

BEATTY LEGAL

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

PRIVILEGED AND CONFIDENTIAL

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PART B
RISK MANAGEMENT STRATEGIES TO MITIGATE CLIMATE CHANGE LEGAL
RISKS FOR COASTAL COUNCILS

1. INTRODUCTION

This Part of the Report draws on the findings of the legal risk analysis in Part A to outline strategies available to Councils to use:

- (i) to minimise their legal risk exposure associated with predicted climate change impacts;
- (ii) to identify alternative measures to adapt to these risks; and
- (iii) to enable them to demonstrate to Courts (and, where possible for their own assets, their insurers) that they have adopted a reasonable and defensible approach to this issue.

Section 1.1 describes the assumptions and objectives of climate change legal risk minimization.

Section 2 sets out Guidelines for Good Decision Making. These Guidelines are in a Checklist in **Appendix B1**.

Section 3 analyses and provides recommendations in respect of a number of the key risk areas identified in Part A.

Section 4 contains Case Studies (developed in consultation with the participating Councils) which apply the guidelines in Section 2.

1.1 Assumptions and Objectives

The legal (and therefore risk) environment in which coastal Councils operate has changed. Irrespective of personal views as to the reality and/or likely extent of climate change impacts, Councils must adapt to the changes in its legal environment. Given recent statutory and common law developments, we recommend that the most prudent approach for coastal Councils to adopt is to assume climate change is real and its impacts will become more pronounced over time.

The advantages of early action are that more options are likely to be available to Council, there is increased scope for consultation and community support and costs for implementing options can more easily be apportioned.

Courts and government are more likely than not over time to add to the decision making burden of Councils in dealing with current or predicted climate change impacts. Inevitably, Councils will incur legal costs in Court either by reason of challenges to their planning decisions or in response to those seeking compensation for climate change related losses or damage which they claim to have suffered

For the purposes of the legal risk mitigation strategies suggested in this Report we have assumed that a Council's primary objective is to protect itself and minimize costs by encouraging good decision making on climate change issues. By making sound, legally defensible decisions Council are best placed to:

- deter or at least minimize the risk of frivolous litigation; and

- ensure, if litigating, that they can avail themselves of available statutory and common law defences.

In addition, Council may realize cost savings in other areas by, for example, reducing insurance premiums, encouraging cost sharing and through early staged adaptation implementing measures that will be more cost effective in the long term.

The risks of poorly informed, inconsistent or unreasonable decision making in the CC context are clear. Such decision making may more readily expose a Council to costly claims for compensation (for instance, in negligence or nuisance) or successful administrative review actions to overturn Council decisions (see discussion in Part A of this Report).

A Council will find it difficult to assert that it has acted in good faith in defending decisions in relation to CC issues where it has:

- failed to inform itself adequately¹ on predicted CC impacts or failed to have due regard to that information;
- deferred/delayed taking action when credible evidence of a high probability of a significant risk had been identified, due to concerns about the residual uncertainty of predicted CC impacts;
- deliberately/willfully ignored the potential consequences of action or inaction on CC issues;
- failed to in fact implement policies it had adopted; or
- failed to respond with care to any legitimate concerns raised by the community or affected residents.

2. GUIDELINES FOR GOOD DECISION MAKING

Council will be a “model litigant” if it can demonstrate that it:

- (i) has good information or a plan for obtaining that information;
- (ii) has a strategy for making defensible decisions using that information;
- (iii) takes measures to ensure that it implements its strategy;
- (iv) regularly reviews its strategy and the information underpinning it; and
- (v) strives to improve its risk environment.

These five key requirements are set out in more detail below and in the checklist in **Appendix B1**.

2.1 Information

Good decisions are based on good information. Council will need:

- to have credible information on current and predicted impacts;
- to keep up to date with climate change science;
- to understand how predicted impacts are more likely to be experienced in its region given local environmental conditions;

¹ See section 2.1 below.

- to know and understand its legal obligations in respect of climate change issues; and
- to inform itself regarding available mitigation and adaptation strategies.

In respect of information regarding actual or predicted impacts Council must have:

- (i) The right type of information for that decision. This can be difficult in the climate change context as:
- there is uncertainty regarding the scale and frequency of predicted impacts. This is exacerbated by the potentially long timeframes involved;
 - there are complex interactions between the possible impacts ;
 - measures taken to alleviate one impact could increase other impacts and specialist advice will be required on proposed measures to respond to actual or predicted impacts;
 - the underlying assumptions and methodology of any scientific research will have a significant impact on its conclusions; and
 - the scale of the information as to predicted impacts must be appropriate. For instance, detailed local mapping may not allow consideration of regional impacts.
- (vi) The capacity to understand and apply that information. This is particularly important as:
- the identity of the person who commissioned the information and the purpose for which it was provided can significantly impact on the conclusions reached;
 - Council will be required to review and make judgment calls on information provided to it by third parties as well as information it commissions itself;
 - there will be significant variations in the quality and reliability of information received; and
 - it is necessary to understand how the underlying assumptions of a report will affect its conclusions.

Good decision making does not require that Council has all possible information. Given the scientific uncertainties this would be impossible. Instead it must (having regard to reasonable resource constraints) have the best available evidence. Where it does not have sufficient good credible information necessary to make the decision:

- there needs to be a plan for obtaining sufficient information and until that necessary information is obtained, a policy of prudent avoidance should be adopted; and
- any decisions made need to have regard to the limitations of the information obtained and allow for review when better information is available.

Section 3.1 discusses legal risk mitigation issues associated with the acquisition, review and dissemination of climate change information by Councils.

2.2 Strategy

Using the best available information, Council must develop, and document in its policy statements and planning instruments, that it has applied, and will continue to apply a consistent reasoned strategy when making decisions on CC issues.

Council, and Council staff, need help to make decisions. A well thought out policy with clear and certain criteria for decision-making will demonstrate good faith when making unpopular decisions.

In all three of the jurisdictions with which this Report is concerned, Government has recommended a risk management approach to policy development². This approach is familiar to Council as it guides its policy development in many other areas.

In addition, in the climate change context, it is particularly important that any policy:

- is based on clearly articulated objectives (that is, what is, and whose values are, to be protected or promoted?);
- makes provision for short term and long term impacts;
- allows for flexibility over time and if information changes or objectives become more refined; and
- where appropriate, has regard to regional impacts and approaches adopted by other Councils with similar issues.

By way of example, a policy regarding new development in greenfield areas may have precinct specific parts (such as defined high risk areas), that require certain safeguards prior to development/redevelopment and specify a trigger for when re-zoning is appropriate.

The case study in section 5.3 suggests matters which a policy on the construction and maintenance of defensive measures (such as seawalls) ought consider.

There are some advantages for a Council if its policies are also articulated in formal planning instruments rather than just in policy statements.

Planning instruments can provide a stronger statutory basis for justifying conditions imposed on developments and for supporting notifications on CC risks made on title. In establishing and communicating a policy through a planning instrument a Council is obliged to more rigorously assess and publicly articulate the risks and responses to an issue for the benefit of affected land owners.

The development of a good policy (whether or not ultimately expressed in a planning instrument) is an opportunity to educate as well as respond to Council's community. While community engagement on climate change issues can carry a risk of causing confusion or alarm³, if properly done it can:

- be used to educate the community on "obvious risks"⁴;
- encourage sharing of responsibility (and costs);
- initiate discussion of short term and long terms options available to Council, the community or other stakeholders; and

² For example, the Victorian Coastal Hazard Guide

³ Eg prompting an alarmist letter to the newspaper

⁴ See discussion at the end of section 3.1

- inform the community about the costs and consequences of the available options.

Litigation and other challenges to policy are often initiated when individuals are unpleasantly surprised by Council's decisions or consider themselves to be unfairly affected by Council decisions. Good pre-emptive communication strategies can deter these potential litigants. While increased transparency and public consultation imposes a significant administrative burden, it can, if thoughtfully undertaken, limit the risk of administrative review and negligence claims.

Section 3 sets out some strategic considerations for Councils in developing policies. Section 3.4 identifies various approaches potentially available to Councils.

2.3 Implementation

Good information and good policy will be of little use if they are not consistently implemented in practice. Development of a policy necessitates a willingness to support it by:

- ensuring that it informs Council's decision making and is translated into procedures that can be implemented by Council staff;
- having the willingness and capacity to implement/pay for the measures identified;
- ensuring staff are trained, aware of the relevant issues and encouraged and facilitated in their implementation of the policy; and
- defending it, and Council staff, if it is challenged.

A policy cannot be effectively implemented by Council unless it takes its community with it. Community engagement is an essential element of policy implementation.

Policy implementation is a vital aspect in managing climate change risks. In many cases where claims for compensation have been successfully made against Councils, a critical factor has been the relevant Council's failure to give effect to policies it has prepared and promulgated. A policy that is not implemented is often a greater liability than having no policy at all.

A failure to give effect to a strategy announced by Council would in most circumstances be seen by the Court as evidence of a failure to act reasonably. In NSW, Councils have been denied an indemnity under s733 where their failure to implement their policies has been held to demonstrate a lack of good faith.

At least in respect of claims in negligence, Council decisions as to how they allocate resources will afford them a measure of protection from liability as a Court is required to consider when determining whether the Council has a duty or has breached it:

- (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,
- (b) the general allocation of those resources by the authority is not open to challenge⁵.

While the resources available to Council are a relevant factor in a Court's assessment of the reasonableness of Council's actions, unless there is specific

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

evidence of an unanticipated budget shortfall which necessarily curtailed Council's actions in a particular instance, an argument based on a lack of resources may bear little weight in Court. Consequently, it is imperative that Council, before committing itself to a particular course of action, properly costs the strategy and ensures that it can be justified on a costs benefit analysis.

2.4 Review

The uncertainties regarding the likely scale, frequency and timeframe of predicted climate change impacts heighten the importance of ensuring that all climate change related policies and their underpinning assumptions are regularly reviewed.

In addition, the effectiveness of implementation must be audited. In some instances, external audit or peer review of the policy/ its implementation might be appropriate.

Amendment or abandonment of a policy is appropriate if circumstances change, provided that the alternative strategy is demonstrably better and the risks of changing policy direction have been properly accounted for.

2.5 Risk Environment

State and to lesser extent Federal governments are best placed to assist Councils manage their legal risks associated with climate change. State government is responsible for establishing a clear land use planning framework to address CCC Impacts and Federal government has a vital role to play in the development and dissemination of information on risk issues, provision of funding for special projects and natural disaster prevention and recovery arrangements.

The Commonwealth Productivity Commission has identified that Councils face the following barriers in carrying out their responsibilities in the CC context:

- The roles and responsibilities of local government are not always clear;
- Local governments have capacity constraints; and
- Legal liability concerns are hindering adaption for many local councils⁶.

Possible changes which Councils might seek to make to their respective risk profiles include lobbying for:

a) *Improvements to the Statutory Framework*

- (i) Enacting a provision equivalent to s733 in other jurisdictions.
- (ii) Logical consistent legal and policy framework, should be advocated by local government for adoption nationally.
- (iii) Clear state benchmarks should be set.
- (iv) A standardised approach to planning responses should be led by State government to infill development.
- (v) Limitations of statutory measures – Councils' options and opportunities for a flexible or incremental approach are significantly constrained by the current planning law framework.

⁶ Productivity Commission Inquiry Report No. 59, 19 September 2012: Barriers to Effective Climate Change Adaption, p16.

- (vi) Land tenure and compensation issues as to erosion should be clarified⁷.
- b) *Better Information*
- (i) Centralized information – there should be greater co-ordination/consultation on further assessment on predicted climate change impacts and a reliable repository of available data.
 - (ii) There should be clearer standards for the preparation and assessment of expert scientific reports on predicted climate change impacts (standards should be directed at ensuring information can be translated into practical outcomes).
 - (iii) More guidance should be provided as to when it is appropriate to require developers (especially small developers) to provide climate change risk information and what standard of information they should provide.
 - (iv) Better information should be provided on predicted climate change impacts;
 - (v) Consideration should be given to possible accreditation of experts so Councils can be confident in expert information provided to it.
- c) *Improved Funding*
- (i) for developing in-house expertise (and educating “experts”)
 - (ii) to tackle specific climate change issues; and
 - (iii) provide incentives for resilient building (eg disaster funding only permits rebuild as is)

Councils need to have confidence that funding is available long term.

3. SPECIFIC RISKS AND RECOMMENDATIONS

This section analyses and provides recommendations in respect of a number of the key risk areas identified in Part A.

3.1 Information

Part A of the Report identified Councils’ duties in relation to how they obtain, use and communicate information on climate change impacts.

⁷ The situation in Australia is unclear and depends on a case-by-case analysis of the relevant property rights in the applicable jurisdiction. This is to be contrasted, for example, by the situation in the United States. The existence of a public trust over the foreshore is recognised in many States of the US. Under this doctrine the State is considered to hold land or water comprising the foreshore in trust solely for the benefit of the public. This means:

- in the event of long term permanent erosion, the boundary of the public trust land migrates inwards at the expense of privately held land (this is achieved by way of a rolling easement); and
- the State is required to prohibit landowners from erecting public works to prevent/postpone the inward migration of the foreshore (this is because it the State may not sacrifice the foreshore to private interests.

For further discussion of this issue see eg:

Bruce Thom “*Climate Change, Coastal Hazards and the Public Trust Doctrine*” MqJICEL (2012) Vol 8(2)
Phillippa England “*Too much too soon? On the rise and fall of Australia’s coastal climate change law*” (2013) 30 EPLJ 390

John R Corkill OAM, “*Claimed property right does not hold water*” (2013) 87 ALJ 49

a) Obtaining Information

In order to demonstrate that it is acting reasonably and making decisions in good faith Council needs to inform itself adequately on predicted climate change issues and to ensure that the information it has obtained remains current.

The technical nature of the information on actual and predicted climate change impacts, the uncertainties regarding scale, frequency and timeframe of impacts, and the complex interactions between those impacts⁸ at a local and regional scale, create significant practical issues for councils.

Of particular concern is the lack of clearly articulated and well understood standards for the collection and interpretation of data on climate change risk issues.

Another issue is that the ill-defined status of State policy documents and guidelines make it difficult for Council to identify what information it ought to obtain. Increasing the volume of information it considers may reduce its risk in negligence but conversely it could increase its risk of administrative review as well as the administrative burden on its staff.

b) Reviewing and Using Information

A Council may receive information on climate change risk issues from:

- its own experts where it has commissioned reports for a particular purpose;
- other government agencies who have published technical information to assist climate change related decision-making;
- third parties who have prepared and provided information to Council for a very specific objective (e.g. a developer providing a coastal hazard vulnerability assessment with its development application).

There are likely to be significant variations in the quality of information and analysis received even having regard to the limited nature and scope of the reports. In particular, in Victoria there appears to be no clear and industry endorsed standard framework for the preparation of Coastal Hazard Vulnerability Assessments required to be prepared by developers in respect of certain proposals⁹.

Consequently, Councils should not take information on climate change issues provided to it on face value (irrespective of the source). To demonstrate that it is taking reasonable care Councils must, at the very least, undertake some basic checks to ensure the information is accurate and, where it conflicts with other credible information, Councils may need to undertake further investigations or ask further questions.

In some instances, peer review of information may be appropriate, especially where there is insufficient in-house expertise to assess the adequacy of

⁸ For example, confluence issues such as inundation impacts where king tides (or cyclone induced high tides), storm events and upstream flooding coincide.

⁹ The Victorian Coastal Hazard Guide provides general guidance on coastal hazard assessment but nothing specific to CHVA to be provided by developers. For instance, it states: "*The level of assessment required will depend upon the available level of information and developed knowledge for the study area, as well as the value of assets at risk and the available budget.*"

information obtained or the robustness of assessments made and conclusions reached.

Importantly, information provided by third parties to Councils may:

- only consider very localised impacts; and
- might only be suitable to be used for the purpose of considering that particular permit/development application; and/or

In addition, Council may not be able to rely on the report, if it subsequently transpires that the conclusions reached were wrong.

When using information on climate change risk issues, Council should ensure the information and its limitations are well understood, and that the information is up to date and consistent with current scientific standards.

c) **Providing Information**

The release of new information on risks may not be welcomed by everyone. For example, when new flooding risks are identified and communicated, this is likely to impact on property values. In this respect, the current owner would be disadvantaged to the benefit of any future owners.

Specific Statutory Duties

Councils have limited specific statutory duties to provide information on climate change risks. They are required:

- to provide, or make available certain land use specific information in planning certificates provided to current and prospective land owners:
 - in WA, State Planning Policy 2.6 recommends that a warning as to identified coastal hazard risks be provided on title. However, a notation on title under *Transfer of Land Act 1893 (WA)* may only be made by the Registrar with the consent of the landowner¹⁰;
 - in NSW, the information that must be included in a certificate attached to a contract for the sale of land (a s149(2) certificate) is relevantly limited to the names of applicable planning instruments, land zoning, whether the land is in the “coastal zone” and information re certain prescribed temporary coastal protection works. Council may include further information in a s149(5) certificate which is available on request¹¹.

¹⁰ 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*”

Councils are also required to prepare planning certificates under the 3 Region Planning Schemes which apply to portions of the State. 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*”.

¹¹ 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 or 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*

- in Victoria, the certificate must include information as to the zoning of the land¹², relevant planning authority and for non metropolitan land, whether the construction of a dwelling house is prohibited¹³; and
- to provide information in the course of public consultation on zoning decisions proposed in response to predicted climate change impacts.

Planning certificates are an efficient method of communicating risks to land owners, potential land owners, lenders and insurers. They are particularly effective in the CC context if the State Government has developed overlay controls or Council has identified risks and established appropriate controls in planning instruments. However, if Councils exceed their statutory obligations they are likely to face opposition from residents¹⁴, (who consider that their property values have been adversely affected) and potentially legal challenges. A legal challenge may succeed if the applicant could establish that the information provided in the certificates was not for a proper planning purpose¹⁵, vague, misleading or inaccurate.

General obligations when providing information

At the very least, to comply with its statutory obligations and minimize its risk under negligence laws, Councils should:

- respond in good faith to enquiries made of them;¹⁶
- take reasonable measures to ensure the accuracy of information they provide;¹⁷ and
- provide information in a form appropriate to their intended audience.¹⁸

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)..."

For a period between March 2011 and January 2013 Councils were required to include in s149 certificates information regarding coastal hazard risk categorization in Coastal Zone Management Plans.

¹² The DEPI website specifies that planning certificates may include information on: zoning of the land and, if applicable, overlay planning controls; reservations that affect the land; classified roads abutting the land; and proposals in an exhibited amendment to the planning scheme.

¹³ 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. If a s173 Agreement were entered into between Council and the landowner to address CC risks this would be noted on title.

¹⁴ For instance, in 2009 Gosford Council decided to include in s149 certificates a statement which identified that the land was being potentially affected to SLR and that Gosford Council had not yet prepared any specific SLR development controls. In the face of community opposition Gosford Council decided to remove this notation in July 2012. For further discussion see Phillipa England "Too much too soon? On the rise and fall of Australia's coastal climate change law" (2013) 30 EPLJ 390

¹⁵ See eg *Compliance Admin Services Pty Ltd v Town of Claremont* [2004] WATPAT 198 where a condition requiring a s70A notation of a static fact (that the approval was for a 1 bedroom apartment) was not considered to be for a proper planning purpose. *Antonias v Town of Vincent* (2006) 45 SR (WA) 327; [2006] WASAT 303 clarified that a continuing obligation which affects the use and enjoyment of the land and which is unusual is appropriate to be required to be included in a s70A notation.

¹⁶ For instance, in *Mid Density Developments Pty Limited v Rockdale Municipal Council* (1993) 116 ALR the Federal Court held that Council had failed to exercise good faith in the preparation of flood information requested in the context of a proposed land sale where no real attempt was made to have recourse to the relevant documentary information available to the council, and the council had no proper system to deal with requests for information of the type in question.

¹⁷ There is significant case law on Councils' responsibilities to provide correct information. Where third parties rely on their incorrect information to their detriment Councils will be exposed to claims for compensation. In addition, incorrect information may impugn Councils' decision-making where it constitutes a failure to comply with public consultation obligations.

In determining what information to provide, regard should also be had to the following general principles derived from misleading and deceptive conduct provisions of consumer protection legislation¹⁹:

- Silence can be misleading or deceptive when, for example:
 - one person fails to alert another to facts known only to them, and the facts are relevant to a decision
 - important details a person should know are not conveyed to them
 - a change in circumstance meant information already provided was incorrect.
- promises, opinions and predictions as to climate change may be misleading or deceptive if, for example, the person making the statement:
 - knew it was untrue or incorrect;
 - did not care whether it was true or not; or
 - had no reasonable grounds for making it.

A prudent Council may also wish to go beyond mere compliance when determining:

- what climate change related information to provide;
- who to provide it to (only affected persons, or the community generally);
- when to provide that information (when it becomes available, when the land is proposed to be sold/developed (when economic consequences will be realized)).

In determining what information to provide, and when, Council may wish to consider:

- whether it has a duty to provide that information (for instance Council may have such a duty if the risk is significant, affects a defined group of people, is known to Council but not generally known and affected people would not be able to obtain or interpret the information without the assistance of Council);
- if a risk is obvious (i.e., well known in the community) or has been voluntarily accepted by a fully informed plaintiff, Council will have good grounds for defending any claim in negligence (for instance, by increasing community awareness storm water impacts, or flooding may become accepted as obvious risks);
- early communication of issues may reduce the likelihood of their economic consequences being unexpected/resisted by the community; and

¹⁸ The appropriate mode of communication will depend on a number of factors including: the nature and size of its intended audience, the nature of the message and the purpose of the communication. Particular issues arise in considering when internet-based communication is appropriate in the circumstances. In part these issues arise from the potential breadth of the audience and difficulties in verifying that the message has been received and understood. Where Council wishes to assert that it has communicated relevant and specific risks and applicable control measures to a particular target audience, mere placing of the information on a general website may not suffice.

¹⁹ This summary is derived from Fair Trading NSW and Consumer Affairs Victoria

- public participation/consultation regarding decision-making procedures may reduce the risk of challenges in negligence or administrative law grounds.

3.2 Planning for Development

Council is required to take climate change issues into account when determining whether:

- to initiate a change in the zoning of land; and
- to approve or reject applications for development approval put to it and what conditions that development should be subject to.

a) Zoning

Council is exposed to significant legal risk if it rezones land to allow more intensive development in circumstances where it knows that development in these areas will be at risk and it has failed to act²⁰.

Re-zoning of land to prohibit or restrict development is an effective tool for managing predicted climate change risks. It is a particularly useful mechanism if the land predicted to be affected has only minimal development or if the identified risks are high and immediate.

The situation is less clear where there is significant existing development in “at risk” areas or there are substantial uncertainties as to the magnitude and timing of those risks. In those circumstances, unless climate change risks are severe and immediate²¹, options other than rezoning may need to be considered.

In all three jurisdictions, the Minister has the power to effectively rezone land in State or Regional Policies. Where this occurs, this can resolve significant uncertainty and reduce legal risk for Councils. State government directed controls, however, are generally only implemented where there is a strong public interest and there is a commonality of risk issues across multiple regions in a State.

Re-zoning land in local areas as initiated by Councils is a somewhat “blunt instrument” whose effectiveness in the climate change context may be affected by the following:

- it can be a time consuming and lengthy process (at least in Victoria and NSW);
- in all three jurisdictions, the Minister is the ultimate approval body. While this shifts responsibility for the “decision” (and the associated risk of legal challenge to the relevant decision to rezone) to the Minister²², it can create uncertainty for Council;

²⁰ eg in *Armistead City Council v Alec Finlayson Pty Ltd* [1999] FCA 330 (8 April 1999), Council was held liable in negligence to a developer where it had rezoned industrial site to residential use and approved development. The site was affected by contamination associated with its prior use as a timber treatment facility.

²¹ Wellington Shire Council in Victoria has amended its Planning Scheme to down zone land subject to flooding (primarily sand dunes) originally zoned residential in the 1950's. The Planning Scheme amendment, which affects over 1000 lots, was approved by the Minister in March this year. Council has already made voluntary assistance payments of over \$2 million to purchase affected land.

²² Where the Minister is the ultimate decision maker, for example on land zoning issues, any judicial review proceedings challenging the lawfulness of that zoning decision will, in most circumstances be directed at

- in Victoria and NSW, standardization of local planning instruments may constrain a Council's flexibility;
- it does not easily allow for incremental, or "trigger based" adjustments to CC impacts;
- local planning instruments will be subject to requirements in State policies and (in WA and Victorian) overlay controls;
- in Victoria and NSW existing use rights will be preserved²³;
- in WA compensation may be payable under injurious affection laws if a "down zoning" has the effect of preventing previously permissible development or reserves the land for a public purpose²⁴;
- In NSW Councils may be required to acquire land where it is rezoned for a public purpose;
- In Victoria compensation may be payable where land is reserved under a planning scheme for a public purpose (for future acquisition); and
- to give effect to "down zoning" it may be necessary or appropriate for Council to purchase the land.

In certain contexts, "down zoning" to adjust to CCC Impacts may be the best strategic option.

In particular, in WA where the time constraints for the determination of development approval are so tight and Council is not as constrained by the standardization of zoning controls, tailored zoning controls specific to local areas to accommodate climate change mitigation strategies should be considered by Councils.

Where Councils have flexibility in their planning instruments/policy²⁵, it would be prudent for Councils to use these documents to articulate and implement a strategic approach to responding to climate change issues within coastal zone.

b) Development

Councils are currently most at risk of being involved in CC related litigation where they determine development applications, either by refusal or unpalatable conditions (at the hands of disappointed applicants) or by approval (at the hands of annoyed neighbours or environmental interest groups).

Merit review rights for applicants (and in Victoria and NSW, some objectors) expose Councils to a constant threat of expensive legal challenge. This risk is exacerbated in coastal areas where the desirability (and therefore value) of land close to water increases the economic impact of development decisions.

Councils' exposure to judicial review (for example, under NSW's open standing provisions where any person can seek to have decisions overturned on one or more alleged breaches of administrative law) may be

the Minister. However, of course, Council will bear the responsibility of taking measures to give effect to that zoning and of defending its actions in the event of legal challenge.

²³ see section 3.2.4 in Part A of this Report

²⁴ see section 3.2.4 in Part A of this Report

²⁵ eg Coastal Zone Management Plans in NSW

reduced where they carefully follow the correct procedures and the information they have relied on is scientifically sound.

In some instances, Council will not be the consent authority,²⁶ and in certain cases (eg where substantial technical expertise beyond the resources of Council may be required) it may be appropriate to seek to transfer decision making to a different body²⁷.

The imposition of appropriate conditions of consent is the most flexible and effective tool Council has in managing predicted climate change impacts on development. For instance, it may impose conditions which:

- require compliance with enhanced building standards (e.g., more durable, more elevated, more energy efficient, more moveable/temporary);
- give effect to planned retreat strategies (e.g., requiring buildings to be relocated if trigger events occur)²⁸;
- require (or prohibit) the construction of protective measures immediately or at a specified time/event in the future;
- limit the possible building envelope (e.g., require structures to be located on higher or more resilient areas of the property);
- require the “voluntary” imposition of positive covenants on title to protect vulnerable areas; and/or
- require the owners to provide consent to the compulsory acquisition of an easement over their land (for a seawall or to provide public access) if trigger events occur.

²⁶ For example, under SEPP 71, the Minister is the consent authority for certain coastal development in NSW. In Victoria, the Minister can exercise a call in power if he believes the application raises a major policy issue or the decision has been unreasonably delayed (s.97B *Planning and Environment Act*) and the relevant coastal management authority may prohibit development or require the imposition of specified conditions on development within the coastal overlay.

²⁷ Eg by persuading the Minister to exercise call in powers or refer an application to a regional consent agency, if available.

²⁸ In NSW, section 80A of the *Environmental Planning & Assessment Act* (1979) lists the types of matters that can be addressed by conditions. Under section 80(1)(d), conditions can specifically be imposed to limit the period during which development may be carried out in accordance with the consent granted. Section 80A(1)(e), specifically enables conditions to be imposed which require the removal of building and works (or any part of them) at the expiration of the period referred to in s. 80(1)(d).

In Victoria, under section 62 of the *Planning and Environment Act* 1987, conditions can be placed on permits which enable the use to only be carried out for a specific time. In relation to these types of permits, conditions can be imposed which specifically require that:

a. any development carried out on the land under the permit is to be removed at the end of the specified time, and

b. the land is to be restored to a specified state at the end of the specified time.

In WA, schedule 7 of the *Planning and Development Act* 2005 provides matters that may be dealt with by a planning scheme, including the imposition of conditions on development approvals. Section 9 of schedule 7 specifies that a Local Planning Instrument may make provision for the “*Approval, refusal or approval subject to conditions of any use or class or kind of development by a consideration of any matter to which the Act relates including the public interest*”. Section 11(3) of schedule 7 provides powers under a scheme to remove, alter, or demolish any building which obstructs the observance or carrying out of the scheme.

Permit/Development conditions create the potential for building a more resilient community²⁹ and generally Councils have a broad discretion in respect of the conditions they may impose³⁰. However, there are some significant constraints on Council's power to impose conditions. First, in many situations, a referral agency, planning instrument or other legislation may require specific conditions to be imposed (or prohibit that development)³¹. Second, any condition must:

- be for a permitted purpose (articulated in the legislation³²);
- not be for an improper purpose; and
- be certain and clearly expressed.

As referral agencies, such as in Victoria, the various Catchment Management Authorities, may require the imposition of specified conditions (or in some instance even require that consent be refused) Councils ought consult with and agree cooperative strategy with referral agency.

In addition, in all jurisdictions Council is mandated (in the case of Victoria) or empowered to impose any condition required to be imposed by a planning instrument. Where the imposition of specific conditions of consent is part of an overarching strategy for managing CCC Impacts in an area, it would be prudent for such conditions to be specified in an applicable planning control. Such an approach would also address concerns Court and Government agencies have expressed concerning the use of ad hoc conditions to address broad climate change risks.

There may, however, be practical challenges when employing creative consent conditions – for example:

- monitoring compliance with, and the enforcement of, conditions triggered by events which may occur a long time in the future;
- conditions must be sufficiently clear to enable them to be enforced without undue resort to the Courts to seek to interpret them; and
- ensuring prospective land owners/developers are made aware of conditions likely to be imposed on new developments or that have been imposed in respect of land they may wish to acquire.

To address these practical concerns, Council could enter into contracts directly with the land owner. Where this contract is registered on title, by way of a covenant or, in Victoria, a s173 agreement³³, this could provide

²⁹ An interesting example is the use of the Stockland shopping centre in Cairns which was used as a refuge during Cyclone Yasi, as it had been built to storm and flood resistant standards.

³⁰ In Victoria, Councils' powers to impose conditions is expressed in broad inclusive terms. Section 62(2) of the *Planning and Environment Act 1987* (Vic) provides "*The responsible authority may include any other condition that it thinks fit including, ...*". In NSW s80A of the *Environmental Planning & Assessment Act* (1979) prescribes numerous matters that may properly be the subject of a conditions of a development consent.

³¹ Eg in Victoria, the floodplain management authority is a referral agency for land subject to an Inundation, Floodway or Special Building Overlay.

³² See *Planning and Environment Act 1987* (Vic) s62, *Environmental Planning & Assessment Act* (1979) (NSW) s80A, *Planning and Development Act* (WA) 2005, Schedule 7

³³ Council may enter into an agreement with an owner or proposed owner of land which creates a covenant making provisions for (s174(2)):

- (a) *the prohibition, restriction or regulation of the use or development of the land;*
- (b) *the conditions subject to which the land may be used or developed for specified purposes;*
- (c) *any matter intended to achieve or advance—*

improved notification and enforcement opportunities. However, there may still be significant issues with long term monitoring and enforcement. In Victoria, a permit may require the land owner to enter into a s173 agreement as a condition of consent.

Covenants on Title / s173 Agreements

It may be possible through registered covenants or s173 agreements (or equivalent) to agree a broader range of conditions than could be imposed by way of conditions on a permit or approval. They may also be a mechanism for expressing the land owners' voluntary assumption of the relevant risk³⁴.

Registered covenants or s173 agreements may be resisted by land owners, especially where there are required to be entered into on an *ad hoc* basis (ie only if a development application is submitted)³⁵. In the case of s173 agreements, the legislation clearly specifies the matters that may, and may not, be included in such an agreement. For instance, it would not be an appropriate mechanism for seeking to obtain a release or an indemnity against future liability in nuisance or negligence. The Courts have specified that a s173 agreement is more in the nature of a planning control rather than a private contract and have strictly held Councils to the statutory basis for such agreement.³⁶

In addition, at least in NSW and Victoria³⁷, a covenant or agreement that is contrary to the provisions of a development consent/permit or the terms of a planning instrument may not be enforceable.

Covenants/Agreements on title have a role to play in the CC context where there is a need to impose conditions that bind subsequent land owners. However, care should be taken to ensure that they are contemplated by (or at least compatible with) a clearly articulated policy (preferably in the form of a planning instrument), lawful and consistently applied and enforced.

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- (i) *the objectives of planning in Victoria; or*
 - (ii) *the objectives of the planning scheme or any amendment to the planning scheme of which notice has been given under section 19;*
 - (d) *any matter incidental to any one or more of the above matters.*

An agreement must not require or allow anything to be done which would breach a planning scheme or a permit (s180).

³⁴ VCAT (Commissioner Baird) in *Ronchi & Anor v Wellington SC* [2009] VCAT 1206 (16 July 2009) indicated that the application of the precautionary principle and the need for a planned response to climate change risks mean that acceptance by owners of the potential risk is not a responsible way forward

³⁵ The Victorian Coastal Climate Change Advisory Committee noted that s173 agreements were not a recommended approach for managing CC risks at the individual property level as they would be difficult to administer (and remove) and could end up applied to isolated lots within existing settlements. Such an outcome would not be an effective or efficient response to climate change. In addition, agreements are difficult to amend and there may be problems financing projects on the land, insurance may be difficult to obtain or the land may be difficult to sell in future. They may also result in inconsistent decisions in relation to different properties.. (see Coastal Climate Change (AC) [2010] PPV 140 (24 December 2010))

³⁶ Eg *Wodonga City Council v Kiene* [2009] VCAT 81.

³⁷ See s28 *Environmental Planning and Assessment Act 1979* (NSW), s180 *Planning and Development Act* (Vic)

3.3 Asset Management

Predicted climate change risks may require Council to make difficult decisions when determining:

- which existing assets (public/private buildings, other infrastructure and natural areas) Council should protect (and to what extent);
- whether and what type of new infrastructure (such as sea walls, water retention or drainage systems) should be constructed to respond to these risks; and
- the maintenance/augmentation requirements of existing assets.

In making these decisions Councils should have regard to:

- who owns the assets and who bears responsibility for their protection/maintenance/augmentation;
- what values the community, through consultation, is willing to protect and at what cost;
- cost sharing opportunities with landowners and/or other government agencies;
- what legal powers it has to undertake, or compel others to undertake, the works;
- whether, when and to what extent:
 - compulsory acquisition is appropriate to ensure public access/public spaces preserved, to allow for future seawalls/protective measures or to enable retreat strategies to be implemented;
 - levies ought be imposed to raise revenue for particular measures.

For instance, if developing a policy on when it would undertake the installation (and maintenance of) new measures to protect property from erosion associated with sea level rise³⁸, Council would need to consider such things as:

- verifying that it is the appropriate body to be undertaking the works (i.e does it own or have responsibility for managing the land on which the works are to be built or that will benefit from the works);
- its statutory obligations in assessing and approving its own development consent to undertake such works³⁹;
- identifying community values for areas likely to be affected by erosion and from that developing a hierarchy of what it wishes to protect/promote eg public land, public access to public land, private buildings, public infrastructure and private land;
- whether there are any low cost measures which ought to be implemented immediately (eg dune stabilization);
- potential consequential impacts of protective measures eg:

³⁸ Section 3.2 above identifies some issues relevant to a decision by Council to grant a consent/permit for works to be undertaken by others.

³⁹ In NSW, for instance, Council would need to be satisfied of numerous matters in the *Coastal Protection Act 1979 (NSW)*, *Environmental Planning and Assessment Act 1979 (NSW)*, *State Environmental Planning Policy 71*, the *NSW Coastal Policy 1997*, any *Coastal Zone Management Plan* and/or any other local planning instruments before granting consent to it (or any other person) to carry out the construction of a new seawall.

- will it cause erosion or accretion in another area;
- will it accelerate the loss of public beachfront or result in a panorama of concrete structures rather than natural beachfront;
- apportionment of costs for designing, installing, maintaining, augmenting the structure;
- measures necessary to verify (during the lifespan of the structure) that the structure is maintained and remains suitable for its task; and
- the extent to which the implementation of measures could be staged (eg augmented in the future) or could be designed to be multi-purpose.

4. SOME POLICY APPROACHES TO CCC IMPACTS

4.1 Some Possible Regulatory/Policy Tools

The following table sets out some different regulatory/policy tools which Councils could use to respond to legal risks created by predicted climate change impacts.

	Tools	Comments
1.	Trigger based policy approach Identification of events which trigger the implementation of specific climate change adaption measures (e.g. action to be implemented if sea level at a specified location reaches a nominated height).	Maximises land use opportunities until event occurs. Provides some certainty as to decision making. Defers difficult decisions. Allows for changes in climate change science and development of new adaption measures.
2.	Conditions in planning permits: [see section 3.2(b)] .	Unusual conditions are likely to be challenged in merit review proceedings. Must be based on defensible policy. Council's power to impose conditions may be construed narrowly.
3.	Communication Strategy Co-ordinated measures to inform and educate community of predicted climate change impacts (or changes to those predictions)	May establish "obvious risks". May decrease risk of legal challenge.
4.	Rezone Land to accommodate predicted climate change impacts	Ideal for vulnerable greenfield areas Can be time consuming, expensive. May be limited in what you can achieve.
5.	Refer to another decision maker (eg Minister ⁴⁰)	Shifts risk of legal challenge Uncertainty as to outcome, may not be consistent with Council strategy (ad hoc)

⁴⁰ eg under s97C of the *Planning and Environment Act* (Vic)

	Tools	Comments
6.	Direct agreements with landowners (eg private contracts, s173 Agreement (in Vic) or requiring covenants on title)	Limitations on Council's right to compel landowners to agree Who will monitor/enforce ongoing compliance with conditions and how?
7.	Acquisition of land (or options to purchase land) (for current/proposed sea walls or to ensure future access to public spaces or relocation of infrastructure)	Costly. If landowner does not consent may be difficult to establish grounds for compulsory acquisition for a public purpose as uncertainty as to extent of CC issues Limitation on re-sale
8.	Share Resources (ie develop cooperative regional bodies to share resources and information) ⁴¹	
9.	Special fees/rates /levies to recover and budget for new costs (eg increased asset maintenance/upgrades, emergency planning)	Likely to be unpopular Need for care when determining scope
10.	Creative Design solutions Eg sea wall that can be raised in the future if needed, multipurpose road/seawall, dual purpose community buildings to provide refuge, relocatable/temporary buildings	Short term cost higher

4.2 Interaction of Multiple Strategies

The policy/regulatory strategies adopted by Council must necessarily work in conjunction with other strategies implemented by it. For instance, a decision to permit development in an at risk area could be part of a reasonable defensible strategy where it is given effect in conjunction with a detailed costed and scientifically justified program for the implementation of protective measures (such as sea walls) to reduce risks arising.

Such an approach might only be legally defensible if:

- it were consistent with applicable planning controls (State, Regional and local) and any specific statutory requirements;
- the protective measures proposed to be implemented were specifically designed/engineered to address predicted CC risks (over an appropriate planning timeframe) as determined by the best available scientific evidence appropriate to the assessment of those risks;

⁴¹ eg Hunter Valley Regional Cooperative

- based on the best available information at the time, the measures were not considered to have the potential to create new risks for other private or public property;
- all measures recommended to be implemented were in fact implemented;
- the costs of implementing those measures were clearly determined and were justified on an appropriate cost / benefit analysis;
- costs were borne appropriately within the community (eg by levies targeted at those benefiting from the works and/or by developer contributions required to be made by new development in the area;
- the proposed measures reduced risks to an acceptable level and residual risks were clearly communicated; and
- mechanisms were in place to review the adequacy of the protective measures and to provide for their maintenance/augmentation;

5. CASE STUDIES

Part A of the Report divided Council's legal obligations in respect of CCC Issues and consequent legal risks into the following three categories. Climate change obligations and risks associated with

- obtaining, using and communicating information;
- planning for development; and
- managing assets.

This section uses the risk management strategies in Section 2 (and **Appendix B1**) to analyse a case study in each of the three categories. The case studies are derived from information received from the participating Councils.

5.1 Case Study 1: Information

Case Study: A Government Agency has published an opinion on the extent of a predicted climate change impact and Council may, but is not required to, take that opinion into account, what legal risk minimization issues should it consider before determining whether to adopt that standard or a higher or lower one? For instance:

- *WA: Draft guideline 2.6 suggests appropriate SLR*
- *Vic: SPPF provides a discretion for Councils to adopt a lower SLR for infill development*
- *NSW: in 2010 a SLR policy was published, this was "retracted" in 2012.*

Decision: What SLR benchmark should Council apply at a specific location

In determining its position on this, Council should have regard to, and should ensure that it can document that it has considered, or made provision for, each of the following:

Good Information:

- Current credible information**
Council must have:

- current scientific assessments as to predicted SLR impacts regionally and locally (based on reasonable assumptions and prepared in accordance with appropriate standards). The experts must be aware of the proposed future use of the information;
- information on unique local features that may differentiate the predicted impacts from those proposed in the State document:
- identified how it proposes to use that information (eg will it be used to authorize/prohibit/restrict development that would not be affected to the same extent by the SLR Benchmark proposed in the State Document?);
- identified measures it could take to mitigate risks and accommodate uncertainties in predictions;
- identified predicted impacts not only on current or proposed development but also infrastructure servicing, and access to, that development.

b) Understanding the information

Council must demonstrate that it understands:

- How it proposes to use the information and whether it is suitable for that purpose;
- How the predicted impacts in the State document were derived and on what basis they may or may not be applicable to the location;
- The uncertainties in the information it has obtained;
- the timeframes involved and the longevity of the implications of its decision as to SLR benchmark;
- when and how it should review the scientific information.

c) Legal obligations

- What are Council's precise statutory obligations in respect of the State document?
- To what extent is Council required to apply the precautionary principle, what effect will this have?
- How will Council implement its SLR Benchmark?
- How will adoption of the SLR benchmark in the State document or adoption of an alternative benchmark affect Council's other policies/planning instruments and their implementation?

d) Legal Risks

Primary risks are:

- compensation in negligence (or possibly nuisance) if Council's SLR benchmark is subsequently found to be inaccurate, decisions have been made on the basis of that benchmark (eg permitting/restricting development), people have suffered loss and Council cannot demonstrate that its selection and implementation of the benchmark was reasonable in the circumstances. This risk may not manifest for some time in the future, eg if Council's SLR benchmark is used to justify permitting new development (or a whole new development area) legal risk continue long into the future;
- Administrative law challenge to planning decisions based on Council's SLR Benchmark.

Legal risks will obviously increase the more people affected or the more valuable the interests affected by Council's SLR benchmark.

- Adoption of a lower benchmark is a high risk strategy unless evidence as to lack of risk very strong. A lower SLR Benchmark should only be considered if scientific consensus, appropriate timeframe, regional implications considered, contingency/review plan and conforms with Council objectives for area generally..

- A higher benchmark may be needed if Council has clear credible info that in the circumstances the guideline won't meet Council's objectives or the objectives of the guideline.

e) **Available options:**

- What position on this issue has been adopted by other Councils or agencies
- What options are there to mitigate risks

f) **Community views**

- who is likely to be affected, who should be consulted (Community, other agencies)

g) **Cost and Risk Implications**

What are the practical risks and consequences if Council's SLR benchmark is too high or too low.

Clear Strategy

h) **Clearly articulated objectives**

Why is the decision being made, is there an imperative to permit development for a specified period. Is the decision consistent with Council's objectives for the area and for its community. What are those objectives

i) **Short term and long term impacts**

Does the strategy address short term and long term implications of the decision?

j) **Flexible**

What triggers are in place to review Decision and amend (eg if new scientific information)

k) **Regional implications**

If this benchmark is adopted how will this affect other areas?

l) **Documented Consistent approach**

The reasons for the decision must be articulated and the information upon which Council relied in making its decision must be documented

m) **Community Engaged**

How will Council inform or engage the community on this issue?

Implementation

n) **Policy informs decision making**

o) **Willingness and capacity to implement**

p) **Staff trained**

q) **Policy defended**

r) **Community informed**

Review

s) **Check Effectiveness**

t) **Adjust Policy**

Risk Environment

u) **Improvement to Risk Environment**

eg:

- s733 indemnity
- clearer State benchmarks

5.2 Case Study 2: Planning For Development

Case study: An application for development approval is lodged for a new residential house in an existing residential area. It will involve demolition and construction of a new dwelling. Information is obtained by Council (from an expert) which shows a combination of SLR and inundation that makes it likely that the current floor level will be subject to flooding.

Design standards require the dwelling to be constructed to 1 in 100 yr flood. If the development is constructed to accommodate the predicted risk, it will be 2m higher than other houses in the street.

Decision: Should Council permit the development and if so, subject to what conditions

In determining its position on this, Council should have regard to, and should ensure that it can document that it has considered, or made provision for, each of the following:

Good Information:

a) Current credible information

Council must have:

- current scientific assessments as to predicted flooding impacts (due to SLR and inundation) in that locality over an appropriate period of time. These assessments must be based on reasonable assumptions, especially on how predicted impacts may interact (including possible rainfall/storm impacts) and be prepared in accordance with appropriate standards. The experts must be aware of the proposed future use of the information. Peer review of the information may be appropriate.
- identified measures it could take, and/or require the landowner to take, to minimize or adapt to the risks. Such measures should be robust enough to accommodate uncertainties in predictions;
- assessed the predicted impact not only on the proposed development site but also infrastructure servicing that site and access to that development.
- characterized the development site, eg is it in a high or low density area, is further development/redevelopment in that area likely in the short to medium term, would the proposed development be compatible with the character of the area and Council's objectives for the area;
- identified interested government agencies and referral authorities and the extent of their interest;
- identified the level of local community awareness of the relevant risk;
- considered how others have addressed these issues
- identified if there are possible trigger events which will alter the adaption measures required in the future
- considered how risks to existing development are addressed.

b) Understanding the information

Council must demonstrate that it understands:

- the uncertainties in the information it has obtained, including the likely timeframes involved;
- the cost and likely effectiveness of the mitigation measures proposed;
- what level of risk would remain if measures implemented
- what steps will it be necessary for Council to take to monitor/enforce any conditions imposed on the development
- community sentiment as to the project and the relevant climate change risks

c) Legal obligations

- Are there any referral authorities?;
- What are the relevant considerations in Council's assessment of the development (i.e relevant planning instruments, building standards and policies)?
- To what extent is Council required to apply the precautionary principle, what effect will this have?
- Do the risks identified require Council to take action to protect existing development or warn others?

d) Legal Risks

The key legal risk is merit review challenge to any conditions imposed or to a determination to refuse development consent by the developer (or in NSW or Victoria, an objector).

Council could also be sued in negligence if Council's predictions as to the extent of the impact were wrong or the consent conditions imposed were insufficient or not enforced and the plaintiff can establish that Council acted unreasonably in making the decision.

If the risk to the area is high and immediate development in the area should not be encouraged. Rezoning/staged retreat measures may need to be considered.

The development should only be approved if the mitigation measures proposed are sufficient and adequate arrangements have been made for monitoring and enforcement (including a willingness to defend the decision).

e) Available options

- What options are there to mitigate risks (possible conditions of consent, agreement with land owner, enforcement, trigger/incremental approach, preventative measures (eg seawalls))
- how flexible are those measures, if circumstances change (eg is it appropriate to have staged measures dependent on trigger events)
- who is best placed to implement those options?
- are there cost/risk sharing opportunities?
- what are other Councils doing

f) Community views

If the development is approved subject to conditions, is there likely to be an appeal?

g) Cost and Risk Implications

What are the practical risks and consequences if the information on which Council made its decision is wrong.

Clear Strategy**h) Clearly articulated objectives**

The decision in relation to the development must be consistent with Council's objectives (eg objective: to allow continuation of existing use of area until specified risks materialize).

i) Short term and long term impacts;**j) Flexible**

Can the measures identified accommodate change to predicted impacts

k) Regional implications

- l) **Documented Consistent approach**
The reasons for the decision must be articulated and the information upon which Council relied in making its decision must be documented. The decision must be part of a planned and orderly approach to development in the area
- m) **Community Engaged**
How will Council inform or engage the community on this issue?

Implementation

- n) **Policy informs decision making**
- o) **Willingness and capacity to implement**
- p) **Staff trained**
- q) **Policy defended**
- r) **Community informed**
Is the community aware of predicted impacts and measures they or Council may need to implement.

Review

- s) **Check Effectiveness**
- t) **Adjust Policy**

Risk Environment

- u) **Improvement to Risk Environment**
Clearer State guidelines on infill development

5.3 Case Study 3: Managing Assets

Case Study: An existing seawall has been damaged by recent storms.

Decision: Is Council required to repair or upgrade/augment the seawall?

In determining its position on this, Council should have regard to, and should ensure that it can document that it has considered, or made provision for, each of the following:

Good Information:

- a) **Current credible information**
Council should inform itself of the following:
- who built the structure and who owns it and/or the land it is on;
 - what consent conditions (if any apply to the structure, do they include maintenance;
 - why is the seawall there, what risk is it addressing;
 - what are the relevant SLR, storm, king tide etc impacts in various time horizons;
 - the integrity of the structure and what measures are necessary to ensure the structure can perform its function (now and in the future), eg should it be augmented;
 - what is the likely cost of any maintenance measures;
 - design options for the maintenance of the wall (eg could it be incrementally enhanced as new threats materialize)
 - who has maintained the structure in the past;
 - are there cost sharing opportunities to cover the costs;

- does the wall perform its function, does it create risks for other locations;
- should the wall be maintained or removed;

b) **Understanding the information**

Council must demonstrate that it understands:

- the structure's function and whether it fulfills it;
- the limitations on the information as to the predicted impacts the structure is intended to address;

c) **Legal obligations**

- Who is legally required to maintain the structure and to what standard;
- Are there consent conditions or other agreements which require it to be maintained or augmented

d) **Legal Risks**

Legal risks in negligence or nuisance if Council owns or has control of the management of the wall, the wall's presence or condition causes damage and Council's actions are subsequently found to be unreasonable.

Possible administrative law risk if Council granted consent for the structure and has failed to enforce compliance with conditions (either by itself or a third party) (eg *Byron Shire Council v Vaughan* [2009] NSWLEC 88 where a 2001 consent issued by Council to itself was considered to require Council to maintain a seawall damaged in a storm, despite its policy of planned retreat).

If Council elects to undertake works it is not required to undertake, it may be creating other consequential burdens for itself.

e) **Available options:**

- Should the wall be removed or maintained
- What are other Councils/land owners doing

f) **Community views**

g) **Cost and Risk Implications**

Clear Strategy

h) **Clearly articulated objectives**

Council should clearly identify what values of the area should be protected and at what cost

i) **Short term and long term impacts;**

j) **Flexible**

k) **Regional implications**

l) **Documented Consistent approach**

m) **Community Engaged**

Implementation

a) **Policy informs decision making**

b) **Willingness and capacity to implement**

c) **Staff trained**

d) **Policy defended**

e) **Community informed**

Review

a) **Check Effectiveness**

b) **Adjust Policy**

Risk Environment

a) **Improvement to Risk Environment**

APPENDIX B1 GUIDELINES FOR GOOD DECISION MAKING

Good Information

1. Council has **current credible information** on existing and predicted climate change impacts relevant to the Decision.
(Who supplied the information, on what assumptions is it based, what were the objectives of the report providing the information, is it sufficiently local/regional, is it up-to-date?);
2. Council **understands the information** on predicted impacts (and its limitations) and how these impacts affect risks associated with the Decision.
3. Council knows and **understands its legal obligations and its associated legal risks** in respect of the relevant Decision.
4. Council has informed itself on **available options** (prevention, mitigation and adaptation strategies), their advantages and disadvantages (including measures others are implementing).
5. Council has informed itself on **community views** regarding the Decision and is aware of the general level of understanding in the community of the relevant issues.
6. Council understands the **cost and risk implications** of the Decision and any consequential impacts that the Decision may have.

Clear Strategy

7. Council's approach to the Decision:
 - a) is based on **clearly articulated objectives**
(i.e. what is, and whose values are, to be protected or promoted);
 - b) makes provision for **short term and long term impacts**;
 - c) allows for **flexibility over time** if information changes or objectives become more refined; and
 - d) where appropriate, has regard to **regional impacts** and approaches adopted by other Councils with similar issues.
8. Council has, and has documented in a policy, **a consistent reasoned approach** to the making of the Decision.
9. Council has **informed the community** of the policy and the reasons for it.

Implementation

10. Council has taken measures to ensure the **policy informs Council's decision making** and is translated into procedures that can be implemented by Council staff;
11. Council has a **willingness and capacity to implement** the policy;
12. Council **staff are trained**, aware of the relevant issues and encouraged and facilitated in their implementation of the policy; and
13. **Council will defend the policy**, and Council staff, if it is challenged.
14. The **community is informed** of the policy and its implications.

Review

15. Council has identified and put in place measures to **check the effectiveness** of the policy? *(Peer review or audit may be appropriate)*
16. Council is willing and able to **adjust the policy** if appropriate.

Risk Environment

17. Council has identified how its **risk environment** could be improved, and is pursuing this through appropriate forums.