
Retreat from retreat – the backward evolution of sea-level rise policy in Australia, and the implications for local government

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Climate change is expected to cause rising sea-levels, threatening communities and the built environment. Most Australian State Governments have responded to the threat of rising sea-levels by implementing laws and policies guiding future development in at risk areas. However, a number of Australian States have taken action to weaken these policies in the wake of State elections, allowing for increased development in vulnerable areas. This creates a conundrum for local governments, which are required to implement policy, approve developments, and potentially bear the risk if properties are subsequently flooded. This article will use the Queensland example as a case study of evolving sea-level rise policy, and assess the legal risk implications for local government. It will conclude that failure to implement clear policies with effective allocation of risk will result in litigation against both State and local governments.

INTRODUCTION

One of the anticipated impacts of climate change is sea-level rise. The Intergovernmental Panel on Climate Change (IPCC) provides an authoritative synthesis of the science surrounding climate change, and their most recent Report released in 2013 projected a global rise of up to 0.98 m by 2100, with the rate of rise dependent on what measures are taken to reduce emissions and decrease concentrations of CO₂ in the atmosphere.¹ This is a significant increase from their earlier projection of 0.59 m in 2007,² and reflects an emerging scientific consensus that sea-level rise may be of a greater magnitude than initially expected.³ This suggests that governments should afford immediate priority to implementing effective policies designed to reduce the development footprint in areas at risk of inundation.

Despite the scientific community generally revising their projections of future sea-level rise upwards, in some Australian States, legal protections are moving in the opposite direction. In 2012, the Queensland, New South Wales and Victorian Governments all took action to remove or weaken existing planning laws designed to reduce the development footprint in at risk areas. These policy developments all occurred in the wake of an election, and a change from a Labor-led (ideologically liberal) to Liberal or Liberal/National-led (ideologically conservative) government.

This change in policy is not surprising, given the extensive body of literature highlighting the relationship between political ideology and belief in climate change. This literature demonstrates a

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¹ Stocker et al, *Climate Change 2013 – the Physical Science Basis. Summary for Policymakers. Working Group 1 contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013) p 23.

² Intergovernmental Panel on Climate Change, *Climate Change 2007 – the Physical Science Basis* (Cambridge University Press, 2007) p 750. The majority of this projection was based on ocean thermal expansion. It was also suggested that a further 20cm rise due to ice sheet melting was possible.

³ See eg, Rahmstorf S, “A Semi-empirical Approach to Projecting Future Sea-level Rise” (2007) 315 *Science* 368; Vermeer M and Rahmstorf S, “Global Sea Level Linked to Global Temperature” (2009) 106 PNAS 21527; Pfeffer WT, Harper JT and O’Neel S, “Kinematic Constraints on Glacier Contributions to 21st Century Sea-level Rise” (2008) 321 *Science* 1340; Overpeck JT and Weiss JL, “Projections of Future Sea Level Becoming More Dire” (2009) 106 PNAS 21461.



link between political conservatism, and resistance to change.⁴ Conservative parties and politicians may be less likely to accept the phenomenon of climate change, because acceptance would require a major shift away from current systems and practices.⁵ A recent survey of Australian politicians at the Federal, State and local levels confirmed the application of these findings in Australia. The survey revealed that politicians from ideologically liberal parties were more likely to believe the scientific consensus surrounding climate change and afford it priority in their work, whereas conservative politicians were more uncertain and sceptical about climate change.⁶

This article will use legal developments in Queensland as a case study of weakened sea-level rise policy following the election of a conservative government. It will then analyse the legal consequences of failing to retain or implement effective sea-level rise policy, with a focus on the legal risk implications for government. Ultimately, it will demonstrate that the legal risks associated with failing to plan for sea-level rise are too grave for governments to allow political ideology to affect the implementation of effective policy.

THE BACKWARDS EVOLUTION OF SEA-LEVEL RISE POLICY IN QUEENSLAND

Coastal and sea-level rise policy in Queensland presents a useful and informative case study. Coastal policy has been subject to an ongoing reform process since 2007, with drastic changes made to policy following an election in 2012. Table One provides a brief timeline of the progress of coastal policy in Queensland.

Table One: Evolution of coastal policy in Queensland

2002	2007-2011		February 2012	October 2012	April 2013	December 2013
Coastal plan released	Coastal plan reviewed	New coastal plan developed	Coastal plan commenced	Coastal plan suspended, new temporary policy released	New draft policy released	Final policy released

The Queensland coastal plan 2012

Sea-level rise policy in Queensland has been a vexed issue for government in recent years. In 2007, the Queensland Government announced a review of the previous coastal policy, which had commenced in 2002. The review suggested that the 2002 plan did not adequately address the threats of sea-level rise and coastal inundation,⁷ and was not always implemented effectively.⁸ In response to the review, a new draft coastal plan imposing stringent restrictions on development in coastal areas was released in 2011. This draft attracted extensive criticism from the development industry,⁹ with the

⁴ See Fielding KS, Head BW, Laffan W, Western M, and Hoegh-Guldberg O, "Australian Politicians' Beliefs about Climate Change: Political Partisanship and Political Ideology" (2012) 21 *Environmental Politics* 712 at 714 for a summary of the literature.

⁵ Feygina I, Jost JT and Goldsmith RE, "System Justification, the Denial of Global Warming, and the Possibility of 'System-Sanctioned Change'" (2010) 36 *PSPB* 326 at 327.

⁶ Fielding et al, n 4 at 728.

⁷ Queensland Government, Department of Environment and Resource Management, *Report of the Review of the State Coastal Management Plan* (2009) p 3, available at <http://rti.cabinet.qld.gov.au/documents/2009/jul/qld%20coastal%20plan/Attachments/Report%20on%20the%20Review%20of%20the%20State%20Coastal%20Management%20Plan.pdf>.

⁸ Queensland Government, Department of Environment and Resource Management, n 7, p 16.

⁹ See eg, Arnold Development Consultants, *The Elephant in the Cupboard: The Coastal Management Plan Must be Stopped* (29 August 2011) <http://www.adcql.com.au/the-elephant-in-the-cupboard-the-coastal-management-plan-must-be-stopped/>; Property Council of Australia, *Property Council Concerned about New Queensland Coastal Plan* (8 April 2011) <http://www.propertyoz.com.au/qld/Article/Resource.aspx?p=21&media=1817>.



Retreat from retreat – the backward evolution of sea-level rise policy in Australia, and the implications

Queensland Government ultimately having to compromise on some aspects of the plan. However, the final plan, which commenced on 3 February 2012, represented a shift towards greater regulation and control of development in coastal areas.

The Queensland Coastal Plan released in 2012 (QCP) aimed to ensure that development in the coastal zone was planned, located, designed, constructed and operated to:

- avoid the social, financial and environmental costs arising from the impacts of coastal hazards, taking into account the projected effects of climate change;
- manage the coast to protect, conserve and rehabilitate coastal resources and biological diversity; and
- preferentially allocate land on the coast for coastal-dependent development.¹⁰

To achieve these outcomes, the QCP contained policies governing land-use planning, and development in “coastal hazard areas”. A “coastal hazard area” was defined in the QCP as a storm-tide inundation area, or an erosion prone area.¹¹ The Queensland State Government mapped these areas of the State’s coastline (called the “coastal hazard areas map”) using high-precision elevation mapping derived from LiDAR technology. The QCP required climate change to be factored into this mapping, accounting for a sea-level rise factor of 0.8 m and a 10% increase in cyclone intensity by 2100.¹²

The QCP contained a development assessment code, regulating development in erosion prone areas, and high and medium coastal hazard areas. The code placed different levels of restriction on development based on the degree of hazard, and whether the area was urban or non-urban. Table Two summarises the types of development permitted in each area.

Table Two: Summary of development permitted under the QCP

	Urban areas	Non-urban areas
Erosion-prone area	<ul style="list-style-type: none"> • Specified development (defined as coastal-dependent, temporary or readily relocatable, essential community service infrastructure, or redevelopment that does not increase the risk to people and property from exposure to adverse coastal hazard impacts (including situations where development is protected by new and existing or new coastal protection works)) • Redevelopment that intensifies, but mitigates any increase in risk to people and property from adverse coastal erosion impacts. 	<ul style="list-style-type: none"> • Specified development
High hazard area (erosion prone/ projected-permanently inundated by 0.8 m sea-level rise /temporarily inundated – one metre or more during storm tide)	<ul style="list-style-type: none"> • Specified development • Consistent with adaptation strategy • Located, designed, constructed and operated to avoid adverse coastal hazard impacts (transitional provision) • Hazard is avoided through existing coastal protection work (defined as any permanent or periodic work undertaken primarily to deliberately alter physical coastal processes such as sediment transport, to manage the effects of coastal hazards) 	<ul style="list-style-type: none"> • Does not facilitate urban development • Specified development • Maritime development/small-medium scale tourist development

¹⁰ Queensland Government, Department of Environment and Resource Management, *Queensland Coastal Plan* (3 February 2012) p 41, <http://www.ehp.qld.gov.au/coastalplan/pdf/qcp-web.pdf>.

¹¹ Queensland Government, Department of Environment and Resource Management, n 10, p 100.

¹² Queensland Government, Department of Environment and Resource Management, n 10, p 44.



TABLE continued

	Urban areas	Non-urban areas
Medium hazard area (temporarily inundated – less than one metre inundation during a storm tide)	<ul style="list-style-type: none"> • Specified development • Consistent with adaptation strategy • Located, designed, constructed and operated to avoid adverse coastal hazard impacts • Hazard is avoided through existing coastal protection work 	<ul style="list-style-type: none"> • Does not facilitate urban development • Specified development • Maritime development/small-medium scale tourist development
Area not mapped as hazard areas	<ul style="list-style-type: none"> • No restrictions in QCP 	<ul style="list-style-type: none"> • No restrictions in QCP

The code was less stringent in relation to development in medium hazard areas than in high hazard and erosion prone areas. The code was also generally less stringent in relation to development in urban areas, with “urban development” defined as development for urban or rural residential purposes, and does not include rural land uses such as agriculture and horticulture. This reflected a key theme of the QCP, which focused on intensifying development in areas already at risk, whilst avoiding exposing new localities to risks. To this end, development could be allowed in an urban high or medium hazard area where it is consistent with an “adaptation strategy”. These documents were required to be prepared by urban local governments for areas projected to be in a high hazard area, within five years of commencement of the QCP. The adaptation strategy would assess mitigation options, including retreat, avoidance and defence, and describe the works to be undertaken. Prior to adoption of an adaptation strategy, property-based risk assessments may be undertaken, and both of these instruments would allow risk to be assessed at a much finer scale. A pilot adaptation strategy was prepared for the Townsville City Council Region, which assessed possible defence and retreat measures in various parts of the region, and graded them as economically viable or unviable upon an analysis of the costs and benefits.¹³

Change of government, change of policy – the Draft Coastal Protection State Planning Regulatory Provision

The Queensland State election was held on 24 March 2012, with the Liberal-National Party (LNP) winning a resounding 78 of the available 89 seats. Labor’s margin was reduced from 51 seats to a mere seven seats. The LNP Government’s focus on economic development became immediately apparent, with Premier Campbell Newman outlining his commitment to growing Queensland’s economy in his first address to Parliament.¹⁴ A number of temporary policies were introduced soon after the change of government, until a comprehensive review of planning policies could be undertaken.

On 24 August 2012, the Newman Government released “Temporary State Planning Policy 2/12: Planning for Prosperity” (TSPP).¹⁵ State Planning Policies are an instrument used in Queensland in areas where the State Government has an interest.¹⁶ State Planning Policies last for 10 years and require public consultation,¹⁷ whereas Temporary State Planning Policies are an interim measure which only last for one year, and do not require public consultation.¹⁸

¹³ GHD et al, *Coastal Hazard Adaptation Strategy for Townsville City Council: Pilot Project* (Townsville City Council, 2012) http://www.townsville.qld.gov.au/council/projects/Documents/Coastal%20Hazard%20Adaptation%20Strategy/Coastal_Hazard_Adaptation_Strategy.pdf.

¹⁴ Queensland, Legislative Assembly, *Parliamentary Debates* (17 May 2012) p 27.

¹⁵ Queensland Government, Department of State Development, Infrastructure and Planning, *Temporary State Planning Policy 2/12: Planning for Prosperity* (August 2012) <http://www.dsdp.qld.gov.au/resources/policy/state-planning/temporary-state-planning-policy-2-12.pdf>.

¹⁶ *Sustainable Planning Act 2009* (Qld), s 40.

¹⁷ *Sustainable Planning Act 2009* (Qld), ss 45, 58-67.

¹⁸ *Sustainable Planning Act 2009* (Qld), ss 47, 49.



The TSPP 2/12 lapsed on 24 August 2013.¹⁹ While in force, it governed State agencies and local government, and applied generally to strategic planning processes.²⁰ It emphasised the Newman Government's commitment to economic development, with the purpose of the TSPP being to ensure that economic growth is facilitated by local and State plans, and is not adversely impacted by planning processes.²¹ In particular, the TSPP expressed a commitment to four key pillars of the economy, being agriculture, tourism, mineral and extractive resources, and construction.²²

Unsurprisingly, the Queensland Coastal Plan did not fit the vision of the Newman Government, and on 8 October 2012 the QCP was suspended, and replaced by the Draft Coastal Protection State Planning Regulatory Provision (regulatory provision).²³ The rationale behind the policy change was that the QCP was "not sufficiently supportive of the Government's commitment to grow the four pillars of Queensland's economy".²⁴

The regulatory provision was a much shorter document than the QCP, broken into two parts, addressing strategic development and individual development applications. The regulatory provision reiterated the QCP's preference for avoiding further development in non-urban, hazard areas, but in a less forceful tone. The regulatory provision required conservation of the coastal zone in non-urban areas, but only "to the extent practicable".²⁵ In terms of existing urban areas, the regulatory provision removed the requirement for preparation of adaptation strategies, and instead noted that "new development within existing urban areas (for example, infill and redevelopment) is preferred and new development should be undertaken so as to avoid or minimise adverse impacts on coastal resources and their values".²⁶

The reference to "coastal hazard areas" was retained, as was the use of coastal hazard maps. The regulatory provision removed the reference to 0.8 m sea-level rise, although the definition of "coastal hazard area" noted that the maps currently used were based on a projected 0.8 m sea-level rise. Consequently, the 0.8 m benchmark was retained, but not given the prominence held under the QCP. The regulatory provision did not place any prohibitions or restrictions on development, but suggested a hierarchy of approaches being avoidance, planned retreat, accommodation and protection.²⁷

In terms of development assessment, restrictions on development in coastal hazard areas had been weakened considerably, with the regulatory provision specifying that "development in areas on the coastal zone identified as having a high risk of being affected by coastal hazards needs to be carefully considered and *wherever possible*, be retained undeveloped" (emphasis added).²⁸ Where an area vulnerable to storm tide inundation had already been developed or was subject to a development commitment, any further development needed to address its vulnerability to sea-level rise and storm tide inundation, and the proposed access to and protection of evacuation routes.

The regulatory provision did state that erosion prone areas should remain undeveloped, apart from acceptable temporary or relocatable structures for safety and recreational purposes, and subject to the

¹⁹ Once it has lapsed, it was immediately followed by Temporary SPP 1/13 Planning for Prosperity, which itself was repealed on 2 December 2013.

²⁰ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, p 3.

²¹ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, p 1.

²² Queensland Government, Department of State Development, Infrastructure and Planning, n 15, pp 3-4.

²³ This instrument was repealed on 3 December 2013 following release of the new State Planning Policy.

²⁴ Queensland Government, Department of State Development, *Infrastructure and Planning, Draft Coastal Protection State Planning Regulatory Provision: Protecting the Coastal Environment* (October 2012) <http://www.dsdip.qld.gov.au/resources/laws/state-planning-regulatory-provision/draft-coastal-protection-sprp.pdf>.

²⁵ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, p 7.

²⁶ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, p 7.

²⁷ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, pp 7-8.

²⁸ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, p 9.



qualifier “to the extent practicable”.²⁹ Where erosion prone areas had already been developed, future development should not intensify use unless it was “clearly demonstrated that it would not compromise coastal management outcomes and principles”. Additionally, while retreat was favoured in erosion prone areas, where areas were already developed to a scale and intensity where this was not achievable, coastal defence works could be required.³⁰

Moving towards a permanent policy – the draft State Planning Policy 2013

In April 2013, the Queensland Government released a new draft State Planning Policy (draft SPP), intended to replace and consolidate numerous other policies, including the regulatory provision. The draft SPP, at first glance, seems more measured in its approach than the Newman Government’s earlier policies, with economic and environmental considerations given corresponding weight.³¹

The draft SPP included a section on natural hazards, which addressed coastal hazards (including erosion prone areas and/or storm tide inundation areas).³² Generally, the purpose of the section was to ensure that “the risk of, and the adverse impacts from, natural hazards were avoided, minimised or mitigated to protect people and property and enhance the community’s resilience to natural hazards”.³³ Like the earlier policies, the draft SPP distinguished between strategic planning, and individual development assessments.

At the strategic level, local planning instruments were required to:

- reflect the outcomes of a natural hazard investigation, including natural hazard maps for the local government area;
- reflect the outcomes of a natural hazard risk assessment;
- reflect the development potential of land by ensuring development in new and existing areas avoids or mitigates the risks of natural hazards to an acceptable or tolerable level; and
- ensure that erosion prone areas were maintained as development free buffers or where permanent buildings or structures exist, coastal erosion risks were avoided or mitigated.³⁴

Individual development applications were required to address the natural hazard by ensuring that:

- development was compatible with the level of risk;
- development siting, layout and access responded to the potential hazard and minimises risk to personal safety;
- development was resilient to natural hazard events by ensuring siting and design accounts for potential risks of natural hazards to the property;
- development directly, indirectly and cumulatively avoided an unacceptable increase in the severity of the natural hazard and did not significantly increase the potential for damage on the site or to other properties;
- the release of hazardous materials was avoided; and
- natural processes and the protective function of landforms and/or vegetation were maintained in natural hazard areas.³⁵

Additionally, erosion prone areas were to be maintained as development free buffers or where permanent buildings or structures existed, coastal erosion risks were avoided or mitigated, and coastal protection work was to be undertaken only as a last resort.³⁶

²⁹ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, p 9.

³⁰ Queensland Government, Department of State Development, Infrastructure and Planning, n 15, pp 9-10.

³¹ Queensland Government, Department of State Development, *Infrastructure and Planning, State Planning Policy: Draft for Consultation* (April 2013) p 6, <http://www.dsdipl.qld.gov.au/resources/policy/state-planning/draft-spp.pdf>.

³² Queensland Government, Department of State Development, Infrastructure and Planning, n 31, p 39.

³³ Queensland Government, Department of State Development, Infrastructure and Planning, n 31, p 39.

³⁴ Queensland Government, Department of State Development, Infrastructure and Planning, n 31, p 39.

³⁵ Queensland Government, Department of State Development, Infrastructure and Planning, n 31, pp 39-40.

³⁶ Queensland Government, Department of State Development, Infrastructure and Planning, n 31, p 40.



Retreat from retreat – the backward evolution of sea-level rise policy in Australia, and the implications

Linked to the draft SPP was a document outlining mandatory requirements for coastal hazards.³⁷ The mandatory requirements document defined coastal hazard more broadly than the draft SPP, and included coastal erosion, storm tide inundation and sea-level rise inundation. Sea-level rise was not treated as a separate hazard, it added to and was combined with coastal erosion and storm tide inundation.³⁸ Crucially, the mandatory requirements also acknowledged the scientific consensus surrounding climate change and sea-level rise, and the need to consider climate change in land use planning decisions.³⁹

The mandatory requirements document also distinguished between strategic planning, and individual development assessments. In terms of strategic planning, local government planning schemes had to address four mandatory and sequential policies, which echoed the draft SPP. The planning scheme was required to:

- reflect the outcomes of a natural hazard investigation – the mapping already undertaken for the QCP would be used, unless more detailed regional assessments had been undertaken;
- reflect the outcomes of a natural hazard risk assessment – this was similar to an adaptation strategy, although the focus was on acute threats such as storm tide inundation rather than chronic sea-level rise inundation. The risk assessment would identify land use planning measures to address coastal hazard risks;
- reflect the development potential of land by ensuring development in new and existing areas avoided or mitigated the risks of natural hazards to an acceptable or tolerable level; and
- ensure the erosion prone areas were maintained as development free buffers.⁴⁰

Additionally, local planning instruments needed to address coastal hazards through:

- strategic frameworks supported by zoning local plans, which ensured that only appropriate development occurred within coastal hazard areas;
- settlement pattern theme/natural hazard theme, by addressing how the settlement pattern would respond to coastal hazards over time, and identifying the most appropriate locations for future development;
- zone codes, or overlay maps and codes, that identified areas where development applications would need to specifically address coastal hazard risks; and
- planning scheme policies that provided guidance on information required to support a development application for a coastal hazard area.⁴¹

Final State planning policy – December 2013

The final State Planning Policy was released on 2 December 2013, and despite the more measured approach of the draft Policy, the final Policy is firmly pro-development. All references to climate change and sea-level rise have been omitted, and the mandatory requirements document has been abandoned. The Policy applies to coastal hazards, defined as erosion and tidal inundation.⁴²

When making a planning scheme, governments must:

- identify natural hazard areas;
- include provisions that seek to achieve an acceptable or tolerable level of risk; and
- require development to avoid or mitigate natural hazard risks, support disaster management responses, avoid an increase in the severity of the natural hazard and potential for damage on the site, and maintain or enhance natural processes.

Additionally, in erosion prone areas governments must:

³⁷ Queensland Government, Department of State Development, Infrastructure and Planning, *State Planning Policy Mandatory Requirements: Coastal Hazard* (April 2013), .

³⁸ Queensland Government, Department of State Development, Infrastructure and Planning, n 37, p 5.

³⁹ Queensland Government, Department of State Development, Infrastructure and Planning, n 37, p 5.

⁴⁰ Queensland Government, Department of State Development, Infrastructure and Planning, n 37, pp 6-10.

⁴¹ Queensland Government, Department of State Development, Infrastructure and Planning, n 37, p 10.

⁴² *Coastal Protection and Management Act 1995* (Qld), Sch.



- maintain these areas as a development free buffer unless it cannot be feasibly located elsewhere, or it is coastal-dependent development, or temporary, relocatable, or able to be abandoned; and
- ensure that redevelopment avoids coastal erosion risks, or uses a strategy of planned retreat, or mitigates risk (in that order).⁴³

A draft guideline will provide further direction on complying with these requirements.⁴⁴

Direction of coastal policy in Queensland and beyond

After a six-year process of reform, it seems that there is now some certainty in coastal planning policy in Queensland, subject to finalisation of the draft guideline. Unsurprisingly, given Queensland's strong pro-development history, restrictions on development have been highly contentious and politically unpalatable. The original iteration of the QCP introduced by the Labor Government in 2011 was heavily criticised by the development lobby, with a watered-down version introduced a year later. On the other hand, the regulatory provision introduced by the LNP Government in 2012 attracted the ire of environmentalists, with the new draft SPP attempting to achieve a more satisfactory balance between development and the environment, and some recognition of the projected impacts of climate change. However, the final SPP tips that balance by giving primacy to development.

Importantly, the QCP reflected a policy stance of the Labor Government that some climate risks were too great to be borne by a property developer or owner, and in these instances, the only viable solution was to avoid development. In contrast, the regulatory provision allowed for greater discretion, both for developers and property owners in deciding how much risk they were willing to bear, and for local government in deciding on an acceptable level of risk for their community to bear. The new SPP continues to support discretionary decision-making, but while policies are required to include provisions that "seek to achieve an acceptable or tolerable level of risk", it is unclear who determines this, and who will bear the risk if development is ultimately impacted by these natural hazards.

The political vulnerability of coastal policy is not exclusive to Queensland. In New South Wales, policy introduced in 2009 adopted sea-level rise benchmarks of 40 cm by 2050 and 90 cm by 2100.⁴⁵ In 2011, the State election resulted in a change of government, with sea-level rise policy revised shortly thereafter in 2012. The sea-level rise benchmarks have been abandoned, with local government instead permitted to determine their own projections.⁴⁶

Prior to the decision to abandon sea-level rise benchmarks in New South Wales, the State Government commissioned a report from the State's Chief Scientist examining the adequacy of the science informing them. The report concluded that the methodologies used to establish these benchmarks were adequate, although the uncertainties inherent in the science were acknowledged.⁴⁷ It was recommended that the projections be retained, with work undertaken to ensure that the projections are updated as the science developed, and could be tailored to specific regions.⁴⁸ Despite confirmation from the State's own Chief Scientist that the projections were adequate, they were abandoned. Consequently, it is now up to local governments to determine the acceptable level of risk for their community.

⁴³ Queensland Government, Department of State Development, Infrastructure and Planning, *State Planning Policy* (December 2013) <http://www.dsdp.qld.gov.au/resources/policy/state-planning/state-planning-policy.pdf>.

⁴⁴ Queensland Government, Department of State Development, Infrastructure and Planning, *Draft: State Planning Policy Guideline* (December 2013) <http://www.dsdp.qld.gov.au/resources/guideline/spp/spp-guideline-natural-hazards-coastal-hazards.pdf>

⁴⁵ New South Wales Government, *NSW Sea Level Rise Policy Statement* (October 2009) p 3, <http://www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf>.

⁴⁶ New South Wales Government, Environment & Heritage, *Sea Level Rise* (28 November 2012) <http://www.environment.nsw.gov.au/climatechange/sealevel.htm>.

⁴⁷ O'Kane M, New South Wales Chief Scientist and Engineer, *Assessment of the Science Behind the NSW Government's Sea Level Rise Planning Benchmarks* (New South Wales Government, April 2012) p 21, http://www.chiefscientist.nsw.gov.au/_data/assets/pdf_file/0016/26206/CSE-Report-Sea-Level-Rise-Benchmarks.pdf.

⁴⁸ O'Kane, n 47, p 22.



Retreat from retreat – the backward evolution of sea-level rise policy in Australia, and the implications

Sea-level rise policy was also weakened in Victoria following a change of government, although the change was not as drastic as the change in New South Wales. The Victorian Government initially adopted a benchmark of 0.8 m sea-level rise by 2100, to be reviewed as new scientific data becomes available.⁴⁹ However, a report of the Coastal Planning Advisory Committee, commissioned by the State Government, observed that a moratorium on all development on land projected to be impacted by a 0.8 m sea-level rise by 2100 would have an enormous economic and social impact.⁵⁰ Instead, the Committee recommended adoption of a staged approach, involving benchmarks of 0.2 m by 2040, 0.5 m by 2070, and 0.8 m by 2100,⁵¹ with this change implemented into law in 2012.⁵²

While this trend towards weakening of sea-level rise policy following election of a conservative government is not surprising, it should be of concern, as failure to implement or retain coastal and sea-level policy may have consequences for State and local government.

WHAT ARE THE CONSEQUENCES FOR STATE AND LOCAL GOVERNMENTS THAT FAIL TO IMPLEMENT EFFECTIVE COASTAL POLICY?

Weakening or removing sea-level rise policies may have serious implications for State and local governments. There is no doubt that governments are free to change policy direction, but where a predecessor government has obtained data on sea-level rise projections and used this as a basis for land-use planning, successor governments should be wary of the liability implications involved with rejecting these laws.

Property developers and owners typically make land use investment decisions based on the allocation and quantum of risk associated with the use of the land. They will look to policy that sets out clearly what the risks are, and where liability lies in the event of any loss or damage, so that they can rely on that policy to find a path to recovery. In the absence of policy, property owners will turn to the courts. Therefore, the lack of effective sea-level rise policy is likely to cause parties to resort to seeking judicial relief, with local and State government being the most obvious targets for cost recovery.⁵³

One reason that governments will be targeted as defendants in litigation is that governments have increasingly taken on the role as the “ultimate social manager of risk”.⁵⁴ More specifically in respect of sea-level rise impacts, these government bodies largely determine whether and where development will occur on the coast.⁵⁵ For example, under the *Sustainable Planning Act 2009* (Qld), the State and local government are charged with assessing and deciding development applications.⁵⁶ In the public perception, these government decision-makers should therefore be liable for decisions that lead to or contribute to loss and damage caused by coastal climate change impacts. Nevertheless, despite the public perception of the duty owed by government planning decision-makers, the duty is not so easily identifiable within the legislation that confers them with their planning powers.

⁴⁹ Victorian Government, *Victorian Coastal Strategy* (2008) p 13, http://www.vcc.vic.gov.au/assets/media/menu_files/VCCCoastalStrategyfinal.pdf.

⁵⁰ Coastal Climate Change Advisory Committee, *Final Report: Volume One* (Victorian Department of Planning and Community Development, December 2010) p 52, http://www.dpcd.vic.gov.au/_data/assets/pdf_file/0009/108099/Coastal-Climate-Change-AC-Final-Report.pdf.

⁵¹ Coastal Climate Change Advisory Committee, n 50, p 54.

⁵² Victorian Planning Provisions, cl 13.01-1.

⁵³ Baker & McKenzie, *Local Council Risk of Liability in the Face of Climate Change – Resolving Uncertainties: A Report for the Australian Local Government Association* (Commonwealth Department of Climate Change and Energy Efficiency, 22 July 2011) p 34, <http://210.193.178.189/~media/publications/local-govt/alga-report-final-pdf.pdf>.

⁵⁴ Dobes L, Jotzo F and Doupe P, *Adaptor of Last Resort? An Economic Perspective on the Government's Role in Adaptation to Climate Change* (National Climate Change Adaptation Research Facility, 2013) p 80, <http://www.nccarf.edu.au/publications/adaptor-last-resort-economic-government-climate>.

⁵⁵ Burkett M, “Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change” (2013) 20 *George Mason Law Review* 775 at 776 and 783.

⁵⁶ See *Sustainable Planning Act 2009* (Qld), Ch 6 (Integrated development assessment system).



Broad considerations imposed under planning legislation certainly require local government decision-makers to take climate change into account.⁵⁷ For example, in Queensland there is a requirement for entities conferred with functions or powers under planning legislation to take into account the short and long-term environmental effects of development at local, regional, State and wider levels, including, the effects of development on climate change.⁵⁸ The decision-making entities (ie State and local government) must seek to provide for equity between present and future generations, and avoid, if practicable, or otherwise lessen, adverse environmental effects of development, including climate change. However, these requirements appear to be directed more towards the mitigation of climate change, and do not appear to require the decision-makers to consider the impacts that the environment will have on development.⁵⁹ A critical examination of the obligations on decision-makers to ensure development is not adversely affected by climate change impacts fails to find an explicit duty in planning legislation. Certainly there are requirements that the public interest be taken into account when making planning decisions,⁶⁰ and while protection of the general public from the impacts of climate change would be seen to be in the public interest, the impact of sea-level rise on an individual or a group of individual landholders, even if the impact was catastrophic, may affect too small a section of the community to warrant public interest consideration.⁶¹

With the prospects of relief for affected property owners found wanting in the planning legislation, claimants will turn to the common law and the most common cases are likely to be those based on the common law tort of negligence.⁶²

The formula for negligence is well established and success in a claim of negligence requires little more than to prove each element.⁶³ Local governments in Australia have already found themselves the target of actions in negligence and are bearing the costs of failed or ineffective coastal policy as a consequence.⁶⁴

But again, local governments only face a real risk of liability for damage arising from climate change impacts if it can be shown that the local government owes a duty to the plaintiff. Nevertheless, where a duty does exist, the local government must act to intervene and prevent damage and loss from the impacts of climate change, and although it is not yet possible to say exactly what standard of

⁵⁷ Lipman Z and Stokes R, "That Sinking Feeling: A Legal Assessment of the Coastal Planning System in New South Wales" (2011) 28 EPLJ 182 at 231.

⁵⁸ *Sustainable Planning Act 2009* (Qld), s 5.

⁵⁹ Environmental protection legislation, such as the *Environmental Protection Act 1994* (Qld) does seek to protect the environment from harm, including protecting people and communities but a similar protection is not found in the planning legislation.

⁶⁰ See eg, there is a requirement under *Sustainable Planning Act 2009* (Qld), s 326, for an assessment manager when deciding whether to approve a development application that conflicts with a relevant instrument, to consider whether it is within the public interest to do so. That the development may be susceptible to inundation from sea-level rise would be a factor that the decision-maker would take into account.

⁶¹ In *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal* (1981) 39 ALR 281 at 389, it was contended that "a consideration of the public interest requires account to be taken of the interests of the community as a whole, as distinct from the interests of sections of the community"; Burkett, n 55 at 778; see also *Aldous v Greater Taree City Council* (2009) 167 LGERA 13 at 31 [40], where a "mandatory obligation under s 79C of the [*Environmental Planning and Assessment Act 1979* (NSW)] to take into consideration the public interest, the council was obliged to take into account the principles of [ecologically sustainable development] and, in particular, climate change induced coastal erosion".

⁶² Burkett, n 55 at 778; see also Cote M, "Climate Adaptation Planning: Anticipating the Legal Issues for Urban Planners" (2011) 2 *The International Journal of Climate Change – Impacts & Responses* 87.

⁶³ Four elements are required to determine whether a local government's conduct has been negligent: (1) the local government owes a duty to the claimant; (2) that duty has been breached; (3) there is a relationship between the cause and the effect; and (4) the effect resulted in damages.

⁶⁴ In *Vaughan v Byron Shire Council*; *Byron Shire Council v Vaughan* [2009] NSWLEC 88; *Vaughan v Byron Shire Council*; *Byron Shire Council v Vaughan* (No 2) [2009] NSWLEC 110; *Vaughan v Byron Shire Council*; *Byron Shire Council v Vaughan* (NSW Land and Environment Court proceedings 40342 and 40344 of 2009), a coastal property owner that allegedly suffered damage as a consequence of protective work carried out by the council, successfully brought proceedings against the council for the damage; see also *Taip v E Gippsland Shire Council* [2010] VCAT 1222; *Gippsland Coastal Board v South Gippsland Shire Council* (No 2) [2008] VCAT 1545.



reasonable conduct the courts will expect and will apply in Australia, an increase in this body of case law will begin to establish standards.⁶⁵ For now, local governments are left to speculate as to where exactly their liability begins and what their actual climate legal risk is.⁶⁶ What is certain amongst all the uncertainty is that the increasing body of knowledge around climate change impacts and the likelihood of those impacts occurring increases the risk of liability for local governments.⁶⁷

Actions in negligence for poor decision-making regarding land-use planning are likely to increase and eclipse actions against carbon emitters⁶⁸ because there is a more intuitive path through each of the elements; from the duty conferred on the local government as a town planning decision-maker and a failure by the local government to make appropriate planning decisions, to the consequential damage to property and loss to property holders from climate change impacts. Local governments may well be tempted to deal with these claims of negligence in much the same way as they have historically dealt with any negligence claim. However, local governments have limited budgets at their disposal, and while a defence may be sought in the argument that that the local government made conscious, carefully considered decisions about the allocation of the budget between its various functions, and that without allocating more to the function in question, it could not have made the relevant place any safer than it was, the anticipated frequency and intensity of climate change events will require a greater proportionate allocation of funds to deal with climate change litigation resulting in a detrimental and overwhelming impact on the local government's ability to perform its other functions.⁶⁹

As there is a reasonable likelihood that claims will increase against local governments for negligent decision-making when dealing with climate change impacts, unless policy or legislation is available to shift or remove the liability, local governments will need to take action, including intervention, to avoid the risk. The time to do this is when the costs of the anticipated damages have become greater than the costs of preventing the harm.⁷⁰

One approach to avoiding liability is to legislatively exclude it. In New South Wales, the *Local Government Act* states that a council does not incur any liability in respect of any advice furnished in good faith by the council that relates to the likelihood of any land in the coastal zone being affected by a coastline hazard, or anything done or omitted to be done in good faith by the council in so far as it relates to the likelihood of land being so affected.⁷¹ This is expressed to apply to, amongst other things, the making of a planning instrument, and granting of development consent.⁷² Good faith is not defined in the legislation, but a person is taken to have acted in good faith if they acted in accordance with any manual or guidelines relating to the management of the coastline.⁷³ The Queensland Government has proposed to adopt a similar model.⁷⁴

The reference to “good faith”, even when coupled with the reference to the manual, is problematic, and may lead to further uncertainty. As observed by the High Court in *Bankstown City Council v Alamo Holdings Pty Ltd* [2005] 223 CLR 660, per Gleeson CJ, Gummow, Hayne and

⁶⁵ See eg, the consideration of “vulnerability” as a key factor in identifying the scope of a duty of care for pure economic loss, in the recent decision of the NSW Court of Appeal, *The Owners – Strata Plan No 61288 v Brookfield Australia Investments Ltd* [2013] NSWCA 317.

⁶⁶ Burkett, n 55 at 784.

⁶⁷ Burkett, n 55 at 786.

⁶⁸ Burkett, n 55 at 776.

⁶⁹ Burkett, n 55 at 790.

⁷⁰ Burkett, n 55 at 781.

⁷¹ *Local Government Act 1993* (NSW), s 733(2).

⁷² *Local Government Act 1993* (NSW), s 733(3).

⁷³ *Local Government Act 1993* (NSW), s 733(4), s 733(5), and s 733(8).

⁷⁴ Queensland Government, Department of State Development, Infrastructure and Planning, *Proposed Amendments to Sustainable Planning Act 2009 Compensation and Statutory Exemption Provisions in Relation to Natural Hazard Management* (February 2013) <http://www.propertyoz.com.au/library/Proposed%20amendments%20to%20Sustainable%20Planning%20Act%202009.pdf>.



Callinan JJ:

given the range of advice, acts and omissions to which s 733(1) may apply, what is required for something to be done or omitted in good faith may vary from one case to the next. This makes it unwise, if not impossible, to place a definitive gloss upon the words of the statute.⁷⁵

Uncertainty to the side, the nature of flood risk makes it impossible to project precisely whether, when, and to what extent flooding will occur. Provided that information is given in good faith, an exemption from liability may encourage the dissemination of information, and may therefore be useful.

However, an exemption from liability may also result in undesirable consequences. The broad wording of the New South Wales provision may protect local government from liability where development is approved, and flooding subsequently occurs. This protection may apply even if the flooding was foreseeable, provided that the decision is made in accordance with a flood manual. Depending on the content of the flood manual, this exemption may facilitate poor decision-making and avoidance of accountability resulting in harm to persons or damage to property from natural processes despite a significant risk being foreseeable.

If inappropriate or careless decisions are made regarding development, there may be a significant cost to government regardless of an exemption from liability. Although exempting local government from liability may appear to be a sensible way to safeguard government assets, in practice, government often absorbs the costs of flooding in other ways, particularly where insurance is inadequate, and government becomes the “insurer of last resort”. Following flood events, the “natural disaster syndrome”⁷⁶ or “Samaritan’s dilemma”⁷⁷ often result in a moral compulsion for government to provide disaster assistance, meaning that the costs of repairs and rebuilding of damaged property are absorbed by the wider community.⁷⁸ For example, the Queensland Premier’s Fund established during the Queensland flood disaster was funded by donations, and distributed to homeowners whose homes were destroyed or damaged. Other payments made were funded through the taxation system.⁷⁹ Ultimately, permitting development in inappropriate areas may result in a cost burden to government even where legal liability is excluded, through payment of disaster recovery. Perversely, governments may approve more development under the protection of a liability exclusion, leading to even greater loss in the future.

As legislative exclusions of liability are not a panacea to ineffective planning, the absence of effective planning policy leaves local governments in an untenable position. The absence of State Government policy will not excuse local governments from litigation, and it may be necessary for local governments to reduce the risk of liability by implementing a range of adaptation options.⁸⁰ For example, local governments can deal with the climate change impacts on development by preventing development on, or removing development from, those areas that may be affected, through the use of

⁷⁵ *Bankstown City Council v Alamo Holdings Pty Ltd* [2005] 223 CLR 660 at [60].

⁷⁶ Kunreuther H, “Reducing Losses from Catastrophic Risks through Long-Term Insurance and Mitigation” (2008) 75 *Social Research* 905 at 912.

⁷⁷ Kunreuther H and Pauly M, “Rules Rather than Discretion: Lessons from Hurricane Katrina” (2006) 33 *Journal of Risk and Uncertainty* 101 at 106.

⁷⁸ See eg Harrington SE, “Rethinking Disaster Policy” (2000) 23 *Regulation* 44. This situation has occurred in Queensland following the 2010-2011 flood disaster, whereby persons who suffered property damage in the Queensland floods and are un-insured or underinsured are eligible for a range of government grants and payments – see Queensland Reconstruction Authority, *Build Back: The Rebuilding Navigator* (2011) <http://www.qldreconstruction.org.au/grants/>.

⁷⁹ Commonwealth of Australia, *Inquiry into Flood Insurance and Related Matters* (National Disaster Insurance Review, June 2011) p 8, <http://www.ndir.gov.au/content/issuespapers/NDIRIssuesPaper.pdf>.

⁸⁰ Dobes, Jotzo and Doupe, n 54 at 5.



planning controls.⁸¹ Although the application of these controls is at the discretion of each local government and can result in inconsistency and add to uncertainty, these approaches should be considered as a risk management response.

CONCLUSION

The weakening of sea-level rise policy by State Governments across Australia increases legal risk for State and local governments alike. The Queensland Coastal Plan 2012 was an attempt to confront the consequence that sea-level rise and other climate change impacts would have on coastal development and more broadly on coastal communities in Queensland. The Plan was opposed and rejected by private sector landowners, developers and local government, and eventually the State Government itself following the election. The new policy released in December 2013 by the LNP government has resulted in a significant policy shift, with the interests of economic development given precedence.

The Queensland Coastal Plan, as well as sea-level rise policies in New South Wales and Victoria, are undoubtedly victims of politics. However, lack of political support will not provide governments with a shield against liability claims. Although there have traditionally always been claims made against local governments by property owners who have suffered loss, in the past local governments have generally been able to bear that cost. However, the potential magnitude of the loss from sea-level rise and catastrophically large storm events mean that local governments will find successful claims against them unbearable.

Failure to implement a policy that adequately allocates climate legal risk will leave affected parties with no other choice than to resort to the courts for an answer. It is crucial that governments move away from political ideology and conceptions about the reality of climate change, and confront important issues of legal risk. State Governments need to implement effective policy that sets out clearly under what circumstances, to whom and how liability is to be allocated. This means that relevant stakeholders, whether property owners, developers, or local or State Governments, know in advance what their risk is, and act accordingly.

⁸¹ See examples in Macintosh A, Foerster A and McDonald J, *Limp, Leap or Learn? Developing Legal Frameworks for Climate Change Adaptation Planning in Australia* (National Climate Change Adaptation Research Facility, 2013) at [4.3.1], <http://www.nccarf.edu.au/publications/limp-leap-or-learn>.

