

BEATTY LEGAL

**Sea Change Taskforce
Coastal Councils Climate
Change Legal Risks Report
Part A**

PRIVILEGED AND CONFIDENTIAL

Table of Contents

EXECUTIVE SUMMARY	3
1. INTRODUCTION.....	6
2. CLIMATE CHANGE ISSUES FOR COASTAL COUNCILS.....	6
2.1 What are Coastal Climate Change Risks?.....	6
2.2 Climate Change Duties and Functions	7
3. SOURCES OF LEGAL CHALLENGE.....	8
3.1 Planning/Administrative Law.....	8
3.1.1 <i>Merits Review</i>	8
3.1.2 <i>Judicial Review</i>	10
3.2 Civil Claims - Tort.....	12
3.2.1 <i>Negligence</i>	12
3.2.2 <i>Breach of Statutory Duty or Failure to exercise Regulatory Functions</i>	15
3.2.3 <i>Nuisance</i>	16
3.2.4 <i>Other Statutory Compensation entitlements</i>	18
3.3 Section 733.....	20
4. APPLICATION OF THESE LEGAL RISKS TO CCC ISSUES.....	21
APPENDIX A1 COUNCILS' STATUTORY OBLIGATIONS TO TAKE INTO ACCOUNT CC ISSUES IN THEIR DECISION MAKING ON PLANNING ISSUES..	29
APPENDIX A2 MERIT REVIEW RIGHTS	39

EXECUTIVE SUMMARY

A. Scope

The purpose of this Report is:

- a. to identify legal risks for coastal Councils in New South Wales, Victoria and Western Australia created by the actual and projected impacts of climate change; and
- b. to suggest how Councils might:
 - i. minimise their legal risks associated with decision making in six (6) key areas;
 - ii. use various regulatory/policy tools to respond to these risks; and
 - iii. demonstrate to Courts (and, where possible for their own assets, their insurers) that they have acted reasonably and in a legally defensible manner.

In preparing this Report we consulted with the following seven coastal Councils: Bass Coast Shire (Vic), East Gippsland Shire (Vic), Mornington Peninsula Shire Council (Vic), Moyne Shire Council (Vic), Rockingham City Council (WA), Busselton City Council (WA) and Shoalhaven City Council (NSW).

This Report is not intended to, and does not provide, specific legal advice. It does not provide a detailed analysis of the precise statutory framework in each of the three jurisdictions. Instead, this Report identifies coastal Councils' key legal climate change risks and suggests a general approach which could be adapted to by Councils based on their specific issues. The analysis of legal risks contained in this Report is confined to the three jurisdictions of the participating Councils: NSW, Victoria and WA.

This Report is in two sections. Part A provides guidance on the scope of coastal Councils' legal obligations with respect to climate change issues and Part B identifies risk management strategies that could be adopted (and adapted) by coastal Councils to address these risks.

B. Findings

For the purposes of this Report we have analysed coastal Councils' main sources of potential legal challenge associated with predicted climate change impacts in three (3) interrelated categories:

- a. **Information:** Legal risks associated with the collection, review and provision of information by or to Council.
- b. **Planning for Development:** Appeals against, and challenges to, the initiation of new zonings or re-zonings and approval decisions.
- c. **Asset Management:** Legal risks arising from the construction, maintenance or augmentation of infrastructure or the protection of natural areas by Council.

In broad terms, decisions made (or not made) by Councils in these three areas could be the subject of legal challenge in the form of:

- judicial/merit review of Council decisions; and/or
- claims for damages because of alleged negligence, breach of statutory duty or nuisance due to Council's actions or lack of action to prevent loss, damage or harm.

The key climate change legal risks of concern for the Councils consulted are:

- *Merit review of planning decisions*

This risk is exacerbated by uncertainties as to the magnitude and timing of predicted climate change risks, a lack of clarity and consistency in State policy and inconsistencies in the approach adopted by Tribunals/Courts.

- *Reviewing and applying information on climate change risks*

There are a lack of clear standards in the preparation of vulnerability assessments, and assumptions (which are critical to the outcome) are often not articulated; interpreting information requires expertise Councils often do not have; and Councils are concerned about their legal responsibilities in the period between first becoming aware of a risk and when action in response to that risk is implemented (often by Government through overlays).

- *Managing Risk for Infill development and Existing Settlements*

Most of the participating Councils have areas of high inundation/erosion risk in existing settlement areas. The community has a high degree of interest in and anxiety about Council decision making in these areas. State government has devolved decision making on this issue to a local level and Councils are burdened with difficult decisions in responses to these risks. Often conditions of consent are the best available option for Council's to allow continued use of areas until risks materialize. There is concern as to councils' role in long term monitoring and enforcing these conditions (which may require the removal of structures) when risks materialise.

- *Public Spaces*

Often public spaces (and access to them) are the most vulnerable areas to climate change risks. A lack of understanding in the community of climate change risks and adaption implications (especially where risks are incremental) inhibits Councils raising and applying the funds needed to protect these areas.

- *Emergency Management and Access Issues*

Access to and from land in extreme weather events is a risk issue for Councils. There are risks associated with the adequacy of emergency response arrangements prepared by or provided to Council; and future issues associated with the approval of development in areas where, for instance, access in extreme inundation events, would be very limited.

C. Suggested Strategy

As a result of predicted climate change impacts, the legal environment in which coastal Councils operate has also changed.

Irrespective of any personal views which elected Councillors or Council staff may hold about the reality or causes of climate change or the likely extent of those impacts, to confront this changed legal environment Councils must adapt how they act.

For the purposes of this Report we have assumed Councils accept the logic of seeking to protect themselves (and, ultimately the people they represent and from whom they levy rates and other charges) from legal actions and attendant

costs. By making sound and legally defensible decisions Councils improve their chances of:

- deterring litigation; and
- ensuring, if litigating, that they are in the best position to defend themselves and reduce or eliminate potentially adverse findings.

To be a “model” defendant/respondent a Council must be able to demonstrate that it has acted in good faith when making decisions and taking or not taking action. This involves ensuring that Council:

- has good information or a plan for obtaining it;
- has a strategy for making defensible decisions using that information
- takes sufficient measures to ensure that it implements its strategy and that the strategy is and remains effective; and
- strives to improve its responses to known or likely risks.

Detailed recommendations for how this can best be achieved are set out in Part B of this Report.

The law referred to in this Report is as stated or enacted as at 30 July 2013

PART A

CLIMATE CHANGE LEGAL RISKS FOR COASTAL COUNCILS

1. INTRODUCTION

This Part of the Report:

- describes the climate change issues faced by coastal Councils and the implications these issues have for their duties and functions (**Section 2**);
- examines the types of legal action coastal Councils may face as a result of decisions they take on climate change issues and describes defences, indemnities and limitations on Councils' liability (**Section 3**); and
- applies the general principles on legal challenges to the climate change context to provide guidance, in a table form, on the scope of coastal Councils' legal obligations with respect to climate change issues (**Section 4**).

2. CLIMATE CHANGE ISSUES FOR COASTAL COUNCILS

2.1 What are Coastal Climate Change Risks?

The bulk of accepted scientific expert opinion has concluded that our climate is changing. There have been increases in sea levels, maximum temperatures, heatwaves, fire weather conditions, minimum temperatures, ocean temperatures, ocean acidity and atmospheric Co₂ concentrations¹. However, there are significant uncertainties regarding the timing, magnitude and location of these changes. This makes both short and long term decision making difficult.

The specific climate change issues of most pressing concern varied between the seven participating Councils due to local environmental factors such as:

- the proximity of private property and public infrastructure to the sea;
- geological factors that increase/diminish erosion risks;
- the location of existing residential areas (eg in low lying areas); and
- the extent to which different protective measures could be effective or economically justified in the circumstances.

In broad terms, the main coastal climate change issues for Councils (**CCC Issues**) are:

- *Flooding*: Sea level rise (**SLR**), rainfall and/or stormwater management resulting in short term and long term impacts (potentially causing damage and loss of land and assets). Of significant concern for coastal communities is that relatively small sea level rises can result in inundation during high tide, king tide and storm surge events.
- *Erosion*: due to SLR and storm events.
- *Damage to buildings and infrastructure*: damage to and instability of buildings and other structures due to extreme weather events.
- *Diminution of public open spaces (and access to them)*: e.g. foreshores and beaches and boating facilities.

¹ See CSIRO "State of the Climate – 2012", <http://www.csiro.au/en/Outcomes/Climate/Understanding/State-of-the-Climite-2012.aspx>

- Emergency planning: a greater likelihood of the occurrence of, and an increase in the extent of, emergency events due to extreme weather conditions.

Notwithstanding skepticism as to the likelihood of, or extent of, climate change impacts, Governments (and the Courts) have imposed new (or have expanded existing) responsibilities on Councils to address these risks.

2.2 Climate Change Duties and Functions

Coastal Councils' duties and functions with respect to CCC Issues are found in both Acts of Parliament and are imposed by the common law (ie, the law made by Judges).

Relevant legislation and State government policies are set out in in **Appendices A1 and A2**.

For the purposes of this Report we have divided these duties and functions (and their corresponding legal risks set out in Section 4) into 3 broad categories:

a. Information

This category includes Councils' responsibilities:

- to obtain information on CCC Issues and their legal responsibilities and to ensure that the information obtained is current and relevant;
- to review (and make an assessment of the adequacy of) information on CCC Issues provided to Council; and
- to communicate identified CCC Issues and risks to affected parties and to the community generally.

b. Planning for Development

Council is required to take into account CCC Issues when determining whether:

- to approve or reject development applications put to it; and
- to initiate or support a proposal to change the zoning of land.

c. Asset Management

Given the possible impact of CCC Issues on existing assets (public and private buildings / other infrastructure and natural areas) a Council is required to make decisions which prioritise the protection/restoration of certain assets when, for example, it:

- determines to construct and/or maintain levies/walls to protect certain public or private assets (often at the risk of further degrading other assets);
- seeks to impose additional levies to fund protective measures or repairs to damaged assets;
- determines to allow existing protective measures to degrade or not to reinstate damaged public infrastructure/assets; or
- determines whether or not to grant consent to private measures to protect private assets.

3. SOURCES OF LEGAL CHALLENGE

Each decision made (or not made) by Council in the exercise of its duties and functions with respect to CCC Issues may create a risk of legal challenge by parties who disagree with what Council does.

Generally speaking, legal challenges to Council decisions on CCC Issues will be made under one (or more) of the following heads:

- a. Planning / Administrative Law; and
- b. Tort:
 - i. negligence;
 - ii. breach of statutory duty; and
 - iii. nuisance.

In addition, actions taken by Council may oblige it to provide statutory compensation to affected persons.

These causes of action, their limitations/defences and the consequences for Council if a plaintiff/applicant is successful are briefly described in Sections 3.1 to 3.2 below. Section 3.3 summarises the effect of section 733 of the *Local Government Act 1993* (NSW), which provides Councils in NSW with an indemnity in respect of certain climate change related claims.

Section 4 summarises these legal risks in table form.

3.1 Planning/Administrative Law

This has been the main source of climate change related litigation for Councils to date.

There are two main categories of review:

a. Merits Review

The new decision maker (often the Court) “stands in the shoes” of the original decision maker and reconsiders the original decision. The Court can either affirm, amend or make an entirely new decision.

b. Judicial Review

The Court is asked to examine whether the original decision was lawful based on one or more of grounds. If the Court accepts that the decision was unlawfully made, the matter will normally be sent back to the original decision maker to be remade.

Appendix A1 summarises the climate change related issues Councils are required to take into account when making planning decisions in the coastal zone.

3.1.1 Merits Review

A merits review is only available if it is expressly granted to the applicant in the relevant legislation. In each of the three jurisdictions considered in this Report, a dissatisfied applicant for a planning approval may appeal to a Court or Tribunal for a review of the decision on its merits. In addition, in NSW and Victoria certain objectors also have rights of appeal. In WA, objectors only have rights to be heard in appeal proceedings in very limited circumstances.

In Victoria in particular, VCAT has tended² to adopt a highly precautionary and risk adverse approach to decision making in merits review actions where it is the decision maker.

The key merit review rights in these three jurisdictions are set out in **Appendix A2**.

Limitations and Defences

Merit review rights are strictly confined to the rights expressly granted by the legislation.

Generally, merit review proceedings:

- may only be commenced by a dissatisfied applicant (and in some instances in Victoria and NSW by an objector); and
- must be commenced promptly after Council makes the applicable decision.

See **Appendix A1** for summary of who may initiate proceedings and within what timeframe.

Remedies

The new decision maker (usually a Court or Tribunal) “stands in the shoes” of the original decision maker and reconsiders the original decision. It can affirm the original decision, amend it or make an entirely new decision.

In WA the Planning Minister can call in and determine an application before the State Administrative Tribunal where the application concerns issues of State or regional importance.³

Discussion: Factual Uncertainty and the Role of the Precautionary Principle

A key characteristic of CCC Issues is uncertainty.⁴ The uncertainty regarding the extent of possible impacts is not a justification for ignoring the issue or for assuming a best case scenario on CC impact prediction. However, it does create considerable risk issues for decision making.

Uncertainties can be accommodated by application of the precautionary principle. Under this principle where there is a threat of serious or irreversible environmental damage and scientific uncertainty as to the nature and scope of the threat, the decision maker must assume the threat is a reality and take appropriate measures to avoid or mitigate the potential harm⁵. In Victoria, NSW and in draft policy, in WA Councils are specifically required to have regard to the precautionary principle when making decisions in the coastal zone.

² There have been inconsistencies in the application of this principle. See discussion by Andrew Macintosh “Coastal Adaptation Planning: A Case Study on Victoria Australia” CCLP Working Paper Series 2012/2 ANU Centre for Climate Change Law and Policy.

³ *Planning and Development Act 2005* (WA) ss 246 & 252, In Victoria and NSW the Minister may call in and determine development applications before Council if the proposed development meets specified criteria. See *Planning and Environment Act 1997* (Vic), s97B and *Environmental Planning and Assessment Act 1979* (NSW) ss89C and 89D.

⁴ Predictions regarding global impacts are based on numerous assumptions about future greenhouse gas emissions, current CO2 levels and their lifespan, climate sensitivity to the radiative forcing effects of greenhouse gases (and other agents) and how temperature changes and other impacts will be affected by regional factors (see Andrew Macintosh, *ibid*). Predictions about how local impacts are derived from these global impact predictions and numerous further assumptions about how local factors might interact.

⁵ *Telstra Corporation Ltd v Hornsby Shire Council*, [2006] NSWLEC 133

Implications for Councils

There are significant uncertainties in any Merits Review proceedings. A Court or Tribunal, especially when applying principles of ecologically sustainable development or the precautionary principle, may reach different conclusions on the appropriateness of the decision made by Council. However, the risks of having a decision overturned are reduced if planning requirements (especially State policies and guidelines) are clear and Council policy is based on appropriate information, reasonable and consistently applied.

3.1.2 Judicial Review

Judicial Review requires the applicant to establish that, having regard to the express statutory provisions (and any implied requirements) authorizing the decision, it was unlawful on one or more of the main grounds of review, principally:

- *Relevant and irrelevant considerations*: Council in its decision-making fails to take into account a relevant consideration or it takes into account irrelevant considerations. In each of the jurisdictions, Councils are required to take specified CCC related issues into account when making certain planning decisions in the coastal zone (see **Appendix A1**).⁶
- *No jurisdiction*: Council makes a decision that is outside the scope of its governing legislation.
- *Error of law*: Council applies the wrong criteria or does not follow the correct procedure prescribed in the statute.
- *Improper purpose*: Council's decision is designed to achieve a purpose that is beyond its responsibilities. It is generally difficult to establish this ground of review, as adequate evidence of the ulterior purpose must be provided. An example might be where a Council rejects a development application ostensibly due to traffic or amenity impacts, but the real reason was due to SLR risks.
- *Unreasonableness*: A Council's decision is so unreasonable that no reasonable Council would have reached that decision. This is a difficult ground of review to establish. It is usually coupled with other grounds. If permit triggers are not clear and the information Council relies upon is vague it is more likely that this ground could be made out. An example may be where a Council completely ignored some relevant climate change information. Alternatively, conditions in an approval for the payment of levies or construction of upgrading works could be deemed unreasonable if they do

⁶ In addition, there may also be an implied requirement to take CCC Issues into account. However, the extent to which such consideration is required is unclear. In 2008, the majority of the NSW Court of Appeal suggested that consideration of ESD principles was an aspect of the public interest considerations the Planning Minister was required to take into account. Consequently, were there to be no consideration of ESD issues (rather than merely inadequate consideration) this could amount to a failure to take a relevant consideration into account.

Minister for Planning v Walker (2008) 161 LGERA 423; [2008] NSWCA 224

In 2010 Justice Biscoe of the NSW Land and Environment Court expressed the view that future climate change effects were now an essential component of the "public interest" due to changes in climate change science, climate change litigation and new coastal flood risk management policy. However, since in this instance, the Council was able to demonstrate that it had considered climate change threats, the applicant failed.

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

not fairly and reasonably relate to the development in question (i.e. they are disproportionate to, or do not have sufficient nexus to the development).⁷

- *Bad faith*: Dishonesty, bribery or corruption has influenced Council's decision.
- *Uncertainty*: Council's decision is too uncertain to be meaningful. An example may be where a Council imposes a vague or uncertain condition on a permit for temporary works requiring it to be dismantled if uncertain events occur in the future.
- *Improper delegation or divesting or dictation*: Council has either wrongly granted authority to another to make the decision or has acted at the dictation of another without exercising its own discretion
- *Inflexible Policy*: Council has inflexibly applied guidelines or policy criteria without regard to the merits of the case.
- *Natural Justice*: Council has not given the applicant a reasonable opportunity to be heard or Council is affected by actual or apprehended bias. An example may be where a Council does not adequately consider matters raised in submissions

Limitations and Defences

Judicial Review proceedings usually require litigants to deal with the following issues.

a. Standing

The applicant must be a person affected by the decision unless legislation specifically extends standing to that person. For instance, s123 of the Environmental Planning and Assessment Act 1979 (NSW) extends standing to "any person" for an order to remedy or restrain a breach of that Act.

Where there is a sufficient public interest in judicial review of the decision a person may request the Attorney General to initiate proceedings.

b. Administrative decision

Judicial review is only available in respect of administrative decisions. Judicial review is not available where the decision is merely a "preliminary step" rather than a "decision of an administrative character". This distinction will depend on the legislation authorizing the decision. For example, a decision to approve amendment of a zoning plan before submission to the Minister could be reviewable⁸ but a decision to propose a re-zoning would not be.⁹

c. Decision by Council

Council will only be subject to review if it has made the relevant decision. For example, the ultimate approval body for a rezoning of land is generally the Minister. However, even where Council is not the ultimate decision maker, there is potential for judicial review if part of the process required to be undertaken by Council is not lawfully carried out

⁷ E.g. *Coulter v Glen Eira City Council* [2000] VCAT 2002: A condition requiring the applicant pay for the entire cost of upgrading half the length of the 107m long, 3m wide driveway that provided vehicle access to the site and to other properties adjoining the site was considered unreasonable.

⁸ *Noosa Shire Council v Resort Management Services Ltd* (1993) 81 LGERA 295.

⁹ *Redland Shire Council v Bushcliff Pty Ltd* [1997] 2 Qd R97.

d. Time limitations

Specific time limitations may apply. For instance, in NSW, judicial review of the grant of consent or a complying development certificate must be commenced within 3 months of public notice of the decision.¹⁰

Remedies

If the Court/Tribunal accepts that the decision was unlawful, the decision will ordinarily be sent back to the original decision maker to be remade.

Implications for Council

It will be difficult for an applicant to succeed in a judicial review case if Council can demonstrate that it has followed any prescribed statutory process for making the decision, the decision made complies with the statutory requirements, information it has relied upon is appropriate and the decision which it made was reasonably open to it.

3.2 Civil Claims - Tort**3.2.1 Negligence**

For a plaintiff to succeed in a negligence action against Council, it would need to establish each of the following:

- (i) *Council owed it a duty of care*
(Generally a duty of care will only arise if Council has a statutory obligation to act¹¹).
- (ii) *Council breached that duty of care*
(Essentially this requires an assessment of the reasonableness of Council's decision having regard to factors such as the likelihood of the risk occurring, its probable magnitude and consequences, the difficulty of taking precautions and the social utility of Council's conduct¹²).
- (iii) *It suffered loss or damage as a result of that breach*
(i.e. Council's negligent conduct caused or materially contributed to the plaintiff's injury/damage¹³).
- (iv) *The loss or damage was not too remote*
(This involves an assessment of whether a reasonable Council should have foreseen that kind of damage).

For instance, in *Kyriacou & Bonhomie Pty Ltd v Kogarah Municipal Council*¹⁴, a Council was liable for negligent misstatement when a council officer gave an inaccurate verbal response to a telephone inquiry about suitability of zoning of land for its use as a wedding reception centre.

¹⁰ s101 *Environmental Planning and Assessment Act 1979* (NSW).

¹¹ *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424.

¹² "The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have" *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 7-8.

¹³ *Tubemakers of Australia Ltd v Ferdandez* (1976) 10 ALR 303. The precise tests for causation at common law and in statute differ.

¹⁴ 88 LGERA 110.

Limitations and Defences

In each of the three jurisdictions considered in this Report, legislation limits the extent of Councils' duty of care. Generally:

- Where the alleged negligence relates to the exercise of, or the failure to exercise, a power conferred by statute (and one which Council could not exercise without the specific statutory power) Council's act/omission must be manifestly unreasonable¹⁵, such that no authority having the functions of the Council could properly consider the act or omission to be a reasonable exercise of its functions.
- In determining whether Council has, or has breached, a duty of care:
 - the functions it is required to exercise are limited by the financial and other resources that are reasonably available to it¹⁶;
 - Council may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates¹⁷;
- In NSW, a Council cannot be held liable for a failure to exercise a regulatory function (e.g., a licence or permit) where it could not be compelled to exercise that function. In WA and Victoria, the legislation creating the relevant function must be compatible with the existence of that liability¹⁸.
- The action must be commenced by Plaintiff within 6 years of the cause of action accruing.¹⁹
- In the case of an inherent risk (one that cannot be avoided by the exercise of reasonable care and skill), Council's liability is limited to a failure to warn of the risk.²⁰

In addition, a number of specific defences may apply. Council may not be held to be liable where:

- a. a fully informed plaintiff has **voluntarily accepted** the risk²¹;
- b. the risk is **obvious** to a reasonable person in the plaintiff's position²² (Note: a risk may be obvious even where the likelihood of its occurring is low²³ or the circumstances giving rise to the risk is not conspicuous or physically observable²⁴);

¹⁵ *Civil Liability Act 2002* (NSW) ss 43 and 43A; *Wrongs Act 1958* (Vic) s 84 and *Civil Liability Act 2002* (WA) ss 3 and 5X.

¹⁶ *Wrongs Act 1958* (Vic) s 83(a); *Civil Liability Act 2002* (NSW) s 42(a); *Civil Liability Act 2002* (WA) s 5W(a).

¹⁷ *Wrongs Act 1958* (Vic) s 83(c); *Civil Liability Act 2002* (NSW) s 42(d); *Civil Liability Act 2002* (WA) s 5W(d).

¹⁸ *Civil Liability Act 2002* (NSW) s 44(1), *Wrongs Act 1958* (Vic) s 84(3) and *Civil Liability Act 2002* (WA) s 5Y.

¹⁹ *Limitation Act 1969* (NSW) s 14(1); *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation Act 2005* (WA) s 13(1).

²⁰ *Civil Liability Act 2002* (NSW) ss 5, 5(1) & (3); *Wrongs Act 1958* (Vic) ss 53, 55(1) & (3); *Civil Liability Act 2002* (WA) ss 3, 5P(1) & (2).

²¹ *Roggenkamp v Bennett* (1950) 80 CLR 292 at 300.

²² *Civil Liability Act 2002* (NSW) ss 5F(1) & 5G; *Wrongs Act 1958* (Vic) s 53(1) & 54(1); *Civil Liability Act 2002* (WA) s 5F(1).

²³ *Civil Liability Act 2002* (NSW) s 5F(3); *Wrongs Act 1958* (Vic) s 53(3); *Civil Liability Act 2002* (WA) s 5F(3).

²⁴ *Civil Liability Act 2002* (NSW) s 5F(4); *Wrongs Act 1958* (Vic) s 53(4); *Civil Liability Act 2002* (WA) s 5F(3).

- c. the negligence alleged is in respect of the materialization of **an inherent risk** (i.e something that cannot be avoided by the exercise of reasonable care²⁵) (however, there may still be a duty to warn);
- d. the negligence alleged is a failure to warn or inform and the risk is obvious, the duty is only breached in NSW and WA if the plaintiff has made an inquiry about the risk to Council or Council is required by law to warn of that risk; and/or²⁶
- e. in NSW, s733(1) of the Local Government Act 1993 (NSW) applies (see section 3.6 below).

A contract between the plaintiff and Council which includes a provision that specifically excludes liability in negligence may also be effective in exempting Council from liability in negligence, at least in respect of that contracting counterparty

Remedies

The usual remedy in negligence is compensatory damages, that is, an award of money to put the plaintiff in the position it would have been in had the tort not been committed.

It is costly and time consuming to defend an action in negligence²⁷. If the action succeeds, the cost of compensatory damages plus both parties legal costs will be high. Even if the defence is successful it is unlikely that Council would recover all of its legal and other costs.

Implications for Climate Change Legal Risks

A Council could be the subject of an action in negligence if it:

- grants approval to a development, which is subsequently rendered uninhabitable due to climate change related issues, or which causes consequential damage to other structures²⁸, in circumstances where the risk of harm is foreseeable; or
- fails to build or maintain infrastructure (for example, stormwater systems, roads, seawalls/levees) and property damage occurs in circumstance where it has failed to take reasonable care.

Given the available statutory defences described above, Council would only be liable if its decision to grant the approval or to fail to conduct works or maintain works was manifestly unreasonable. However, as scientific evidence mounts and case law evolves, it is more likely that a decision may be held to be manifestly unreasonable if:

- the decision maker's decision was based on a denial that CC was occurring;
- it ignored evidence as it became available; and/or
- the decision increased vulnerability without regard to available protective/preventative measures.

²⁵ *Wrongs Act 2002* (Vic) s 55; *Civil Liability Act 2002* (NSW) s 5I(1); *Civil Liability Act 2002* (WA), s 5P.

²⁶ *Civil Liability Act 2002* (NSW) s 5H; *Civil Liability Act 2002* (WA) s5O.

²⁷ Action may take months or years, depending upon the Court, jurisdiction and cause of action.

²⁸ Eg in *Egger v Gosford Shire Council* 1989 67 LGRA 34, the NSW Court of Appeal a landowner alleged that Council were negligent in approving a development in 1968, including a seawall and in permitting temporary reinforcement of that seawall in 1974. The Court, in 1989, considered that at the time of the decisions there was not sufficient information, or expertise available, for Council, acting reasonably, to have appreciated the risks of the development.

3.2.2 Breach of Statutory Duty or Failure to exercise Regulatory Functions

A Council could be exposed to a claim for damages for breach of statutory duty if, for example, it could be alleged that Council has failed to erect or maintain a seawall to prescribed statutory standards²⁹. The law in this area is unsettled, however, as a general rule, it would be necessary for a plaintiff to establish that:

- Council owed a duty of care to a class of persons to which he /she belonged;
- the duty was clearly defined in the legislation (that is, it was not ambiguous or vague);
- the legislation demonstrated an intention that a breach of that duty to be actionable³⁰;
- Council has failed to comply with that duty; and
- that breach caused the harm suffered by the plaintiff.

In NSW, for instance, the Supreme Court has held that breach of the conditions of a development consent relating to the support of adjoining land gave rise to a private right of action by the neighbour against the developer³¹. Similarly, in Victoria, the Supreme Court also held the builder and owner liable for breach of statutory duty where provisions of the Australian Building Code (incorporated by reference into the Victorian Building Act 1993) as to the height of a balustrade had been breached, causing severe physical injury to the plaintiff³².

Limitations and Defences

The following additional statutory limitations may apply in Victoria, NSW and WA to protect Councils. A plaintiff must establish that:

- the act or omission was in the circumstances so unreasonable that no Council having the functions of the Council in question could properly consider the act or omission to be a reasonable exercise of its functions³³;
- in Victoria and WA, the provisions and policy of the Act creating that duty are “compatible with the existence of that liability”,³⁴ i.e. the legislation demonstrates an intention that its breach be actionable; and
- in NSW, where Council is alleged to have failed to exercise or to consider exercising its functions to prohibit or regulate an activity, the Council could have been compelled to exercise the function in proceedings instituted by the plaintiff³⁵.

²⁹ In the UK for instance, the Court of Appeal held that a statutory duty imposed under section 25 of the Tramways Act 1870, which required that tram lines laid into a public road be ‘on a level with the surface of the road’, gave rise to a civil liability (the plaintiff’s car had slid on some wet rails and caused injury, and one of the causes was said to be that the rails were too high above the surface of the road.) *Roe v Sheffield City Council* [2004] QB 653; [2003] EWCA Civ 1 (17 January 2003). In New Zealand a land developer was held to have an action against a local council for failing to carry out its statutory duty to refuse to allow building in certain areas: *Smaill v Buller District Council* [1998] 1 NZLR 190. See Neil Foster “The Merits of a Civil Action for Breach of a Statutory Duty” *Sydney Law Review* Vol 33:67; and N Foster, *Breach of Statutory Duty and Risk Management in Occupational Health and Safety Law: New Wine in Old Wineskins?* *Tort Law Review* Vol. 14, Issue 2, p. 79-104.

³⁰ For example, it was limited and quite specific, and there were no other effective means of ensuring the protection the statute provided.

³¹ *Piling v Prynew Nemeth v Prynew* [2008] NSWSC 118 (26 February 2008).

³² *Toomey v Scolaro's Concrete Constructions Pty Ltd (in liq) & Ors (No 2)* [2001] VSC 279

³³ *Civil Liability Act 2002* (NSW) ss 43 and 43A; *Wrongs Act 1958* (Vic) s 84; *Civil Liability Act 2002* (WA) ss 3 & 5X.

³⁴ *Wrongs Act 1958* (Vic) s 84(3); *Civil Liability Act 2002* (WA) s 5Y (2).

³⁵ *Civil Liability Act 2002* (NSW) s 44.

In addition, the cause of action for damages for breach of statutory duty must ordinarily be commenced by the Plaintiff within 6 years from the cause of action accruing, that is the decision, action or inaction of the Council³⁶.

Remedies

The relevant remedy available to the plaintiff who has suffered harm is damages.

Implications for Councils

A Plaintiff is unlikely to succeed in a claim of breach of statutory duty unless Council has failed to comply with a prescribed and specific statutory duty and Council's conduct is so unreasonable that no reasonable Council could have acted in that way.

3.2.3 Nuisance

A cause of action in nuisance may arise if:

- i. (*Private nuisance*) Council substantially and unreasonably interferes with a plaintiff's ordinary and reasonable use of land they own or occupy³⁷. It may be established if:
 - Council owned or controlled the asset from which the nuisance emanated;
 - the nuisance caused material damage to the land owned or occupied by the plaintiff (his or her reasonable enjoyment of that land);
 - the nuisance was due to Council's action or inaction;
 - Council knew or ought to have known of the nuisance;
 - the risk of harm was foreseeable; and
 - Council did not take reasonable action to end the nuisance.
- ii. (*Public nuisance*) Council is in control of premises/resources from which a nuisance emanated and caused a substantial and unreasonable interference with the rights of the public. For instance, if it controlled land from which a landslide, bushfire, flooding or coastal erosion emanated. Civil proceedings may be brought by the Attorney General or someone who suffers damage over and above that suffered by the general public.

Limitations and Defences

Even if each of the required elements (set out in (i) or (ii) above) have been made out, a nuisance claim may be successfully defended where:

- there has been a voluntarily assumption of risk by the plaintiff;
- Council has a legal right to create that nuisance;
- the nuisance was created in order to avoid a real and imminent harm; and/or
- the nuisance is an inevitable consequence of Council's carrying out of an activity authorized under an Act.

In addition, the plaintiff is ordinarily required to commence the action in nuisance within 6 years from the cause of action accruing, that is, the decision, action or inaction of the Council³⁸.

³⁶ *Limitation Act 1969* (NSW) s 14(1); *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation Act 2005* (WA) s 13(1).

³⁷ *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 896-7 per Lord Atkin.

³⁸ *Limitations Act 1969* (NSW) s 14(1); *Limitation of Actions Act 1958* (Vic) s 5(1)(a); *Limitation Act 2005* (WA) s 13(1).

Remedies

The following remedies may apply:

- an action at common law for damages;
- abatement without recourse to legal procedure; and
- equitable relief³⁹.

The remedies available to the Court in respect of nuisance are broader than those for negligence. For instance, Courts may, in circumstances where they have the power to award an injunction or order specific performance, also award damages in addition to or in substitution for the injunction or specific performance. In addition, damages may even be awarded in lieu of an injunction in respect of an injury which is still in the future⁴⁰. Nuisance also protects a broader range of interests than negligence as it will protect comfort and convenience and unlike negligence, may not require a material injury.⁴¹

³⁹ *Conti v Chenery* [2001] WASC 107.

⁴⁰ *Bankstown City Council v Alamo Holdings Pty Ltd* [2005] HCA 46; (2005) 223 CLR 660; (2005) 221 ALR 1; (2005) 79 ALJR 1511 (7 September 2005) citing *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 860.

⁴¹ *Bone v Seale* [1975] 1 WLR 797; *Oldham v Lawson* (No 1) [1976] VR 654 at 658-9.

Climate Change Example

There have been a number of cases where Councils' stormwater management has resulted in nuisance claims.⁴²

A nuisance claim may also arise if:

- sea walls, levees or drainage systems built by Council are poorly located, designed or constructed so that they exacerbate the issue or create new problems elsewhere; or
- a bushfire spreads to another property from Council land and Council has failed to take reasonable steps to prevent this.

In certain circumstances, Council may be held liable for nuisance that it did not create and that is wild or at large⁴³. These cases and the stormwater cases suggest the potential for nuisance actions to be brought to require Council to undertake drainage works or build sea walls.

Council may also wish to seek compensation from others where the use of its property has been adversely affected by a nuisance.

3.2.4 Other Statutory Compensation entitlements

In some instances, the rezoning of land to restrict development due to climate change risks or the carrying out of works for the mitigation of CC Impacts could give rise to a requirement under statute to acquire land and/or pay compensation.

Compulsory Acquisition of Land

Where Council acquires land (or interests in land) under its powers of compulsory acquisition, for example for the construction of mitigation works, compensation would be payable to the dispossessed land owner.

⁴² For example, in *Gales Holdings Pty Ltd v Tweed Shire Council* [2011] NSWSC 1128, Council was required to compensate a developer for nuisance due to stormwater pooling on his property. The Court considered that the 200% increase in stormwater experienced on the site was due to a combination of: increased development in the area (approved by Council); inadequate provision for drainage in conditions imposed on neighbouring development and a failure to enforce compliance with drainage conditions; inadequate provision for drainage from Council roads; and inadequate inspection of systems. The Court considered Council's actions, once it became aware of the nuisance (and the developer's lack of tolerance of it), so unreasonable that no reasonable Council would have acted as it did. The Court also considered that there was no "real financial constraint" preventing Council from taking steps to alleviate the nuisance.

⁴³ For example, in *Goldman v Hargrave* 1986 IAC 695, the House of Lords (on appeal from the High Court) the Court considered a landowner liable in nuisance in circumstance where: lightning had struck a tree on his property and caught fire, he had cut it down and cleared the surrounding area and left the fire to burn itself out, later a change in the weather caused the fire to flare up and caused a bushfire affecting neighbouring land. The Court noted at 656-7 that this was a situation in which the land owner "*faced with a hazard accidentally arising on his land fails to act with reasonable prudence so as to remove the hazard*". In *Stockwell v the State of Victoria* 2000 VSC 497 The State of Victoria was found liable in nuisance for failing to take reasonable steps to prevent wild dogs on land under its control from entering the Plaintiff's property and attacking sheep. The State had various statutory responsibilities in respect of vermin and noxious weed control. The Court considered that while the State did not create the nuisance, it had knowledge of it and measures (such as baiting/trapping) were reasonably available to control the spread of the dogs. In this instance it was relevant that the State had not kept a record of any measures it had implemented and any measures were implemented on an ad hoc basis.

In each of the three jurisdictions reviewed in this Report the circumstances in which Council may compulsorily acquire land and the manner in which compensation is to be calculated is prescribed by statute⁴⁴. The provisions in WA are more restrictive as acquisition must be for a specified “public work.”

Rezoning and Compensation

Council may be liable to pay compensation or be compelled to acquire land when it is rezoned.

In NSW where land is rezoned for specified public purposes (eg a public reserve) the planning instrument must specify the Government Agency that will (at some point in the future) acquire the land and an affected landowner may require the acquisition to occur if he/she can demonstrate hardship.⁴⁵

In Victoria, where land is reserved under a planning scheme for a public purpose landowners may claim compensation for financial loss directly due to that reservation or due to a refusal of a planning permit on the grounds that the land is or will be need for a public purpose⁴⁶. Compensation is not payable if the land has been purchased or compulsorily acquired by Council.

In Western Australia, a Council may be liable to pay compensation to a land owner if a local planning scheme is made or amended such that:

- i. it prohibits, wholly or partially, continuing a previously permissible use of that land or erecting, altering or an extending a building that was previously permissible;
- ii. the land is reserved for a public purpose; or
- iii. no development (other than development for public purposes) is permitted.⁴⁷

A claim is generally required to be made within 6 months of making or amendment of the planning scheme.⁴⁸ The compensation payable is equivalent to the difference between value of land with the affection and the value of land prior to the affection.

In Victoria and NSW, the protection of existing use rights⁴⁹ means the circumstances envisaged by the first category in the WA provisions ((i) above) are unlikely to arise.

⁴⁴ *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) Part 3 & Part 4; *Land Administration Act 1997* (WA) Part 9 & Part 10; *Land Acquisition and Compensation Act 1986* (Vic) Part 2 & Part 3.

⁴⁵ *Environmental Planning and Assessment Act 1979* (NSW) ss 26 & 27; *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) Part 2, Division 3.

⁴⁶ *Planning and Environment Act 1987* (Vic) s98. Section 5 of the Land Acquisition Act specifies that an authority cannot commence to acquire the land ‘unless the land has been first reserved by or under a planning instrument for a public purpose’. Land reserved for future compulsory acquisition is identified by including the land in a Public Acquisition Overlay. This use of the term ‘reserved’ in this context is separate from its use in other legislation, such as the *Crown Land (Reserves) Act 1978* (where provision is made for Crown land to be reserved for certain purposes, and for its management) or the *Subdivision Act 1988*, which refers to land being set aside as a reserve. (For further information see the DPCD publication “Using Victoria’s Planning System”, Chapter 6)

⁴⁷ *Planning and Development Act 2005* (WA) s 174.

⁴⁸ *Planning and Development Act 2005* (WA) s 178(1).

⁴⁹ An existing use right may arise when changes to the planning controls have the effect of prohibiting a previously lawful use of the land. ⁴⁹ *Planning and Environment Act 1987* (Vic) s6(3) and *Environmental Planning and Assessment Act 1979* (NSW) Division 10 (ss106-109B).

3.3 Section 733

Section 733 of the *Local Government Act* 1993 (NSW) provides Councils with an indemnity for acts or omissions undertaken in good faith. It specifically applies to climate change related acts or omissions.

The Council must meet each of the following conditions:

- a. in *good faith*;
- b. provides advice, does anything, or omits to do anything;
- c. which relates to either:
 - i. the likelihood of land being subject to flooding, affected by a coastal hazard (if the land is in the coastal zone) or being subject to the risk of bushfire; or
 - ii. the nature and extent of any such affect or hazard⁵⁰.

Specifically section 733(3) provides that this indemnity includes advice furnished or things done (or omitted to be done) in respect of such things as the preparation of planning instruments, the granting or refusal of a development application, the carrying out of coastal management works, the failure to upgrade or maintain flood mitigation or coastal management works in response to projected climate change impacts and the provision of information regarding climate change or sea level rise.

What is “good faith”?

The indemnity is only available if Council can demonstrate⁵¹ that it has acted in “good faith”: the indemnity will only apply where a negligence/nuisance case has been made out, that is, a plaintiff has already prima facie established that Council failed to take reasonable care.

The relevant case law suggest that this requires Council to have made a real attempt to perform its functions (ie, more than mere “honesty and ineptitude”)⁵².

Section 733(4) specifies that a Council is taken to have acted in good faith if its actions or advice has been substantially in accordance with the most recent manual notified by the Minister for Planning under s733(5). In NSW the following manuals have been gazetted for the purposes of s733:

- Floodplain management manual 2005; and
- Guidelines for preparing coastal zone management plans 2013 (gazetted for the purposes of s733 on 19 July 2013).

If Council takes action which it is not required by statute to do, it may not have the benefit of s733 as it cannot be said to be exercising their functions.

⁵⁰ *Local Government Act* 1993 (NSW) ss 733(1), (2) & (2A).

⁵¹ Council has the burden of establishing that it acted in good faith: *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408; (1993) 44 FDR 290.

⁵² *Bankstown City Council v Alamo Holdings Pty Ltd* [2005] HCA 46; (2005) 223 CLR 660; (2005) 221 ALR 1; (2005) 79 ALJR 1511 (7 September 2005) citing *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 860; *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408; (1993) 44 FDR 290.

In *Melaleuca Estate Pty Ltd v Port Stephens Council* [2006] NSWCA 31, the NSW Court of Appeal found Council had not acted in good faith in circumstances where a drainage pipe discharged collected water, and its pollutants, directly onto the land.

4. APPLICATION OF THESE LEGAL RISKS TO CCC ISSUES

For coastal Councils the main potential sources of legal challenge associated with CCC Issues arise from:

- a. (Information) for example, deficiencies in information provided (or not provided) by Council (negligence);
- b. (Planning for Development) for example, appeals against zoning and approval decisions; and
- c. (Asset Management) for example, alleged failure to provide services or maintain infrastructure.

The table below summarises the relevant legal risks.

Appendix A2 identifies some current case law on CCC Issues. Councils should note, however, that the matters that are pursued in Court:

- may not be representative of common experiences for local Councils;
- may be decided upon the basis of a specific (and often extreme or unusual) factual scenario;
- have been pursued in Court because one or more of the parties has the resources to litigate to achieve a resolution to an issue.

Table 1: Legal Risks for Coastal Councils due to CCC Issues

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
Information			
Obligations to inform and warn	Fail to provide information as to CC risks (e.g. information as to flooding and coastal hazards)	Breach of Statutory Requirements: Council's have specific statutory duties to provide zoning information in planning certificates. ⁵³ Community consultation requirements in planning laws and government guidelines ⁵⁴	Possible claim for compensation for losses caused by the breach. Low risk provided Council complies with its specific statutory obligations and does not provide misleading or inaccurate information
		Judicial Review If the failure amounts to a breach of Council's statutory obligations Judicial review proceedings may be brought to restrain that breach ⁵⁵ .	If the failure to provide information breached public consultation obligations, Council's consequent decision may be considered unlawful. Low risk provided statutory processes complied with.

⁵³ In **NSW**, a s149(2) certificate must be attached to a contract for the sale of land. This certificate must include the matters prescribed in Schedule 4, Part 3 of the Regulations (s149(2) *Environmental Planning & Assessment Act* 1979 (NSW) and cl 279 of the Regulations). These matters include (among other things) the names of planning instruments applicable to the land, zoning, whether council has been notified that the land is in the coastal zone under the *Coastal Management Act* and the existence of certain regulated temporary coastal protection works. A section 149(2) certificate must be attached to a contract for sale of land. Section 149(5) states "a council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.". Section 149(6) further provides: "A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5)..."

In **WA** where there is a Region Planning Scheme an application can be made for a planning certificate under that scheme. For example, clause 53 of the Greater Bunbury RS entitles an applicant to a certificate which states: "the manner in which it is affected by the Scheme and the purpose, if any, for which the land is reserved under the Scheme". Section 70A of the *Transfer of Land Act* 1893 (WA) permits a Council to request a notification on title of a factor affecting the use or enjoyment of the land or part of the land where it considers it desirable that proprietors or prospective proprietors of the land be made aware of that factor. However, the notation may only be made with the consent of the land owner. SPP 2.6 recommends that a warning be placed on title as follows: "VULNERABLE COASTAL AREA – This lot is located in an area likely to be subject to coastal erosion and/or inundation over the next 100 years"

In **Victoria**, s32(2) *Sale of Land Act* (Vic), prescribes the matters to be included in the relevant certificate. These include the zoning of the land, name of the planning authority, whether it is in a bushfire risk zone and specified prohibitions on residential development.

⁵⁴ Eg The current process for the development of coastal hazard and floodplain risk management plans includes community consultation and involvement. Councils' coastal hazard and flood studies should be made available to the public when completed.- NSW Coastal Planning Guideline section 2.5

⁵⁵ see *Planning and Environment Act* (Vic) 1987 s149B, *Environmental Planning and Assessment Act* (NSW) 1979 s123.

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
		<p><i>Negligently fail to provide information</i> Plaintiff will need to establish duty owed, duty breached and that breached caused loss. Due to statute, where risk is obvious, Council in NSW and WA is only required to warn if the Plaintiff specifically enquired or Council is required by law to warn.</p>	<p>Compensatory damages – put plaintiff in position would have been in but for the breach.</p> <p>Low risk It may be difficult for a Plaintiff to establish duty to provide information owed and breach caused loss/damage.</p> <p>In NSW, s733 will provide an indemnity where Council has acted in good faith.</p>
	Fail to provide correct information (e.g. inaccurate information in property certificates or published material)	<p><i>Negligently provide or provide the wrong information</i> Need to take reasonable care. Significant case law as to Councils providing incorrect information, but not in CC context.⁵⁶</p>	<p>Compensatory damages – put plaintiff in position would have been in but for the breach.</p> <p>Low risk provided Council does not provide misleading or inaccurate information</p> <p>In NSW, s733 will provide an indemnity where Council has acted in good faith.</p>
	Fail to provide information in appropriate manner	<p><i>Negligence/ Judicial Review</i> Manner of communication of warning must be reasonable in the circumstances, where information is specifically required to be provided to a limited class of persons, care should be taken to ensure the information is provided in an appropriate manner.</p>	<p>In NSW, s733 will provide an indemnity where Council has acted in good faith.</p> <p>Low risk provided Council complies with its specific statutory obligations and does not provide misleading or inaccurate information</p>
Obtaining information & remaining up to	Fail to have current scientific information	<p><i>Judicial or Merit Review action</i> (eg judicial review as to</p>	<p>Merit/Judicial review proceedings likely to be successful if Council has</p>

⁵⁶ e.g. *Shaddock v Parramatta City Council* (1981) 150 CLR 225; *Kyriacou v Kogarah Municipal Council* (1995) 88 LGERA 110

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
date	Fail to ensure information provided is credible /accurate	failure to consider a relevant considerations)	not had regard to accurate and current information relevant to its decision. Medium risk
		<i>Negligence:</i> Could form the basis for a claim in negligence that Council has acted unreasonably by not having regard to appropriate information	Council is unlikely to be seen as having acted in good faith as required by the NSW s733 indemnity. Medium risk
Reviewing information obtained	Fail to critically review information obtained Eg Coastal Hazard Vulnerability Assessments (Vic)	<i>Negligence:</i> Negligence issue if information is clearly non-compliant or inadequate or if contradict other credible information and conflict between opinions expressed not considered. If information was required to be obtained by Council and is sufficiently non compliant may also give rise to a breach of statutory duty.	Low risk provided Council takes appropriate steps to verify the accuracy/suitability of information provided to it.
		<i>Judicial or Merit Review action</i> (eg judicial review as to failure to consider a relevant considerations)	Merit/Judicial review proceedings likely to be successful if Council has not had regard to accurate information relevant to its decision Medium Risk
Planning for Development			
Approving /rejecting development approval	Approve of development where foreseeable risk of harm (eg erosion / flood	<i>Negligently approve Development</i> Legislation limits action. Plaintiff must demonstrate Council's action in approving	Compensatory damages (& costs). Time. If decision did not take climate change factors into account at all, it is likely to be manifestly unreasonable.

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
	area)	development is manifestly unreasonable.	In NSW, s733 will provide an indemnity where Council has acted in good faith.
	Challenge to decision to grant, or refuse to grant, or the conditions imposed on approval due to CC Issues E.g. <i>Walker v Minister for Planning</i> [2008] NSWCA 224 and <i>Gippsland Coastal Board v South Gippsland SC and ors (no 2)</i> [2008] VCAT 1545	<i>Merit Review of development approval decision.</i> Challenge must be brought by person (usually applicant) with standing within timeframe	Court/Tribunal/Minister makes fresh decision. Courts likely to take a precautionary approach to CC risk where still scientific uncertainty as to CC issues material to the proposed development. Medium risk
		<i>Judicial Review of development approval decision</i>	Decision remitted to original decision maker to be made lawfully. Council has a significant discretion provided proper process followed. Decision must: - comply with statutory requirements; and - be reasonable and proportionate. Low risk
	Proceedings to compel Council to make a decision	Administrative Review proceedings as to deemed refusal	Low risk provided Council complies with its specific statutory obligations.
		Statutory compensation claim for failure to grant development approval.	Proper exercise of Councils function. Generally no compensation for failure to grant an approval unless the reason for the failure to grant is that the land is to be used for a public purpose. ⁵⁷ Low risk
Zoning /rezoning	Planning scheme does not include protective standards (eg minimum	<i>Negligently prepare planning scheme</i> Failure to include standard must lead to loss /damage ⁵⁸ Legislation limits	Compensatory damages (& costs). Time. High risk in vulnerable areas (flood prone, coastal zone or otherwise at risk)

⁵⁷ Eg statutory exception in s98(2) *Planning and Environment Act 1987* (Vic)

⁵⁸ eg *Ryan v Great Lakes* [1999] FCA 177

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
	standards above sea level for new development or requirement for building to be storm proofed)	action. Plaintiff must demonstrate Council's actions in preparing scheme/scheme amendment were manifestly unreasonable. Decision not taking CC into account likely to be manifestly unreasonable.	If high risk and determination did not take cc impacts into account likely to be an absence of good faith as required by the NSW s733 indemnity.
		<i>Judicial Review of decision to approve planning scheme</i> Council may not be the decision maker if final decision rests with the Minister	Low risk. Unlikely as Minister often the decision maker
	Loss of land value due to planning scheme changes	<i>Statutory Compensation Claim</i> Usually not an issue in NSW and Victoria as "existing use rights" preserve existing development value of land. In WA compensation may be payable under injurious affection laws if an application for development consent is rejected. In all jurisdictions compensation may be payable, when land is reserved for a public purpose ⁵⁹ .	
Asset Management			
Building /Maintaining Protective Structures	Failure to build/ maintain infrastructure or undertake coastal	<i>Negligently not build or maintain protective structures</i> Breach must lead to loss/damage	Action in Supreme Court. Compensatory damages (& costs). Need clear framework to ensure emergency work

⁵⁹ see section 3.2.4

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
	protection works Failure to upgrade drains, stormwater systems, roads, build sea walls/levies Eg <i>Byron Shire Council v Vaughan</i> ⁶⁰ <i>Brodie J Singleton Shire Council</i> ⁶¹	In WA, NSW and Victoria, general allocation of resources cannot be challenged. Note: if risk is an "inherent risk" Council's duty may be limited to an obligation to warn	carried out in a coordinated manner. In NSW s733 will protect actions taken in good faith
		Nuisance Council required to take reasonable measures to ensure its land/structures don't cause nuisance and to prevent natural phenomenon emanating from land it controls from affecting neighbours (e.g. bushfires). Risk issue if Council had control of the resource that caused the damage & it failed to take <u>reasonable</u> measures.	Injunction or compensatory damages If Council is aware of a nuisance emanating from its land/structures and that it is not tolerated it should ensure that it takes reasonable measures to address the nuisance. Note statutory limitations protecting Councils may not apply to nuisance. S733 indemnity will protect NSW Councils if acts/omissions in good faith.
		Breach of Statutory Duty Failure to carry out works Failure to provide services/works	Low risk The plaintiff would need to establish that Council had a specific enforceable duty to carry out those works and that other remedies were not suitable ⁶² .
		Judicial Review If conditions of consent granted by Council to itself for the erection of a protective structure	Mandamus to compel Council to perform a statutory duty or exercise a statutory power

⁶⁰ Owner alleged council had failed to maintain the council erected geobag erosion control wall. Case succeeded on planning law grounds. Court also found owner could have brought an action in negligence/nuisance. *Vaughan v Byron Shire Council (No 2)* [2009] NSWLEC 110

⁶¹ (2001) 206 CLR 512

⁶² see section 3.2.2

	CC Example	Source and Scope of Council's Duty	Consequences /Remedies/Risk
		oblige Council to monitor/maintain/repair the structure.	
Public Infrastructure/Public Access	Resumption of land to create access way (e.g. if existing access eroded), to erect protective structure or to ensure significant areas conserved	<i>Compulsory Acquisition</i> Acquisition must be for a "public purpose" and on "just terms" ⁶³ . Under WA legislation acquisition must be for one of a number of specified "public works" ⁶⁴	Uncertainty over extent of CC impact may create issues in establishing acquisition for a public purpose and the area of land required. Frequent litigation as to valuation issues as to compulsory acquisition.
Special projects	Challenge to special rates levied to fund protective works required due to climate change	<i>Judicial Review</i> of decision regarding levies or special rates/fees	Scope of works, the landholders that will benefit and the extent to which they will benefit need to be defined with care. Care also needs to be taken to ensure irrelevant considerations not taken into account. Eg in NSW the works must either provide a special benefit or be accessible to the rateable land levied or the rateable land must have contributed to the need for the work ⁶⁵ .
	Challenge to by-law to control access or require licences to manage climate change risks	<i>Judicial Review</i> of decision to make by-laws	Provided the by-law is within power, likely to be decision of legislative rather than administrative character and hence not subject to review

⁶³ *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) Part 3 & Part 4 and s188(1) *Local Government Act 1993* (NSW)

⁶⁴ s161 *Land Administration Act 1997* (WA) CHECK & *Public Works Act 1902* (WA)

⁶⁵ see s495 *Local Government Act 1993* (NSW)

APPENDIX A1 COUNCILS' STATUTORY OBLIGATIONS TO TAKE INTO ACCOUNT CC ISSUES IN THEIR DECISION MAKING ON PLANNING ISSUES

1. NEW SOUTH WALES

Section 79C of the Environmental Planning and Assessment Act 1979 (NSW) requires Council, if it is the consent authority, to take into account the provisions of any relevant EPI, and any applicable coastal zone management plan when deciding a development application.

1.1 SEPP 71 – Coastal Protection

This SEPP applies to any land the whole or part of which is in the coastal zone, except Lord Howe Island or if certain provisions of SEPP 62 – Sustainable Aquaculture apply. Under this SEPP, certain matters are to be taken into account by Council when preparing a draft local environmental plan or when determining a development application. Clause 8 of the SEPP (extracted below) sets out the matters for consideration. The SEPP does not explicitly require consideration of climate change impacts, but sub-cl 8(d) and (j) will necessarily require consideration of SLR and its potential impact on development.

“8 Matters for consideration

The matters for consideration are the following:

- (a) *the aims of this Policy set out in clause 2,*
- (b) *existing public access to and along the coastal foreshore for pedestrians or persons with a disability should be retained and, where possible, public access to and along the coastal foreshore for pedestrians or persons with a disability should be improved,*
- (c) *opportunities to provide new public access to and along the coastal foreshore for pedestrians or persons with a disability,*
- (d) *the suitability of development given its type, location and design and its relationship with the surrounding area,*
- (e) *any detrimental impact that development may have on the amenity of the coastal foreshore, including any significant overshadowing of the coastal foreshore and any significant loss of views from a public place to the coastal foreshore,*
- (f) *the scenic qualities of the New South Wales coast, and means to protect and improve these qualities,*
- (g) *measures to conserve animals (within the meaning of the Threatened Species Conservation Act 1995) and plants (within the meaning of that Act), and their habitats,*
- (h) *measures to conserve fish (within the meaning of Part 7A of the Fisheries Management Act 1994) and marine vegetation (within the meaning of that Part), and their habitats*
- (i) *existing wildlife corridors and the impact of development on these corridors,*
- (j) *the likely impact of coastal processes and coastal hazards on development and any likely impacts of development on coastal processes and coastal hazards,*

- (k) *measures to reduce the potential for conflict between land-based and water-based coastal activities,*
- (l) *measures to protect the cultural places, values, customs, beliefs and traditional knowledge of Aboriginals,*
- (m) *likely impacts of development on the water quality of coastal waterbodies,*
- (n) *the conservation and preservation of items of heritage, archaeological or historic significance,*
- (o) *only in cases in which a council prepares a draft local environmental plan that applies to land to which this Policy applies, the means to encourage compact towns and cities,*
- (p) *only in cases in which a development application in relation to proposed development is determined:*
 - (i) *the cumulative impacts of the proposed development on the environment, and*
 - (ii) *measures to ensure that water and energy usage by the proposed development is efficient.*

Note: *Clause 92 of the Environmental Planning and Assessment Regulation 2000 requires the Government Coastal Policy (as defined in that clause) to be taken into consideration by a consent authority when determining development applications in the local government areas identified in that clause or on land to which the Government Coastal Policy applies. “*

1.2 Coastal Protection Act 1979

The Coastal Protection Act (**CP Act**) aims to provide protection for NSW's coastal environment for benefit of both present and future generations. In its objects, the CP Act specially encourages and promotes plans and strategies that respond to climate change impacts, including projected sea level rise.⁶⁶ An important climate change related consideration required of Council is in relation to Coastal Zone Management Plans, which are to be prepared under the CP Act (see section below for further detail on CZMPs).

Importantly for Councils, section 38 of the CP Act (partly extracted below), which requires the concurrence of the NSW Minister for the Environment when carrying out, or granting consent to carry out, development in the coastal zone. Concurrence is required:

if, in the opinion of the Minister, as advised from time to time by the Minister to the [public authority](#), the [development](#) or the use or occupation may, in any way:

- (b1) be inconsistent with the [principles of ecologically sustainable development](#), or*
- (c) adversely affect the behaviour or be adversely affected by the behaviour of the sea or an arm of the sea or any bay, inlet, lagoon, lake, body of water, river, stream or watercourse, or*
- (d) adversely affect any [beach](#) or [dune](#) or the bed, bank, shoreline, foreshore, margin or flood plain of the sea or an arm of the sea or any bay, inlet, lagoon, lake, body of water, river, stream or watercourse.*

Councils should note that section 37 of the CP Act (extracted below) identifies circumstances when concurrence of the Minister is not required.

The concurrence of the Minister under this Part is not required in relation to the carrying out in the [coastal zone](#) of any [development](#) (within the meaning of the Environmental Planning and Assessment Act 1979) that:

⁶⁶ Coastal Protection Act 1979 (NSW) s 3(h).

- (a) requires [development consent](#) under that Act, or
- (b) is exempt [development](#) under that Act, or
- (c) is carried out in accordance with a [coastal zone management plan](#) under Part 4A of this Act.

1.3 Coastal Zone Management Plans

Section 79C(1)(a)(v) of the EP&A Act requires Council to consider any applicable coastal zone management plan. S55C of the Coastal Protection Act 1979 (NSW) (extracted below) provides that CZMPs will make provision for, among others, the impacts from climate change on risks arising from coastal hazards, as appropriate. Should a CZMP apply it is likely that, under s55C, it will contain a provision on climate change related risk that is required to be considered by Council when deciding a development application.

55C Matters to be dealt with in coastal zone management plans

- (1) A coastal zone management plan must make provision for:
 - (a) protecting and preserving beach environments and beach amenity, and
 - (b) emergency actions carried out during periods of beach erosion, including the carrying out of related works, such as works for the protection of property affected or likely to be affected by beach erosion, where beach erosion occurs through storm activity or an extreme or irregular event, and
 - (c) ensuring continuing and undiminished public access to beaches, headlands and waterways, particularly where public access is threatened or affected by accretion, and
 - (d) where the plan relates to a part of the coastline, the management of risks arising from coastal hazards, and
 - (e) where the plan relates to an estuary, the management of estuary health and any risks to the estuary arising from coastal hazards, and
 - (f) the impacts from climate change on risks arising from coastal hazards and on estuary health, as appropriate, and
 - (g) where the plan proposes the construction of coastal protection works (other than temporary coastal protection works) that are to be funded by the council or a private landowner or both, the proposed arrangements for the adequate maintenance of the works and for managing associated impacts of such works (such as changed or increased beach erosion elsewhere or a restriction of public access to beaches or headlands).
- (2) A coastal zone management plan must not include the following:
 - (a) matters dealt with in any plan made under the State Emergency and Rescue Management Act 1989 in relation to the response to emergencies,
 - (b) proposed actions or activities to be carried out by any public authority or relating to any land or other assets owned or managed by a public authority, unless the public authority has agreed to the inclusion of those proposed actions or activities in the plan.
- (3) Despite subsection (1), the Minister may give a direction under section 55B that a council make a coastal zone management plan that makes provision

for only one or more of the matters referred to in that subsection as specified in the direction.”

Part 5 of the EP&A Act regulates activities that are undertaken by public authorities, which includes Councils. The Environmental Planning and Assessment Regulation 2000 (NSW) provides in sub-cl 228(2)(p) (extracted below) that climate change is a relevant factor that needs to be taken into account when considering the likely environmental impact of a proposed activity under Part 5 of the EP&A Act.

“(2) *The factors referred to in subclause (1) (b) (ii) are as follows:*

...

(p) *any impact on coastal processes and coastal hazards, including those under projected climate change conditions.”*

1.4 NSW Coastal Policy (1997)

Under sub-s 79C(1)(iv) of the EP&A Act, cl 92 of the EP&A Reg requires Council to consider the NSW Coastal Policy when determining a development application. With regard to climate change, the Coastal Policy outlines that the precautionary principle is particularly relevant when addressing climate change and SLR issues. The Coastal Policy also provides an action for Council, that it will consider appropriate mechanisms for incorporating sea level change scenarios set by the Inter-governmental Panel on climate change.

1.5 Coastal Risk Management Guide: Incorporating Sea Level Rise Benchmarks in Flood Risk Assessments (2010)

This policy documents does not prescribe any consideration required under legislation rather it provides targeted guidance for Council on how to conduct assessment for SLR risks.

1.6 Standard Instrument – Principal Local Environment Plan

The Standard Instrument provides at cl 5.5, for development within the coastal zone. Among others, the clause (partly extracted below) intends to implement the NSW Coastal Policy, with specific reference to the recognition and accommodation of coastal processes and climate change.

2. VICTORIA

Victoria’s State Planning Policy Framework, which includes: the Victorian Coastal Strategy 2008; Ministerial Direction No.13: Managing Coastal Hazards and the Coastal Impacts of Climate Change; General Practice Note: Managing Coastal Hazards and the Coastal Impacts of Climate Change; and State Planning Policy Framework clause 13 - ‘*Environmental Risks*’, contains some specific provision for coastal areas.

2.1 Victorian Coastal Strategy 2008 (“VCS”)

The VCS developed in accordance with the *Coastal Management Act* 1995 (Vic), establishes the overall framework for planning and management of the Victorian coast. In particular, it

Councils are required to take all reasonable steps to give effect to the Coastal Strategy⁶⁷.

⁶⁷ *Coastal Management Act* 1995 (Vic) s 21.

The Victorian Coastal Strategy 2008 provides an integrated management framework for the coast of Victoria. It is established under the Coastal Management Act 1995. The Act directs the Victorian Coastal Strategy to provide for long-term planning of the Victorian coast for the next 100 years and beyond.

In particular the VCS aims to provide a framework for the development and implementation of other specific strategies and plans such as Coastal Action Plans, management plans and planning schemes and a guide for exercising discretion by decision-makers, where appropriate.

The VCS specifies that decision-making should be consistent with the following hierarchy of principles:

“1 Provide for the protection of significant environmental and cultural values.

2 Undertake integrated planning and provide clear direction for the future.

3 Ensure the sustainable use of natural coastal resources.

When the above principles have been considered and addressed:

4 Ensure development on the coast is located within existing modified and resilient environments where the demand for development is evident and the impact can be managed.”

A component of the second principle is planning for climate change. The specific policy objectives articulated in the VCS in relation to planning for climate change are:

“1 Plan for sea level rise of not less than 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions, such as topography and geology when assessing risks and impacts associated with climate change. As scientific data becomes available the policy of planning for sea level rise of not less than 0.8 metres by 2100 will be reviewed.

2 Apply the precautionary principle to planning and management decision-making when considering the risks associated with climate change.

3 Prioritise the planning and management responses and adaptation strategies to vulnerable areas, such as protect, redesign, rebuild, elevate, relocate and retreat.

4 Ensure that new development is located and designed so that it can be appropriately protected from climate change’s risks and impacts and coastal hazards such as:

- inundation by storm tides or combined storm tides and stormwater (both river and coastal inundation)*
- geotechnical risk (landslide)*
- coastal erosion*
- sand drift.*

5 Avoid development within primary sand dunes and in low-lying coastal areas.

6 Encourage the revegetation of land abutting coastal Crown land using local provenance indigenous species to build the resilience of the coastal environment and to maintain biodiversity.

7 New development that may be at risk from future sea level rise and storm surge events will not be protected by the expenditure of public funds.

8 Ensure that climate change should not be a barrier to investment in minor coastal public infrastructure provided the design-life is within the timeframe of potential impact.

9 Ensure planning and management frameworks are prepared for changes in local conditions as a result of climate change and can respond quickly to the best available current and emerging science.

10 Ensure all plans prepared under the Coastal Management Act 1995 and strategies relating to the coast, including Coastal Action Plans and management plans consider the most recent scientific information on the impacts of climate change.”

2.2 Coastal Action Plans and Coastal Management Plans

Councils are required to develop and implement Coastal Action Plans (**CAPs**) and Coastal Management Plans (**CMPs**) consistent with the VCS⁶⁸.

CAPs: CAPs are the primary mechanism for the implementation of the principles and priorities identified in the VCS at a regional or local level. They are intended to establish a long term strategic direction for the future management of an area of coast by identifying necessary priorities, key actions and preferred outcomes.

Draft CAPs are developed by Regional Coastal Boards in consultation with interested local, regional and state bodies. The draft CAP is then referred to the Victorian Coastal Council for approval. Subject to approval, Council then refers the plan to the Minister for Environment and Climate Change for its endorsement and formal notification through the Government Gazette.

The Victorian Coastal Council has prepared *Guidelines for Preparation, Implementing and Reviewing Coastal Action Plans* (2005) under s8(1) (g) of the *Coastal Management Act 1995*.

CMPs: CMPs provide direction for day to day management of an area of coast by outlining management requirements, proposed works and budget priorities. They must be consistent with the VCS, CAPs and relevant legislation.

CMPs are developed by coastal managers in accordance with the *Coastal Management Act 1995* and are approved by the Minister for Environment.

2.3 SPPF Clause 13 – Environmental Risks

Clause 13.01 of the SPPF (extracted below) identifies climate change as an environmental risk to be considered by decision-makers. It gives more practical affect to the policy directives of the VCS, and emphasises that planning for future development in coastal areas should identify coastal climate change risk and appropriately provide for it, requiring strategic distribution of development to avoid those risks - for example, focusing development in areas unlikely to inundated due to SLR or exposed to other coastal climate change risks. It also expressly states that planning must consider the VCS, any relevant coastal action plans or management plans and any Land Conservation Council recommendations.

“13.01 Climate change impacts

13.01-1 Coastal inundation and erosion

Objective

To plan for and manage the potential coastal impacts of climate change.

Strategies

In planning for possible sea level rise, an increase of 0.2 metres over current 1 in 100 year flood levels by 2040 may be used for new development in close proximity to existing development (urban infill).

Plan for possible sea level rise of 0.8 metres by 2100, and allow for the combined effects of tides, storm surges, coastal processes and local conditions such as topography and geology when assessing risks and coastal impacts associated with climate change.

Consider the risks associated with climate change in planning and management decisionmaking processes.

For new greenfield development outside of town boundaries, plan for not less than 0.8 metre sea level rise by 2100.

Ensure that land subject to coastal hazards are identified and appropriately managed to ensure that future development is not at risk.

Ensure that development or protective works seeking to respond to coastal hazard risks avoids detrimental impacts on coastal processes.

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

Policy guidelines

Planning must consider as relevant:

- *The Victorian Coastal Strategy (Victorian Coastal Council, 2008).*
- *Any relevant coastal action plan or management plan approved under the Coastal Management Act 1995 or National Parks Act 1975.*
- *Any relevant Land Conservation Council recommendations.”*

Clause 11.05-05 of the SPPF (extracted below) relevantly provides a strategy for achieving sustainable coastal development by avoiding development on ridgelines, primary coastal dune systems and low lying coastal areas.

“11.05-5 Coastal settlement

Objective

To plan for sustainable coastal development.

Strategies

Support a network of diverse coastal settlements which provides for a broad range of housing types, economic opportunities and services.

Encourage urban renewal and redevelopment opportunities within existing settlements to reduce the demand for urban sprawl.

Identify a clear settlement boundary around coastal settlements to ensure that growth in coastal areas is planned and coastal values protected. Where no settlement boundary is identified, the extent of a settlement is defined by the extent of existing urban zoned land and any land identified on a plan in the planning scheme for future urban settlement.

Direct residential and other urban development and infrastructure within defined settlement boundaries of existing settlements that are capable of accommodating growth.

Avoid linear urban sprawl along the coastal edge and ribbon development within rural landscapes and protect areas between settlements for non-urban use.

Avoid development on ridgelines, primary coastal dune systems and low lying coastal areas.

Encourage opportunities to restructure old and inappropriate subdivisions to reduce development impacts on the environment.

Ensure a sustainable water supply, stormwater and sewerage treatment for all development.

Minimise the quantity and enhance the quality of storm water discharge from new development into the ocean, bays and estuaries.

Policy guidelines

Planning must consider as relevant:

- *Victorian Coastal Strategy (Victorian Coastal Council, 2008)."*

2.4 Ministerial Direction No. 13

The Direction applies to amendments to planning schemes that would allow non-urban land to be used for urban development on land abutting the coastline, a coastal reserve or land less than 5 m AHD within one kilometre of the coastline.

The Direction requires Council to provide specific information to the Minister, when preparing an application for amendment to a planning scheme, outlining how the amendment addresses, generally, the SPPF and the need to avoid coastal climate change risks as discussed above under the Victorian Coastal Strategy and clause 13. Its effect is that it provides for the more rigorous application of the SPPF and Coastal Strategy.

2.5 Practice Note 53: Managing Coastal Hazards and the Coastal Impacts of Climate Change, July 2012

The Practice Note provides guidance on how Council can effectively assess coastal climate change risks for future development. It provides the following general process for assessing and responding to proposals in coastal areas :

1. establish the context (e.g specific CC risks in a given location as well as availability of information and decision timeframe);
2. assess vulnerability (e.g frequency, magnitude, probability of risks);
3. evaluate risks; and
4. response strategy (e.g retreat, avoid, accommodate the risks and apply a precautionary approach).

3. WESTERN AUSTRALIA

3.1 Local planning schemes (formerly town planning schemes)

Local planning schemes (**LPS**) are administered by Council and provide a basic framework for what type of development is permissible, and subject to what controls, across a local area. LPS are provided for under Part 5 of the *Planning and Development Act 2005* (WA).

Division 3 of Part 5 of the Act sets out the process Council needs to follow when creating or amending a LPS. Among other considerations, Council is to have due regard to any State planning policy (**SPP**) which affects its local area when preparing or amending a LPS⁶⁹.

The Act allows Council to amend a LPS either through preparation by Council itself and then approval by the Minister, or through consent of all or any landowners within the area of the scheme, being accepted by Council and then approved by the

⁶⁹ *Planning and Development Act 2005* (WA) s 77.

Minister⁷⁰. Council is required to make reasonable endeavours to consult, when preparing or amending a LPS, with any public authorities or persons deemed by Council likely to be affected by the proposed scheme or amendment⁷¹. Council must also advertise the proposed scheme or amendment for public inspection in accordance with the regulations⁷².

3.2 Region Planning Schemes (“RPS”)

There are three RPS in operation in WA, the Metropolitan Region Scheme, the Peel Region Scheme and the Greater Bunbury Region Scheme. These cover 3 of the 9 planning regions in WA.

A RPS may deal with the same matters that can be dealt with under a LPS and can establish planning controls for the whole or any part of the relevant region.

A LPS cannot be approved if its provisions are inconsistent with a RPS and Councils are required, within 90 days of a RPS coming into effect, to amend their LPS to ensure that it is consistent with the RPS⁷³.

3.3 State Planning Policies (“SPP”)

SPPs are primarily directed at broad general planning and facilitating the co-ordination of planning throughout WA but can make provision for any matter which may be the subject of a LPS.

Councils are required to have regard to SPPs when preparing or amending LPS. In addition, the Minister may, on the recommendation of the Western Australian Planning Commission (**WAPC**), order a Council to prepare and submit for the approval of the Minister an amendment to a LPS so as to make it consistent with a specified SPP⁷⁴.

State Planning Policy No. 1 State Planning Framework Policy identifies the policies, plans, strategies and guidelines as well as regional strategies, regional and sub-regional structure plans, strategic policies and operation policies and guidelines applicable to decision making by the WAPC and the Department of Planning.

State Planning Policy No. 2: Environment and Natural Resources Policy sets out the broad environment and resource management policies for sustainable development.

3.4 State Planning Policy No. 2.6 – State Coastal Planning Policy (“SPP2.6”)

SPP 2.6 was gazetted on 30 July 2013.

The SPP provides a number of policy measures targeted at coastal hazard risk management and adaptation planning including the establishment of the following process: context vulnerability assessment; risk identification; analysis; evaluation; adaptation; funding arrangements; maintenance; monitoring and review.

Relevantly, SPP 2.6 provides:

- a warning of coastal hazard risks should be placed on certificates of title as follows:

VULNERABLE COASTAL AREA – This lot is located in an area likely to be subject to coastal erosion and/or inundation over the next 100 years.

⁷⁰ *Planning and Development Act 2005* (WA) s 75.

⁷¹ *Planning and Development Act 2005* (WA) s 83.

⁷² *Planning and Development Act 2005* (WA) s 84.

⁷³ *Planning and Development Act 2005* (WA) s 124.

⁷⁴ *Planning and Development Act 2005* (WA) s 77 and s 77A.

- Where risk assessments identify unacceptable levels of risk, the following hierarchy of adaptation measures should be used to seek to bring risks to an acceptable level: Avoid (the area identified as being affected by the coastal hazards); Planned or Managed Retreat; Accommodation (if sufficient justification can be provided for not avoiding the area); Protection (where accommodation alone cannot adequately address the risks).
- new coastal protection works (or coastal works that require significant upgrade/maintenance) are not permitted unless all other options of avoiding and adapting have been exhausted as part of a comprehensive risk management process. Protection works should only be supported if it can be demonstrated that there will be no significant negative impacts to the adjacent environment and that appropriate funding arrangements for construction and maintenance are in place. Protection work should also be primarily proposed in the public interest.
- for the application of the Precautionary Principle; and the allowance for sea level rise should be based on a vertical sea level rise of 0.9 metres over a 100-year planning timeframe to 2110.

3.5 Draft Coastal Zone Management Policy for Western Australia (2001)

This instrument, while still in draft form, provides further policy impetus for Council to consider coastal climate change risks when carrying out its planning responsibilities. Policy objective 3 (extracted below) provides relevant guidance to Council.

In recognition of the dynamic nature of natural processes on the coast, the physical capability of coastal land must always be considered before development takes place. Development should be restricted to areas of high capability and low risk. In particular, development should not be permitted on unstable, active frontal dunes and beaches. Dynamic coastal processes that need to be taken into account include natural fluctuations in sea level and climate, climate change, storm events, shoreline changes, and the mobility of species within coastal ecosystems.

3.6 Development Control Policy 6.1 Country Coastal Planning Policy (1989)

This policy instrument is intended assist Council, among others, in following the Western Australian Planning Commission's (WAPC) approach with respect to coastal planning. While this document does not deal explicitly with coastal climate change risk issues it does provide Council with relevant considerations when undertaking coastal planning.

It identifies coastal erosion as a longstanding issue in Western Australia, requiring appropriate management. At sections 3.3, 3.4 and 3.6 the Policy highlights the coastal risk of erosion to development. Having regard to water, wind and wave erosion, the Policy recommends that future development should be adequately located and/or setback.

Despite being a 1989 instrument, the Policy foreshadows implications of climate change to coastal environments by reference to the greenhouse effect.

APPENDIX A2 MERIT REVIEW RIGHTS

Table 2: Merit Review Rights

		Merit Review Right	Time limit
NSW <i>Environmental Planning and Assessment Act 1979</i>	s97 & 97AA	An applicant for a development application or an application to modify a development consent for development who is dissatisfied with the determination of a consent authority with respect to the applicant's development application or modification may appeal to the Land and Environment Court	6 months
	ss82, 97AA & reg 113	An applicant for a development application or modification of a development application an application may appeal against a deemed refusal	40, 60,90 days
	s98	An objector who made a submission objecting to a development application for designated development during the submission period who is dissatisfied with the determination of a consent authority to grant consent to that development application.	28 days
	97A & L&E Crt Act s39A	An objector may be joined in applicants' appeal	
Victoria <i>Planning and Environment Act 1987</i>	ss77, 79 and 80	An applicant for a planning permits has the right to review of: - a refusal to grant the permit; - a failure to grant the permit within time ⁷⁵ ; and -in respect of conditions imposed on the permit.	60 days
	82	An objector who lodged an objection with Council I about a proposal to develop or use land make seek review of Council's decision to grant a planning permit.	21 days
	82B	An affected person may apply for leave to seek review of a decision to grant a permit if an objection was made (even if the objection was not made by that person).	
	39	A person who is substantially or materially affected by a failure of the Minister, planning authority or a panel to comply with Part3, Division 1 or Division 2 or Part 8 in relation to an amendment which has not been approved refer the matter to the Tribunal for its determination.	1 Month after becoming aware of the failure
	149	A specified person (see s148 for definition) may apply to the Tribunal for review of a decision by a specified body (see s148 for definition) in a number of circumstances relating to that decision.	28 days

⁷⁵ Note s82AA An applicant for a permit for the use or development of coastal Crown land within the meaning of the *Coastal Management Act 1995*, has no right to apply to the Tribunal for review where the Minister has refused or has been deemed to have refused consent

		Merit Review Right	Time limit
	149A	A specified person (see s148) may apply to the Tribunal for the determination of a matter if the matter relates to: the interpretation of a planning scheme or a permit; whether s 6(3) applies to a particular use or development of land; or relates to a provision of a planning scheme or amendment permitting the continuation a lawful existing use.	
WA <i>Planning and Development Act 2005</i>	s249	An applicant may seek review by the State Administrative Tribunal (SAT) of an approval in respect of development under an interim development order	28 days after decision made
	s250(1)	An applicant may seek review by the SAT of Council's refusal of an application to carry out development in a planning control area or the conditions to which consent of Council is subject	28 days after decision made
	s251(1) and (2)	An applicant may seek review by the SAT of WAPC's decision to refuse to approve a plan of subdivision, application for title, transfer, conveyance, lease, licence to use and occupy or mortgage or WAPC's conditions of such an approval	28 days after decision made
	s252(1)	An applicant may seek review by the SAT of A decision under a planning scheme to refuse an application or to grant an application subject to conditions	28 days after decision made
		Additional review rights for applicants may also be prescribed in planning schemes (and given statutory effect by s236 of the Act)	
		The Minister may 'call in' and determine an application currently before the SAT, where the application concerns issues of State or regional importance. The Minister can take public interest concerns into account, as well as planning considerations. The Minister's decision is final.	
		Objectors to development have no right of appeal to the SAT. Additionally, there are no rights to be joined as a party to an appeal lodged by someone else. On public interest issues, intervener status may be obtained on application to the SAT. It is also possible to make an application to be heard as a submitter where SAT is of the opinion that the person has a sufficient interest in the matter. A submitter is not a party and is not involved in mediations (unless the parties agree).	