Advice

Climate change policy

Climate change policy legal risks

Confidential & Privileged – Draft for discussion

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Climate change policy legal risks

Matter	Climate change policy
Context	The Western Australian Local Government Association (**WALGA**) is planning a policy to guide Western Australian Local Governments on climate change issues for making planning approval decisions (**Policy**). The Policy is being developed in 2 stages: 1 an initial high level legal advice by Freehills; and 2 the preparation of the Policy by Essential Environmental, as guided by the legal advice.
Scope	WALGA has requested our high level legal advice regarding: 1 the existing WA planning regime and how it currently addresses climate change risks; 2 potential legal ramifications for Local Governments if they improperly consider climate change risks; 3 consideration of the current 'levels' of climate change science / policy at State, National and International levels that WA Local Governments should pay heed to when formulating planning schemes and policies and making planning decisions, to minimise the potential legal ramifications; 4 an indication of whether, if Local Governments merely follow State imposed planning guidelines / policy, (which may or may not adequately address climate change impacts) but are aware of higher level climate science predictions / implications, they will be adequately protected against legal challenge from developers and / or ratepayers; and 5 recommendations arising from the matters in 1-4.
WA planning regime	Other than for the Western Australian Statement of Planning Policy No. 2.6 “State Coastal Planning Policy” (**Coastal SPP**), there is a general absence of State imposed planning guidelines / policy regarding climate change risks to guide

Local Governments.

Instead Local Governments have broad discretion for:

- the preparation of local planning schemes; and
- making planning approval decisions.

Even in respect of the Coastal SPP, the obligation on Local Governments is still to only give it 'due regard' in preparing local planning schemes and consider it is a relevant factor for individual planning approval applications.

Our interpretation of the Coastal SPP is that its sea level rise setback is an evolving one, which will now incorporate the latest IPCC Fourth Assessment Report, 2007 (**AR4**).

A relevant element of the WA planning regime is the ability to claim compensation if land is 'injuriously affected' by a planning scheme.

Potential legal ramifications for Local Governments if improper consideration of climate change risks

A summary table of the potential legal ramifications is presented in Schedule 1.

The scope for Local Governments to suffer legal ramifications is limited. This is primarily because of the generally limited ability to pursue legal actions against Local Governments.

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.

The main potential legal actions are:

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.

How important is proper consideration of climate change risks to minimise the potential legal ramifications?

The availability of these main potential legal actions 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.

Current climate change science/policy

There are numerous climate change focused studies, strategies, initiatives and bodies and their work is constantly evolving. This makes it very difficult without expert scientific advice to determine with confidence what is a 'proper' or

'sufficient' approach to climate change risks for WA Local Governments.

There are several climate change adaptation policy initiatives underway and progressing, but there is a long way to go to achieve a clear, co-ordinated approach. This process may be led and guided by the Commonwealth Department of Climate Change, but will ultimately most likely need agreement through COAG.

Is following State imposed planning guidelines / policy sufficient to avoid the potential legal ramifications?

Under the WA planning regime Local Governments must themselves determine their approach to climate change risks.

Advice and recommendations

Land use planning is the appropriate way to prepare for long term climate change adaptation.

However, taking the necessary planning steps may require some restriction on existing property rights which could require compensation.

The preferred approach to address climate change risks through land planning, while also addressing compensation issues, is a co-ordinated national approach involving all spheres of government. It will be particularly important for the identified compensation issues to be addressed.

In the absence of such a co-ordinated national approach currently existing then WA Local Governments must consider other alternatives to manage their risk, at least for the interim period before there is such a co-ordinated national approach. This would ideally be effected through a co-ordinated state approach with the backing of the State Government. However, if that is also not possible then it should be done by the next most preferable way, being through a collective Local Government approach such as under WALGA. At a minimum the WAPC and State Government should be consulted with.

We recommend that the Policy:

1 state a recommended scientific position to the extent possible, including at least for sea level rise risks, as advised by independent expert opinion, ideally by a panel of experts, based on a review of the available science;

2 require climate change risks to be considered to that standard whenever a new local planning scheme is prepared and at reasonably regular review points, for example every 5 years;

3 only allow Local Governments to deviate from that standard in their own local planning schemes on the advice of an independent expert consultant, whose advice is documented (ideally in the Local Government's

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Council minutes when voting on the local planning scheme) and is consulted on with the scheme;

4 itself be regularly reviewed, again potentially every 5 years, including in respect of the recommended scientific position which may become more or less cautious depending on the developing scientific knowledge;

5 provide suggested:

- climate change risk disclaimer wording for planning approval applications; and
- guidance for Local Government offices in dealing with climate change risk issues with applicants; and

6 be carefully prepared to manage any potential legal exposure from WALGA to Local Governments relying on it. We can advise on this further once the Policy is prepared.

In respect of the recommended scientific position, while it should be advised on by an independent expert, or ideally a panel of experts, we note that AR4 represents the accepted scientific standard and therefore minimum standard of climate change risk that should be considered. This is mandatory for sea level rise risk consideration because the Coastal SPP is an evolving standard that now incorporates AR4. AR4 represents a minimum acceptable standard because there is growing scientific support that the climate system appears to be changing faster than earlier thought likely.

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Detailed advice

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1 Exemptions and qualifications

WALGA has instructed us to only consider:

1. planning issues, not building design or any other potentially climate change related issues; and
2. potential issues for future planning approval decisions, not for decisions already made.

Rising sea level issues are focused on in this advice as an indicative example of climate change risks. They are:

- one of the most developed areas of climate change risk knowledge;
- the most advanced area of climate change planning policy; and
- one of the potentially most significant climate change risks for Local Governments.

Other potentially relevant climate change risks may include:

- increased bush fire frequency and impact;
- increased storm frequency and impact, including increased rainfall and flooding events;
- access to water resources; and
- access to other services, including energy.

We have also only considered potential legal ramifications for Local Governments arising from bona fide decisions, not where there is deliberate bias, misfeasance or any other inappropriate approach to decision making.

2 WA planning regime and climate change risks

2.1 The PD Act

The *Planning and Development Act 2005* (WA) (**PD Act**) is the principal WA planning legislation, which sets out the WA planning regime.

Section references in this advice are to the PD Act.

2.2 WA planning hierarchy

The PD Act provides for:

- State planning policies (**SPPs**) (Part 3);
- region planning schemes (Part 4); and
- local planning schemes (Part 5).

Region planning schemes and local planning schemes are collectively referred to as 'planning schemes'.

Local planning schemes are not to be approved by the Minister unless their provisions are in accordance with and consistent with any relevant region planning scheme (section 123(1)). A region planning scheme prevails over a local planning scheme to the extent of any inconsistency and a Local Government must resolve to amend a local planning scheme in accordance with a region planning scheme (section 124).

The PD Act also provides for various other planning instruments, including interim development orders (Part 6), planning control areas (Part 7) and Improvement Plans (Part 8). However, this advice will focus on those bullet pointed above and in particular on local planning schemes as the most relevant for Local Governments.

2.3 Planning approval

Any planning scheme can require that 'development' not be undertaken without approval (section 162). Therefore, whether any development will require planning approval and the precise process that must be followed, including what must be considered, will depend on the relevant planning scheme.

'Development' is broadly defined in the PD Act as:

> the development or use of any land, including —
>
> (a) any demolition, erection, construction, alteration of or addition to any building or structure on the land;
>
> (b) the carrying out on the land of any excavation or other works;
>
> …'

2.4 Local planning schemes

(a) Preparation and approval

A new local planning scheme, or an amendment to an existing local planning scheme, goes through a complex preparation and approval process, including:

- preparation and adoption by the Local Government
- advertisement;
- consultation;
- referral to the Environmental Protection Authority (**EPA**) which may assess it;
- Western Australian Planning Commission (**WAPC**) examination; and
- Ministerial approval (section 87 and the *Town Planning Regulations 1967* (WA) (**TP Regs**)).

(b) Model Scheme Text

There is great variation between the various planning schemes operating in WA and we are unable to review them all for the purposes of this advice. Therefore we have only considered the Model Scheme Text for local planning schemes. The Model Scheme Text is contained in the TP Regs.

Clause references in this paragraph 2.4 are to the Model Scheme Text.

Under regulation 11 of the TP Regs if a local planning scheme envisages the zoning or classification of land it must be prepared:

- in accordance with the Model Scheme Text; and
- otherwise, in such manner and form as the Minister or an authorised person may require.

Therefore the Model Scheme Text can serve as a reasonable guide to the local planning schemes applying in WA, particularly any new or recently amended local planning schemes.

(c) Requirement for planning approval

Other than for certain permitted development, considered below, all development on land zoned and reserved under a Model Scheme Text scheme will require planning approval (cl 8.1).

(d) Permitted development

The Model Scheme Text provides for some forms of development which would not require planning approval (cl 8.2), including the erection on a lot of a single house including any extension, ancillary outbuildings and swimming pools (cl 8.2(b)).

(e) Matters to be considered by local government

Cl 10.2 provides that:

> 'The local government in considering an application for planning approval is to have due regard to such of the following matters as are in the opinion of the local government relevant to the use or development the subject of the application –
>
> (a) the aims and provisions of the Scheme … ;
>
> (b) the requirements of orderly and proper planning … ;
>
> (c) any approved statement of planning policy of the Commission;
>
> …
>
> (e) any relevant policy or strategy of the Commission and any relevant policy adopted by the Government of the State;
>
> …
>
> (i) the compatibility of a use or development with its setting;
>
> (j) any social issues that have an effect on the amenity of the locality;
>
> …
>
> (l) the likely effect of the proposal on the natural environment and any means that are proposed to protect or to mitigate impacts on the natural environment;
>
> (m) whether the land to which the application relates is unsuitable for the proposal by reason of it being, or being likely to be, subject to flooding, tidal inundation, subsidence, landslip, bush fire or any other risk;
>
> (n) the preservation of the amenity of the locality;
>
> …
>
> (w) whether the proposal is likely to cause soil erosion or land degradation;
>
> (y) any relevant submissions received on the application;
>
> (z) the comments or submissions received from any authority consulted … ; and
>
> (za) any other planning consideration the local government considers relevant.' (emphasis added)

We have quoted these particular matters as they can all potentially involve consideration of climate change risks.

The effect of the introductory passage prior to the listed matters is potentially unclear. There is an express inclusion of a subjective element. We see 2 possible interpretations:

1 that it is at the Local Government's subjective discretion as to:

- which of the listed matters are relevant to a development or use; and
- what 'due regard' to them requires; or

2 that it is only at the Local Government's subjective discretion as to which of the listed matters are relevant to a development or use, and what is 'due regard' is to be determined by a more objective standard.

In our view the second interpretation is preferable. We consider it is supported by the language used, that 'as are' suggests the 'opinion of the local government' only relates to the multiple 'following matters'. If the opinion of the local government was also intended to apply to what is 'due regard', then the passage would instead have been:

> 'have due regard to such of the following matters as ~~are~~ in the opinion of the local government is relevant to the use or development …'

From a Local Government's perspective the second interpretation is more conservative and therefore less open to challenge. Also, for a Local Government to itself seek to apply the more objective standard is likely to ensure more rigorous and less challengeable decisions. Even in respect of a subjective discretion there would be an error of law if the decision-maker's decision was 'manifestly unreasonable'.

Therefore, we consider that it is at a Local Government's subjective discretion as to which of the cl 10.2 matters are relevant to a development or use, provided that is not 'manifestly unreasonable'. What will be relevant to any particular development or use will depend on the particular circumstances. However, where development or use will be in a coastal area it is likely that sea level rise risks would, at least objectively, be a relevant matter.

The meaning of 'due regard' has been considered in a PD Act context by two recent 2009 WA Supreme Court cases. These cases involved a slightly different context, involving section 241(1) which outlines the State Administrative Tribunal (**SAT**)'s relevant considerations in hearing planning appeals. However, we consider that the consideration of the 'due regard' requirements would apply equally, that the SAT and Local Government's 'due regard' of planning considerations would be the same.

In summary these cases held that:

- due regard requires more than 'mere advertence' to the relevant matter;
- due regard is not left to a decision-maker to subjectively determine a matter's weight as they consider appropriate. Rather, the weight to be assigned depends on the nature of the matter in question. If it is 'highly material' to the decision then it must be given weight as a 'fundamental element'. If the matter was of marginal relevance to the decision then the weight to be assigned would not be that of a fundamental element and the requirement would be to 'merely consider' the matter;
- the matter of weight assigned by a decision maker would not involve an error of law unless the decision-maker gave inordinate weight to a consideration of relatively little importance or very little weight to a consideration warranting very great importance, such that it was 'manifestly unreasonable';
- there is a failure to have due regard if in applying a policy instrument its terms were sufficiently misconstrued or its purposes misunderstood; and
- the weight given to a considered matter does not prevent departure from it.

Again, what will be 'due regard' in respect of cl 10.2 matters relating to climate change risks will depend on the particular circumstances. Where development or use will be in a coastal area possibly susceptible to inundation it is likely that sea level rise risks would be 'highly material' to the decision and must be given weight as a 'fundamental element'.

2.5 SPPs

The following SPPs are considered as being the main SPPs that potentially involve consideration of climate change risks.

(a) Coastal SPP

The Western Australian Statement of Planning Policy No. 2.6 "State Coastal Planning Policy" (**Coastal SPP**) is an SPP under section 29 of the PD Act.

Clause references in this paragraph 2.5(a) are to the Coastal SPP.

(1) Objectives

One objective of the Coastal SPP is to ensure that the location of coastal facilities and development takes into account coastal processes including erosion, accretion, storm surge, tides, wave conditions, sea level change and biophysical criteria.

(2) Coastal setbacks

Clause 2.3 addresses coastal setbacks. The clause is slightly unclear. It provides that there must be a 'total setback' which includes both:

1. a 'coastal foreshore reserve', which provides for factors such as ecological values and public access; and
2. 'development setbacks for physical processes', for which Schedule One provides guidance.

It is the second category which is relevant to sea level rise risks.

The required total setback will vary according to the circumstances of any particular proposal. As a general guide a total setback in the order of 100 metres from the horizontal setback datum (HSD) will be expected but each proposal must be assessed having regard to the Coastal SPP, including the principles of Schedule One.

(3) Sea level rise development setbacks

Clause 5 'Policy Measures' provides that:

> **'5.1 General measures**
>
> Local and regional planning strategies, structure plans, schemes, subdivisions, strata subdivision and development applications, as well as other planning decisions and instruments relating to the coast should:
>
> …
>
> **Development and Settlement**
>
> (xv) Ensure that use of the coast, including the marine environment, for recreation, conservation, tourism, commerce, industry, housing, ocean access and other appropriate activities, is sustainable and <u>located in suitable areas</u>.
>
> …
>
> **Physical Processes Setback**
>
> (xxii) <u>Ensure that new buildings and foreshore infrastructure on the coast are positioned to avoid risk of damage from coastal processes</u> and, where possible, avoid the need for physical structures to protect development from potential damage caused by physical processes on the coast. <u>The Setback Guidelines in Schedule One form part of this Policy and should be applied to determine appropriate setbacks to accommodate coastal processes</u>.
>
> (xxiii) Recognise, if specifically appropriate, the variations and possible exemptions to the physical processes setback (in Schedule One) that

may be considered to accommodate varying physical circumstances and desirable, essential or practical community development outcomes (as specified in the Schedule).

5.2 Coastal Plan Requirements

A coastal planning strategy and/or foreshore management plan should be prepared to support development proposals on the coast. The coastal planning strategy or foreshore management plan should:

(i) take into account:

- coastal processes and sea level change;

…' (emphasis added)

Schedule One provides 'Coastal Development Setback Guidelines for Physical Processes'. In particular it provides for the following component of a coastal setback:

'**D.3 (S3) Distance to Allow for Sea Level Change**

The setback to allow for sea level rise is based on the mean of the median model of the latest Assessment Report of the IPCC Working Group (currently, the *Third Assessment Report of the Intergovernmental Panel on Climate Change Working Group*, January 2001). The vertical change predicted by the current model between the years of 2000 and 2100 is 0.38 metres. A multiplier of 100, based on the Bruun Rule shall be used and gives a value for S3 = 38 metres for sandy shores. For other shore types, S3 shall be assessed in regard to local geography.' (emphasis added)

Our interpretation of this passage is that the sea level rise setback must be based on the 'latest' IPCC Assessment Report using 'a multiplier of 100, based on the Bruun Rule'. At the time the Coastal SPP was published that was 'currently' the IPCC's Third Assessment Report with a modelled change of 0.38 metres. This gives a sea level rise setback of 38m for sandy shores. We consider that the Coastal SPP's sea level rise setback requirement is an evolving one, which will now incorporate the latest IPCC Fourth Assessment Report, 2007.

Schedule One then provides for some 'Variations to the General Case' and 'Possible Exemptions'.

The apparent focus of the Coastal SPP is:

- on planning schemes being prepared with appropriate coastal setbacks which include a sea level rise component to ensure that development and use is positioned to avoid damage. This would most likely be effected through reserves or zoning which would not permit any development;
- rather than being considered for individual planning approval decisions.

(b) Natural hazards and disasters SPP

The Western Australian Statement of Planning Policy No. 3.4 "Natural hazards and disasters" (**NH&D SPP**) is also an SPP under section 29 of the PD Act. It is relatively brief and high level only.

Clause references in this paragraph 2.5(b) are to the NH&D SPP.

(1) Objectives

The objectives of the NH&D SPP are to:

- include planning for natural disasters as a fundamental element in the preparation of all statutory and non-statutory planning documents, specifically local planning schemes and amendments, and local planning strategies;
- through the use of these planning instruments, to minimise the adverse impacts of natural disasters on communities, the economy and the environment.

(2) Considerations

The NH&D SPP provides:

- that regional and local planning strategies, structure plans, schemes, subdivisions, strata subdivision and development applications, as well as other planning decisions and instruments should have regard to the natural elements that may combine to create hazards (cl 5.1); and
- for various hazards to be addressed, including:
  - flood;
  - severe storms and cyclones;
  - storm surge, with reference to the Coastal SPP;
  - Tsunami;
  - coastal erosion, by reference to the Coastal SPP;
  - bush fires, incorporating the provisions and requirements contained in the guidelines *Planning for bushfire protection* (2001), Development Control Policy 3.7 Fire planning, and *Rural urban bush fire threat analysis* (2003);
  - landslides and other land movements; and
  - earthquakes.

However, the NH&D SPP is relatively brief with only limited detail.

(c) Role of SPPs

(1) Preparation of local planning schemes

Under the PD Act a Local Government 'is to have due regard to any State planning policy which affects its district' in preparing or amending a local planning scheme (section 77).

The meaning of 'due regard' is considered in paragraph 2.4(e) above, albeit in a slightly different PD Act context, but we consider the Supreme Court's reasoning would apply equally to section 77 also.

If a Local Government does not so give 'due regard' to an SPP in preparing or amending a local planning scheme then potentially the prepared or amended local planning scheme would be invalid, providing a legal ground for judicial review (further considered in paragraph 3.2(a)(2) below).

It may also be relevant to potential civil actions against a Local Government, as considered further in paragraph 3 below.

(2) Local Government planning approval decisions

We have set out our view of a Local Government's required planning approval considerations under the Model Scheme Text in paragraph 2.4(e) above. SPP's are one of the matters listed in cl 10.2 to which a Local Government may consider.

In our view, the Coastal SPP will be relevant to any coastal development for which planning approval is sought. Arguably a Local Government would be acting in a 'manifestly unreasonable' way, open to SAT and/or Supreme Court challenge, if it did not consider the Coastal SPP to be relevant in promoting a new scheme or deciding a planning approval. In addition, we expect that sea level rise issues would be likely to be relevant under other elements of Model Scheme Text cl 10.2 as listed in paragraph 2.4(e) above.

2.6 SAT appeal

(a) Applicant's right to appeal to SAT

An applicant may apply to the SAT for a review of a responsible authority's decision to refuse or grant subject to conditions any consent, permission, approval or other authorisation in the discretion of a responsible authority under a planning scheme (section 252). This right applies even if a planning scheme does not expressly provide for a right of appeal.

Cl 10.10 of the Model Scheme Text does expressly provide for SAT appeal.

A SAT appeal is a full merits review, meaning the SAT will itself reconsider matters and remake the decision.

(b) Matters to be considered by SAT

Section 241(1) provides that:

> 'In determining an application in accordance with this Part the State Administrative Tribunal is to have due regard to relevant planning considerations including —
>
> (a) any State planning policy which may affect the subject matter of the application;
>
> … '

This confers the SAT with a very broad discretion. Exactly how broad that discretion may be has not been judicially considered, but we consider it would extend to allow consideration of any matter that may physically affect a site proposed for development, including as a result of climate change.

SPPs are expressly identified as a relevant consideration for the SAT. The identified SPPs potentially relevant to climate change risks are likely to be relevant for SAT decisions in the same way they are for Local Government planning approval decisions, as addressed in paragraph 2.5(c)(2) above.

(c) Third party rights

The PD Act and Model Scheme Text do not confer any rights of appeal on parties other than the applicant. However, the SAT may receive or hear submissions in respect of an application from a person who is not a party to the application if the SAT is of the opinion that the person has a sufficient interest in the matter (section 242).

The Minister may make submissions to SAT if it appears to the Minister that an application may be determined in a way which will have a substantial effect on the future planning of the area in which the land the subject of the application is situated (section 245).

(d) Ministerial call in

The Minister may determine an application referred to the SAT, if the Minister considers that the application raises issues of such State or regional importance that it would be appropriate for the application to be determined by the Minister (sections 246-248).

In determining an application the Minister is not limited to planning considerations but may make the determination having regard to any other matter affecting the public interest (section 247).

Like a SAT appeal, the Minister will reconsider matters and remake the decision.

2.7 Injurious affection compensation

Any person whose land is 'injuriously affected' by the making or amendment of a planning scheme is entitled to obtain compensation in respect of the injurious affection from the responsible authority (being the WAPC for regional planning schemes and Local Governments for local planning schemes) (section 173).

Land is injuriously affected by the making or amendment of a planning scheme if:

'(a) that land is reserved (whether before or after the coming into operation of this section) under the planning scheme for a public purpose;

(b) the scheme permits development on that land for no purpose other than a public purpose; or

(c) the scheme prohibits wholly or partially —

(i) the continuance of any non-conforming use of that land; or

(ii) the erection, alteration or extension on the land of any building in connection with or in furtherance of, any non-conforming use of the land, which, but for that prohibition, would not have been an unlawful erection, alteration or extension under the laws of the State or the local laws of the local government within whose district the land is situated.' (section 174(1))

This entitlement is then subject to further limitations under section 174, including that land is not injuriously affected due to building requirements that do not actually prohibit development.

'non-conforming use' is defined as:

> 'a use of land which, though lawful immediately before the coming into operation of a planning scheme or amendment to a planning scheme, is not in conformity with a provision of that scheme which deals with a matter specified in Schedule 7 clause 6 [zoning] or 7 [special land controls]'.

'public purpose' is defined as:

> 'a purpose which serves or is intended to serve the interests of the public or a section of the public and includes a public work.'

The compensation payable is effectively treated as the reduction in value of land caused by its reservation/development prohibition.

3 Potential legal ramifications for Local Governments if improper consideration of sea level rise risks

3.1 Introduction

This part of the advice considers the potential legal ramifications for Local Governments, considered against:

- the WA planning regime; and
- the general law regarding Local Government liability.

We have considered the potential legal ramifications according to whether the Local Government's action:

1. prevents the development – due to an allegedly too cautious approach to climate change risks; or
2. allows the development – due to an allegedly not cautious enough approach – and climate change impacts subsequently result.

These situations may arise due to:

1. a local planning scheme prepared or amended by a Local Government; or
2. a Local Government's planning approval decision on a particular application.

Some additional examples of other States' case law is presented in Schedule 2. While those cases provide some interesting background they are necessarily rooted in the

relevant State's legal system which may vary from WA's. We believe the following consideration of the potential legal ramifications for WA Local Governments is the most relevant.

A summary table of the potential legal ramifications is presented in Schedule 1.

3.2 Development prevented

The Local Government's approach to climate change risks is allegedly too cautious, resulting in development being prevented when it should be allowed.

The Developer suffers primarily economic loss, for example loss of property value, not being able to undertake development and not being able to conclude a sale.

(a) Local planning scheme prohibits development

The Local Government may have made a local planning scheme that prohibits development, or would only allow it subject to conditions undesirable for the developer.

For example the extension of a coastal setback due to updated and worse sea level rise predictions, or information regarding bush fire prone areas.

(1) Developer makes injurious affection claim

Some of the more foreseeable forms of land use restriction in respect of climate change risks are:

- coastal setbacks against sea level rise risks, most likely by way of a conservation/nature reserve or special control area which could potentially intrude onto zoned areas where private development has been permitted and either:
  - only prohibit any further development; or
  - also prohibit the continuance of previous development which becomes a non-conforming use; and
- various risk minimisation measures in respect of development in bush fire, flood or other risk prone areas, possibly by way of rezoning or special control areas that either:
  - guide the form of future development by prescribing building requirements;
  - only prohibit any further development; or
  - also prohibit the continuance of previous development which becomes a non-conforming use.

These outcomes would qualify as injurious affection, other than building restrictions.

Where the changes are required under local planning schemes only as a result of changes to a region planning scheme (see paragraph 2.2 above) the liability would most likely rest with the WAPC as the responsible authority for the regional planning scheme, rather than a Local Government in respect of the local planning scheme which follows the region planning scheme.

Otherwise the liability would rest with the Local Government. There is potential for significant liability to arise, as well as public outcry.

(2) Developer seeks Supreme Court judicial review

(A) Standing

A developer would likely have 'standing' to seek judicial review regarding the preparation of a local planning scheme in the Supreme Court.

The availability of injurious affection compensation may be considered by the Supreme Court as a factor weighing against it hearing, or supporting, a judicial review action.

(B) Grounds of review

The party bringing the action must make out a ground of review, to demonstrate a legal error by the decision-maker, which could include:

- that the decision was made without power ('ultra vires');
- that the decision was made under an improper or unauthorised delegation;
- that the decision was fettered (where a decision maker has not exercised a discretionary power);
- where a decision was made for improper purposes or in bad faith;
- where the decision was so unreasonable that no reasonable decision maker could have made it;
- that irrelevant considerations were taken into account or that relevant considerations were not considered;
- that procedural fairness ('natural justice') was denied (including if there was bias).

Judicial review of the preparation of a local planning scheme would be very tightly constrained to only whether it met the WA planning regime requirements. This was considered in paragraph 2.4 above. Other challenges to the substance of a local planning scheme are unlikely to be allowed as the creation of a local planning scheme is a legislative function, not open to judicial review.

The primarily challenge available in respect of a local government would be whether it had given appropriate 'due regard' to SPPs as considered in paragraph 2.5(c)(1) above. What will be 'due regard' will depend on the circumstances, however, what it ultimately requires is a proper consideration of the issues rather than necessarily reaching a particular conclusion.

We consider that a Local Government would only be considered to be in legal error for an allegedly too cautious consideration of climate change risks, if it could be said that:

- those risks were given an inordinate weight of consideration when of relatively little importance; or
- the decision was so unreasonable that no reasonable decision maker could have made it.

While it would ultimately depend on the particular circumstances, we consider such an outcome to be unlikely, unless the Council's decision was unjustifiably out of step with the latest established scientific predictions (as considered further below under 'Risks').

(C) Remedies

Judicial review is commonly viewed as being ineffectual from an applicant's perspective. This is because the Supreme Court rarely exercises, and then only in extraordinary circumstances, its power to itself step into the decision-maker's shoes and remake its decision. It would be unlikely to do so, and probably unlikely to even hear a matter, if any SAT appeal rights had not first been exhausted.

If it is established that a legal error was made by the decision-maker then the matter will likely be remitted to the original decision-maker to correct any errors and then re-decide the matter. For example if a relevant matter was not considered then the decision maker can be ordered to consider that matter and then again make a decision. Commonly the same outcome will result, rendering the process ineffectual from an applicant's perspective whose goal would be a different outcome.

(D) Risks

In addition to being commonly viewed as ineffectual from an applicant's perspective, seeking judicial review is time consuming and costly. The successful party may be able to

obtain some of its legal costs from the other party, but is unlikely to cover all of its legal costs. Therefore such actions are not very common.

On the one hand, the potential time and costs involved provide a justification for Local Governments ensuring they make proper decisions to avoid the possibility of judicial review being sought.

However, on the other hand it also makes the risks of such action low, especially prior to a SAT appeal if the action relates to a planning approval decision. Further, if a judicial review action appeared likely in a particular circumstance a Local Government could 'double check' its consideration of climate change risks to ensure its decision could withstand challenge.

The risks for Local Governments are somewhat minimised given a local planning scheme will also be:

- referred to the EPA which may assess it;
- examined by the WAPC; and
- ultimately approved by the Minister.

(3) Developer sues

Murcia Holdings Pty Ltd v City of Nedlands (1999) 22 WAR 1 (**Murcia**) is the landmark WA Supreme Court case regarding the potential liability of Local Governments in respect of planning matters.

Murcia involved 3 plaintiffs suing the City of Nedlands, a number of councillors and the mayor on various causes of action arising out of the alleged failure of the City to proceed with proper expedition to approve amendments to the City's town planning scheme which would have enabled the plaintiffs to develop their land in a particular way.

The circumstances were not the same as may arise in respect of climate change risks. However, they are the best available guide, and the Court considered the potential liability of the Local Government in a general sense.

The Court identified that the potential causes of action against a Local Government, excluding for misfeasance or other improper action, were for:

- breach of statutory duty; or
- negligence.

We consider that these are the potential causes of action which could be brought against a Local Government in respect of climate change risks.

(A) Statutory duty

A statute can confer a private cause of action for its breach. This type of claim is different to and separate from negligence claims, and is not regulated by the *Civil Liability Act 2002* (WA) (**Civil Liability Act**) (considered further below). Normal negligence issues such as foreseeability of harm, the practicability of taking preventative measures and reasonableness are irrelevant.

Instead the cause of action is made out upon proof that the defendant breached the duty and that the breach of duty caused the harm complained of. The question will be simply whether a duty fixed by the statute has been obeyed.

Whether a statutory duty gives rise to a private cause of action is a question of construction. It is a matter of ascertaining, upon a proper construction of the legislation, whether it was the intention of the legislature to confer a civil remedy in the event of breach of duty.

In Murcia the Court held that the relevant *Town Planning and Development Act* 1928 (WA) sections (Murcia predated the PD Act) and TP Regs (which regulations still apply under the PD Act in respect of local planning scheme preparation), including their context did not confer a right of action on individual landowners whose commercial interests may

have suffered through the failure of a municipality to make or amend a local planning scheme or to comply with the obligatory formalities in respect of the making or amendment of a local planning scheme which a municipality has resolved to initiate. The object of the legislative provisions authorising municipalities to make and amend local planning schemes is orderly and proper planning within the municipal district. The scope and purpose of the legislation did not include the protection or advancement of the commercial interests of individual landowners or classes of landowners or other classes of persons.

While the circumstances of Murcia are not the same as may arise in respect of climate change risks, they are instructive in respect of Local Governments making or amending local planning schemes for climate change risks, and we believe are similar in respect of the general planning regime context.

We see nothing in the relevant PD Act section or regulations, including section 77 and the Model Scheme Text, that would confer a right of action outside of the injurious affection regime on individual landowners whose commercial or property interests may be affected by the preparation of local planning schemes.

(B) Negligence

Introduction

This form of claim was developed through the ‘common law’, namely by the Courts rather than Parliament. However, in WA negligence claims are now regulated by the Civil Liability Act. The Civil Liability Act was not in force at the time of Murcia. While the Civil Liability Act changed some aspects of negligence claims in WA, we consider that it does not significantly affect the negligence principles considered in Murcia. Further, we consider Murcia to be the most relevant statement of the applicable principles, as it specifically considered Local Government planning negligence.

Difficulties if no statutory duty

Murcia considered that where legislation did not itself give rise to a statutory duty it was difficult to appreciate how a duty of care could arise for a negligence claim. The policy of the legislation is a crucial factor in the decision whether a duty of care applied. If the policy of the legislation was to not create a statutory liability to pay compensation, then the same policy should ordinarily exclude the existence of a duty of care.

Exercise of discretion non-justiciable

Murcia further considered the importance of whether a case was about a failure to:

- exercise a statutory power or discretion; or
- perform a statutory duty.

A failure to amend or progress a scheme or on a decision made on a planning approval application would be failures to exercise a planning discretion in a certain way. Failure to exercise a planning discretion in a certain way would almost certainly be non-justiciable by a Court (as a Court’s jurisdiction is to adjudicate legal matters, not exercise executive government discretions), except to a limited extent if it could be shown that a decision was not made bona fide or was actuated by motives or reasons outside of the legislation.

Therefore Local Government decisions:

- to make or amend planning schemes; or
- on individual planning approval applications,

are not a basis for creating a duty of care.

Potential duty of care arising from statutory duty

The only potentially relevant duty we can see is under section 77, that a Local Government ‘is to have due regard to any State planning policy which affects its district’ in preparing or amending a local planning scheme.

Murcia considered 2 relevant High Court cases. They showed that the law relating to liability of municipalities is unsettled and still evolving, but the following factors and elements could be identified, the presence or absence of which will affect whether a duty of care exists:

1. foreseeability of harm remains an essential element;
2. however, foreseeability of harm is not decisive;
3. the Courts remain much less ready to find that the circumstances give rise to a duty to protect a plaintiff against purely economic loss. Mere foreseeability of financial harm will certainly not be enough;
4. where the alleged duty of care springs from the acts or omissions of a statutory body, the existence or otherwise of the alleged duty will be largely determined by reference to the statutory framework governing the conduct of the body; and
5. there will generally be no room for a duty of care to arise where the conduct complained of is in the nature of a legislative or quasi-legislative function.

As for Murcia:

- the preparation of a local planning scheme is a quasi-legislative function. Under section 87(4) a local planning scheme approved by the Minister has full force and effect as if it were enacted by the PD Act;
- in making or amending a scheme or deciding not to do so, a Local Government is at no stage required to have the interests of individuals in contemplation, although, of course, it may often do so. The decision is not an 'operational' decision, but a policy decision which involves broad planning considerations and an evaluation of competing interests. It is a social and political function which requires judgments to be made that invariably will advantage some and disadvantage others. The function is to be performed and each step of the function is to be performed not for the benefit of property developers, but for the collective good; and
- the only foreseeable loss for an aggrieved developer is purely economic.

For these reasons, we consider that a Local Government will not owe a duty of care in respect of its role in preparing or amending local planning schemes. The relationship between a Local Government and potentially affected individuals is not a relationship of sufficient proximity to give rise to a duty of care.

This conclusion is not without some doubt. A matter will always depend on its particular circumstances. Therefore it remains prudent for Local Governments to ensure that they appropriately consider climate change risks to ensure that if there is any such duty it is discharged.

<u>Other matters</u>

Even if a duty of care could be established, a number of other matters would also need to be established including:

- that the Local Government's actions caused the damage suffered. It is possible that there may be a number of intervening matters. In particular it may be difficult to determine that the damage was in fact caused by climate change, and if so then who caused the climate change would also be relevant; and
- that loss was not of a type which was too remote at law – it is only the type of loss and not the extent which must be foreseeable.

It would also be relevant whether the affected party has actually contributed to their own losses and if so the proportionate liability provisions of the Civil Liability Act may apply.

These matters would depend on the particular circumstances.

A Local Government may be able to contract out of any duty of care that does exist.

(C) **Conclusion**

It is highly unlikely that a Local Government could be successfully sued regarding the bona fide preparation of a local planning scheme in respect of climate change risks.

(b) Planning approval refused

Development is permitted with approval under a local planning scheme, but is refused by a Local Government for a particular application.

(1) Developer appeals to SAT

See paragraph 2.6 above for information regarding SAT appeals. A SAT appeal will always be available regardless of whether a Local Government's decision was properly made. As a SAT appeal is a full merits review it can itself reconsider matters and remake the decision.

(2) Developer seeks Supreme Court judicial review

A developer seeking Supreme Court judicial review in respect of a decision on a particular planning approval application relies on the same matters set out in paragraph 3.2(a)(2) above, other than as addressed below.

(A) Standing

A developer would have 'standing' to seek judicial review of a Local Government planning approval decision in the Supreme Court. However, the Supreme Court would likely rule that the SAT appeal process should be exhausted first.

(B) Climate change risk ground of review

Given our consideration in paragraph 2.4(e) above that Local Governments:

- are entitled to subjectively determine relevant matters in making planning approval decisions. There is broad scope for what can be relevant, including sea level rise risks, provided they do not do so in a 'manifestly unreasonable' way; and
- have flexibility in having 'due regard' to those matters,

we consider that a Local Government would only be considered to be in legal error for an allegedly too cautious consideration of climate change risks, if it could be said that:

- those risks were given an inordinate weight of consideration when of relatively little importance; or
- the decision was so unreasonable that no reasonable decision maker could have made it.

While it would ultimately depend on the particular circumstances, we consider such an outcome to be unlikely, unless the Council's decision was entirely out of step with existing climate change risk predictions.

(3) Developer sues

It is highly unlikely that a Local Government could be successfully sued regarding a bona fide local planning approval decisions, for the same reasons set out in paragraph 3.2(a)(3) above.

We are not aware of any aggrieved applicant attempting to bring such action. It is unlikely an applicant would attempt to do so without first seeking SAT review.

3.3 Development allowed

The Local Government's approach to climate change risks is allegedly not cautious enough, resulting in development being allowed when it should have been prevented.

Third parties could object to the local planning scheme or development at the time.

Developer or other affected parties (such as future owners, occupants, neighbours, financiers or insurers) could later suffer loss due to climate change related impacts.

(a) Local planning scheme permits development without requiring approval

(1) Developer or other affected parties sue

It is highly unlikely that a Local Government could be successfully sued regarding the bona fide preparation of a local planning scheme in respect of climate change risks, for the same reasons set out in paragraph 3.2(a)(3) above.

Again, this conclusion is not without some doubt. A matter will always depend on its particular circumstances. Therefore it remains prudent for Local Governments to ensure that they appropriately consider climate change risks to ensure that if there is any such duty it is discharged.

(2) Third party sues for breach of statutory duty or negligence

Third parties would not be able to make out claims as they had not suffered any damage.

(3) Third party seeks Supreme Court judicial review

The general considerations for a third party Supreme Court judicial review are the same as for an applicant, as set out in paragraph 3.2(a)(2) above, other than for 'standing', the possible remedies and the risks for Local Governments.

Again, the scope for judicial review in respect of the preparation of a local planning scheme would be very tightly constrained to only whether it met the WA planning regime requirements.

(A) Standing

Whereas an aggrieved developer will always have standing to seek review of a SAT decision, a third party would need to demonstrate that they have a sufficient interest in the matter. Whether the threshold is met will depend on the circumstances.

The following people have been held in Western Australia to have a particular grievance sufficient to ground standing:

- a local resident who wished to have a highway order quashed for denial of procedural fairness;
- a ratepayer, in respect of an invalidly made rating list, even though the defects would make no difference to him or her financially;
- a neighbour who objected to the grant of a planning permission;
- a secretary or member of a heritage trust, in relation to a development proposal;
- a ratepayer who used Crown reserve bushland and was affected by an amendment to the regional planning scheme and who sought to quash the Ministerial approval of the amendment; and
- an association of ratepayers, in relation to a planning decision.

(B) Remedies

The only notable difference in remedies between a developer's action and a third party action is that the third party may also seek both interim and long term injunctions to prevent the development proceeding.

(C) Risks

The only difference in respect of risks for a third party claim versus a developer action (as considered in paragraph 3.2(a)(2)(D) above) is that they may be more common for third parties as it is one of their few available actions.

(b) Planning approval granted

(1) Third party seeks Supreme Court judicial review

Similar considerations apply as for paragraph 3.3(a)(3) above.

(2) Developer or other affected parties sue

(A) Statutory duty

We consider that an aggrieved developer would be unable to make out a statutory duty claim against a Local Government for a planning approval refusal. This is for the same reasons set out in paragraph 3.2(a)(3)(A) above.

(B) Negligence

The considerations for whether a negligence claim could be made out generally follow the matters set out in paragraph 3.2(a)(3) above, which we consider is highly unlikely. A key difference for claims related to climate change damage is that it is direct physical damage, whereas the damage due to development being prevented is primarily economic. However, on balance we consider that a duty would not arise. This is primarily as planning approval decisions are the exercise of a discretion which is non-justiciable by a Court.

3.4 Conclusion

The scope for Local Governments to suffer legal ramifications is limited. This is primarily because of the generally limited ability to pursue legal actions against Local Governments.

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.

The main potential legal actions are:

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.

4 How important is proper consideration of climate change risks to minimise the potential legal ramifications?

The availability of these main potential legal actions, SAT appeals and injurious affection claims, will not be prevented by a ‘proper’ consideration of climate change risks. In fact injurious affection claims may be more likely to arise through a proper consideration of climate change risks if that leads to local planning scheme amendments which cause land to be injuriously affected by reservation or zoning changes.

While SAT appeals cannot be prevented, the likelihood of such appeals and then chance of Local Government planning decisions being overturned may be minimised by the proper consideration of climate change risks. Further, a proper consideration of climate change risks may help minimise any residual risk of other potential legal actions such as negligence claims.

Therefore, it does remain relevant to consider:

1. the current climate change science/policy; and
2. whether following State imposed planning guidelines / policy is sufficient to avoid the potential legal ramifications?

We will return to the issue of injurious affection claims when we make recommendations in paragraph 7 below.

5 Current climate change science/policy

5.1 Introduction

This part of the advice reviews currently available climate change science and policy at international, national and state levels.

5.2 International

(a) IPCC

The key, most comprehensive and renowned climate change science work is conducted by the Intergovernmental Panel on Climate Change (**IPCC**). The IPCC is essentially an aggregator of climate change science research. Its latest report is its Fourth Assessment Report, 2007 (**AR4**). The IPCC has commenced work on a Fifth Assessment Report (**AR5**).

The IPCC reports are the most comprehensive scientific work available on global climate change risks. In terms of future predictions AR4 presents a number of potential scenarios. For example they present a range of potential future sea level rises based on the different scenarios, of up to 0.79m by 2099 relative to 1980-1999.

However, the IPCC's reports are necessarily globally focused and therefore by themselves are of limited use for guiding local Australian, Western Australian or Local Government policy.

(b) Other

There are numerous other international groups, organisations, collaborations, studies etc that focus on climate change risks, including according to particular aspects such as sea level rise. Given their number and variety their information can be difficult to access and interpret. However, ultimately their work will be considered by the IPCC and form part of the IPCC's Assessment Reports.

5.3 National organisations

(a) DCC

Australia's national approach to climate change risk study and adaptation is co-ordinated for the Federal Government by its Department of Climate Change (**DCC**).

The DCC has developed a National Framework for Climate Change Science to identify climate change science priorities for the coming decade, see: http://www.climatechange.gov.au/government/initiatives/national-framework-science.aspx.

The DCC is overseeing:

1 an Australian Climate Change Science Program to support a broad range of global and regional climate change science research and understand the potential impact on Australia's natural and managed systems, see: http://www.climatechange.gov.au/government/initiatives/accsp.aspx; and

2 a Climate Change Adaptation Program to fund a number of projects and assessments to improve knowledge of climate change impacts and strengthen decision-maker capacity, see:

http://www.climatechange.gov.au/government/initiatives/climate-change-adaptation-program.aspx.

The DCC has released a position paper titled 'Adapting to Climate Change in Australia', see: http://www.climatechange.gov.au/government/adapt.aspx. This position paper is relatively high level. It notes the importance of all government spheres working together.

(b) Council of Australian Governments (COAG)

The 'National Climate Change Adaptation Framework' released in 2007, endorsed by COAG, outlines key adaptation actions, see: http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/national_climate_change_adaption_framework.pdf.

COAG continues to focus on climate change and adaptation issues.

(c) CSIRO

The CSIRO undertakes research into a variety of climate change issues, including adaptation, see: http://www.csiro.au/science/Climate-Change.html.

(d) Bureau of Meteorology (BoM)

From its website the BoM's focus appears to be more focused on understanding existing climate change effects rather than making future projections, see: http://www.bom.gov.au/climate/change/.

However, it is involved with the CSIRO for the Climate Change in Australia Report.

(e) Climate Change in Australia

The primary available report regarding climate change projections for Australia is the 'Climate Change in Australia' Report 2007, see: http://www.climatechangeinaustralia.gov.au/.

It was prepared through the Australian Climate Change Science Program by the CSIRO and BoM. It is based upon international climate change research including conclusions from AR4. It also builds on a large body of climate research that has been undertaken for the Australian region in recent years.

It is specifically designed to assist governments to understand the likely magnitude of climate change in Australia and the possible impacts.

(f) OzClim

The CSIRO's OzClim tool can be used to generate climate change scenarios for temperature or rainfall using IPCC emissions scenarios based on selected variables, see: http://www.csiro.au/ozclim.

(g) New online projections tool

The DCC has committed funds to bring together information in the Climate Change in Australia Report and OzClim into a single web tool. It is expected to be available in June 2010, see: http://www.climatechange.gov.au/en/climate-change/impacts/future.aspx.

(h) Climate Change 2009: Faster Change & More Serious Risks

The DCC supported a report released in May 2009 entitled *Climate Change 2009: Faster Change & More Serious Risks*, prepared by Will Steffen, see: http://www.climatechange.gov.au/publications/science/faster-change-more-risk.aspx. This report reviewed and synthesised the science of climate change since AR4. In particular the report considered that the climate system appears to be changing faster than earlier thought likely. It considered the following risks:

- rising sea level;
- changing water availability;
- ocean acidification; and

- storms and extreme events.

It was stated that:

> 'Uncertainties still surround some important aspects of climate science, especially the rates and magnitudes of the major processes that drive serious impacts for human societies and the natural world. However, the majority of these uncertainties operate in one direction – towards more rapid and severe climate change and thus towards more costly and dangerous impacts.'

(i) National Coastal Risk Assessment

The DCC released a 'first pass' national assessment of Climate Change Risks to Australia's Coast in 2009 (**National Coastal Risk Assessment**), see: http://www.climatechange.gov.au/government/initiatives/national-coastal-risk-assessment.aspx. The National Coastal Risk Assessment identifies the key risks of climate change to Australia's coastal zone and outlines the role of adaptation as part of a balanced and staged response to manage those climate change risks.

It presents the most comprehensive and usable information regarding sea level rise risks for Australia and WA.

The National Coastal Risk Assessment noted that:

- AR4 estimated global sea-level rise of up to 79 cm by 2100, but also noted the risk that the contribution of ice sheets to sea level risk this century could be higher (para 2.2.3, page 25); and
- further more recent research suggesting more rapid growth was referred to, namely a range of 0.75 to 1.9m by 2100 relative to 1990, with 1.1-1.2m the mid-range.

Therefore a sea-level rise value of 1.1m by 2100 was selected for the National Coastal Risk Assessment based on the plausible range of sea-level rise values from post AR4 research (Box 2.2, page 28). Further justification of this value is given at: http://www.climatechange.gov.au/en/government/initiatives/national-coastal-risk-assessment/key-questions.aspx.

Key findings for WA were:

- Between 18,700 and 28,900 residential buildings in Western Australia may be at risk of inundation from a sea-level rise of 1.1 metres.
- The current replacement value of the residential buildings at risk is between $4.9 billion and $7.7 billion.
- Local government areas of Busselton, Mandurah, Rockingham and Bunbury have the highest level of risk, collectively representing over 60 per cent of residential buildings at risk in Western Australia.
- There are approximately 2,100 residential buildings located within 110 metres of 'soft' erodible shorelines, of which approximately 200 are within 55 metres of soft coasts (para 5.1.9, page 115).

(j) National Climate Change Coastal Forum

Following the release of the National Coastal Risk Assessment, the DCC committed to holding a national forum, which was held 18-19 February 2010. Further information is available at: http://www.climatechange.gov.au/en/government/initiatives/national-coastal-risk-assessment/national-climate-change-forum.aspx.

(k) Coasts and Climate Change Council

Also following the National Coastal Risk Assessment, the Coasts and Climate Change Council was tasked with helping to engage the Australian people (government, businesses, professional bodies and communities) in starting to prepare for the impacts of climate change on the coast, particularly in the lead-up to the Coastal Forum.

The Council's 5 February 2010 preliminary conclusions were discussed at the National Climate Change Forum and are available at http://www.climatechange.gov.au/~/media/publications/coastline/coasts-climate-report-pdf.ashx.

(l) House of Representatives Inquiry into climate change end environmental impacts on coastal communities

A report of a Federal parliamentary inquiry into climate change and environmental impacts on coastal communities was released in Federal Parliament on 26 October 2009, available at: http://www.aph.gov.au/house/committee/ccwea/coastalzone/report.htm. The inquiry, which was conducted over a period of 18 months by the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, made 47 recommendations, designed to help address many challenges facing coastal councils and residents in coastal areas.

Key recommendations included:

- Establishment of a new Coastal Zone Ministerial Council to develop an Intergovernmental Agreement on the Coastal Zone endorsed by the COAG.
- A separate funding program for infrastructure enhancement in coastal areas vulnerable to climate change.
- An Australian Law Reform Commission inquiry into the liability issues facing public authorities and property owners in respect of climate change.
- A Productivity Commission inquiry into insurance cover for coastal properties.

The inquiry was conducted by a bipartisan committee which includes representatives of the Government and Coalition.

(m) National Sea Change Taskforce

Local councils representing all states established a National Sea Change Taskforce in 2004, see: http://www.seachangetaskforce.org.au/Home.html. The taskforce was set up to be the national body representing the interests of coastal councils and communities experiencing the effects of rapid population and tourism growth. It now has more than 68 member councils from around Australia. It promotes adopting a coordinated national approach to managing sea change growth with a commitment by all three levels of government to work collaboratively to ensure that coastal development is managed with a focus on sustainability of coastal communities and the coastal environment.

The Taskforce commissioned and released a report in July 2008, 'Planning for Climate Change: Leading Practice Principles and Models for Sea Change Communities in Coastal Australia' see: http://www.seachangetaskforce.org.au/Publications/PlanningforClimateChange.pdf. The report outlines the implications of climate change for sea change communities and explains why new approaches to coastal planning and governance are needed.

The Report concludes that while climate change is increasingly recognized by the Federal Government as a critical issue for coastal communities, few local planning schemes include specific provisions for consideration of climate change risks, in particular sea level rise. Although South Australia and Western Australia have long included provisions for local governments to maintain a coastal setback planning control to accommodate potential sea level rise, these controls are currently under review to take into account the States' wider approach to climate change adaptation and to incorporate the impacts of more up to date scientific evidence.

(n) Climate Change Adaptation Actions for Local Government

As described in the WALGA Climate Change Management Toolkit:

> This 2007 SMEC report is one of several tools the Australian Government is developing to assist Local Governments identify and implement climate change adaptation actions. The report identifies climate change adaptation actions that can

be implemented by Local Governments in response to the impacts of climate change. The adaptation actions that have been identified during this study are those that provide a net economic, social or environmental benefit no matter what level of climate change occurs. Case study examples are included. *Climate Change Adaptation Actions for Local Government* was commissioned by the former Australian Greenhouse Office as part of the Australian Government's National Climate Change Adaptation Program.

5.4 WA

(a) Office of Climate Change

The WA Office of Climate Change is part of the Department of Environment and Conservation. It is responsible for whole of government policy and strategy focusing on the economic, environmental and social impacts of climate change.

There is only limited information available on the Office of Climate Change's website regarding its initiatives.

We understand that the Office is developing a 'WA Climate Change Adaptation and Mitigation Strategy' (B). However, we could not obtain any publicly available information regarding the status of its preparation or likely release date which is therefore unclear. When completed CCAMS would ideally be a key strategic guide for WA Local Governments.

(b) Department of Health

The WA Department of Health has released a study entitled *Health Impacts of climate change: Adaptation strategies for Western Australia*, see: http://www.public.health.wa.gov.au/2/705/2/climate_change.pm.

(c) Indian Ocean Climate Initiative (IOCI)

The IOCI is a research partnership between the WA State Government, CSIRO and BoM. It investigates the causes of the changing climate in WA and develops projections of the future climate in WA.

The IOCI is now in its third stage of research, which it has said will draw heavily on the extensive AR4 modeling studies, and will produce climate change scenarios for both the south west and north west that are useful for adaptation decision-making purposes. The intention is for the results of the research effort to be delivered in ways that will readily inform decision-making by the State Government, Local Governments, industry and the community.

The IOCI can therefore be seen as a key scientific researcher to inform WA Local Government strategy.

(d) EPA

The EPA has prepared Guidance Statement 12 'Minimising Greenhouse Gas Emissions' October 2002. However, that Guidance Statement is stated to have a duration of 5 years, which has expired.

The EPA prepared a 'Draft Environmental Assessment Policy – Climate Change' in late 2009 designed to replace Guidance Statement 12. We understand that after the release of this draft the EPA was instructed by the WA Department of Premier and Cabinet to review the policy and release a further draft, presumably re-assessing its stated approach. It is uncertain when a further draft will be released and what approach it would propose.

These documents relate to matters for the WA environmental impact assessment process under the *Environmental Protection Act 1978* (WA), rather than to climate change risks and adaptation more generally.

(e) Swan River Trust

In 2007 the Swan River Trust's Technical Advisory Panel published a comprehensive paper on the 'Potential impacts of climate change on the Swan and Canning rivers', available at: http://www.swanrivertrust.wa.gov.au/science/climate/Content/Home.aspx. The paper provides an overview of climate change impacts and potential adaptation strategies for the Swan Canning Catchment.

(f) Town of Cottesloe

The Town of Cottesloe has undertaken a Project to assess Climate Change Vulnerability for the Cottesloe Foreshore, completed in June 2008. Information is available at: http://www.cottesloe.wa.gov.au/?p=942.

5.5 Other states

The following information relates to other state's approaches to sea level rise issues only.

(a) New South Wales

In October 2009, the New South Wales Government released its Policy Statement on Sea Level Rise following extensive public consultation, see: http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=ukmXcVJesYA%3d&tabid=177. The Policy Statement specifies sea level planning benchmarks for the New South Wales coastline.

As a result, the Department of Planning has released a 'Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise' which adopts the New South Wales sea level rise benchmarks in the Policy Statement, see: http://www.environment.nsw.gov.au/resources/climatechange/09710draftcoastrisk.pdf. The draft guideline outlines a proposed approach to assist councils, State agencies, planners and development proponents when addressing sea level rise in land-use planning and development assessment. Public consultation on the draft guideline closed on 11 December 2009 and a final version is expected to be released by the Department of Planning later in 2010.

(b) Victoria

In December 2008, the Victorian Government published the 'Victorian Coastal Strategy' which is the state government's policy commitment specifying sea level planning benchmarks for the Victorian coastline, see: http://www.vcc.vic.gov.au/2008vcs/home.htm. The strategy is given operation to in planning schemes through clause 15.08 'Coastal Areas' of the State Planning Policy Framework.

The Victorian Planning and Environmental Law Association has prepared a report for the Victorian Department of Planning and Community Development on climate change and sea level rise, available at: http://www.vpela.org.au/documents/VPELA%20BriefingPaper.pdf.

(c) Tasmania

In 2006, the Tasmanian Government commissioned the 'Sharples Report' to investigate the vulnerability of the Tasmanian coastline to the impacts of climate change and sea level rise. Following its release, the Tasmanian Government undertook the 'Climate Change and Coastal Risk Management' project to build on the Sharples Report findings and to look at the risks that storm surge and sea level rise pose for built infrastructure and natural values and assets in low lying coastal areas. After extensive consultation a 'Revised Draft State Coastal Policy 2008' has been developed, see: http://www.dpac.tas.gov.au/__data/assets/pdf_file/0003/82713/Draft_State_Coastal_Policy_2008.pdf. It was referred to the Resource and Development Commission (Commission) in June 2009 for full assessment and report, including public consultation. The Commission's assessment of the Revised Draft is expected to be released in mid-2010.

(d) Queensland

In August 2009, the Queensland Department of Environment and Resource Management released a new 'Draft Queensland Coastal Plan' to deal with emerging coastal hazards, including those resulting from climate change, see: http://www.derm.qld.gov.au/coastalplan/. The call for submissions closed on 30 November 2009 and a final Plan is due for release in late 2010.

(e) South Australia

The South Australian sea level rise policy of 1991 is still in effect but currently under review. Further information about South Australia's management of coastal development and planning can be found in the Coastal Planning Information Package, see: http://www.environment.sa.gov.au/coasts/pdfs/planning_package.pdf.

5.6 Conclusion

There are numerous climate change focused studies, strategies, initiatives and bodies and their work is constantly evolving. This makes it very difficult to determine with confidence what is a 'proper' or 'sufficient' approach to climate change risks for WA Local Governments.

In respect of climate change science:

- the IPCC is the authoritative scientific body, but its reports are necessarily global in focus. AR4 is its latest study, but work has commenced on AR5;
- the Climate Change in Australia Report is the authoritative Australian focused scientific report, based on AR4;
- the National Coastal Risk Assessment is the authoritative Australian sea level rise scientific report, while also being the 'high water mark' of Australian studies on types of climate change risk;
- the Swan River Trust's work provides useful information for Perth metropolitan Local Governments abutting the Swan and Canning rivers;
- the IOCI is providing the most authoritative WA focused information; and
- while there is still considerable uncertainty surrounding estimates of future climate change impacts, the majority of the uncertainties are towards more rapid and severe climate change and thus towards more costly and dangerous impacts.

There are of course also arguments that climate change is not real. We are not qualified to consider the veracity of the science. However, we have observed a general authoritative scientific consensus that man-made climate change is occurring and projected, as demonstrated by the reports considered. Further, the publications of both the Australian and Western Australian Government align with that view. Given the general scientific consensus and potential for significant impact, from a risk minimisation perspective a focused response is appropriate.

In respect of climate change adaptation policy there are several initiatives underway and progressing, but there is a long way to go to achieve a clear, co-ordinated approach. This process may be led and guided by the DCC, but will ultimately most likely need agreement through COAG. We will return to the issue of nation and state level coordination when we make recommendations in paragraph 7 below.

6 Is following State imposed planning guidelines / policy sufficient to avoid the potential legal ramifications?

As identified in paragraph 4 above, the availability of the main potential legal actions, SAT appeals and injurious affection claims, will not be prevented by a 'proper' consideration of

climate change risks. They cannot be 'avoided' as such. However, a proper consideration of climate change risks may help minimise SAT appeals and any residual risk of other potential legal actions such as negligence claims.

Other than for coastal setbacks under the Coastal SPP there is a general absence of State imposed planning guidelines / policy regarding climate change risks to guide Local Governments. Instead Local Governments have broad discretion for:

- the preparation of local planning schemes; and
- making planning approval decisions.

Even in respect of the Coastal SPP, the obligation on Local Governments is still to only give it 'due regard' in preparing local planning schemes and to consider it as a relevant factor for individual planning approval applications.

Under this framework Local Governments must themselves determine their approach to climate change risks. We provide the following advice and recommendations accordingly.

7 Advice and recommendations

7.1 Land use planning the appropriate response

Land use planning is the appropriate way to prepare for long term climate change adaptation. The most effective approach to minimise legal risks, as well as the most appropriate from a planning and community perspective, is through planning schemes (both region and local) prepared with proper consideration of climate change risks. These planning schemes then guide proper individual planning approval decisions, rather than potential climate change risks needing to be separately considered for each individual applications. This approach would be the most consistent, as well as easiest to implement for Local Governments.

7.2 Compensation issues

However, taking the necessary planning steps may require some restriction on existing property rights which may require compensation. While preparation for climate change impacts is very important given the risks and potential costs, in our legal system and society the protection of personal property rights is fundamentally important. This is particularly the case in respect of climate change risks where properties may have been acquired over a period of time when the risks were not widely known or acknowledged. This arguably should shift the burden of those risks from individuals to a broader collective. It needs to be recognised that the potential costs may be far greater than Local and State Governments can bear.

For example the National Coastal Risk Assessment puts the current replacement value of existing WA residential buildings at risk of a 1.1m sea level rise at between $4.9 billion and $7.7 billion. That figure does not include other buildings or public infrastructure costs or the loss of land value.

Under the existing WA planning regime the use of planning schemes and land restrictions could give rise to injurious affection compensation claims. The greatest liability for injurious affection claims may fall to the WAPC in respect of properties under the Metropolitan Region Scheme, Peel Region Scheme and Greater Bunbury Region Scheme, which cover the vast bulk of WA's residential properties and public infrastructure, at least against the most threatening sea level rise risk. Therefore the risk is potentially as great if not greater for the WA State Government than it is for Local Governments.

We still consider planning schemes are the most appropriate approach for climate change risks, but will also require a connected approach to address potential compensation issues.

7.3 The preferred approach

The preferred approach to address climate change risks through land planning, while also addressing compensation issues, is a co-ordinated national approach involving all spheres of government.

The preference for a co-ordinated national approach is to ideally have:

- an accepted position regarding the appropriate scientific position;
- a consistent approach as wide as possible, for both Government and community acceptance and ease of implementation and operation; and
- adequate resourcing available in recognition that preparing for (including studying) and then protecting against climate change risks has the potential to be considerably expensive.

As noted earlier, there are several climate change adaptation policy initiatives underway and progressing, but there is a long way to go to achieve an in force, clear and co-ordinated national approach. This process may be led and guided by the DCC, but will ultimately most likely need agreement through COAG. It will be particularly important for the identified compensation issues to be addressed.

7.4 The best currently available approach

In the absence of such a co-ordinated national approach currently existing then WA Local Governments must consider other alternatives to manage their risk, at least for the interim period before there is such a co-ordinated national approach.

We still recommend the use of properly prepared planning schemes as the appropriate strategy, for the reasons outlined above. This will include region schemes being refined where appropriate, given that local planning schemes will follow them. While there may be some scope of injurious affection compensation we would expect that to currently be limited given existing local planning schemes should have already been considering climate change risks, at least in respect of sea level rise under the Coastal SPP to at least the IPCC AR3 standard.

In the absence of a co-ordinated national approach, then ideally this would be effected through a co-ordinated state approach with the backing of the State Government. This would be particularly appropriate given the potential future exposure of the WAPC in respect of injurious affection claims and that where region planning schemes operate they must guide local planning schemes.

However, if that is also not possible then it should be done by the next most preferable way, being through a collective Local Government approach such as under WALGA. Hence why WALGA is planning the Policy. This may present some difficulties for where region planning schemes operate. At a minimum the WAPC and State Government should be consulted with.

7.5 Policy

We recommend that the Policy:

1. state a recommended scientific position to the extent possible, including at least for sea level rise risks, as advised by independent expert opinion, ideally by a panel of experts, based on a review of the available science;

2 require climate change risks to be considered to that standard whenever a new local planning scheme is prepared and at reasonably regular review points, for example every 5 years;

3 only allow Local Governments to deviate from that standard in their own local planning schemes on the advice of an independent expert consultant, whose advice is documented (ideally in the Local Government's Council minutes when voting on the local planning scheme) and is consulted on with the scheme;

4 itself be regularly reviewed, again potentially every 5 years, including in respect of the recommended scientific position which may become more or less cautious depending on the developing scientific knowledge;

5 provide suggested:

- climate change risk disclaimer wording for planning approval applications; and
- guidance for Local Government offices in dealing with climate change risk issues with applicants; and

6 be carefully prepared to manage any potential legal exposure from WALGA to Local Governments relying on it.

In respect of the recommended scientific position, while it should be advised on by an independent expert, or ideally a panel of experts, we note that AR4 represents the accepted scientific standard and therefore minimum standard of climate change risk that should be considered. This is mandatory for sea level rise risk consideration because the Coastal SPP is an evolving standard that now incorporates AR4.

AR4 represents a minimum acceptable standard because there is growing scientific support that the climate system appears to be changing faster than earlier thought likely.

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Schedule 1 – Summary of potential legal ramifications for Local Government if they improperly consider climate change risks

Impacts	Local Government decision	Potential legal actions	Likelihood of action being successful against Local Government	Potential outcomes
Development prevented Climate change consideration allegedly too cautious Developer suffers primarily economic loss, eg loss of property value, prevented development and/or sale	Makes or amends local planning scheme to prohibit development or	Developer claim for 'injurious affection'	Available if PD Act criteria met	Local Government must compensate for loss of land value, unless change due to region scheme change in which case WAPC likely to be responsible. See paragraph 3.2(a)(1) above.
		Developer seeks Supreme Court judicial review	Availability of action tightly constrained, unlikely to be successful unless unjustifiably out of step with the latest established scientific predictions	If Supreme Court action allowed and if challenge made out: • matter usually remitted to decision maker to correct any errors and re-decide; or • Supreme Court would only itself remake the decision in extraordinary circumstances. See paragraph 3.2(a)(2) above.
		Developer sues	Highly unlikely to be successful	Local Government would be liable for damages. See paragraph 3.2(a)(3) above.
	Refuses to grant planning approval, or only grants approval subject to	Developer appeals to SAT	Always available	• SAT can itself remake decision – see paragraph 2.6 above; or • Minister can call in and determine the matter (if State/Regional significance) – see paragraph 2.6(d) above.

Impacts	Local Government decision	Potential legal actions	Likelihood of action being successful against Local Government	Potential outcomes
	undesirable conditions	Developer seeks Supreme Court judicial review	The Supreme Court would likely rule that the SAT process be exhausted first. Availability of action tightly constrained, unlikely to be successful unless unjustifiably out of step with the latest established scientific predictions.	If Supreme Court action allowed and if challenge made out: • matter usually remitted to decision maker to correct any errors and re-decide; or • Supreme Court would only itself remake the decision in extraordinary circumstances. See paragraph 3.2(b)(2) above.
		Developer sues the Local Government	Highly unlikely to be successful	Local Government would be liable for damages. See paragraph 3.2(b)(3) above.
Development allowed Climate change consideration allegedly not	Makes or continues local planning scheme that permits development without requiring approval	Developer or other affected parties sue the Local Government	Highly unlikely to be successful	Local Government would be liable for damages. See paragraph 3.3(a)(1).

Impacts	Local Government decision	Potential legal actions	Likelihood of action being successful against Local Government	Potential outcomes
cautious enough Developer or other affected parties (such as future owners, occupants, neighbours, financiers or insurers) later suffer loss due to climate change related impacts	or	Third party seeks Supreme Court judicial review	Need to establish 'standing'. Availability of action tightly constrained, unlikely to be successful unless unjustifiably out of step with the latest established scientific predictions.	If they can establish standing and if challenge made out: • matter usually remitted to decision maker to correct any errors and re-decide; or • Supreme Court would only itself remake the decision in extraordinary circumstances; and • the third party could seek both interim and long term injunctions. See paragraph 3.3(a)(3) above.
Third parties object to development	Grants approval, including subject to conditions	Third party seeks Supreme Court judicial review	Need to establish 'standing'. Availability of action tightly constrained, unlikely to be successful unless unjustifiably out of step with the latest established scientific predictions.	If they can establish standing and if challenge made out: • matter usually remitted to decision maker to correct any errors and re-decide; or • Supreme Court would only itself remake the decision in extraordinary circumstances; and • the third party could seek both interim and long term injunctions. See paragraph 3.3(b)(1) above.
		Developer or other affected parties sue the Local Government	Highly unlikely to be successful	Local Government would be liable for damages. See paragraph **Error! Reference source not found.**.

Schedule 2 – other States' case law

1 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 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.

2 New South Wales

The NSW Court of Appeal in *Minister for Planning v Walker* (2008) 161 LGERA 423; [2008] NSWCA 224 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] NSWLEC 133 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 orders made on 1 February 2010 by the NSW Land and Environment Court to effectively overrule a local council'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

Council'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 councils, in terms of formulating and implementing long-term local planning policies.

3 South Australia

In *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57, 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.

4 Queensland

In *Charles & Howard Pty Ltd v Redland Shire Council* (2007) QPEC 95, 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.