circumstances would result in a poor planning outcome and unnecessarily burden future generations. The application was accordingly refused by the Tribunal.

In *Gippsland Coastal Board v South Gippsland Shire Council* [2008] VCAT 1545, the VCAT overturned a council's decision to grant development consent for six coastal dwellings. While the relevant planning legislation did not specifically require consideration of coastal recession or sea level rise, it required the responsible consent authority to consider any significant effects which the environment may have on use of the development. The Tribunal found that the location of the development was not suitable for the proposed development given the unacceptable risk of sea level rise and flood inundation. Although the Tribunal conceded that there was no scientific certainty as to the degree or magnitude of sea level rise, there was general consensus that some level of climate change would lead to extreme weather beyond the historical record of sea levels or inundation from coastal or inland storm events.

New South Wales

The NSW Court of Appeal in *Minister for Planning v Walker* (2008) has affirmed the possibility of future challenges to planning and development approvals under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) if decision-makers fail to take into account long-term environmental risk factors, including climate change.

The Court of Appeal agreed with the views of Preston CJ in *Telstra Corporation Limited v Hornsby Shire Council* [2006] that although section 79C of the EP&A Act (which sets out the evaluation process for consent authorities) does not expressly refer to principles of ecologically sustainable development (ESD principles) as factors required to be taken into account by a consent authority, the "public interest" is broad enough to embrace ESD principles, including the precautionary principle. The Court of Appeal said that, while it is not mandatory for the Minister to consider any particular aspect of the "public interest", ESD principles are likely to be an element of public interest in relation to most planning decisions in coastal areas, and failure to consider ESD would provide strong evidence of the failure to consider the public interest.

The Court of Appeal decision, however, sits uncomfortably with an order made on 1 February 2010 by the NSW Land and Environment Court to effectively overrule a Local Government's planning policy to roll back beachfront living given the threat of sea level rise. In court proceedings between Byron Shire Council and a local resident, the Court upheld a home owner's right to protect his property from the sea, effectively undermining the Local Government's long-term strategy of planned retreat aimed at pushing back development from the seafront. These decisions illustrate the considerable uncertainty which currently exists, especially for Local Governments, in terms of formulating and implementing long-term local planning policies.

South Australia

In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008], the South Australian Supreme Court upheld a decision of the Environment, Resources and Development Court refusing a subdivision of a large parcel of coastal land, finding that rising sea levels and changes in flood patterns caused by global warming would erode a buffer zone and prevent public access to the coast.

Queensland

In *Charles & Howard Pty Ltd v Redland Shire Council* (2007), the Queensland Planning and Environment Court dismissed an appeal against a decision by Redland Shire Council. The Council had granted approval to construct a building pad but required the applicant to locate the building pad on the western side of the land, instead of the eastern side. In imposing the condition, the Council took into account the impact of climate change on the flood prone land. The Court found that the condition requiring the house to be located in an area less prone to tidal inundation was relevant and reasonable as it better reflected the aims of the planning scheme provisions.

Conclusion

A number of these decisions demonstrate the willingness of courts and planning tribunals, across various Australian jurisdictions, to accept evidence of climate change risk and emphasise the need for development applicants and consent authorities to take account of climate change risks, in particular the impact of rising sea levels, when planning their developments.